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Case Number 469,2016

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 REPLY BRIEF

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INTRODUCTION[1]

Grand Acquisition's "Answering Brief" (cited as "AB") may be titled as such, but it fails to answer any of the substantive arguments in the Trust's Opening Brief (cited as "OB"). Indeed, it cites to the Trust's Opening Brief just once and it never even discusses the basic rules of statutory construction. Instead, Grand Acquisition simply parrots back the trial court's reasoning.

Grand Acquisition's cavalier approach fails to persuade.

[1] All capitalized terms have the same meaning ascribed to them in Appellant's Opening Brief, filed on October 28, 2016.

ARGUMENT

I. 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

A. The Meaning Of "Otherwise Provided" Is Plain

Grand Acquisition contends that the plain meaning of "otherwise provided" does not mean "otherwise specifically contradicted." (AB at 13.) Yet, Grand Acquisition never says what, in its view, the prefatory clause means and requires in order to override Section 3819's default rules. All Grand Acquisition says is that because Section 5.3(c) of the Trust Agreement has a books and records provision, it has "otherwise provided an independent contractual right that is separate and apart from the statutory scheme." (*Id.*) Apparently, Grand Acquisition's position is that a silent contractual provision operates independent of the statute or that silence equals "otherwise provided." Both arguments ignore the DST Act's mandate and the plain English meaning of the words "otherwise provided."

Dictionary definitions demonstrate that silence cannot otherwise provide. "Otherwise" means "something to the contrary." *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 11 Dec. 2016. "Provide" (or "provided" in this context) means "to supply or make available." *Id.* Thus, the plain English meaning of the phrase is to "supply" "something to the contrary." That is precisely the definition

Grand Acquisition contends cannot be correct, but it is the one mandated by the core tenent of statutory construction that courts must "adhere to the plain meaning of the statutory language." *Hazout v. Tsang Mun Ting*, 134 A.3d 274, 286 (Del. 2016). It is also the definition ascribed to "otherwise provided" in *Cargill, Inc. v. JWH Special Circumstance LLC*, 959 A.2d 1096 (Del. Ch. 2008), a case interpreting the DST Act.

Like the trial court, Grand Acquisition's attempt to distinguish *Cargill* misses the mark. Grand Acquisition contends that the Trust ignores the "context" of *Cargill* (AB at 14), but *Cargill*'s reasoning and "context" are entirely consistent with the Trust's arguments. As the Trust explained in its Opening Brief, to which Grand Acquisition did not respond, the trust agreement in *Cargill* was <u>*not*</u> silent *writ large* on the subject of duties. The trust agreement had an exculpatory provision, which preserved liability for breach of certain standards or duties, 959 A.2d at 1118, but was silent on whether fiduciary duties were owed, waived, or modified. Section 3806(c) of the DST Act states that "duties (including fiduciary duties)," made applicable by Section 3809, may be "expanded or restricted or eliminated by provisions in the governing instrument." 12 *Del. C.* § 3806(c). The court concluded that the trust agreement's silence did not mean that the common law and statutory default duties were overridden. To the contrary, because the trust agreement did not otherwise provide, the DST Act applied. *Id.* at 1114.

Here, the Trust Agreement supplies the non-substantive "reasonable standards" for "time and location" of an inspection, as contemplated by Section 3819(a), but it is wholly silent with regard to any of the substantive default "preconditions and defenses" contained in Section 3819, just like the silence on "fiduciary" duties in *Cargill*. The silence in the Trust Agreement's books and records provision is in contrast with Section 10.7 of the Trust Agreement, which actually modified Section 3809's default rule and excepts "[t]he laws of the State of Delaware pertaining to trusts (other than the Act)." The parties knew how to otherwise provide, but did not so provide in Section 5.3(c).[2] Because the plain language of "otherwise provided" means to "supply" something "contrary" to the default provisions in each subsection of Section 3819, and because it is undisputed that the Trust Agreement has not done so, Section 3819's default provisions apply.

Despite the plain language at issue here, Grand Acquisition argues that the "expressed legislative intent" of the DST Act is the "policy" embodied in Section 3825, which is to give "maximum effect to the principle of freedom of contract." (AB at 13-14.) Admittedly, the DST Act, like the LLC Act and DRULPA,

[2] Grand Acquisition argues that the Trust waived the argument that Section 10.7 incorporates by reference all of the DST Act's default rules. (AB at 17.) However, the Trust has never argued as much because, even without the express preservation of the DST Act in Section 10.7, all provisions of the DST Act and "the laws of this State pertaining to trusts" apply unless "otherwise provided" per Section 3809. The Trust only refers to Section 10.7 to show that the parties knew how to "otherwise provide," within the meaning of the DST Act, and did not do so in Section 5.3(c) with regard to Section 3819's default rules.

provides for freedom of contract, but that freedom must operate within the confines of the statutory provisions. Such freedom yields when the terms of the contract "contravene any mandatory provisions of the Act." *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 290 (Del. 1999). Indeed, as this Court explained in *Elf Atochem*, the statutory provisions provide the ability to draft an agreement and "*to furnish default provisions when the . . . agreement is silent*." *Id.* at 291 (emphasis added). That is the exact situation here.

The Court's goal in interpreting a statute is to "ascertain and give effect to the intent of the legislature." *Hazout*, 134 A.3d at 286. The General Assembly has expressed its intent and understanding of the language at issue here. Grand Acquisition's Answering Brief says not one word about the General Assembly's expressed definition that "unless otherwise provided" means "that a statutory trust may *opt out* . . . *if provided* in the certificate of trust and the governing instrument of such statutory trust." S.B. 243, 148th Gen. Assem., 80 Del. Laws ch. 304 (2016) syn., § 1 (emphasis added). The intent could not be clearer: Sections 3819(a), (b), and (c) apply to all Delaware trust agreements unless the agreement explicitly "opts out" by providing contrary requirements. In addition to *Cargill*, this understanding is in accord with numerous courts in this and other jurisdictions that have interpreted "otherwise provided" and similar phrases. *See, e.g., Marino v. Patriot Rail Co.*, 131 A.3d 325, 337 (Del. Ch. 2016) ("Unlike Section 145(e),

which is a permissive grant of authority that a corporation can make mandatory, the Continuation Clause is a mandatory provision that requires an explicit opt-out ('unless otherwise provided when authorized or ratified').''); *In re Ahern Enters., Inc.*, 507 F.3d 817, 822 (5th Cir. 2007) (explaining that "except as otherwise provided" in 11 U.S.C. § 1141(c) demonstrates that what follows is a default rule unless "specifically" altered); *State v. Stevens*, 912 A.2d 1229, 1233 (Me. 2007) (stating that plain meaning of "except as otherwise provided by law" means that different law must "furnish[] or suppl[y]" something different).

Section 3819's default rules apply to the Trust Agreement because it did not provide to the "contrary."

B. The Structure Of Section 3819 Demonstrates That Silence Cannot Satisfy "Otherwise Provided"

The structure of Section 3819 also demonstrates that merely having a "books and records" provision in a trust agreement is insufficient to "otherwise provide[]." Section 3819's prefatory clause is not present in a general preamble, but is repeated in each of the three individual subsections containing the default pre-conditions and defenses. This critical point merits nothing more than the following quip from Grand Acquisition: "That the prefatory language is set out in each subsection and not in a stand-alone section is of no moment and a form over substance argument." (AB at 17.) That hallow response gives short shrift to the General Assembly's effort and intent.

Beyond its plain language, Sections 3819's structure clearly shows that a trust agreement must modify or opt out of each subsection for it not to apply. If not, why did the General Assembly put the prefatory clause in each of the subsections? Under a plain reading of Section 3819, a governing instrument must "otherwise provide" something different to alter the proper purpose requirement, the manager's authority to withhold books and records in the "best interests" of the trust, and the effectiveness of confidentiality agreements. The Trust Agreement did nothing of the sort.

C. The Material Differences Between The DST Act And DRULPA And The LLC Act Require Silence To Be Treated Differently Under The DST Act

Clear differences between the DST Act and DRULPA and the LLC Act demonstrate that interpreting the three acts to achieve the same result -- *i.e.*, that silence as to substantive rights in an agreement means an act's default provisions do not apply -- cannot be right. Like the trial court, Grand Acquisition points to authorities interpreting DRULPA and the LLC Act for its proposition that silence satisfies the "otherwise provided" language and if a trust agreement has a "books and records" provision, Section 3819's default rules must be expressly incorporated for them to apply.

As explained in the Trust's Opening Brief, subsections (a)-(c) of the books and records sections of the DST Act, DRULPA, and the LLC Act are identical, but for the prefatory clause found only in the DST Act. 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. *See Nakahara v. NS 1991 Am. Trust*, 739 A.2d 770, 782 (Del. Ch. 1998) ("With all else the same, a single difference would have more meaning."); *see also Alpine Inv. P'rs v. LJM2 Capital Mgmt., L.P.*, 794 A.2d 1276, 1282-83 (Del. Ch. 2002) (stating that single difference in DGCL and DRULPA was dispositive and General Assembly "is presumed to have inserted every provision . . . for some usual purpose and construction, and when different terms are used in various parts of a statute, it is reasonable to assume that a distinction between the terms was intended" (quotations omitted)). Courts are loathe to construe statutory language as mere "surplusage," *Oceanport Indus. Inc. v. Wilm. Stevedores, Inc.*, 636 A.2d 892, 900 (Del. 1994), yet, that is what Grand Acquisition's position would do. Grand Acquisition never reconciles the prefatory clause in the DST Act with the lack thereof in DRULPA and the LLC Act.

Grand Acquisition's "reliance" on the "congruity" between the three statutory schemes (AB at 16-17), and thus on the case law interpreting DRULPA and the LLC Act, is unavailing because the statutes contain important differences.

Because of those differences, the trial court erred in relying upon cases such as *Madison Real Estate Immobilien-Anlagegesellschaft Beschrankt Haftende Kg v. Kanam USA XIX Ltd. P'ship*, 2008 WL 1913237 (Del. Ch. May 1, 2008), and *Bond Purchase, L.L.C. v. Patriot Tax Credit Properties, L.P.*, 746 A.2d 842, 853 (Del. Ch. 1999). Cases interpreting DRULPA or the LLC Act are relevant only to provide a counterpoint to the DST Act, precisely because of the different statutory language.

Lastly, the DST Act's prefatory clause cannot mean, as Grand Acquisition suggests, the same thing as Section 17-305(f) of DRULPA and Section 18-305(g) of the LLC Act, else the General Assembly would have amended Sections 17-305(a)-(b) and 18-305(a)-(c) to model Section 3819(a)-(c) instead of creating entirely new subsections with entirely different words. *See 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."). The General Assembly used different words because Sections 17-305(f) and 18-305(g) do not serve the "same purpose" as the prefatory clause in each of Sections 3819(a), (b), and (c). (*See* OB at 32-34.) True to pattern, nowhere in Grand Acquisition's Answering Brief does it confront the

Trust's argument as to why the restrictive clauses in Sections 17-305(f) and 18-305(g) do not mean the same thing as the Section 3819's prefatory clause. That is because Sections 17-305(f) and 18-305(g) do not demonstrate "congruity" among the three statutory schemes; they demonstrate the marked differences.

Grand Acquisition fails to confront the rules of statutory construction because application of the rules undercuts Grand Acquisition's overarching theme that all it is doing is harmonizing the DST Act, DRULPA, and the LLC Act, which Grand Acquisition claims, without authority, to be the General Assembly's intent. (AB at 11-13, 16.) The goal is not to focus on a uniform outcome and reverse engineer the analysis. In other words, the goal is not to interpret independent statutes so that they all have the same outcomes under identical factual scenarios. Here, harmonizing the three statutes means interpreting the words of each act consistently, and providing meaning to each word, or lack thereof, in the respective statutes, so that if that analysis warrants different outcomes, it can be reasonably explained. The harmony is in the sound legal rationale for the different outcomes based on the different statutory language. The following hypotheticals demonstrate why Grand Acquisition's view of harmony cannot be correct:

1. Assume three agreements, one governed by the LLC Act, one by DRULPA, and one by the DST Act. Each agreement contains a books and records provision providing for the time and place to view books and records, but each is

silent as to proper purpose, rights of the manager, and confidentiality agreements. Under Grand Acquisition's view, all three agreements should be interpreted the same -- *i.e.*, the default rules do not apply to any of the agreements (per cases like *Bond Purchase*) -- even though the three statutory schemes are *not* the same. Grand Acquisition's position simply reads "except to the extent otherwise provided" out of Section 3819. That cannot be the right result.

2. Assume an agreement governed by the DST Act with a books and records provision that explicitly says that the proper purpose requirement is eliminated (per the prefatory clause in Section 3819(a)), but the agreement is silent with respect to the manager's right to withhold books and records (per Section 3819(c)), and the effect of confidentiality agreements (per Section 3819(c)). The agreement has "otherwise provided" with respect to the proper purpose requirement, but under Grand Acquisition's view, the manager's rights and effectiveness of confidentiality agreements are also eliminated from the agreement as a result of its silence. That makes the effort to modify only the proper purpose requirement meaningless or redundant. That cannot be the right result because that too reads "otherwise provided" out of each subsection of Section 3819.

These exercises expose the fallacy in Grand Acquisition's position. To Grand Acquisition, silence evinces a contemplation of Section 3819's default rules and an intent to not have them apply by not expressly incorporating them. But, is

it not far more reasonable to conclude that silence evinces a contemplation of the default rules and an intent to have them apply by remaining silent so as to not "otherwise provide[]" per the express statutory language? Acceptance of both views would only open up litigation over DST agreements to parol evidence to determine whether the drafters' silence was intended to include or exclude the default rules. That cannot be the right result and it demonstrates why Grand Acquisition's reading of Section 3819 is unreasonable and must fail. The plain language of Section 3819 tells drafters what they must do: They must "provide[]" something and silence provides nothing.

II. THE TRUST AGREEMENT SPECIFICALLY DEFINES "OWNERSHIP RECORDS" AND THEY ARE NOT INCLUDED IN THE "BOOKS AND RECORDS OF ACCOUNT" THAT OWNERS MAY REVIEW UNDER SECTION 5.3(c) OF THE TRUST AGREEMENT

In Section 1.1, the "Definitions" Section of the Trust Agreement, "Ownership Records" means the "name, mailing address and Percentage Share of each Owner," which is precisely the Requested Information Grand Acquisition seeks. In its Answering Brief, all Grand Acquisition has to say about this definition is that it is a "housekeeping mechanism," and, as such, "the maximum [*sic*] *expressio unius est exclusio alterius* d[oes] not apply." (AB at 22.) That is an inadequate response when the Requested Information is specifically defined but not included in Section 5.3(c).

A. Grand Acquisition's Position Finds No Support In The Language Of Section 5.3(c)

The Trust's position can be sustained by construing the Trust Agreement as a whole with the language in Section 5.3(c). Section 5.3(c) provides Owners with access to books and records so that each Owner can have the information "*necessary for such Owner to prepare such Owner's income tax returns*." (A057 (emphasis added).) The Ownership Records sought by Grand Acquisition are not germane to that purpose because information on *other* Owners is not "necessary" for an Owner to prepare "tax returns."

Grand Acquisition's reliance on *Arbor Place, L.P. v. Encore Opportunity Fund, L.L.C.*, 2002 WL 205681 (Del. Ch. Jan. 29, 2002), to argue that the Court of Chancery has construed similar books and records language before is misplaced. The language at issue in *Arbor Place* is dispositively different from Section 5.3(c) of the Trust Agreement. In that case, the Court of Chancery was construing the following language:

> *Books and Records.* At all times during the existence of the Company, the Company shall cause to be maintained full and accurate books of account, *which shall reflect all Company transactions*. The books and records of the Company shall be maintained at the offices of the Company and/or such other places as the Managing Member may designate. Each Common Member (or such Common Member's designated representative) shall have the right during ordinary business hours and upon reasonable notice to inspect and copy (at such Common Member's own expense) *all books and records of the Company*.

Id. at *2 (emphasis added). That provision is clear that each member had access to "all books and records," which records were supposed to include "all Company transactions."

Here, the relevant sentences in Section 5.3(c) state:

> 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).) Although the second sentence does not contain the words "of account," it is clearly referring to the books and records referenced in the first sentence, which are those "of account" kept "at the Manager's principle place of business." (*Id.*) Reviewing the entirety of Section 5.3(c) as it applies to Owners illustrates that it relates to the financial information of the Trust so that Owners may file their tax returns. Grand Acquisition would have this Court read out "of account" from Section 5.3(c). That cannot be correct.[3]

B. Grand Acquisition's Reading Of The Trust Agreement Vitiates The Confidentiality Agreements Between The Trust And Its Owners

As explained in its Opening Brief, the Trust's reading of Section 5.3(c) is the only one that gives effect to the confidentiality agreements executed by its Owners. 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

[3] Grand Acquisition also contends that Section 5.3(c), when coupled with Exhibit C, indicates that Owners were entitled to the Ownership Information once they became a party to the Trust Agreement. (AB at 22 n.7.) Exhibit C is attached to the Trust Agreement and is a blank document representing the form the "Ownership Records" should take when the Manger of the Trust provides them to the Trustee. (A048.) The Trust Agreement actually describes what Exhibit C is in its Definitions section: "Ownership Records means the records maintained by the Manager, *substantially in the form as set forth on Exhibit C* . . . ." (*Id.*) Exhibit C is merely an exemplar of what the Ownership Records document should look like. The inclusion of the *form* in the Trust Agreement does not mean that every Owner was entitled to a form of Exhibit C as completed and maintained separately by the Manager. Indeed, there is no language in the Trust Agreement saying that an Owner is entitled to the Ownership Records, and Grand Acquisition's argument to the contrary has no support.

Trust as shown by the confidentiality agreements entered into at the time the Owners invested in the Trust. *See E.I. duPont de Nemours and Co., v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985) ("In upholding the intentions of the parties, a court must construe the agreement as a whole, giving effect to all provisions therein.").

To present its contrary arguments, Grand Acquisition misconstrues the confidentiality agreements -- *i.e.*, Section VII of the Questionnaire. (AB at 22-24.) First, Grand Acquisition focuses on the wrong section of the Questionnaire when it claims the title "Release of Information to Registered Representative and Broker/Dealer" answers the question. (AB at 23.) The part of the form in question is titled, appropriately, "Release of Information to Other Holders of Interest." (A094.)

Second, Grand Acquisition's contention that because the Questionnaire was submitted in advance it was not a "binding third-party confidentiality agreement" is wrong. (AB at 23.) Although the Questionnaire was provided to prospective purchasers, a review of the plain language of Section VII demonstrates that the relevant confidentiality provisions clearly and unambiguously were intended to apply post-investment. For example, under the heading "Approval of Release," Section VII states: "[t]he Trust and its affiliates . . . shall be authorized to release [enumerated] information and documentation *throughout the holding of the*

Interest, which shall include the release of information regarding the eventual sale of my/our Interest." (A094.) This provision, which enabled prospective owners to elect or decline to permit disclosure, expressly applies "*throughout the holding of the Interest*," and thus continues to be binding as to each current Owner that declined to permit disclosure.

In addition, under the heading "Release of Information to Other Holders of Interest," Section VII provides: "I/we authorize the Trust and its affiliates . . . to release [enumerated] personal information about me/us and or my/our entity formed to hold the Interest to *the other holders of Interests* . . . ." (*Id.* (emphasis added).) The only reasonable reading of this provision is that it applies post-investment. The key phrase -- *i.e.*, "*other* holders of interest" -- only makes sense if the permission expressly granted or withheld is interpreted as applying after the individual to whom the disclosure option is posited actually becomes an investor, because only then would there be fellow or, more specifically, "*other*" investors.

Finally, in two separate instances, Section VII states that "I acknowledge that all information regarding *initial purchase* of the Interest will be[] provided to my registered representative." (*Id.* (emphasis added).) These reservations by the Trust can apply, logically, only after an initial interest is purchased, otherwise the Trust has nothing to disclose. Put another way, if a potential purchaser never

actually invests, there would be no "initial purchase" about which the Trust would need to disclose information to the potential purchaser's registered representative.

All of these provisions indicate that any disclosure contemplated therein would occur post-investment. The specific confidentiality provisions, therefore, should be construed consistently with the remainder of Section VII and apply throughout the duration of an Owner's interest. Accordingly, those confidentiality agreements -- including Grand Acquisition's own agreement -- compel the Trust to keep the Requested Information confidential, as expressly contemplated by Section 3819(c) of the DST Act.

Moreover, Grand Acquisition's reliance on *Arbor Place* for its argument that the Questionnaires are not binding third-party confidentiality agreements is just flat wrong. In *Arbor Place*, the defendant limited liability companies contended that their member lists were confidential (and thus immune to plaintiff's demanded inspection), in part, because all members, before achieving that status, had filled out "Confidential Subscribe Questionnaires," which stated that information collected "WILL BE KEPT STRICTLY CONFIDENTIAL." 2002 WL 205681, at *4. The Court rejected that argument, observing that "[t]he confidentiality provision in the application form was designed to protect the identity of potential investors. . . . Once the investors qualified and elected to invest in the LLCs, however, they were governed by the LLC Agreements, which expressly grant

members access to books and records (which under [6 *Del. C.* § 18-305(a)(3)] includes membership lists)." *Id.*

Unlike *Arbor Place*, here, the identity of the Trust's Owners is to be kept confidential -- even from other Owners -- per contracts between the Trust and individual Owners, contracts which on their face contemplate their effectiveness post-investment (*e.g.*, "if I/we do not check any of the following, the Trust and its affiliates, as well as any property manager, asset manager or master tenant, are *not* authorized to release any information about me/us or my/our *Interest* to the *other holders of Interests*").

The Trust's reading of Section 5.3(c) as not including Ownership Records is the only interpretation that is consistent with the Trust Agreement as a whole, as well as respecting the binding confidentiality agreements signed by the Owners of the Trust. Grand Acquisition's reading of Section 5.3(c) should be rejected because, like its reading of Section 3819, it ignores the plain language of Section 5.3(c), the separate definition of Ownership Records and the Trust Agreement as a whole, and it would eviscerate the third-party confidentiality agreements.

III. THE IMPROPER PURPOSE DEFENSE APPLIES TO GRAND ACQUISITION'S DEMAND AND THE TRUST MET ITS BURDEN TO DEMONSTRATE THAT GRAND ACQUISITION'S DEMAND IS FOR AN IMPROPER PURPOSE

Grand Acquisition continues its leitmotif of not responding to the Trust's arguments when, instead of explaining why the evidence the Trust adduced was not sufficient to carry its burden of proving that Grand Acquisition seeks the Requested Information for an improper purpose, it argues that the improper purpose defense does not apply (AB at 25-26) and, even if it does apply, the Trust's complaints are with Maxus not Grand Acquisition. Neither argument has merit.

A. The Improper Purpose Defense Applies

The improper purpose defense has its genesis in *Schwartzberg v. CRITEF Associates Ltd. Partnership*, 685 A.2d 365 (Del. Ch. 1996), to protect entities from having to grant unfettered access to books and records under a contractual analysis if the demanding party has an ill-purpose. *See id.* at 376 (concluding in partnership context that it could not be assumed that "rational negotiators would confer on managing partners discretion to determine what access would threaten harm to joint investment"). As in *Schwartzberg*, the improper purpose defense applies here because, assuming Grand Acquisition is correct that Section 3819's pre-conditions and defenses do not apply, the Manager of the Trust would be helpless to prevent

Grand Acquisition from accessing the Trust's books and records even if it is clear that doing so will result in harm to the Trust and its other Owners.

Further, Grand Acquisition's citation to *In re Paine Webber Qualified Plan Property Fund Three, L.P. Litigation*, 698 A.2d 389 (Del. Ch. 1997), for its argument that "there is no basis to imply a proper purpose requirement" is misplaced. (AB at 25-26.) The court in *In re Paine Webber* concluded that there could be no improper purpose defense because the partnership agreement in that case was formed prior to 1985. That date was critical because the "books and records" sought was the list of other partners, which before 1985 was a publicly filed document under the partnership act. Accordingly, the court concluded that "it was not possible to conclude that the negotiators of the partnership agreement, if they had addressed the subject, would have agreed more likely than not to deny access to the lists that were already a matter of public record." *In re Paine Webber*, 698 A.2d at 393 (quoting *In re Paine Webber Ltd. P'ships*, 1996 WL 535403, at *14 (Del. Ch. Sept. 17, 1996)).

The improper purpose defense, assuming the DST Act's default provisions do not apply, should therefore apply to the Trust Agreement because it is more likely than not that rational negotiators would not leave the Manager of the Trust without any means to prevent access to books and records when such access is sought for an improper purpose.

B. The Trust Proved That Providing Grand Acquisition The Requested Information Would Be Adverse To The Trust

Grand Acquisition makes no real argument that the evidence adduced by the Trust was insufficient to demonstrate by a preponderance of the evidence that providing the Requested Information to a Maxus-related entity would be adverse to the Trust. Instead, Grand Acquisition continues to argue that it is not an affiliate of Maxus or Mr. Johnson because neither exercise control over Grand Acquisition. (*See* AB at 6 (stating that because "Grand Acquisition is not owned or controlled, directly or indirectly by Maxus Realty Trust or any other Maxus entity . . . it is therefore not an affiliate of a Maxus entity").) But Grand Acquisition misses the point. It uses an overly narrow view of affiliates and it continues to attempt to distance itself from Maxus and Mr. Johnson, which speaks volumes.

The Trust has never contended that Maxus exercises enforceable parent-subsidiary control over Grand Acquisition. Instead, the Trust has demonstrated that (i) Mr. Johnson (and thus Maxus) is clearly involved and behind Grand Acquisition, and (ii) Grand Acquisition's managers are closely related -- thus affiliated with -- Maxus. Grand Acquisition does not dispute these facts. That is why Grand Acquisition's offer to use the Requested Information "in-house" rings hollow. (AB at 28.) People "in-house" at Grand Acquisition include board members at Maxus and Maxus's own CEO, Mr. Johnson, who have past practices of disrupting Passco entities. Whether or not Maxus controls Grand Acquisition

does not assuage the harm to the Trust from providing Mr. Johnson and his like-minded colleagues access to the Trust's documents.

Critically, Grand Acquisition fails to refute or discuss the evidence the Trust adduced. Instead, it attempts to make up for its failure to contradict Mr. Clifton's Affidavit, or any of the Trust's evidence, by making a blanket "hearsay" objection. Final verdicts for fraud and judicial pronouncements about nefarious business methods are not hearsay, nor is Grand Acquisition's LLC Agreement, which itself exposes the Maxus-Grand Acquisition relationship.

In fact, Grand Acquisition failed to identify which evidence it believes is hearsay other than saying all of it is. However, the majority of the Trust's evidence is from public documents -- federal and state court judgments, which are clearly not hearsay. The only two documents that are not from either court dockets or SEC filings is the statement on Maxus's own website, as well as the news article regarding Greg Orman, the owner of one of Grand Acquisition's two members, who, it just so happens, is a Maxus Board member. Curiously, Grand Acquisition does not deny the truth of any of the documents or their contents, and without an objection that those documents do not have an indication of veracity, they are not hearsay. *See* D.R.E. 807.

Even if one only considers Mr. Clifton's Affidavit detailing Passco's history with Maxus and its related entities, the federal judgment finding Mr. Johnson guilty of fraud (A388–406),[4] and the state court's holding that details Mr. Johnson's business practices as one of disruption (A172), that is more than enough to demonstrate that providing the Requested Information to Grand Acquisition will be adverse to the Trust's interests. That is especially true when that evidence is coupled with not just silence on Grand Acquisition's part, but a clear attempt to distance itself from Maxus by continuing to proclaim it is not an "affiliate" of Maxus, even though Grand Acquisition's LLC Agreement clearly states that Mr. Johnson has guaranteed Grand Acquisition's debt, and Mr. Orman, a Maxus Board member, is the majority holder of one Grand Acquisition's two members.

Grand Acquisition's Demand for the Requested Information is just another instance of a Maxus-related entity attempting to contact other Owners to sow dissent and 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 demand for access to the Trust's Ownership Records.

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[4] Grand Acquisition's argument that the documents found at A388-406 should not be considered is baseless. Those are public documents from the federal court docket that were cited by the Trust in its briefs before the trial court without objection from Grand Acquisition. They are publicly accessible by a variety of methods, including PACER.

CONCLUSION

For the reasons set forth above, the Trust 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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