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IN THE SUPREME COURT OF THE STATE OF DELAWARE

HUGH F. CULVERHOUSE, individually and on behalf of all others similarly situated, Plaintiff-Appellant, v. PAULSON & CO. INC. and PAULSON ADVISERS, LLC, Defendants-Appellees.	No. 349, 2015 Certification of Question of Law from the United States Court of Appeals for the Eleventh Circuit C.A. No 14-1426

OPENING BRIEF OF APPELLANT HUGH F. CULVERHOUSE

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NATURE OF PROCEEDINGS

The question is whether claims are derivative or direct under the facts set forth by the United States Court of Appeals for the Eleventh Circuit in its petition to certify a question of law to this Court.

The plaintiff, Hugh Culverhouse, invested in a "feeder fund" named HedgeForum Paulson Advantage Plus, LLC. That feeder fund invests substantially all of its assets in the hedge fund Paulson Advantage Plus, L.P. Culverhouse brought claims for breach of fiduciary duty, gross negligence, and unjust enrichment against the general partners of the hedge fund, Paulson & Co. Inc. and Paulson Advisers, LLC.

A district court in the Southern District of Florida dismissed Culverhouse's claims on the ground that they were derivative. The Eleventh Circuit found that Culverhouse's appeal depended on the resolution of an unsettled issue of Delaware law. This case appeared to be governed by *Anglo American Security Fund, L.P. v. S.R. Global International Fund, L.P.*, 829 A.2d 143 (Del. Ch. 2003), because both Paulson Advantage Plus and HedgeForum have the same structure as the hedge fund at issue in that case. Among other things, Paulson Advantage Plus and HedgeForum are structured so that profits and losses are immediately allocated to investors' capital accounts, and neither fund issues transferable shares. Under these facts, *Anglo American* held that claims by an investor were direct.

Anglo American preceded this Court's decision in *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004). The Eleventh Circuit stated that the analysis in *Anglo American* appeared consistent with the test set forth in *Tooley*, but nonetheless certified the following question of law to this Court:

> Does the diminution in the value of a limited liability company, which serves as a feeder fund in a limited partnership, provide the basis for an investor's direct suit against the general partners when the company and the partnership allocate losses to investors' individual capital accounts and do not issue transferable shares and losses are shared by investors in proportion to their investments?

This Court found "that there are important and urgent reasons for an immediate determination of the question certified" and accepted the question. The Court should answer the question in the affirmative.

SUMMARY OF ARGUMENT

1. The Court should answer the certified question in the affirmative based on the two-part test for whether a claim is derivative or direct set forth in *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004).

a. Under *Tooley*, whether a claim is direct or derivative depends solely on "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)." *Id.* at 1033.

b. The investors in Paulson Advantage Plus and HedgeForum at the time of the losses are the parties "who suffered the alleged harm" under the facts of this case. Both funds are structured so that all profits and losses at the fund-level are allocated immediately and irrevocably to individual capital accounts of current investors. The harm to those investors is what is relevant under *Tooley*. Injury to the funds themselves was fleeting and illusory, and persons who invested after the losses suffered no harm.

c. The investors in Paulson Advantage Plus and HedgeForum would "receive the benefit of the recovery" in this litigation because both funds are structured so that gains are allocated to investors' individual capital accounts. Thus, both prongs of *Tooley* dictate that the Court answer the certified question in the affirmative.

2. The Court should also answer the certified question in the affirmative under the reasoning of *Anglo American Security Fund, L.P. v. S.R. Global International Fund, L.P.*, 829 A.2d 143 (Del. Ch. 2003).

a. The structure of the hedge fund at issue in *Anglo American* was identical to the structure of Paulson Advantage Plus and HedgeForum. No other case under Delaware law has analyzed whether claims are direct or derivative under the facts of *Anglo American*.

b. Like Paulson Advantage Plus and HedgeForum, the hedge fund in *Anglo American* was structured so that "whenever the value of the Fund is reduced, the injury accrues irrevocably and almost immediately to the current partners" through a proportionate reduction in their capital accounts. *Id.* at 152. "The Fund operates more like a bank with the individual partners each having accounts" than like a traditional corporation. *Id.* at 154.

c. Also like Paulson Advantage Plus and HedgeForum, only partners in the hedge fund in *Anglo American* at the time of the fund's losses were injured by reductions in partnership assets. Because partnership interests were not transferable, later-admitted partners were not successors-in-interest to losses suffered by current partners. *Id.* at 152. Accordingly, a recovery in a derivative action would give later-admitted partners a windfall, while denying any recovery for partners who suffered the loss but had withdrawn from the partnership.

d. Under these facts, the claims in *Anglo American* were direct, not derivative. For the same reasons expressed in *Anglo American*, the Court should answer the certified question in the affirmative.

3. The holding and analysis in *Anglo American* is consistent with the two-part test in *Tooley*. Neither this Court nor any other Delaware court has questioned the holding of *Anglo American* under the facts at issue in that case. *Anglo American* is good law and reflects the proper analysis and outcome of the certified question. Non-Delaware courts have declined to apply *Anglo American* because the facts before them were distinguishable.

4. General statements by this Court that a stockholder's direct injury must be independent of injury to the corporation and that claims for mismanagement of corporate assets are derivative do not control under the specific facts of this case.

a. The Court has made such statements in cases involving traditional corporate structures, not facts analogous to this case. *Anglo American* provides the more appropriate framework for analyzing the issue here.

b. Like the fund in *Anglo American*, Paulson Advantage Plus and HedgeForum have "no going-concern value." *Anglo Am.*, 829 A.2d at 154. Unlike a traditional corporation, which has a speculative value that is independent of the individual interests of its stockholders, the value of Paulson Advantage Plus and

HedgeForum is merely the combined value of their individual investor accounts. It is the actual losses at the investor level, not the fleeting and illusory losses to the funds, that are significant to the analysis of whether claims are direct or derivative.

c. Relatedly, the mismanagement of corporate assets of a typical corporation necessarily injures the corporation, but not necessarily the stockholders. Because a corporation has an independent speculative value, loss to the corporation has only an indirect effect on stockholders. By contrast, loss at the fund level in this case translates directly and necessarily into actual loss at the investor level. *Anglo American* properly recognizes that difference.

5. A derivative action under the facts of this case would benefit the wrong parties. It would give a windfall to investors who entered either Paulson Advantage Plus or HedgeForum after the losses at issue, while denying any recovery to former investors who actually suffered injury. That fundamental problem shows why the Court should answer the certified question in the affirmative.

STATEMENT OF FACTS

1. Factual background[1]

"Paulson Advantage Plus is a Delaware limited partnership that invests in corporate securities." Certification Order at 2, *Culverhouse v. Paulson & Co. Inc.*, No. 14-14526 (11th Cir. June 30, 2015) ("Certification Order") (attached under Tab A). "Paulson & Co., a Delaware corporation, and Paulson Advisers, a Delaware limited liability company, serve as the general partners of Paulson Advantage Plus." *Id.*

Hugh Culverhouse "had invested in HedgeForum Paulson Advantage Plus, a 'passthrough' or 'feeder' fund sponsored by Citigroup Alternative Investments, LLC." *Id.* HedgeForum "invests 'substantially all of its capital' in Paulson Advantage Plus." *Id.* It "gives investors the opportunity to invest in Paulson Advantage Plus for less than the $5 million minimum required for a limited partner interest" in that fund. *Id.* at 3.

Both "Paulson Advantage Plus and HedgeForum are structured so that all profits and losses are allocated to investors' individual capital accounts." *Id.* at 6. Thus, any losses in either entity "are shared by investors in proportion to their

[1] "Questions certified for resolution by the Court under Supreme Court Rule 41 are determined as a matter of law on the undisputed facts submitted by the certifying court in its Certificate of Questions of Law." *Duncan v. Theratx, Inc.*, 775 A.2d 1019, 1021 (Del. 2001). Accordingly, the factual background in this brief "is drawn from the [Eleventh] Circuit's petition to certify a question of law to this Court." *Terex Corp. v. S. Track & Pump, Inc.*, 117 A.3d 537, 539 n.1 (Del. 2015).

investments" in that entity. *Id.* at 8. In addition, neither Paulson Advantage Plus nor HedgeForum issues transferrable shares. *Id.* at 6.

Because of this entity structure, "any losses suffered by Paulson Advantage Plus and HedgeForum accrue irrevocably and almost immediately to investors, but do not harm those who invest after the losses." *Id.* at 6 (internal quotation omitted). Furthermore, as the Eleventh Circuit found, any recovery in a derivative action "could not provide a remedy to wronged former partners nor to their (non-existent) successors in interest." *Id.* (internal quotation omitted).

2. History of this litigation

"Between 2007 and 2011, Paulson Advantage Plus invested approximately $800 million in Sino-Forest Corporation, a Chinese forestry company." *Id.* at 2-3. "After another investment firm issued a report that Sino-Forest had overstated its timber holdings and engaged in questionable related-party transactions, Paulson Advantage Plus sold its Sino-Forest shares at a loss of approximately $460 million." *Id.* at 3.

"After Paulson Advantage Plus sold its Sino-Forest shares at a loss, Culverhouse filed a putative class action against Paulson & Co. and Paulson Advisers for breach of fiduciary duty, gross negligence, and unjust enrichment." *Id.* "Paulson & Co. and Paulson Advisers moved to dismiss for failure to state a claim and for lack of subject matter jurisdiction." *Id.* They "contended that

because Culverhouse was an investor in HedgeForum and not a limited partner of Paulson Advantage Plus, they did not owe him fiduciary duties." *Id.* Paulson & Co. and Paulson Advisers also argued "that even if they did owe Culverhouse fiduciary duties, he lacked standing because his claims were derivative under Delaware law." *Id.*

A district court in the Southern District of Florida "ruled that Culverhouse's claims were derivative under Delaware law and dismissed his amended complaint for lack of subject matter jurisdiction." *Id.* at 3-4. "The district court did not address whether Culverhouse failed to state a claim." *Id.* at 4. Culverhouse appealed to the Court of Appeals for the Eleventh Circuit. *Id.* at 2.

After briefing and oral argument, the Eleventh Circuit found that Culverhouse's appeal "depends on the resolution of an unsettled issue of Delaware law." *Id.* The Court of Chancery's decision in *Anglo American* appeared to apply. *Id.* at 5-6. *Anglo American* "held that claims brought by former limited partners of a hedge fund against the fund and the fund's general partner and auditor were direct." *Id.* at 5. As the Eleventh Circuit found, "[t]he fund in *Anglo American* is similar to Paulson Advantage Plus and HedgeForum." *Id.* at 6.

Nonetheless, the Eleventh Circuit was "hesitant to hold that *Anglo American* controls" in light of this Court's decision in *Tooley*. *Id.* at 6. "Although the analysis in *Anglo American* appears consistent with the analytical framework set

forth in *Tooley*," the Eleventh Circuit noted that other courts had "questioned whether *Anglo American* remains good law after *Tooley*." *Id.* at 7. The Eleventh Circuit certified the question, and this Court accepted it. *Culverhouse v. Paulson & Co. Inc.*, No. 349, 2015 (Del. July 16, 2015) (attached under Tab B).

After this Court accepted the certified question, Paulson & Co. and Paulson Advisers (collectively, "Paulson") requested that the Eleventh Circuit rephrase the question. Paulson argued that the certified question "omits and misstates critical issues of undisputed fact that may be determinative of the outcome of the underlying motion to dismiss." *See* Pet. Reh'g at 5, *Culverhouse v. Paulson & Co. Inc.*, No. 14-14526 (11th Cir. July 21, 2015) (attached under Tab C).[2] The Eleventh Circuit denied Paulson's request to rephrase the certified question. *Culverhouse v. Paulson & Co. Inc.*, No. 14-14526 (11th Cir. Aug. 4, 2015) (attached under Tab D).

[2] Paulson submitted a copy of the Petition for Rehearing that it submitted to the Eleventh Circuit as an exhibit to the Motion to Stay filed with this Court on July 22, 2015.

ARGUMENT

1. Question presented

The Court of Appeals for the Eleventh Circuit certified the following question: "Does the diminution in the value of a limited liability company, which serves as a feeder fund in a limited partnership, provide the basis for an investor's direct suit against the general partners when the company and the partnership allocate losses to investors' individual capital accounts and do not issue transferable shares and losses are shared by investors in proportion to their investments?" Certification Order 7-8.

2. Standard of review

Because the Court is "addressing a certified question of law, as distinct from a review of a lower court decision, the normal standards of review do not apply." *Rales v. Blasband*, 634 A.2d 927, 931 (Del. 1993). The Court "must review the certified question in the context in which it arises." *Riblet Prods. Corp. v. Nagy*, 683 A.2d 37, 39 (Del. 1996).

The certified question is a pure question of law. *Terex Corp. v. S. Track & Pump, Inc.*, 117 A.3d 537, 541 (Del. 2015). Accordingly, the Court exercises *de novo* review. *Lambrecht v. O'Neal*, 3 A.3d 277, 281 (Del. 2010).

3. Merits of argument

A. This Court's decision in *Tooley* dictates that the Court answer the certified question in the affirmative.

"The distinction between direct and derivative claims is frustratingly difficult to describe with precision." *Agostino v. Hicks*, 2004 WL 443987, at *4 (Del. Ch. Mar. 11, 2004). As this Court has recognized, distinguishing between the two types of actions is "often difficult." *Grimes v. Donald*, 673 A.2d 1207, 1213 (Del. 1996). In addition, until 2004, the precedent on this issue had been "ambiguous" and fell "short of providing coherent guidance." *Agostino*, 2004 WL 443987, at *6.

In 2004, however, this Court clarified the test for distinguishing between direct and derivative claims. The Court held in *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004), that the "issue must turn *solely* on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)."

In setting out "[t]his simple analysis," *id.* at 1035, the Court disapproved of two concepts that had developed in Delaware law. The first was the requirement that a plaintiff pursuing a direct action show "special injury," meaning that "the wrong is inflicted upon the stockholder alone or . . . the stockholder complains of a wrong affecting a particular right." *Tooley*, 845 A.2d at 1037. The Court rejected

"the amorphous and confusing concept of 'special injury'" as part of the analysis of whether a claim is direct or derivative. *Id.* at 1035.

The Court also rejected the proposition "that an action cannot be direct if all stockholders are equally affected or unless the stockholder's injury is separate and distinct from that suffered by other stockholders." *Id.* at 1038-39. Like the concept of "special injury," this concept had proven "confusing and inaccurate." *Id.* at 1037. The Court held that "a direct, individual claim of stockholders that does not depend on harm to the corporation can also fall on all stockholders equally, without the claim thereby becoming a derivative claim." *Id.*

Thus, under *Tooley*, whether a claim is direct or derivative "must be based solely on the following questions: Who suffered the alleged harm—the corporation or the suing stockholder individually—and who would receive the benefit of the recovery or other remedy?" *Id.* at 1035. Under that test, the Court should answer the certified question in the affirmative.

The Eleventh Circuit's certification order identifies a number of facts that show "who suffered the alleged harm" in this case. It found, first, that "Paulson Advantage Plus and HedgeForum are structured so that all profits and losses are allocated to investors' individual capital accounts." Certification Order 6. Under this structure, "any losses suffered by Paulson Advantage Plus and HedgeForum accrue irrevocably and almost immediately to investors." *Id.* (internal quotation

omitted). Any injury to the funds on paper was only "fleeting" and passed along to investors. *Id.* at 5.

Furthermore, this harm accrued only to persons who were invested in the funds at the time of the losses. Because "neither fund issues transferable shares," there are no successors-in-interest to those investors' ownership interests. Certification Order 6. "[T]hose who invest[ed] after the losses" caused by the Sino-Forest investment suffered no harm. *Id.*

Thus, the answer to "who suffered the alleged harm" in this case is the investors in the funds at the time the losses occurred. Only those investors—not the funds themselves or investors who participated in the funds afterward—were harmed by the losses caused by Paulson's alleged breaches of fiduciary duty, gross negligence, and unjust enrichment in connection with the Sino-Forest investment.

Investors in the funds, not the funds themselves, also "would receive the benefit of the recovery" in this litigation. As the Eleventh Circuit found, Paulson Advantage Plus and HedgeForum are structured so that their gains—including gains from a recovery in this litigation—would be directly allocated to investors' individual capital accounts. *Id.* Just as in *Tooley*, where "[t]here [wa]s no relief that would go [to] the corporation," 845 A.2d at 1039, in this case, there is no relief that would benefit Paulson Advantage Plus or HedgeForum separate from their investors.

The analysis required by *Tooley* therefore dictates that the Court answer the certified question in the affirmative. Culverhouse's claims are direct because the fund investors, not the funds themselves, were harmed by the alleged misconduct and would receive the benefit of any recovery in this litigation.

B. The Court should answer the certified question in the affirmative under *Anglo American*, the most factually analogous case under Delaware law.

Although *Tooley* clarified the analysis for determining whether a claim is derivative or direct, its two-part test was already "well imbedded in [this Court's] jurisprudence." *Tooley*, 845 A.2d at 1035. Earlier decisions had established that courts addressing whether a claim is derivative or direct "should look to the nature of the wrong and to whom the relief should go." *Id.* at 1039 (citing *Grimes*, 673 A.2d at 1213, *Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348, 352 (Del. 1988), and *Parnes v. Bally Entm't Corp.*, 722 A.2d 1243, 1245 (Del. 1999)).

Anglo American is one of the pre-*Tooley* cases that applied this analysis. *Anglo American* is particularly relevant because the business entity structure at issue in that case was closer to the structure of Paulson Advantage Plus and HedgeForum than any other case under Delaware law. *Anglo American*, like *Tooley*, dictates that the Court answer the certified question in the affirmative.[3]

[3] Seven months after deciding *Anglo American*, Chancellor Chandler also decided *Agostino v. Hicks*, 2004 WL 443987 (Del. Ch. Mar. 11, 2004). His decision in *Agostino* included "a scholarly analysis of this area of the law" upon which this Court relied in deciding *Tooley*. 845

The plaintiffs in *Anglo American* were former limited partners in a partnership operating as a hedge fund. 829 A.2d at 148. They brought claims against the general partner and the partnership's auditor relating to a withdrawal by the general partner from its capital account. *Id.* at 148. The defendants moved to dismiss on the ground that the claims were derivative, not direct. *Id.* at 149.

Consistent with *Tooley*, Chancellor Chandler held that the test for distinguishing direct from derivative claims "looks to the nature of the injury and to the nature of the remedy that could result if the plaintiffs are successful." *Id.* at 150. Although that test "is substantially the same" when the underlying entity is a limited partnership instead of a corporation, *id.* at 149, applying the test "to a limited partnership necessitates a bit of flexibility," *id.* at 150. Because "limited partnerships offer greater contractual flexibility with only a few statutory constraints," a court must take into account "the contents of the limited partnership agreement—how it specifies or modifies the entity's function and structure and the rights and responsibilities of the general and limited partners." *Id.*

The defendants argued that the plaintiffs' claims were derivative because the alleged injury was a "diminution in value of the Fund[']s assets, which injures the limited partners only in proportion to their *pro rata* interest in the Fund." *Id.* at 151. Chancellor Chandler acknowledged that "diminution of the value of a

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A.2d at 1036. Chancellor Chandler's analytical approach to whether a claim is direct or derivative was consistent in *Agostino* and *Anglo American*.

business entity is classically derivative in nature." *Id.* But he concluded that "the operation and function of the Fund as specified in the [Partnership] Agreement diverge so radically from the traditional corporate model that the claims made in the complaint must be brought as direct claims." *Id.* at 152.

The hedge fund in *Anglo American* differed from a typical corporation in several significant ways. First, "whenever the value of the Fund is reduced, the injury accrues irrevocably and almost immediately to the current partners." *Id.* Losses to the partnership "effect an almost immediate reduction in the capital accounts of each of the existing partners." *Id.* "The Fund operates more like a bank with the individual partners each having accounts" than like a traditional corporation. *Id.* at 154. Reductions in partnership assets "confer only a fleeting injury to the Fund, one that is immediately and irrevocably passed through to the partners." *Id.* at 152.

In addition, only current partners were injured by reductions in partnership assets. "There are no successors in interest to partners so injured because there are no 'shares' sold to someone else." *Id.* Unlike stock in a typical corporation, "the limited partners' interests in the Fund are not freely transferable or tradable." *Id.* at 154. When a partner withdrew from the fund, that partner's "interest in the entity is liquidated." *Id.* at 152. "If additional partners are later admitted, they suffer no injury from previous reductions in the value of the fund because their

capital accounts will reflect the full amount of their initial investments adjusted only for events occurring after their admission as partners." *Id.*

Although later-admitted partners suffer no loss from fund reductions that preceded their investment, a derivative action would provide them with a recovery. As Chancellor Chandler held, "newly admitted limited partners would receive a windfall if the Fund were to recover damages for diminution of Fund value prior to their admission as limited partners." *Id.* at 153; *see also id.* at 153 n.31.

A derivative action would give future partners a windfall, but it would provide no relief for partners who withdrew from the partnership after the diminution of their capital accounts. "When an injured partner withdraws from the partnership, the partner's capital account has already been diminished by any and all diminutions of value to the Fund from the time of entering the partnership until the time of withdrawal." *Id.* at 152. "Characterizing the plaintiffs' claims as derivative would thus have the perverse effect of denying standing (and therefore recovery) to parties who were actually injured by the challenged transactions while granting ultimate recovery (and therefore a windfall) to parties who were not." *Id.* at 153.

As the Eleventh Circuit found, Paulson Advantage Plus and HedgeForum have the same structure as the fund in *Anglo American*. Certification Order 6. All profits and losses at the entity level are immediately allocated to investors'

individual capital accounts. Neither fund issues transferable shares. Investors in the funds when they incurred losses from the Sino-Forest investment were harmed, while investors who invested after those losses were not. *Id.* The facts of this case fall squarely within the facts of *Anglo American*. The reasoning of *Anglo American* dictates an affirmative answer to the certified question.

C. *Anglo American* remains good law after *Tooley*.

The holding and analysis in *Anglo American* is consistent with the two-part test set out in *Tooley*. First, the persons "who suffered the alleged harm" in *Anglo American* were the investors in the hedge fund whose capital accounts were reduced because of the Sino-Forest losses. Any harm to the partnership itself was fleeting and illusory. Second, those investors are the parties who should "receive the benefit of any recovery." A derivative action would have denied a recovery to injured former partners while giving a windfall to new investors in the fund. *Anglo Am.*, 829 A.2d at 152-53. *Anglo American* pre-dated *Tooley*, but *Tooley* would not have changed its analysis or result.

This Court has never addressed *Anglo American*. Indeed, the business entity structure at issue in *Anglo American*, which "diverge[d] so radically from the traditional corporate model," *id.* at 152, has not been at issue in any other Delaware case analyzing whether a claim is derivative or direct. No Delaware court has questioned or criticized *Anglo American*'s reasoning under the facts of that case.

Paulson has cited non-Delaware cases, including several cases involving claims by hedge fund investors, that declined to apply *Anglo American*. Those cases all distinguish *Anglo American* on its facts. They do not undermine the reasoning or applicability of *Anglo American* to the facts in this case.[4] Paulson has never identified a case that is factually analogous to *Anglo American* where a court declined to apply the reasoning of that decision.

Paulson also cited cases that do not discuss *Anglo American* in which claims brought by hedge fund or feeder fund investors were held to be derivative. None of those cases analyzed an entity structure in which diminution of value at the fund level "accrues irrevocably and almost immediately to the current partners but will not harm those who later become partners." *Anglo Am.*, 829 A.2d at 152.[5] These cases do not undermine *Anglo American* or answer the certified question.

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[4] *See BCR Safeguard Holdings, L.L.C. v. Morgan Stanley Real Estate Advisor, Inc.*, 2014 WL 4354457, at *20 (E.D. La. Sept. 2, 2014) (finding that the limited liability company at issue was "fundamentally different from the hedge fund at issue in *Anglo American*" because it derived value from its tangible and intangible assets and did not "function[] essentially as a bank"); *Saltz v. First Frontier, LP*, 782 F. Supp. 2d 61, 78 n.15 (S.D.N.Y. 2010) (holding that, unlike in *Anglo American*, the plaintiffs did "not adequately allege that the [limited partnership at issue] differs so drastically from the corporate model"); *Newman v. Family Mgmt. Corp.*, 748 F. Supp. 2d 299, 314 n.12 (S.D.N.Y. 2010) (same); *Askenazy v. Tremont Grp. Holdings, Inc.*, 29 Mass. L. Rptr. 340, 2012 WL 440675, at *10 (Mass. Super. Jan. 26, 2012) (declining to apply *Anglo American* because "none of the plaintiffs is alleged to be a former partner who would be deprived of any recovery, and there is no possibility of a windfall to partners that join after the harm occurred"); *Zutty v. Rye Select Broad Mkt. Prime Fund, L.P.*, 2011 WL 5962804, at *7 (N.Y. Sup. Apr. 15, 2011) (same).

[5] *See Stephenson v. Citco Grp. Ltd.*, 700 F. Supp. 2d 599, 608-12 (S.D.N.Y. 2010), *aff'd, Stephenson v. PricewaterhouseCoopers, LLP*, 482 F. App'x 618 (2d Cir. 2012); *In re Parkcentral Global Litig.*, 2010 WL 3119403 (N.D. Tex. Aug. 5, 2010); *W. Palm Beach Police*

Anglo American remains good law and good policy. It is consistent with *Tooley* and no Delaware court has called its reasoning into question. Non-Delaware courts that declined to apply *Anglo American* did so because it was factually distinguishable. The relevant facts of this case, however, are nearly identical to *Anglo American*. Its reasoning squarely applies here.

D. General statements by this Court in the traditional corporate context do not control under the specific facts of this case.

Relying on statements by this Court, Paulson has argued that Culverhouse's claims are derivative because (1) his injury depends on injury to Paulson Advantage Plus and HedgeForum, and (2) his claims relate to mismanagement of corporate assets. Neither argument applies under the facts of this case.

This Court has stated that a "stockholder's claimed direct injury must be independent of any alleged injury to the corporation." *Tooley*, 845 A.2d at 1039; *see also Feldman v. Cutaia*, 951 A.2d 727, 732 (Del. 2008) ("[I]f the stockholder suffered harm independent of any injury to the corporation that would entitle him to an individualized recovery, the cause of action is direct."). But the Court has made such statements in cases involving traditional corporate structures, not facts analogous to this case. *Anglo American* provides the more appropriate framework for analyzing the issue here.

Pension Fund v. Collins Capital Low Volatility Performance Fund II, Ltd., 2010 WL 2949856 (S.D. Fla. July 26, 2010).

Like the fund in *Anglo American*, Paulson Advantage Plus and HedgeForum "operate[] more like a bank" than a corporation. *Anglo Am.*, 829 A.2d at 154. They have "no going-concern value" based on "physical assets . . . [or] the speculative value of the entity as a going concern." *Id.* at 154. The value of both funds is merely the combined value of individual investor accounts. The entities themselves have no other intrinsic value.

By contrast, a traditional corporation has a character, existence, and value that is independent of the individual interests of its stockholders. And in a typical corporation, gains and losses at the corporate level affect the entity's value going forward. For example, waste of corporate assets, loss of good will, and reputational harm cause ongoing injury to the corporation and impact its speculative value. The same is not true for investment vehicles structured like Paulson Advantage Plus, HedgeForum, and the hedge fund in *Anglo American*. For such entities, it is the actual losses at the investor level, not the fleeting and illusory losses to the fund, on which the analysis should focus.

This Court's statements that claims for mismanagement of corporate assets are derivative also do not fit with the facts in this case. *See Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348, 353 (Del. 1988) (citing *Bokat v. Getty Oil Co.*, 262 A.2d 246, 249 (Del. 1970)). In a typical corporation, the mismanagement of corporate assets may ultimately injure stockholders through a lower stock price.

But that price is also the result of other factors, including market perception of the corporation's speculative value. Furthermore, stockholders do not incur any actual loss until they sell their shares in the corporation. Thus, while mismanagement of assets necessarily injures the corporation, it does not necessarily injure stockholders. In that context, unlike here, it may make sense to focus on the injury to the corporation and to provide the corporation with a derivative claim.

In the context of the business entity structure at issue in *Anglo American* and in this case, a loss on paper at the fund level translates directly into an actual loss at the investor level. Mismanagement of fund assets immediately and necessarily injures fund investors in a way that it does not injure investors in a traditional corporation. *Anglo American* properly recognized that difference and gave it weight in analyzing "the nature of the injury" and "the nature of the remedy that could result if the plaintiffs are successful." 829 A.2d at 150. Neither of Paulson's arguments takes into account the particular business entity structure at issue here.

E. Under the facts of this case, a derivative action compensates the wrong parties and a direct action compensates the right ones.

A derivative action would provide a recovery to the wrong parties under the facts of this case. Such an action would compensate investors who entered Paulson Advantage Plus or HedgeForum after the Sino-Forest losses and suffered no harm. At the same time, a derivative action would deny compensation to

former investors who actually suffered injury. This fundamental problem shows that the claims in this case must be direct, not derivative.

Only a direct action properly aligns the parties "who would receive the benefit of any recovery" with the parties "who suffered the alleged harm." *Tooley*, 845 A.2d at 1035. A direct action will provide a recovery for the investors in Paulson Advantage Plus and HedgeForum at the time of the losses but prevent a windfall to new investors who suffered no injury. "The second prong of the [*Tooley*] analysis should logically follow" from the first. *Id.* at 1036. Only a direct action produces that result under the facts of this case.

Furthermore, a derivative action that denies recovery to injured parties while giving a windfall to uninjured parties makes no sense under bedrock principles of damages. "The object and purpose of an award of compensatory damages in a civil case is to impose satisfaction for an injury done." *Jardel Co. v. Hughes*, 523 A.2d 518, 528 (Del. 1987). "[D]amages must be logically and reasonably related to the harm or injury for which compensation is being awarded." *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766, 773 (Del. 2006). A derivative recovery for the Sino-Forest losses would violate both of these basic principles.

In this Court's previous cases, a derivative action would not have compensated the wrong parties. In the typical corporate structure, injured stockholders may sell their stock to other investors who then become the

successors-in-interest to a share of any recovery in a derivative action. That is not the case here and that fact, along with the immediate and direct injury to investors from losses at the fund level, distinguishes this case from every case other than *Anglo American*.

The analysis of whether a claim is direct or derivative should not "unjustly exalt form over substance." *Gatz v. Ponsoldt*, 925 A.2d 1265, 1280 (Del. 2007). It requires "careful application of a rather nuanced test" based on the facts of a particular case. *Anglo Am.*, 829 A.2d at 150. The "substantive effects" of the harm alleged in this case, *Gatz*, 925 A.2d at 1280, accrued to investors in the funds, not to the funds themselves. Any recovery in a direct action should do the same, by compensating the investors who were actually harmed. Accordingly, the claims are direct, not derivative.

CONCLUSION

For the foregoing reasons, the Court should answer the question certified by the U.S. Court of Appeals for the Eleventh Circuit in the affirmative.

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September 9, 2015

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TAB A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 14-14526

D.C. Docket No. 1:12-cv-20695-MGC

HUGH F. CULVERHOUSE,
individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

versus

PAULSON & CO. INC.,
PAULSON ADVISERS LLC,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(June 30, 2015)

Before WILLIAM PRYOR, JULIE CARNES, and SILER,* Circuit Judges.

WILLIAM PRYOR, Circuit Judge:

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* Honorable Eugene E. Siler, Jr., United States Circuit Judge for the Sixth Circuit, sitting by designation.

This appeal involves a question of Delaware corporate law, which we certify to the Delaware Supreme Court. After Paulson Advantage Plus, L.P., lost approximately $460 million on an investment in a Chinese forestry company, Hugh Culverhouse filed a putative class action against general partners Paulson & Co. Inc., and Paulson Advisers LLC, for breach of fiduciary duty, gross negligence, and unjust enrichment. Culverhouse had invested in HedgeForum Paulson Advantage Plus, LLC, a "pass-through" or "feeder" fund that invests "substantially all of its capital" in Paulson Advantage Plus. Paulson & Co. and Paulson Advisers moved to dismiss for failure to state a claim and for lack of subject matter jurisdiction. After it concluded that Culverhouse's claims were derivative under Delaware law, the district court dismissed his amended complaint for lack of subject matter jurisdiction. Because this appeal depends on the resolution of an unsettled issue of Delaware law, we certify that issue to the Delaware Supreme Court.

I. BACKGROUND

Paulson Advantage Plus is a Delaware limited partnership that invests in corporate securities. Paulson & Co., a Delaware corporation, and Paulson Advisers, a Delaware limited liability company, serve as the general partners of Paulson Advantage Plus. Between 2007 and 2011, Paulson Advantage Plus

invested approximately $800 million in Sino-Forest Corporation, a Chinese forestry company. After another investment firm issued a report that Sino-Forest had overstated its timber holdings and engaged in questionable related-party transactions, Paulson Advantage Plus sold its Sino-Forest shares at a loss of approximately $460 million.

After Paulson Advantage Plus sold its Sino-Forest shares at a loss, Culverhouse filed a putative class action against Paulson & Co. and Paulson Advisers for breach of fiduciary duty, gross negligence, and unjust enrichment. Culverhouse had invested in HedgeForum Paulson Advantage Plus, a "pass-through" or "feeder" fund sponsored by Citigroup Alternative Investments, LLC, which invests "substantially all of its capital," in Paulson Advantage Plus. HedgeForum gives investors the opportunity to invest in Paulson Advantage Plus for less than the $5 million minimum required for a limited partner interest.

Paulson & Co. and Paulson Advisers moved to dismiss for failure to state a claim and for lack of subject matter jurisdiction. Paulson & Co. and Paulson Advisers contended that because Culverhouse was an investor in HedgeForum and not a limited partner of Paulson Advantage Plus, they did not owe him fiduciary duties, and that even if they did owe Culverhouse fiduciary duties, he lacked standing because his claims were derivative under Delaware law. The district court

ruled that Culverhouse's claims were derivative under Delaware law and dismissed his amended complaint for lack of subject matter jurisdiction. The district court did not address whether Culverhouse failed to state a claim.

II. STANDARD OF REVIEW

"We review dismissal for lack of subject matter jurisdiction *de novo*." *Lobo v. Celebrity Cruises, Inc.*, 704 F.3d 882, 891 (11th Cir. 2013).

III. DISCUSSION

Under Delaware law, a derivative suit "enables a stockholder to bring suit on behalf of the corporation for harm done to the corporation." *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1036 (Del. 2004). But "a stockholder who is directly injured . . . retain[s] the right to bring an individual action for injuries affecting his or her legal rights as a stockholder." *Id*. Any recovery obtained in a derivative suit "must go to the corporation," while any recovery in a direct action "flows directly to the stockholders, not to the corporation." *Id*. Stockholders seeking to maintain a derivative action must "state with particularity . . . any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members; and . . . the reasons for not obtaining the action or not making the effort." Fed. R. Civ. P. 23.1(b)(3). Investors who file a direct action need not comply with this requirement.

Culverhouse argues that his claims against Paulson & Co. and Paulson Advisers are direct under *Anglo American Security Fund, L.P. v. S.R. Global International Fund, L.P.*, 829 A.2d 143 (Del. Ch. 2003). In *Anglo American*, the Delaware Chancery Court held that claims brought by former limited partners of a hedge fund against the fund and the fund's general partner and auditor were direct. *Id*. The limited partners contended that the general partner had "withdr[awn] funds from [his] capital account in violation of the partnership agreement; that this withdrawal exceeded the balance in the account; and that timely disclosure of the withdrawal was not given to the limited partners." *Id*. at 151. The Chancery Court acknowledged that "Delaware . . . limited partnership cases have agreed that a diminution of the value of a business entity is classically derivative in nature," but held that the limited partners' claims were direct because "the operation and function of the Fund . . . diverge[d] . . . radically from the traditional corporate model," *id*. at 151–152. The Chancery Court explained that the fund in *Anglo American* "operate[d] more like a bank with the individual partners each having [separate] accounts," *id*. at 154, than a traditional corporation or limited partnership, because losses "confer[red] only a fleeting injury to the Fund" that accrued "irrevocably and almost immediately to the current partners but [did] not harm those who later bec[a]me partners," *id*. at 152. And because the fund in *Anglo*

American had "no going-concern value" other than the general partner's interest in management fees, *id*. at 154, did not issue transferable shares, and liquidated the interests of withdrawing partners, "[a]ny recovery obtained by the Fund in a derivative action [could not] provide a remedy to wronged former partners nor to their (non-existent) successors in interest," *id*. at 152. Instead, "if the Fund," as opposed to individual partners, "were to recover damages for diminution of Fund value," limited partners admitted after the losses were incurred "would receive a windfall." *Id*. at 153.

The fund in *Anglo American* is similar to Paulson Advantage Plus and HedgeForum. Like the fund in *Anglo American*, Paulson Advantage Plus and HedgeForum are structured so that all profits and losses are allocated to investors' individual capital accounts, and neither fund issues transferable shares. As in *Anglo American*, any losses suffered by Paulson Advantage Plus and HedgeForum accrue "irrevocably and almost immediately to" investors, but do not harm those who invest after the losses, *id*. at 152. And any recovery in this litigation could not "provide a remedy to wronged former partners nor to their (non-existent) successors in interest," *id*.

But later developments in Delaware law make us hesitant to hold that *Anglo American* controls this appeal. After *Anglo American* was decided, the Delaware

Supreme Court clarified the law of derivative suits. In *Tooley*, the Delaware Supreme Court explained that an analysis of whether claims are direct or derivative "must be based solely on the following questions: Who suffered the alleged harm—the corporation or the suing stockholder individually—and who would receive the benefit of the recovery or other remedy?" 845 A.2d at 1035. In establishing these steps as the "sole[]" inquiries relevant to an analysis of whether a claim is direct or derivative, the Court "expressly disapprove[d]" of the "special injury" test employed in some of its previous opinions, according to which "a claim is necessarily derivative if it affects all stockholders equally." *Id*. at 1039 (internal quotation marks omitted). Although the analysis in *Anglo American* appears consistent with the analytical framework set forth in *Tooley*, the Southern District of New York has questioned whether *Anglo American* remains good law after *Tooley*. *See Newman v. Family Mgmt. Corp.*, 748 F. Supp. 2d 299, 314 n.12 (S.D.N.Y. 2010); *Saltz v. First Frontier, LP*, 782 F. Supp. 2d 61, 78 n.15 (S.D.N.Y. 2010). Accordingly, we conclude that this appeal depends on the resolution of unsettled Delaware law.

IV. CERTIFICATION

We certify the following question to the Delaware Supreme Court: Does the diminution in the value of a limited liability company, which serves as a feeder

fund in a limited partnership, provide the basis for an investor's direct suit against the general partners when the company and the partnership allocate losses to investors' individual capital accounts and do not issue transferable shares and losses are shared by investors in proportion to their investments?

QUESTION CERTIFIED.

TAB B

IN THE SUPREME COURT OF THE STATE OF DELAWARE

HUGH CULVERHOUSE,	§	
	§	No. 349, 2015
Plaintiff-Appellant,	§	
	§	
v.	§	Certification of Question of Law
	§	from the United States Court of
PAULSON & CO., INC and PAULSON	§	Appeals for the Eleventh Circuit
ADVISERS LLC,	§	C.A. No. 14-14526
	§	
Defendants-Appellees.	§	

Submitted: July 6, 2015
Decided: July 16, 2015

Before **STRINE**, Chief Justice, **VAUGHN**, and **SEITZ**, Justices.

O R D E R

This 16th day of July 2015, it appears to the Court that:

(1) The United States Court of Appeals for the Eleventh Circuit has certified a question to this Court in accordance with the Delaware Constitution, art. IV, § 11(8) and Delaware Supreme Court Rule 41.

(2) The basis for the certification arises from a putative class action filed by Hugh Culverhouse against Paulson & Co., Inc. and Paulson Advisers LLC, who are the general partners of Paulson Advantage Plus, L.P., for breach of fiduciary duties, gross negligence, and unjust enrichment. Culverhouse had invested in HedgeForum Paulson Advantage Plus, LLC, which is a "feeder" fund that invests substantially all of its capital in Paulson Advantage Plus, L.P. The District Court

concluded that Culverhouse's claims were derivative under Delaware law and dismissed his amended complaint for lack of subject matter jurisdiction.

(3) The United States Court of Appeals for the Eleventh Circuit has certified the following question to this Court for disposition in accordance with Rule 41:

> Does the diminution in the value of a limited liability company, which serves as a feeder fund in a limited partnership, provide the basis for an investor's direct suit against the general partners when the company and the partnership allocate losses to investors' individual capital accounts and do not issue transferable shares and losses are shared by investors in proportion to their investments?

(4) After careful consideration, we find that there are important and urgent reasons for an immediate determination of the question certified. Therefore, in accordance with the provisions of the Delaware Constitution, art. IV, § 11(8), and Rule 41 of this Court, the question certified by the United States Court of Appeals for the Eleventh Circuit is ACCEPTED. The Clerk of the Court is directed to issue a briefing schedule forthwith.

IT IS SO ORDERED.

BY THE COURT:

/s/ *Collins J. Seitz, Jr.*
Justice

TAB C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 14-14526-CC

HUGH F. CULVERHOUSE, individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

v.

PAULSON & CO. INC. and
PAULSON ADVISERS, LLC,

Defendants-Appellees.

DEFENDANTS-APPELLEES' PETITION FOR REHEARING

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

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Counsel for Defendants-Appellees Paulson & Co. Inc. and Paulson Advisers, LLC

APPELLEES' CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

Appellees Paulson & Co. Inc. and Paulson Advisers, LLC, by their undersigned counsel, and pursuant to Fed R. App. P. 26.1(a) and 11th Cir. R. 26.1-3 and 27-1(a)(10), hereby submit this Certificate of Interested Parties and Corporate Disclosure Statement as follows:

The name of each person, attorney, association of persons, firm, law firm, partnership and corporation that has or may have an interest in a party to this action or in the outcome of this action, including subsidiaries, conglomerates, affiliates, parent corporations, publicly-traded companies that own 10% or more of a party's stock, and all other identifiable legal entities related to the party are as follows:

1. Bass, Hilarie;
2. Block, Dennis J.;
3. Byer, Robert L.;
4. Cech Samole, Brigid F.;
5. Cooke, Judge Marcia G.;
6. Culverhouse, Hugh F.;
7. Duane Morris LLP;
8. Edlin, Richard A.;
9. Goldstein, Dale R.;
10. Greenberg Traurig, LLP;

11. Greenberg Traurig, P.A.;

12. Gurland, Harvey W. Jr.;

13. HedgeForum Paulson Advantage Plus, L.P.;

14. Kellogg, Jason;

15. Kellogg, Lawrence A.;

16. Kolaya, Timothy A.;

17. Levine Kellogg Lehman Schneider & Grossman LLP;

18. Ostfeld, Gregory E.;

19. Palumbos, Robert M.;

20. Paulson & Co. Inc.;

21. Paulson Advisers, LLC;

22. Paulson Advantage Plus, L.P.;

23. Paulson HedgeForum Advantage Plus, L.P.;

24. Paulson, John;

25. Proposed class of Persons who (i) had a capital account with Paulson Advantage Plus, L.P. or with one of its Platform Funds on June 2, 2011, (ii) subsequently withdrew those funds, and (iii) received redemption proceeds prior to the date of certificate of the class;

26. Scherker, Elliot H.;

27. Schonfeld, Felice K.;

28. Thompson, Brandon M.; and

29. Turnoff, Magistrate Judge William C.

/s/ Richard A. Edlin
Richard A. Edlin

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STATEMENT OF THE ISSUE WARRANTING PANEL REVIEW

Defendants-Appellees Paulson & Co. Inc. ("Paulson") and Paulson Advisers, LLC ("Paulson Advisers") (collectively, "Defendants") respectfully request that this Court grant rehearing of its decision issued in this case on June 30, 2015, for the limited purpose of rephrasing its certified question of law to the Delaware Supreme Court.

Defendants are the administrative and managing general partners of Paulson Advantage Plus, L.P. (the "Investment Fund"), a limited partnership hedge fund. Plaintiff-Appellant Hugh F. Culverhouse ("Plaintiff") is not and never has been an investor of the Investment Fund; rather, he invested in and signed agreements with an independently organized and independently managed limited liability company feeder fund, HedgeForum Paulson Advantage Plus, LLC (the "Feeder Fund"). The Feeder Fund, in turn, is an investor in the Investment Fund, but is separately sponsored and managed by Citigroup Alternative Investments LLC and AMACAR CPO, Inc., *not* Defendants. In the underlying action, Plaintiff claimed that he has standing to bring a direct suit against the managers of the Investment Fund in which the Feeder Fund (not Plaintiff) invested, as a so-called "Pass-Through Investor." Thus, Plaintiff's status as a Feeder Fund investor versus that of an Investment Fund investor is vital to the proper resolution of the underlying motion to dismiss.

The question posed to the Delaware Supreme Court, however, omits undisputed critical issues of fact which may be determinative of the outcome of the underlying litigation; specifically that Plaintiff is a Feeder Fund investor who seeks to bring a direct suit against the general partners of the Investment Fund in which the Feeder Fund—not Plaintiff—invested. Furthermore, the proposed question inadvertently misstates certain undisputed facts regarding how profits and losses are allocated to investors' (including Plaintiff's) individual capital accounts. As such, Defendants respectfully submit rehearing is necessary for the limited purpose of rephrasing the Court's certified question to the Delaware Supreme Court.

COURSE OF PROCEEDINGS AND STATEMENT OF FACTS

Plaintiff commenced this putative class action lawsuit against Defendants on February 21, 2012, in the United States District Court for the Southern District of Florida (the "District Court"). (R-1). In his original Complaint, Plaintiff alleged that he "held [a] limited partner interest[]" in the Investment Fund, and attached an unsigned agreement with the Investment Fund, suggesting to the District Court that it was his "contract." (*Id.* ¶¶ 1, 15; R-1-3). When the basis for those representations was challenged by Defendants in the first Motion to Dismiss, Plaintiff was forced to amend his complaint and concede that he was not an investor in the Investment Fund, but rather, in the separately organized and separately managed Feeder Fund. (R-9; R-20 ¶ 9). Plaintiff asserted, however,

that he had standing as a so-called "Pass-Through Investor" in a "Platform Fund." (*Id.* ¶¶ 15-23).

Defendants thereafter moved to dismiss the Amended Complaint, based upon, *inter alia*, Plaintiff's lack of standing to bring a direct claim against the general partners of a fund in which Plaintiff did not invest. (R-26). On March 31, 2013, the District Court entered an Endorsed Order granting Defendants' motion to dismiss without leave to amend, based on Plaintiff's lack of standing and failure to state a claim, as well as an Amended Endorsed Order, which stated that a complete written order would be forthcoming. (R-47; R-48.) Subsequently, on September 30, 2014, the District Court entered its final decision dismissing Plaintiff's Amended Complaint with prejudice, on the grounds that Plaintiff lacked standing as a *Feeder Fund* investor to bring a direct claim against the general partners of the separately organized and separately managed *Investment Fund* in which the Feeder Fund invested, and thus, the District Court lacked subject matter jurisdiction (the "Final Order"). (R-56.)

Plaintiff thereafter appealed the Final Order, alleging that the District Court incorrectly construed and failed to apply controlling Delaware law regarding Plaintiff's lack of standing. On June 30, 2015, this Court issued an opinion (the "Opinion"), attached hereto as an Addendum, which certified a question of law to the Delaware Supreme Court. (Opinion at 7-8). The Opinion states that

certification is necessary because the appeal "depends on the resolution of" an unsettled issue of Delaware corporate law. (*Id.* at 7).

ARGUMENT

Defendants seek rehearing for the limited purpose of rephrasing the certified question to the Delaware Supreme Court, because Defendants are concerned the certified question as presently phrased is ambiguous regarding Plaintiff's status as an investor in the *Feeder Fund*, and Defendants' status as the general partners of the *Investment Fund* in which the Feeder Fund (not Plaintiff) invested. As a result of this ambiguity, there is a danger the Delaware Supreme Court could misconstrue the certified question and provide an answer that would not assist this Court in deciding the underlying appeal. Adjustments to the certified question would dispel this risk and improve the likelihood that the certified question will be answered in a manner helpful to the Court.

It is well-established that this Court may certify questions of law to a state supreme court "[w]hen substantial doubt exists about the answer to a material state law question upon which the case turns." *Pruco Life Ins. Co. v. Wells Fargo Bank, N.A.*, 780 F.3d 1327, 1336 (11th Cir. 2015) (internal citations omitted); *see also Forgione v. Dennis Pirtie Agency, Inc.*, 93 F.3d 758, 761 (11th Cir. 1996). Further, the Delaware Constitution permits the Delaware Supreme Court to hear questions certified to it from federal courts when the answer is "determinative of

the outcome of the underlying litigation in the certifying court and there is no controlling precedent." *United States v. Anderson*, 669 A.2d 73, 79 (Del. 1995); *see also* Del. Const. Art. IV § 11(8). Conversely, where a question of law is non-dispositive of the case on appeal, the Delaware Supreme Court will decline to answer. *See Anderson*, 669 A.2d at 79; *see also In re 1982 Honda, Delaware Registration No. 83466*, 681 A.2d 1035, 1039 (Del. 1996) (declining to answer certified questions where the resolution of such questions was "unnecessary for the trial court to reach a decision in the case at bar").

The panel certified the following question to the Delaware Supreme Court:

> Does the diminution in the value of a limited liability company, which serves as a feeder fund in a limited partnership, provide the basis for an investor's direct suit against the general partners when the company and the partnership allocate losses to investors' individual capital accounts and do not issue transferable shares and losses are shared by investors in proportion to their investments?

This proposed question, however, omits and misstates critical issues of undisputed fact that may be determinative of the outcome of the underlying motion to dismiss.

As an initial matter, the certified question does not distinguish between investors in the Feeder Fund and investors in the Investment Fund—a critical distinction. The primary issue in the underlying action is whether Plaintiff, as a *Feeder Fund* investor, has standing to bring a direct suit against the fiduciaries of the *Investment Fund* in which the Feeder Fund (not Plaintiff) invested, as a so-called "Pass-Through Investor." The certified question posed to the Delaware

Supreme Court, however, does not distinguish the specific fund in which Plaintiff invested, nor does it distinguish the specific fund of which Defendants are general partners. Rather, the certified question simply asks whether "an investor" can bring a "direct suit against the general partners," inviting the mistaken conclusion that the certified question pertains to an "investor" and "general partners" in the same entity, rather than separately organized and managed entities. (Opinion at 7-8). Plaintiff's status as a Feeder Fund investor and Defendants' status as the general partners of the separately organized and managed Investment Fund is vital to the proper resolution of the motion to dismiss, and by omitting such critical facts the certified question does not sufficiently apprise the Delaware Supreme Court of the issues upon which the matter turns.

Additionally, the certified question seems to suggest that individual investors in the Feeder Fund are reflected on the books and records of the Investment Fund. Specifically, the proposed question states that the Feeder Fund and the Investment Fund "allocate losses to investors' individual capital accounts and . . . losses are shared by investors in proportion to their investments." This suggests that losses incurred by the Investment Fund may be allocated directly to the individual capital accounts of investors in the Feeder Fund, an incorrect inference. To the contrary, profits and losses to the Investment Fund are allocated to its own investors' capital accounts—which includes the Feeder Fund—in

proportion to their investments in the Investment Fund. The Feeder Fund then separately allocates profits and losses to its investor's individual capital accounts in proportion to their investments in the Feeder Fund. It is undisputed that Plaintiff's investment in the Feeder Fund was not identified or otherwise reflected on the books and records of the Investment Fund. (R-20 ¶¶ 9, 12, 16-17; R-20-3, pp. 1, 5, 32-34).

Therefore, in order to properly present the question of Delaware law raised by this case, and to provide appropriate guidance to the Delaware Supreme Court in answering the certified question, Defendants propose that the certified question be rephrased as follows:

> Does the diminution in the value of a limited liability company, which serves as a feeder fund, and which invests in a separately managed limited partnership investment fund, provide the basis for a direct suit by an investor in the feeder fund against the general partners of the investment fund, when losses to the investment fund are allocated to its investors (which includes the feeder fund) in proportion to their investments in the investment fund and the feeder fund separately allocates losses to its investor's individual capital accounts in proportion to their investments in the feeder fund, and the feeder fund and the investment fund do not issue transferable shares?

CONCLUSION

A rehearing for the limited purpose of rephrasing the certified question presented to the Delaware Supreme Court would enhance the clarity of the certified question and would increase the probability of the Delaware Supreme Court returning an answer that would assist this Court in deciding the underlying

appeal. For these reasons, Defendants respectfully request that the Court grant its rehearing petition and rephrase the certified question of law to the Delaware Supreme Court.

Dated: July 21, 2015

Respectfully submitted,

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Counsel for Defendants-Appellees
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Paulson Advisers, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing petition for rehearing was electronically filed with the Clerk of Court on July 21, 2015, which will send a notice of electronic filing to counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF:

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On this same date, 2 copies of the petition were dispatched to the above listed counsel via third-party commercial carrier for overnight delivery.

Unless otherwise noted, 4 paper copies have been filed with the Court on the same date via Express Mail.

/s/ Richard A. Edlin
Richard A. Edlin

ADDENDUM

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 14-14526

D.C. Docket No. 1:12-cv-20695-MGC

HUGH F. CULVERHOUSE,
individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

versus

PAULSON & CO. INC.,
PAULSON ADVISERS LLC,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(June 30, 2015)

Before WILLIAM PRYOR, JULIE CARNES, and SILER,* Circuit Judges.

WILLIAM PRYOR, Circuit Judge:

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* Honorable Eugene E. Siler, Jr., United States Circuit Judge for the Sixth Circuit, sitting by designation.

This appeal involves a question of Delaware corporate law, which we certify to the Delaware Supreme Court. After Paulson Advantage Plus, L.P., lost approximately $460 million on an investment in a Chinese forestry company, Hugh Culverhouse filed a putative class action against general partners Paulson & Co. Inc., and Paulson Advisers LLC, for breach of fiduciary duty, gross negligence, and unjust enrichment. Culverhouse had invested in HedgeForum Paulson Advantage Plus, LLC, a "pass-through" or "feeder" fund that invests "substantially all of its capital" in Paulson Advantage Plus. Paulson & Co. and Paulson Advisers moved to dismiss for failure to state a claim and for lack of subject matter jurisdiction. After it concluded that Culverhouse's claims were derivative under Delaware law, the district court dismissed his amended complaint for lack of subject matter jurisdiction. Because this appeal depends on the resolution of an unsettled issue of Delaware law, we certify that issue to the Delaware Supreme Court.

I. BACKGROUND

Paulson Advantage Plus is a Delaware limited partnership that invests in corporate securities. Paulson & Co., a Delaware corporation, and Paulson Advisers, a Delaware limited liability company, serve as the general partners of Paulson Advantage Plus. Between 2007 and 2011, Paulson Advantage Plus

invested approximately $800 million in Sino-Forest Corporation, a Chinese forestry company. After another investment firm issued a report that Sino-Forest had overstated its timber holdings and engaged in questionable related-party transactions, Paulson Advantage Plus sold its Sino-Forest shares at a loss of approximately $460 million.

After Paulson Advantage Plus sold its Sino-Forest shares at a loss, Culverhouse filed a putative class action against Paulson & Co. and Paulson Advisers for breach of fiduciary duty, gross negligence, and unjust enrichment. Culverhouse had invested in HedgeForum Paulson Advantage Plus, a "pass-through" or "feeder" fund sponsored by Citigroup Alternative Investments, LLC, which invests "substantially all of its capital," in Paulson Advantage Plus. HedgeForum gives investors the opportunity to invest in Paulson Advantage Plus for less than the $5 million minimum required for a limited partner interest.

Paulson & Co. and Paulson Advisers moved to dismiss for failure to state a claim and for lack of subject matter jurisdiction. Paulson & Co. and Paulson Advisers contended that because Culverhouse was an investor in HedgeForum and not a limited partner of Paulson Advantage Plus, they did not owe him fiduciary duties, and that even if they did owe Culverhouse fiduciary duties, he lacked standing because his claims were derivative under Delaware law. The district court

ruled that Culverhouse's claims were derivative under Delaware law and dismissed his amended complaint for lack of subject matter jurisdiction. The district court did not address whether Culverhouse failed to state a claim.

II. STANDARD OF REVIEW

"We review dismissal for lack of subject matter jurisdiction *de novo*." *Lobo v. Celebrity Cruises, Inc.*, 704 F.3d 882, 891 (11th Cir. 2013).

III. DISCUSSION

Under Delaware law, a derivative suit "enables a stockholder to bring suit on behalf of the corporation for harm done to the corporation." *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1036 (Del. 2004). But "a stockholder who is directly injured . . . retain[s] the right to bring an individual action for injuries affecting his or her legal rights as a stockholder." *Id*. Any recovery obtained in a derivative suit "must go to the corporation," while any recovery in a direct action "flows directly to the stockholders, not to the corporation." *Id*. Stockholders seeking to maintain a derivative action must "state with particularity . . . any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members; and . . . the reasons for not obtaining the action or not making the effort." Fed. R. Civ. P. 23.1(b)(3). Investors who file a direct action need not comply with this requirement.

Culverhouse argues that his claims against Paulson & Co. and Paulson Advisers are direct under *Anglo American Security Fund, L.P. v. S.R. Global International Fund, L.P.*, 829 A.2d 143 (Del. Ch. 2003). In *Anglo American*, the Delaware Chancery Court held that claims brought by former limited partners of a hedge fund against the fund and the fund's general partner and auditor were direct. *Id*. The limited partners contended that the general partner had "withdr[awn] funds from [his] capital account in violation of the partnership agreement; that this withdrawal exceeded the balance in the account; and that timely disclosure of the withdrawal was not given to the limited partners." *Id*. at 151. The Chancery Court acknowledged that "Delaware . . . limited partnership cases have agreed that a diminution of the value of a business entity is classically derivative in nature," but held that the limited partners' claims were direct because "the operation and function of the Fund . . . diverge[d] . . . radically from the traditional corporate model," *id*. at 151–152. The Chancery Court explained that the fund in *Anglo American* "operate[d] more like a bank with the individual partners each having [separate] accounts," *id*. at 154, than a traditional corporation or limited partnership, because losses "confer[red] only a fleeting injury to the Fund" that accrued "irrevocably and almost immediately to the current partners but [did] not harm those who later bec[a]me partners," *id*. at 152. And because the fund in *Anglo*

American had "no going-concern value" other than the general partner's interest in management fees, *id*. at 154, did not issue transferable shares, and liquidated the interests of withdrawing partners, "[a]ny recovery obtained by the Fund in a derivative action [could not] provide a remedy to wronged former partners nor to their (non-existent) successors in interest," *id*. at 152. Instead, "if the Fund," as opposed to individual partners, "were to recover damages for diminution of Fund value," limited partners admitted after the losses were incurred "would receive a windfall." *Id*. at 153.

The fund in *Anglo American* is similar to Paulson Advantage Plus and HedgeForum. Like the fund in *Anglo American*, Paulson Advantage Plus and HedgeForum are structured so that all profits and losses are allocated to investors' individual capital accounts, and neither fund issues transferable shares. As in *Anglo American*, any losses suffered by Paulson Advantage Plus and HedgeForum accrue "irrevocably and almost immediately to" investors, but do not harm those who invest after the losses, *id*. at 152. And any recovery in this litigation could not "provide a remedy to wronged former partners nor to their (non-existent) successors in interest," *id*.

But later developments in Delaware law make us hesitant to hold that *Anglo American* controls this appeal. After *Anglo American* was decided, the Delaware

Supreme Court clarified the law of derivative suits. In *Tooley*, the Delaware Supreme Court explained that an analysis of whether claims are direct or derivative "must be based solely on the following questions: Who suffered the alleged harm—the corporation or the suing stockholder individually—and who would receive the benefit of the recovery or other remedy?" 845 A.2d at 1035. In establishing these steps as the "sole[]" inquiries relevant to an analysis of whether a claim is direct or derivative, the Court "expressly disapprove[d]" of the "special injury" test employed in some of its previous opinions, according to which "a claim is necessarily derivative if it affects all stockholders equally." *Id*. at 1039 (internal quotation marks omitted). Although the analysis in *Anglo American* appears consistent with the analytical framework set forth in *Tooley*, the Southern District of New York has questioned whether *Anglo American* remains good law after *Tooley*. *See Newman v. Family Mgmt. Corp.*, 748 F. Supp. 2d 299, 314 n.12 (S.D.N.Y. 2010); *Saltz v. First Frontier, LP*, 782 F. Supp. 2d 61, 78 n.15 (S.D.N.Y. 2010). Accordingly, we conclude that this appeal depends on the resolution of unsettled Delaware law.

IV. CERTIFICATION

We certify the following question to the Delaware Supreme Court: Does the diminution in the value of a limited liability company, which serves as a feeder

fund in a limited partnership, provide the basis for an investor's direct suit against the general partners when the company and the partnership allocate losses to investors' individual capital accounts and do not issue transferable shares and losses are shared by investors in proportion to their investments?

QUESTION CERTIFIED.

TAB D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14-14526-CC

HUGH F. CULVERHOUSE,
individually and on behalf of all others similarly situated,

Plaintiff - Appellant,

versus

PAULSON & CO. INC.,
PAULSON ADVISERS LLC,

Defendants - Appellees.

Appeal from the United States District Court
for the Southern District of Florida

BEFORE: WILLIAM PRYOR, JULIE CARNES and SILER,*, Circuit Judges.

PER CURIAM:

The petition(s) for panel rehearing filed by the Appellees is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

*Honorable Eugene E. Siler, Jr., United States Circuit Judge for the Sixth Circuit, sitting by designation.

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