EFiled: Nov 28 2016 02:59PM EST
Filing ID 59879535
Case Number 469,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

PASSCO INDIAN SPRINGS DST,	) No. 469, 2016
Defendant-Below/Appellant,	)
v.	) Court Below:
	) Court of Chancery of the
GRAND ACQUISITION, LLC,	) State of Delaware
Plaintiff-Below/Appellee.	) C.A. No.: 12003-VCMR

APPELLEE GRAND ACQUISITION, LLC'S ANSWERING BRIEF

R. KARL HILL (2747)
SEITZ, VAN OGTROP & GREEN, P.A.
222 Delaware Avenue, Suite 1500
P. O. Box 68
Wilmington, Delaware 19899
(302) 888-0600
(302) 888-0606 (fax)
khill@svglaw.com
Attorneys for Grand Acquisition, LLC
Plaintiff-Below/Appellee

Dated: November 28, 2016

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Rules and Statutes

NATURE OF PROCEEDINGS

This is an appeal from the Court of Chancery's September 7, 2016 Opinion (the "Opinion") which granted Plaintiff Below-Appellee Grand Acquisition, LLC's ("Grand Acquisition") Motion for Summary Judgment and denied Defendant Below-Appellant Passco Indian Springs DST's (the "Trust") Cross Motion for Summary Judgment.

On September 30, 2015, Grand Acquisition made its demand for a list of the Trust's other beneficial owners, their contact information and respective ownership percentages (together the "Requested Information"). (A016) Passco Companies, LLC, through its general counsel, responded on October 28, 2015. (A017) The response did not raise any issue in respect to the list being an Ownership Record and, therefore, not subject to production, but instead referred to the list as a "book and record." *Id.* On December 18, 2015, Grand Acquisition supplemented its demand (A018-19), and the Trust did not respond to that supplemental demand.

Grand Acquisition initiated the underlying action on February 16, 2016 to compel the Trust to produce the Requested Information based on the rights set forth in the parties' Amended and Restated Trust Agreement dated November 17, 2011 (the "Trust Agreement") and alternatively 12 Del. C. §3819 of the Delaware Statutory Trust Act ("Section 3819"). (Verified Complaint A010-15)

The parties exchanged written discovery pursuant to a stipulated scheduling order, submitted simultaneous briefing, and argued their respective positions at oral argument on June 30, 2016. (Oral Argument Transcript B035-107)

In the Opinion, the Court of Chancery held that Grand Acquisition was entitled to the Requested Information based on the rights set forth in the Trust Agreement and that the preconditions contained in Section 3819 did not apply. Passco filed the present appeal on September 13, 2016, and filed its Opening Brief on Appeal ("O.B.") with an Appendix (A001 to A410) on October 28, 2016. This is Grand Acquisition's Answering Brief on Appeal with accompanying Appendix (B001 to B107).

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly held that Section 5.3(c) of the Trust Agreement entitled Grand Acquisition to the Requested Information and the preconditions of Section 3819 did not apply by default.

2. Denied. The Court of Chancery properly held that the definition of "Ownership Records" in Section 1.1 of the Trust Agreement did not override Grand Acquisition's rights to the Requested Information based on the books and records provision in Section 5.3(c).

3. Denied. The Court of Chancery properly rejected the Trust's implied improper purpose defense because even if it applied (which Grand Acquisition contends it does not), the Trust failed to prove it. The materials submitted in respect to the "bad acts" of non-parties were insufficient to prove harm to the Trust.

COUNTER STATEMENT OF FACTS

The Opinion sets forth the basic facts as submitted. This counter statement of facts refers to only those additional facts that were a part of the record submitted to the Court of Chancery and relevant on appeal.

A. The Trust

The Trust is governed by the Trust Agreement dated November 17, 2011. (A042-84) The Trust Agreement was made by and among Passco Indian Springs Depositor, LLC as Depositor, Passco Indian Springs Manager, LLC, a Delaware limited liability company (the "Manager"[1]), and CSC Trust Company of Delaware, a Delaware corporation, as Trustee.

Grand Acquisition is an Owner of 0.185874 percent of Class A beneficial interests in the Trust.

All prospective investors in the Trust were required to complete and submit a questionnaire, proof of entity's good standing, and a copy of the entity's operating agreement prior to potentially becoming an owner. (A085-123) The Trust reserved the right to "accept [ ] or reject [ ]" a prospective investor/owner. (A087) Grand Acquisition submitted the questionnaire and all related materials, including its limited liability agreement on or about February 13, 2012. (A085) Once

[1] The Opinion at page 2 states that the Manager is owned and controlled by Passco Companies, LLC, but there is nothing in the record to support that statement. It appears Passco Companies, LLC is the manager of the Depositor in the Trust Agreement. (A074)

approved, Grand Acquisition then submitted a fully executed signature page (Exhibit "D" to that Agreement) to become an owner and party to the Trust Agreement. (A097) The Trust Agreement contains other exhibits, including the form of trust certificate (B-1), and ownership record form (C), signature page (D), form of limited liability agreement (E), trust and manager fee disclosure (F), and conversion notice (G). (A075-84) All exhibits are a part of and incorporated into the Trust Agreement.

Pursuant to Section 2.2(a) of the Trust Agreement, the "Trustee shall hold the Trust Estate for the benefit of the Owners upon the terms set forth in this Agreement." (A050) Pursuant to Section 5.1, the "activities and affairs of the Trust shall be managed exclusively by or under the direction of the Manager." (A055) Importantly, pursuant to Section 6.2 of the Trust Agreement, a Class A owner's (like Grand Acquisition) "sole right shall be to receive distributions." The owners have "no right or power to direct in any manner the actions of the Trust… or the Manger in connection with the management or operation of the Trust or the Project" and "shall have no voting rights." (A061)

Grand Acquisition is a company formed under the laws of the State of Nevada on or about September 21, 2011 and at all times in good standing. (A086) As reflected in the Operating Agreement (A098-123), the two members of Grand Acquisition are Tuscon Partners, LP and GMG Real Estate LLC, who appointed

John M. Alvey and Eugene M. Rerat, respectively, as the initial managers. (A104, 109-110) Pursuant to Section 8.4 of the Operating Agreement, Mr. Rerat was appointed the Chief Operating Officer "to whom day to day business decisions, including powers outlined in Section 8.6" were delegated. (A110) Mr. Rerat continues to act in that capacity for Grand Acquisition.

Mr. Rerat, on behalf of Grand Acquisition, verified answers to interrogatories, indicating that Grand Acquisition is not owned or controlled, directly or indirectly by Maxus Realty Trust or any other Maxus entity, and is therefore not an affiliate of a Maxus entity. (A127-28) Grand Acquisition owns Tranquility Lake LLC which is one of 35 of the tenant in common owners of a development in Texas. (A131-32)

B. The Alleged Maxus Bad Acts (the "Boogeyman")

The Trust's assertion of an implied purpose defense is related to non-parties Maxus Realty Trust, Inc. or Maxus Properties, LLC. The Trust states that another non-party, Passco Companies LLC, has had a "decade" or "long history" with Maxus or Maxus controlled entities that have used a scheme to "sow dissent among other investors." (A284, A327, O. B. at p.11)

The Trust relies heavily on the Affidavit of Alan Clifton (the "Clifton Affidavit") to support its defense based on alleged harm to the Trust. (A137-42) Mr. Clifton recounts that after it received Grand Acquisition's initial demand for

the Requested Information, Passco Companies LLC performed due diligence and discovered what it calls Grand Acquisition's "relationship" with Mr. Johnson and, therefore, refused to produce the Requested Information. (A141-42)[2] Mr. Clifton provides three examples of the alleged bad acts of Maxus entities in paragraphs 4(a)(b) and (c) of his affidavit. (A138-41) One example relates to Four Winds, which involved a lawsuit by MLake 31, LLC and a sale of tenant in common interests in which Passco Property Management, Inc. prevailed. A second involves Tranquility Lake, wherein other owners agreed to sell interests to USA Tranquility Lake 2 LLC. Finally, Grissinger Holdings involved a situation wherein Grissinger Holdings LLC voted against a sale by Passco Companies, LLC, which vote was ultimately overturned by the other investors who supported the sale by Passco. *Id*. The Court of Chancery properly found the Clifton Affidavit lacked any "allegation of damage to the value of the joint investment", i.e., harm to the Trust, and described Mr. Clifton's examples as "run-of-the-mill business conflicts between an investor in a real estate asset and that asset's manager." Opinion at 28.

In addition to the Clifton Affidavit, the Trust has submitted website pages and other materials some of which purportedly involved David Johnson or companies he is or was involved with, including excerpts from court documents

[2] Mr. Clifton refers to a provision in the Grand Acquisition Operating Agreement wherein Mr. Johnson becomes a guarantor if Grand Acquisition defaults on any loans. (A142) There is nothing in the record about whether there are outstanding loans and the status of those loans.

from Kansas and California. All of this material spans a timeframe beginning in 2002 and does not involve Grand Acquisition.

The materials include: A *Forbes Magazine* article (A150); a letter from CCSB Financial about a dissident shareholder group, Jefferson Acquisition, LLC (A151-52); a letter from Real Estate Associates Ltd. VI regarding Bond Purchase and Johnson (A166-69); letters from Boston Financial Qualified Tax Creditors LP to limited partners about Anise LLC and Bond Purchase (A170-200); a newspaper article about Greg Orman and his run for a senate seat in Kansas with unsolicited posts from readers (A267-75); a news article from Maxus Realty Trust Inc.'s website about acquiring 59% of the tenant in common interest in Tranquility Lake (A276-78); and suit papers related to Kansas and California court proceedings involving National Corporate Tax Credit, et al. and Bond Purchase, et al. (A388-406).[3]

These materials are hearsay pursuant to D.R.E. 803 and irrelevant. Contrary to the Trust's assertion that Grand Acquisition failed to provide "any response" to these materials, Grand Acquisition clearly asserted a hearsay objection and otherwise distinguished the Clifton Affidavit. (See Answering Brief in Chancery (B001-34, 005, 010); and Oral Argument Transcript (B035-107, 161, 103)). The

[3] The documents attached as A388 to 406 were not produced in discovery, not submitted to the Chancery Court, and should not be considered on appeal.

Court of Chancery nevertheless reviewed these materials and properly found them to be "vague and speculative," and therefore not persuasive.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY HELD THAT GRAND ACQUISITION'S RIGHTS TO THE REQUESTED INFORMATION UNDER SECTION 5.3 (C) IS NOT SUBJECT TO SECTION 3819's PRECONDITIONS AND DEFENSES.

A. QUESTION PRESENTED.

Did the Court of Chancery correctly hold that Grand Acquisition had a unqualified contractual right to the Requested Information?

B. SCOPE OF REVIEW.

Grand Acquisition agrees that the standard of review of the question presented is *de novo*.

C. MERITS OF ARGUMENT.

1. Section 5.3(c) of the Trust Agreement provides a broad inspection and copying right to Grand Acquisition independent from the statutory preconditions and defenses.

The Trust's principal argument, distilled to its essence, is that the prefatory clause "except to the extent otherwise provided in the governing instrument" before each of subsections (a), (b), and (c) [but not (d) and (e)] mandates that the default rules and conditions (as to purpose, best interests, harm, and third-party confidentiality agreements) apply unless the Trust Agreement specifically "disavows or contradicts them" (See O.B. at page 22). Thus, to accept the Trust's position to override those conditions, a trust agreement would have to specifically state, e.g. that an owner does not need to state a "purpose reasonably related to the"

owner's interest, or that the manager or trust has no right to keep the records confidential and state that the manager cannot assert that production is not in the best interest of the trust or may harm the trust. The Trust contends that its interpretation requiring a specific contradiction of each of the separate conditions in Section 3819 is supported by the inclusion of a prefatory clause and *Cargill Inc. v. JWH Special Circumstance LLC*, 959 A. 2d 1096 (Del. Ch. 2008), wherein the Court of Chancery used the isolated phrase "to the contrary." The linchpin to the Trust's interpretation is the assumption that the Trust Agreement is "silent" because the conditions or default rules were not specifically contradicted. The Trust's tortured reading of the meaning of the prefatory clause essentially reads out the right contained in Section 5.3(c), and cannot be sustained.

The Court of Chancery rejected the Trust's interpretation. The Court concluded that Section 5.3(c) expressly provides the owners the right to "inspect, examine, and copy the Trust's books and records" subject to the inspection being done "during normal business hours," i.e. was not "silent." Opinion at 11. Thus, Section 5.3(c) provided an unconditional right to the Requested Information separate and distinct from the default rules in the statute.

To support this conclusion, the Court properly relied on cases interpreting the similar books and records rights in the governing instruments of limited liability companies and limited partnerships. *Id.* at 8. For example, the Court of

Chancery quoted *Bond Purchase, LLC v. Patriot Tax Credit Props., L.P.*, 746 A.2d 842, 853-55 (Del. Ch. 1999) for the proposition that "it is not necessary for …. partnership provisions to include explicit language that they are creating contractual rights separate and independent of statutory rights in order for those provisions to in fact create a separate and independent contractual right." Opinion at 9. The Court will enforce a separate and independent contracted right if it is provided in the contract. For that proposition, the Court also cited at pages 8-9, fn. 18 of the Opinion (as quoted): *Madison Real Estate Immobilien-Anlagegesellschaft Beschrankt Haftende KG v. Kanam USA XIX Ltd. P'ship*, 2008 WL 1913237, at *4 n.33 (Del. Ch. May 1, 2008) ("The statutory and contract claims could have been interdependent, if the contract had specifically invoked § 17-305, but [the relevant contractual provision] does not mention § 17-305. In any event, a partnership agreement can create a contractual inspection right 'in addition to and separate from' the statutory inspection right." (quoting *Bond Purchase*, 746 A.2d at 853)); *Arbor Place, L.P. v. Encore Opportunity Fund, L.L.C.*, 2002 WL 205681, at *4 n.9 (Del. Ch. Jan. 29, 2002) (extending the holding in *Bond Purchase* to the LLC context); *In re Paine Webber Ltd. P'ships*, 1996 WL 535403, at *1 (Del. Ch. Sept. 17, 1996) ("*Paine Webber I*") ("The Court concludes that, in these particular circumstances, (1) the plaintiffs do not have a statutory right to the lists, because they have not established a proper statutory purpose as required by 6

Del. C. § 17-305; and (2) the plaintiffs do have a contractual right to the lists under the applicable Partnership Agreements."). Further, the Chancery Court, relying on this well established precedent, held that where a trust agreement provides the owners an unconditional contract right, the relevant statutory preconditions and defenses are simply "inapplicable." *Id.* at 10.

The Trust contends that the General Assembly intended the prefatory clause to mean that the statutory default provisions applied unless specifically contradicted. The Trust is wrong. A plain and ordinary reading of the phrase "otherwise provided" does not mean "otherwise specifically contradicted" as the Trust contends. Governing instruments are construed like any other contracts based on the common or ordinary meaning of the terms used. *See Arbor Place*, 2002 WL 205681 at *3. The Court of Chancery held that Section 5.3(1) sets forth the procedure for an owner to obtain records, i.e. has otherwise provided an independent contractual right that is separate and apart from the statutory scheme and enforceable as written.

The Trust's view on the intent of the legislature as to the prefatory clause misses the mark because it does not acknowledge a key part of the Court of Chancery's rationale in following the cases that have enforced independent contractual rights separate and apart from the statutory standards: the expressed legislative intent. Section 3825(b) provides the intent: "it is the policy of this

subchapter to give maximum effect to the principle of freedom of contract and to the enforceability of governing documents." This same legislative intent is engrafted into the Delaware LP Act, upon which the DST Act is modeled, and the Delaware LLC Act. Opinion at 11, including fn. 11; *See also* 6 Del. C. §17-1101(c) and 6 Del. C. §18-1101(b) (identical provisions to Section 3825(b)), and cited in other cases such as *Bond Purchase* to enforce governing instruments as written. The Court of Chancery has held that §3825(b) (its predecessor was 3821(b)) was "highly permissive language" that "reveals a clear intent on the part of the General Assembly to grant business trusts broad freedom in establishing their internal governance mechanisms." *Nakahara v. NS 1991 Am. Trust*, 739 A. 2d 770, 782 (Del. Ch. 1998). Given that "broad freedom", the business trust act is "construed broadly." *Id.* at 783. Further, this Court "must ascertain and give effect to the intent of the legislature," will review the statute as a whole, and "must reject any reading of the statute that is inconsistent with the intent of the General Assembly." *Dambro v. Meyer*, 974 A.2d 121, 129-130 (Del. 2009). The Trust's interpretation of the prefatory clause is inconsistent with the expressed legislative intent and must be rejected.

The Trust's reliance on *Cargill* and the court's reference to the phrase "to the contrary" to support its interpretation is misplaced. As the Court of Chancery properly held, the Trust ignored the context of the *Cargill* case. In *Cargill*, at issue

was the contention by the Defendant that the Act "creates a kind of *sui generis*. entity for which no default duties are implied" and that to state a claim for breach of fiduciary duty, the Trust Agreement would have to explicitly identify fiduciary duties owed, for any duty to arise. Opinion at 14. Vice Chancellor Parsons rejected that contention relying in part on Section 3809, which states that "except to the extent otherwise provided in the governing instrument… the laws of this state pertaining to trusts are made applicable," and therefore the Court applied the statutory and common law of trusts to supply fiduciary duties. Opinion at 13. The *Cargill* Court recognized that the intent of the Delaware Statutory Trust Act was to allow freedom to the parties to "bargain for modifications" to the default fiduciary duties. *Cargill*, 959 A.2d at 1111. Thus, the parties were "free in the governing instrument to 'expand,' 'restrict,' or 'eliminate'" or to "vary" applicable duties. 959 A.2d at 1112, 1113. The Trust's reliance on the phrase "to the contrary" in isolation is misplaced.

The Court of Chancery distinguished *Cargill* because the Trust Agreement was "not silent as to the owners' books and records inspection right in the same way that the trust agreement in *Cargill* was silent" relating to the disclaimer of fiduciary duties. Opinion at 15. Section 5.3(c) provides the unqualified contractual right, i.e.: has otherwise provided for these rights. The Court hypothesized that if the Trust Agreement were silent, i.e., had no inspection rights

under 5.3(c) [i.e, 5.3(c) was omitted], the statutory preconditions might then apply. "That is not the situation here." *Id.*; *see also Elf Atochem N. Am. Inc. v. Jaffari*, 727 A.2d 286, 290-92 (Del. 1999) (citation omitted) (recognizing "basic approach [of the Act]… is to provide members with broad discretion in drafting the Agreement"… "and to furnish answers only in situations where the parties have not expressly made provisions in their partnership agreement.") The Supreme Court in *Elf Atochem* supported its holding to enforce the contractual forum selection clause by stating that the "Act is replete with fundamental provisions made subject to modification in the Agreement (e.g. 'unless otherwise provided in a limited liability agreement…'"). *Id.* at 291 (citing various provisions of the LLC Act containing that phrase). The Court of Chancery's interpretation that the Trust Agreement was not silent and "made provisions," for the right to books and records apart from the statute was correct.

Similarly, the Court of Chancery drew an appropriate parallel between the prefatory clauses in Section 3819 and the similar provisions in the LLC Act and LP Act permitting parties to restrict or modify statutory inspection rights. Opinion at 17-18, and 6 Del. C. §18-305(g) and 6 Del. C. §17-305(f). Contrary to the Trust's assertion of error, the Court of Chancery was simply identifying the congruity between the three statutory schemes to support its reliance on cases interpreting the LLC and LP Acts that have held that the statutory schemes can be modified by the

language of the governing instruments.[4] The Trust Agreement should be enforced based on its terms, and there was no basis to imply the conditions set forth in Section 3819. That the prefatory language is set out in each subsection and not in a stand-alone section is of no moment and a form over substance argument.

The Trust also relies on Section 10.7 of the Trust Agreement to assert that the Act was incorporated therein. This argument was not presented to the court below and should not be considered here. See Del. Supr. Ct. Rule 8 and *Smith v. Delaware State University*, 47 A.3d 472, 479 (Del. 2012). Even if considered, Section 10.7 is a choice of law provision and does not impair the explicit rights contained in Section 5.3(c).

In sum, Section 5.3(c) provides an unqualified right to inspect the books and records and Section 3819 does not apply by implication. The Trust's reading of Section 5.3(c) to create no rights as if the provision did not exist, and its twisted logic as to the prefatory clause and the intent of that clause are inconsistent with the plain and ordinary words used. The Court of Chancery's interpretation was totally consistent with the legislative intent expressed in the Delaware Statutory

[4] The Trust's citation to the timing of the enactment of the respective statutes is misplaced because even prior to the enactment of 18-305(g) and 17-305(f) in 2001, courts have held, consistent with the freedom of contract policy, that agreements can modify statutory rights. *See Elf Atochem supra; Bond Purchase*, 746 A.2d at 859 (parties "may bargain for language designed to give partners access to information under terms less restrictive and in addition to that granted by statute") citing *Paine Webber I* at *15 (policy behind statute allows rights to be "expanded and restricted" by contract provisions).

Trust Act to give parties a broad freedom to govern themselves and the enforceability of contracts as written. The Court of Chancery did not err by simply enforcing the Trust Agreement as written.

II. THE COURT OF CHANCERY CORRECTLY HELD THAT SECTION 5.3(C) OF THE TRUST AGREEMENT INCLUDES THE REQUESTED INFORMATION

A. QUESTION PRESENTED.

Did the Court of Chancery err in holding that Grand Acquisition's inspection rights under Section 5.3(c) include the Requested Information and Ownership Records are not excepted therefrom?

B. SCOPE OF REVIEW.

Grand Acquisition agrees that the standard of review on the question presented is *de novo*.

C. MERITS OF ARGUMENT.

1. The plain and ordinary meaning of "books and records" includes the Requested Information.

The Trust contends that the Requested Information is not part of the "books and records" subject to inspection, but are "Ownership Records" defined in Section 1.1 of the Trust agreement to which only the Trustee can obtain pursuant to Section 5.3(i). [5] To support this argument, the Trust contends that "books and records" in Section 5.3(c) refers only to financial information about the Trust and not the list of owners.

[5] Passco Companies' response to the initial demand did not raise this argument. To the contrary, Passco's general counsel indicated that the list was a "book and record." (A017)

The Court of Chancery, reading the paragraph as a whole, rejected the Trust's arguments on this issue. The Court determined that the opening sentence of Section 5.3(c) "indicates that books and records should be defined by their customary meaning." Opinion at 21. The reference in other sentences of §5.3(c) to records of "account" did not alter the reference in other parts of the section to "books and records" and the broad and customary meaning of those plain words. The Court of Chancery also relied on *Arbor Place* to support this conclusion. In *Arbor Place*, the court held that a member list fell within the "broad language" of the "books and records" provision of the agreement as they were clearly understood to be "records of the company" based in part because the LLC Act included the list as a book and record. 2002 WL 205681 at *3.

The court in *Arbor Place* had before it almost an identical books and records provision containing both a reference to "books and records" and "books of account", and rejected the similar argument made by the Trust herein. In *Arbor Place*, the court held that the second sentence permitting a member to inspect "books and records" had independent meaning that was not limited by a reference to "books of account" in another sentence. *Id.* The court held that a list was a "record" and there was nothing in the agreement to define "books and records" in a "more restrictive manner." *Id*. at *3 and 8 fn. 3. *See also Bond Purchase*, 746 A.2d at 855-56 (term "books and records" encompasses a list of partners); 8 Del.

C. §220 (list is a book and record of the corporation). Compare *Madison Real Estate Immobilien,* 2008 WL 1913237, 2008 Del. Ch. LEXIS 201 at *42 (court interpreted "books of account" to relate to financial information because there was no reference to "books and records" in the contract).

The Trust also contends that the Court of Chancery erred by referring to Section 3819's definition of books and records to include a list because that conclusion was inconsistent with the court's primary holding that Section 3819 did not apply to the Trust Agreement. The Trust is mistaken. The Court of Chancery cited case law to support the common understanding of the meaning of "books and records" and was merely citing the statute in further support of the common understanding of those words.[6]

The Court of Chancery also correctly concluded that the separate reference to Ownership Records in the Trust Agreement did not impair the owner's rights under Section 5.3(c), because a plain reading of 5.3(i) did not provide an exclusive inspection right in favor of the Trustee. Opinion at 20. Section 5.3(i) requires the Manager to "provide the Trustee a copy of the Ownership Records promptly after each revision thereto" and does not on its face limit access to only the Trustee. Opinion at 20-21. That section appears to be merely a housekeeping mechanism

[6] The Court also noted that the Trust had conceded in its Answering Brief that under the DST, LLC Act and the DRULPA, a trust's books and records include a list of investors. Opinion at 21, citing page 24 of A.B. (A368).

for the Manager to provide and keep current the Ownership Records in accordance with Exhibit C to the Trust Agreement (*See also* Section 1.1 – Definition of Ownership Record) (A048, 58, 80). Thus, the maximum *expressio unius est exclusio alterius* did not apply.[7] The Ownership Records provisions simply do not exclude or impair rights under Section 5.3(c).[8]

Finally, the Trust weakly contends that its reading - that 5.3(c) does not give owners the right to inspect "Ownership Records" - gives affect and protects the

---

[7] The doctrine, in any event, is to be used only with extreme caution. See *Delmarva Health Plan v. Aceto*, 750 A.2d 1213, 1217 n.23 (Del. Ch. 1999) (citations omitted) (maxim only used with "great caution" and not to defeat the intention of the parties).

[8] While not addressed by the Court of Chancery, a plausible way to interpret Section 5.3(c) and Exhibit "C" together is that Exhibit "C", when filled out, signaled to the owners that they would get this information when they became parties to the Trust Agreement. Exhibit "C" is a part of the exhibits to the Trust Agreement, all of which were incorporated into the Trust Agreement, to be provided to the owners when they became parties to it. There can be no dispute that the Trust drafted the Trust Agreement. The burden was on the Trust to draft explicit protections into the governing instrument, especially in this case where it claims to have known for a decade at least about bad behavior by Maxus as it relates to use of investor information to "sow dissent." As the Court of Chancery indicated: "If [Passco Trust] wished to bar access to the names and address of [owners], it could have done so explicitly in the Trust Agreement." Opinion at 21-22. The Trust could have specifically added the conditions contained in Section 3819 into the Trust Agreement if that is what it intended, but did not do so. Compare *Madison Ave. Ind. Partners, LLC v. Am. First Real Estate Inv. Partners L.P.*, 806 A.2d 165, 173 and n.16 (Del. Ch. 2002) ("would have been a simple matter for the drafters … to include language clearly stating an intent to supplant or restrict the statutory right of inspection" or refer to the specific statute or itemize the categories of documents); *see also Allied Capital Corp. v. GC-Sun Holdings L.P.*, 910 A.2d 1020, 1035 (Del. Ch. 2006) ("[c]ourts should be most chary about implying a contractual protection when the contract easily could have been drafted to expressly provide for it.").

"confidentiality agreements between the trust and owners." Of course, the Court of Chancery's underlying conclusion that Section 3819(c) relating to third-party confidentiality agreements does not apply because the agreement does not require it, is dispositive.

Further, the questionnaire forms (the purported basis of confidentiality) were submitted in advance by potential investors for screening purposes. The form is titled "Release of Information to Registered Representative and Broker/Dealer" and on its face, intended to permit the exchange of information about the investment. (A094) It gives the right to the Trust to accept or reject an investor based on the questionnaire and documentation submitted with it and is not a binding third-party confidentiality agreement. (A087) (Instructions) After submitting the questionnaire and related documentation, Grand Acquisition was approved as an owner and thereafter executed a signature page to become a party (not third party) to the Trust Agreement. (A097) The questionnaires were never intended to be a part of or incorporated into the Trust Agreement. Further, there is no confidentiality protection at all in the definition of or reference to Ownership Records in the Trust Agreement.

The Trust cites no case law to support its assertion that the questionnaires were third party confidentiality agreements. To the contrary, under very similar circumstances, the court in *Arbor Place* determined that pre investment screening

questionnaires essentially became moot when investors later became parties to the governing instrument (which did not contain express and binding confidentiality protections). 2002 WL 205681 at *12-13. In other words, when the Class A owners signed, they became party to the Trust Agreement, and the questionnaires no longer applied.

In sum, there is no support in the language of the Trust Agreement or in case law to support the Trust's argument that the Requested Information is subject to binding confidentiality agreements.

III. THE COURT OF CHANCERY CORRECTLY DECIDED THAT IF AN IMPLIED PURPOSE DEFENSE APPLIED, THE TRUST FAILED TO PROVE IT

A. QUESTION PRESENTED.

Did the Court of Chancery err in holding that the Trust failed to establish an implied defense of an improper purpose based on the alleged bad acts of a non-party?

B. SCOPE OF REVIEW.

Grand Acquisition agrees that the standard of review of the question presented is *de novo*.

C. MERITS OF ARGUMENT.

1. There is no basis to imply the improper purpose defense.

As recognized by the Court of Chancery, there is an "open issue" as to whether the improper purpose defense applies in the first instance. Grand Acquisition submits that because the Trust Agreement contains a broad books and records provision that contains no conditions, there is no basis to imply a proper purpose requirement. *See In re Paine Webber Qual. Plan Prop. Fund Three*, 698 A.2d 389, 391-92 (Del. Ch. 1997) (partnerships agreements that did not "explicitly condition plaintiff's rights to the lists [of partners] on the existence of a proper purpose," and the Court refused to read that condition into the agreement); *See also Paine Webber Ltd. Partnership*, 1996 WL 535403, 1996 Del. Ch. LEXIS 117

at *17-19 (Del. Ch. Sept. 17, 1996) (same). Thus, there is no basis to imply an improper purpose defense and this ends the inquiry.

2. Even if implied, the Trust failed to prove the improper purpose defense.

The Court of Chancery did not decide whether the implied defense applied, but instead found, in any event, that the Trust "failed to prove that releasing the Requested Information to Grand Acquisition actually would harm the Trust." Opinion at 24. The court quoted *Bond Purchase* that in order to establish an improper purpose defense to defeat a contractual right to a list, the partnership must prove that disclosure would be "adverse to the partnership." *Id.* at 27. The Court of Chancery also quoted *Paine Webber I* wherein Vice Chancellor Jacobs held that a claim of potential harm was not enough and defendants must prove that disclosure "would adversely affect (in an economic sense) the defendant limited partnerships as a whole, as distinguished from the limited partners as individuals."[9] Opinion at 29.

[9]Indeed, there is abundant case law involving books and records actions in the corporate context to support the proposition that a fear of harm and speculation is not enough to defeat a shareholder's right to books and records. *See Skouras v. Admiralty Enter, Inc.*, 386 A.2d 674, 682-83 (Del. Ch. 1978) (quoting *Fletcher on* Corporations §2275 "it is clearly the rule of the cases discussing [a concern that plaintiff may use information to harm the company] that the mere possibility of such abuse or misuse is not grounds for any withholding or restriction on the right [of inspection]"; *Kerkorian v. Western Airlines*, 252 A.2d 221, 225 (Del. Ch. 1969) *aff'd.*, 254 A.2d 240 (Del. 1969) (defendants' contentions of potential harm

The Court of Chancery acknowledged that the Trust's defense was based on its "belief that Grand Acquisition is affiliated with Maxus Realty Trust, LLC ("Maxus")." Opinion at 24. The Court of Chancery carefully considered the documents submitted by the Trust to attempt to prove the bad acts of Maxus. The Court also considered Clifton's Affidavit and the three examples of past bad acts of Maxus related entities to "sow dissent" among investors. Ultimately, the Court rejected the proffered information as "vague and speculative." Opinion at 28. The Court found that the Clifton Affidavit made no allegation of damage to the Trust, and simply "describes run of the mill business conflicts." *Id.* Given this lack of proof of actual harm to the Trust, the Court rejected the trust's improper purpose defense.

Certainly, the materials submitted by the Trust relate to past alleged bad acts of Maxus or to be more precise, other entities allegedly connected with Maxus, and did not establish that Grand Acquisition had committed "bad acts" against the Trust or Passco Companies, LLC or would do something nefarious with the Requested Information against the Trust.

In fact, the Trust Agreement has built in protections against the very conduct that Passco Companies fears. Pursuant to the Trust Agreement, Grand Acquisition, along with the other Class A owners, have no rights to vote and no ability

---

"involves too many ifs" and court will not deny inspection "upon speculation as to how all of this may come out").

whatsoever to affect the day to day operations and decision making of the Manager or the Trustee. (Section 6.2 of the Trust Agreement, A061) *See Bond Purchase*, 746 A.2d at 866 (one basis for the court's rejection of argument that disclosure would cause harm to the partnership as a whole was the fact that the partnership agreement did not grant interest holders the right to govern, manage, or control the partnership property). Further, Grand Acquisition has previously offered to only use the Requested Information in-house and not to share it with anyone outside Grand Acquisition, and this offer fell on deaf ears. (Opinion at 27, Oral Argument Transcript at 30-31, B064-65) Instead, the Trust has turned what was supposed to be a quick summary proceeding into a campaign to chase the Maxus boogeyman at all costs, and to no avail.

The Trust contends that Grand Acquisition did not counter the Clifton Affidavit and, therefore, his statements were unchallenged. That is not so. Grand Acquisition, as the Court did, read the affidavit, and on its face, determined that it was woefully deficient to establish actual harm to the Trust. Further, the alleged "bad acts" relating to Mr. Johnson and other entities, referenced on the web and in other materials, are all hearsay, irrelevant, and inadmissible evidence that does not need to be countered. The Trust submitted these materials and expected Grand Acquisition to refute them, knowing that Maxus (or the actual entities identified) would be the proper person to refute them, and knowing that Maxus was not a

party and not represented in this case. Grand Acquisition submitted sworn interrogatory answers that it is not affiliated with Maxus, and the hearsay materials do not refute that.

This "summary proceeding" is certainly not the time or place for non-party Passco Companies, LLC to sling arrows and attack non-party Maxus. The real parties in interest are Grand Acquisition and the Trust and the case is about Grand Acquisition's rights in the Trust.

CONCLUSION

For all the foregoing reasons, the Opinion of the Court of Chancery should be affirmed in all respects.

Dated: November 28, 2016

SEITZ, VAN OGTROP & GREEN, P.A.

/s/ R. Karl Hill
R. KARL HILL (2747)
222 Delaware Avenue, Suite 1500
P. O. Box 68
Wilmington, DE 19899
(302) 888-0600
khill@svglaw.com
Attorneys for Grand Acquisition, LLC
Plaintiff-Below/Appellee