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IN THE SUPREME COURT OF THE STATE OF DELAWARE

PASSCO INDIAN SPRINGS DST,	:	
Defendant-Below/ Appellant,	:	
v.	:	No. 469, 2016
GRAND ACQUISITION, LLC,	:	Court Below: Court of Chancery of the
Plaintiff-Below/ Appellee.	:	State of Delaware C.A. No. 12003-VCMR

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

This appeal involves an issue of first impression; that is, the statutory construction of the "books and records" provision of the Delaware Statutory Trust Act ("DST Act"), 12 *Del. C.* § 3819. Defendant-Below/Appellant Passco Indian Springs DST ("Passco" or the "Trust") appeals from the Court of Chancery's September 7, 2016 *Revised* Opinion (Ex. A, the "Opinion," cited as "Op."),[1] which denied Passco's motion for summary judgment and granted the motion for summary judgment of Plaintiff-Below/Appellee Grand Acquisition, LLC ("Grand Acquisition" or "Plaintiff"). Grand Acquisition brought the action below pursuant to Section 3819 of the DST Act and the parties' Amended and Restated Trust Agreement, dated November 17, 2011 (the "Trust Agreement") in an attempt to obtain the current list of Passco's beneficial owners (the "Owners"), their contact information, and respective ownership percentages (collectively, the "Requested Information"). The trial court held that Grand Acquisition had an independent contractual right to books and records under the Trust Agreement unencumbered by Section 3819 of the DST Act.

On September 13, 2016, Passco filed this appeal. On September 21, 2016, Passco filed with the Court of Chancery a motion to stay its ruling pending this appeal, which, after full briefing, was granted on October 21, 2016.

[1] A copy of the Court of Chancery's original Opinion, dated August 26, 2016, is attached hereto as Exhibit B.

SUMMARY OF ARGUMENT

I. The "books and records" sections of the DST Act, the Delaware Limited Liability Company Act ("LLC Act"), 6 *Del C.* § 18-305, and the Delaware Revised Uniform Limited Partnership Act ("DRULPA"), 6 *Del. C.* § 17-305, contain form and manner requirements and set forth the rights of a manager to withhold books and records, as well as the rights of investors to confidentiality. The language used in each of those sections is substantively identical, except for one critical difference. Several subsections of the DST Act (3819(a), (b), and (c)) each contain the following prefatory clause (and the other statutes do not): "Except to the extent otherwise provided in the governing instrument of the statutory trust." The meaning of this language, and whether it can be satisfied by silence, is at the core of this appeal.

The plain language of Section 3819's prefatory clause means that all of the preconditions and defenses set forth in each of Sections 3819(a), (b), and (c) apply as gap fillers or in default to every statutory trust agreement, unless the trust agreement "otherwise provide[s]." This plain language means that something contrary to each of Sections 3819(a), (b), and (c)'s provisions, or an express rejection of them, must be included in a trust agreement to "opt out" of these important statutory default rules. The books and records provision of the Trust Agreement at issue in this case (Section 5.3(c)) is silent with respect to the

preconditions and defenses set forth in each of Sections 3819(a), (b), and (c). Those preconditions and defenses thus apply to the Trust Agreement.

The trial court incorrectly framed the question as "whether the trust agreement ***incorporates*** the statutory requirements" (Op. at 1 (emphasis added)) and held that, because "Section 5.3(c) does not ***expressly include*** Section 3819's preconditions and defenses," it is "subject only to" a "during normal business hours" requirement (*id*. at 11 (emphasis added)) and Owners have "an unqualified contractual right to the Trust's books and records, which is contrary to Section 3819's qualified statutory right." (*Id.* at 15.) The trial court reasoned that "the prefatory clause in Section 3819 is what indicates that a DST's governing document ***may*** restrict the inspection rights granted under that section," but "there is ***no basis*** on which I can conclude that because of the prefatory clause, the Trust Agreement must expressly disclaim Section 3819's preconditions and defenses for them to be rendered inapplicable." (*Id*. at 18 (emphasis added).) Passco submits that the plain language of the prefatory clause itself provides the "basis," and the trial court erred in at least three ways:

First, the trial court violated the first rule of statutory construction by ignoring and not applying the plain and unambiguous language in Section 3819's prefatory clauses. *Hazout v. Tsang Mun Ting*, 134 A.3d 274, 286 (Del. 2016) ("In interpreting any statute, we ascertain and give effect to the intent of the

legislature. Where the statute is unambiguous, we must adhere to the plain meaning of the statutory language."). In that regard, the trial court unpersuasively distinguished a prior Court of Chancery decision, *Cargill, Inc. v. JWH Special Circumstance LLC*, 959 A.2d 1096 (Del. Ch. 2008), which involved a Delaware statutory trust and construed the exact same prefatory clause language at issue here. *Cargill* held that because of the prefatory clause, "contrary" language is required to opt out of the DST Act's default provisions: "Thus, in the absence of language in the governing instrument or the Act itself *to the contrary*, this Court must apply the statutory and common law relating to trusts." *Id.* at 1116 (emphasis added).

Second, the trial court relied upon *In re Paine Webber Limited Partnerships*, 1996 WL 535403 (Del. Ch. Sept. 17, 1996), and *Bond Purchase, L.L.C. v. Patriot Tax Credit Properties, L.P.*, 746 A.2d 842 (Del. Ch. 1999), for the proposition, and its ultimate holding, that silence with regard to Section 3819's default provisions creates an independent contractual right to which the default rules do not apply. But, those cases are distinguishable because they interpreted DRULPA's books and records provision, which *does not* contain prefatory clauses like Section 3819 of the DST Act. The trial court thus violated two more fundamental principles of statutory construction by (i) failing to give effect to the General Assembly's intent as expressed by its insertion of additional and meaningful language (*i.e.*, the

prefatory language) into the DST Act and (ii) rendering that language surplusage. *See Nakahara v. The NS 1991 Am. Trust*, 739 A.2d 770, 782 (Del. Ch. 1998) ("With all else the same, a single difference would have more meaning."); *Lukk v. State Farm Mut. Auto. Ins. Co.*, 2014 WL 4247767, at *4 (Del. Super. Aug. 27, 2014), *corrected by* (Del. Super. Aug. 29, 2014) ("When different words are used in two clauses like this it must be presumed different meanings are intended."); *Oceanport Indus., Inc. v. Wilm. Stevedores, Inc.*, 636 A.2d 892, 900 (Del. 1994) ("Additionally, words in a statute should not be construed as surplusage if there is a reasonable construction which will give them meaning and courts must ascribe a purpose to the use of statutory language, if reasonably possible.") (internal citation omitted)).

Third, the trial court also erred when it analogized Section 3819's prefatory clauses with the later-adopted Sections 18-305(g) of the LLC Act and 17-305(f) of DRULPA, which both have identical language stating that inspection rights "may be restricted" in the governing agreement. Initially, the trial court held that Section 3819 was "structured to mirror" Sections 18-305(g) and 17-305(f) (Ex. B at 18), but when it was pointed out that those sections did not come into existence until five years after the passage of Section 3819, the trial court revised its Opinion. The trial court then held that Sections 3819, 18-305(g), and 17-305(f) should be construed the same because they "mirror each other" and serve "the same

purpose." (*See* Op. at 18.) The trial court's conclusion was legally wrong because, not only does a comparison of the different language in those sections demonstrate that they do not "mirror" each other, the General Assembly's decision to do something different rather than replicate Section 3819 when it passed Sections 18-305(g) of the LLC Act and 17-305(f) of DRULPA must be respected.

The restrictive language in Sections 18-305(g) and 17-305(f), by its plain terms, allows covered agreements to restrict the ability of investors to obtain information, but each of the books and records sections of the LLC Act, DRULPA, and DST Act also contain other provisions that deal with access to information from the perspectives of management rights and third-party rights, which the Opinion did not fully recognize. Those are contained in subsections (a)-(c) of each of Sections 3819, 18-305 and 17-305, but each of those subsections in 3819 contains a prefatory clause whereas the subsections in 18-305 and 17-305 do not. The phrase "may be restricted" when dealing with inspection rights *vis-à-vis* the investor versus the entity under the LLC Act and DRULPA does not equate with the substantive rights and requirements in *separate* subsections of Section 3819 dealing with *other constituencies*, each of which must apply "except to the extent otherwise provided." Under these provisions, the Trust had the right to protect confidential information of its Owners (*as required by agreements with them*) and refuse inspection when the manager of the Trust believed in good faith (as he did

here) that disclosure was not in the best interest of the Trust. The trial court had no basis to blue pencil those rights and protections out of the Trust Agreement.

II. The trial court also erred when, instead of applying the actual language used in the Trust Agreement, it imported the broader "books and records" definition from Section 3819(a)(2), despite holding earlier in the Opinion that Section 3819 did not apply to the Trust Agreement. The information on Owners that Grand Acquisition seeks is separately defined (as "Ownership Records"), and separately treated, in the Trust Agreement, which expressly permits only the Trustee (not other Owners, like Grand Acquisition) to view that information. Thus, Ownership Records are not included in the information permitted to be inspected under Section 5.3(c) of the Trust Agreement.

Separately defining and treating "Ownership Records" from what is included in Section 5.3(c) makes sense when one looks at Section 5.3(c)'s plain language. Section 5.3(c) uses the phrase "books and records *of account*" (emphasis added) when discussing the type of information to be maintained and provided to Owners. Section 5.3(c) refers to "audited financial reports" and "reports of income and expenses" that (in addition to being "certified to the Lender") are to be used by Owners "as necessary" to prepare their "income tax returns." The subject matter of Section 5.3(c) does not have anything to do with Ownership Records. Nor does

information on *other* Owners have anything to do with valuing one's investment or preparing one's *own* tax filings.

Moreover, not only are Ownership Records excepted from Section 5.3(c), even under a pure contractual analysis, the confidentiality agreements between the Owners and the Trust must be enforced. Those agreements bar Grand Acquisition from the Owner information it seeks.

III. Lastly, the trial court concluded that Passco's "evidence may suffice to establish that Passco's manager has a good faith belief that revealing the Requested Information to Grand Acquisition is not in Passco Trust's best interests," but held that Passco could not withhold the information on that basis because Section 3819(c) did not apply. (Op. at 27.) The trial court then addressed Passco's implied contractual defense of an "improper" purpose, which has a higher burden than the Section 3819(c) good faith defense. Putting aside the erroneous conclusion that Section 3819(c) does not apply, the trial court erred in granting Grand Acquisition summary judgment and finding that the Trust failed to prove its improper purpose defense. The Trust submitted significant evidence, including an affidavit from a company representative, exposing Grand Acquisition's motives. In contrast, Grand Acquisition provided *no* contradictory evidence; indeed, it submitted nothing at all. The trial court erred in not drawing an adverse inference from Grand Acquisition's silence.

Passco's evidence included uncontroverted documents that the affiliates behind Grand Acquisition, Maxus Realty Trust, Inc. ("Maxus") and its CEO, David Johnson, have a history of disrupting entities like the Trust. For example, a Nebraska state court explained that Mr. Johnson's entity "employs a business strategy wherein it purchases a small fraction of a company or partnership in order to gain a toehold in the enterprise" and then uses that toehold "to gain access to sensitive business information which, if successful, is then used for exploitation of either the business, its less sophisticated shareholders, or both." (A172.) In another case (not even discussed in the Opinion), a federal jury found that Mr. Johnson committed fraud. (A388-93.) Passco's evidence also included the affidavit of Mr. Alan Clifton, a senior vice president at Passco Companies, LLC, to explain that Passco itself has had several run-ins with Maxus, which tried on at least three occasions to disrupt Passco-run entities. Mr. Clifton's affidavit also explained that providing the Requested Information to Grand Acquisition would harm the Trust.

To reiterate, Grand Acquisition failed to provide ***any*** response to this evidence. Nonetheless, the trial court labeled this evidence "vague and speculative" and granted summary judgment to Grand Acquisition. That decision was wrong because the evidence was overwhelming and uncontroverted.

STATEMENT OF FACTS

The facts are set forth in the Opinion. (Op. at 2–5.) This Opening Brief discusses only those facts necessary to resolve the appellate issues or to place into context the relief Passco seeks. Supr. Ct. R. 14(b)(v).

A. The Parties

Passco is a Delaware statutory trust that owns an apartment complex in Louisville, Kentucky, known as "The Legends of Indian Springs Apartments." (A011.) Passco and the apartment complex are managed by Passco Indian Springs Manager, LLC (the "Manager") (*id.*), which in turn is owned and controlled by Passco Companies, LLC ("Passco Companies") (Op. at 2).

Grand Acquisition is a Nevada Limited Liability Company, which at all relevant times has held Class A interests (0.186%) in the Trust. (A010.)

B. Maxus Realty Trust, Inc.

A discussion of Grand Acquisition's affiliate, non-party Maxus, and its CEO Mr. Johnson, is key to understanding certain of Passco's good faith defenses under Section 3819(c) and its implied improper purpose defense. Maxus has a long history of bad acts and has repeatedly tried to disrupt entities it invests in, including other ventures of Passco Companies.

The prior conduct of Maxus and its affiliates is quite disturbing and subject to judicial notice. In a 2006 lawsuit -- captioned, *Institutional Bond Investors II L.L.C. v. America First Tax Exempt Investors, L.P., et al*. -- the District Court of Douglas County, Nebraska, described the Maxus business model and explained that Mr. Johnson and the entities he controls "employ[] a business strategy wherein it purchases a small fraction of a company or partnership in order to gain a toehold in the enterprise" and then "attempts to gain access to sensitive business information which, if successful, is then used for exploitation of either the business, its less sophisticated shareholders, or both." (A172.) Mr. Johnson has attempted to employ that model time and time again, sometimes successfully. (A184–88.)[2]

Maxus has employed this tactic with Passco entities before. As explained by Mr. Clifton in his Affidavit, Passco Companies have experience dealing with other Maxus-related entities. (A138–41.) Starting in 2013, Maxus and its affiliates have on at least three occasions gained "toe holds" in Passco's related projects and attempted to disrupt those projects by accusing Passco of mismanagement or withholding consent for no apparent reason, other than in an attempt to sow dissent among other investors. (*Id.*) Passco has in fact had litigated (successfully) to stop Maxus's tactics. (A138–40.)

[2] Additional bad acts by Maxus and Mr. Johnson are discussed in the appropriate Argument section, *infra*.

C. The Trust Agreement

The DST Act and the common law of Delaware applicable to trusts applies to all entities formed pursuant to the DST Act, unless "otherwise provided." *See* 12 *Del. C.* § 3809 ("Except to the extent otherwise provided in the governing instrument of a statutory trust or in this subchapter, the laws of this State pertaining to trusts are hereby made applicable to statutory trusts . . . ."). Here, the Trust Agreement actually contemplated, referred to, and modified the applicable law in accordance with Section 3809. In Section 1.1, the "Definitions" section, the Trust Agreement defines the "Act" as "Chapter 38 of Title 12 of the Delaware Code" (A046) and Section 10.7, titled "Governing Law," states:

> This Agreement shall be governed by and construed and enforced in accordance with the laws of the State of Delaware (without regard to conflict of law principles). The laws of the State of Delaware pertaining to trusts (*other than the Act*) shall not apply to this Agreement.

(A071 (emphasis added).)

There are several other sections of the Trust Agreement relevant to Grand Acquisition's claim and Passco's defenses. Section 5.3(a) provides in pertinent part:

> The Manager shall not have any duty or obligation under or in connection with this Agreement or the Trust, or any transaction or document contemplated hereby, except as expressly provided by the terms of this Agreement, and no implied duties or obligations shall be read into this Agreement against the Manager.

(A056.) The default right of the Manager to keep certain information confidential pursuant to 3819(c) is not in any way contradicted in the Trust Agreement.

Section 5.3(c), the Trust Agreement's books and records provision, provides as follows:

> The Manager shall keep customary and appropriate books and records relating to the Trust and the Trust Estate and shall certify such reports to the Lender if required by the Loan Documents. *The Manager will obtain annual audited financial reports for the Trust which will be provided to the Owners upon the written request of the Owner*. The Manager shall keep customary and appropriate books and records *of account* for the Trust at the Manager's principal place of business. The Owners may inspect, examine and copy the Trust's books and records at any time during normal business hours. The Manager shall maintain appropriate books and records in order to provide reports of *income and expenses* with respect to the Trust Estate to each Owners as *necessary for such Owner to prepare such Owner's income tax returns*.

(A057.) This Section provides the time and location books and records may be inspected by Owners, but it is silent on the requirements for a demand, the effect of confidentiality agreements, and the ability of the Trust Manager to refuse disclosure in the best interest to the Trust.

With respect to what constitutes "books and records" available to Owners, Section 5.3(c) explains that the "books and records" in this context are those "of account" such as "audited financial reports" and "reports of income and expenses" that are "necessary" to "prepare such Owner's tax returns." "Books and records"

does not include the Requested Information. The Trust Agreement separately defines and separately treats "Ownership Records," which include the "name, mailing address and Percentage Share of each Owner," the same information Grand Acquisition seeks. (A048.) The entitlement to "Ownership Records" is limited to the Trustee after each revision of the Ownership Records. Section 5.3(h) of the Trust Agreement expressly requires the Manager to "provide to each Person who becomes an Owner a copy of this Agreement," but Section 5.3(i) only requires the Manager to "provide to the Trustee a copy of the Ownership Records promptly after each revision thereto." (A058.) "Ownership Records" are not identified in Section 5.3(c) as information an Owner "may inspect."

Consistent with Section 3819(c) of the DST Act, each purchaser of a beneficial interest (including Grand Acquisition) was presented with an agreement governing the release of Owner information at the time that the Owner purchased an interest in the Trust. (A087–97.) Under the heading "Release of Information to Other Holders of Interests," the agreement provided an option for the Owners to protect their name and contact information by agreeing that neither the Trust or its managers were "authorized to release any information about me/us or my/our Interest to the other holders of Interests." (A094.) Fifty-nine out of seventy-four Owners elected not to have their information shared with other Owners. Grand

Acquisition was one of the 58 that *did not waive* the confidentiality of its ownership information. (A201–60.)

D. Grand Acquisition's Demands

On September 30, 2015, Grand Acquisition sent the Trust's Manager a demand for books and records (the "Original Demand") that identified no "purpose," as required by Section 3819(a) and (e), and stated, in its entirety, as follows:

> I am writing to request the list of current members and amount of ownership in the above referenced property per 5.3c of the Amended And Restated Trust Agreement, page 159 of 334 in the Private Placement Memorandum. Please email or mail me the requested info to the below address or email address. Thank you for your prompt response.

(A016.) Passco Companies (as Manager) responded on October 28, 2015, and requested a "reasonable basis" for the demand related to Grand Acquisition's interest as a beneficial owner. (A017.)

Nearly two months later, on December 18, 2015, Grand Acquisition sent a second demand (the "Supplemental Demand") contending that the Trust Agreement eliminated all requirements otherwise imposed by the DST Act, and thus, it need not have a "reasonable basis" for the Requested Information. (A018–19.) The Supplemental Demand nevertheless stated that the Trust Agreement "broadly" permits inspection of "a current list and name and last known business,

residence or mailing address of each beneficial owner and trustee for the purpose of communicating with other beneficial owners, which communications ***may*** include offering to acquire additional beneficial ownership interest, discussing the operations of Passco DST, and discussing other matter relating to the beneficial owners' investment in Pasco DST." (*Id.* (emphasis added).) Grand Acquisition never actually identified ***its*** actual purpose, only what it contends the Trust Agreement generally permits.

When Grand Acquisition first made its demand for books and records, Passco investigated Grand Acquisition and learned that it had an affiliation with Maxus. (A141–42.) Grand Acquisition has two members, one of which is GMG Real Estate, LLC, which is owned by Mr. Greg Orman. (A122–23; A261–62; A266; A268.) Mr. Orman is a member of the Board of Maxus. (A270.) Also, Grand Acquisition's Operating Agreement provides that "David Johnson [Maxus's CEO] [is] a guarantor" of certain Grand Acquisition debt (A109–10) and, if it defaults, Mr. Johnson serves as the Special Manager of Grand Acquisition. (*See id*.) Further, Maxus's own website explains that it is affiliated with Grand Acquisition: "Grand Acquisition LLC and USA Tranquility Lake 2, LLC, ***have related parties of MRTI as owners***." (A276 (emphasis added).)

Given Passco Companies' past experience with Maxus-related entities and knowledge of its exploitation of entities for private fortune, and its knowledge of Grand Acquisition's connection to Maxus, Passco refused to provide any books and records because (i) Grand Acquisition failed to state a proper purpose per Sections 3819(a) and (e), (ii) the Requested Information was subject to third-party confidentiality agreements per Section 3819(c), (iii) disclosure was not in the "best interests" of the Trust per Section 3819(c), and (iv) the Trust Agreement itself does not provide for access to the Requested Information by Grand Acquisition. (A057; A137–42.) Passco did not respond to Grand Acquisition's Supplemental Demand.

E. Procedural History

Grand Acquisition filed its Verified Complaint on February 16, 2016. Pursuant to a stipulated scheduling order, the parties cross-moved for summary judgment, pursuant to Court of Chancery Rule 56(h). Passco submitted the affidavit of Mr. Clifton, which detailed Passco Companies' past dealings with Maxus and explained that providing Grand Acquisition with the Requested Information would harm the Trust. In response, Grand Acquisition failed to submit an affidavit or any evidence to contradict Mr. Clifton's affidavit.

The trial court issued its initial Opinion on August 26, 2016, denying Passco's motion for summary judgment and granting Grand Acquisition's motion for summary judgment. In it, the trial court reasoned that, "[t]o the extent that

Section 3819 was *structured to mirror* Sections 18-305 and 17-305, it appears that the General Assembly included the prefatory clause in Sections 3819(a) and (c) to replace the corresponding provisions in Sections 18-305(g) and 17-305(f)." (Ex. B at 18 (emphasis added).) When Passco brought to the trial court's attention that Section 3819, with the prefatory clauses, was adopted almost five years *before* Sections 18-305(g) and 17-305(f) (A374–79), the trial court revised its Opinion, but only further hedged on its reasoning: "*To the extent that* Sections 3819, 18-305, and 17-305 *mirror each other*, the prefatory clause in Sections 3819(a) and (c) serves the same purpose as Sections 18-305(g) and 17-305(f)." (Op. at 18 (emphasis added).)

This appeal followed.

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN CONCLUDING THAT THE CLEAR AND UNAMBIGUOUS PREFATORY CLAUSE IN THE "BOOKS AND RECORDS" SECTION OF THE DELAWARE STATUTORY TRUST ACT -- "EXCEPT TO THE EXTENT OTHERWISE PROVIDED IN THE GOVERNING INSTRUMENT OF THE STATUTORY TRUST" -- CAN BE SATISFIED WITH SILENCE

A. Question Presented

Should Section 3819 of the DST Act be construed as effectively "mirror[ing]" its sister sections in the LLC Act and DRULPA, so that there are no default rules for a governing instrument with an inspection provision unless that provision expressly incorporates the relevant statutory requirements, or should Section 3819's unambiguous prefatory clauses -- "except to the extent otherwise provided" (which is not found in its sister statutes) -- be given meaningful effect so that the statute's relevant provisions apply unless the trust agreement expressly rejects or "*otherwise provide[s]*" something contrary to the DST Act's provisions?

This issue was preserved for appeal. (A301–30; A350–55; A374–79.)

B. Standard of Review

This Court reviews *de novo* questions of statutory interpretation and contract interpretation. *See CML V, LLC v. Bax*, 28 A.3d 1037, 1040 (Del. 2011); *Genecor Int'l, Inc. v. Novo Nordisk A/S*, 766 A.2d 8, 13 (Del. 2000).

C. Merits of Argument

1. The Plain Language Of Section 3819's Prefatory Clause, And Basic Rules Of Statutory Construction, Demonstrate That Section 3819's Default Rules Apply Absent Explicit Language In The Trust Agreement To The Contrary

The trial court correctly noted that the scope and meaning of the DST Act's books and records provision is a matter of first impression. (Op. at 10 (stating "no such cases have been decided regarding a DST").)[3] Section 3819 addresses access to information by beneficial owners. Sections 3819(a), (b) and (e) provide that beneficial owners and each trustee have the right to examine a trust's books and records, so long as there is a "reasonable demand," "in writing," for a purpose "reasonably related" to an interest in the trust. 12 *Del. C.* § 3819(a), (b) & (e). Subsection (c) further provides that, notwithstanding Subsections (a) and (b), the trustee or trust manager can withhold books and records information if they believe "in good faith" that disclosure is not in the "best interest" of the trust, could "damage" the trust, or the information is subject to third-party agreements of confidentiality. *Id.* § 3819(c). Importantly, subsections (a), (b), and (c) all begin with the following prefatory clause: "Except to the extent otherwise provided in the governing instrument . . . ."

[3] The importance of the question presented cannot be overstated: "The Delaware Statutory Trust Act dominates the field, both in new statutory trust formations and in the aggregate number of statutory trusts." *National Conference of Commissioners on Uniform State Laws*, Uniform Statutory Trust Entity Act, Prefatory Note (Mar. 31, 2010).

The Trust Agreement contains the following language related to an Owners' access to books and records:

> The Manager shall keep customary and appropriate books and records of account for the Trust at the Manager's *principal place of business*. The Owners may inspect, examine and copy the Trust's books and records at any time *during normal business hours*.

(A057 (emphasis added).) Section 5.3(c) only addresses the location ("principle place of business") and time ("during normal business hours") of inspection.[4] Section 5.3(c) addresses nothing substantive; it is silent on the default rules in Sections 3819(a)-(c).

The trial court concluded that such silence means the Trust Agreement grants an unfettered contractual right to information "subject only to" a "normal business hours" requirement. (Op. at 11.) The Court reasoned that because "Section 5.3(c) does not expressly *include* Section 3819's preconditions and defenses" (*i.e.*, was silent) (*id.* (emphasis added)), Owners have "an unqualified contractual right to the Trust's books and records, which is contrary to Section 3819's qualified statutory right." (*Id.* at 15.) In other words, the trial court determined that Section 3819 does not apply to the Trust Agreement because

[4] The "time and location" are not part of Section 3819's default rules, but are instead part of the "reasonable standards" Section 3819(a) leaves to be determined by the manager or the agreement. Providing a "time and location" is supplemental to, not contrary to, Section 3819, and certainly does not create some independent and unconditional inspection right.

Section 5.3(c) does not address, one way or the other, the preconditions and defenses set forth in each of Sections 3819(a), (b), and (c). This conclusion was error because it ignored and failed to give effect to the plain language of Section 3819's prefatory clauses, which compel a different result. Section 3819 unambiguously provides a set of default rules for access to a trust's books and records. Because Section 5.3(c) does not contain any language that disavows or contradicts any of those preconditions and defenses, all of them apply.

As with all issues of statutory construction, this Court's goal is to "ascertain and give effect to the intent of the legislature." *Hazout*, 134 A.3d at 286. That is a straightforward task when "the statute is unambiguous." *Id.* In such a case, the Court "must adhere to the plain meaning of the statutory language." *Id.* Here, the plain and ordinary meaning of the prefatory clause is that the default provisions of Sections 3819(a), (b), and (c) apply to all trust agreements unless the trust agreement itself expressly contradicts those requirements; mere silence is insufficient. To state the obvious, "otherwise provide[]" means you must actually "provide" something; silence provides nothing.

Although this Court has not interpreted Section 3819, the prefatory language appears throughout the DST Act, and both the Court of Chancery and the General Assembly itself have construed it. In *Cargill*, the Court of Chancery explained that a trust agreement must employ language "contrary" to the DST Act to "opt out":

> [T]he Act generally does not create duties or specify mandatory standards of review or liability, but rather references certain default principles, such as: "*Except to the extent otherwise provided* in the governing instrument of a statutory trust or in this subchapter, the laws of this State pertaining to trusts are hereby made applicable to statutory trusts . . . ." *Thus, in the absence of language in the governing instrument or the Act itself to the contrary, this Court must apply the statutory and common law relating to trusts*.

959 A.2d at 1116 (emphasis added). The dispute in *Cargill* concerned whether default fiduciary duties applied to the parent company of the manager of the trust. The trust agreement did not expressly refer to any "fiduciary" duties, but did contain a standard exculpatory provision that applied to the manager or affiliate and exculpated them from liability for decisions taken in good faith.

The parent and grandparent entities of the manager argued that "the Act creates a kind of *sui generis* entity for which virtually no default duties are implied by the Act or the common law," and thus "in the absence of any positive statement in the Trust Agreement explicitly attributing fiduciary duties to a corporate parent of a fiduciary, such a corporate parent would not owe any duty to the statutory trust whatsoever." *Id.* at 1110. The court rejected this argument and explained that the DST Act's prefatory clause renders statutory trusts subject to relevant default rules unless a governing document "provides otherwise." *See id.* at 1110–13. The court further noted that the relevant statutory provision "does not state that for there to be any [default] duties, the governing instrument must so provide." *Id.* at 1112;

see also id. at 1117 (explaining that the presence of the prefatory clause "except to the extent otherwise provided in the governing instrument" requires a contrary contractual provision deviating from the applicable default rule). Put another way, if instruments could so sweepingly "provide otherwise" by silence, the prefatory clause would be declawed and rendered meaningless. *See United States v. Butler*, 297 U.S. 1, 65 (1936) ("These words cannot be meaningless, else they would not have been used.").

Rather than follow *Cargill*, the trial court attempted to distinguish it by placing dispositive weight upon its different factual "context." (Op. at 13.) That overlooked the importance of *Cargill*'s well-reasoned determination of what the ***plain language*** of the prefatory clause requires. The prefatory clause can appear in different contexts, but what the language requires is a constant (*i.e.*, something "contrary" to the DST Act). Nonetheless, the trial court explained that, in *Cargill*, the "relevant provision in the trust agreement addressed only the circumstances under which the managing owner and its affiliates could be exculpated from liability for a fiduciary breach," and the trust agreement was silent with respect to what duties were owed. (*Id.* at 14–15.) The trial court then explained that, unlike *Cargill*, the Trust Agreement in this case is "not silent as to the Owners' books and records inspection right in the same way that the trust agreement in *Cargill* was silent as to the managing owner's fiduciary duties" and that "[a] more apt analogy

would be if the Trust Agreement did not create a books and records inspection right at all." (*Id.* at 15.) Respectfully, even on the "context," the trial court misapprehended *Cargill*.

Cargill's rationale is persuasive and consistent with the intent of the General Assembly in enacting Section 3819. The trial court here actually adopted the argument the court in *Cargill* rejected: "in the absence of any positive statement in the Trust Agreement ***explicitly attributing*** fiduciary duties to a corporate parent of a fiduciary, such a corporate parent would not owe any duty to the statutory trust whatsoever." 959 A.2d at 1110 (emphasis added). The trial court concluded that because the trust agreement in *Cargill* was silent -- in the sense that it did not expressly refer to "fiduciary" duties -- that is why the court in *Cargill* concluded that default fiduciary duties applied. The problem with that reading is that although the trust agreement in *Cargill* did not expressly mention "fiduciary" duties, it was ***not*** silent *writ large* on the subject of duties owed to the trust. It had an exculpatory provision, which preserved liability for breach of certain standards or duties but not others. *Id*. at 1114. Here, the Trust Agreement does state the time and place for an inspection, but it is wholly silent with regard to any of the default "preconditions and defenses" contained in Section 3819, just like the silence on "fiduciary" duties in *Cargill*.

The trial court's misreading of *Cargill* is further apparent when one considers how Section 3819 is structured. The prefatory clause is not just present in a general preamble, but is repeated in each of the three individual subsections. Beyond its plain language, Sections 3819's structure also has meaning and purpose -- each subsection must be explicitly contradicted in the trust agreement for it not to apply. If not, what is the point of putting the prefatory clause in each of the subsections? Thus, even assuming the trial court's reading of *Cargill* were correct -- *i.e.*, that Section 3819's default provisions only apply if there is total silence -- there *is* total silence in Section 5.3(c) of the Trust Agreement regarding the specific preconditions and defenses in Section 3819. The ***only*** topics that Section 5.3(c) even touches upon (*i.e.*, time and location) are supplemental to and not part of Section 3819's default rules. Clearly, the Trust knew how to "opt out" of Sections 3819(a)-(c) if it wanted to because it satisfied the same prefatory clause in Section 3809 when it specifically excluded Delaware's common law applicable to trusts while expressly incorporating the DST Act. Section 10.7 of the Trust Agreement states that Delaware law applies, but excepts "[t]he laws of the State of Delaware pertaining to trusts (other than the Act)."

In addition to the plain language of Section 3819 and *Cargill*, the General Assembly recently made several amendments to the DST Act, including adding the following underlined prefatory clause to Section 3810(g)(2): "Any such

association heretofore or hereafter organized shall be a statutory trust and, *unless otherwise provided in its certificate of trust and in its governing instrument*, a separate legal entity." Del. S.B. 243, 148th Gen. Assem., 80 Del. Laws ch. 304 (2016). The General Assembly explained in the Synopsis to the Bill what "unless otherwise provided" means. The Synopsis states that Section 3801(g) was amended "to provide that a statutory trust may *opt out* of separate legal entity status *if provided* in the certificate of trust and the governing instrument of such statutory trust." *Id.* syn., § 1 (emphasis added). Thus, the General Assembly's understanding of the phrase "unless otherwise provided" is that it requires a trust's governing instrument to "opt out," which means it must actually provide something contrary to the DST Act. Silence is not an "opt out."[5] The General Assembly's intended meaning is entitled to deference. Sections 3819(a), (b), and (c) apply to all Delaware trust agreements unless the agreement explicitly "opts out" by providing contrary requirements.

Instead of just applying the plain language of the prefatory clause, the trial court looked to cases construing the "books and records" provisions of the LLC Act and DRULPA. The books and records provisions in both of those statutes are identical to Section 3819 of the DST Act, with one exception: the prefatory clause

[5] The General Assembly also added a section that contained the "except to the extent otherwise provided" prefatory clause, and explained that that clause required the statutory language to apply "unless otherwise provided in the governing instrument." Del. S.B. 243 syn., 148th Gen. Assem. § 4.

found in each of Sections 3819(a), (b) and (c). Specifically, the LLC Act and DRULPA require the requesting party to have a "proper purpose," and permit the manager to withhold information "in good faith" and/or pursuant to third-party confidentiality agreements. *See* 6 *Del. C.* §§ 18-305(a)-(c) and 17-305(a)-(b). Delaware courts have uniformly interpreted both the LLC Act and DRULPA as ***not*** necessarily providing a set of default provisions; that is, when the governing agreement does not address books and records, the LLC Act and DRULPA provide the default provisions, but when an agreement broadly addresses books and records and is ***silent*** on the default rules, such as the "proper purpose" requirement, courts have not read the default rules into the agreement. *See, e.g.*, *Madison Real Estate Immobilien-Anlagegesellschaft Beschrankt Haftende KG v. Kanam USA XIX Ltd. P'ship*, 2008 WL 1913237, at *13 (Dec. Ch. May 1, 2008) ("Under Delaware law, unless a contract imposes a "proper purpose" requirement on an inspection right, a court should not read in such a requirement.") (citation omitted); *In re Paine Webber*, 1996 WL 535403 at *5–6 (same); *Bond Purchase*, 746 A.2d at 853. The rationale of these cases is that silence with regard to the default rules creates an independent contract right not subject to them. That rationale cannot apply here because the General Assembly intended a different result for statutory trusts.

The above line of cases are not on point here because neither the LLC Act nor DRULPA contain a prefatory clause.[6] It is a fundamental tenet of statutory construction that the General Assembly's intent, as expressed by its insertion of additional and meaningfully-different language into the DST Act, must be respected, especially when all else is equal but for a single significant change. *See Nakahara*, 739 A.2d at 782 ("With all else the same, a single difference would have more meaning."); *see also Lukk*, 2014 WL 4247767, at *4 ("When different words are used in two clauses like this it must be presumed different meanings are intended."); *States Roofing Corp. v. Winter*, 587 F.3d 1364, 1370-72 (Fed. Cir. 2009) (applying the canon of statutory interpretation: "different terms are presumed to have different meanings"). Courts are loathe to construe statutory language as mere "surplusage." *Oceanport Indus.*, 636 A.2d at 900. Thus, unlike the LLC Act and DRULPA, in order to give meaning to the General Assembly's words and structure, the DST Act must be read to provide a series of default rules, each of which ***must*** apply unless expressly disavowed or altered by the governing document.

[6] A chart providing the statutory language of the LLC Act, DRULPA, and the DST Act side-by-side at the time Section 3819 was enacted in 1996 is included in the Appendix for the Court's convenience. (A407–10.)

Nothing in Section 5.3(c) of the Trust Agreement provides for the wholesale elimination of Section 3819's preconditions and defenses. Nor does Section 5.3(c) contain language "contrary" to Section 3819 (per *Cargill*); it is simply silent -- *i.e.*, it does *not* "otherwise provide[]" anything different from the DST Act (which was expressly contemplated and incorporated in its entirety by Section 10.7 of the Trust Agreement). All of Section 3819's preconditions and defenses thus apply to the Trust Agreement's books and records provision.

2. Section 3819 Of The DST Act Does Not "Mirror" Sections 18-305(g) Of The LLC Act And Section 17-305(f) Of DRULPA And It Does Not Serve The "Same Purpose"

The trial court further erred in looking to Sections 18-305(g) of the LLC Act and 17-305(f) of the DRULPA to interpret Section 3819's prefatory clause. Section 18-305(g) provides that "[t]he rights of a member or manager to obtain information as provided in this section may be restricted in an original limited liability company agreement." 6 *Del. C.* § 18-305(g). Section 17-305(f) provides that "the rights of a limited partner to obtain information as provided in this section may be restricted in an original partnership agreement." *Id.* § 17-305(f).

The trial court observed that "Sections 18-305 and 17-305 both have nearly identical subsections allowing an LLC's or LP's governing document to restrict the inspection rights granted under that section" (Op. at 17) and then concluded that Section 3819's prefatory language is the corollary to Sections 18-305(g) and 17-

305(f) and merely "indicates that a DST's governing document may restrict the inspection rights granted under that section." (*Id*. at 18.) The trial court reasoned that "[t]o the extent that Sections 3819, 18-305, and 17-305 mirror each other, the prefatory clause in Sections 3819(a) and (c) serves the same purpose as Sections 18-305(g) and 17-305(f)." (*Id*.) That rationale is wrong for several reasons.

First, a basic comparison between Sections 3819(a)-(c) demonstrates that they do not "mirror" Sections 18-305(g) and 17-305(f).

Second, Section 3819 of the DST Act was enacted, with its prefatory clauses at issue here, on July 18, 1996. *See* 70 Del. Laws ch. 548, § 16 (1996). Its substantive language was identical to both Sections 18-305 and 17-305, *except* Section 3819 contained prefatory clauses. (A407–10.) Subsections 18-305(g) and 17-305(f) of the LLC Act and DRULPA were not enacted until almost five years later, on June 30, 2001, and June 27, 2001, respectively. *See* 73 Del. Laws ch. 83, § 15 (2001) (LLC Act); 73 Del. Laws ch. 73, § 20 (2001) (DRULPA). What existed at the time Section 3819 was passed was Sections 18-305 and 17-305 without subsections (g) and (f), respectively, and without the prefatory clause. (A407–10.) With knowledge of the LLC Act and DRULPA as they existed in 1996, not only did the General Assembly purposely add the prefatory clause with meaningful language in each of Sections 3819(a), (b), and (c), it chose not to replicate Section 3819's prefatory clauses when it later adopted Subsections 18-

305(g) and 17-305(f). That is precisely the type of important "single difference" and use of "different words" and structure that compels different interpretations. *See Nakahara*, 739 A.2d at 782; *see also Leatherbury v. Greenspun*, 939 A.2d 1284, 1291 (Del. 2007) ("It is well established that a court may not engraft upon a statute language which has clearly been excluded therefrom. Where, as here, when provisions are expressly included in one statute but omitted from another, we must conclude that the General Assembly intended to make those omissions.").

Third, Sections 18-305(g) and 17-305(f) do not serve the "same purpose" as the prefatory clause in each of Sections 3819(a), (b), and (c). Subsections (a)-(c) address different constituencies. The restrictive language in Sections 18-305(g) and 17-305(f), by its plain terms, allows covered agreements to restrict the ability of investors to obtain information, but each of the books and records sections of the LLC Act, DRULPA, and DST Act also contain other provisions -- set forth in separate subsections, *i.e.*, (a), (b), and (c) of each Act -- that deal with access to information from the perspectives of management rights and third-party rights. The Opinion did not fully recognize this. The phrase "may be restricted" when dealing with inspection rights *vis-à-vis* the investor versus the entity under the LLC Act and DRULPA does not equate with the substantive rights and requirements in *separate* subsections of Section 3819 (and the LLC Act and DRULPA) dealing with *various constituencies*, each of which contain a prefatory clause (not found in

the LLC Act or DRULPA), that must apply "except to the extent otherwise provided."

Although addressing the subject matter of books and records in an LLC or LP agreement and remaining silent on the issue of proper purpose, third-party confidentiality, and the rights of a manager to restrict access in good faith, *may* show an intent for the default provisions of Sections 18-305(a)-(c) and 17-305(a)-(b) *to not apply* unless expressly "incorporated" (per *Paine Webber* and *Bond Purchase*),[7] the prefatory clauses in each of Sections 3819(a), (b) and (c) evidence a statutory mandate that the default rules of the DST Act *shall apply* unless

[7] Passco uses the word "may" because *Paine Webber* and *Bond Purchase* were not Delaware Supreme Court cases. Moreover, those cases were decided at a time when Subsections 18-305(g) and 17-305(f) did not exist. Thus, the *only* difference between the statutory language interpreted in *Paine Webber* and *Bond Purchase* and the language in Section 3819 is the prefatory clause. Of relevance here is this Court's decision in *Parkcentral Global, L.P. v. Brown Investment Management, L.P.*, 1 A.3d 291 (Del. 2010). *Parkcentral* is in accord with Passco's position. The plaintiff in *Parkcentral* satisfied both the requirements of the partnership agreement and Section 17-305 of the DRULPA for access to a current list of the names and last known addresses of each partner, because such access was not *expressly* "restricted in [the applicable] partnership agreement." *See id.* at 296 ("If the General Partner wished to bar access to the names and addresses of partners, it could have done so *explicitly* in the Partnership Agreement *under § 17–305(f)*.") (emphasis added). This Court held that an *explicit* restriction is what Section 17-305(f) requires. Here, although the relevant statutory language of the DST Act is different, if anything, it too requires an *explicit contravention* of Sections 3819(a), (b) and (c) for them to be overridden. Indeed, the language "*otherwise provided*" is stronger than the "may restrict" language in Section 17-305 of the DRULPA. Thus, *Parkcentral* is in accord with the Passco's position; that is, if the applicable statute says you have certain rights unless modified by the applicable agreement, the agreement must expressly modify those rights as opposed to being silent.

disavowed or contradicted (per *Cargill*). Otherwise, what is the point of putting the prefatory clause in each of Sections 3819(a), (b), or (c), if not to require that a trust agreement must expressly opt-out of each subsection? It is because of this material difference that Section 3819's prefatory clauses cannot be equated with Sections 18-305(g) and 17-305(f).

The trial court erred when it failed to "adhere to the plain meaning of the statutory language" of Section 3819. *Hazout*, 134 A.3d at 286.

II. THE COURT OF CHANCERY ERRED IN ITS CONTRACTUAL ANALYSIS BY NOT ENFORCING THE ACTUAL LANGUAGE IN THE "BOOKS AND RECORDS" SECTION OF THE TRUST AGREEMENT, WHICH EXCEPTS "OWNERSHIP RECORDS," AND BY NOT RECOGNIZING THE OWNERS' CONFIDENTIALITY AGREEMENTS

A. Question Presented

Do "Ownership Records," which are separately defined and separately treated in the Trust Agreement, fall within the limited language contained in Section 5.3(c) of the Trust Agreement?

This issue was preserved for appeal. (A330–32; A366–71.)

B. Standard of Review

This Court reviews a trial judge's contract interpretations *de novo*. *Nationwide Emerging Managers, LLC v. Northpointe Hldgs., LLC*, 112 A.3d 878, 889 (Del. 2015).

C. Merits of Argument

The Requested Information is not part of the "books and records" subject to inspection under Section 5.3(c). The Trust Agreement contains the following definition: "Ownership Records," which are those that include the "name, mailing address and Percentage Share of each Owner." (A048.) The only duty the Manager has with regard to "Ownership Records" is limited in Section 5.3(i) to providing them to the Trustee after each revision of them. (A058.) That is precisely the information Grand Acquisition seeks; but, Section 5.3(c) of the Trust

Agreement, upon which Grand Acquisition relies, makes no mention of Ownership Records.

Section 5.3(c) provides, in full:

> The Manager shall keep customary and appropriate books and records relating to the Trust and the Trust Estate and shall certify such reports to the Lender if required by the Loan Documents. *The Manager will obtain annual audited financial reports for the Trust which will be provided to the Owners upon the written request of the Owner*. The Manager shall keep customary and appropriate books and records of account for the Trust at the Manager's principal place of business. The Owners may inspect, examine and copy the Trust's books and records at any time during normal business hours. The Manager shall maintain appropriate books and records in order to provide reports of income and expenses with respect to the Trust Estate to each Owners as *necessary for such Owner to prepare such Owner's income tax returns*.

(A057.) The context of the "customary and appropriate books and records" discussed in Section 5.3(c) shows they relate to financial information about *the Trust* (not its Owners) for "reports to the Lender if required by Loan Documents." The information maintained by the Manager for the Owners are "books and records *of account*," such as "annual audited financial reports," so the Manager can "provide reports of income and expenses with respect to the Trust Estate to each Owner as *necessary* for such Owner to *prepare* such Owner's *income tax returns*." The Ownership Records sought by Grand Acquisition are not germane to any of

those categories and information on *other* Owners is not "necessary" for an Owner to prepare "tax returns."

The trial court concluded otherwise. Although it conceded that Passco's argument had "logical appeal," it nevertheless concluded that the defined term "Ownership Records" was "wholly unrelated to the Owners' inspection right in Section 5.3(c)." (Op. at 20–21.) The trial court then, after concluding earlier in the Opinion that Section 3819 did not apply to the Trust Agreement, actually used Section 3819(a)(2) to supply the definition for "books and records." That internal inconsistency[8] further demonstrates why the trial court should be reversed.

By specifically defining and treating "Ownership Records" separate from those types of books and records "of account" discussed in Section 5.3(c), the Trust "otherwise provided" (per the prefatory clause) something "contrary" (per *Cargill*) and the trial court erred by importing Section 3819's books and records definition into the Trust Agreement. The standard canon of construction *expresio unius est exclusio alterus* compels that conclusion. *See Delmarva Health Plan, Inc. v. Aceto*, 750 A.2d 1213, 1216 (Del. Ch. 1999) (applying canon in contractual analysis and explaining that "venerable interpretative maxim of *expressio unius est*

[8] The trial court held that Passco's statutory defenses could not be invoked "[b]ecause Section 5.3(c) does not *expressly include* Section 3819's preconditions and defenses" (Op. at 11), but then read Section 3819(a)(2) into the Trust Agreement even though Section 5.3(a) does not "expressly include" Section 3819(a)(2)'s definition of books and records.

exclusio alterius" means "the expression of one thing is the exclusion of another"). Indeed, Passco's reading not only has "logical appeal," it is required to give effect to the confidentiality of Ownership Records intended by the Trust Agreement as a whole. *See E.I. duPont De Nemours and Co., Inc., v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985) ("In upholding the intentions of the parties, a court musty construe the agreement as a whole, giving effect to all provisions therein.") Excluding Ownership Records from inspection under Section 5.3(c) harmonizes Sections 5.3(c), 5.3(i), 10.7, and the course of dealing between Owners and the Trust as shown by the confidentiality agreements presented at the time the Owners invested in the Trust.

Finally, even assuming a pure contractual analysis unencumbered by Section 3819, the trial court completely eviscerated the enforceable confidentiality agreements between the Trust and the Owners.

III. THE COURT OF CHANCERY ERRED IN ITS RULING THAT PASSCO FAILED TO PROVE ITS IMPLIED IMPROPER PURPOSE DEFENSE BECAUSE PASSCO SUBMITTED OVERWHELMING AND UNCHALLENGED EVIDENCE THAT GRAND ACQUISITION IS SEEKING ACCESS FOR A PURPOSE PERSONAL TO IT AND ADVERSE TO THE TRUST

A. Question Presented

Was the substantial and unchallenged evidence adduced by Passco establishing Grand Acquisition's affiliation with Maxus, an entity that is run by individuals known publicly (including to the courts) to exploit sensitive business information and to even commit fraud to buy out passive investors on the cheap, along with Grand Acquisition's attempt to hide its relationship with Maxus, sufficient to demonstrate, by a preponderance of the evidence, an improper purpose for Grand Acquisition's Demand?

This issue was preserved for appeal. (A327–30, A336–40; A371–72.)

B. Standard of Review

"Motions for summary judgment are subject to *de novo* review." *Motorola, Inc. v. Amkor Tech., Inc.*, 849 A.2d 931, 935 (Del. 2004).

C. Merits of Argument

The trial court acknowledged the "improper purpose defense," but found that Passco failed to prove it. In *Bond Purchase*, the court explained:

> [T]his court is warranted in denying a partner's request for access to a partnership's records when (i) neither an explicit contractual provision in a partnership agreement nor statutory language negate the notion that a partner must have a proper purpose and (ii) the partner denying another partner access to partnership business records can show that the partner seeking access is doing so for a purpose personal to that partner and adverse to the interests of the partnership considered jointly.

Bond Purchase, 746 A.2d at 857.

The record here shows that Grand Acquisition is an affiliate of Maxus. That company and its CEO, Mr. Johnson, have on at least three occasions attempted to cause disruption in entities controlled by Passco Companies. Indeed, Mr. Clifton recounts in detail in his affidavit the disruption Maxus and its related entities have caused Passco Companies. (A138–41.) Grand Acquisition's failure to explain otherwise suspicious circumstances leads to an unfavorable inference. *Interstate Circuit v. United States*, 306 U.S. 208, 225-26 (1939).

Maxus, Mr. Johnson, and its affiliates have a long history of similar attempts at disruption, and not just with Passco Companies. In 2006, a Nebraska Judge described Mr. Johnson's business practices thusly: Mr. Johnson's entity "employs a business strategy wherein it purchases a small fraction of a company or partnership in order to gain a toehold in the enterprise," then Mr. Johnson uses that toehold "to gain access to sensitive business information which, if successful, is then used for exploitation of either the business, its less sophisticated shareholders,

or both." (A172.) Indeed, in a previous transaction where Mr. Johnson appeared successful in gaining this toehold (Bond Purchase, an entity he controlled), he sought to amend the Partnership for its own personal gain. (A177–79.) The managing partner of the target of Bond Purchase described the tactic as follows: "the motive for Bond Purchase to call this meeting and consent solicitation is to continue the past practices of Bond Purchase and its allies to delay the sale . . . of the Partnership's assets for their own benefit. Allies to Bond Purchase have recently filed consent solicitations and tender offers in the pursuit of similar objectives." (A179.)

This business strategy has been pervasive. The record shows that on numerous occasions other entities have expressed concern over Maxus's investment, and its attempted increased investment. For example, CCSB Financial Corp. explained Mr. Johnson's business practices as follows: "We further believe that Mr. Johnson and the Jefferson Group may be employing a strategy wherein it purchases a fraction of the Company in order to gain access to sensitive information or exploit other stockholders." (A151; *see also* A151–53; A184–88.) In fact, in one case a federal jury found that Maxus's CEO, Mr. Johnson, committed fraud. (A388–93.) Mr. Johnson and his affiliates were then ordered to be removed as general partners of the limited partnership. (*Id*.) When they refused to comply with that order, the court ordered that they immediately surrender

management of the properties and authorized the United States Marshals to assist in enforcing that order. (A394–406.)

Given this history, as Mr. Clifton explained in his affidavit, Passco believed that providing Grand Acquisition with the Requested Information would harm the Trust. Grand Acquisition's Demand for the Requested Information is just another instance of a Maxus-related entity attempting not only to contact other Owners to sow dissent, but to attempt to buy out those Owners and profit from its increased investment in the Trust by engaging in disruption solely designed to benefit Maxus, not the Trust as a whole. Accordingly, Grand Acquisition's improper purpose warrants the denial of its request for access to the Trust's Ownership Records.

In the face of this record, the trial court acknowledged that Passco's "evidence may suffice to establish that Passco Manager has a good faith belief that revealing the Requested Information to Grand Acquisition is not in Passco Trust's best interests" per Section 3819(c) (Op. at 27), but concluded that Passco had not met its burden of proving that providing Grand Acquisition with the Requested Information would adversely affect Passco. The trial court characterized the evidence Passco submitted (including judicial findings) as "vague and speculative" and Mr. Clifton's affidavit as a description of "run-of-the-mill business conflicts

between an investor in a real estate asset and that asset's manager." (Op. at 27–28.)

The evidence Passco submitted was neither "vague," "speculative," nor "run-of-the-mill" business conflicts. Passco submitted public documentation, including court documents and findings, that conclusively establish that Maxus and its CEO -- who are associated with Grand Acquisition -- have engaged in fraud in their real estate investments, and otherwise advance their strategy of increasing investments through harmful entity disruption. (*See* Op. at 24-27.) Mr. Johnson's history of damaging the entities he and his affiliates invest in raises the real concern that Grand Acquisition will do the same to Passco if given the opportunity. Grand Acquisition presented no evidence on the other side of the scale. Accordingly, Passco's evidence, and Grand Acquisition's failure to challenge it by affidavit, proved that Grand Acquisition's purpose is improper.

Indeed, the trial court erred when it failed to address Grand Acquisition's lack of contrary evidence. The reasonable inference from Passco's evidence is that Grand Acquisition -- as an affiliate of Maxus -- would continue the typical Maxus behavior. That inference was more than reasonable. Throughout this litigation, Grand Acquisition refused to acknowledge any affiliation with Maxus, even though public documents and Grand Acquisition's own operating agreement established that affiliation. Grand Acquisition's attempt to hide that affiliation

speaks volumes. But the trial court was deaf to that point. The trial court instead focused only on Passco's evidence and failed to consider Grand Acquisition's silence when a reasonable person would speak. Indeed, under Court of Chancery Rule 56(e), Grand Acquisition had a duty to provide a contrary affidavit, but it failed to do so. The totality of the evidence, including the adverse inference to be drawn from Grand Acquisition's silence, proved an improper purpose.

CONCLUSION

For the reasons set forth above, Passco respectfully request that this Court reverse the trial court's judgment denying the Trust's motion for summary judgment and granting Grand Acquisition's motion for summary judgment.

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