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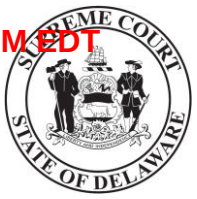

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SPENCER L. MURFEY, III as Co-Trustee for the Trust for the Benefit of Spencer L. Murfey, III, under the Power of Appointment Trust of Spencer L. Murfey, Jr., u/a/d August 1, 2002 and CYNTHIA H. MURFEY as Co-Trustee for the Trust for the Benefit of Cynthia H. Murfey, under the Power of Appointment Trust of Spencer L. Murfey, Jr., u/a/d August 1, 2002,

Plaintiffs Below
Appellants,

v.

WHC VENTURES, LLC, a Delaware limited liability company, WHC VENTURE 2009-1, L.P., a Delaware limited partnership, WHC VENTURES 2013, L.P., a Delaware limited partnership, and WHC VENTURES 2016, L.P., a Delaware limited partnership,

Defendants Below
Appellants.

PUBLIC VERSION

No. 294, 2019

Court Below: Court of Chancery of the State of Delaware

C.A. No. 2018-0652-MTZ

APPELLEES' SECOND CORRECTED ANSWERING BRIEF

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NATURE OF THE PROCEEDINGS

This is a case in which the plaintiffs sued the wrong defendants. Plaintiffs are each one of two co-trustees of two different trusts and are the beneficiaries of those trusts. The trusts are limited partners in three Delaware investment limited partnerships. Plaintiffs are unhappy with a decision that their current co-trustee and a predecessor trustee made in 2011 not to purchase a greater interest for each of the trusts in one of the subject partnerships. Instead of pursuing claims against those trustees, however, Spencer L. Murfey, III and Cynthia H. Murfey (the "Murfeys") made a books and records demand (the "Demand") and ultimately decided to commence a books and records action against the partnerships.

Before making the Demand, the Murfeys knew (i) what the 2011 decision was; (ii) who made the decision and (iii) why the decision was made. In fact, all of this information is set forth in (i) a 2011 email from the other current co-trustee on each trust and (ii) a 2018 email from that same current co-trustee to counsel for the Murfeys seven months before they commenced suit.

In response to the Demand, the partnerships (i) made all requested documents, including the Schedule K-1s of all the other limited partners (the "K-1s"), available to the Murfeys' expert for inspection; (ii) offered to let the Murfeys' expert re-inspect everything, including the K-1s; (iii) offered to let the Murfeys themselves inspect and review the K-1s and (iv) offered to, and then agreed to and did, allow the

Murfeys' expert and the Murfeys' counsel to obtain and keep copies of the K-1s. Notwithstanding the fact that the partnerships provided the Murfeys with almost everything for which they asked, the Murfeys commenced this lawsuit.

The parties agree that the sole issue presented at trial was whether the Murfeys are entitled to receive either (i) copies of the K-1s for each of the other approximately 62 limited partners in WHC Venture 2009-1, L.P. ("WHC 2009"), WHC Ventures 2013, L.P. ("WHC 2013") and WHC Ventures 2016, L.P. ("WHC 2016") (collectively the "Partnerships"), or (ii) information derived from the K-1s that leads to disclosure of any single individual limited partner's ownership interest or of any group of less than all of the limited partner's ownership interests in capital, profit or loss (collectively "the Information").

After trial, the Court of Chancery correctly found that the Murfeys were not entitled to the Information. The Court of Chancery saw through the Murfeys' pretext and realized that the Murfeys do not really have a dispute with the Partnerships. Rather, their dispute is with their current and former co-trustees. The Partnerships should be left out of that dispute, and the judgment of the Court of Chancery should be affirmed.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly held that the Murfeys were required to demonstrate that the K-1s were "necessary and essential" to the Murfeys' stated purpose of valuing the trusts' interests in the Partnerships.

2. Denied. The Court of Chancery did not abuse its discretion by holding, pursuant to Section 17-305 and the relevant partnership agreements (the "Partnership Agreements"), that the Murfeys failed to meet their burden of demonstrating that the K-1s were "necessary and essential" to their stated purpose.

3. Denied. The Court of Chancery properly admitted into evidence two emails from the co-trustee on each of the two trusts which were not hearsay and which were in the possession, custody or control of the trusts, but not produced in discovery by them.

4. Denied. Because the Court of Chancery denied the Murfeys access to the K-1s, the Court of Chancery did not consider whether the K-1s could be released from confidential treatment if produced. Accordingly, if necessary, the Court of Chancery should consider that issue in the first instance. In any event, the K-1s contain confidential personal information of other limited partners of the Partnerships. Such information is entitled to confidential treatment under Court of Chancery Rule 5.1.

5. Even if the Court determines that the Court of Chancery erred with

respect to its analysis of the "necessary and essential" requirement, the Court may still affirm the judgment because the Court of Chancery erred in finding that the Murfeys demonstrated a proper purpose.

STATEMENT OF FACTS

A. The Parties

The Trust for the Benefit of Spencer L. Murfey, III ("Spencer"), under the Power of Appointment Trust of Spencer L. Murfey, Jr., u/a/d August 1, 2002 (the "Spencer Trust"), and the Trust for the Benefit of Cynthia H. Murfey ("Cynthia"), under the Power of Appointment Trust of Spencer L. Murfey, Jr., u/a/d August 1, 2002 (the "Cynthia Trust") (together, the "Trusts") are each limited partners in the Partnerships. Each of the Murfeys is one of two co-trustees on his or her respective trust. The Murfeys have been co-trustees of their respective trusts since 2015. A1018.

Spencer replaced Maria Muth as co-trustee of the Spencer Trust. *Id*. Cynthia replaced Ms. Muth as co-trustee of the Cynthia Trust. *Id*. The other trustee on each trust is Homer Chisholm. Mr. Chisholm has been the other co-trustee of each of the Trusts since June 15, 2007. *Id*. Mr. Chisholm did not join the Murfeys in sending the Demand or filing the lawsuit.[1]

[1]The Trusts -- not the Murfeys -- are the actual limited partners of the Partnerships. The Murfeys, however, call themselves the "Plaintiffs." By obscuring who are the actual plaintiffs and limited partners, the Murfeys incorrectly claim that "Plaintiffs" (meaning themselves) were not aware of or informed of certain facts, when in fact the two trustees of the Trusts at the relevant time period, and hence the Trusts, as the actual limited partners, were informed and had all necessary knowledge.

All of the limited partners in the Partnerships are members (or entities owned by or for the benefit of members, including the Murfeys) of the Murfey family or of the Corning family of Cleveland, Ohio, which has been investing with Greylock Partners ("Greylock") since 1965. A1020. Accordingly, effectively all of the limited partners are from the same extended family.

The Partnerships are formed under the laws of the State of Delaware. *Id*. WHC Ventures, LLC, a Delaware limited liability company, is the General Partner of the Partnerships. *Id*. Peter Nordell, Jr., a non-party, is the managing member of the General Partner. *Id*.

B. The Trusts' Limited Partnership Interests

The Trusts' interests in WHC 2009 and WHC 2013 were purchased by the then co-trustees of the Trusts, Mr. Chisholm and Ms. Muth. *Id*. Mr. Chisholm and Ms. Muth executed and delivered Subscription Applications dated October 24, 2009 for each of the Trusts (the "2009 Applications") for investment interests in WHC 2009. *Id*. The 2009 Applications committed $500,000 on behalf of each of the Trusts to WHC 2009. A1019. Mr. Chisholm and Ms. Muth subsequently executed and delivered Amendments to the 2009 Applications dated February 10, 2011 (the "2009 Application Amendments"). *Id*. The 2009 Application Amendments increased each of the Trusts' capital commitment amounts to $665,000. *Id*.

Mr. Chisholm and Ms. Muth executed and delivered Subscription Applications dated July 26, 2013 and August 6, 2013 for each of the Trusts (the "2013 Applications") for investment interests in WHC 2013. *Id*. The 2013 Applications committed $590,000 on behalf of each of the Trusts. *Id*.

The Trusts' respective limited partner interests in WHC 2016 were purchased by Mr. Chisholm and either Spencer or Cynthia acting for their respective Trust. *Id*. Mr. Chisholm and either Spencer or Cynthia, as the case may be, executed and delivered Subscription Applications dated September 20 and 21, 2016 for each of the Trusts (the "2016 Applications") for investment interests in WHC 2016. *Id*. The 2016 Applications committed $590,000 on behalf of each of the Trusts. A1020.

C. The 2011 Investment Opportunity

In 2011, Greylock told the General Partner that Greylock had an additional $12 million of investment opportunity available to the limited partners of WHC 2009. A825-30. This additional opportunity was presented to all limited partners of WHC 2009. A1023. In 2011, Mr. Chisholm informed the Murfeys of this opportunity to increase the Trusts' investments in WHC 2009. *Id*. The Murfeys directed Mr. Chisholm to increase the Trusts' investments in WHC 2009. *Id*. Accordingly, Ms. Muth and Mr. Chisholm executed and delivered the 2009 Application Amendments. A1019. The 2009 Application Amendments increased each of the Trusts' capital commitment amounts in WHC 2009 to $665,000. *Id*. Like

the Murfeys, many other WHC 2009 limited partners agreed to commit to a portion of the 2011 opportunity from Greylock. *Id*.; A1023.

Later in 2011, Greylock made an additional $12 million of investment opportunity available to the limited partners of WHC 2009. A828; A747-48. Like the first 2011 additional opportunity from Greylock, this second opportunity was presented by the General Partner to all of the WHC 2009 limited partners, including the Trusts. A825-30. This time, some WHC 2009 limited partners, but not the Trusts, chose to commit to a portion of this second 2011 investment opportunity. A829; A747-53. The fact that other WHC 2009 limited partners chose to increase their investment in WHC 2009 when presented with this second 2011 opportunity resulted in a one-time percentage decrease in 2011 of the Trusts' ownership interest in WHC 2009. A825-30; B1-132 (annual K-1s for each Trusts' investment in WHC 2009 showing no other decrease).

The decision of the then trustees Mr. Chisholm and Ms. Muth not to invest in the second opportunity is documented in emails between Mr. Chisholm and Ms. Muth on February 4 and 5, 2011. A747-48. Moreover, seven months before the Murfeys commenced suit below, Mr. Chisholm sent an email dated February 12, 2018 to the Murfeys' trial counsel informing him of the details surrounding the two additional Greylock investment opportunities in 2011. A752 (section entitled Increased WHC 2009 Commitment). In that email, Mr. Chisholm specifically states:

"**Beneficiaries and trustees of the POAs decided not to increase** the commitment by an additional $165,000 for a variety of reasons." *Id*. (emphasis added). A749-53.

D. The Demand and Defendants' Response

The Demand, dated January 10, 2018, sought ten categories of information. A733-41. The Demand purported to state two purposes:

> First, my clients seek to value their respective interests held by the Trusts in each of the Partnerships . . . . Second, this demand is being submitted to understand the propriety of the ownership structures of each of the Partnerships, and the propriety of the Trusts' respective ownership interests in each of the Partnerships. My clients have recently learned of an unexplained diminution of their respective ownership interests in entities that invest in various funds managed by Greylock Partners. For example, each of the Trusts hold an ownership interest of approximately 7.35% in M-C Limited Liability Company I, which was formed in 2000. However, the Trusts' ownership interests in M-C Limited Liability Company II, formed in 2005, appear to have been unilaterally lowered to 2.22%. The Trusts hold an even lower ownership interest in WHC Ventures 2009, at approximately 1.185%, and in WHC Ventures 2013, L.P., at approximately 1.178%. Therefore, the Co-Trustees seek documentation to explain this diminution, and to determine whether certain other Corning or Murfey family trusts have been unjustly enriched at the expense of the Trusts.

A733-34. M-C Limited Liability Company I and M-C Limited Liability Company II (the "M-C Entities") are distinct from the Partnerships and are controlled by entities or persons distinct from the General Partner. B682-83; B549. Critically, the Murfeys' counsel conceded at trial that issues involving the M-C Entities were not before the Court of Chancery. B761.

On January 18, 2018, the Partnerships responded to the Demand, pointing out (i) the lack of a proper purpose for the Demand and (ii) the overbreadth of the demanded categories of requested information (the "Response"). A742-45. Nevertheless, the Partnerships offered to make information -- to the extent it existed -- available for inspection by a competent professional third party and under a confidentiality and non-disclosure agreement. *Id*. On April 13, 2018, the Murfeys and the General Partner entered into a Confidentiality and Non-Disclosure Agreement Governing the Inspection of Books and Records ("Confidentiality Agreement"). A1021.

E. The Inspection By The Murfeys' Expert

The Murfeys hired a third-party professional, Richard Szekelyi of Phoenix Management Services (the "Murfeys' Expert"), to conduct the inspection. On July 31, 2018, the Murfeys' Expert conducted an in-person inspection of certain of the Partnerships' books and records at the offices of the General Partner (the "Inspection"). A1020. During the Inspection, all of the documents requested in the Demand that existed were made available to the Murfeys' Expert, including unredacted copies of the K-1s. The K-1s were made available to the Murfeys' Expert to review but not to copy. *Id*. The General Partner declined to allow the Murfeys' Expert to copy the K-1s because (i) the Murfeys do not have any right to receive the information on the K-1s or have copies of them; (ii) the K-1s contain highly

confidential information of the other limited partners; and (iii) seeing and keeping copies of the K-1s was not necessary to satisfy the Murfeys' professed purposes in the Demand.

F. The Complaint

After the General Partner made available all of the information requested in the Demand for inspection by the Murfeys' Expert, including the K-1s, on September 4, 2018, the Murfeys, again acting without their respective co-trustee on each trust, filed a Verified Complaint on behalf of the Trusts seeking certain books and records solely pursuant to 6 *Del. C.* § 17-305 (the "Complaint"). B220-32. Although the K-1s were made available to the Murfeys' Expert during the Inspection, the Complaint inaccurately states:

> At the time of the Inspection, Mr. Szekelyi requested and was refused access to the individual K-1's for each Partnerships' limited partners distributed in connection with the annual tax filings for each Partnership.

B226 ¶ 14.

In their Answer to Interrogatories, when asked for the basis for the above-quoted allegation, the Murfeys conceded that the K-1s were in fact made available to their expert during the Inspection by stating that: "During the Inspection, Mr. Szekelyi requested access to the individual K-1 forms but he was refused permission to make copies of the individual K-1 forms." B242.

In the Complaint, the Murfeys describe the purposes of the Demand as:

> First, the Murfeys seek to value their respective interests held by the Trusts in each of the Partnerships. Second, the Murfeys seek to understand the propriety of the ownership structures of each of the Partnerships, and the propriety of the Trusts' respective ownership interests in each of the Partnerships.

B224. The Murfeys then allege:

> Specifically, Plaintiffs have reason to believe that the Trusts' ownership interests **in certain entities** have been unilaterally and inexplicably diminished. Plaintiffs seek to investigate this diminution of value.

B224-25 (emphasis added).

G. Post-Complaint Negotiations

After the filing of the Complaint, the parties continued to negotiate whether the Murfeys' Expert, the Murfeys and the Murfeys' counsel could receive copies of the K-1s. The Partnerships offered to (i) let the Murfeys' Expert re-inspect the K-1s and (ii) allow Spencer to inspect the K-1s, without signing any additional confidentiality obligation. Subsequently, on November 19, 2018, the Murfeys executed Amendment No. 1 to the Confidentiality Agreement ("Amendment No. 1"), which allowed the Murfeys' counsel and the Murfeys' Expert to obtain and possess copies of the K-1s on the terms and conditions contained in Amendment No.

1.[2] A1022. Subsequently, the Murfeys' counsel and the Murfeys' Expert executed undertakings in connection with Amendment No. 1 and received copies of the K-1s. *Id*.

H. The Court of Chancery's Ruling

Following discovery and a trial on the papers, the Court of Chancery denied the relief requested by Murfeys in an oral ruling on June 21, 2019. OB Ex. A at 3. Specifically, the Court of Chancery found:

- "I conclude that plaintiffs have no right to the K-1s or the information they contain." *Id.* at 11.
- "I conclude that plaintiffs have stated proper purposes of valuing their shares and investigating wrongdoing." *Id.* at 14.
- "Plaintiffs have failed to demonstrate a credible basis to support wrongdoing in the admission of new limited partners." *Id.* at 15.
- "Plaintiffs have also failed to establish a credible basis for suspecting wrongdoing in the context of missing an opportunity to increase investments in the WHC 2009 partnership." *Id.* at 16.
- "The record does not establish any basis for suspecting wrongdoing within the partnership[s] in the form of improper admission of new partners, not maintaining equal participation, or in not being informed of the opportunity to invest." *Id.* at 20.

[2]As Mr. Nordell testified, the decision was made to allow the Murfeys' Expert to have copies of the K-1s, without waiver of any rights, only because the Murfeys' Expert claimed that he could not prepare a report for the Murfeys unless he kept all source documents. B336-37. Also, the Murfeys had rejected an offer to allow Spencer Murfey to view the K-1s.

- "Because the K-1s do not include information that will assist in valuing the shares, they are not necessary and essential to that purpose." *Id*. at 22.

Final judgment was entered on June 28, 2019. Trans. ID 63491302. This appeal followed.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY RULED THAT THE MURFEYS WERE REQUIRED TO PROVE AND FAILED TO PROVE THAT ALLOWING THEM TO HAVE COPIES OF THE K-1s IS NECESSARY AND ESSENTIAL FOR THEIR ALLEGED PURPOSE.

A. Question Presented

Did the Court of Chancery commit reversible error when it ruled that the Murfeys were required to prove and failed to prove that the K-1s are necessary and essential to their stated purpose of valuing the Trusts interests in the Partnerships? This argument was preserved in the trial court at A946-47 and A1069-72.

B. Standard Of Review

The question of whether the Murfeys were required to demonstrate that the K-1s were necessary and essential to their stated purpose is a legal question which this Court reviews *de novo*. *Packcentral Global L.P. v. Brown Inv. Management, LP*, 1 A.3d 291, 295-96 (Del. 2010).

The question of whether the K-1s are necessary and essential to the Murfeys' stated purpose is reviewed for abuse of discretion. *KT4 Partners LLC v. Palantir Techs. Inc.,* 203 A.3d 738, 748 (Del. 2019) ("In a § 220 action, [this Court] review[s] for abuse of discretion the Court of Chancery's determination of both the scope of relief and any limitations or conditions on that relief. This standard of review is highly deferential."). "An abuse of discretion occurs when 'a court . . . exceeded the bounds of reason in view of the circumstances, [or] . . . so ignored recognized rules

of law or practice so as to produce injustice." *MCA, Inc. v. Matsushita Elec. Indus. Co. Ltd.*, 785 A.2d 625, 633-34 (Del. 2001) (quoting *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994) (alterations in original).

C. Merits Of Argument

The Court of Chancery correctly determined that the Murfeys were required to demonstrate, under both 6 *Del. C.* § 17-305 ("Section 17-305") and the Partnership Agreements, that the K-1s were necessary and essential to their stated purpose. The Court of Chancery did not abuse its discretion in determining that the K-1s were not necessary and essential. Moreover, the Partnership Agreements preclude the Murfeys from keeping copies of the K-1s.

1. The Murfeys Were Required To Prove That Allowing Them To Have Copies Of The K-1s Is Necessary And Essential For Their Alleged Purpose.

The Murfeys bore the burden to prove how providing copies of the K-1s to them was necessary and essential. *Thomas & Betts Corp. v. Leviton Mfg. Co.*, 685 A.2d 702, 714 (Del. Ch. 1995) (moving parties' burden "to justify each category of books and records whose production it seeks to have compelled. Only those records that are essential and sufficient will be required."), *aff'd*, 681 A.2d 1026 (Del. 1996). Inspection rights are "limited to those documents that are necessary, essential, and sufficient for the shareholder's purpose." *Madison Ave. Inv. P'rs, LLC v. Am. First Real Estate Inv. P'rs, L.P.*, 806 A.2d 165, 176 (Del. Ch. 2002). A document is

"essential" if "it addresses the crux of the shareholder's purpose," and the "information the document contains is unavailable from another source." *Espinoza v. Hewlett-Packard Co.*, 32 A.3d 365, 371-72 (Del. 2011).

On appeal, the Murfeys ask the Court to ignore the existing case law decided under Section 17-305 that applies a "necessary and essential" test in evaluating a Section 17-305 demand and instead rule that the "necessary and essential" test applies only to Section 17-305(a)(6) but not to Section 17-305(a)(1)-(5). Appellants' Opening Brief ("Op. Br.") at 18-21. The Murfeys' argument should be rejected.

Cases decided under Section 17-305 have applied the necessary and essential requirement. *See Madison Ave. Inv. P'rs, LLC*, 806 A.2d at 176 (inspection rights limited to documents necessary, essential and sufficient for purpose); *Holman v. Nw. Broad, L.P.*, 2007 WL 1074770, at *2 (Del. Ch. Mar. 29, 2007) ("[t]he scope of such relief will typically be limited only to the inspection of those books and records that are necessary and essential to the satisfaction of the stated purpose."); *In re Plains All Am. Pipeline, L.P.*, 2017 WL 6016570, at *4 (Del. Ch. Aug. 8, 2017). The Murfeys argue that these cases which look to case law decided under 8 *Del. C.* § 220 ("Section 220") for guidance were wrong in doing so because, according to the Murfeys, Section 220 does not specify which "books and records" a stockholder can obtain while Section 17-305 does for a limited partner. Op. Br. at 18-20. But this argument is based on false distinction. As the Murfeys admit, Section 220 lists two

categories of information (the stock ledger and a list of stockholders) before listing the catchall "other books and records." 8 *Del. C.* § 220(b)(1). Section 17-305(a) lists five categories of information before listing the catchall "other information regarding the affairs of the limited partnership as are just and reasonable." 6 *Del. C.* § 17-305(a).

Neither Section 220 nor Section 17-305 contains a "necessary and essential" test in the language of the statute. But the fact that one lists two categories of information followed by a catchall provision while the other lists five such categories followed by a catchall provision is not a valid reason to conclude that Section 220 contains a "necessary and essential" test and Section 17-305 does not.

Moreover, the "necessary and essential" test is a reasonable governor on books and records demands for all business entities no matter what the particular form. *La. Mun. Police Emps.' Ret. Sys. v. Lennar Corp.*, 2012 WL 4760881, at *3 (Del. Ch. Oct. 5, 2012) ("To permit stockholders to demand corporate books and records based on the 'mere suspicion' of wrongdoing would 'invite mischief' and expose companies to 'indiscriminate fishing expeditions.'") In arguing that the "necessary and essential" test does not apply to limited partnerships, the Murfeys are advocating for a system in which those seeking books and records would not have to show that the requested books and records were necessary and essential to their stated purposes.

That would be the exact kind of mischief and fishing expeditions that the Delaware courts have attempted to limit.

The Court of Chancery also correctly ruled that the Partnership Agreements are properly read as incorporating the "necessary and essential" requirement because the Partnership Agreements track the language of Section 17-305. As stated by the Court of Chancery:

> Section 12.2.1 permits each limited partner to obtain the information in Section 12.1 "for purposes reasonably related to the Limited Partner's Interest." The simple word "for" links the right to obtain the information in Section 12.1 to the limited partner's proper purpose in the very same way Section 17-305 does.

OB Ex. A at 24:23-25:6. In making this ruling, the Court of Chancery cited to existing Court of Chancery precedent and noted that the Murfeys "cite no contrary case applying the proper purpose requirement without the 'necessary and essential' element." *Id.* at 25:12-14; *see also DFG Wine Co., LLC v. Eight Estates Wine Holdings, LLC*, 2011 WL 4056371, at *9 (Del. Ch. Aug. 31, 2011). The Murfeys continue to cite no case law to the contrary on this appeal.

Finally, the Murfeys repeatedly claim that if they are entitled to inspect the Partnership tax returns, they can automatically obtain the K-1s. *See, e.g.*,Op. Br. at 1, 6, 24, 27. This contention is incorrect. The Internal Revenue Service ("IRS") recognizes a distinction between a tax return and return information of a partnership and a distinction between the tax returns and the K-1s of other investors. In fact, the

IRS manual specifically provides that while a limited partner is entitled to receive the partnership's returns, a limited partner is only entitled to obtain his or her own K-1, not the K-1s of other limited partners. 11.3.2.4.2 (01-26-2017) https://www.irs.gov/irm/part11/irm_11-003-002. fJ

The Court of Chancery correctly held that the Murfeys were required by both Section 17-305 and the Partnership Agreements to demonstrate that the K-1s were necessary and essential to their stated purpose. That judgment should be affirmed.

2. The Murfeys Have Not Shown That The Court Of Chancery Abused Its Discretion By Ruling That The K-1s Were Not Necessary And Essential To Their Stated Purpose.

On the question of whether the K-1s were necessary and essential to the Murfeys' stated purpose, after careful review of the evidence and arguments of counsel, the Court of Chancery made the following ruling:

> Based on my review of the plaintiffs' K-1s that are in evidence, I conclude that [receiving and keeping copies of the K-1s] is not necessary and essential to satisfying the stated valuation purposes. I see no type of information on the K-1s that would help the plaintiffs value their investments. And I do not see how the percentages of the other limited partners, with identifiers, are necessary and essential to value plaintiffs' investments.
>
> I twice asked about this at trial, in the transcript at page 14, lines 12 through 16 and at page 17, lines 17 through 20, and neither time was I pointed to information that would assist plaintiffs.

OB Ex. A at 21.

On appeal, the Murfeys have offered nothing to show that the Court of Chancery abused its discretion on this matter. Logically, the K-1s cannot help the Murfeys value the Trusts' respective interests in the Partnerships because the K-1s do not contain any information relevant to that topic. B133-216. The K-1s concern information particular to other investors, not the entity itself.

Moreover, there are other sources such as the Partnerships' tax returns and annual valuations, which have been provided to the Trusts, from which the Murfeys can determine the financial state of each Partnership. The K-1s cannot help the Murfeys value the Trusts' interests in each of the Partnerships because the Murfeys already know how much the Trusts own, and the K-1s concern information about individual investors, not the entities themselves.

Perhaps the best evidence, however, that the K-1s are not necessary and essential is the testimony of Cynthia herself. When asked at her deposition why she needed copies of the K-1s, she responded: "I don't need copies." B706. The Court of Chancery simply held Cynthia to her sworn representations.

The Murfeys have not demonstrated that the Court of Chancery abused its discretion in determining that the K-1s were necessary and sufficient to their stated purpose. Accordingly, the judgment of the Court of Chancery should be affirmed.

3. The Partnership Agreements Do No Allow and In Fact Preclude the Plaintiffs From Obtaining the K-1s

Even if the Court disagrees with the Court of Chancery's "necessary and essential" analysis, there is an additional reason that the judgment can be affirmed. This Court "may affirm on the basis of a different rationale than that which was articulated by the trial court" and "may rule on an issue fairly presented to the trial court, even if it was not addressed by the trial court." *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995) (citing *Standard Distrib. Co. v. Nally*, 630 A.2d 640, 647 (Del. 1993)); *see also Riverbend Cmty., LLC v. Green Stone Eng'g, LLC*, 55 A.3d 330, 333 n.7 (Del. 2012) (considering separate basis for summary judgment not relied on by the trial court where that basis "was fairly presented to the trial judge"). Specifically, the judgment can be affirmed because the Partnership Agreements preclude the Murfeys from obtaining the K-1s.

In accordance with Section 17-305(a)(b) and (f), Article 12 of the Agreements specifically states:

> Despite anything to the contrary in this Agreement or in the Act, **Limited Partners will not be entitled to inspect or receive copies of the following . . . . (c) . . . investor information, financial statements of Limited Partners or similar materials, documents and correspondence**.

A58; A473, A625 (all at Section 12.2.1(emphasis added)). The K-1s fall within Section 12.2.1 of the Agreements because they contain "investor information."

Further, Article 12 provides:

> To the full extent permitted by applicable law, however, the General Partner may keep confidential from any Limited Partner any information the disclosure of which the General Partner in good faith believes could be harmful to the business of the Partnership or is otherwise not in the best interests of the Partnership, **or that the Partnership is required by law or agreement with a third party to keep confidential**.

A58; A473, A625. (emphasis added). In addition, Article 12.2.2 provides:

> Notwithstanding anything in this Agreement or in the Act to the contrary, no Limited Partner is entitled to receive or to inspect any records or information other than expressly set forth in this Article XII.

A58; A473, A625. Moreover, Section 7.1 of the Agreements vests "exclusive management and control of the business of the Partnership" in the General Partner, providing that the General Partner "will make all decisions affecting the Partnership," except as otherwise provided in the agreements (not applicable here). A58; A473, A625.

The General Partner's representative Mr. Nordell testified that he did "not think it's consistent with the agreement we've signed, and I don't think it's in the best interest of the partnership" for the Murfeys to have the K-1s. B339-41. Mr. Nordell has the authority to make that decision under Sections 7.1 and 12.2.2 of the Agreements. A58; A473, A625. Mr. Nordell also testified that the Partnerships do not allow limited partners to have copies of the confidential information that the Partnerships receive from Greylock. B323.

Mr. Nordell further testified that as manager of the General Partner he believes that "absent a direct instruction from the authorized person" he is not allowed to provide K-1s to someone other than their owner. B355. On this point, and directly contrary to arguments by the Murfeys' trial counsel below, Mr. Nordell testified that when he contacted the other limited partners, it was not to see if he could release the K-1s, but instead to see if they, *as owners of their own K-1s*, wanted on their own to release their K-1s to the Murfeys. B333-34; B403; B267. Contrary to the impression the Murfeys' trial counsel tried to create before the Court of Chancery, the General Partner has not given control over the issue of the Defendants providing the K-1s to any group of limited partners. Also, the Murfeys' counsel argued below, without basis, that Mr. Nordell had checked with the limited partners before the inspection and that was why the Murfeys' Expert was not allowed to copy the K-1s at the Inspection. There is no evidence of this timing. In fact, Mr. Nordell did not check with the other limited partners until well after the Inspection when the parties were negotiating Amendment No.1.

Even if the Court disagrees with the Court of Chancery's necessary and essential analysis, the Court should enforce Articles 7 and 12 of the Agreements and Section 17-305(a)(b) and (f) and reject the Murfeys' attempt to avoid their clear terms. *Madison Ave.*, 806 A.2d at 170-71 (Section 17-305 "allows general partners to refuse disclosure to limited partners of any information that the partnership is

required by law or contract to keep confidential or which might damage the partnership"); *see also In re Plains*, 2017 WL 6016570, at *2.

* * *

The Court of Chancery correctly determined that (i) the Murfeys had to prove, under both Section 17-305 and the Partnership Agreements, that the K-1s were necessary and essential to their stated purpose and (ii) the K-1s were not necessary and essential. Furthermore, the Partnership Agreements preclude the Murfeys from receiving copies of the K-1s. Under all circumstances, the judgment of the Court of Chancery should be affirmed.

II. PLAINTIFFS LACK A PROPER PURPOSE.

A. Question Presented

Whether the Court of Chancery correctly determined that the Murfeys stated a proper purpose? This argument was preserved in the trial court at A936-45 and A1056-69.

B. Standard Of Review

The question of proper purpose is an issue of law which the Court reviews *de novo*. *Compaq Computer Corp. v. Horton*, 631 A.2d 1, 3 (Del. 1993).

C. Merits Of Argument

The Court of Chancery properly found that the Murfeys did not show a credible basis of wrongdoing on the part of the Partnerships. The Court of Chancery erred, however, in determining that the Murfeys stated a proper purpose of valuing their interests in the Partnerships.[3]

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[3]The Murfeys' brief gives the impression that the Court of Chancery found that the Murfeys had demonstrated two proper purposes. The Court of Chancery did find that the Murfeys had demonstrated a proper purpose of valuing the Trusts' interests in the Partnerships. OB Ex. A at 14. While the Court of Chancery also found that the Murfeys had **stated** a proper purpose of investigating wrongdoing, *see id.*, the Court of Chancery held that the Murfeys had **not demonstrated** or **established** a credible basis for wrongdoing. *Id.* at 15, 16, 20. The Murfeys did not directly challenge the lack of proper purpose finding in their opening brief. *See* Op. Br. at 6-7. Accordingly, the Court should find that they have waived their right to contest that finding any further. *See* Supr. Ct. R. 14(a)(vi)(A)(3) ("The merits of any argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal."). In the event the Court does

1. The Murfeys Failed To Meet Their Burden Of Proving A Genuine Proper Purpose.

The Murfeys bore the burden of proving a genuine proper purpose for their Demand. To obtain books and records of a limited partnership under Section 17-305, a limited partner must satisfy three conditions. *Madison Ave.*, 806 A.2d at 170-71.

> First, . . . that it has complied with the provisions respecting the form and manner of making demand for obtaining such information . . . . Second, the demand must be reasonable and for a purpose reasonably related to the limited partner's interest as a limited partner . . . . Third, the right is subject to such reasonable standards "as may be set forth in the partnership agreement or otherwise established by the general partners." . . . In addition, Section 17-305 of the DRULPA allows general partners to refuse disclosure to limited partners of any information that the partnership is required by law or contract to keep confidential or which might damage the partnership if disclosed.

Id. at 170-71 (footnotes omitted); *see also In re Plains*, 2017 WL 6016570, at *2 (Del. Ch. Aug. 8, 2017) (ORDER).

To determine "whether a purpose is reasonably related to the limited partner's interest under § 17-305, the Court of Chancery will consider whether that purpose is 'proper' within the meaning of 8 *Del. C.* § 220, the corporate analog to § 17–305." *Madison Real Estate Immobilien–Anlagegesellschaft Beschrankt Haftende KG v. KanAm USA XIX Ltd. P'ship*, 2008 WL 1913237, at *5 (Del. Ch. May 1, 2008); *cf.*

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not find a waiver, however, Defendants address that aspect of the Court of Chancery's ruling below.

8 *Del. C.* § 220(b) (proper purpose means purpose reasonably related to person's interest as stockholder). Plaintiff must "describe 'with reasonable particularity [its] purpose and the records [it] desires to inspect.'" *In re Plains*, 2017 WL 6016570, at *4 (alterations in original) (quoting *Madison Ave.*, 806 A.2d at 176); *Thomas & Betts*, 681 A.2d at 1031 n.3.

2. Merely Reciting A Purpose That Could Be a Proper Purpose Does Not Mean the Murfeys Have a Proper Purpose.

The Murfeys seem to suggest that simply because their stated purposes have been found to be proper purposes in other cases, they are proper purposes here. Op. Br. at 28-31. The Murfeys are wrong. The mere incantation of phrasing that may be a proper purpose is not the end of the proper purpose inquiry. *Bizzari v. Suburban Waste Servs., Inc.*, 2016 WL 4540292, at *5 (Del. Ch. Aug. 30, 2016) ("simple invocation of the phrase 'mismanagement and wrongdoing' is not sufficient to obtain access to corporate books[;] [m]ere suspicion or subjective belief of wrongdoing, without more, is not enough to state a proper purpose"). Instead, Delaware courts have regularly denied books and records requests that superficially appear to state a proper purpose.

3. The Murfeys' Claim That They Seek to Value the Trusts' Interest in the Partnerships is a Sham, Not a Genuine Proper Purpose.

The Court of Chancery found that the Murfeys demonstrated a proper purpose of valuing the Trusts' interests in the Partnerships. OB Ex. A at 14. Before so ruling, however, the Court of Chancery made the following observation:

> It is tempting to look only at the narrow nature of the remaining dispute and conclude that plaintiffs do not have a proper purpose for requesting copies of the K-1s, which is what defendants argue I should do. But the plaintiffs requested other documents as well, and those documents, which defendants provided, fit more neatly within the stated purposes.

Id.

The Court of Chancery should have given in to that temptation and found that the Murfeys had not stated a proper purpose of valuing the Trusts' interests in the Partnerships. While it is true that at the time of making the Demand, the Murfeys requested many documents other than the K-1s, by the time they filed their Complaint and at the time of trial, they had received all documents requested other than copies of the K-1s. It was error for the Court of Chancery to ignore this reality. A finding by this Court that the Court of Chancery erred on this point would result

in a complete affirmance of the judgment below even if the Court disagrees with the Court of Chancery's analysis of the necessary and essential requirement.[4]

The Murfeys claim that they want to value the Trusts' interests in the Partnerships. This contention cannot be their true purpose, however, because by the time they filed their Complaint, the Murfeys already received from the Partnerships copies of the Partnership tax returns, the Trusts' Schedule K-1s and annual valuations -- more than enough information to let them "value [the Trusts'] respective interests in the Partnerships." B392; A1016. The Murfeys have never denied this fact, choosing instead to ignore it. Also, and contrary to the Demand, the Murfeys have been made aware of and either have participated in annual meeting or calls of the partners or chosen not to participate. B732-35. Further, as discussed previously, if the Murfeys' purpose truly were to value the Trusts' interests in the Partnerships, they do not need to see the K-1s or the Information, as Cynthia admitted at her deposition. B706. These simple uncontroverted facts demonstrated at trial reveal that the Court of Chancery abused its discretion by determining that the Murfeys had proven a proper purpose of valuing their interests in the Partnerships.

[4] "An appellee who does not file a cross-appeal . . . may defend the judgment with any argument that is supported by the record even if it questions the trial court's reasoning." *Haley v. Town of Dewey Beach*, 672 A.2d 55, 58-59 (Del. 1996).

4. The Murfeys' Finally Admit That They "Seek To Investigate Mismanagement or Wrongdoing By Their Co-Trustee" With Respect To Their Trusts.

While the Murfeys' true purpose was readily apparent at trial, on appeal, the Murfeys have finally admitted that what they are really doing is investigating their co-trustee and decisions he made as a trustee of their Trusts. Specifically, the Murfeys state in their opening brief: "Appellants seek to investigate why their Trustee, Homer Chisholm, did not invest in the Partnerships whenever possible, in contravention of Appellants' expressly stated wishes." Op. Br. at 2. That is not mismanagement or wrongdoing by or in the Partnerships. Accordingly, the Court of Chancery correctly held the following:

> I recognize that the credible basis standard is incredibly low, but in this case, the record contains an unrebutted admission by plaintiffs' then-trustees that they knew about the offer and decided against it. **The record does not establish any basis for suspecting wrongdoing within the partnership in the form of improper admission of new partners, not maintaining equal participation, or in not being informed of the opportunity to invest**.

OB Ex. A 20:8-16 (emphasis added). There is no basis for disturbing that finding.

The Murfeys cannot be allowed to have the K-1s of the other limited partners in the Partnerships when they have finally admitted that what they are doing is investigating their co-trustee and the management of their Trusts, entities and a person entirely separate from the Partnerships and the General Partner.

Even if investigating their co-trustee were a proper purpose -- it is not -- the Murfeys are still not entitled to any relief because their alleged claims are time-barred, and they do not need the K-1s to attempt to pursue those claims. The Murfeys claim that they seek to investigate whether to bring claims arising from the alleged dilution of their interests against their co-trustee, the General Partner or the other limited partners. Op. Br. at 30-32. As they did at trial, the Murfeys mention possible claims for unjust enrichment and fraudulent conveyance without providing any explanation of how such claims could apply.

The record is undisputed that there was a one-time 2011 decrease in the Trusts' percentage interest in WHC 2009 caused by other limited partners choosing to invest more in WHC 2009 when the two 2011 opportunities arose, but the trustees of the Trusts choosing only to participate in the first opportunity. B312-17. It is too late for the Murfeys to bring such claims against over a 2011 transaction. The longest possible statute of limitations under Delaware law for a claim of unjust enrichment is three years and four years for fraudulent conveyance. *See Advanced Cardiovascular Sys., Inc. v. Medtronic Vascular, Inc.*, 182 F. App'x 994, 999 (Fed. Cir. 2006) (citing 10 *Del. C.* § 8106) (unjust enrichment); *TrustCo Bank v. Mathews*, 2015 WL 295373, at *6 (Del. Ch. Jan. 22, 2015) (citing 6 *Del. C.* § 1309) (fraudulent conveyance). Seeking to investigate time-barred claims is not a proper purpose. *Graulich v. Dell, Inc.*, 2011 WL 1843813 (Del. Ch. May 16, 2011) (because any suit

by stockholder would be procedurally barred, no proper purpose for inspecting corporate books and records).[5]

* * *

[5]There has been no diminution of any kind in the Trusts' interests in WHC 2013 and WHC 2016, and no propriety issues concerning those partnerships. The Trusts' annual K-1s show their ownership interests in WHC 2013 and WHC 2016 have never changed. B133-216 (particularly JX 57, JX 58, JX 65, JX 66, JX 67, JX 68 at Section Part II J (initial and most recent K-1s showing Trusts' interests in profit and loss for WHC 2013 and WHC 2016 remained constant)). The Murfeys have put forth no evidence or argument of any impropriety with respect to WHC 2013 or WHC 2016. OB Ex. A at 16:15-17 (Court noting that the only evidence of any diminution occurred in 2011 in WHC 2009.)

The Murfeys have not demonstrated that either of their stated purposes is proper. Accordingly, the judgment of the Court of Chancery should be affirmed.

III. THE COURT OF CHANCERY CORRECTLY DETERMINED THAT TWO EMAILS FROM THE MURFEYS' CO-TRUSTEE ON EACH OF THE TRUSTS WERE NOT HEARSAY.

A. Question Presented

Did the Court of Chancery correctly determine that two emails from the co-Trustee of the Trusts (Joint Exhibits 87 and 88) were not hearsay? This argument was preserved in the trial court at A1078-79.

B. Standard Of Review

The determination of whether a statement is hearsay is subject to *de novo* review. *Mentore v. Metropolitan Restaurant Management Co.*, 941 A.2d 1019 (Del. 2008).

C. Merits Of the Argument

The Court of Chancery correctly determined that Joint Exhibits 87 and 88 were not hearsay.

Joint Exhibit 87 is an email from Mr. Chisholm, co-trustee on each of the Trusts since 2007, to the Murfeys' trial counsel dated February 12, 2018, seven months before suit was filed. Joint Exhibit 88 consists of emails between the Trusts' co-trustees in 2011 discussing why the decision was made not to increase the Trusts' interests in WHC 2009 when presented with the second 2011 opportunity. The Trusts are the limited partners and real parties here. Statements by a trustee of the

Trusts since 2007, about a decision the Trusts' made in 2011 concerning the second 2011 opportunity are not hearsay.

Delaware Uniform Rule of Evidence 801(d)(2)(D) provides that a statement that is offered against an opposing party and was made by the party's agent is not hearsay. D.U.R.E. 801(d)(2)(D). The statements made in Joint Exhibits 87 and 88 were made by agents of Trusts and were offered against the Trusts. Accordingly, the Court of Chancery correctly determined that the statements were hearsay. As the Court of Chancery stated:

> [A]s to hearsay, plaintiffs complain that Chisholm was not deposed and did not appear at trial to be subject to cross-examination. Plaintiffs miss that Chisholm is not a stranger. At all relevant times he has been a trustee of the trusts on behalf of which plaintiffs purportedly brought this action. His statements are thus not hearsay under Delaware Rule of Evidence 801(d)(2)(D), as Chisholm was the Trusts' agent, the statement is within the scope of his relationship and responsibilities as Trustee, and the statements were made while he held the role of Trustee.

OB Ex. A at 19.

On appeal, the Murfeys make two arguments. Neither argument changes the fact that the documents do not contain hearsay.

First, the Murfeys argue that Mr. Chisholm was not acting within the scope of his agency because the statements in the emails are damaging. Op. Br. at 33. The Murfeys cite no authority for this proposition because it makes no sense. The fact that the emails are damaging to the Murfeys and the Trusts does not make them

hearsay. Statements "offered against an opposing party" typically are damaging to the party. Otherwise, they would not be offered against them.

Second, the Murfeys argue that Defendants should have produced the documents earlier than they did. Op. Br. at 34. What the Murfeys ignore, however, is that the Trusts -- as the actual plaintiffs and limited partners -- had an obligation to produce those documents.[6]

This Court should affirm the Court of Chancery's determination that Joint Exhibits 87 and 88 are not hearsay.

[6]Protestations from the Murfeys that they may not have had Joint Exhibits 87-88 in their personal possession miss the mark and, once again, show that the Murfeys are trying to separate themselves from their Trusts when it benefits them. Joint Exhibits 87 and 88 were clearly within the possession, custody or control of the Trusts, and the Murfeys purport to be acting as co-trustees of the Trusts in bringing suit and pursuing this appeal.

IV. THE K-1s ARE ENTITLED TO CONFIDENTIAL TREATMENT AND SHOULD REMAIN CONFIDENTIAL REGARDLESS OF THIS COURT'S RULING.

A. Question Presented

Whether the K-1s are entitled to confidential treatment? This argument was preserved in the trial court at B816-21.

B. Standard Of Review

This Court reviews questions of law *de novo*.

C. Merits Of the Argument

In their brief, the Murfeys argue that in the event this Court determines that they are entitled to receive copies of the K-1s, the K-1s should not be subject to confidential treatment pursuant to Court of Chancery Rule 5.1. Op. Br. at 37. This argument should be rejected.

First, the Court of Chancery never considered this issue, so it is not ripe for appeal. Accordingly, if necessary the most this Court should do is remand for a determination by the Court of Chancery in the first instance. *See Cede & Co. v. Technicolor, Inc.*, 636 A.2d 956, 956 (Del. 1994).

Second, the confidential treatment of information concerning the investment amounts of non-party limited partners must be maintained in accordance with Amendment No. 1, which provides in pertinent part:

> Notwithstanding any other provision of this Amendment No. 1 or the Agreement, Mr. Szekelyi, Attorney Neff, and any assistants, staff, or

> other professionals at either Phoenix Management or Fox Rothschild LLP **shall not reveal to anyone, including to the Co-Trustees, (i) the identity of the person or entity to whom a K-1 was furnished by any of the Partnerships**, (ii) any portion of any tax i.d. number or social security number contained on a K-1, **or (iii) any information copied, duplicated or derived from the K-1's that effects disclosure of any single individual limited partner's ownership interest or of any group of less than all of the limited partner's ownership interests in capital, profit, or loss**.

A0763. (emphasis added). The Murfeys agreed to this provision.

Finally, the K-1s contain personal financial information of other limited partners that have nothing to do with this lawsuit. This is the very kind of "sensitive, non-public information" that Court of Chancery Rule 5.1 is designed to protect. *Romero v. Dowdell*, 2006 WL 1229090, at *2 (Del. Ch. Apr. 28, 2006) ("This Court repeatedly has held that good cause exists" to protect the confidentiality of "nonpublic financial information.").

The Court should not find that the K-1s are subject to public disclosure.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Chancery should be affirmed.

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