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, Appellees.	No. 294,2019 Court Below: Court of Chancery of the State of Delaware C.A. No. 2018-0652-MTZ **PUBLIC VERSION FILED ON OCTOBER 28, 2019**

APPELLANTS' REPLY BRIEF

Carl D. Neff (Bar No. 4895)
E. Chaney Hall (Bar No. 5491)
FOX ROTHSCHILD LLP
Citizens Bank Center
919 N. Market Street, Suite 300
Wilmington, DE 19801

Dated: October 11, 2019

Counsel for Appellants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION[1]

In the books and records action below, Appellants seek tax information about the Partnerships. The limited partners are entitled to receive copies of tax returns under the terms of the Partnership Agreement. Moreover, tax returns are commonly provided to books and records plaintiffs. Appellants are entitled to the relief they seek.

In their Answering Brief, Appellees provide no basis to deny providing tax returns to the Appellants. Instead, Appellees discuss the underlying dispute between Appellants and their Trustee to distract from the nature of this books and records action. Appellees' newly minted narrative that Appellants "sued the wrong defendants" misunderstands the relief that Appellants seek here.

The Appellants seek K-1 Forms that are necessary and essential to value their interests in the Partnerships. The K-1 Forms reflect that while Appellants' interests have been diluted over time, other Limited Partners' interests have increased. Appellants seek to investigate this dilution. Who is to blame for that dilution is an ancillary point that cannot be resolved and ought not to be resolved in a books and records action. Appellants did not sue the wrong defendants; on the contrary, Appellants sought books and records as is proper under the statute and the Limited

---

[1] Each capitalized term not otherwise defined herein shall have the meaning ascribed to such term in Appellants' Opening Brief.

Partnership Agreement. The General Partner should be ordered to provide Appellants with copies of the K-1 Forms to fulfill their stated purposes of evaluating their interests in the Partnerships, investigating potential mismanagement or wrongdoing and asserting fraudulent transfer claims against the limited partners.

RESPONSE TO SUMMARY OF ARGUMENT

5. Denied. The Court of Chancery correctly found that the Murfeys demonstrated a proper purpose.

REPLY STATEMENT OF FACTS

A. Other Partnerships Involving The Same Parties Lack Appellees' Claimed Confidentiality Restrictions.

All limited partners are members of the Corning family (or are entities owned by the family members). Appellees' Second Corrected Answering Brief ("Answering Brief," cited "A.B.") at 6. The family members have been investing with Greylock Partners since 1965. *Id.* In that time, to Appellants' understanding, no family member has raised the confidentiality objections that Appellees raise here.

The Corning family and their trusts invest with Greylock through several other investment funds. Two investment funds are M-C Limited Liability Company I and M-C Limited Liability Company II (together, "M-C Entities"). Mr. Nordell testified that Henry Corning, who established the Partnerships, modeled the ownership structure of the M-C Entities in determining the ownership allocations of the WHC 2009 entity. A0823:14-A0824:15. "The allocation of the 2009 fund started with the amount that each family had invested in prior funds." *Id.* at A0824:9-11.

The amount of shares held by each investor, capital invested, and distributions received by investors is freely provided to investors of the M-C Entities. *See* A044-448. The reason for the General Partner's deviation from this long-standing practice has not been articulated.[2]

---

[2] In their Answering Brief, Appellees assert that Appellants' counsel argued without

The Answering Brief criticizes Appellants' citation to the policies of the M-C Entities. *See* A.B. 9. Appellees' position ignores the close interconnection of the M-C Entities with the Partnerships. Appellees do not (and cannot) deny that the Corning family invests through various vehicles, including the Partnerships and the M-C Entities. Appellees also do not (and cannot) deny that the General Partner is controlled by the same individual, Peter Nordell, who is Greylock's point of contact with the M-C Entities. The parties' course of dealing with respect to the M-C Entities is relevant to this dispute, and demonstrates the baselessness of the General Partner's stance in this action.

In the half century that the Corning family has invested together, no one ever has expressed the confidentiality concerns that Appellees stated in the case below. These confidentiality concerns were not included in the Partnership Agreement because they did not exist before this action. The Appellees' protestations do not

---

basis that Mr. Nordell had "checked with" the limited partners to determine their preference, which led to copies of the K-1s not being provided. A.B. 24. But this contradicts the August 6, 2018 email from the General Partner's counsel, which stated "the *limited partners* are particularly sensitive about disclosure of their personal financial information…." A0769 (emphasis added). By contrast, in the January 18, 2018 response to the Demand, the General Partner placed no such restriction on making all of the requested categories of information identified in the Demand available for inspection. A0742-45. Given this reversal, the assertion that Mr. Nordell did not consult with any of the limited partners (who can remove the General Partner by majority vote under the Agreement) before refusing to permit copying of the K-1s strains credulity.

conform with the Partnership Agreement, the books and records statute, or the parties' course of dealing, and therefore must be disregarded.

B. Appellees Offer Inspection But Not Copying.

Appellees provide no explanation as to why Appellants should be permitted to review the K-1 Forms (in Mr. Nordell's office) but not retain copies. *See* A.B. 11-12. Appellants are understandably wary of the General Partner's curious offer. Mr. Nordell has made similar offers to the Murfeys in the past, but those offers were not honored. B517:7-13; B567:5-16; B570:1-15. Mr. Nordell extended to Mr. Murfey an "invitation to come to [Mr. Nordell's] offices to inspect the records . . . at any time with relatively short notice." *Id.* However, "[n]one of those invitations were sincere." *Id.* Mr. Murfey explained, "[E]ach and every time the offer was made, I always took [Mr. Nordell] up on his offer, and when it came time for me to make arrangements to go up to his office . . . it never came to fruition." *Id.* at B570:1-6. "The last offer was the books and records inspection in Cleveland when we were supposed to attend with Mr. Szekelyi, and at the last minute Peter Nordell decided that he did not want either Cynthia or I to attend." *Id.* at B570:9-15. Given this history, the Murfeys doubt the sincerity of these renewed invitations.[3]

---

[3] The General Partner has continued to mistreat the Murfeys during the pendency of this appeal. Since the filing of the appeal, the General Partner has attempted to improperly withhold distributions to the Trusts as compensation for fees incurred in defending the case. The General Partner's action violates the Court of Chancery's

Merely viewing the K-1 Forms is inadequate for Appellants' purposes. As described in more detail in Appellants' Opening Brief ("Opening Brief," cited "O.B."), Appellants' interests in the Partnerships were diluted despite their standing instructions to invest in the Greylock entities whenever possible. O.B. 12-15. Appellants must consult with their financial advisors, counsel, and trustees to further investigate the circumstances surrounding the dilution and possibly initiate litigation. Moreover, as Mr. Murfey explained, "I'm not sure I understand the logic. When Peter Nordell ... tells me I will let anybody see [the K-1 Forms] but you, I will let your accountant see these, I'll let your attorneys see these, but I won't let you see them, that raises suspicions with me. That makes me very concerned." B575:1-8. Ms. Murfey similarly affirmed that she would like to be able to review unredacted copies of the K-1 Forms. B706:20-22. Appellants and their advisors need to be able to review copies so that Appellants can make informed decisions about how to proceed and whether to commence any subsequent litigation. Appellants are entitled to copies of the K-1s.

---

order, which states that each side shall bear their own fees. O.B. Ex. B, p. 2 ¶ 4. The General Partner's improper withholding of distributions from the Trusts may give rise to further litigation.

ARGUMENT

I. APPELLANTS STATED A PROPER PURPOSE TO SUPPORT THEIR DEMAND, AND THEREFORE APPELLANTS ARE ENTITLED TO RECEIVE COPIES OF THE K-1s.

A. The Necessary and Essential Requirement Does Not Apply to Appellants' Demand.

The parties agree that this Court reviews *de novo* the question of whether the Appellants were required to demonstrate that the requested documents were "necessary and essential" to their proper purposes. *See* A.B. 15 (citing *Parkcentral Global L.P. v. Brown Inv. Management, L.P.*, 1 A.3d 291, 295-96 (Del. 2010). No Delaware Supreme Court opinion has applied the "necessary and essential" requirement in the Section 17-305 context. Indeed, it is not appropriate to apply a "necessary and essential" requirement to a request that falls under Section 17-305(a)(1)-(5) for the same reason that this Court does not apply the requirement to a request for a stock ledger or shareholder list under Section 220.

The parties also agree that the Court of Chancery has applied Section 220 case law in the context of a books and records demand served upon an alternative entity. *See* O.B. 18-20; A.B. 16-19. Appellees misunderstand Appellants' argument regarding the application of this case law. Appellants do not argue that Section 220 case law is *never* applicable to Section 17-305. Rather, the specifically enumerated categories of documents in Section 17-305(a)(1)-(5) warrant the same treatment as the specifically enumerated categories of documents in Section 220.

Under Section 220, a stockholder may request, for any proper purpose, a stock ledger, a list of stockholders, or other books and records. 8 *Del. C.* § 220(b)(1). This Court and the Court of Chancery have established two frameworks for analyzing demands under Section 220. "[W]hen seeking inspection of books and records ***other than the corporate stock ledger or stock list***, a shareholder has the burden of proving that his purpose is proper." *Thomas & Betts Corp. v. Leviton Mfg. Co.*, 681 A.2d 1026, 1030 n.1 (Del. 1996) (citation omitted) (emphasis added). A stockholder seeking "other" books and records also must demonstrate that requested documents are necessary and essential to his proper purpose. *Id.*

A request for a stock ledger or list of stockholders is subject to a separate framework. "The burden of proof rests with the corporation to demonstrate an improper purpose when resisting demands to inspect stocklists and stock ledgers." *KT4 Partners LLC v. Palantir Techs., Inc.*, 2018 WL 1023155, at *7 n.75 (Del. Ch. Feb. 22, 2018), *rev'd and remanded on other grounds*, 203 A.3d 738 (Del. 2019); *see also Compaq Computer Corp. v. Horton*, 631 A.2d 1, 3 (Del. 1993) ("when a stockholder complies with the statutory requirements as to form and manner of making a demand, then the corporation bears the burden of proving that the demand is for an improper purpose"). Thus, the two specifically enumerated categories of documents in Section 220 ***are not*** subject to the "necessary and essential" requirement.

The same logic applies to Section 17-305. When a books and records demand seeks "other" documents, the demand must state a proper purpose and the stakeholder is entitled only to those documents that are necessary and essential to fulfill the proper purport. Where a demand seeks the specifically enumerated categories of documents in Section 17-305(a)(1)-(5), the stakeholder needs only show a proper purpose. The burden rests upon the company to demonstrate an improper purpose.

Appellants are entitled to complete tax returns, including K-1s, under Section 17-305(a)(2) and the Partnership Agreements, which track the statute. Appellees note that the IRS draws a distinction between K-1s and a tax return. A.B. 19-20. This is a distinction without a difference. The K-1s are submitted with the Partnerships' tax returns and are therefore part of the complete tax return. *See* A0853. In other words, the Partnerships' tax returns would be incomplete if the K-1s were absent. The Partnerships cannot refuse to produce complete copies of their tax returns.

Moreover, Appellants' request falls under Section 17-305(a)(5) (and the Partnership Agreements), which requires the Partnerships to produce information sufficient to identify the capital contributed by each partner. As Appellants represented at trial, they will accept a table reflecting the names and partnership percentages of each limited partner in lieu of the K-1s. A1036:2-10. Appellees

refused this offer. Even if Appellants are not entitled to the K-1s under Section 17-305(a)(2), they are entitled to information sufficient to identify the names and capital contributions of each limited partner pursuant to Section 17-305(a)(5).

B. The Court of Chancery Correctly Found that Appellants Stated A Proper Purpose.

The Court of Chancery correctly held that Appellants stated a proper purpose reasonably related to their interests as limited partners. O.B. Ex. A at 14:1-5. This determination is subject to *de novo* review. *Compaq Computer Corp.*, 631 A.2d at 3. "If there is any doubt, it must be resolved in favor of the statutory right of the stockholder to have an inspection." *Id.* Appellants' proper purposes are valuing their interests in the Partnerships and investigating mismanagement and wrongdoing.[4] O.B. Ex. A at 14:1-5.

---

[4] Appellees inaccurately contend that Appellants failed to preserve their argument on appeal that the Court of Chancery erred in finding that Appellants did not establish a credible basis to suspect wrongdoing. Appellants explicitly raised and discussed this argument in their Opening Brief. O.B. 28-31 ("The Court erred in finding that Appellants did not establish a credible basis to suspect wrongdoing."). Moreover, the Court of Chancery "conclude[d] that plaintiffs have stated proper purposes of valuing their shares and investigating wrongdoing." O.B. Ex. A at 14:16-17.

1. The Cross-Appeal Rule and the Law of the Case Doctrine Preclude Appellees From Challenging the Court of Chancery's Holding that Appellants' Valuation Purpose Is Proper

The cross-appeal rule and the law of the case doctrine preclude Appellees from challenging the Court of Chancery's determination that Appellants stated a proper valuation purpose. As the United States Supreme Court articulated, "Under that unwritten but longstanding rule, an appellate court may not alter a judgment to benefit a nonappealing party." *Greenlaw v. United States*, 554 U.S. 237, 244 (2008). Rather, "This Court, from its earliest years, has recognized that it takes a cross-appeal to justify a remedy in favor of an appellee." *Id.* This Court similarly has recognized the cross-appeal rule. *Sullivan v. Town of Elsmere*, 23 A.3d 128, 133 (Del. 2011).

In their Answering Brief, Appellees challenge the Court of Chancery's holding that Appellants stated a proper valuation purpose to support their Demand. A.B. 28-30. Appellees could have filed a cross-appeal to challenge this finding, but they did not. Appellees are barred from challenging the Court of Chancery's finding. This Court should not disturb the Court of Chancery's holding to favor a non-appealing party.

Appellees are also barred from challenging this holding under the law of the case doctrine. This Court explained, "The 'law of the case' doctrine similarly may preclude consideration of issues that have been decided by a lower court." *Sullivan*,

23 A.3d at 134. When an appellee fails to file a cross-appeal, the issues resolved below become part of the law of the case and cannot be disturbed upon appeal. *See id.* (discussing *Scharf v. Edgcomb*, 864 A.2d 909 (Del. 2004)). The law of the case doctrine has two exceptions, neither of which apply here. "First, the doctrine does not apply where a previous ruling was 'clearly in error' or if there was an important change in circumstances with respect to the factual basis for issues previously decided." *Id.* (citation omitted). Second, "the doctrine does not apply if there is sufficient 'equitable concern of preventing injustice' to overcome the doctrine." *Id.* (citation omitted).

The Court of Chancery's finding of a proper valuation purpose is the law of the case and should not be disturbed. The Court of Chancery's determination is not in clear error and there is no change of circumstance to justify a different finding. Moreover, there are no equitable concerns of preventing injustice that weigh in favor of overcoming the law of the case doctrine. Appellees provide nothing to suggest that an exception to the law of the case doctrine should apply in this appeal. Appellees are barred from challenging the Court of Chancery's ruling.

Appellees attempt to revive their improperly-raised argument by contradictorily asserting that the Court can reverse the Court of Chancery's holding regarding Appellants' proper purpose but nevertheless issue a "complete affirmance" of the overall judgment. A.B. 29-30. In support of this position,

Appellees cite to *Haley v. Town of Dewey Beach*, 672 A.2d 55 (Del. 1996). First, Appellees' argument is a contradiction in terms. This Court cannot issue a "complete affirmance" of a ruling that is reversed in part. Whether the result may be the same – Appellants do not receive the K-1s – does not change the fact that Appellees seek a reversal of a key portion of the Court of Chancery's decision. Second, *Haley* does not support Appellees' argument. Appellees do not merely disagree with the Court of Chancery's reasoning, they ask this Court to reverse the determination that Appellants stated a proper valuation purpose. Appellees' argument is barred.

2. The Court of Chancery Correctly Ruled that Appellants Stated a Proper Valuation Purpose

As noted, Appellants' valuation purpose is proper. *See Compaq Computer Corp.*, 631 A.2d at 3. Where, as here, the Demand complied with the statutory form and manner requirements, the Partnerships bear the burden[5] of showing an improper purpose. *Id.* The Appellees have not met this burden.[6]

---

[5] Even if, as Appellees contend (*see* A.B. 27), Appellants bear the burden of proof, Appellants have met their burden.

[6] Appellees oddly assert that Appellants suggested the "mere incantation" of a proper purpose means the purpose is proper. A.B. 28. Appellants made no such argument. Rather, Appellants rely upon the Court of Chancery's holding that their valuation purpose was proper; Appellants challenge the Court of Chancery's finding that Appellants lack a credible basis to investigate mismanagement or wrongdoing.

The Court of Chancery found, in the context of requesting documents in addition to the K-1s, "viewing the request as a whole, in the absence of evidence showing an improper actual purpose, I conclude that plaintiffs have stated proper purposes of valuing their shares and investigating wrongdoing." O.B. Ex. A at 14:13-17. Indeed, the Court of Chancery has repeatedly held that "[v]aluation of one's interest is a proper purpose for the inspection of limited partnership's books and records." *Holman v. Northwest Broadcasting, L.P.*, 2007 WL 1074770, at *2 (Del. Ch. Mar. 29, 2007).

Appellees inaccurately contend that Appellees' valuation purpose is a sham. In support of this argument, they assert, "*by the time they filed their Complaint*, the Murfeys already had received… *more than enough information* to let them 'value the Trusts' respective interests in the Partnerships.'" A.B. 30 (emphasis added). Appellees continue, "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."[7] A.B. 30 emphasis added). This language belies Appellees' argument.

---

[7] Appellees make much ado of Ms. Murfeys' statement that she, personally, does not need to see copies of the K-1s. *See* A.B. 30 (citing B706). Ms. Murfey stated, however, that she would like to be able to review unredacted copies of the K-1s. B706:20-22. Moreover, Appellants require copies of the K-1s to provide to their advisors.

First, Appellees' argument confuses the "proper purpose" requirement with the "necessary and essential" requirement. Whether Appellants had "more than enough" documents to satisfy their stated purpose, and whether they needed to see the K-1s, speaks to whether the requested documents were "necessary and essential" to the stated purpose. It does not challenge the propriety of the valuation purpose. Indeed, Appellees provide no support for their argument that the valuation purpose was a sham.

Second, Appellees provide no reason to suspect that the Demand was improper at the time it was made. Whether the Murfeys needed additional documents at the time the Complaint was filed is irrelevant to whether the *Demand* was supported by a proper purpose when made. Appellees have provided no evidence to support the conclusion that Appellants' valuation purpose was a sham when made.

3. The Court of Chancery Erred in Finding that Appellants did not Establish a Credible Basis for Mismanagement or Wrongdoing

The Court of Chancery erred in determining that Appellants did not establish a credible basis to infer mismanagement or wrongdoing. *See* O.B. Ex. A, 15-18. Appellants seek to investigate why their interests in the Partnerships were diluted. "Wrongful dilution that benefits a majority holder is worthy of investigation." *Sanders v. Ohmite Holdings, LLC*, 17 A.3d 1186, 1193 (Del. Ch. 2011)

In 2011, there were two opportunities to increase the Trusts' investment in WHC 2009. The Trusts took advantage of the first, but not the second, opportunity. Other limited partners took advantage of this opportunity. As a result, the Trusts' interests were diluted. Neither the General Partner nor the Trustees advised the Murfeys about the second opportunity to invest. Appellees produced two emails (on the eve of trial) to suggest the General Partner gave the Trustees a second opportunity to invest, but the Trustees declined. As discussed (O.B. § III; *infra* § III), those emails are inadmissible hearsay and should not have been considered. It is uncontroverted that the Murfeys did not know that their co-trustees had violated the Murfeys' standing orders to invest in Greylock at every opportunity. The dilution of Appellants' interests provides a credible basis to infer mismanagement or wrongdoing.

Appellees contend that mismanagement or wrongdoing *by the co-trustees*, and not by the Appellees, cannot satisfy the credible basis requirement. Appellees cite no authority for this contention, and Appellants could find none. The question of *whose* mismanagement or wrongdoing must be shown to satisfy the credible basis requirement appears to be an issue of first impression.

Appellants respectfully submit that evidence of a wrongful dilution of their interest is sufficient to warrant investigation, regardless of who appears to be at fault for the dilution. *See Sanders*, 17 A.3d at 1193 (Del. Ch. 2011). This interpretation

comports with the purpose of the books and records statute. Inspection rights "originated at common law and were recognized because as a matter of self-protection, the stockholder was entitled to know how his agents were conducting the affairs of the corporation of which he or she was a part owner." *Central Laborers Pension Fund v. News Corp.*, 45 A.3d 139, 143 (Del. 2012) (internal quotations and citation omitted).

The Appellants and the Murfeys require information about their investment to protect their interests in the Partnerships. As the Court of Chancery noted, the evidence suggests that the co-trustees did not follow the Murfeys' standing orders. O.B. Ex. A, 20:4-16. Appellants must investigate how their agents' conduct impacted the Appellants' interests in the Partnerships. This information can only be obtained from the Partnerships, and relates to the Appellants' interests in the Partnerships. Accordingly, the Partnerships are the proper target of the books and records demand. The Appellants' investigation efforts support a credible basis finding. The Court of Chancery erred in finding otherwise.

Appellants also require the K-1s to investigate whether to bring a subsequent action against their fellow limited partners. As one might expect in a books and records case, much is unknown about any potential claims that may flow from the information gleaned from the requested records.

Appellees argue that any such action would be time-barred under Delaware law. First, it is uncertain whether Delaware law would control any claims. The Trusts are organized under Florida law. The residence or state of organization of the other limited partners is unknown to Appellants. It is unknown to Appellants whether any tortious conduct by the limited partners occurred in Delaware. The Court should not bar a books and records demand on the basis of an unknown limitations period.

Second, if the potential claims implicated a limitations period, Appellants would argue that the claims should be tolled. Again, the applicable law to govern the potential claims is unknown, and so the Court cannot assess the viability of a tolling argument. Appellants' request should not be barred due to an unknown limitations period. Appellants demonstrated a credible basis to support their proper purpose of mismanagement or wrongdoing.

II. IF A NECESSARY AND ESSENTIAL REQUIREMENT APPLIES TO APPELLANTS' DEMAND, THEY SATISFIED THAT STANDARD.

A. The K-1s Are Necessary and Essential to Satisfy Appellants' Proper Purpose.

Appellants require the K-1s or a chart reflecting the names and ownership percentages of the limited partners to fulfill their proper valuation purpose. The Court of Chancery has found that tax returns *and* Schedule K-1s are necessary to value a party's interest. *See Bizzari v. Suburban Waste Services, Inc.*, 2016 WL 4540292, at *7 (Del. Ch. Aug. 30, 2016) (directing defendants to produce "tax returns **and schedules thereto**") (emphasis added); *Sanders*, 17 A.3d at 1195 (Del. Ch. 2011) (Schedule K-1s were required to fulfill the stated proper purposes of valuation and investigating wrongdoing). The K-1 Forms are necessary and essential to Appellants' valuation purpose.

Appellees contend that Appellants do not need the K-1s because they already received other information to support their valuation purpose. As reflected in the above-cited case law, a request for tax returns and schedules is appropriate to support a valuation demand. Appellees also point to Ms. Murfey's statement that she does not personally require copies of the K-1s. Ms. Murfey clarified that she indeed would like to review copies of the K-1s. B706:20-22. Permitting Appellants to retain copies of the K-1 Forms will allow counsel to "giv[e] complete advice to enable the client to make proper decisions with respect to the litigation." *Phila. Gear*

Corp. v. Power Transmission Servs., 1991 WL 29957, at *4 (Del. Ch. Mar. 6, 1991). The Court of Chancery erred in determining that the General Partner may pick and choose which portions of the tax returns Appellants may inspect.

B. The Partnership Agreements Require Production of the K-1s.

The Partnership Agreements require the General Partner to permit Appellants to obtain the information identified in Section 12.1 upon showing a proper purpose. Section 12.1 lists categories of documents that, pursuant to Section 12.2.1 (which governs inspection rights), limited partners are entitled to obtain. These categories include "[a] current list of the full name and last known business or residence address of each Partner, together with the Capital Contributions and Partnership Percentage of each of those Partners;" and "[c]opies of the Partnership's federal, state and local income tax information returns and reports, if any, for the six most recent taxable years." A0058, A0473, A0624-25, §§ 12.1.1 & 12.1.3.

The K-1 Forms contain the name, address, capital contributions, and partnership percentages of each limited partner. *See generally* A0098-443. Thus, the information contained in the K-1 Forms squarely falls within the information that a limited partner is entitled to obtain under Section 12.1.1 (and Section 17-305(a)(5)). Additionally, the K-1s are "tax information returns and reports" that a limited partner is entitled to obtain under Section 12.1.3 (and Section 17-305(a)(2)).

Under the plain terms of the Partnership Agreements, Appellants are entitled to obtain a copy of the K-1s.

Appellees argue that the K-1s constitute "investor information, financial statements of Limited Partners or similar materials, documents and correspondence" that limited partners are not entitled to obtain under Section 12.2.1. A.B. 22. But K-1s are clearly not financial statements. And the generic and undefined term "investor information" cannot be read to include K-1s, especially when Section 12.2.1 explicitly provides limited partners with the right to obtain a list of the limited partners with the Capital Contributions and Partnership Percentage of each partner, information which is readily available on a K-1 form. The Partnership Agreements do not preclude Appellants from obtaining the K-1s.

Further, the General Partner does not have a good faith belief that disclosing the K-1 Forms is not in the best interest of, or could damage, the Partnerships under Section 12.2.2 of the Partnership Agreement. Mr. Nordell specifically testified that he has no "reason to believe that [the Murfeys] would violate [the] confidentiality agreement," B354:15-17, does not believe the Murfeys will compete with Greylock, B351:8-17, and has no concerns that the Murfeys will misuse the K-1s, B351:18-B352:1.

Notably, this ran contrary to a pre-suit August 6, 2018 email from Appellees' counsel in which they stated, in support of not providing the K-1s to the Murfeys,

that "it is not in the best interest for the partnerships to provide individual k-1s to [the Murfeys]." A0769. However, by the time of trial, counsel for Appellees confirmed that Appellees had since abandoned any argument that providing the K-1s to the Murfeys would not be in the best interests of the Partnerships under Article 12.2.2. B796:5-13. Curiously, Appellees now attempt to resurrect this since-abandoned argument in appellate briefing by citing to and relying upon Mr. Nordell's testimony that "[he] [does not] think it's in the best interest of the partnership" to provide the K-1s to the Murfeys. A.B. 23. Appellees' improper attempt to resuscitate this abandoned argument should be rejected. *See* Del. S. Ct. R. 8.

Mr. Nordell's testimony and counsel's concession at trial confirm that the General Partner does not believe that the disclosure of the K-1s would damage the Partnerships. *See DFG Wine Company, LLC v. Eight Estates Wine Holdings, LLC*, 2011 WL 4056371, at *8 (Del. Ch. Aug. 31, 2011). Accordingly, the Partnership Agreements require the production of the K-1s.

III. THE BELATEDLY-PRODUCED EMAILS ARE INADMISSIBLE HEARSAY.

Mr. Chisholm's *ultra vires* emails are inadmissible hearsay. A statement of an agent is only admissible under Delaware Rule of Evidence 801(d)(2)(D) if the statement was made "within the scope of his agency or employment." *Thomas & Betts Corp. v. Leviton Mfg. Co., Inc.*, 681 A.2d 1026, 1032 (Del. 1996). Mr. Chisholm's emails were sent outside the scope of his position as co-trustee, and in violation of his fiduciary duties to the Trusts, and therefore are not subject to a hearsay exception.

Joint Exhibit 87 is an email from Mr. Chisholm to the Trusts' trial counsel that Mr. Chisholm then unilaterally forwarded to Appellees' counsel. In essence, Mr. Chisholm attempted to aid *the Partnerships'* litigation position at the expense of the Trusts, of which he is a fiduciary. At the same time, he attempts to protect his own interests by justifying his actions as a co-trustee of the Trusts. This action cannot have been taken within the scope of Mr. Chisholm's role as a fiduciary of the Trusts. The email from Mr. Chisholm, co-trustee of the Trusts, to counsel for the Trusts in this action, which was forwarded to opposing counsel, is not admissible hearsay under D.R.E. 801(d)(2)(D).

Joint Exhibit 88 represents another attempt of Mr. Chisholm to aid Appellees in this litigation and to intentionally and maliciously harm the Trusts of which he is a co-trustee. Mr. Chisholm produced this document to opposing counsel, after the

Demand was served, without the consent or knowledge of the Murfeys or the Trusts' trial counsel. Mr. Chisholm's *ultra vires* email is not admissible hearsay under D.R.E. 801(d)(2)(D).

Appellees misunderstand Appellants' argument; Mr. Chisholm did not merely damage the Trusts, he intentionally and maliciously undermined the Trusts' litigation position by, among other things, disclosing confidential and attorney-client privileged information to opposing counsel, in violation of his fiduciary duties. This type of *ultra vires* action is not subject to a hearsay exception because the declaration cannot have been made in the scope of Mr. Chisholm's role as trustee.

Moreover, Appellants properly faulted Appellees for failing to produce these communications before the eve of trial, at a time when deposing Mr. Chisholm would not have been feasible. Meanwhile, Appellees wrongly contend that Appellants were obligated to produce the communications to Appellees. But JX 88 had never previously been provided to the Murfeys as Co-Trustees, and JX 87 was already in the possession of Appellees, and not responsive to any discovery request served by the General Partner. The Court should find that the belatedly-produced documents are inadmissible hearsay.

IV. THE K-1s ARE NOT CONFIDENTIAL.

If this Court finds that Appellants are entitled to receive copies of the K-1s, Appellants respectfully request that the Court also lift the confidentiality of the K-1s and information derived therefrom. The Court of Chancery ruled that the K-1s would remain confidential pending a final ruling, but did not find that Appellees met their burden to maintain confidentiality. *See* O.B. Ex. C. Indeed, other than social security numbers, this information is not subject to continued confidential treatment.

Appellees paradoxically contend that this question was preserved below (A.B. 38, "This argument was preserved at the trial court at B816-21"), but also that the Court of Chancery never decided this issue (A.B. 38). Appellees also contend that the Confidentiality Agreement precludes the Court from lifting the confidentiality of this information. The parties entered into the Confidentiality Agreement for litigation purposes only, and Appellants specifically reserved the right to challenge such designation. *See* A0755-756, Confidentiality Agreement § 8. This Court (and the Court of Chancery) are empowered to lift any confidentiality restriction, as recognized by the explicit terms of the Confidentiality Agreement. *See id.* at § 13(iii). Appellants respectfully request that the Court lift the confidentiality of the K-1s if the Court finds that the K-1s should be produced to the Appellants.

CONCLUSION

Appellants respectfully request that the Court reverse the Court of Chancery's decision and direct the court of Chancery to enter an order compelling the production of the K-1 Forms, not subject to a professionals' eyes only confidentiality designation.

Dated: October 11, 2019

FOX ROTHSCHILD LLP

/s/ Carl D. Neff

Carl D. Neff (Bar No. 4895)
E. Chaney Hall (Bar No. 5491)
Citizens Bank Center
919 N. Market Street, Ste. 300
Wilmington, DE 19899
Telephone: (302) 654-7444
cneff@foxrothschild.com
chall@foxrothschild.com

Attorneys for Appellants