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Case Number 349,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

HUGH F. CULVERHOUSE, individually and on behalf of all others similarly situated,	:	No. 349, 2015
Plaintiff-Appellant,	:	Certification of Question of Law from the United States Court of Appeals for the Eleventh Circuit C.A. No. 14-14526
v.	:	
PAULSON & CO. INC. and PAULSON ADVISERS, LLC,	:	
Defendants-Appellees.	:	

APPELLEES' ANSWERING BRIEF

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NATURE OF PROCEEDINGS

The Eleventh Circuit's certified question to this Court seeks to determine if, under Delaware law, a limited partner in an unaffiliated feeder fund entity can bring a *direct* suit for breach of fiduciary duty and negligence against the general partners of a separate, unaffiliated Delaware partnership. Defendants Paulson & Co. Inc. ("Paulson") and Paulson Advisers, LLC ("Paulson Advisers") (collectively, "Defendants") are the administrative and managing general partners of Paulson Advantage Plus, L.P. (the "Investment Fund"). Plaintiff Hugh F. Culverhouse ("Plaintiff") is *not* an investor in the Investment Fund, but rather in an unaffiliated Citigroup feeder fund, HedgeForum Paulson Advantage Plus, LLC (the "Feeder Fund"). The Feeder Fund itself is an investor (limited partner) in the Investment Fund, but is sponsored and managed by its own, unaffiliated managers — *not* Defendants. Plaintiff invested in the unaffiliated Feeder Fund by entering into a contract with it, which provided that he "will not be an investor in the [Investment Fund]," "will have no direct interest in the [Investment Fund]," and "will have no recourse to or against" the Investment Fund. *See* Counterstatement of Facts § I, *infra*. Plaintiff did *not* enter into the separate contract required to become a limited partner of and invest in the Investment Fund.

Plaintiff ignores settled law that under this ordinary feeder fund/investment fund structure, feeder fund investors do not have standing to directly sue the managers of an investment fund in which they have no direct investment. Instead,

he seeks standing to represent a divergent class of investors who, unlike him, had capital accounts with the Investment Fund, along with other investors who, like him, were investors in and had capital accounts with unaffiliated so-called "Platform Funds" like the Feeder Fund. He alleges that Defendants' mismanagement of the Investment Fund caused it to lose money on an investment, which in turn caused losses to be allocated to the capital account of the Feeder Fund, which in turn caused losses to be allocated by the Feeder Fund to the capital accounts of "Pass-Through Investors" like Plaintiff who invested in the Feeder Fund, *not* the Investment Fund.

Despite having contractually agreed with the Feeder Fund that he had no privity with or recourse against the Investment Fund, Plaintiff ignores this Court's controlling decision in *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004), and asserts standing to bring direct claims against Defendants under the Court of Chancery's decision in *Anglo American Security Fund, L.P. v. S.R. Global International Fund, L.P.*, 829 A.2d 143 (Del. Ch. 2003). Plaintiff insists that, pursuant to *Anglo American*, courts should disregard corporate form, contractual restrictions and obligations, and separateness, and permit him to assert direct claims against Defendants as managers of the Investment Fund in which he did *not* invest, because the Investment Fund and Feeder Fund are purportedly structured so that losses are "immediately allocable" to investors' capital accounts

and neither the Investment Fund nor the Feeder Fund issued transferable shares. Plaintiff also argues that *Tooley* is "consistent with" his proposed reading of *Anglo American*, despite *Tooley*'s clear holding that an injury giving rise to direct standing must be "independent of any alleged injury to the corporation," and that a plaintiff asserting such an injury "must demonstrate that the duty breached was owed to the [plaintiff] and that he or she can prevail without showing any injury to the corporation." *Id*. at 1039. Plaintiff's claims are without merit. Unlike *Anglo American*, which was decided before *Tooley* and whose continuing validity has been repeatedly questioned, *Tooley* has been followed extensively in and outside of Delaware since it came down and precludes Plaintiff's recovery here.

The District Court correctly rejected Plaintiff's theory and dismissed his claims for lack of standing, holding that Plaintiff pled a "paradigmatic derivative claim." Following Plaintiff's appeal, the Eleventh Circuit certified a question to this Court to clarify the surviving scope and effect (if any) of *Anglo American* after this Court's decision in *Tooley*. *See* Question Presented, *infra*; Cert. Order (Pl. Br., Tab A), pp. 7-8. For the reasons set forth below, Defendants respectfully submit the certified question should be answered in the negative, because Plaintiff has no standing to bring direct suit against the managing partners of an Investment Fund in which Plaintiff did *not* invest.

SUMMARY OF ARGUMENT

1. Denied. Plaintiff's proposed interpretation of *Tooley* is irreconcilable with Delaware law and policy. To assert direct standing, a plaintiff's injury must be "independent of any alleged injury to the corporation," and the duty allegedly breached must be owed to the plaintiff individually so that "he or she can prevail without showing any injury to the corporation." *Tooley*, 845 A.2d at 1039. Contrary to this rule, Plaintiff seeks to assert direct standing against the general partners of the Investment Fund in which Plaintiff did *not* invest and from which no duty was owed (and indeed was eliminated by contract), based on an injury to the Investment Fund that was allocated pro rata to all limited partners in the Investment Fund, including the Feeder Fund, and then allocated pro rata by the Feeder Fund to all its investors, which included Plaintiff. In dismissing Plaintiff's Complaint, the District Court correctly held that this is nothing more than a paradigmatic derivative claim. Indeed, it is double derivative, as Plaintiff invested in the Feeder Fund, but seeks to sue the managers of the Investment Fund in which the Feeder Fund invested.

2. Denied. The ordinary feeder fund-to-unaffiliated investment fund structure in this case is fundamentally different from the entity at issue in *Anglo American*. Plaintiff cannot demonstrate that the structure of the Feeder Fund and Investment Fund "differ[] so drastically from the corporate model" so as to permit

a direct suit by an investor in one entity against the general partners of a separate, unaffiliated entity in which that investor did *not* invest. *Anglo American*, 829 A.2d at 151. In fact, *Plaintiff's own Complaint* characterizes his loss as "proportionate," confirming that *Tooley* controls this case. Characterizing Plaintiff's claims as derivative does not "deny" him a remedy or grant a "windfall" to other investors; rather, it simply recognizes that Plaintiff's remedy has always been against the Feeder Fund, and *only* against the Feeder Fund, regardless of Plaintiff's efforts to ascribe his contractual relationship with the Feeder Fund to the Investment Fund. Thus, *Anglo American*, to the extent that it is even good law post-*Tooley*, is inapposite. Even though Plaintiff disregards his obligations under and the limitations set forth in the Feeder Fund agreements he signed, Delaware courts "take the corporate form and corporate formalities very seriously[.]" *Case Financial, Inc. v. Alden*, 2009 WL 2581873, at *4 (Del. Ch. Aug. 21, 2009). Delaware's respect for corporate form will not tolerate a direct suit by an investor in one entity against the general partners of a separate, unaffiliated entity in which he did *not* invest, especially where Plaintiff's own contract makes clear that he had full disclosure of the separate character of his investment in the Feeder Fund, and acknowledged he would have no relationship with, or recourse against, Defendants as the managers of the distinct Investment Fund.

3. Denied. *Every* court to consider *Anglo American* in the context of

claims asserted by a feeder fund investor against either the feeder fund or the investment fund in which the feeder fund invested, has found those claims to be derivative not direct, and has questioned whether *Anglo American* retains any vitality following *Tooley*. *See* Argument § II, *infra*. Plaintiff offers no explanation why the structure of the Feeder Fund in this case justifies an exception to *Tooley* so as to allow a feeder fund investor – with contractual obligations prohibiting such a suit – to sue directly the managers of the investment fund in which the feeder fund invested under the guise of calling himself a "Pass-Through Investor."

4. Denied. It is well established that a claim for deficient management or administration of a fund is a paradigmatic derivative claim. Delaware law bars Plaintiff from asserting a direct claim against the fiduciaries of the Investment Fund in which he did *not* invest, because any alleged losses in the value of his investment are shared among and incurred proportionally by *all* investors in the fund in which he invested.

5. Denied. Characterizing Plaintiff's claims against the Investment Fund as derivative will neither "deny" him a remedy nor grant a "windfall" to other investors. As a Feeder Fund investor, neither the injury of which he complains nor the remedy he seeks ever belonged to him in the first place. His rights and obligations are prescribed in the contract he executed with the Feeder Fund, under which he is contractually prohibited from bringing this lawsuit.

COUNTERSTATEMENT OF FACTS

Plaintiff's Statement of Facts is incomplete. Delaware Supreme Court Rule 41 must be applied in a "careful and precise manner" in answering certified questions. *Espinoza on behalf of JPMorgan Chase & Co. v. Dimon*, 2015 WL 5439176, at *1 (Del. Sept. 15, 2015). Rule 41(b) "contemplates that a certification will pose a specific question of law, based on a *stipulated set of facts*." *Espinoza*, 2015 WL 5439176, at *1 (emphasis added). "This approach allows us to focus on a relevant question of Delaware law against the backdrop of *established facts*, which are *not the subject of dispute* among the parties." *Id*. (emphasis added). Here, the Eleventh Circuit's Certification Order contains a short "Background" section which briefly summarizes certain of Plaintiff's allegations, but does not contain a "stipulated set" of all undisputed "established facts" as contemplated by Rule 41. *See* Cert. Order, pp. 2-4.

Under these circumstances, the Court "will endeavor to be as helpful as we can be without risking giving overbroad and potentially misleading guidance because of the absence of stipulated facts, against which a precisely tailored question is framed[.]" *Espinoza*, 2015 WL 5439176, at *1. To that end, while the Certification Order as filed "shall constitute the record," *see* Del. S. Ct. Rule 41(c)(iv), "additional allegations from the plaintiffs' pleadings" may be included "in order to provide better context" for the Court's decision. *Lincoln Nat'l Life Ins. Co. v. Joseph Schlanger 2006 Ins. Trust*, 28 A.3d 436, 437 n. 2 (Del. 2011); *PHL*

Variable Ins. Co. v. Price Dawe 2006 Ins. Trust, ex rel. Christiana Bank & Trust Co., 28 A.3d 1059, 1063 n. 2 (Del. 2011). Here, there are additional "established facts" set forth in Plaintiff's pleadings and exhibits which "are not the subject of dispute among the parties" and will "provide better context" for the Court's determination of the certified question.[1]

I. Additional Factual Background

Defendants are the general partners of the Investment Fund, a hedge fund whose strategy is to invest in event-driven opportunities. Am. Compl., ¶¶ 9, 15-17, 32 (B003-05, B009). Plaintiff, a sophisticated lawyer and businessman, is *not* an investor in the Investment Fund. Rather, he chose to invest in the Feeder Fund, a separate and independent fund that invests in the Investment Fund, but is sponsored and managed by Citigroup Alternative Investments LLC ("Citigroup AI") and AMACAR CPO, Inc. ("AMACAR"), not Defendants. *Id*. ¶ 19 (B005); *id*. Ex. 1, p. 1; *id*. Ex. 2, p. 1; *id*. Ex. 3, pp. iii, v, 1-3, 5-8, 16, 32-33.

The terms of Plaintiff's investment in the Feeder Fund are memorialized in a

[1] Although Defendants believe the additional facts set forth in this Counterstatement of Facts provide better context for the Court, the outcome of this appeal is the same regardless of whether or not the Court chooses to consider these additional facts. The Background section of the Certification Order, though omitting a number of established and undisputed facts, nevertheless captures the essential facts that: (1) Plaintiff "had invested in" the Feeder Fund, not the Investment Fund; (2) the Feeder Fund, not Plaintiff, invested "substantially all of its capital" in the Investment Fund; and (3) the Feeder Fund and the Investment Fund are separate and independent entities with separate and unaffiliated sponsors and managers. *See* Cert. Order, pp. 2-3. These facts are sufficient to confirm Plaintiff's lack of direct standing. *See* Argument §§ I-II.

series of offering documents and governing agreements. The Confidential Memorandum of HedgeForum Paulson Advantage Plus, LLC (the "Feeder Fund Memorandum"), states in relevant part:[2]

- "*The Paulson Advantage Fund is not affiliated with Citigroup, Inc., CAI, or the Feeder* (which has its own managing member, AMACAR CPO, Inc)." Am. Compl., Ex. 3, p. 1.

- "The Feeder is one of several private investment vehicles *sponsored and managed by CAI* as part of Citigroup Alternative Investments' HedgeForum … to make available to eligible investors access or exposure to hedge funds *managed by third party managers*[.] * * * Portfolio managers included in the initial launch of the Platform in May 2005 *were chosen by CAI*." *Id*., pp. 1, 5.

- "*CAI also employs a robust proprietary risk management platform* specifically designed for a breadth of complex strategies within the hedge fund universe. * * * *Risk management is applied both in the due diligence process and through ongoing monitoring by the risk analysis team*." *Id*.

- "CAI . . . may (but will not be obligated to) terminate a portfolio manager from HedgeForum, *in its sole discretion, based on any factor which CAI deems relevant to making such a decision to terminate a portfolio manager*, including, without limitation, performance, *risk management*, *due diligence*[.]" *Id*., p. 6.

- "*CAI conducted initial due diligence regarding the Paulson Advantage Fund, Paulson & Co. and Paulson Advisers and will conduct ongoing risk analysis of the Feeder's investment in the Paulson Advantage Fund. The Paulson Advantage Fund is not affiliated with Citigroup, Inc., Citigroup Alternative Investments LLC, or the Feeder* (which has its own managing member)." *Id*., p 16.

- "Portfolio Manager's Misconduct or Bad Judgment. It will be

[2] The Feeder Fund Memorandum uses the terms "Paulson Advantage Fund" to refer to the Investment Fund, "Feeder" to refer to the Feeder Fund, and "CAI" to refer to Citigroup AI. Emphases are added.

difficult, if not impossible, for the Feeder [Fund], the Managing Member and Citigroup AI to protect investors from the risk of any portfolio manager (*including the investment advisor of the Paulson Advantage Fund*) engaging in fraud, misrepresentation or material strategy alteration. *Investors themselves will generally have no direct dealings or contractual relationships with any portfolio manager*." *Id*., p. 32.

- "*Members of the Feeder will not be Members of the Paulson Advantage Fund*. The Feeder will be a member of the Paulson Advantage Fund, entitled to the rights of a member under Delaware law and the limited liability company agreement of the Paulson Advantage Fund. *Investors in the Feeder, however, do not thereby become members of the Paulson Advantage Fund and will not have rights as members of the Paulson Advantage Fund*. Rather, investors in the Feeder will have rights as Members of the Feeder. *As such, investors in the Feeder have no ability to assert claims against the Paulson Advantage Fund or its affiliates*." *Id*., p. 33.

- "Terms and Conditions of the Feeder. Investors are investing in the Feeder under the terms and conditions set forth in this Memorandum and in the LLC Agreement. *The terms and conditions of an investment in the Feeder are materially different than the terms and conditions of an investment in the Paulson Advantage Fund*." *Id*., p. 34.

Furthermore, the Feeder Fund's Initial Subscription Agreement (the "Subscription Agreement"),[3] which Plaintiff executed to become a limited partner

[3] The Subscription Agreement, which Defendants included as Exhibit 1 to their Motion to Dismiss filed with the District Court, is conspicuously absent from the Amended Complaint, despite the fact that Plaintiff made his subscription in the Feeder Fund and putative status as a "Pass-Through Investor" central to his allegations of standing. *See* Am. Compl. ¶¶ 15-23 (B004-07). The Eleventh Circuit and this Court may thus consider the Subscription Agreement as a document integral to the Amended Complaint whose authenticity is not disputed. *See Speaker v. U.S. Dept. of Health & Human Servs. Ctrs. for Disease Control & Prevention*, 623 F.3d 1371, 1379 (11th Cir. 2010); *In re Santa Fe Pacific Corp. S'holder Litig.*, 669 A.2d 59, 69-70 (Del. 1995). *See also* Argument § III, *infra*.

in the Feeder Fund, is even clearer in distinguishing investments in the Feeder Fund from the Investment Fund. Section V(A) states that Plaintiff "understands that an investment in the [Feeder Fund] does not constitute a direct investment in the [Investment Fund]." Subscription Agreement § V(A) (B039). It declares Plaintiff's understanding that he "will not be an investor in the [Investment Fund], will have no direct interest in the [Investment Fund], and will have no voting rights in the [Investment Fund]." *Id*. Additionally, Plaintiff "acknowledges and agrees" that by "subscribing for Interests" in the Feeder Fund, he "will have *no recourse* to or against" the Investment Fund. *Id*. (emphasis added).

Although Plaintiff is *not* an investor in the Investment Fund, he claims that a lack of diligence by Defendants in their management of the Investment Fund caused it to lose money on an investment in Sino-Forest Corporation ("Sino-Forest"), a Canadian corporation that operates commercial forest plantations in China and whose shares were publicly listed. According to Plaintiff, after Defendants caused the Investment Fund to invest in Sino-Forest (by purchasing shares on the Toronto Stock Exchange) in 2007, Defendants failed to conduct proper initial or ongoing due diligence into Sino-Forest's operations, and continued to invest in the company. Am. Compl. ¶¶ 2-3, 34-36, 52-53 (B001-02, B009-10, B015). He also alleges that Defendants failed to divest the Investment Fund of its holdings in Sino-Forest despite learning prior to June 2, 2011 that its stock was

heavily targeted by short sellers. *Id*. ¶¶ 55, 63 (B015, B017).

II. Additional Procedural History

Plaintiff falsely alleged in his original Complaint that he held a direct limited partnership interest in the Investment Fund, and attached an unsigned version of the Investment Fund's Limited Partnership Agreement that he purportedly "executed" when he "became a limited partner." Compl. ¶¶ 1, 15, Ex. 3 (B061, B064). After Defendants filed a motion to dismiss presenting incontrovertible evidence that Plaintiff was *not* an investor in the Investment Fund, and instead had invested in the unaffiliated Feeder Fund, Plaintiff filed his Amended Complaint. He now admitted that he was *not* an investor in the Investment Fund, that the purported Limited Partnership Agreement that he attached to his Complaint and asserted was the basis of his fiduciary relationship with the Defendants was, in fact, *not* his contract, and that instead, he was an investor in the Feeder Fund. Am. Compl. ¶ 9 (B003). Plaintiff asserted, however, that he had direct standing as a so-called "Pass-Through Investor" in a "Platform Fund." *Id*. ¶¶ 15-23 (B004-07).

Defendants filed a motion to dismiss the Amended Complaint for lack of standing and failure to state a claim. On March 31 2013, the District Court entered an Endorsed Order and an Amended Endorsed Order granting Defendants' motion to dismiss without leave to amend, based on Plaintiff's lack of standing and failure to state a claim. (B084, B085). On September 30, 2014, the District Court entered its final decision dismissing Plaintiff's Amended Complaint with prejudice (the

"Final Order"). (B086-91). The Final Order held that Plaintiff lacked standing and that the Court lacked subject matter jurisdiction. *Id*. Plaintiff appealed.

On June 30, 2015, the Eleventh Circuit entered its Certification Order. In so doing, the Eleventh Circuit stated that it was "hesitant" to find that Plaintiff's claims were direct and not derivative under *Anglo American*, in light of this Court's more recent decision in *Tooley*. Cert. Order, pp. 6-7. The Eleventh Circuit further questioned whether *Anglo American* remains good law after *Tooley*. *Id*.

Upon reviewing the Certification Order, Defendants were concerned with the brevity of the Eleventh Circuit's background section, which omits a number of established facts which are not the subject of dispute among the parties, as described above. *See* Statement of Facts § I, *supra*. Defendants also believed that the phrasing of the certified question was imprecise in capturing Plaintiff's status as an investor in the *Feeder Fund*, not the *Investment Fund*, and in describing the separate existence and management of the Feeder Fund and the Investment Fund, though these facts are captured in the Certification Order as a whole. *See* Certification Order, pp. 2-3, 7-8. Defendants were further concerned that the certified question could be misconstrued by this Court to suggest, inaccurately, that individual investors in the Feeder Fund are reflected on the books and records of the Investment Fund, when in fact it is undisputed that losses to the Investment Fund are allocated to its own investors' capital accounts – including the Feeder

Fund – and the Feeder Fund then separately allocates losses to its investors' individual capital accounts in proportion to their investments in the Feeder Fund. *See* Am. Compl. ¶¶ 9, 12, 16-17 (B003-05); *id*. Ex. 3, pp. 1, 5, 32-34.

To address these concerns, Defendants filed a Petition for Rehearing, asking the Eleventh Circuit to rephrase the certified question 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?

See Def. Pet. Reh'g (Pl. Br., Tab C), p. 7. The Eleventh Circuit denied the Petition for Rehearing. (Pl. Br., Tab D).[4]

[4] When faced with an incomplete set of stipulated facts or an inartfully phrased certified question in the past, this Court has at times felt "obliged to decline to answer the question as formulated or to try to reformulate the question more narrowly." *Espinoza*, 2015 WL 5439176, at *1. Here, the outcome is the same under either phrasing of the certified question, so Defendants do not take the view that the Court is obliged to decline to answer the certified question or to reformulate it, but respectfully submit that consideration of Plaintiff's pleadings and incorporated exhibits and documents will provide better context to answer the certified question as written.

ARGUMENT

I. QUESTION PRESENTED

The Eleventh Circuit 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?

Cert. Order, pp. 7-8.

II. SCOPE OF REVIEW

Where a certified question of law arises in the context of motions to dismiss, this Court must accept as true the well-pleaded allegations in the complaint. *See Rales v. Blasband*, 634 A.2d 927, 931 (Del. 1993). However, this Court "need not accept as true conclusory allegations without specific facts alleged to support the conclusion." *Hillman v. Hillman*, 910 A.2d 262, 269 (Del. Ch. 2006) (citing *In re General Motors (Hughes) S'holders Litig.*, 897 A.2d 162, 168 (Del. 2006)). The Court is required to accept only "reasonable inferences that logically flow from the face of the complaint" and "is not required to accept every strained interpretation of the allegations proposed by the plaintiff." *In re General Motors*, 897 A.2d at 168 (quoting *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001)).

III. MERITS OF ARGUMENT

A. DELAWARE LAW WILL NOT DISREGARD CORPORATE FORM TO PROVIDE STANDING FOR A FEEDER FUND INVESTOR TO BRING A DIRECT SUIT AGAINST THE MANAGERS OF AN INVESTMENT FUND IN WHICH THE FEEDER FUND INVESTED

The Certification Order identifies Plaintiff as an investor in the Feeder Fund, *not* the Investment Fund. Cert. Order, pp. 2-3. It notes that the Feeder Fund was created by a separate sponsor as a distinct entity to give investors an opportunity to invest in the Investment Fund in an amount below the $5 million required for a limited partner interest in the Investment Fund itself, and it was the Feeder Fund (not Plaintiff) which invested "substantially all of its capital" in the Investment Fund. *Id*. The certified question likewise acknowledges this distinction, asking whether the diminution in value of a limited liability company (the Feeder Fund) "provide[s] the basis" for an investor in the Feeder Fund to bring "direct suit against the general partners" of a limited partnership (the Investment Fund) in which the investor was not directly invested. *Id*., pp. 7-8. Yet Plaintiff's opening brief ignores the Eleventh Circuit's treatment of the Feeder Fund and the Investment Fund as separate entities. Instead, it puts the "rabbit in the hat" and jumps directly to a discussion of whether unspecified "fund investors" have direct standing against the general partners of the Investment Fund under *Tooley* and *Anglo American*, while blithely skipping over the distinction between a Feeder Fund investor and an Investment Fund investor. S*ee* Pl. Br., pp. 12-25.

Delaware law, however, is not so cavalier in matters of corporate separateness. To the contrary, Delaware courts "take the corporate form and corporate formalities very seriously," and "will disregard the corporate form only in the 'exceptional case.'" *Vichi v. Koninklijke Philips Electronics N.V.*, 62 A.3d 26, 48-49 (Del. Ch. 2012) (*quoting Case Financial*, 2009 WL 2581873, at *4). Plaintiff chose to invest in the separately managed Feeder Fund, which invested in the Investment Fund, which is managed by Defendants. *See* Cert. Order, pp. 2-3; Am. Compl. ¶¶ 9, 12, 16-17 (B003-05). With three layers of separation between the "investor" and the "general partners" described in the certified question, there is no contractual or fiduciary relationship or privity between them to provide any basis for a direct suit. Plaintiff's suggestion that he has a direct claim because of allocated losses to his capital account, while irrelevant from a legal standpoint, *see* Argument § II, *infra*, is even more absurd here, because Plaintiff's capital account was with the Feeder Fund, *not* the Investment Fund.

No court has granted standing to a feeder fund investor to bring direct suit against the managers of an investment fund in which the feeder fund invested. In *Saltz v. First Frontier, LP*, 782 F. Supp. 2d 61, 77-79 (S.D.N.Y. 2010), the court applied Delaware law to dismiss for lack of standing the claims of sub-feeder fund investors for breach of fiduciary duty, gross negligence, and unjust enrichment asserted against the investment fund in which the sub-feeder fund invested and its

investment manager. There, as here, the plaintiffs alleged that the sub-feeder fund invested "substantially all" of its asserts with the investment fund, and alleged that they experienced direct losses to their individual investment accounts as a result of the sub-feeder fund's investments with the investment fund. *Id*. at 67-68, 76. Applying *Tooley*, the court found that plaintiffs' lacked direct standing, because the injury from the "continued investment" was "necessarily" to the sub-feeder fund. *Id*. at 79. "The diminution in the value of partnership interests clearly is not a direct injury, because '[t]he diminution in the value of their interests flows from the damage inflicted directly on the Partnership.' *Id*. (quoting *Litman v. Prudential-Bache Props. Inc.*, 611 A.2d 12, 15 (Del. Ch. 1992)).

In reaching this result, the court rejected plaintiffs' assertion of *Anglo American* as a basis for standing, finding both that *Anglo American* was decided before *Tooley* (*see also* Argument § II, *infra*) and that a feeder fund structure does not "differ[] so drastically from the corporate model" to justify disregarding Delaware corporate law. *Id*. at 78 n.15. The court noted that, unlike the plaintiffs in *Anglo American*, all of the sub-feeder fund's limited partners "were injured in an identical way, and any potential recovery would be distributed to them on a pro rata basis." *Id*. The same is true here, where Plaintiff alleges he was injured in an identical way as every other direct or "Pass-Through Investor" in the Investment Fund, with his losses (and any potential recovery) being allocated to him on a pro

rata basis through his Feeder Fund capital account, which in turn had its losses allocated to it on a pro rata basis through its Investment Fund capital account.

In *Newman v. Family Management Corp.*, 748 F. Supp. 2d 299, 314-16 & n.12 (S.D.N.Y. 2010), the court applied the same analysis under Delaware law and reached the same result. It held that losses to sub-feeder fund investors' capital accounts did not confer standing under *Tooley* to assert direct claims for breach of fiduciary duty, gross negligence, and unjust enrichment against the investment fund or its fiduciaries, because "[a] claim for deficient management or administration of a fund is 'a paradigmatic derivative claim.'" *Id*. at 314 (quoting *Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 2130607, at *13 (Del. Ch. Aug. 26, 2005)). As in *Saltz*, the court in *Newman* considered and rejected plaintiffs' efforts to invoke *Anglo American* as a basis for standing, again noting that that *Anglo American* was decided before *Tooley*, that a feeder fund structure does not "differ[] so drastically from the corporate model" to disregard Delaware corporate law, and that all of the sub-feeder fund's limited partners "were injured in an identical way, and any potential recovery would be distributed to them on a pro rata basis." *Id*. at 314 n.12.

Likewise, in *Stephenson v. Citco Group Ltd.*, 700 F. Supp. 2d 599, 608-12 (S.D.N.Y. 2010), *aff'd*, *Stephenson v. PricewaterhouseCoopers, LLP*, 482 Fed. App'x 618 (2d Cir. 2012), the court applied Delaware law to dismiss for lack of

standing a feeder fund investor's claims for breach of fiduciary duty against the administrators and auditors of the feeder fund. In so holding, the court specifically rejected plaintiff's argument – the same argument offered by Plaintiff here – that the feeder fund itself "did not suffer any harm" because "it was a passive vehicle" for investment with the investment fund. *Id*. at 609. The court found that plaintiff in *Stephenson* – again like Plaintiff here – "cites no authority to support its contention that a 'passive' investment partnership is not a separate legal entity that suffers direct injury" from its investment. *Id*.

These feeder fund cases all applied Delaware law and reached the correct result, as evidenced by Plaintiff's inability in his opening brief to cite a single contrary case in which a feeder fund investor has been found to have standing under Delaware law or that of any other state to sue the managers of an investment fund in which the feeder fund invested. Here, as in *Saltz*, *Newman*, and *Stephenson*, a Feeder Fund investor like Plaintiff cannot claim any direct injury from Defendants' purported mismanagement of the Investment Fund. The Feeder Fund, not Plaintiff, holds the limited partnership interest and the capital account at the Investment Fund. Plaintiff's separate and distinct interest is confined to his limited liability company (Feeder Fund) interest and account at the Feeder Fund, which is independent of the Investment Fund and separately managed by AMACAR and Citigroup AI, not Defendants. Plaintiff has no partnership interest

in the Investment Fund, no capital account with the Investment Fund, and no assets of his own entrusted to the Investment Fund; his full investment interest is in the Feeder Fund. Because Delaware law recognizes and respects the distinct corporate existence of the Investment Fund and the Feeder Fund, it does not provide any basis for a feeder fund investor to bring a direct suit against the general partners of an investment fund in which the feeder fund invested.

B. A FEEDER FUND INVESTOR LACKS STANDING UNDER DELAWARE LAW TO ASSERT INDIVIDUAL, DIRECT CLAIMS FOR LOSSES ALLOCATED TO THE INDIVIDUAL CAPITAL ACCOUNTS OF ALL INVESTORS IN AN INVESTMENT FUND

Even were it possible under Delaware law to lump Feeder Fund investors and Investment Fund investors together under the amorphous generic category of "fund investors," which it is not, the alleged diminution in value to an investor's capital account due to the proportional allocation of losses from the Investment Fund to the Feeder Fund and then to the investor's capital account does not support an investor's direct suit against the general partners of the Investment Fund under *Tooley* or *Anglo American*. Plaintiff has not alleged and cannot allege any losses by the Feeder Fund separate and apart from those incurred by the Investment Fund. Accordingly, any claim he would make against Defendants as the general partners of the Investment Fund would be a derivative claim. In fact, Plaintiff's claims are derivative as to *both* the Investment Fund *and* the Feeder Fund, making them double derivative under controlling Delaware law.

1. Claims Arising from an Investor's Proportional, Allocated Losses to His Capital Account Are Derivative Claims, Not Direct Claims

Plaintiff's claims are derivative as a matter of law and belong in the first instance to the Investment Fund, because Plaintiff's alleged injury with respect to the Sino-Forest investment is not independent of any alleged injury to the Investment Fund, and is undifferentiated from the injuries allegedly incurred by every other limited partner of the Investment Fund (and thereafter by every other investor in the Feeder Fund). A decade ago, this Court clarified the proper test for determining whether a claim is direct or derivative, holding in *Tooley* that the outcome turns 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)." *Tooley*, 845 A.2d at 1033. The claimed direct injury must be "independent of any alleged injury to the corporation," and a plaintiff must demonstrate "that he or she can prevail without showing any injury to the corporation." *Id*. at 1039.[5] Thus, where the alleged misconduct does not injure a plaintiff directly, but only indirectly as a result of his ownership of a partnership interest, it is "a derivative claim that [the plaintiff] lacks standing to assert directly." *Stephenson*, 482 Fed. App'x at 621 (*quoting Tooley*, 845 A.2d at 1039 (internal quotations omitted)); *see*

[5] The test for whether a claim is derivative is "substantially the same" for claims against limited partnerships as it is for claims against corporations. *Litman*, 611 A.2d at 15.

also Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc., 854 A.2d 121, 168-69 (Del. Ch. 2004) (LLC member's claim for "lost potential profits" are derivative because they are "entirely contingent on harm suffered" by the LLC).

A Feeder Fund investor like Plaintiff cannot satisfy either prong of the *Tooley* standard, because he has neither suffered the alleged harm nor is entitled to receive the benefit of any recovery or remedy. Plaintiff's claims stem from a diminution in the value of the Investment Fund, and its supposed "pass-through" effects on the capital accounts of investors in the Investment Fund. Plaintiff, however, did not have a capital account with the Investment Fund; the injuries for which he seeks redress – the diminution in his capital account with the *Feeder Fund* – are entirely contingent on the harm suffered by the Feeder Fund as a whole. He asserts a "proportional" injury through his investment in the Feeder Fund, but that alleged harm does not exist independent of the Investment Fund, nor can he receive the benefit of any recovery separate from the Feeder Fund. Plaintiff thus has no direct claim against Defendants for their alleged mismanagement of the Investment Fund. *See Sandalwood Deb Fund A, L.P. v. KPMG, LLP*, 2013 WL 3284126, *7 (N.J. Super. Ct. App. Div. Jul. 1, 2013) (applying Delaware law and finding that claims brought by the limited partners of a feeder fund against the fiduciary of an investment fund were derivative, where plaintiffs were only indirectly injured through the losses to their feeder fund investments).

Plaintiff nonetheless attempts to characterize his claims as direct rather than derivative under *Tooley*, asserting that he suffered the alleged harm and would receive the benefit of any recovery because any losses suffered by the Investment Fund and the Feeder Fund "accrue irrevocably and almost immediately to investors" due to the allocation of profits and losses to investors' individual capital accounts. Pl. Br., pp. 13-14. Plaintiff's own explanation exposes the defect in his argument. By his own reasoning, Plaintiff is not claiming an injury "independent of any alleged injury to the corporation," and cannot prevail "without showing any injury to the corporation," because his alleged injury arises due to the *allocation* of losses incurred by the Investment Fund to all of its limited partners, including the Feeder Fund, and the subsequent *allocation* of losses incurred by the Feeder Fund to all of its members, including Plaintiff. That these derivative losses purportedly accrue "irrevocably and almost immediately" does not change their character; they accrue to the entity first and then by allocation to all investors on a pro rata basis.

Confirming the error in Plaintiff's reasoning, ***every*** court to apply the *Tooley* test in the context of mismanagement claims asserted by a feeder fund investor against either the feeder fund or the investment fund in which the feeder fund invested, has held those claims to be derivative not direct. *See Stephenson*, 482 Fed. App'x at 608-12; *Saltz*, 782 F. Supp. 2d at 78-79; *Newman*, 748 F. Supp. 2d at 314-16; *West Palm Beach Police Pension Fund v. Collins Capital Low Volatility*

Perf. Fund II, Ltd., 2010 WL 2949856, *2 (S.D. Fla. July 26, 2010). These authorities recognize that a claim asserted against the managers of an investment fund in which a feeder fund invested is a "paradigmatic derivative claim." *Saltz*, 782 F. Supp. 2d at 79 (*quoting Albert v. Alex. Brown Mgmt. Serv., Inc.*, 2005 WL 2130607, at *12–13 (Del. Ch. Aug. 26, 2005); *Litman*, 611 A.2d at 15-16). The resulting "diminution in the value of partnership interests clearly is not a direct injury," because it "flows from the damage inflicted directly on the [p]artnership." *Id*. (*quoting Litman*, 611 A.2d at 16). "These claims may only be brought, if at all, derivatively[.]" *Id*. *See also Newman*, 748 F. Supp. 2d at 315-16 (same).

In fact, Plaintiff's claims are not just derivative, but "double derivative." A double derivative action is characterized by "two layers (or 'tiers') of corporate entities," where the plaintiff seeks to pass derivatively through one entity to sue the fiduciaries of the second entity. *Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A.*, 34 A.3d 1074, 1079 (Del. 2011). Here, Plaintiff seeks to pass through the Feeder Fund and recover a fractional share of a "proportionate" injury that resulted from losses to the Investment Fund. In recognition of the practical reality that in such cases "demand could only be made – and a derivative action could only be brought – at the parent, not the subsidiary, level[,]" Delaware only recognizes double derivative standing in cases involving a "wholly-owned subsidiary." *Lambrecht v. O'Neal*, 3 A.3d 277, 282 n.14 (Del. 2010). The Feeder

Fund is not a wholly-owned subsidiary of the Investment Fund. Accordingly, Plaintiff lacks both derivative and double derivative standing.

2. The *Anglo American* Case on Which Plaintiff Relies Does Not Transform His Derivative Claims into Direct Claims

In an effort to escape the application of Delaware law to his derivative claims, Plaintiff asks this Court to recognize a broad and non-existent exception to its derivative standing principles, which would allow investors of any fund that allocates profits and losses through investor capital accounts to bring direct claims against the fund's managers. Although Plaintiff argues that prior to *Tooley*, the law on direct versus derivative claims was "ambiguous" and fell "short of providing coherent guidance" (Pl. Br., p. 12), he relies upon a pre-*Tooley* decision of the Court of Chancery, *Anglo American*, for the proposition that claims which at first appear to be "classically derivative in nature" should nevertheless be treated as direct claims where the operation and function of a partnership "diverge so radically from the traditional corporate model" that the claims "must be brought as direct claims." Pl. Br., p. 17 (*quoting Anglo American*, 829 A.2d at 151-52). Plaintiff asserts that this "radical" divergence occurs wherever the partnership is structured so that (1) injuries accrue "irrevocably and almost immediately to the current partners" and (2) interests "are not freely transferable or tradable" such that only current partners are injured by reductions in partnership assets. *Id*. Plaintiff grossly misconstrues *Anglo American* for broad propositions it never stated and no

court has ever accepted.

Anglo American was *not* a feeder fund case, nor was it a case in which all of the investors suffered a proportionately equal diminution in the value of their partnership interests. Rather, in *Anglo American*, one partner of an investment fund withdrew $22.35 million from its capital account, and the plaintiffs, all of whom were limited partners of the same fund, alleged that the withdrawal overdrew the capital account. 829 A.2d at 148. Thus, *Anglo American* involved the circumstances, not present here, in which one partner enjoyed a direct benefit and other partners in the same fund suffered a direct detriment as the result of an overdrawn capital account, the losses of which were "irrevocably and almost immediately" passed on from one limited partner to the other limited partners. *Id*. at 152-53. Based upon these unique circumstances, the Chancery Court permitted plaintiffs to bring their claims directly.

Plaintiff here, on the other hand, cannot demonstrate that the structure and operation of the Investment Fund and Feeder Fund differ "so radically" from the corporate model. Plaintiff *had no capital account* with the Investment Fund; his account was with the Feeder Fund. Moreover, all capital accounts at the Investment Fund suffered the same "proportionate" loss, as did all Feeder Fund capital accounts; no single account benefited at the expense of others. As *Saltz* and *Newman* both recognized, the structure of a feeder fund does not "differ[] so

drastically from the corporate model" as described by *Anglo American*, and claims by a feeder fund investor are still derivative rather than direct under *Tooley*, where the feeder fund investors "were injured in an identical way, and any potential recovery would be distributed to them on a pro rata basis." *Saltz*, 782 F. Supp. 2d at 78 n.15; *Newman*, 748 F. Supp. 2d at 314 n.12.

Courts have been similarly unreceptive to Plaintiff's theory of "pass-through" standing. In *BCR Safeguard Holding LLC v. Morgan Stanley Real Estate Advisor Inc.*, 2014 WL 4354457, at *19 (E.D. La. Sept. 2, 2014), the court considered whether *Anglo American* transformed a "pass-through" investor's otherwise derivative claims into direct claims under Delaware law, and concluded that it did not. The court held that *Anglo American* "did not upset" the general rule that "a diminution of the value of a business entity is classically derivative in nature," and limited it to its "specific factual context[.]" *Id*. at *20. *See also Stephenson*, 700 F. Supp. 2d at 609 (holding that a "passive" investment vehicle is still a "separate legal entity that suffers direct injury").

Plaintiff's only answer to this substantial weight of authority – and the absence of a single case construing *Anglo American* as he does – is to describe them as non-Delaware cases (though they apply Delaware law in a careful and well-reasoned manner), and to state that they "all distinguish *Anglo American* on its facts." That is inaccurate, as many courts have questioned whether *Anglo*

American retains any vitality at all following *Tooley*.[6] Regardless, Plaintiff offers no explanation why the structure of the Feeder Fund in this case differs so radically from the structure of the feeder funds addressed in *Saltz*, *Newman*, *Stephenson*, *BCR Safeguard Holding*, and other cases, such that *Anglo American* would afford an exception to derivative standing principles here where it has not done so in *any other* feeder fund case. In those cases, as in this case, feeder fund investors suffered losses to their investment accounts due to alleged mismanagement of an investment fund, and in each instance their claims for mismanagement of the investment fund were held to be derivative, not direct. The same is true here.

3. Plaintiff is Not Entitled to Bring a Direct Claim against the Investment Fund Merely Because He Would Not Receive the Recovery of a Derivative Suit

Unable to respond to the unanimous weight of authority holding that a feeder fund investor lacks standing to bring a direct claim against the managers of the investment fund in which the feeder fund invested, Plaintiff contends that his

[6] *See Saltz*, 782 F. Supp. 2d at 78 n.15 (questioning whether *Anglo American* remains good law and noting that it was "decided before *Tooley*"); *Newman*, 748 F. Supp. 2d at 314 n.12 (same). Even cases Plaintiff has cited in the past for the "continued viability" of *Anglo American* have generally declined to apply it, effectively limiting it to its peculiar facts. *See Askenazy v. Tremont Group Holdings, Inc.*, 2012 WL 440675 at *10 (finding *Anglo American* "distinguishable" where plaintiffs were not former partners); *Zutty v. Rye Select Broad Mkt. Prime Fund, L.P.*, 2011 WL 5962804, at *7 (N.Y. Sup. Apr. 15, 2011) (finding *Anglo American* "completely inapposite" and collecting cases distinguishing it). Indeed, the principal authority on which *Anglo American* relied, *In re Cencom Cable Income Partners, L.P.*, 2000 WL 130629, at *3 (Del. Ch. Jan. 27, 2000), has since been limited "to its own unique set of facts[.]" *Agostino v. Hicks*, 845 A.2d 1110, 1125 (Del. Ch. 2004).

claims must be characterized as direct because investors' interests are non-transferable and a derivative action would have the "perverse effect" of denying recovery to partners who withdrew from the partnership prior to the litigation, while giving future partners a "windfall." Pl. Br., pp. 18, 23-25. But the mere fact that Plaintiff redeemed his shares and therefore will not receive any benefit from a derivative suit, does not entitle him to bring his claims directly against the Investment Fund. This Court routinely denies standing – and therefore the possibility for any recovery – to shareholders who were injured by an allegedly improper transaction but cease to be a shareholder prior to or at the time of the lawsuit. *See Lewis v. Anderson*, 477 A.2d 1040, 1049 (Del. 1984) ("A plaintiff who ceases to be a shareholder whether by reason of a merger or for any other reason, loses standing to continue a derivative suit"). Plaintiff's loss of standing due to the redemption of his investment in the Feeder Fund is neither "perverse" nor unusual; it is the ordinary effect of an investor's election to withdraw from an investment. *See* Fed. R. Civ. P. 23.1 (requiring plaintiff in derivative action to be "a shareholder or member at the time of the transaction complained of" and at all times until recovery); Del. Ch. R. 23.1 (same).

Regardless, Plaintiff had his capital account with the Feeder Fund, *not* the Investment Fund. Therefore, characterizing Plaintiff's claims against the Investment Fund as derivative is neither "denying" him a remedy nor "granting" a

"windfall" to others. *Anglo American*, 829 A.2d at 153. As a Feeder Fund investor, neither the injury nor the remedy ever belonged to Plaintiff in the first place. Plaintiff essentially asks this Court to transform whatever double derivative claims he may have had against the Investment Fund into direct claims, based solely on his decision to sell his shares and forfeit any double derivative claims he might have sought to assert. *See* Fed. R. Civ. P. 23.1; Del. Ch. R. 23.1. No court has upheld such a broad exception to the rules of derivative standing.

C. DELAWARE LAW WILL NOT RELIEVE PLAINTIFF OF HIS CONTRACTUAL UNDERTAKINGS IN ORDER TO GRANT HIM DIRECT STANDING AGAINST THE MANAGERS OF AN INVESTMENT FUND IN WHICH HE DID NOT INVEST

Lastly, Plaintiff's opening brief makes numerous attempts to distinguish the structures of the Investment Fund and Feeder Fund in this case from the "traditional corporate structure," in an effort to persuade the Court to apply *Anglo American* as the "more appropriate framework" to analyze standing in this case. Pl. Br., pp. 21-23. To that end, Plaintiff acknowledges that, in determining whether claims are direct or derivative under *Anglo American*, "a court must take into account the contents of the limited partnership agreement [and] how it specifies or modifies the entity's function and structure[.]" Pl. Br., p. 16 (*quoting Anglo American*, 829 A.2d at 150). Yet Plaintiff's consideration of the governing agreements for the Investment Fund and Feeder Fund is peculiarly myopic, addressing only those provisions he believes are helpful to his "pass-through"

theory of investor standing, while disregarding the many specific provisions of the Feeder Fund agreement he signed which control his rights and remedies, and which directly and dispositively contradict his theory.

Delaware law does not pick and choose the relevant provisions of Plaintiff's voluntary contractual undertakings in this manner, merely to facilitate an expansive theory of investor standing. This Court's jurisprudence gives "maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements." *Parkcentral Global, L.P. v. Brown Inv. Mgmt., L.P.*, 1 A.3d 291, 296 (Del. 2010). Where, as here, the "explicitly negotiated and validly adopted provisions" of Plaintiff's agreement make clear that the Feeder Fund and the Investment Fund are separate and unaffiliated entities that are managed by two unrelated sets of managers, with no recourse by investors in the Feeder Fund against the Investment Fund or its managers, these provisions "will be enforced." *U.S. West, Inc. v. Time Warner, Inc.*, 1996 WL 307445 *49 (Del. Ch. May 9, 1996). Delaware courts "will not be tempted by the piteous pleas of limited partners who are seeking to escape the consequences" of their own contractual choices. *Miller v. Am. Real Estate Partners, L.P.*, 2001 WL 1045643, at *8 (Del. Ch. Sept. 6, 2001).

Here, Plaintiff's voluntary undertakings as an investor in the Feeder Fund, including the disclosures set forth in the Feeder Fund Memorandum and the terms

and conditions of the Subscription Agreement, explicitly reject Plaintiff's "pass-through" theory of standing. The Feeder Fund Memorandum, for example, states that the Investment Fund "is not affiliated with" the Feeder Fund or Citigroup AI, that the Investment Fund is "managed by third party managers," that Feeder Fund investors "will generally have no direct dealings or contractual relationships with" the Investment Fund or its managers, and that the terms and conditions of an investment in the Feeder Fund "are materially different" from an investment in the Investment Fund. *See* Counterstatement of Facts § I, *supra*. The Feeder Fund Memorandum also expressly differentiates the Feeder Fund's management from that of the Investment Fund. It touts the advantages of investing through the Feeder Fund rather than the Investment Fund to obtain the benefits of Citigroup AI's initial and ongoing sourcing, due diligence, and risk management with respect to the hedge funds and portfolio managers "chosen by" Citigroup AI. *Id*. It also describes Citigroup AI's authority "in its sole discretion" to terminate a hedge fund or portfolio manager. *Id*.

More important, Plaintiff's Subscription Agreement, which he signed to become an investor in the Feeder Fund, is flatly incompatible with Plaintiff's conclusory "pass-through" allegations. By signing the Subscription Agreement, Plaintiff acknowledged that his investment in the Feeder Fund "does not constitute a direct investment" in the Investment Fund, and that he "will not be an investor

in," "will have no direct interest in," and "will have no voting rights in" the Investment Fund. *Id*. Plaintiff also "acknowledges and agrees" that by "subscribing for Interests" in the Feeder Fund, he "will have *no recourse* to or against" the Investment Fund. *Id*. (emphasis added).

Thus, consideration of the contents of Plaintiff's agreement with the Feeder Fund and how it specifies or modifies the Feeder Fund's function and structure does *not* provide a basis for Plaintiff's direct suit against the general partners of the Investment Fund, but rather precludes such a direct suit. Giving effect to Plaintiff's own voluntary contractual undertakings, Plaintiff has no direct investment in the Investment Fund, no privity with the Investment Fund, and no recourse against the Investment Fund or by extension its managers. By Plaintiff's own contractual agreement, he is not a "Pass-Through Investor" in the Investment Fund; he is solely an investor in the separately managed and unaffiliated Feeder Fund. Plaintiff's theory of standing therefore cannot be reconciled with his own voluntary contractual undertakings, much less Delaware law.

CONCLUSION

The Eleventh Circuit has asked this Court to clarify whether, under *Tooley* and *Anglo American*, an investor in a Feeder Fund has direct standing to bring suit against the general partners of an Investment Fund in which the Feeder Fund invested, where losses arising from a diminution in the value of the Investment Fund are allegedly allocated to the capital accounts of the Investment Fund's

limited partners, and the resulting losses to the Feeder Fund are allocated to the capital accounts of the Feeder Fund's investors. As discussed in this brief, Delaware corporate law giving effect to the corporate form and corporate formalities, Delaware derivative standing principles, and Delaware precedent giving maximum effect to the principle of freedom of contract, all compel the conclusion that a Feeder Fund investors has no basis for direct suit against the general partners of an Investment Fund in which the Feeder Fund invested. For the foregoing reasons, Defendants respectfully request that this Court enter a decision and order answering the Eleventh Circuit's certified question in the negative.

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