

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

JAMES FORSYTHE and ALAN TESCHE,)
)
Plaintiffs,)
)
v.) C.A. No. 657-N
)
CIBC EMPLOYEE PRIVATE EQUITY)
FUND (U.S.) I, L.P., and ESC FUND)
MANAGEMENT CO. (U.S.),)
)
Defendants.)

MEMORANDUM OPINION

Submitted: June 1, 2005

Decided: July 7, 2005

Robert J. Kriner, Jr., Esquire, A. Zachary Naylor, Esquire, CHIMICLES & TIKELLIS LLP, Wilmington, Delaware; Lynda J. Grant, Esquire, GOODKIND LABATON RUDOFF & SUCHAROW LLP, New York, New York, *Attorneys for the Plaintiffs.*

Michael D. Goldman, Esquire, Stephen C. Norman, Esquire, Melony R. Anderson, Esquire, POTTER ANDERSON & CORROON, Wilmington, Delaware, *Attorneys for the Defendants.*

LAMB, Vice Chancellor.

The plaintiffs, unitholders in a limited partnership, bring this action seeking to inspect the books and records of the limited partnership. The plaintiffs allege that their purpose is to investigate mismanagement and to value their investments in the limited partnership. For the reasons, and subject to the limitations, described below, inspection of the limited partnership's books and records will be allowed.

I.

The plaintiffs, James Forsythe and Alan Tesche, are former high producing employees of Canadian Imperial Bank of Commerce ("CIBC") and limited partners in CIBC Employee Private Equity Fund (U.S.) I, L.P., a Delaware limited partnership (the "Fund"). The plaintiffs made a demand upon the Fund, and ESC Fund Management Co. (U.S.), a Delaware corporation and the General Manager of the Fund (the "General Manager"),¹ to inspect certain books and records of the Fund pursuant to 6 *Del. C.* § 17-305.

In March of 2000, CIBC created the Fund to allow some of its employees to invest alongside CIBC in certain of its investments, through what is known as a "co-invest" fund. The Fund is governed by an Amended and Restated Agreement of Limited Partnership, dated March 10, 2003 (the "Partnership Agreement"). CIBC sold units in the Fund via a confidential private placement memorandum, dated November of 1999 (the "PPM") and a supplement thereto (the "Supplement"). Limited partners were allowed to leverage their investment by

¹ ESC is 100% owned by three individuals who are independent of CIBC.

taking out loans offered by CIBC. However, the decision to take out loans, like the decision to invest in the Fund, was completely voluntary.²

The goal of the Fund was to achieve long-term capital appreciation for its investors through a diversified portfolio of investments in three targeted investments categories: (i) the Trimaran Fund, (ii) the Fund-of-Funds, and (iii) Merchant Banking.³

The Trimaran Fund is a private equity fund run by “an entity controlled by certain senior members of the high yield investments banking unit of CIBC acting in their individual capacity[.]”⁴ Trimaran investments were intended to represent between 33% and 50% of the Fund’s total capital commitment.⁵

The Fund-of-Funds investments were in predominately designated, and some undesignated, private equity funds which were managed by sponsors not affiliated with CIBC.⁶ Fund-of-Funds investments were intended to represent between 40% and 57% of the Fund’s total capital commitment.⁷

The Merchant Banking investments referred to “certain merchant banking and venture capital investments to be made by CIBC on a global basis[.]”⁸

² See Forsythe Dep. at 62-63; Tr. at 267-68.

³ See PPM at 1.

⁴ *Id.*

⁵ *See id.*

⁶ *See id.*

⁷ *See id.*

⁸ PPM at 1.

Merchant Banking investments were intended to represent approximately 10% of the Fund's total capital commitment.⁹

The General Partner is a separate legal entity from CIBC, and is controlled by a three-member board of directors, none of whom are affiliated with CIBC.¹⁰ Under the terms of the Partnership Agreement, the General Partner was allowed to delegate its authority to manage and administer the affairs of the Fund.¹¹ The General Partner exercised this power by delegating the authority to make decisions relating to the selection and disposition of the Fund's investments to CIBC ESC SLP, LLC (the "Special Limited Partner") and by delegating its other investments management and related powers to CIBC ESC Advisors, LLC (the "Investments Advisor").¹² Also, the General Partner delegated the maintenance of its books and records to RK Consulting, LLC.

The Fund was designed to allow CIBC employees to invest alongside CIBC. It, therefore, could only make investments in which CIBC had also invested.

⁹ *See id*

¹⁰ *See* PPM at 15; *see also* Tr. at 244

Q You also allege in your complaint -- actually, in that paragraph four, that the general partner is controlled by CIBC. Right?

A [Forsythe] Yes, I do.

Q But you don't have any personal knowledge of any facts that demonstrate that CIBC, in fact, controls the general partner. Do you?

A No, I do not.

Q You also assert that CIBC is an agent of the General Partner. Right?

A Yes.

Q And you don't have any facts to support that claim, either. Do you?

A No, I don't.

¹¹ Partnership Agreement at § 4.1.

¹² PPM at 3-5.

Furthermore, CIBC's Investment Committee decided whether or not to make a specific investment for CIBC's own account.¹³ Thus, the Fund could only make investments after those investments were approved by the CIBC Investment Committee.

In addition, the Fund had its own criteria for inclusion of investments.¹⁴ The Investment Adviser applied these criteria to choose investments from those made by CIBC, which it deemed appropriate for the Fund.¹⁵ Moreover, there were certain investments in which CIBC could participate, but the Fund could not.¹⁶ Thus, the Investment Adviser made decisions on whether to include an investment in the Fund based on: (i) whether the CIBC Investment Committee made the investment, (ii) whether CIBC allowed the Fund to participate in the investment, and (iii) whether the investment fits the Fund's eligibility requirements.

Whatever the criteria used to select its investments, the Fund did not prosper. This is something of an understatement, as the Fund lost over 75% of its initial value, and over half of its investments have been written down or written off. In addition to this plunge in value, several facts about the Fund made the plaintiffs suspect mismanagement.¹⁷ First, several CIBC senior executives who served on the CIBC Investment Committee were also members of the Investment

¹³ Tr. at 37.

¹⁴ *Id.* at 40.

¹⁵ *Id.* at 39-40.

¹⁶ PPM at 53.

¹⁷ The plaintiffs have, in fact, already brought a derivative suit before this court, alleging mismanagement of the Fund. *Forsythe v CIBC ESC Fund Mgm't Co.*, C.A. No. 1091-N.

Advisor and the Special Limited Partner. Second, Forsythe had personal knowledge that CIBC invested in Shoppers Mart for its own account, which he believed was an excellent investment, and in which the Fund did not invest. Third, the plaintiffs contend that, while the Fund was plunging in value, CIBC was making millions of dollars on management fees and interest on loans to the limited partners.

On December 23, 2003, counsel for the plaintiffs sent a letter to the General Partner, care of RK Consulting, requesting certain documents related to the Fund. However, the letter did not comply with the requirements of a demand letter, as set forth in 6 *Del. C.* § 17-305.¹⁸ After continued correspondence, on March 2, 2004, Tonya Carmichael, acting on behalf of the General Partner, produced certain documentation that she claimed to be responsive to the plaintiffs' request. Unsatisfied with Carmichael's response, on April 30, 2004, the plaintiffs finally made a demand upon the General Partner that complied with 6 *Del. C.* § 17-305 (the "Demand Letter"). The Demand Letter requested the following:

- (1) All documents demonstrating the value of every private equity fund investment transferred into the Partnership as a Fund of Funds Investment, as that term is used in the applicable offering circular dated November 1999 (the "Offering Circular"):
 - (a) at the time that CIBC purchased the investment; and/or
 - (b) at the time that CIBC Oppenheimer Private Equity Partners II, L.P. ("COPEP II") made an investment;

¹⁸ The Partnership Agreement does not create any right to Fund documents greater than that contained in 6 *Del. C.* § 17-305.

- (c) at the time the investment was transferred from CIBC to the Partnership; and
 - (d) currently.
- (2) All documents demonstrating every Fund of Fund Investment which CIBC or any affiliate sold or transferred to an unaffiliated third party, the price at which such investment was sold or transferred and the date of such sale or transfer.
- (3) All communications between the general partner of the Partnership (the “General Partner”) and the limited partners, including any transcripts or notes of any conference call with any limited partner.
- (4) The names and addresses of all limited partners.
- (5) The Exemptive Order referenced in the Offering Circular, which purportedly exempts the Fund from registration under the United States Investment Company Act of 1940.
- (6) All investment memoranda used to approve every investment made by or transferred into the Partnership.
- (7) All documents discussing whether CIBC or any affiliate thereof acted as an underwriter, investment banker, investment advisor, financier or banker with regard to any company and/or private equity fund in which the Partnership made an investment, including but not limited to documents discussing whether such positions constitute a conflict of interest.
- (8) All documents demonstrating all fees earned by CIBC or any affiliate thereof for managing the Partnership or any portion thereof.
- (9) All documents demonstrating all monies earned by CIBC or any affiliate thereof as interest on loans made to the limited partners.
- (10) All minutes, notes and records of any meeting of any investment advisor to the Partnership pertaining to any investment transferred into or made by the Partnership, including but not limited to notes/or minutes of all meetings of any investment advisor in which

the “fairness” determination as described in Section 2.7(i)(a) of the Partnership Agreement was made.

(11) For Merchant Banking Investments, as that term is used in the Offering Circular, all documents demonstrating:

- (a) the value of any Merchant Banking Investment at the time that CIBC purchased or made the investment;
- (b) the date of the investment;
- (c) the date such investment was transferred to the Partnership;
- (d) its value on the date it was transferred;
- (e) its current value; and
- (f) the total amount of capital invested by the Partnership in Merchant Banking Investments.

(12) With regard to the Partnership’s Merchant Banking Investments, all documents which demonstrate the length of the operating history of the companies in which the Partnership invested, prior to the Partnership’s investment.

(13) All documents pertaining to any investment made by the Trimaran Fund, as that term is used in the Offering Circular, after June 2001.

(14) All documents pertaining to any change in or reorganization of the Trimaran Funds, its principals or its investment advisor after March 2000.

(15) All documents pertaining to any agreement between CIBC, the Trimaran Fund or any principal thereof and/or any other party regarding investment opportunities by CIBC to be offered to the Trimaran Fund, and the resolution of any conflicts of interest.

(16) All documents pertaining to any investigation of CIBC by any regulatory agency or stock exchange with regard to claims of insiders trading or the front-running of trades.

(17) All documents discussing the reason why the Partnership did not make an investment in Shoppers Drug Mart.¹⁹

After failing to receive a satisfactory response, on August 23, 2004, the plaintiffs filed their complaint, seeking to compel inspection of the Fund's books and records. On April 1, 2005, the court held a one day trial. At the close of trial, the court instructed the parties to file short, post-trial briefs focusing on two issues. The first was whether the plaintiffs had stated a proper purpose. The second was a listing of the specific documents requested, the evidence that such documents exist, and, if those documents were held or under the control of an entity other than the General Partner (such as CIBC), the plaintiffs' right to demand inspection of those documents. Post-trial briefing was concluded on June 1, 2005. This is the court's post-trial opinion.

II.

The books and records section of the Delaware Revised Uniform Limited Partnership Act ("DRULPA") provides a limited partner the right to inspect partnership books and records for any purpose that is "reasonably related to the limited partner's interest as a limited partner." 6 *Del. C.* § 17-305 provides, in relevant part:

¹⁹ The plaintiffs have withdrawn Request Nos. 4, 14, and 16. The plaintiffs have also received documents responsive to, and therefore are not pursuing, Request Nos. 5, 8, 11(b), 11(c) and 11(d), and 13. The defendants have indicated that, contrary to the relevant offering material, COPEP II was never formed, and therefore there are no documents with regard to Request No. 1(b). The plaintiffs have received only a partial response to Request No. 10, given the extensive redactions which the defendants made to the documents before producing them. The plaintiffs, therefore, continue to pursue Request No. 10, in full without redactions.

(a) Each limited partner has the right, subject to such reasonable standards (including standards governing what information and documents are to be furnished, at what time and location and at whose expense) as may be set forth in the partnership agreement or otherwise established by the general partners, to obtain from the general partners from time to time upon reasonable demand for any purpose reasonably related to the limited partner's interest as a limited partner:

(1) True and full information regarding the status of the business and financial condition of the limited partnership;

...

(6) Other information regarding the affairs of the limited partnership as is just and reasonable.

In determining whether a specific purpose is “reasonably related to the limited partner’s interest” under 6 *Del. C.* § 17-305, this court has referred to whether that purpose has been deemed a “proper purpose” under 8 *Del. C.* § 220, which is the corporate analogue to section 17-305.²⁰

In the Demand Letter, the plaintiffs state that their purposes are: (i) to determine the value of certain assets in the Fund (and thereby, the court assumes, the value of their units), and (ii) investigate wrongdoing in the management of the company. Both of these are proper purposes.²¹

²⁰ See *Bond Purchase, L.L.C. v. Patriot Tax Credit Props., L.P.*, 746 A.2d 842, 851 (Del. Ch. 1999); *In re Paine Webber Ltd. P'ships.*, 1996 Del. Ch. LEXIS 117, at *15 (Del. Ch. Sept. 17, 1996).

²¹ See *Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 567 (Del. 1997) (“[I]nvestigation of mismanagement is a proper purpose for a [] books and records inspection.”); *Madison Ave. Inv. Partners, LLC v. Am. First Real Estate Inv. Partners, L.P.*, 806 A.2d 165, 174 (Del. Ch. 2002) (“Valuing one’s investment is generally considered to be a proper purpose reasonably related to one’s interest.”).

“It is well established that investigation of mismanagement is a proper purpose for a [] books and records inspection” once a limited partner establishes “a credible basis to find probable wrongdoing on the part of” the general partner.²² “While [limited partners] have the burden of coming forward with specific and credible allegations sufficient to warrant a suspicion of waste and mismanagement, they are not required to prove by a preponderance of the evidence that waste and mismanagement are actually occurring.”²³ “All that the [books and records] plaintiff must show is a credible basis for claiming that ‘there are legitimate issues of wrongdoing.’”²⁴

The plaintiffs have met this standard. They have shown that the Fund’s value has plummeted over the last few years while the General Partner and Special Limited Partner made substantial fees. In addition, Forsythe testified that CIBC made highly profitable investments that the Fund did not participate in. While these facts fall well short of actually proving wrongdoing, they do provide a credible basis for inferring mismanagement of the Fund.

In addition, the Fund is comprised of several non-typical investments which make valuing the plaintiffs’ interest in the Fund difficult. Coupled with the facts that the Fund has written down many of its investments and that the overall value

²² *Sec. First*, 687 A.2d at 567.

²³ *Thomas & Betts Corp. v. Leviton Mfg. Co.*, 681 A.2d 1026, 1031 (Del. 1996).

²⁴ *Khanna v. Covad Communications Group*, 2004 Del. Ch. LEXIS 11, at *21 (Del. Ch. Jan 23, 2004) (quoting *Sec. First*, 687 A.2d at 568).

of the Fund has plunged by 75%, the plaintiffs have good reason to want to properly value their interests in the Fund.

Therefore, the court concludes that the plaintiffs' stated purposes, to investigate mismanagement and to value their investments in the Fund, are proper.

III.

At trial, it became clear that many of the documents the plaintiffs requested are in the possession of CIBC, either because they were CIBC's documents, or because they were the Fund's documents but the custodian of the documents worked for CIBC. Furthermore, some of the documents that the plaintiffs requested are plainly CIBC documents. For example, the plaintiffs wanted copies of all the materials that the CIBC Investment Committee used in making investments for its own account.²⁵

Generally, a shareholder (or unitholder) is only entitled to the books and records of the company in which the shareholder owns shares (or units). For example, before recent amendments to 8 *Del. C.* § 220, Delaware courts repeatedly held that a shareholder of a company is not entitled to the books and records of even the company's subsidiary, much less its parent.²⁶ Applying this general rule, the plaintiffs should not be entitled to the documents held by CIBC.

²⁵ See Tr. at 37-40.

²⁶ See, e.g., *Saito v. McKesson HBOC, Inc.*, 806 A.2d 113, 118 (Del. 2002); *Skouras v. Admiralty Enter., Inc.*, 386 A.2d 674, 681 (Del. Ch. 1978). In 2003, 8 *Del. C.* § 220 was amended to provide for inspection of documents of a "subsidiary" of the corporation upon which the demand

However, the plaintiffs make three arguments as to why they are entitled to these documents. First, they argue that the documents are the Fund's documents. Second, they argue that CIBC is the "alter ego" of the Fund. Third, they argue that the Partnership Agreement contemplates that others will hold the Fund's documents. The court addresses these arguments in turn.

A. The Documents Are CIBC's Documents, Not The Fund's

The plaintiffs argue that they are entitled to the documents held by CIBC because these documents are the Fund's documents. While repeatedly making this assertion, the plaintiffs cannot plausibly explain why it is true. The Fund is a co-invest fund, whereby the Fund chooses its investments from those made by CIBC for its own account. The documents that the plaintiffs have requested from CIBC relate to CIBC's decision to make its own investments. These documents were created by CIBC in the course of making its own investments. The documents are not the property of the Fund, and the managers of the Fund did not use the information contained in the documents to make Fund investments.

The plaintiffs argue that they are entitled to these documents because they are of the type that "the Fund would ordinarily be expected to have, but does not, solely because CIBC executives created the Fund's recordkeeping system in a

for inspection is made. *Weinstein Enters. v. Orloff*, 870 A.2d 499, 505 (Del. 2005). However, the General Assembly has *not* amended Section 17-305 in a similar fashion.

disjointed manner.”²⁷ In making this argument, the plaintiffs rely almost exclusively on this court’s decision in *Dobler v. Montgomery Cellular Holding Co.*²⁸ In that case, minority shareholders of the defendant corporation brought two books and records actions to investigate mismanagement, and to value their interest in the corporation. In order to ensure that the plaintiffs’ inspection right would not be “defeated simply by having another entity hold the records relating to [the defendant corporation] which [the defendant corporation] ordinarily would have,” this court ordered production of any documents held by other corporations that would have been subject to inspection if they were in the possession of the defendant corporation.²⁹

Dobler is inapposite to this case. *Dobler* is based on the unremarkable premise that a company cannot prevent its books and records from being subject to inspection by giving them to another party. For example, in this case, the Fund’s books and records are subject to production, even though they are in the possession of RK Consulting. *Dobler* does *not* give a unitholder a broad right to inspect the books and records of another related company, even when those documents would enable the unitholder to better value its investment. The court in *Dobler* stated as much. “Plaintiffs are not entitled under § 220 to documents of the other corporations which may shed light upon their concerns if they are not documents to

²⁷ Pl.’s Post-Trial Memo. Of Law at 17.

²⁸ 2001 Del. Ch. LEXIS 126 (Del. Ch. Oct. 19, 2001).

²⁹ *Id.* at *34.

which [the defendant corporation] is a party or if they are not documents which relate to the handling of [the defendant corporation's] assets.”³⁰ The Fund is not a party to the documents requested, and these documents do not relate to the handling of the Fund's assets.

An example may help clarify the flaw in the plaintiffs' position. Suppose that a fund was set up as a limited partnership that promised to make exactly the same investments as a mutual fund run by the Vanguard Group. However, the management fees would be less because the fund would only copy the investments of the public, professionally managed fund. Suppose further that the value of this “clone” fund dropped precipitously and a unitholder, suspecting fraud or seeking to value her investment, made demand upon the clone fund for Vanguard's books and records. The unitholder would obviously not be entitled to the books and records in such a case. While the instant case is of course different because CIBC set up the Fund and employees of CIBC manage the Fund, it still remains true that the plaintiffs agreed to invest in a fund whose investment philosophy was based almost entirely on the decisions of another party. The plaintiffs agreed to invest in the co-invest Fund, knowing that the Fund's main criteria in choosing an investment would be that CIBC made the investment.

For the above reasons, the court concludes that the documents requested from CIBC are not the documents of the Fund.

³⁰ *Id.* at *36.

B. The Fund Is Not An “Alter-Ego” Of CIBC

The plaintiffs argue that they are entitled to the CIBC documents because the Fund is an “alter-ego” of CIBC. In making this argument, the plaintiffs point to the case of *Somerville S Trust v. USV Partners, LLC*.³¹ In that case, former Vice Chancellor (now Justice) Jacobs allowed an investor in a Limited Liability Company access to the company’s books and records to investigate possible mismanagement.³² In deciding whether the investor had stated a *proper purpose*, Vice Chancellor Jacobs concluded that evidence that Gregory Earls (the sole officer, director, and member of the company) had disregarded the corporate form and failed to follow corporate formalities supported the investor’s stated purpose of investigating mismanagement.³³

Somerville is inapposite to this case. The court has already found that the plaintiffs have stated a proper purpose for their books and records demand. *Somerville* does *not* stand for the proposition for which the plaintiffs cite it, namely that a unitholder in a limited partnership can obtain books and records from a non-party entity. In fact, the circumstances in *Somerville*, in which Vice Chancellor Jacobs found the company was the alter ego of Earls, are completely different from this case. In *Somerville*, Earls was the “sole shareholder, director, officer, and

³¹ 2002 Del. Ch. LEXIS 103 (Del. Ch. Aug. 2, 2002).

³² *Id.* at *1.

³³ *Id.* at *23-*24 (stating that Earls’s “pervasive disregard of corporate formalities, all of which is probative in supporting the conclusion that the [company was] in fact merely [an] alter ego[] of Earls.”) (internal quotations omitted)).

decision-maker of the [company], which has no office or employees. Either Earls or his accountant maintains [the company's] books and records and its mailing address is that of Earls's office or residence."³⁴ In this case, the Fund is run by a General Partner, whose directors are independent of CIBC. It also has a different address than CIBC and its documents are kept by RK Consulting, the Fund's administrator, and not CIBC.

Most important, in contrast to *Somerville*, the plaintiffs have not shown any "fraud or injustice" sufficient to justify piercing the corporate veil.³⁵ While they have claimed that the Fund was used by CIBC to off-load non-performing investments, the plaintiffs have not adduced any evidence to buttress this bare allegation. There is simply no evidence, as in *Somerville*, that there was "pervasive disregard of corporate formalities." In fact, the evidence adduced at trial supports the conclusion that the Fund's management did follow proper corporate formalities.

While a books and records case is a summary proceeding, and the plaintiffs can hardly be expected to definitively prove fraud in such a proceeding, they cannot simply make bare allegations that the Fund is an "alter ego" of CIBC. As stated above, the general rule is that a unitholder is only entitled to the books and

³⁴ *Id.* at *24.

³⁵ *See, e.g., Mobil Oil Corp. v. Linear Films, Inc.*, 718 F. Supp. 260, 268 (D. Del. 1989) ("[P]iercing the corporate veil is appropriate only upon a showing of fraud or something like fraud.") (cited approvingly by *Medi-Tec of Egypt Corp. v. Bausch & Lomb Surgical*, 2004 Del. Ch. LEXIS 21, at *16 n.30 (Del. Ch. Mar. 4, 2004)).

records of the entity in which the unitholder owns units. The plaintiffs' bare allegations do not entitle them to CIBC's documents.

C. The Partnership Agreement Does Not Require The Production Of CIBC's Documents

The plaintiffs argue that the Partnership Agreement expressly provides that the Fund's books and records would be kept in locations other than the Fund's office. They then quote Section 8.1 of the Partnership Agreement, which states: "The books and records shall be maintained at the offices of the Fund or at such other office of the Fund as shall be determined from time to time by the General Partner."

However, there is nothing in this section of the Partnership Agreement, or any other section, that requires *CIBC* to provide *its* documents to the unitholders. Instead, this section simply allows the Fund to place its documents with another entity, as it did with RK Consulting. It is undisputed that the plaintiffs are entitled to any Fund documents held by a third party, such as RK Consulting. Therefore, the court must conclude that the Partnership Agreement does not require the production of any CIBC documents.

IV.

In their post-trial memorandum of law, the plaintiffs detail their demand requests, and the documents (they contend) they have proven exist, they are entitled to, and that are responsive to their requests. The vast majority of these documents are CIBC documents, in the possession of CIBC. As discussed, *supra*, the plaintiffs are not entitled to these documents. However, Request No. 1 and Request No. 11 relate to documents held by RK Consulting. In addition, Request No. 17 purportedly relates to documents held by the Investment Advisor or the Special Limited Partner.

A. Request No. 1 And Request No. 11

Request No. 1 seeks documents for the Fund-of-Funds investments “demonstrating the value of every private equity fund investment transferred into the Partnership” Request No. 11 seeks the same documents, but for the Merchant Banking investments of the Fund. In their post-trial memorandum of law, the plaintiffs list the following documents the Fund should have produced: (i) “all general ledgers,” (ii) “the record of all securities transactions,” (iii) “[RK Consulting’s] analysis of the Fund’s assets,” (iv) “[RK Consulting’s] workpapers prepared for the Special Purpose Financials which discuss the values of the Fund-of-Funds investments,” and (v) “the audit package prepared for CIBC’s auditors

which also contains documents analyzing or regarding the value of the Fund or the Fund's Investments.”³⁶

In response, the defendants argue that the Demand Letter did not request these documents. Moreover, the documents are only accounting records, held for tax purposes, that reflect the Fund's financial information as cash balances. Therefore, they contend, the documents are irrelevant to the valuation of the Fund and to the plaintiffs' investments.

With respect to the information given to the auditors, this information is clearly not responsive to a demand for information about valuation. While some of the information that an auditor requests may be useful for valuation, much obviously is not. The representatives of the Fund cannot be expected to divine the intentions of the plaintiffs and produce documents that were not requested.

With respect to the other documents held by RK Consulting, these documents relate to the value of the Fund and are responsive to the plaintiffs' request. Even though they are kept on a cash basis, they should provide insight into the value of the Fund. Certainly the balance of its assets versus its liabilities is relevant to the value of the Fund. These documents must be produced.

B. Request No. 17

Request No. 17 seeks production of “[a]ll documents discussing the reasons why the Partnership did not make an investment in Shoppers Drug Mart.”

³⁶ Pls.' Post-Trial Memo. Of Law at 24.

Forsythe testified that CIBC owned an enormous amount of Shoppers Drug Mart stock and that, when Shoppers Drug Mart went public, the Fund was excluded from investing in it.³⁷ The plaintiffs argue that the Special Limited Partner and/or the Investment Advisor have documents responsive to this request.

However, at trial Carmichael testified that neither the Special Limited Partner nor the Investment Advisor had these documents. She stated that while CIBC may have some responsive documents, the Special Limited Partner and the Investment Advisor do not.³⁸ The plaintiffs did not introduce any evidence contradicting Carmichael, and the court found her testimony on this issue to be credible. As discussed, *supra*, the plaintiffs are not entitled to the production of documents from CIBC. As such, this request is denied.

V.

For the reasons set forth above, the court concludes that the plaintiffs have established proper purposes for their demand and that they are entitled to inspection of the requested books and records of the Fund. However, they are *not* entitled to the production of any books and records of CIBC. Counsel shall confer and submit an implementing order reflecting the rulings in this opinion within ten days of the date hereof.

³⁷ Tr. at 189.

³⁸ *Id.* at 114-15.