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IN THE SUPREME COURT OF THE STATE OF DELAWARE

POPE INVESTMENTS LLC, POPE INVESTMENTS II, LLC and CHINA ALARM HOLDINGS ACQUISITION LLC,	)	
Defendant-Below, Appellants,	)	
v.	)	
	)	C.A. No. 259, 2017
THE MARILYN ABRAMS LIVING TRUST,	)	On Appeal from the Court of Chancery of the State of Delaware C.A. No. 12829-VCL
Plaintiff-Below, Appellee.	)	

OPENING BRIEF OF APPELLANTS POPE INVESTMENTS, LLC, POPE INVESTMENTS, II, LLC, AND CHINA ALARM HOLDINGS ACQUISITIONS, LLC

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NATURE OF THE PROCEEDINGS

This is an appeal from findings that Appellants Pope Investments LLC ("Pope I"), Pope Investments II, LLC ("Pope II"), and China Alarm Holdings Acquisition LLC ("CAHA" and collectively with Pope I and Pope II, the "Funds") acted in bad faith opposing Appellee The Marilyn Abrams Living Trust's ("Abrams") books and records action request and that the Trust was entitled to all of its reasonable costs, including attorneys' fees and expenses. The Funds are investment funds. Abrams is a member of each of the Funds. Following written correspondence between the parties, including a formal demand, the Trust commenced an action against the Funds seeking to compel inspection and copying of the Funds' books and records pursuant to the terms of the Funds' operating agreements and 6 *Del. C.* § 18-305. After a one-day trial, the Chancery Court issued a post-trial opinion on March 21, 2017 finding, among other things, that Abrams had a clearly defined right to all of the books and records sought, and that the Funds acted in bad faith by requiring Abrams to bring the action. The Chancery Court awarded Abrams all of her reasonable attorneys' fees and costs incurred in prosecuting the action. *See* Post-Trial Opinion, Exhibit A hereto ("Op.").

The Funds timely filed a motion for clarification and reargument pursuant to Court of Chancery Rules 59(e) and (f), requesting clarification regarding the books

and records that were ordered to be produced, and argued that the Chancery Court had failed to consider and/or misapprehended the Funds' good faith bases for denying the records request and for defending their positions during the litigation. The Funds requested that the award of attorneys' fees be eliminated or that only a partial award was appropriate.

While clarifying certain aspects of the Op., the Chancery Court denied the Funds' motion for clarification and reargument, found that the motion itself had been brought in bad faith and awarded Abrams her fees and costs in defending against the motion. *See* Order Denying Defendants' Motion for Clarification and Reargument, Exhibit B hereto (the "Reargument Order"). The Op. and Reargument Order were subsequently memorialized in the Final Order and Judgment (the "Final Order"), Exhibit C hereto. The Chancery Court then subsequently awarded Abrams $317,717.20 in fees and expenses. *See* Order Awarding Attorneys' Fees and Expenses (the "Fee Order"), Exhibit D hereto. The Funds appeal the erroneous bad faith findings and awards of attorneys' fees and expenses in the Op., Reargument Order, Final Order and Fee Order.

SUMMARY OF THE ARGUMENT

1. The Chancery Court erred as a matter of law in finding that Abrams had a "clearly defined and established right" to inspect the Funds' books and records and abused its discretion in awarding Abrams all of her fees and costs. There was not clear evidence that the Funds acted in subjective bad faith. The Funds made a good faith challenge that Abrams' asserted purposes for inspection were not her primary purposes. The existence of heated litigation between the Funds' manager and Abrams' husband, together with the overbroad document request and deficient purported bases for mismanagement in Abrams' demand provide sufficient grounds for the Funds challenge. The contentious litigation preceded Abrams' document requests and Abrams was assisted in drafting her requests by affiliates of her husband. The requests themselves were vastly overbroad, essentially requesting every document in the Funds' possession since their inceptions almost ten years before. Abrams' deposition testimony that she was not accusing the manager of "anything" and had no reason to request the membership lists run contrary to the Chancery Court's findings that the Funds' prolonged the litigation. The same is true with respect to the Funds' defenses of the mismanagement claims, many of which were not pursued at trial. The Chancery Court further erred in finding that the Funds' allegations that Abrams was litigating in bad faith was a basis for awarding attorneys' fees. The Funds'

actions did not rise to the high level of egregiousness required to find bad faith. As Abrams did not have a "clearly defined and established right" to the Funds' books and records, the Funds could not have acted in bad faith in challenging her right to those books and records. The award of all of Abrams' fees and expenses should be reversed.

2. The Chancery Court also erred as a matter of fact and law in finding that the Funds acted in bad faith in requesting clarification of the scope of the ordered production and reargument on the finding of bad faith and award of all of Abrams' fees and costs. The Funds had a good faith basis to request clarification of the scope of the ruling, and the Chancery Court did, in fact, make clarifications. The Funds also had good faith arguments that the Chancery Court misinterpreted the record and misapplied the law in making its bad faith determination. The Funds' actions did not rise to the high level of egregiousness required to find bad faith. The award of all of Abrams' fees and expenses incurred in connection with the motion for clarification and reargument should be reversed.

3. The Chancery Court abused its discretion when it awarded Abrams all of her reasonable attorneys' fees instead of only awarding partial fees. Given that Abrams abandoned several requests related to mismanagement claims, the Funds successfully limited the scope of some of her other requests, and that the Funds' conduct did not rise to the level of egregiousness typically seen in matters where

bad faith conduct was found, the award of all of Abrams' reasonable fees and expenses was unreasonable. If it is determined that the Funds' conduct warrants a fee award, such an award should be reduced to only partial fees.

STATEMENT OF THE FACTS

A. The Parties

The Funds are each investment funds. *See* Op. at 1-2. CAHA was formed on February 1, 2005. Pope I was formed on December 15, 2005 and, pursuant to its operating agreement, was required to liquidate no later than December 31, 2015, if not extended by the consent of holders of two-thirds of the outstanding membership. *Id.* at 2 and 5. Pope II was formed on May 24, 2007 and is required to liquidate no later than December 31, 2017. *Id.* at 2. CAHA has no deadline to liquidate. A222. The manager for each of the Funds is Pope Asset Management, LLC (the "Manager"). Op. at 1. The Funds' assets currently consist mostly of illiquid assets, known as "Level 3" assets, many of which are in litigation or workout status, and the reported value of which is determined by judgments made by the Manager. *Id.* at 2-3. The Manager is currently not charging any fees for managing the Funds. Trial Tr. at 149:12-13 (McCandless)).

Appellee Abrams is an investor in each of the Funds and has received distributions of 100% of her initial investment in Pope I and 75% of her initial investment in Pope II. Op. at 2.

B. The SAM Litigation

On March 13, 2015, Southern Advanced Materials LLC ("SAM"), an entity affiliated with the Manager filed a complaint against Ms. Abrams' husband, Robert

Abrams, over the sale of company where Mr. Abrams was the manager and SAM a member entitled to a preferred return (the "SAM Litigation"). *Id.* at 4. The Post-Trial Ruling characterizes the SAM Litigation as a matter where SAM contends in that it did not receive its preferred equity return. *Id.* The SAM Litigation was much more contentious, however. Among other things, in a second amended complaint filed on October 19, 2015, SAM accuses Mr. Abrams and his company of breach of contract, breach of fiduciary duty, and asserts damages of at least $40 million, plus punitive damages. *See* A379-A391. Mr. Abrams filed counterclaims. A640 (Trial Tr. at 158:4-10 (McCandless)). Additionally, Mr. Abrams sued certain of SAM's members, which included entities that were also members of one or more of the Funds. *Id.*

The law firm representing Abrams in the books and records action was the same law firm representing Mr. Abrams' company in the SAM Litigation. A46 (M. Abrams Tr. at 28:2-7). In her deposition testimony, Abrams testified that associates of her husband assisted her with analyzing the Funds' books and records and preparing for the deposition. A41, A44-A45 (*Id.* at 18:11-25, 26:17-27:9).

At the time of trial in the above-captioned action, the SAM Litigation remained pending.

C. The Books and Records Demand

When Abrams' initial investments were made in the Funds, they were passive investments. *See* A426, A441 (Trial Tr. 14:7, 29:10-13 (Abrams)). Abrams testified that she became concerned about her investments in the Funds around the end of 2015. *See* A425, 441 (*Id* at 13:3-15:7, 29:18-21). On July 29, 2016, Abrams sent the Manager an informal request to examine Funds' books and records. *See* Op. at 5; A393. On August 10, 2016, the Manager replied by email requesting "the specific information you are looking to receive." A396. In response, the Trust sent the Manager a second request on August 12, 2016, listing certain categories of documents, with several looking back to 2006. *See* Op. at 5; A394-395.

By letter dated August 19, 2016, counsel for the Manager denied Abrams' request. *See* Op. at 5; A398. The letter noted:

> As you are aware your firm represents Mrs. Abrams [sic] husband, Robert, in connection with …. bitterly contested litigation filed by …. Southern Advanced Materials LLC (SAM), and a separate suit commenced by Mr. Abrams.
>
> This …leads to the reasonable conclusion that Mrs. Abrams is attempting to exam [sic] files, book [sic] and records of the three Pope related entities for more than just the purpose of her accounts, per se, in those entities.

Id. The letter also noted that Section 3.01(c) of Pope I and Pope II's respective operating agreements "gives the Manager the right to keep confidential

information that it reasonably believes the disclosure of which is not in the best interests of the Company or could damage the Company" and that the Manager was invoking this right. *Id.* Further, the letter noted that the August 12, 2016 request "greatly expands any reasonably permissive examination of" the Funds. *Id*.

On August 23, 2016, Abrams sent another demand letter. A399-A400. This letter essentially recited the categories of documents set forth in 6 *Del. C.* 18-305. *Id.* There was no restriction on the look-back period for the document request. *Id*. By separate letter dated August 23, 2016, Abrams responded to the Manager's August 19, 2016 letter. A401-A402. The letter stated that, based on the Manager's assertion that the August 12, 2016 letter greatly expanded the scope of permissible examination, Abrams was recrafting its request to comply with 6 *Del. C.* 18-305. *Id.* Additionally, although the letter reiterated the position that Abrams, as a member of the Funds, had a right to the books and records, it did not dispute that Abrams' books and records request was related to the SAM Litigation, nor did it address the Manager's assertion of confidentiality over the requested documents. *Id.*

On August 30, 2016, the Manager responded to the August 23, 2016 letter. A403-A404. The letter provided a description of the judgment obtained by CAHA and noted that post-judgment litigation had been commenced to collect on the

judgment. *Id.* The letter further noted that status updates on collection would be provided when more information became available. *Id.*

With respect to the document requests directed to Pope I and Pope II, pointing to the Operating Agreements, the Manager stated its position was that "the discretion granted to the Manager has been appropriately referred to and explained…" and also that "section 3.01(d) [of the Operating Agreements] specifically authorizes the retention of the books and records to be kept confidential. Your client as a Member waived and covenanted 'not to assert, any claim or entitlement whatsoever to gain access to such information including any information relating to any other Member or trading activity.'" *Id.* The letter concluded by stating that the Trust "has no right to demand any disclosures in connection with these two entities. Op. at 6 (citing A403).

On September 13, 2016, the Trust sent a formal demand (the "Demand"). A405-A407. The Demand requested access to essentially every document of the Funds, with no time period limitation. A406. The Demand also set forth the Trust's purported purposes for requesting the documents, including valuation of her membership interests and investigation of potential mismanagement. A404-A405; *See also* A22, ¶ 2 (Compl.).

With respect to mismanagement, the Demand set forth the following basis to suspect mismanagement:

> (i) the fact that the LLC Investments, which were originally scheduled to be limited duration investment entities, continue to be open past the targeted liquidation date; (ii) the fact that she has not been given the opportunity to liquidate her interest in the LLC Investments while numerous other investors have been given the opportunity; (iii) the fact that other investors [sic] liquidations have occurred during the wind-down phase and coincided with the onboarding of new investors to the funds; (iv) the fact that she has had no access to the board meetings, or meeting minutes of the LLC Investments for the past several years; (v) the lack of transparency into the financial condition of the LLC Investments, including with respect to significant, unexplained losses; (vi) concerns regarding the shift of investment focus of [Pope I] and [Pope II] during the wind-down phase that is inconsistent with the investor disclosure statements, both current and at the time of the investment; and (vii) the lack of responsiveness to multiple attempts to obtain access to the books and records of the entities over the last couple of months.

A405.

There were several issues with Abrams' purported credible bases for mismanagement. For example: (i) only Pope I went beyond its targeted liquidation date (though its term was extended) the term of Pope II has not expired, and CAHA has no term;[1] (ii) Abrams never requested to liquidate her investment;[2] (iii) there were no new investors during the wind-down phase, no liquidations since 2012 and no member exit since 2014;[3] (iv) because each of the Funds only had one manager, they were not required to hold board meetings, thus, no meeting minutes

[1] *See* A222, § 2.03(b) (CAHA);§ A249, § 2.03(b) (Pope I); A279, § 2.03(b) (Pope II).
[2] A48-A49, A52 (M. Abrams Tr. at 30:18-31:4, 34:5-10).
[3] A143 (Def. Pre-Trial Brief).

existed;[4] (v) the operating agreement provided the Manager with full discretion over investments, thus there was no justiciable mismanagement issue,[5] and (vi) the Funds' investment focus never shifted.[6]

Moreover, Abrams testified at her January 4, 2017 deposition that she "was not alleging anything" against the Manager. A58-A59 (M. Abrams Tr. at 75:25-76:5). Abrams also testified that she was not interested in the Funds' membership lists ***and had no reason to request them***:

> "Q. … You are not really interested in learning the names of the other members of these LLC's, are you?
>
> A. ***I am not interested in names of the other people unless there were some reason that I should know them, which I am not aware.***"[7]

Section 3.01(c) of the Pope I and Pope II Operating Agreements provide for the confidential treatment of:

> information which the manager reasonably believes to be in the nature of trade secrets or other information the disclosure of which the manager believes is not in the best interest of the company or could damage the company or its business or which the company is required by law agreement for a third party to keep confidential.

A250, A280.

Section 3.01(d) of the operating agreements states:

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[4] A229, § 5.06(b) (CAHA); A257, § 5.06(b) (Pope I); A288, § 5.06(b) (Pope II).
[5] A231, § 5.11 (CAHA); A259, § 5.11(Pope I); A290, § 5.11 (Pope II).
[6] A66-A67 (McCandless Tr. at 59:8-60:40)
[7] A58 (emphasis added). (M. Abrams Tr. at 75:16-24).

> (d) Each member agrees that the manager shall be entitled to preserve the confidentiality of the information contained in the books and records of the company to the maximum extent permitted by law, and each member waives, and covenants not to assert, any claim or entitlement whatsoever to gain access to any such information, including any information relating to any other member or the company's trading activity.

Id.

In response to the Demand, on September 26, 2017, the Manager produced 431 pages of Abrams' quarterly statements, distributions and communications to investors by the Manager regarding the status of their investments. A184.

Abrams commenced an action in Chancery Court on October 17, 2016.

D. The Post-Trial Ruling

On March 21, 2017, the Chancery Court issued its post-trial ruling. Among other things, the Chancery Court found that Abrams had asserted proper purposes with respect to her valuation and mismanagement purposes, as well as with respect to the member lists. Op. at 7-10. The court below noted that while "[t]here may be some relationship between the Southern litigation and Abrams' newfound interest in her investment …that does not mean her primary purpose is to harass the manager." *Id.* at 10.

The Chancery Court further found that Abrams was "entitled to all of the documents she sought …." *Id.* at 11. With respect to her mismanagement claims, the Chancery Court found that documents related to the Multivir loans and the loan

from Pope I to Pope II were necessary and essential. *Id.* The Chancery Court did not place any limitation on the scope of the look-back period for any of the documents ordered to be produced. *See generally* Op. The Chancery Court also ordered production of the member lists, finding that the Funds were not entitled to keep the lists confidential. *Id.* at 11-14.

Lastly, the Chancery Court found that the record as a whole led to a conclusion that Funds had acted in bad faith and awarded Abrams all of her reasonable costs, including attorneys' fees and expenses. *Id.* at 16. The court below held that Abrams "had a 'clearly defined and established right' to inspect the funds' books and records." *Id.* at 14. The Chancery Court stated that Abrams articulated numerous facially valid purposes for her inspection." *Id.* While not addressing the Funds' concerns regarding Abrams' purported purposes, the Chancery Court found that the Funds had used confidentiality concerns "as a pretext to broadly deny Abrams her legal right to inspect books and records." *Id.*

The Chancery Court further found that the "funds' blanket assertion of confidentiality forced Mrs. Abrams to bring this action and litigate through trial" and that "[i]nstead of cooperating, the funds quibbled with the measured tone of the expert report, claimed that the requested documents remained 'too vague and broad'" and designated all valuation reports confidential. *Id.* at 15-16. The

Chancery Court further held that the Funds' assertion that Abrams had litigated in bad faith was unwarranted and was another basis for awarding fees. *Id.*

E. The Motion for Clarification and Reargument and the Final Order

The Funds timely filed a motion for clarification and reargument (the "Reargument Motion") under Chancery Court Rule 59(f). On May 6, 2017, the Chancery Court issued the Reargument Order and denied the Reargument Motion. Nevertheless, the Reargument Order clarified several points of the Op. raised by the Funds. Reargument Order at 2-5. The Chancery Court also faulted the Funds on two points of clarification: (1) for the documents to be produced, the Chancery Court found that the Funds had misrepresented the Op. and record; (2) for the look-back period, the Chancery Court found that the issue could have been resolved without submission to the Court. *Id.* at 2-3.

As to reconsideration of the bad faith finding, the Chancery Court rejected the Funds' overbreadth argument, finding "an obligation on the Company to be constructive" and determine an appropriate scope of inspection. *Id.* at 5. The Chancery Court further found that the Funds' arguments regarding their defense of Abrams' mismanagement claims misrepresented the factual record and that the "fact that Abrams did not pursue all of her allegation of mismanagement at trial … does not change matters." *Id.* at 5-6. The Chancery Court also held that the Funds should have provided the member lists prior to Mrs. Abrams' deposition, that they

"failed to offer any sound explanation linking Abrams' books and records demand to the [SAM Litigation]" and that they used confidentiality "as a pretext to deny Abrams her right [to] inspect books and records. *Id.* at 6-7. The Chancery Court further found that, since Abrams had a clearly defined and established right to inspect the books and records, a full—rather than partial—award of attorneys' fees was appropriate. *Id.* at 7-8.

The Chancery Court further found that the Funds "continued to demonstrate bad faith in the prosecution of [the Reargument Motion] by rehashing arguments already rejected by this court, misrepresenting the factual record and asking the court to clarify issues that could have easily been resolved by first contacting opposing counsel." *Id.* at 8. Abrams was thus awarded her attorneys' fees and costs incurred in responding to the Reargument Motion.

On May 9, 2017, the Chancery Court issued the Final Order.

F. The Fee Order

On May 26, 2017, the Chancery Court issued the Fee Order. The Fee Order reduced Abrams' request for $436,061.28 in fees and expenses to $317,717.20. Specifically, the order reduced Abrams' claim for $354,818.58 in fees to $261,362.00 and Abrams' claim for $81,242.70 in expenses to $56,355.20. *See* Fee Order at 3-7.

The Funds' timely appealed the Fee Order and Final Order by filing this appeal on June 23, 2017.

ARGUMENT

I. THE FUNDS ACTED IN GOOD FAITH IN DENYING ABRAMS' REQUEST FOR INSPECTION AND COPYING OF BOOKS AND RECORDS, BOTH AT THE OUTSET AND DURING THE LITIGATION.

A. Question Presented.

Whether the court below erred as a matter of law in holding that Abrams had a "clearly defined and established right" to inspect the Funds' books and records and abused its discretion in awarding Abrams attorneys' fees and costs when the Funds' made a good faith challenge to Abrams' primary purpose for inspection, good faith arguments that Abrams abandoned certain of her purported purposes, and that Abrams failed to prove certain of her purported basis for alleging a credible basis for mismanagement. Op. at 9; A151-164, A679-A685.

B. Scope of Review.

This Court reviews an award of attorneys' fees for abuse of discretion, but reviews *de novo* the legal principles applicable to that decision. *Alaska Elec. Pension Fund v. Brown*, 941 A.2d 1011, 1015 (Del. 2007) (citing *Dover Historical Soc. Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1089 (Del. 2006)). A court "abuses its discretion when it exceeds the bounds of reason in light of the circumstances or when it ignores the rules of law or practices in a manner that creates injustice." *Schultz v. Ginsburg*, 965 A.2d 661, 667 (Del. 2009).

C. Merits of Argument.

A proper purpose must be the member's primary purpose for seeking inspection of a company's books and records. *See Caspian Select Credit Master Fund Ltd. v. Key Plastics Corp.*, 2014 Del. Ch. Lexis 26, at *9-*10 (Del. Ch. Feb. 24, 2014). "Stockholders may have multiple purposes for demanding inspection of a corporation's books and records, and the Court may inquire into the *bona fides* of the stockholder's primary purpose." *Quantum Tech. Partners IV, L.P. v. Ploom, Inc.*, 2014 Del. Ch. LEXIS 78, at *25 (Del. Ch. May 28, 2014). Indeed, "[a] corporate defendant may resist demand where it shows that the stockholder's stated proper purpose is not the actual purpose for the demand. . . ." *Pershing Square, L.P. v. Ceridian Corp.*, 923 A.2d 810, 817 (Del. Ch. 2007). Where a colorable basis exists to challenge a proper purpose, that challenge cannot be said to have been made in bad faith. *Cf. Mickman v. Am. Int'l Processing, LLC*, 2009 Del. Ch. LEXIS 134, at *15 (Del. Ch. Jul. 28, 2009).

For the bad faith exception to the American Rule to apply, "a court must find that a party acted in bad faith using the 'clear evidence' standard of proof." *Nichols v. Chrysler Group LLC*, 2010 Del. Ch. LEXIS 251, at *9 (Del. Ch. Dec. 29, 2010) (quotation omitted). "[T]he bad faith exception applies only in extraordinary cases, and the party seeking to invoke that exception must demonstrate by clear evidence that the party from whom fees are sought . . . acted

in subjective bad faith." *Lawson v. State*, 91 A.3d 544, 552 (Del. 2014) (internal quotations omitted) (citation omitted). "[T]o constitute bad faith … the defendants' action must rise to a high level of egregiousness." *FGC Holdings Ltd. v. Teltronics, Inc.*, 2007 Del. Ch. LEXIS 14, at *16 (Del. Ch. Jan. 22, 2007) (quotation omitted).

"A party engages in 'bad faith' sufficient for awarding attorneys fees to its opponent when it (i) defends the action despite knowledge there is no valid defense, (ii) delays the litigation and asserted frivolous motions, (iii) falsifies evidence, and (iv) changes his or her testimony to suit his or her needs." *P.J. Bale v. Rapuano*, 2005 Del. LEXIS 459, at *4 (Del. Nov. 17, 2005). "Generally, a party acting merely under an incorrect perception of its legal rights does not engage in bad-faith conduct; rather, the party's conduct must demonstrate 'an abuse of the judicial process and clearly evidence[] bad faith.'" *LeCrenier v. Cent. Oil Asphalt Corp.*, 2010 Del. Ch. LEXIS 246, at *19 (Del. Ch. Dec. 22, 2010) (citations omitted).

The Chancery "Court does not lightly award attorneys' fees under [the bad faith] exception, and has limited its application to situations in which a party acted vexatiously, wantonly, or for oppressive reasons." *Postorivo v. AG Paintball Holdings, Inc.*, 2008 Del. Ch. LEXIS 120, at *85 (Del. Ch. Aug. 20, 2008). The Chancery Court has acknowledged that "a stockholder … frequently encounters

challenges to his purpose for a Section 220 demand." *Norman v. US MobilComm, Inc.*, 2006 Del. Ch. LEXIS 81, at *14 (Del. Ch. Apr. 28, 2006). While such challenges are not always successful, that does not mean that they were brought in bad faith.

The Chancery Court erred as a matter of law in finding that Abrams "has a 'clearly defined and established right' to inspect the funds' books and records." Op. at 14. Neither the Op. nor the Reargument Order found that the Funds acted in bad faith in contending that Abrams' asserted purposes for inspection were not her primary purposes. The Chancery Court itself acknowledged a linkage between the Demand and the SAM Litigation when it stated: "[T]here may be some relationship to the Southern litigation and Mrs. Abrams' newfound interest in her investment …." Op. at 10. The Funds' challenge to Abrams' asserted purposes does not rise to the "high level of egregiousness" required for a bad faith finding. *FGC*, 2007 Del. Ch. LEXIS 14, at *16.

The Funds asserted a good faith challenge that Abrams' primary purposes were to value her membership interests and to investigate claims of mismanagement. The Funds initially set forth their first good faith basis to challenge the primacy of Abrams' asserted purposes—retaliation due to the SAM Litigation—in an August 19, 2016 letter. *See* A398. The overbreadth of the request—which asked for essentially every document in the Funds' possession

since 2006, was further indicia that Abrams' asserted purposes were not her primary ones. *Id.* The Funds' lone witness testified at trial:

> the initial requests for the books and records demands … appeared to be unreasonable and overly broad, not to mention the fact that they came subsequent to the timing of the introduction of the litigation between [SAM] and CV Holdings. So that we were cautious in terms of providing information, especially when we believe the appearance of the lawsuit at the time was likely an expedition to get additional information for ulterior motives and purposes.

A649 (Trial Tr. at 167:8-18 (McCandless)). In its subsequent letters, up to and including the Demand, Abrams never narrowed her requests and disputed that the SAM Litigation was a motivating factor behind the inspection requests. The Funds therefore believed they had a justifiable basis for denying access to the books and records. That the Chancery Court found they were incorrect in that belief should not lead to a bad faith finding. *LeCrenier*, 2010 Del. Ch. LEXIS 246, at *19.

Additionally, the Funds had every right to challenge the primacy of Abrams' stated purposes once the litigation was commenced. *See Quantum Tech.*, 2014 Del. Ch. LEXIS 78, at *25 (Court may inquire into the *bona fides* of the stockholder's primary purpose). The Chancery Court acknowledged a relationship between the SAM Litigation and the records request, but held that it did not mean that the purpose of the litigation was to harass the Manager. Op. at 10. Though the Funds' argument "may not have been a 'winning' one, it was nonetheless present." *P.J. Bale*, 2005 Del. LEXIS 459, at *6.

Indeed, there was no clear evidence that the Funds acted in subjective bad faith, as required by *Lawson*, 91 A.3d at 552, and it is unclear if the Chancery Court even applied this standard. Abrams initiated her requests for inspection after the SAM Litigation commenced, having never previously asked for such detailed information. The law firm representing Abrams in the books and records action was the same law firm representing her husband in the SAM Litigation. Other people advising Abrams with respect to the books and records demands were also affiliated with her husband and the entity adverse to the Manager in the SAM Litigation. Abrams had never before questioned the value of her holdings in the Funds. Knowing or suspecting these facts at the time of Abrams' initial requests and the Demand, it is not unreasonable for the Funds to have concluded that the SAM Litigation and harassment of the Manager was the primary purpose for the inspection requests.

But it was not merely the existence of the SAM Litigation that led the Funds to believe that Abrams' asserted purposes were not her primary ones. As noted above, Abrams' document request appeared overly broad and unreasonable. A648 (Trial Tr. at 167:8-20 (McCandless)). The Demand requested essentially every document in the Funds' possession, for all time. A406-A407.[8] Nevertheless,

[8] It was not until a few days before trial that Abrams', through her expert, first referenced the possibility of only looking back five years, rather than ten or more. A215 (Seitz Tr. at 105:8-12).

without conceding that her purposes were proper, after the Demand, the Manager produced 431 pages of Abrams' quarterly statements, distributions and communications to investors by the Manager regarding the status of their investments. A184.[9] Still, coupled with the SAM Litigation, the scope of the Demand appeared to confirm the Funds' suspicions that its true purpose was to harass the Manager, providing a credible basis to challenge Abrams' purposes. A130; A648 (Trial Tr. at 167:8-20 (McCandless)). *See CM & M Gp., Inc. v. Carroll*, 453 A.2d 788, 792 (Del. 1982) (member's purpose may not be to harass a company).

Further indicia that Abrams' asserted purposes were not her primary ones was that several of the Demand's allegations of mismanagement—including that Abrams was not given an opportunity to liquidate her investments—[10] had no basis in fact. *See* A157-A166 (Def. Pre-Trial Br.). The Funds also argued, in good faith, that the requests related to mismanagement were overbroad, including not being limited to time period. *See* A166-167. Nor, given the factual inaccuracies of many of the purported basis, did Abrams have a "clearly established right" to the documents she was requesting. While "[i]t is well settled that an investigation of waste and mismanagement is a proper purpose for the inspection of books and

[9] The Chancery Court incorrectly found that the Manager "refused to provide any documents" to Abrams. Op. at 6.

[10] *See* A48-A49, A52 (M. Abrams Tr. at 30:18-31:4, 34:5-10) (testifying that she never requested any of the Trust's accounts be liquidated).

records …[t]his does not mean, however, that a stockholder who demands books and records for the purpose of investigating corporate waste and mismanagement has a clear right to those documents." *Norman v. US*, 2006 Del. Ch. LEXIS 81, at *12-*13. For example, in order for a claim of mismanagement to be a proper purpose, "the corporate wrongdoing which he seeks to investigate must necessarily be justiciable." *SEPTA v. AbbVie*, 2015 Del. Ch. LEXIS 110, at *41 (Del. Ch. Apr. 15, 2015).

Here, the Funds asserted good faith arguments for why the purported claims of mismanagement set forth in the Demand and Complaint were not justiciable. *See* A158-A166 (Def. Pre-Trial Br.). The Funds noted that their operating agreements do not require board meetings where, as is the case with the Funds, there is only one manager; thus, the failure to hold board meetings could not support a claim of mismanagement. A159. With respect to the denial of access to information regarding the Funds' financial condition, the Funds questioned how the mere denial of Abrams' books and records request could constitute a basis for mismanagement, since such a finding would mean any denial of a books and records request would support a credible basis to infer mismanagement. A160. The Funds further noted that the Manager had full discretion over investment decisions and was fully immunized by the Funds' operating agreements with respect to the "significant and unexplained losses" for which Abrams was alleging

inferred mismanagement. *Id.* With respect to the purported shifting of investment focus as a basis for mismanagement, the Funds explained why no such shift occurred. A161-A163. With respect to the purported failure to liquidate the Funds, the Funds showed that only Pope I's initial term had expired, and thus, the allegation could not support a claim of mismanagement against Pope II or CAHA. A163. For Pope I, the Funds explained why there was no justiciable action for the failure to timely liquidate because, though the member extensions were all dated after the end of Pope I's term, 6 *Del. C.* § 18-806 set forth the process for revocation of a dissolution, which took place here. A163-A164. Finally, the Funds explained that there was no basis in fact for Abrams' assertion that other members were given the opportunity to liquidate, while she was not and that no members liquidated during the wind-down phase and no new members were added during this period. A165-A166. Indeed, Abrams testified that she *never requested her accounts be liquidated,*[11] and that she had no knowledge of any investors who liquidated their investments or who joined during the wind-down period.[12] Each of these arguments provided a colorable basis to challenge Abrams' purported credible bases to infer mismanagement.

In *Mickman v. Am. Int'l Processing, LLC*, the defendants took the position that the plaintiff was not a member of defendant LFF and, therefore was not

[11] A48-A49, A52 (M. Abrams Tr. at 30:18-31:4, 34:5-10).
[12] A52-A55 (M. Abrams Tr. at 34:19-37:2).

entitled to inspect its general ledger pursuant to 6 *Del. C.* § 18-305. 2009 Del. Ch. LEXIS 134 (Del. Ch. Jul. 28, 2009). Defendants asserted that plaintiff was not a member because, while plaintiff was listed as a member on LFF's 2001 tax return and under the schedule K-1 filed by LFF for 2001, her name was omitted from the list of members in LFF's operating agreement. *Id.* at *15. The Chancery Court held that "because Defendants had at least a colorable basis for denying Plaintiff is a member of LFF, she lacks a 'clearly defined and established interest' to inspect LFF's books and records." *Id*.

The same is true here. The Funds had a colorable basis to allege that Abrams' asserted purposes were not her primary purposes. This colorable basis, as noted by the Chancery Court in *Mickman*, is sufficient to defeat the assertion that Abrams had a clearly defined and established interest to inspect the Funds' books and records. The Chancery Court erred as a matter of law in finding that Abrams had a clearly established right to the books and records related to mismanagement.

In *Sutherland v. Sutherland*, the Chancery Court addressed, among other things, whether corporate offers acted in bad faith by refusing the plaintiff's request for books and records and by contesting the subsequently filed action to obtain the documents. 2010 Del. Ch. LEXIS 88, at *56 (Del. Ch. May 3, 2010). In finding that the defendants did not act in bad faith, the Chancery Court noted the "very personal and acrimonious nature of the dispute" and "recognized the

existence of several improper purposes that possibly motivated [Plaintiff's] efforts to access the Companies' information …." *Id.* at *58. The Chancery Court noted that the defendants formed a good faith belief in the validity of their defenses following discussions with their attorneys. *Id.* In support of this statement, the Chancery Court found that the defendants had succeeded in limiting the scope of production from seven years to one year. *Id.* at n. 114.

Here, the Funds succeeded in limiting the scope of Abrams' valuation-related requests from over ten years to five. *See* Reargument Order at 3. Thus, the Funds had good faith arguments for challenging the scope of Abrams' requests. Moreover, the first time a look-back period of five years was mentioned was when Abrams' expert testified at his deposition on March 1, 2017;[13] such a limitation was not present in the expert report. *See generally* A72-A89. It was not until trial on March 6, 2017 that Abrams appeared to agree with this five-year limitation suggested by the expert. *See* A509, (Trial Tr. at 97:11-15 (Seitz)).[14] The Funds thus did not prolong the litigation by disputing the look-back period. Challenging the look-back period, therefore cannot be evidence of bad faith. *Sutherland*, 2010 Del. Ch. LEXIS 88, at *56.

[13] *See* A215 (Seitz Tr. at 105:8-12).

[14] In their pre-trial brief and at trial, the Funds took the position that three years of financial information was sufficient. *See* A169-A170; A532 (Trial Tr. at 120:10-15 (McCandless)).

The Funds also had colorable arguments to challenge Abrams' request for the member lists. First, as with all of her requests, the Funds believed that Abrams was requesting the member lists for an improper purpose. Second, Abrams testified at her deposition that she was not seeking the membership lists. A58 (Abrams Tr. at 75:21-24) ("I am not interested in the names of the other people unless there were some reason that I should know them, which I am not aware."). That Abrams changed her testimony at trial does not mean that the Funds were litigating the issue of the member lists in bad faith. At trial, Abrams testified that, *as she was walking home from the deposition*, she remembered that she would like to communicate with the members. A449 (Trial Tr. at 37:10-24 (Abrams)). Despite this, Abrams did not amend her deposition testimony, as she was permitted to under Chancery Court Rule 30(e). Instead, she allowed the Funds to operate under the assumption that she had no basis to seek the member lists. The Funds cannot be said to have acted in bad faith by not providing that which Abrams said she was not seeking.

Nevertheless, in the Reargument Order, the Chancery Court stated that the Funds should have provided the member lists prior to her deposition. Reargument Order at 6-7. However, because the Funds had a colorable basis to challenge the *bona fides* of Abrams' purported purposes, including the request for the member lists, the Funds acted in good faith in refusing to provide the members lists prior to

and after her deposition. The failure to provide the lists certainly does not rise to the high level of egregiousness to necessitate a bad faith finding. The Chancery Court misinterpreted the law and abused its discretion when it made this finding.

Additionally, the Funds' substantive challenge to the mismanagement claims was also made and good faith, leading to Abrams' changing her mismanagement claims. In her Demand, Abrams alleged seven different alleged bases for mismanagement. A405. By the time of trial, Abrams was alleging only three credible bases for mismanagement: (1) the failure to timely liquidate Pope I, (2) the Manager's connections to Pope II's largest position, a company called Multivir, and a loan made by the president of the Manager to Multivir, and (3) loans made by Pope I to Pope II. *See* A118-A120 (Pl. Pre-Trial Br.). Abrams was no longer requesting documents related to her other purported basis for mismanagement. *See* A120-A121 (*Id.*). Thus, the Funds successfully challenged many of Abrams' initial demands. This success is evidence that the Funds' challenges were made in good faith.

Although the Reargument Order stated that Abrams' "core allegations" of mismanagement remained constant throughout the proceedings and the failure to pursue all of its allegations of mismanagement at trial "does not change matters,"[15] the Funds respectfully submit that the Chancery Court was factually and legally

[15] Reargument Order at 5-6.

incorrect on this point and abused its discretion in finding that the Funds acted in bad faith in litigating Abrams' mismanagement claims.

The Chancery Court asserted that "[t]hrough trial, Abrams alleged the following grounds for suspecting mismanagement that were also alleged in the Complaint: "(a) failing … to hold and/or provide board meetings and meeting minutes; (b) denying Plaintiff access to information regarding Defendants' financial condition, including with respect to significant, unexplained losses; (c) shifting investment focus of [Pope I] and [Pope II] during their purported wind-down phase …."; (d) failing to liquidate Defendants" and referred to these arguments as "Abrams' core arguments." Reargument Order at 5-6 (citing A22-23) (Complaint). This is incorrect.

While it is true that Abrams' Complaint made those allegations, other than the failure to timely liquidate Pope I (which the Funds never claimed was abandoned in Abrams' brief or at trial),[16] they were not her core arguments in Abrams' Pre-Trial Brief or at trial. *See* A117-A120 (Pl. Pre-Trial Br.). Instead, Abrams' Pre-Trial Brief focused on a personal loan made by the President of the Manager to one of Pope II's investments and a loan made by Pope I to Pope II. *Id.*

Neither the Pre-Trial Order, nor Abrams' Pre-Trial Brief discuss the Funds' failure to hold annual meetings or provide board meeting minutes as a basis for

[16] *See* A681, ¶ 23.

mismanagement. *See generally* A19-20 (Pre-Trial Order); A117-120 (Pl. Pre-Trial Br.).[17] Moreover, while the Demand requested "true and correct copies of all Defendants' board meeting minutes," *see* A30 (Complaint at 10), Abrams was no longer requesting board meeting minutes at the time of trial. *See* A120 (Pl. Pre-trial Br.). The Funds discussed, *supra* at pp. 11, 25, why no board meetings were held (and therefore no meetings existed).

The same is true with respect to the allegation of a "shifting investment focus" as a basis for mismanagement. This argument is not asserted in either the Pre-Trial Order or Abrams' Pre-Trial Brief, nor was any shift discussed at trial, or in the Op. Nor has there ever been any specification as to how the Funds' investment focus has shifted. The only testimony on this point came from the Funds' witness, who testified that the Funds' investment focus had not changed. *See* A66-A67 (McCandless Tr. at 59:8-60:40). *See also* A161-A163 (Def. Pre-Trial Br.).

Additionally, the Funds made good faith arguments that Abrams abandoned her original claims of mismanagement when, during her deposition, Abrams stated that she was "not alleging anything against Mr. Wells." A157-A158 (Def. Pre-Trial Br.). The Chancery Court discounted this testimony by stating that Abrams

[17] There was one member request for a list of members of Pope II to call for a special meeting or request the Manager hold an annual meeting, which was brought up at trial, but that request was made *after* the Demand was made A661-633 (McCandless Trial Testimony at 179:10-180:24) (citing A409).

is 80 years old and that "[s]he made this statement two hours into her deposition at the end of a long line of skillful questioning." Op. at 9. However, the Chancery Court did not find that the Funds acted in bad faith in relying on Abrams' deposition testimony. Indeed, this statement, together with Abrams' testimony during her deposition that she was not aware of any reason to request the member lists validated the Funds' good faith belief that investigating mismanagement was not a primary purpose of Abrams' Demand and did not prolong the litigation. As in *P.J. Bale*, where the Supreme Court affirmed the Chancery Court finding that despite the appellees' argument not being a "winning one", there was a colorable basis for it, so too here was there a colorable basis for the Funds' arguments challenging Abrams' mismanagement claims. 2005 Del. LEXIS 459, at *6 (quotation omitted).

The Chancery Court incorrectly devoted much of its bad faith finding to the Funds' assertion of confidentiality over the books and records. Op. at 15. Confidentiality, however, was not the Funds' primary basis for denying access to the books and records. The SAM Litigation and the overbreadth of the request was first raised in the Funds' August 19, 2016 letter. A396. Confidentiality was not raised until the Funds' August 30, 2016 letter. A403. Additionally, the Funds acknowledged during the litigation that confidentiality did not protect all of the documents sought by Abrams. A152 (Def. Pre-Trial Br.) (noting that "[t]he

Manager has not designated all information regarding the Funds as confidential ….").

Nevertheless, the Manager's assertion of confidentiality was also made in good faith. The confidentiality designations were based on Sections 3.01(c) and 3.01(d) of the Pope I and Pope II Operating Agreements, and 6 *Del. C.* 18-305(c) with respect to CAHA. In particular, the Manager relied both on the ability to keep information confidential from Members for a limited period of time if he believed that it was not in the best interests of the company or could damage the company, and on the members'—including Abrams'—agreement pursuant to Section 3.01(d), waiving any right to gain access to such information, "including information relating to any other Member or the Company's trading activity." A250, A280 This assertion was made in letter by the Funds' legal counsel. A398. *Cf. Sutherland*, 2010 Del. Ch. LEXIS 88, at *56. Although the Funds may have been acting "under an incorrect perception of its legal rights" that does not mean that they "engage[d] in bad-faith conduct." *LeCrenier*, 2010 Del. Ch. LEXIS 246, at *19. Moreover, as set forth above, contrary to the Chancery Court's finding, *see* Op. at 15, the assertion of confidentiality was not the only reason why this action was litigated through trial.

The Chancery Court also erred when it misinterpreted the Funds' vagueness argument. The Chancery Court wrote:

> The funds take the extreme position that because Mrs. Abrams' valuation expert stated that certain documents "would make sense to review," or "would appear to be the starting point" in valuing the funds, nearly all of Mrs. Abrams' requests are "too vague to achieve [her] purpose." Dkt. 30 at 45. This position exemplifies the funds' uncompromising approach, which unnecessarily prolonged this litigation.

Op. at 10. The Chancery Court used this as a basis for its bad faith finding. *Id.* at 16. In actuality, Defendants were referring to the *categories* of documents suggested by the expert, such as "the system and underlying support for the Portfolio Center reports," "documentation for accounting process" and "support for the accounting matters …" as not providing the rifled precision required for books and records requests. A168-169 (Def. Pre-Trial Br.). Moreover, Defendants' pre-trial brief was filed prior to Defendants having the opportunity to depose the expert witness. A169, n. 80 (*Id.*). The Funds' challenge to the scope and vagueness of the document requests was not made in bad faith, but was rather zealous advocacy that Abrams had not satisfied her burden to request documents with the necessary "rifled precision." A169. The Funds' conduct during the litigation does not rise to the high level of egregiousness typically found in a bad faith finding.

Finally, the Chancery Court erred in finding that fee shifting was further warranted because the Funds accused Abrams of bad faith litigation conduct. *See* Op. at 16; Reargument Order at 8. While it is true that parties should be circumspect before moving for fee shifting, the Funds had a good faith basis to

argue that at least partial fee shifting was appropriate because Abrams unequivocally stated that she was not interested in and knew of no reason why she needed the membership lists and had no basis for many of the mismanagement allegations in her Demand and Complaint. A175 (Def. Pre-Trial Br.). The Chancery Court therefore abused its discretion in shifting fees due to the Funds' assertion that Abrams litigation conduct was also in bad faith.

As there is no clear evidence that Abrams had a "clearly defined and established right" or that the Funds asserted their defenses to the books and records request in bad faith, the Chancery Court's ruling must be reversed.

II. THE FUNDS ACTED IN GOOD FAITH IN REQUESTING CLARIFICATION AND REARGUMENT OF THE POST-TRIAL RULING.

A. Question Presented.

Whether the court below erred as a matter of fact and law and abused its discretion in finding that the Funds acted in bad faith in filing the Reargument Motion and shifting fees to Abrams when the Funds had legitimate basis for bringing the Reargument Motion. Reargument Order at 8; A674-A691.

B. Scope of Review.

The scope of review is the same as set forth in Argument Section I, *supra*.

C. Merits of Argument.

The Chancery Court incorrectly found that the Funds "continued to act in bad faith in the prosecution of [the Reargument Motion] by rehashing arguments already rejected by the court, misrepresenting the factual record, and asking the court to clarify issues that could have been easily resolved by first contacting opposing counsel." Reargument Order at 8. A motion for clarification may be granted "where the Court's ruling is unclear." *Gore v. Al Jazeera Am. Hldgs. I, Inc.*, 2015 WL 721068, at *1 n.1 (Del. Ch. Feb. 19, 2015). A motion for reargument will be granted when the court "misapprehended the law or the facts so that the outcome of the decision would be affected." *In re OM Gp., Inc. S'holders Litig.*, 2016 WL 7338590, at *2 (Del. Ch. Dec. 16, 2016) (quotation omitted). Through the Reargument Motion, the Funds listed several areas where they

believed the Op. to be unclear and, in fact, the Chancery Court clarified portions of the Op. *See* Reargument Order at 3-4. Additionally, the Funds argued in good faith that it would be a manifest injustice to shift all of Abrams' fees and expenses to the Funds and, further that the Chancery Court did not consider the Funds' good faith bases for opposing Abrams' books and records requests. The Chancery Court therefore erred as a matter of law and abused its discretion in finding that the Reargument Motion was brought in bad faith.

The Chancery Court set the stage for its ruling by incorrectly stating that the Funds "claim that the Order requires the defendants to produce documents different than those requested in the Pre-Trial Order" and that "[t]his claim misrepresents the Order and the record in this case." Reargument Order at 2. The Funds made no such argument. Rather the Op. held that Abrams "is entitled to all of the documents she sought …," Op. at 11, and the Reargument Motion requested clarification as to whether the term "all of the documents she sought" referred to the documents listed in the Pre-Trial Order or the specific listing of documents in Abrams' *Pre-Trial Brief*. *See* A676-A678. As the Funds noted, the documents demanded in Abrams' *Pre-Trial Brief* were different from those in the Pre-Trial Order and the Demand, as they were more specific, than those listed in the Pre-Trial Order.[18] *Id.* The Chancery Court therefore erred as a matter of fact and

[18] The Reargument Motion also noted that the Demand only requested lists of

abused its discretion in finding that the Funds misrepresented Op. and record with respect to the documents ordered to be produced.

Moreover, although styled as an *Order Denying Defendants' Motion for Reargument and Clarification*, the Reargument Order actually clarified several parts of the Op. The Reargument Order clarified: (1) that the categories of documents listed in the Pre-Trial Order, not the more limited documents listed in Abrams' Pre-Trial Brief must be produced; (2) that the parties would work constructively with respect to the catchall category of "any other books and records … and other documents related to the business and affairs" of the Funds; (3) that the look-back period for valuation-related documents would be five years; (4) that lists containing current and former members must be produced; (5) that the Funds could exclude members' K-1s included with the federal tax returns they were ordered to produce; and (6) that production of the documents would not be conditioned on the execution of an appropriate confidentiality order. *See* Reargument Order at 2-5. Indeed, the Op. had been completely silent as to the look-back period, whether K-1s needed to be produced or whether a confidentiality order could be required. *See generally* Op. That the Chancery Court made such clarifications shows—as a matter of law—that the Funds' requests were not made

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"current" members, while the Pre-Trial Order requested lists of "present or former" members, and the Pre-Trial Brief simply stated "member lists." A676-A677. Thus, the Reargument Motion requested clarification as to whether only lists of current members needed to be produced. A678.

in bad faith and that the Chancery Court and abused its discretion when it made that finding. The Funds' conduct does not rise to the "high level of egregiousness" required for a bad faith finding. *FGC*, 2007 Del. Ch. LEXIS 14, at *16

The Chancery Court also erred as a matter of law and abused its discretion in finding that the Funds acted in bad faith in not conferring with Abrams before filing the Reargument Motion because: (1) the Funds were under no obligation to confer with opposing counsel, and (2) the Funds' had just a short time after the issuance of the Op. to file the motion. There is no requirement that counsel meet and confer prior to filing a motion for clarification or reargument. *See* Chancery Court Rule 59(f). Other Chancery Court rules do require meeting and conferring with opposing counsel. *See* Chancery Court Rule 16(b) (requiring counsel to "confer in good faith effort to stipulate to the contents of the pretrial order."). Moreover, Chancery Court Rule 59(f) only allows five (5) days for the filing of a motion for reargument. *See* Rule 59(f). The Chancery Court's finding therefore "ignores the rules of law or practices in a manner that creates injustice." *Schultz v. Ginsburg*, 965 A.2d 661, 667 (Del. 2009). It would be unjust to place obligations on the Funds that are not in the Chancery Court rules, and then punish the Funds for not following the heretofore unknown requirements.

The Chancery Court again abused its discretion in finding that the Funds misrepresented the factual record in claiming "they had good faith arguments for

contesting Abrams' entitlement to inspect books and records because her allegations of mismanagement changed throughout the proceeding." Reargument Order at 5. As set forth above, Abrams' allegations of mismanagement did change, she was no longer pursuing the vast majority of her original mismanagement bases at trial, and the "core allegations" identified by the Chancery Court[19] were not her core allegations. *See* pp. 30-32, *supra*. The Chancery Court thus misapprehended the facts in its belief that Abrams' core claims of mismanagement involved failing to hold board meetings and a shifting investment focus. The Chancery Court misapprehended the law when it determined that denying access to information supported a credible basis for mismanagement, especially because the Funds had a good faith belief the Abrams' asserted purposes were not her primary ones.

It further misapprehended the law by determining that Abrams' abandonment of most of her claims of mismanagement "does not change the matters." *Id.* at 6. It does. The abandonment of these claims, for which there was no evidentiary support, bolstered the Funds' good faith argument that investigating mismanagement was not her primary purpose. Even if the court determined her primary purposes were proper, evidence of an improper ulterior motive could have supported the Chancery Court's limiting the scope of the books and records

[19] Reargument Order at 5.

requested. *See Quantum Tech.*, 2014 Del. Ch. LEXIS 78, at *25 (secondary purposes may be relevant in determining the scope of the inspection).

The Funds' actions in filing the Reargument Motion were not made in subjective bad faith, nor do they rise to a high level of egregiousness necessitating a bad faith finding. Accordingly, the Chancery Court's bad faith finding in the Reargument Motion and the award of attorneys' fees and expenses should be reversed.

III. IF FEES AND EXPENSES ARE APPROPRIATE, THEY SHOULD BE REDUCED.

A. Question Presented.

Whether the court below abused its discretion in awarding Abrams the full amount of her reasonable attorneys' fees instead of a partial award. Op. at 16; A686-687.

B. Scope of Review.

The scope of review is the same as set forth in Argument Section I, *supra*. "[T]he challenge of quantifying fee awards is entrusted to the trial judge and will not be disturbed on appeal in the absence of capriciousness or factual findings that are clearly wrong." *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1262 (Del. 2012).

C. Merits of Argument.

If this Court determines that the Funds acted in bad faith and that an award of attorneys' fees and expenses is appropriate, the amount awarded should be reduced. Here, the Chancery Court awarded Abrams all of her fees and expenses. *See* Final Order at ¶ 5. Although the Chancery Court reduced Abrams' fees and expenses, it did so not as a partial award, but on the basis that the fees sought were unreasonable for the entirety of the litigation. *See, generally,* Fee Order.

In *Ensing v. Ensing*, 2017 Del. Ch. LEXIS 41(Del. Ch. March 6, 2017), the Chancery Court awarded only partial fees to a plaintiff where defendant engaged in

bad faith conduct both prior to and during the litigation. *Id.* at *29-*30. Among other things, the plaintiff was forced to litigate the authenticity of a sham documents, including hiring an expert, filing pre- and post-trial briefs and introducing evidence at trial. *Id.* at *29-*33. The defendant also violated the court's status quo order, forced the plaintiff to depose him twice and intentionally ignored a court order to produce discovery relating to the sham documents, among other bad acts. *Id.* at *32. Even under those circumstances, the Chancery Court only awarded plaintiff two-thirds of her counsel fees. *Id.* at *33.

Here, Abrams abandoned several of her claims of mismanagement, and the Pope Fund successfully reduced the scope of several of Abrams' requests. Additionally, the level of the Funds' alleged bad faith was minimal compared to the type of egregious conduct typically found in cases where attorneys' fees have been awarded for bad faith conduct. The Chancery Court abused its discretion in awarding Abrams all of her reasonable attorneys fees' and expenses when in cases of far more egregious conduct, such as *Ensign*, only partial fees were awarded.

CONCLUSION

For the foregoing reasons, the Funds respectfully request that this Court reverse the Final Order and Fee Order and hold that: (1) the Funds' conduct was not in bad faith; and (2) shifting all of Abrams' reasonable attorneys' fees and costs is not warranted or (3) alternatively, that the amount of attorneys' fees should be reduced.

Respectfully submitted,

Dated: August 21, 2017
Wilmington, Delaware

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