



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,)

No. 294,2019

Court Below: Court of Chancery
of the State of Delaware

C.A. No. 2018-0652-MTZ

Plaintiffs Below,
Appellants,

**PUBLIC REDACTED VERSION
FILED SEPTEMBER 11, 2019**

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.

APPELLANTS' OPENING BRIEF

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INTRODUCTION

The case below presents a narrow issue: whether Appellants¹ are entitled to inspect and retain copies of Schedule K-1s from Appellees under 6 *Del. C.* § 17-305 and the Partnership Agreements. The plain and unambiguous terms of the Partnership Agreements entitle limited partners, upon showing a proper purpose, to “obtain” Partnership tax returns and documents sufficient to reflect, among other things, the name, address, capital contribution, and partnership percentage of each of their fellow limited partners. The Schedule K-1s squarely fall within the scope of Section 12.1 because (i) they are part of the Partnership tax returns, and (ii) they contain the name, address, capital contributions, and partnership percentage of each limited partner.

The Court of Chancery correctly determined that Appellants stated a proper valuation purpose to support their books and records demand. The Court erred, however, in determining that Appellants must demonstrate that the requested documents are “necessary and essential” to the stated valuation purpose. Although the case law under 8 *Del. C.* § 220 contains a necessary and essential requirement, no Delaware Supreme Court case has applied this requirement in the alternative

¹ Capitalized terms shall have the meaning ascribed to them herein.

entity context. Section 17-305(a) is distinct from Section 220 because it specifically articulates categories of documents, including tax returns, that a books and records plaintiff may obtain upon stating any proper purpose. With respect to these specified categories, the application of the necessary and essential standard is inappropriate.

Even if the necessary and essential element applies to a Section 17-305 books and records demand, Appellants satisfied that requirement. Appellants seek high-level financial documents to value their shares in a limited partnership. Appellants cannot adequately value their shares absent full federal tax returns of the Partnerships. Accordingly, Appellants are entitled to inspect and copy the Schedule K-1s. Appellants respectfully request that this Court reverse the Court of Chancery's decision to deny Appellants the requested Schedule K-1s.

Additionally, the Schedule K-1s are necessary and essential to investigate mismanagement and wrongdoing. First, Appellants seek to investigate why their Trustee, Homer Chisholm, did not invest in the Partnerships whenever possible, in contravention of Appellants' expressly stated wishes. Second, Appellants may bring fraudulent conveyance actions against other limited partners. Appellants stated a credible basis to infer mismanagement and wrongdoing, and, accordingly, are entitled to copies of the Schedule K-1s.

Finally, if Appellants are successful on their claim to obtain copies of the Schedule K-1s, then those documents and the information derived therefrom should

not be shielded from public review. Appellants request that the Court lift the confidentiality restrictions because the Schedule K-1s do not constitute confidential information within the meaning of Court of Chancery Rule 5.1.

NATURE OF PROCEEDINGS

On September 4, 2018, Plaintiffs-Below, Appellants 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 (“Spencer POA Trust”) 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 (“Cynthia POA Trust,” together with the Spencer POA Trust, the “Trusts”) filed their Verified Complaint Pursuant to 6 *Del. C.* § 17-305 to Compel the Inspection of Books and Records (“Complaint”) against Defendants-Below, Appellees, WHC Ventures, LLC (“General Partner”), WHC Venture 2009-1, L.P. (“WHC 2009”), WHC Ventures 2013, L.P., and WHC Ventures 2016, L.P. (“WHC 2016”) (collectively, “Partnerships”, together with General Partner, “Appellees”). (A0771-98). In the Complaint, Appellants sought to inspect and copy certain books and records of Appellees. *Id.* Appellees answered the Complaint on September 26, 2018. (A0799-811).

On February 6, 2019, the Court of Chancery conducted a trial on the papers. (*See* A0923-1007). Post-trial briefing followed. (A1043-1182). The issues remaining for trial centered upon whether Appellants were entitled to retain copies of the K-1 forms of other limited partners that are submitted with the Partnerships’ federal tax returns, and whether Appellants’ advisors could consult with Appellants

regarding the information contained in the K-1s. (Ex. A, Transcript of Ruling at 11:16-19).

During the pendency of the case below, Appellees twice moved for orders maintaining confidential treatment. (*See* A0010, 0014). On April 24, 2019, the Court of Chancery denied the motions with respect to two categories and granted the motion with respect to the Schedule K-1s and information derived therefrom. A true and correct copy of the Order Regarding Confidential Treatment is attached hereto as Exhibit C.

On June 21, 2019, the Court of Chancery issued a bench ruling denying Appellants' request for books and records. A true and correct copy of The Court's Bench Ruling Re Plaintiffs' Request For Books And Records ("Ruling") is attached hereto as Exhibit A. On June 28, 2019, the Court of Chancery entered its Final Order and Judgment. A true and correct copy of the Court of Chancery's Final Order and Judgment is attached hereto as Exhibit B. On July 9, 2019, Appellants timely filed their Notice of Appeal. (Dkt. No. 1).

SUMMARY OF ARGUMENT

1. Appellants are entitled to copies of the requested K-1 forms included with the partnership's tax filings. Appellants need not demonstrate that the requested K-1 forms are "necessary and essential" to their stated purpose of valuation. The applicable books and records statute, 6 *Del. C.* § 17-305, specifically enumerates categories of documents that a limited partner is entitled to inspect "for any purpose reasonably related to the limited partner's interest as a limited partner." *Id.* Tax returns are included in the specifically enumerated categories. *Id.* at § 17-305(2). The statute does not limit a partner's inspection of such documents to those that are "necessary and essential" to the stated purpose in the demand. Thus, so long as Appellants' stated purpose is reasonably related to their interest as limited partners, Appellants are entitled to inspect the enumerated categories of documents, including tax filings. Accordingly, Appellants are entitled to inspect the K-1 forms to fulfill their proper purpose, regardless of whether the K-1 forms are "necessary and essential" to their valuation purpose.

2. Even if Appellants must demonstrate that the K-1 forms are necessary and essential to their stated purposes, Appellants met their burden and are entitled to receive copies of the K-1 forms. First, Appellants are entitled to investigate wrongdoing committed by their Trustee, Homer Chisholm. Second, as stated in the Demand Letter, Appellants may bring fraudulent conveyance or other actions

against other limited partners whose interests were increased at the expense of Appellants. Appellants cannot determine whether and who to sue if they receive merely an anonymized table reflecting ownership interest. Appellants must know which limited partner's name corresponds to which ownership interest. Otherwise, Appellants risk unintentionally suing close family members, such as their mother and sister, who are also limited partners of the Limited Partnerships.

3. Two exhibits introduced by Appellees should be excluded on hearsay grounds. These two emails were sent to Peter Nordell, the General Partner, from Mr. Chisholm, the Murfeys' co-Trustee, after the Murfeys sent the Demand Letter to the General Partner. Despite the fact that Mr. Nordell had these documents in his possession since early 2018, he declined to produce them until the eve of trial. These documents are hearsay for which no exception applies and should be excluded on that basis.

4. Finally, if Appellants are entitled to receive copies of the K-1 forms, then there is no basis to permit the continued redaction of information in the K-1 forms. The K-1 forms are not subject to confidential treatment under Court of Chancery Rule 5.1.

STATEMENT OF FACTS

A. The Investment History of the Corning Family

The Partnerships' limited partners are entities controlled by or benefitting members of the Corning family (or are entities owned by the family members). (Ex. A, Ruling at 5:22-6:3). The Murfey family are adopted siblings. (A0850:24). Their mother, Louise T. Murfey, holds an interest in at least one of the Partnerships, WHC 2009. (*See* A0087). The Murfey family understand that their sister, Pallyanna Murfey, also holds an interest in one of the limited partners. (A0841:16-20).

The family members have been investing with Greylock Partners since 1965 through various investment funds. (Ex. A, Ruling at 6:4-5). Mr. Nordell testified that Henry Corning, who established the Partnerships, modeled the ownership structure of the Partnerships after the ownership allocations of other investment funds, which the investors referred to as the M-C Entities. (A0823:14-A0824:15). "The allocation of the 2009 fund started with the amount that each family had invested in prior funds." (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* A0444-448). The reason for this practice is clear. The family members invest together in the Greylock funds, and have been doing so for decades.

B. Plaintiffs' Efforts to Investigate their Trusts' Interests in the Partnerships.

In 2002, Spencer Murfey, Jr., the Murfeys' father, established the Spencer POA Trust and Cynthia POA Trust for the benefit of his children. (Ex. A, Ruling at 4:2-9). After Spencer Murfey, Jr. passed away in 2003, the Murfeys were provided with scarce details regarding the investments held by each trust. (A0834:23-A0835:6). At that time, Maria Muth and William Murfey were the co-trustees of the Trusts. (A0840:13-15). Homer Chisholm replaced William Murfey as a co-trustee of the Trusts in 2007. (A0842:20-24).

In 2015, the Murfeys replaced Ms. Muth as co-trustee of each of their respective trusts. (A0836:20-A0837:9). In their role as co-trustees, the Murfeys requested information about the investments held by their trusts. (A0838:18-A0839:12). Much of the information produced in response to these requests was incomplete. (A0839:1-12).

The Murfeys proceeded to work with Mr. Chisholm and Mr. Nordell to obtain complete information regarding the Trusts' investments. (A0839:1-12). The Murfeys carefully analyzed the information they received from Mr. Chisholm and Mr. Nordell. (A0844:4-14). "[A]fter analyzing the information that was sent to us, we came to the conclusion that our partnership share allocation interests were in fact

being reduced.” *Id.* This information was discovered in the K-1 Forms for the Trusts. (A0852:12-14; *see also* A0733-741 (outlining the diminution in value)).

On January 10, 2018, Appellants served the General Partner with a Demand pursuant to Section 17-305 for the inspection of certain books and records of the Partnerships (“Demand Letter”). (A0733-741). Among other things, Appellants sought “[c]opies of each Partnership’s federal, state and local income tax or information returns and reports, if any, for the six most recent taxable years.” (A0735).

C. The General Partner Initially Agrees to Inspection of all Demanded Documents.

On January 18, 2018, Appellees’ counsel responded to the Demand Letter (“Response”). (A0742-745). The Response agreed to “make available for inspection at a mutually convenient time, by a competent professional third party and under a mutually agreeable confidentiality agreement, information, to the extent it exists” (A0743-744). The Response did not state that any documentation would be withheld or place any other limitations on the inspection. *Id.*

On April 13, 2018, Appellants and the General Partner entered into a Confidentiality and Non-Disclosure Agreement Governing the Inspection of Books and Records (“Confidentiality Agreement”). (A0754-761). Pursuant to that agreement, the General Partner agreed to make information and documents available

in response to the Demand Letter. *Id.* Neither the Confidentiality Agreement nor Response indicated that the K-1 Forms could not be inspected or copied by the Murfeys.

On July 31, 2018, Richard Szekelyi of Phoenix Management Services conducted an inspection of the Partnerships' books and records (the "Inspection"). At the time of the Inspection, Mr. Szekelyi was permitted to review the K-1 Forms. However, on the day of the inspection, Appellees (for the first time) refused to permit copying of the K-1 Forms. This was confirmed via email dated August 6, 2018 from counsel to General Partner. (A0766-770). In that email, counsel advised that "it is not in the best interests for the partnerships to provide individual K-1s to [the Murfeys]." *Id.* However, at trial, counsel stated that the General Partner took no such position. (A1041:5-13) ("We have never made the argument that it would be to the detriment of the partnerships to actually provide copies of the K-1s.")²

Appellees subsequently agreed to provide the K-1 Forms to Mr. Szekelyi and Appellants' counsel only if such documents were produced under a professionals' eyes only designation. At the insistence of Appellees, Appellants executed Amendment No. 1 to Confidentiality Agreement ("Amendment No. 1"). (A0762-

² This statement contradicted Appellees' counsel's August 6, 2018 email which stated the opposite. (A0766-770).

765). Appellants expressly reserved their rights to obtain copies of the K-1 Forms by proceeding with the case below. (A0812-819).

Appellees offered Appellants the ability to “view”, but not copy, the K-1 Forms. (A0935). Appellants declined this invitation because merely “viewing” the K-1 Forms is inadequate for their purposes. Appellants must consult with their financial advisors, counsel, and trustees to value their respective Trusts’ interests in the Partnerships, and to investigate the dilution. Appellants need to copy the K-1 Forms, and their advisors need to review copies with Appellants, so that Appellants can make informed decisions about how to proceed.

D. The K-1 Forms Reflect a Dilution of Appellants’ Trusts Interests.

A review of the K-1 Forms reveals that a material variance in Appellants’ interests in the Partnerships occurred in 2011. The Murfeys knew of only one opportunity in 2011 to make a one-time additional capital contribution, to which Appellants agreed. (A0845:16-A0846:1). Shortly thereafter, unbeknownst to the Murfeys, there was an opportunity to invest an additional \$12 million in WHC 2009. (A0825:21-A0830:14). If the Murfeys had known of it, they would have chosen to invest more in WHC 2009. (A0843:22-24). The failure to invest runs against the Murfeys’ standing orders to always invest in Greylock funds. (A0837:3-7; A0838:4-10). Some of the other limited partners took advantage of this second opportunity to increase their investment. (A0828:20-A0829:4). The Murfeys’ inability to invest

when other limited partners invested caused Appellants' interests in the Partnerships to become diluted. (Ex. A, Ruling at 20:4-7).

Also in 2011, two partners, [REDACTED] and [REDACTED] were admitted to WHC 2009, representing new capital of approximately [REDACTED]. (A0257 (box J); A0260 (box J)). Under the terms of the partnership agreements, new partners can be admitted upon the approval of the General Partner and the majority interest of the Limited Partners. (A0034-95, WHC Venture 2009-1, L.P. Agreement of Limited Partnership ("Partnership Agreement") Section 2.3.2). Moreover, at the discretion of the General Partner, each of the existing limited partners may have the opportunity to make an additional capital contribution when new limited partners are admitted. *Id.* This provision does not establish a limit on the incremental capital that can be contributed. As such, limited partners can increase, not just maintain, their proportionate interest.

The K-1 Forms demonstrate that in 2011, 13 of the 40 limited partners chose to increase their investments in WHC 2009. Specifically:

1. [REDACTED] (A0284).
2. [REDACTED] (A0328).
3. [REDACTED] (A0364).
4. [REDACTED] (A0368).

5. [REDACTED] (A0376).
6. [REDACTED] (A0380).
7. [REDACTED] (A0384).
8. [REDACTED] (A0396).
9. [REDACTED] (A0400).
10. [REDACTED] (A0404).
11. [REDACTED] (A0408).
12. [REDACTED] (A0412).
13. [REDACTED] (A0432).

The admission of new limited partners, and the increased investment of certain existing partners, caused the Trusts' interests in WHC 2009 to become diluted in 2011 as reflected in the K-1 Forms. (Ex. A, Ruling at 20:4-7).

Similarly, in 2013, according to the K-1 Forms, three new limited partners were admitted to WHC 2009: [REDACTED] (A0510); [REDACTED] (A0588); and [REDACTED] (A0594). None of the existing limited partners invested additional capital to maintain or increase their interests in 2013. (*See generally* A0500-99). The Murfeys were not presented with an opportunity to increase their shares in 2013. (*See* A0486-491; A0492-99).

The Trusts should have been given an equal opportunity to increase their investment in the Partnerships, but they were not. Appellants are entitled to personally inspect and copy the K-1 Forms to investigate the diminution and dilution of their interests in the Partnerships.

ARGUMENT

I. APPELLANTS NEED NOT DEMONSTRATE THAT THE K-1 FORMS ARE NECESSARY AND ESSENTIAL TO FULFILL THEIR PROPER PURPOSE

Question Presented

Did the Court of Chancery err in requiring a books and records plaintiff under 6 *Del. C.* § 17-305 to demonstrate that the requested records are “necessary and essential” to plaintiff’s stated purpose, where the relevant Partnership Agreement does not contain a “necessary and essential” requirement? (Ex. A, Ruling at 24:12-22; A1100-02). Answer: Yes.

Scope of Review

This Court reviews *de novo* issues of contract interpretation and of law. *Parkcentral Global L.P.*, 1 A.3d at 295-96.

Merits of the Argument

A. The Demand Was Made for a Proper Purpose Within the Meaning of Section 17-305 and the Partnership Agreements.

Section 17-305 of Delaware’s Revised Uniform Limited Partnership Act (“Section 17-305”) provides that a limited partner may obtain specifically enumerated categories of documents “for any purpose reasonably related to the limited partner’s interest as a limited partner.” 6 *Del. C.* § 17-305(a). The plaintiff bears the burden of demonstrating that the demand reasonably relates to its interest

as a limited partner and that the demand does not run afoul of such reasonable standards “as may be set forth in the partnership agreement or otherwise established by the general partners.” *Madison Ave. Inc. Partners, LLC v. Am. First Real Estate Inv. Partners, L.P.*, 806 A.2d 165, 170-71 (Del. Ch. 2002) (citations omitted). Courts have interpreted this language to require a Section 17-305 plaintiff to demonstrate a proper purpose underlying the demand. *Schwartzberg v. CRITEF Assocs. Ltd. P’ship*, 685 A.2d 365, 375 (Del. Ch. 1996); *Gotham Partners L.P. v. Hallwood Realty Partners, L.P.*, 714 A.2d 96, 100-01 (Del. Ch. Apr. 29, 1998).

The Partnership Agreements track Delaware law regarding a limited partner’s entitlement to books and records. Section 12.2 of each Partnership Agreement outlines the inspection rights of limited partners. Section 12.2.1 states in part:

Each Limited Partners has the right, on reasonable request and subject to whatever reasonable standards as the General Partner may from time to time establish (including standards for determining whether the purpose for the request is reasonably related to the Limited Partner’s Interest as a Limited Partner), to obtain from the General Partner for purposes reasonably related to the Limited Partner’s Interest as a Limited Partner the information set forth above in Section 12.1 as well as information regarding the status of the business and financial condition of the Partnership (generally consisting of the Partnership’s financial statements) and whatever other information regarding the affairs of the Partnership as is just and reasonable in light of the purpose related to the Limited Partner’s Interest as a Limited Partner for which the information is sought.

Partnership Agreements, Section 12.2.1. (A0058, A0473-74, A0625).

The Court of Chancery correctly held that Appellants stated two proper purposes reasonably related to their interests as limited partners: valuing their interest in the Partnerships, and investigating mismanagement and wrongdoing. (Ex. A, Ruling at 14:1-5).

B. Section 17-305 Does Not Contain a Necessary and Essential Standard

Upon showing a proper purpose, a books and records plaintiff may receive the categories of documents listed in Section 17-305. *See 6 Del. C. § 17-305(a)*. These categories include “a copy of the limited partnership’s federal, state and local income tax returns for each year”; “[t]rue and full information regarding the amount of cash and a description and statement of the agreed value of any other property or services contributed by each partner and which each partner has agreed to contribute in the future, and the date on which each became a partner”; and “other information regarding the affairs of the limited partnership as is just and reasonable”. *6 Del. C. § 17-305(a)(2), (5) and (6)*.

In evaluating a books and records demand under Section 17-305, courts often look to case law under *8 Del. C. § 220* (“Section 220”), which governs inspection rights in the corporate context. *See, e.g., Madison Ave. Inv. P’rs, LLC v. Am. First Real Estate Inv. P’rs, L.P.*, 806 A.2d 165, 176 (Del. Ch. 2002). Relying upon Section 220 precedent, the Court of Chancery has held that inspection rights under

Section 17-305 are “limited to those documents that are necessary, essential and sufficient” for the limited partner’s stated purpose. *See, e.g., In re Plains All Am. Pipeline, L.P.*, 2017 WL 6016570, at *4 (Del. Ch. Aug. 8, 2017); *Holman v. Nw. Broad., L.P.*, 2007 WL 1074770, at *6 (Del. Ch. Mar. 29, 2007).

The Court below applied this line of Court of Chancery precedent in determining that Appellants must demonstrate that K-1 Forms are “necessary and essential” to fulfill their proper valuation purpose. (Ex. A, Ruling at 24:12-25:22). The Court determined that the K-1 Forms are not necessary and essential to value Appellants’ shares and, accordingly, the Court determined that Appellants are not entitled to receive copies of the requested documents. (Ex. A, Ruling at 21:10-13).

No Delaware Supreme Court opinion has determined that the “necessary and essential” requirement applies to the Section 17-305 context. Appellants respectfully submit that the “necessary and essential” standard ought to apply only to the catchall provision of Section 17-305(a)(6) and not to the specifically enumerated categories of documents listed in Section 17-305(a)(1)-(5).

The language of Section 17-305(a) is notably distinct from Section 220. Under Section 220, a stockholder may obtain the stock ledger, a list of stockholders, and “other books and records”. *See* 8 *Del. C.* § 220(b)(1). Section 220 does not further specify which “books and records” a stockholder could obtain. *See id.*

Rather, the legislature left the courts to decide which documents a stockholder may be entitled to inspect and copy in furtherance of a proper purpose. *See id.* at § 220(c).

The case law in the Section 220 context has evolved to respond to this apparent mandate from the legislature. A stockholder with a proper purpose may obtain only those books and records that are necessary and essential to the stockholder's stated purpose. *See, e.g., Wal-Mart Stores, Inc. v. Indiana Elec. Workers Pension Trust Fund IBEW*, 95 A.3d 1264, 1271 (Del. 2014). In this way, the statute vests in the Court of Chancery the discretion to perform a case-by-case analysis of the documents that a Section 220 plaintiff may obtain. *See id.*

By contrast, Section 17-305(a)(a) to (5) specifies categories of documents that a limited partner may obtain. *See 6 Del. C. § 17-305(a)(1)-(5)*. Thus, with respect to these categories, there is no need for a court to conduct the “necessary and essential” analysis developed in the Section 220 context. Indeed, once a proper purpose is stated, a books and records plaintiff in the alternative entity context may obtain “information regarding the amount of cash and a description and statement of the agreed value of any other property or services contributed by each member and which each member has agreed to contribute in the future.” *Sanders v. Ohmite Holdings, LLC*, 17 A.3d 1186, 1194 (Del. Ch. 2011) (citing 6 *Del. C. § 18-305(a)(5)*).

Rather, the “necessary and essential” analysis is more appropriately applied to Section 17-305(a)(6). That provision is a catchall, akin to the wording of Section 220, that empowers the Court of Chancery to provide other documents as is just and reasonable. Thus, the rationale underlying the “necessary and essential” standard is applicable to only Section 17-305(a)(6).

In the case below, Appellants’ request falls within Section 17-305(a)(2) because the K-1 Forms are part of the Partnerships’ federal tax returns. (A0853) (“[t]he partnership files a copy of Schedule K-1 (Form 1065) with the IRS.”). There is no doubt that Appellants stated a proper purpose. (Ex. A, Ruling at 14:1-5). The Court of Chancery erred in deciding that Appellants must demonstrate that the K-1s are necessary and essential to Appellants’ proper purposes. Appellants respectfully request this Court to determine that Appellants are entitled to inspect the K-1s because Appellants stated a proper purpose and the K-1s fall within Section 17-305(a)(2).

C. The Partnership Agreements Does Not Contain a Necessary and Essential Requirement.

The Partnership Agreement provides that, once a proper purpose is stated, limited partners are entitled to receive the categories of documents listed in Section 12.1 of the Partnership Agreement. 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”. Partnership Agreements, Sections 12.1.1 & 12.1.3 (A0058, A0473, A0624-25).

The Partnership Agreements do not require a limited partner to demonstrate that the requested documents are “necessary and essential” to its stated purpose. Under the Partnership Agreement and Section 17-305, once a proper purpose is established, the documents identified in Section 12.1 must be disclosed to a limited partner.

The Court of Chancery determined that the Partnership Agreements incorporated the “necessary and essential” element because the agreements track the language of Section 17-305. (Ex. A, Ruling at 24:12-25:22). The Court cited a Court of Chancery case, *DFG Wine Co., LLC v. Eight Estates Wine Holdings, LLC*, 2011 WL 4056371 (Del. Ch. Aug. 21, 2011) in support of the conclusion that Section 17-305 incorporates the necessary and essential elements. There does not appear to be any Delaware Supreme Court precedent on this issue.

The Partnership Agreements do not condition a limited partner’s inspection rights on proving that the requested documents are necessary and essential to their stated proper purpose. Instead, Section 12.1.1 lists the information that a limited partner may receive. (*See* A0058, A0473, A0624-25). 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 pursuant to Section 12.1.1.

The K-1 Forms are part of the partnership's federal tax filings and, accordingly, a limited partner is entitled to obtain the documents under Section 12.1.3. Under the plain terms of the Partnership Agreement, Appellants are entitled to obtain a copy of the K-1 Forms upon stating a proper purpose, subject to "reasonable standards" the General Partner may establish.

D. The General Partner Did Not State a Reasonable Basis to Deny Appellants Access to the K-1 Forms

The Partnership Agreements and Section 17-305 authorize the General Partner to establish reasonable standards governing access to information. (A0058, A0473-74, A0625 at § 12.2.1(c)). *See also* Section 17-305(f); *Parkcentral Global L.P. v. Brown Inv. Management, LP*, 1 A.3d 291, 296 (2010). However, the General Partner may not "purport[] to deny completely a right granted in the Partnership Agreement. *Id.* at 296. The Partnership Agreement outlines a few, narrow bases upon which the General Partner may deny a books and records request. None of these bases authorizes the General Partner to deny Appellants' request.

The General Partner denied access to the K-1 Forms in reliance upon Section 12.2.1(c). (A1041:17-1042:4). Under that section, Limited Partners may not inspect or receive copies of “(c) trade secrets of the Partnership or the General Partner, investor information, financial statements of the Limited Partners or similar materials, documents and correspondence.” (A0058, A0473-75, A0625).

The K-1 Forms are not the type of “investor information” that Section 12.2.1(c) intends to shield from disclosure. Appellants do not seek information that would typically be provided by an investor to a partnership upon its admission, *i.e.* net assets, salary, compensation, value of trusts, or other information that an investor may be required to provide.

Indeed, as noted, Section 12.1 entitles a limited partner to tax returns, which includes K-1 Forms, and to certain other information regarding other limited partners. (A0058, A0473-74, A0625). Specifically, a limited partner is entitled to a list of the full name, address, capital contribution, and partnership percentage of each of the limited partners. (*Id.* at Section 12.1.1). All of this information is contained in the K-1 Forms.

Section 12.2.1(c) is more accurately read to preclude any limited partner from seeking the internal financial documents of another limited partner. This reading comports with the plain language of that section – a limited partner is not entitled to the “financial statements of Limited Partners or similar materials. . . .” (A0058,

A0473-74, A0625). This reading also is consistent with Delaware law. Court of Chancery Rule 5.1 provides examples of categories that may qualify as confidential information, including “trade secrets,” “sensitive proprietary information” and “social security numbers”; it does not protect disclosure of information simply because that information is nonpublic. Ct. Ch. R. 5.1(b)(2); *Horres v. Chick-fil-A*, 2013 WL 1223605, at *3 (Del. Ch. Mar. 27, 2013). The K-1 Forms are not the sort of highly confidential materials contemplated by this section or by Delaware law.

“The General Partner’s policy goes beyond reasonably governing access to information; it purports to deny completely a right granted in the Partnership Agreement.” *Parkcentral Global L.P.*, 1 A.3d at 296. If the General Partner wished to bar access to the K-1 Forms, “it could have done so explicitly in the Partnership Agreement under § 17-305(f).” *Id.* The Partnership Agreements and Section 17-305 do not provide any basis for the General Partner to withhold the K-1 Forms from Appellants. Accordingly, Section 12.2.1(c) cannot serve as a basis to deprive Appellants of the K-1 Forms.

II. IF APPELLANTS ARE REQUIRED TO DEMONSTRATE THAT THE K-1 FORMS ARE NECESSARY AND ESSENTIAL TO THEIR STATED PURPOSE, APPELLANTS HAVE SATISFIED THAT STANDARD.

Question Presented

Did the Court of Chancery err in finding that the K-1s are not “necessary and essential” to Appellants’ stated purpose? (A1037:2-3; A1113-15). Answer: Yes.

Scope of Review

In a books and records action, this Court reviews for abuse of discretion the Court of Chancery’s determination of both the scope of relief and any limitations or conditions on that relief. *KT4 Partners LLC v. Palantir Techs. Inc.*, 203 A.3d 738, 748 (Del. 2019). Questions of law, however, “are reviewed *de novo*.” *Id.* at 748-49.

Merits of the Argument

Even if the “necessary and essential” standard applies to books and records requests under Section 17-305, Appellants satisfied that standard. Inspection rights are “limited to those documents that are necessary, essential, and sufficient for the shareholder’s purpose.” *Madison Ave. Inc. Partners, LLC*, 806 A.2d at 176. A document is “essential” if “it addresses the crux of the shareholder’s purpose,” and the “information the document contains is unavailable from another source.” *Espinoza v. Hewlett-Packard Co.*, 32 A.3d 365, 371-72 (Del. 2011) (citations

omitted). “[A] petitioner meets her burden to provide necessity by identifying the categories of books and records she needs and presenting some evidence that those documents are indeed necessary.” *KT4 Partners LLC v. Palantir Techs. Inc.*, 203 A.3d 738, 755 (Del. 2019). The K-1s are necessary and essential to fulfilling Appellants’ stated proper purpose.

A. Appellants Demonstrated that the K-1s are Necessary and Essential to Fulfill Their Proper Valuation Purpose.

The Court of Chancery has recognized that tax documents are necessary and essential to fulfill a valuation purpose. *See, e.g., Bizzari v. Suburban Waste Services, Inc.*, 2016 WL 4540292 at *7 (Del. Ch. Aug. 30, 2016). Indeed, “tax returns and schedules thereto” are the type of “high-level financial information” necessary to value an interest holder’s stake in the company. *Id.* Moreover, as noted, the Partnership Agreements explicitly contemplate that a limited partner who states a proper purpose is entitled to receive tax returns. (A0058, A0473-74, A0625).

The Court below correctly found that Appellants stated a proper valuation purpose. (Ex. A, Ruling at 14:15-17). The Court of Chancery erred, however, by determining that Appellants are not entitled to receive copies of the K-1 Forms in light of this mandate from the Partnership Agreements. (Ex. A, Ruling at 15:2-10).

Appellants established that their valuation purpose was proper. (Ex. A, Ruling at 14:15-17). Tax documents are exactly the type of “high-level financial

information” that a books and records plaintiff is entitled to obtain to fulfill a valuation purpose. *See, e.g., Bizzari*, 2016 WL 4540292, at *7. Appellants should not be deprived of obtaining copies of the Partnerships’ complete federal tax returns as provided by Delaware law and the Partnership Agreements. (*See id.*; A0058, A0473-74, A0625). Appellants’ request for copies of the K-1 Forms, or a table summarizing the information contained in the K-1 Forms, (A1036:2-10), is narrowly tailored to accomplish Appellants’ stated valuation purpose. As a matter of law, Appellants’ proper purpose of valuing their interests and evaluating the marketability of their interests entitles them to obtain copies of the K-1 Forms or other documents that reflect the information contained in the K-1 Forms.

B. Appellants Established a Credible Basis to Infer Mismanagement and Wrongdoing Sufficient to Demonstrate that the K-1 Forms are Necessary and Essential to their Investigation.

To prove a stated purpose to investigate mismanagement, a plaintiff must demonstrate a “credible basis from which the court can infer that waste or mismanagement may have occurred.” *Thomas & Betts Corp. v. Leviton Mfg. Co.*, 681 A.2d 1026 (Del. 1996). This low “threshold may be satisfied by a credible showing, through documents, logic, testimony or otherwise, that there [exist] legitimate issues” of mismanagement or wrongdoing. *Id.* at 1031. The Court of Chancery has held, “[w]rongful dilution that benefits a majority holder is worthy of investigation.” *Sanders v. Ohmite Holdings, LLC*, 17 A.3d 1186, 11913(Del. Ch.

2011). The Court of Chancery correctly found that Appellants stated a proper purpose to investigate wrongdoing. (Ex. A, Ruling at 14:15-17). The Court erred in finding that Appellants did not establish a credible basis to suspect wrongdoing. (Ex. A, Ruling at 15:21-23; 16:12-15; 17:6-9; 18:9-12).

1. Appellants Seek to Investigate Mismanagement or Wrongdoing By Their Co-Trustee

Appellants seek to investigate the propriety of the diminution of their interests in the Partnerships. (*See* Ex. A, Ruling at 9:17-20). In 2011, Greylock provided the 2009 Partnership with two investment opportunities. (*Id.* at 17:21-18:6). The Trusts took advantage of the first, but not the second, opportunity. (*Id.*) If the Murfeys had known about this second opportunity, they would have taken advantage of it. (A0843:22-24). The Court of Chancery found that the Trusts' then-co-trustees, Maria Muth and Homer Chisholm, "knew about the opportunity and decided against investing more." (Ex. A, Ruling at 18:16-18). The co-trustees' failure to invest in the second round caused the Trusts' interest in the 2009 Partnership to become diluted. (*Id.* at 20:4-7).

Appellants require copies of the K-1 Forms so they may investigate the activities that led to the dilution of their interests. *See, e.g., Ohmite Holdings, LLC*, 17 A.3d at 1194. Specifically, Appellants are entitled to investigate why their co-trustees ignored Appellants' explicit instructions to invest in the Partnerships

whenever possible. The Court of Chancery's findings of fact support the conclusion that Appellants stated a credible basis for mismanagement and wrongdoing *by the co-trustees*. (See Ex. A, Ruling at 20:4-16). The K-1 Forms are critical to Appellants' investigation of this wrongdoing and to any potential action that the Appellants may bring against the co-trustees. Appellants are entitled to the requested documents to fulfill this proper purpose.

2. Appellants Seek To Investigate Whether to Bring a Subsequent Action Arising From the Dilution of Their Interests

Appellants seek the requested documents to investigate whether to bring a subsequent action against their co-trustee, the General Partner, or other limited partners. (See Ex. A, Ruling at 16:23-17:5). This investigation requires the Murfeys to obtain the names of the limited partners associated with each interest, rather than an anonymized spreadsheet, so that the Murfeys do not inadvertently sue their mother or sister, who have an interest in two of the other limited partners. (See *id.*) Additionally, the Murfeys may wish to speak with the other limited partners to aid their investigation.

The Court of Chancery determined Appellants are not guaranteed a right to equal shares and so they have not demonstrated a credible basis to suspect wrongdoing. (Ex. A, Ruling at 17:9-9). This ruling delves too far into the merits of any future potential claim. Historically, the Court of Chancery has declined to

engage in such an analysis. *La. Mun. Police Empls.' Ret. Sys. v. Countrywide Fin. Corp.*, 2007 WL 2896540, at *12 (Del. Ch. Oct. 2, 2007) (“[The defendant company] seeks to litigate the ultimate issue in a possible future derivative suit that might eventually be filed by [the plaintiff]. This is neither the time nor the procedural setting to address that issue.”); *Amalgamated Bank v. UICI*, 2005 WL 1377432, at *2 (Del. Ch. June 2, 2005) (“The potential availability of affirmative defenses to withstand fiduciary duty claims cannot solely act to bar a plaintiff under Section 220.”); *Marmon v. Arbinet–Thexchange, Inc.*, 2004 WL 936512, at *6 (Del. Ch. Apr. 28, 2004) (“[Allowing merits-based defenses] would turn on its head both § 220 and the case law upholding a books and records inspection for the purpose of investigating mismanagement.”); *Khanna v. Covad Commc’ns Gp., Inc.*, 2004 WL 187274, at *6 (Del. Ch. Jan. 23, 2004).

The strength or weakness of Appellants’ potential claims is not within the scope of the Court of Chancery’s inquiry in a books and records action. *See id.* As a matter of law, the Court of Chancery thus erred in determining that Appellants failed to state a credible basis to support their purpose because they did not demonstrate an entitlement to maintain equal shares in the Partnerships. Appellants are entitled to continue their investigation into the impropriety surrounding the dilution of their interests, and they require the K-1 Forms to complete this investigation. Appellants have satisfied the credible basis standard.

III. THE BELATEDLY-PRODUCED COMMUNICATIONS WITH HOMER CHISHOLM ARE INADMISSIBLE HEARSAY

Question Presented

Did the Court of Chancery err in admitting JX 87 and 88 into evidence over Appellants' hearsay objections? (A1116-17; Ex. A, Ruling at 18:24-19:24).

Answer: Yes.

Scope of Review

This Court reviews “a trial court’s decision to exclude matters from evidence for abuse of discretion.” *Mentore v. Metropolitan Restaurant Management Co.*, 941 A.2d 1019 (Del. 2008) (TABLE). The trial court’s predicate determination as to whether a statement is hearsay “involves a legal issue and, thus, is subject to *de novo* review.” *Id.*

Merits of the Argument

Hearsay “is a statement made by a declarant outside the courtroom that is offered to prove the contents of the statement,” and unless the statement is offered for a nonhearsay purpose or falls within a hearsay exception, it is inadmissible. *Brown v. Liberty Mut. Ins. Co.*, 774 A.2d 232, 238 (Del. 2001); *see also* D.R.E. 801(c). Delaware Rule of Evidence 801(d)(2)(D) “allows hearsay testimony of an agent or servant concerning matters within the scope of his agency or employment.” *Thomas & Betts Corp. v. Leviton Mfg. Co., Inc.*, 681 A.2d 1026, 1032 (Del. 1996).

The context in which the statements are made, however, is significant. The statements must demonstrate “independent guarantees of trustworthiness.” *Id.*

The Court of Chancery erred in admitting JX 87 and 88 under the hearsay exception of D.R.E. 801(d)(2)(D). (Ex. A, Ruling at 19:19-24). JX 87 is an email from Mr. Chisholm dated February 12, 2018 sent to Mr. Neff, trial counsel for the Murfeys, that Mr. Chisholm apparently forwarded to Mr. Nordell, the General Partner. (A0749-53). This email post-dates the Demand Letter, which was delivered to the General Partner on January 10, 2018. (*See* A0781-89).

JX 88 is an email chain between Maria Muth and Homer Chisholm in February 2011 that Mr. Chisholm emailed to Mr. Nordell on January 29, 2018. (A0746-48). Ms. Muth and Mr. Chisholm were the co-trustees of the Trusts in 2011. (*See* Ex. A, Ruling at 18:15-18). Again, this email was forwarded to Mr. Nordell after the Demand Letter was served on the General Partner. (A0746-748).

In essence, Mr. Chisholm emails potentially damaging information to the General Partner after the delivery of the Demand Letter. This email could not have been sent in Mr. Chisholm’s role as a co-Trustee for the Trusts because it has obviously damaging implications for the Trusts’ position in the to-be-filed books and records action. “Statements made in this context lack independent guarantees of trustworthiness and are inherently unreliable.” *Thomas & Betts Corp.*, 681 A.2d

at 1032. JX 87 and 88 do not fall within the hearsay exception of D.R.E. 801(d)(2)(D).

Moreover, despite the fact that Mr. Nordell possessed these documents in early 2018, he did not produce them until the eve of trial. (*See* A1037). This belated production deprived Appellants the opportunity to cross-examine Mr. Chisholm as to why he sent these communications to Mr. Nordell and what he intended to communicate through these communications. (*See* A1116). Appellees should not be permitted to rely on these documents. The Court of Chancery erred as a matter of law in admitting JX 87 and 88.

IV. THE K-1 FORMS AND INFORMATION DERIVED THEREFROM ARE NOT SUBJECT TO CONFIDENTIAL TREATMENT UNDER COURT OF CHANCERY RULE 5.1 IF APPELLANTS PREVAIL ON THEIR BOOKS AND RECORDS REQUEST.

Question Presented

Did the Court of Chancery err in finding that the K-1s and information derived therefrom are entitled to continued confidential treatment under Court of Chancery Rule 5.1? (A1038:21-A1039:7; Ex. A, Ruling at 25:23- 26:5). Answer: Yes.

Scope of Review

This question presents an issue of law. “Appellate courts review a trial court’s legal conclusions *de novo*.” *Bank of New York Mellon Trust Co., N.A. v. Liberty Media Corp.*, 29 A.3d 225, 236 (Del. 2011).

Merits of the Argument

Public access to judicial proceedings is “fundamental to a democratic state.” *Horres v. Chick-fil-A, Inc.*, 2013 WL 1223605, at *1 (Del. Ch. Mar. 27, 2013) (citation omitted). The right of access enables the public to judge the product of the courts in a given case. *In re Appraisal of Columbia Pipeline Group, Inc.*, 2018 WL 4182207, at *1 (Del. Ch. Aug. 30, 2018) (internal quotations omitted). This, in turn, helps ensure quality, honesty and respect for the legal system. *Id.* (citing *Horres*, 2013 WL 1223605, at *1). Consequently, all court proceedings are presumptively open to the public. *Id.* (citing *In re Nat’l City Corp. S’holders Litig.*, 2009 WL 1653536, at *1 (Del. Ch. Jun. 5, 2009)) (internal quotations omitted). “Denial of

access to litigation material must be approached from the premise that a judicial restraint on access should not be imposed unless strong justification exists for such action.” *Id.* (quoting *Ramada Inns, Inc. v. Drinkhall*, 490 A.2d 593, 598 (Del. Super. 1985)).

Rule 5.1 provides examples of categories that may qualify as confidential information, including “trade secrets,” “sensitive proprietary information” and “social security numbers.” Ct. Ch. R. 5.1(b)(2). In fact, the Court has rejected the sealing of proprietary information that is not readily available to the general public. *Horres v. Chick-fil-A*, 2013 WL 1223605, at *3 (Del. Ch. Mar. 27, 2013) (“[t]hat information is nonpublic does not automatically make it sensitive or entitle it to Confidential Treatment.”).

In order to demonstrate good cause for continued confidential treatment, the party seeking to maintain confidentiality must show “particularized harm.” Ct. Ch. R. 5.1(g)(2). Good cause does not exist “merely because disclosure has the potential for collateral economic consequences.” *Al Jazeera Am., LLC v. AT&T Servs., Inc.*, 2013 WL 5614284, at *5 (Del. Ch. Oct. 14, 2013). The fact “that information is nonpublic does not automatically make it sensitive or entitle it to Confidential Treatment.” *Horres*, 2013 WL 1223605, at *3 (“[t]hat information is nonpublic does not automatically make it sensitive or entitle it to Confidential Treatment.”).

The Court of Chancery ruled that the K-1s would remain confidential pending a final ruling on Appellants' books and records demand because allowing public access to the documents would essentially grant Appellants the final relief they requested. (Ex. C, ¶ 4). The Court did not find that Appellees had met their burden to maintain confidentiality, and indeed, the Appellees did not meet their burden³. (*See id.*). Accordingly, to the extent that this Court orders that Appellants are entitled to receive copies of the K-1 Forms, Appellants respectfully request that the Court enter an order lifting the confidentiality of the K-1s and information derived therefrom, except for social security numbers.

CONCLUSION

Appellants respectfully request that the Court reverse and remand the Court of Chancery's order denying Appellants the right to inspect and copy the K-1 Forms.

³ Appellants are submitting this Opening Brief and the Appendix To Appellants' Opening Brief ("Appendix") as a confidential filing because some of the documents therein contain information that Appellees requested to maintain as confidential, and that the Court of Chancery ordered may remain confidential. Appellants do not waive their right to challenge the confidentiality of any information in the Opening Brief or Appendix, or concede that the information contained therein is confidential.

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