**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

| | | |
|---|---|---|
| SCION BRECKENRIDGE MANAGING MEMBER, LLC, SCION 2040 MANAGING MEMBER, LLC, and SCION DWIGHT MANAGING MEMBER, LLC, | : | No. 437, 2012 |
| Defendants-Below / Appellants, | : | Court Below:<br>Court of Chancery<br>C.A. No. 5843-VCL |
| v. | : | |
| ASB ALLEGIANCE REAL ESTATE FUND, EBREF HOLDING COMPANY, LLC, and DWIGHT LOFTS HOLDINGS, LLC, | : | |
| Plaintiffs-Below / Appellees. | : | |

**ANSWERING BRIEF OF PLAINTIFFS-BELOW/APPELLEES**

DLA PIPER LLP (US)
John L. Reed (I.D. No. 3023)
Scott Czerwonka (I.D. No. 4844)
919 N. Market Street, Suite 1500
Wilmington, DE 19801
(302) 468-5700
(302) 394-2341 (Fax)
john.reed@dlapiper.com
scott.czerwonka@dlapiper.com

*Attorneys for Plaintiffs-Below / Appellees*

**OF COUNSEL:**

Bruce E. Falby
Bruce S. Barnett
Justin Brown
DLA PIPER LLP (US)
33 Arch Street
26th Floor
Boston, MA 02110
617-406-6000

Dated: October 23, 2012

## TABLE OF CONTENTS

**PAGE**

## TABLE OF AUTHORITIES

**CASES** **PAGE(S)**

**<u>STATUTES</u>**

**OTHER AUTHORITIES**

## NATURE OF THE PROCEEDINGS

The Chancery Court reformed three operating agreements for real estate joint ventures between the plaintiff pension funds (the "Funds") and defendant operating entities of The Scion Group, Inc. (collectively, "Scion") to correct a scrivener's error in a distribution waterfall. As-written, the provision virtually guarantees Scion incentive compensation, regardless of performance, in a fashion unprecedented in the real estate industry. The court believed the "candid[] and credibl[e]" testimony of witnesses for the Funds' investment adviser, ASB Capital Management, LLC ("ASB"), which was supported by documentary evidence. The court rejected the "feigned," "self-serving," "implausible," and "economically irrational" testimony of Scion's witnesses, which was counter to the documents. It found that ASB proved by clear and convincing evidence that: 1) the parties had reached a specific prior understanding as to the structure of the compensation waterfall that was not correctly captured in the written contract; 2) ASB executed the contract mistakenly thinking it stated the prior agreement; and 3) Scion knew about the mistake but stayed silent to take advantage of it.

Recognizing the Vice Chancellor's withering credibility determinations and the overwhelming documentary evidence supporting reformation, Scion does not challenge a single factual finding in the Opinion below. Rather, Scion offers (baseless) legal excuses why the Funds should be denied reformation and it should be allowed to reap millions of underserved dollars from the mistake. But, Scion's Opening Brief is no more credible than its witnesses' testimony at trial.

Scion principally relies on a negligence-based affirmative defense that does not exist under Delaware law. Scion falsely asserts that the Chancery Court found that ASB's President did not read any portion of the disputed agreements. The trial court found the opposite. In any event, negligence does not bar reformation. Falling back, Scion asserts for the first time on appeal that ASB had to prove more than knowing silence by Scion to achieve reformation due to unilateral mistake. Scion falsely tells the Court that it preserved this argument below, but it did not. In any event, it is settled Delaware law that nothing more than knowing silence is required.

Scion responded to ASB's pre-litigation request to correct the disputed agreements by filing lawsuits in multiple courts seeking to enforce the contracts as written and secure a windfall. The Chancery Court correctly applied the prevailing-party fee-shifting provision in the contracts to award the Funds costs and expenses incurred to enforce the parties' true agreement.

## SUMMARY OF THE ARGUMENT

1. Denied. The affirmative defense on which Scion relies does not exist in Delaware. Neither this Court nor any Delaware Court has denied reformation to a party who clearly and convincingly established the elements of unilateral mistake due to the party's conduct contributing to the mistake. This Court has indicated that, if it were to recognize a misconduct defense, it would follow the Restatement and the majority rule and require a degree of fault greater than a failure to read or negligence. In any event, Scion has not proven that ASB did not read the disputed agreements; the Chancery Court found that ASB did so.

2. Denied. Scion waived its argument that Delaware law of unilateral mistake requires more than knowing silence by not presenting it to the Chancery Court. In any event, it has been settled law of this Court for over 30 years that a plaintiff is entitled to reformation upon proof that the defendant knew that the written contract did not state the parties' actual agreement but remained silent so that it could take advantage of the mistake.

3. Denied. The Chancery Court properly rejected Scion's affirmative defense that the doctrine of ratification bars the Fund member of Dwight Lofts, LLC from reforming its agreement. ASB did not learn of the mistake in the Sale Proceeds Waterfall until over two years after the unrelated amendment to the contract that contained boilerplate language ratifying the unamended portions of the agreement. Ratification does not bar reformation when the party seeking relief was not actually aware of the mistake in the contract at the time of the allegedly ratifying action.

4. Denied. The Funds prevailed in this action to enforce the true agreement between ASB and Scion and in their defense of Scion's claims here and elsewhere to enforce the erroneous contracts as written. Finding that Scion filed and pursued multiple lawsuits to make this litigation as difficult and expensive as possible for the Funds with the hope of obtaining, through settlement, promote compensation to which it was not entitled, the Chancery Court properly applied the contractual fee-shifting provision to award the Funds the fees and costs incurred in connection with those enforcement actions. Scion cannot evade its responsibility for the fees incurred as a result of its meritless bid to enforce the as-written agreements by pointing to the fact that DLA Piper took responsibility for its role in the creation of the mistake and agreed to conduct the litigation at no cost to the Funds.

## STATEMENT OF FACTS

In this appeal, Scion challenges none of the facts found by the Chancery Court, which depend critically on credibility determinations. This statement adds undisputed facts and corrects Scion's most egregious misstatements.

### A. Scion And ASB Form A Business Relationship

ASB is a registered investment adviser and an investment manager for approximately 150 pension funds. To diversify, it makes and manages real estate investments. Scion, co-founded in 1999 by brothers Rob and Eric Bronstein, specializes in student housing. Rob and Eric, who remain principals of Scion, had significant real estate experience before forming Scion. Eric's came as an attorney. Between 2002 and 2006, Scion sponsored 15 student housing real estate joint ventures in which it invested a total of $12.2 million. (Op. 3-4.)

Between January 2007 and January 2008, ASB-advised pension funds and special purpose entities owned by Scion entered into five student-housing joint ventures, each a Delaware limited liability company. (Op. 4.) For each deal, Rob negotiated the economic terms with ASB, primarily with former ASB managing director Keyvan Arjomand, who was Scion's principal contact. ASB President Robert Bellinger actively oversaw and sometimes participated directly in the negotiations. Both Bellinger and ASB's Real Estate Investment Advisory Committee ("REIAC") approved each deal. The REIAC did not review actual transaction documents, but instead considered the deals based on an ASB-drafted memorandum summarizing the deal terms (a "REIAC Memo"). (Op. 4.)

Rob left the "wordsmithing" of the agreements to Eric. (Tr. 257.) Eric and ASB's lawyers at DLA Piper LLP worked to memorialize the deal terms that Rob and ASB negotiated. (Op. 2.) DLA Piper real estate partner Barbara Trachtenberg headed the firm's team and was heavily involved in the initial joint venture agreement, for University Crossing. After that, she ceded much of the drafting responsibility for joint venture documents to Cara Nelson, an associate who was new to real estate joint ventures. (Op. 4-5.)

### B. The Core Joint Venture Terms

In the joint ventures, ASB provided at least 99% of the capital and retained at least 99% of the equity. Scion served as the sponsor and invested no more than 1% of the capital. Scion earned a property management fee, a leasing fee, and an acquisition fee. Scion also had the potential to earn incentive compensation that took the form of a promoted interest, or "promote." (Op. 5.)

A promote pays a sponsor an agreed-upon portion of the cash flows generated by operations or by a capital event such as a sale or refinancing of the joint venture property. The promote is triggered once the project clears a specified hurdle known as the "preferred return," which is set at or slightly above the project's expected return. Once the preferred return has been reached, the sponsor gets a share of profits disproportionately greater than its ownership stake. The promote thus incentivizes the sponsor to achieve higher-than-expected levels of profitability. (Op. 5-6.) Because a promote is a share of *profits* and rewards the operator for creating value, there can be no promote payment upon a capital event until the investors have recovered their invested capital. (Tr. 11-12, 119-21, 598-611, 639, 678-79 752-53, 758-59; B1214-20; B1267; B1281; B1286; B1149; B1156.)

Real estate professionals commonly discuss promotes using the industry shorthand of "an X over a Y," where X is the disproportionate share of profits and Y is the preferred return hurdle. For example, the phrase "20% over an 8%" means the sponsor would receive 20% of incremental profits after the project generated an 8% preferred return. (Op. 6.) The promote shorthand is well understood in the commercial real estate industry to mean that in a capital event the operator will receive the promote only after the capital partner has received a return of its capital and the specified level of preferred return. (Tr. 12-14, 112, 121-22, 602-04, 615-16, 736-37; B1; B1219-22; B1268.)

### C. <u>The Initial ASB/Scion Joint Ventures</u>

From the start, Arjomand and Rob used the industry shorthand for promotes. For the University Crossing deal, they agreed to a promote of "20% above an 8% preferred return." (B23-25.) With no further discussion, the University Crossing LLC Agreement incorporated their agreement into a capital-event waterfall (the "Sale Proceeds Waterfall") that placed the promote after payment of the preferred return and return of invested capital. (Op. 7.)

Scion's compensation in the second venture, Millennium Bloomington Apartments, LLC, mirrored the University Crossing terms. (Op. 7-8.) On Millenium, ASB declined a request by Rob for higher guaranteed compensation. Although this sparked extensive discussion about up-front and management fees

(Tr. 23), there was no discussion about the order of return of capital and promote in the capital-event waterfall. (Tr. 237-38.)

### D. The Parties Agree On A Two-Tier Promote

Following Millennium, Arjomand encouraged Rob to focus on the promote as a way to achieve potentially greater compensation. They emailed each other about ASB's desire for deals with lower guaranteed fees and more incentive compensation so that Scion was less incented by fees and more by the upside it could earn through the promote. Rob responded that he did not mind trading up-front fees for greater incentive compensation. (Op. 9.) Rob and Bellinger had a conversation to the same effect. (Tr. 24-26.)

Rob understood that the purposes of a promote were to give Scion a disproportionate share of the upside it was creating for everyone (Tr. 241) and to ensure Scion would make money on its equity only if the Funds did (*id*. 244). Prior to the ASB deals, Scion had done 13 joint ventures with promotes, in all of which the promote came after either (a) the return of capital in a capital event waterfall or (b) a return of 100% of the investors' capital and a 50% net return on that capital. (Tr. 224-27.) Rob had told ASB that Scion's strategy was to identify projects where Scion could add value. (Tr. 243.) He expected the deals he brought to ASB to make money for the Funds and, to induce ASB to invest with Scion, he provided models projecting just that. (*Id.*)

Ultimately, ASB and Scion agreed to increase Scion's potential incentive compensation by adding a second tier of promote that would pay Scion a greater disproportionate share of returns after the Fund received the first preferred return, the return of its capital, and a higher level of profit or second preferred return "hurdle." (Op. 8; Tr. 30-31, 121.).

In March 2007, Rob suggested a two-tier promote for an opportunity called Case Western Triangle Apartments (a deal the parties did not pursue). In his proposal, Rob suggested that Scion receive "20% of returns above an 8% preferred return — and 30% of returns above 12%." (B28.) No one suggested that Scion could earn its promote if ASB did not receive back all its capital. The Chancery Court found that Rob's proposal contemplated an additional level of incentive compensation *on a profitable deal*. (Op. 8.)

Rob continued in the same vein in a March 30, 2007 memorandum, stating that he appreciated "ASB's desire to establish economic terms in which

Scion is rewarded for long-term success.” (B40.) He proposed a two-tier promote for all future deals: "Once [an] 8% return has been achieved, Scion will receive 25% of the proceeds (75% to the Fund) until the Fund realizes a 12.0% cumulative annual return, above which Scion will receive 50% of proceeds (50% to the Fund)." (B41; Op. 9.)

About five weeks later, Arjomand and Rob completed their negotiations of the two-tier promote and other compensation issues. In an email exchange dated May 9 and 10, 2007, with the subject "ASB/Scion General Deal Parameters Going Forward," they agreed to a promote as follows: “**Promote** - On an unlevered deal, 20% over an 8%, and 35% over a 12%. On a levered deal, 20% over a 9%, and 35% over a 15%." (B42-43 (the "May 2007 Terms").) Arjomand forwarded the email agreement to DLA Piper shortly thereafter, adding "Please save this email for future reference. Below are the basic economics of our deal format with Scion on a go forward basis . . . ." (B45; Op. 9-10.)

### E. The May 2007 Terms Were A Specific Prior Understanding

The Chancery Court found, and Scion does not challenge on appeal, that ASB proved by clear and convincing evidence that the May 2007 Terms constitute a specific prior understanding that return of capital was to come before the payment of promote, providing the necessary foundation for reformation. (Op. 27.) The court found that "promote" is a term of art that inherently contemplates the prior return of invested capital upon a capital event because it refers to a share of the profits or upside from a project. (Op. 25.) In the capital event context, profit or upside is necessarily calculated by subtracting the invested capital and other costs from the proceeds. (Op. 25-26.)

The Chancery Court found that throughout their relationship and in agreeing to the May 2007 Terms, the parties operated based on the established industry meaning of a "promote." (Op. 26.) It credited the ASB witnesses' testimony about the meaning of a promote and the terms of their agreement with Scion. It found their testimony and the economic structure they contemplated make sense as a coherent whole. (*Id.*) By contrast, the court rejected as self-serving and internally contradictory the Bronsteins’ testimony that the May 2007 Terms were not an agreement regarding the order of return of capital and payment of promote. (Id.) Scion’s expert admitted that the term promote is as well established and understood in the real estate industry as terms such as mortgage, nonrecourse, and IRR. (Tr. 758-59.) In 25 years in the industry, he had never heard of a real estate deal in which a promote was paid before the return of capital in a capital-event waterfall. (Op. 26.) Neither had Eric. (Tr. 485.)[1]

### F. The Breckenridge Joint Venture

Breckenridge was the first joint venture after the May 2007 Terms were agreed to. DLA Piper prepared the initial draft of the LLC agreement by electronically copying the Millennium LLC Agreement, then making deal-specific adjustments. (Op. 10.) The draft Nelson circulated on June 14, 2007, did not reflect the May 2007 Terms. Although DLA Piper had revised the Sale Proceeds Waterfall to add the second preferred return, it provided for only one level of promote. (A586.) Eric replied the same day, noting that the waterfalls "seem to be missing language applying the 'Promote Percentage' split after the first-tier preferred return has been achieved but before the second-tier has been reached." The Chancery Court found that contrary to one version of Eric's testimony, in which he claimed to have negotiated the change in the promote, he did not offer this comment to alter the economic terms of the waterfall, but to memorialize accurately the May 2007 Terms. (Op. 10.)

---

[1] Scion incorrectly claims that Arjomand and Bellinger testified that the May 9, 2007 email was not an agreement regarding the order of return of capital and payment of promote. (O.B. 7.) Arjomand's deposition testimony (he did not testify at trial) was that the May 9th email proposed that return of capital would come before the payment of promote, as in every deal he had ever done. (A1400-01 at 199-203.) He testified that he would need Bellinger's approval to negotiate changes to the waterfall and that he did not discuss with Bellinger any change to the capital events waterfall to place promote before the return of capital. (A1399 at 193.) In the testimony to which Scion cites (A1377 at 107-09), Arjomand was addressing not the May 9 email, but rather a June 15, 2007 email (B44) that instructed DLA Piper to use the lower, unlevered preferred-return hurdles in the Breckenridge transaction. As for Bellinger, he testified at trial that he went over the May 9th email with Arjomand very carefully before he sent it. (Tr. 28-29.) Consistent with the industry meaning of promote, Bellinger understood and intended the email to provide for the return of capital before the payment of any promote upon a capital event. (Tr. 29-31, 111-12.) This had been the case in the prior Scion joint ventures and, indeed, in every joint venture Bellinger had ever done at ASB or heard of in the industry. (Tr. 22-23, 29-31.)

DLA Piper revised the waterfall. When Nelson circulated another draft the next day, the missing first-tier promote appeared after the first preferred return but *before* the return of capital in the Sale Proceeds Waterfall. (A655.) In this structure, Scion would earn its promote immediately after the preferred return is achieved, before ASB and Scion received back their capital. Therefore, on a money-losing deal, after the initial 8% preferred return, Scion effectively would receive 20% of every dollar that ASB originally invested. (Op. 10-11.)

After the June 15 draft, the only edit to the Sale Proceeds Waterfall clarified that, after the first preferred return was achieved, Scion would continue to receive the first promote after it achieved its second preferred return and until the Fund earned its second return. (Op. 12-13.) Thus, the relevant portion of the executed version of the Breckenridge Sale Proceeds Waterfall placed the first level of promote in a Paragraph Third before the return of capital in a Paragraph Fourth. (B832.) The Chancery Court found that Paragraph Third was erroneously placed before Paragraph Fourth and, as a result, the written agreement does not reflect the May 2007 Terms because the first promote is ahead of the return of invested capital. As the court noted, the transposition of the paragraphs leaves an odd dangling "and" at the end of Paragraph Third. (Op. 13.) Scion paraphrases the waterfall to avoid the dangling "and." (O.B. 4.)

### G. Scion's Knowing Silence

The change at issue — placing promote before the return of capital — was "a radical departure that promised Scion promote compensation even if ASB lost 80-85% of its invested capital." (Op. 12; *see also* Tr. 135-36, 143, 459.) Yet, no one commented on the change. Eric reviewed the Sale Proceeds Waterfall in the June 15 draft in detail. He noted that the first-tier promote now appeared before the return of capital, and he understood the favorable implications of the error for Scion. (Op. 11; Tr. 462, 472.) He also admitted that he stayed silent. (Op. 27.) The Chancery Court found (a finding unchallenged on appeal) that ASB proved by clear and convincing evidence that Scion, through Eric, knew that the Sale Proceeds Waterfall as written did not reflect the May 2007 Terms but intentionally remained silent to take advantage of the mistake. (Op. 27.)

In one version of his testimony, Eric claimed to have negotiated the change and thought DLA Piper gave it away. (Op. 2, 28.) He admitted that Scion provided no consideration for placing the first-tier promote before the return of capital (Tr. 462-63), but he claimed implausibly as part of his negotiation story that it was normal for opposing counsel to give away a significant deal point for nothing. (Tr. 467.) The Chancery Court found that given the allocation of responsibility between Rob and Eric at Scion, and between ASB and DLA Piper on the Fund side, it is not credible that Eric negotiated a change in the Sale Proceeds Waterfall. At Scion, Eric did not play that role, and Rob testified that he did not instruct Eric to seek to elevate the promote before the return of capital. (Tr. 259.) Indeed, Rob claimed not to recall being aware of the placement of the first-tier promote before 2010. (Op. 11.) The court further found that, as outside counsel, DLA Piper did not have authority to make substantive changes to the economic agreement between business principals. (Op. 12, Tr. 198, 201; B1272.)

In another contradictory version of his testimony, Eric claimed he lacked sophistication in real estate matters, innocently asked about the waterfall, and naively believed that DLA Piper accurately scrivened the deal. (Op. 2, 28; Tr. 530-43.) In this account Eric testified that he thought DLA Piper intended in adding a second level of promote for the first level of promote to jump ahead of return of capital to create a preferred-promote hybrid. (Tr. 473-75.) Yet, when asked why, if he truly thought ASB wanted to put promote ahead of the return of capital, he had never proposed this structure in any of Scion's subsequent deals with other investors, Eric admitted that it would be a "nonstarter." (Tr. 485-87.)

Rejecting Eric's testimony "in the alternative" (Op. 2), the court below was convinced that Eric, a sophisticated real estate attorney with significant real estate joint venture experience, intentionally remained silent in an effort to capture an undeserved benefit for Scion. It found Eric's denials not credible: "Having evaluated Eric's demeanor, I am convinced that Eric recognized the scrivener's error and tried to take advantage of the mistake." (Op. 28.) The court also rejected Rob's after-the-fact rationale that paying promote before returning capital functions as a reward for long-term success, even if the Fund loses money, because ASB itself makes fees for deploying capital (Tr. 283-87), a theory of promote the court accurately described as "to incent ASB to act in a self-interested disloyal fashion to its investors." (Tr. 285.)

### H. ASB's Mistake

ASB's REIAC approved the Breckenridge deal based on a REIAC Memo summarizing the Sale Proceeds Waterfall as it should have been drafted, with the return of invested capital before the first promote. (B170-71; Op. 14.)

Bellinger testified that he reviewed parts of the Breckenridge LLC Agreement before approving it but did not remember how much he read. (Op. 14;

Tr. 41-43.) His testimony at trial was consistent with his deposition testimony and his affidavits. (A1467-69 at 236, 240-43; A1920 at 48-49; B1378 ¶¶16-17.) Bellinger typically reads distribution waterfalls and believes he did so here. (Tr. 41-43, 100-03.) Bellinger admitted that he did not read the agreement carefully and that he overlooked the placement of the first-tier promote in the Sale Proceeds Waterfall. (Op. 14.) He focuses on the percentage numbers when he reviews waterfalls, "since there's really never any change" in the position of the return of capital. (Tr. 43.) Rob testified similarly that when he reviews waterfalls, he looks at the percentages to see that the numbers that he negotiated appear. (Tr. 301.) Expecting to see return of capital ahead of the promote, Bellinger missed the mistake. (Tr. 42-43.) He noted that "once someone points out the mistake, it's very obvious that it's wrong." (Op. 14, citing Tr. 42-43.)[2]

Trachtenberg testified at trial that she did not recall whether she had followed her normal practice and reviewed the drafts and the agreements, but if she did she "didn't focus on what the language was there, because it's just wrong. It's a terrible translation of the [May 2007 Terms]." (Op. 11-12, Tr. 124, 139-40, 145, 147, 151.) Nelson conceded that at the time of the Breckenridge deal, she lacked the experience necessary to understand the terms of the promote. She only learned of the mistake in the Sale Proceeds Waterfall when Trachtenberg explained it to her in fall 2010. (Op. 11-12.)

### I. <u>The 2040 Lofts And Dwight Lofts Joint Ventures</u>

The 2040 Lofts and Dwight Lofts joint ventures followed Breckenridge. In each case, DLA Piper electronically copied the Breckenridge LLC Agreement, then made deal-specific changes. The only changes to the Sale Proceeds Waterfall were, in 2040 Lofts, to replace the word "First" with "8%" in two

---

[2] Scion mischaracterizes this testimony, claiming that ASB testified that the mistake was "obvious." (O.B. 6.) Scion cites also to Trachtenberg's testimony that when in 2010 she reviewed the waterfall and "saw that it actually said to pay promote before the return of capital, [she] was horrified." (Tr. 147.) Trachtenberg did not use the word obvious and neither she nor Bellinger said the mistake was obvious in the sense that it was immediately apparent. Bellinger analogized missing the mistake to missing a typographical error despite reading a document several times. The mistake *was* essentially a typographical error, likely resulting from a missed or missing caret instructing the typist to reverse the order of Paragraphs Third (with its dangling "and") and Fourth.

places and the word "Second" with "12%" in one place and, in Dwight Lofts, to replace “Fund” with “Fund Member.” (B206; B890.) Neither ASB nor Scion reviewed the Sale Proceeds Waterfall in any meaningful respect. Everyone assumed that the Breckenridge LLC Agreement reflected the deal terms, which were to stay the same unless the principals negotiated a change. (Op. 14-16.)

In both cases, the REIAC approved the transaction based on a memorandum that described return of capital as preceding the first-tier promote in the Sale Proceeds Waterfall. (B287; B1136.) In each of the actual LLC agreements, the return of capital came after the first-tier promote. (A917; A1055; Op. 15-16.) Neither Bellinger nor Trachtenberg read either agreement carefully before approving the deal. Bellinger relied on Trachtenberg. Trachtenberg relied on Nelson, who thought the Breckinridge Agreement accurately reflected the agreed-upon ASB/Scion deal structure. (*Id.*)

Effective March 3, 2008, ASB and Scion amended a put provision in the Dwight Lofts LLC Agreement (the "Dwight Amendment"). In boilerplate, the amendment states that "[e]xcept as set forth herein, the terms and provisions of the [LLC Agreement] are hereby ratified and confirmed and shall remain in full force and effect." (A1142.) The Dwight Amendment did not change the Sale Proceeds Waterfall and before entering into it, Scion and ASB did not discuss the Sale Proceeds Waterfall, the placement of the first-tier promote, or the economic implications of its location. At the time, ASB and DLA Piper did not know about the error. Only Scion did. (Op. 16.)

### J. <u>The Automatic Lofts Deal</u>

After 2040 Lofts but before Dwight Lofts, Scion and ASB entered into a sixth deal, Automatic Lofts. For tax reasons, Scion could not be an equity holder, the deal was not a traditional joint venture. Instead, Scion was the property manager and loan servicer, and the parties agreed to structure Scion's compensation to "mimic" Scion's joint venture compensation under the May 2007 Terms, including the two-tier promote. (B799; Op. 16-17.) Because new documents were needed, Trachtenberg was heavily involved. She recommended re-casting Scion's two-tier promote as an "Incentive Fee" paid pursuant to an Incentive Management Agreement. To mimic the preferred return concept, that agreement employed an internal rate of return ("IRR") formulation. (B804.) Under an IRR formulation, the return of invested capital necessarily comes *before* payment of the promote. (Op. 17-18.)

The Chancery Court found that Eric's silent acceptance of the return of capital *before* the first promote in Automatic Lofts confirmed he knew the Sale Proceeds Waterfalls in the disputed agreements was a mistake of which ASB was unaware. (Op. 18.) If Eric believed that the promote-before-capital sequence stated in the disputed agreements was the negotiated deal, he would have objected to the lack of mimicry. The Chancery Court discredited the Bronstein brothers' explanations at trial for their acceptance of the IRR formulation, finding that they "feigned naivety." (Op. 18.)

### K. <u>ASB Learns About The Mistake</u>

ASB learned of the mistake in 2010 after Scion exercised its right to put its interest in the 2040 Lofts venture to the Fund. ASB and Scion had contributed (in their 99:1 ratio) $47.8 million in capital by that time, but the venture had a fair market value of only $35.5 million. Eric told ASB that Scion's calculation of the purchase price of the Scion interest was $1.83 million, including a promote of $1,556,356.92. Under that pricing, Scion would gain 282% on its $479,000 investment, while ASB's investment would be valued at $32.96 million, representing a loss of $14.41 million or roughly 30%. Using the correct waterfall, Scion would suffer a loss proportionate to the Fund's and receive a buyout price of only $347,792.46. (Op. 18.)

By the time Scion exercised the put, Arjomand's ASB employment had terminated for reasons unrelated to the issues in this lawsuit (Tr. 46-48), and James Darcey was in charge of the Scion relationship. He responded to Eric's calculation less than half-an-hour after receiving it, asking how the underwater venture could generate a promote. Eric replied: "[W]e prepared our calculation to follow the LLC Agreement precisely, so I believe it is correct." (Op. 19; B1153.) Darcey then inquired of Rob, who claimed by reply email that he had negotiated with Arjomand the deal as written and that it was deserved because Scion brought to ASB an off-market deal, reduced its acquisition fee and management fee, and had to pay capital gains tax on proceeds it left in the deal. (B1152.) The Chancery Court found, as Rob admitted at trial, that virtually every statement in his reply was false. (Op. 19.) Rob at trial admitted that he did not negotiate a change to put promote ahead of the return of capital. (Tr. 299-300.)

After the email exchanges with Rob and Eric, Darcey and Bellinger examined the Sale Proceeds Waterfall and identified the scrivener's error. Bellinger called DLA Piper and "had a very, very tough conversation." (Tr. 44.) Bellinger was "incredibly upset that this had happened because it was clear what the document said, and that it was just wrong." (Tr. 44-45.) ASB subsequently put DLA Piper on notice of a malpractice claim. (Op. 19-20.)

Later in 2010, Scion exercised its put right under the Dwight Lofts LLC Agreement. ASB had contributed approximately $78.5 million in capital to Dwight Lofts; Scion had contributed approximately Scion calculated a $3.38 million purchase price, including a promote of approximately $2.6 million, for the interest in which it had invested $790,000. ASB calculated the purchase price under the correct waterfall to be only $1.26 million. (Op. 20.)

### L. <u>Facts Misstated By Scion As To ASB's Conduct</u>

Scion brief misstates facts relating to its affirmative negligence defense. Scion's claims that Bellinger admitted in affidavits in the parallel federal cases that he did not read the Sale Proceeds Waterfall. (O.B. 7.) His affidavit testimony was that if he had focused on the capital event waterfall sufficiently to understand that it provided for payment of Scion's promote ahead of the return of capital, then he would have known it was a mistake. (B1378 ¶¶16-17.) (Trachtenberg's affidavit testimony, though not relevant to relevant to Scion's affirmative defenses, *see infra* Section I.C.5, was the same. (B1384-85 ¶¶14-16.))

Scion incorrectly claims that the Chancery Court found that Bellinger did not read the disputed agreements. (O.B. 8, 13). The Chancery Court credited Bellinger's testimony as candid and credible (Op. 1, 26), including his testimony that he reviewed parts of the Breckenridge LLC Agreement before approving it but did not remember how much he read. (Op. 14; Tr. 41-43; *see* Section H, *supra*.) When challenged on cross examination about transmittal emails sending him LLC agreements, Bellinger remembered in particular reviewing, in preparation for testifying at trial, an email transmittal of the Breckenridge Agreement. (Tr. 103.) ASB promptly located and produced to Scion a corroborating June 19, 2007 email from Nelson to ASB's Larry Braithwaite (and others) attaching the complete Breckenridge Agreement and instructing them to give it to Bellinger. (Tr. 772, 880-83.) Because ASB had withheld the June 19 email as privileged and did not log it, the Chancery Court excluded the email itself from the record and declined to consider it. (Op. at 29.) However, the Court declined to grant Scion's request for an adverse inference contrary to Bellinger's testimony. (Op. at 29.) The Court further found (at Op. 29-30):

> Having considered Bellinger's testimony and the overall context of the negotiations, I believe that Bellinger read the University Crossing Agreement in its entirety and was familiar with its terms. After that, I believe Bellinger relied on Trachtenberg and Arjomand to advise him about any changes, brief him on new terms, and provide him with any portions that he needed to read. Delaware law does not require that a senior decision-maker like Bellinger read every agreement in *haec verba*. I find that Bellinger adequately and properly oversaw the negotiation process and was informed about the terms of the joint venture agreements as negotiated by the parties.

Scion incorrectly claims that Bellinger testified at deposition that he did not believe ASB had a duty to read documents before signing them. (O.B. 8.) Bellinger said at deposition that he did not believe it was his duty personally to read all of every document he signed. At deposition and at trial Bellinger testified that he relied on others to make sure the documents were accurate, primarily ASB's attorneys and also Arjomand. (A1468 at 238-40; Tr. 43-44.) Scion introduced no evidence that Arjomand did not read the disputed agreements.

Scion also incorrectly claims that ASB did not create letters of intent or term sheets for the last three ventures (contrary to supposed industry practice), and did not inform DLA Piper of the business terms of those ventures. (O.B. 9.) The May 2007 Terms were a term sheet, a "summary" of "business terms on go forward deals" (B42), and, by their use of the term promote and its shorthand, expressed the order of the capital event waterfall. In addition, although DLA Piper did not receive the ASB REIAC memos, ASB carefully provided DLA Piper with the May 2007 Terms for reference and use going forward. (B45.)

The conduct of ASB's attorneys is not relevant to Scion's affirmative defense, *see infra* Section I.C.5. Nonetheless, Scion misstates the roles played by DLA Piper's Trachtenberg and Nelson. (O.B. 9-10.) Trachtenberg, the partner in charge, was heavily involved in preparing the first joint venture documents and later the new set of documents required for Automatic Lofts. (Op. 26; Tr. 191-92). In the deals in-between, the prior deal's documents served as the template so there was much less drafting and Nelson took a greater role. (Tr. 124-25, 188-89). For all the transactions, Trachtenberg followed her usual training practice of having her associate serve as the primary contact. Nelson distributed documents and received comments, but worked with Trachtenberg and Arjomand to approve and incorporate changes. (Tr. 124-25, 188-89.)

Based on testimony by Nelson that she often sent ASB only signature pages for execution, Scion incorrectly concludes that ASB signed the disputed agreements without ever seeing those documents. (O.B. 10.) This is contrary to Bellinger's testimony that he read parts of the agreements and the Chancery Court's factual findings, which credited his testimony. (Op. 1, 26.) It also ignores that Arjomand received copies of each draft of the agreements. (A565; A632; B48; B107; A776; A837; B184; B300; B428; B429; B550; B673; B867; B932; B992; B1072.) Bellinger also testified that when given signature pages to sign, he did not sign them before having reviewed the documents and being told of any changes since his review. (Tr. 100-01.)

### M. Scion Caused ASB To Incur Attorneys' Fees And Costs Of $3.2 Million

After learning of the mistake at the end of August 2010, ASB investigated and then wrote a detailed letter dated September 20 inviting Scion to join in correcting the agreements. (A1145.) Instead, Scion sought to cash-in on the clear mistake by filing three duplicative lawsuits in federal courts to enforce the disputed agreements as written. The Funds brought this action to enforce the parties' actual agreements, and Scion counterclaimed to enforce the as-written agreements. Scion also counterclaimed against the Dwight Lofts Fund member, seeking to enforce the Managing Member fiduciary duties set forth in the Dwight Lofts LLC Agreement. (The court rejected the counterclaim.) Recognizing its role in contributing to the scrivener's error in the capital events waterfall, DLA Piper agreed to bear the fees and expenses incurred in connection with these actions to enforce the agreements. (Tr. 45-46.)

The Chancery Court found, and Scion does not challenge the finding on appeal, that Scion filed and pursued multiple lawsuits to make this litigation as difficult and expensive as possible for ASB, hoping to create leverage that would force a settlement more favorable to Scion than the merits of its position warranted. (Fees Opinion at 2 (A547).)

# ARGUMENT

## I. SCION DID NOT PROVE THAT ASB FAILED TO READ THE DISPUTED AGREEMENTS, THE CHANCERY COURT DID NOT FIND THAT ASB WAS NEGLIGENT, AND IT NEVERTHELESS CORRECTLY CONCLUDED THAT, IN ANY EVENT, NEGLIGENCE DOES NOT BAR REFORMATION

### A. Questions Presented

Whether the Scion can sustain its affirmative defense based on total failure to read and other negligence by ASB when the Chancery found Bellinger read parts of the documents and was not negligent and Scion did not prove Arjomand failed to read the documents. Also, whether a complete failure to read, even if it had been found, would preclude reformation when ASB met all the elements of the remedy. This issue was addressed below at B1347 and B1576.

### B. Scope of Review

In reviewing this mixed question of law and fact, the Court defers to the findings of fact below unless they are clearly erroneous and not supported by the record, *see Brody v. Zucha*, 697 A.2d 749, 751 (Del. 1997), and reviews *de novo* the existence of the claimed affirmative defense, *Kahn v. Lynch Comm'n Syst.*, 669 A.2d 79 (Del. 1982).

### C. Merits of the Argument

To avoid the Chancery Court's findings, by clear and convincing evidence, that ASB met the unilateral-mistake criteria, Scion asks that this Court, for the first time ever, establish a bar to reformation based on the plaintiff's conduct and that it set the threshold for disqualification at negligence. In doing so, Scion grossly misleads the Court as to the relevant facts and ignores that the Court has previously stated that any such defense must be based on conduct more culpable than negligence.

#### 1. Scion did not prove that ASB failed to read the disputed agreements and the Chancery Court did not find that ASB was negligent

To establish the (counter-)factual predicate on which its claimed defense hinges — that Bellinger (and therefore ASB) failed to read the disputed agreements and that ASB was otherwise negligent — Scion falsely asserts that the "Chancery Court found that Bellinger did not read the agreements at all." (O.B. at 14). To the contrary, the Chancery Court credited Bellinger's testimony that he read parts of each of the disputed agreements (though he does not remember which sections) and found he was not negligent but rather that had adequately and properly overseen the negotiations.

Scion misleadingly quotes a subsequent sentence fragment to mask the Chancery Court's finding by asserting that it "*concluded* for purposes of its decision that 'Bellinger did not read the agreements before approving them.'") (O.B. 13 (quoting Op. 30) (emphasis added). The complete sentence, however, makes clear that the court was moving on to its alternative holding: "Even *assuming* Bellinger did not read the agreements before approving them, that would not bar equitable reformation." (emphasis added).

Scion's proof fails for the independent reason that there is no evidence that Arjomand did not read the disputed agreements. Arjomand, who was the primary ASB contact for Scion, was sent copies of each version of the disputed agreements. Scion deposed Arjomand and *did not ask* him whether he had read the drafts of the agreements. To make up for this fatal deficiency, Scion constructs its failure-to-read argument by ignoring Arjomand altogether and pretending that Bellinger was the only person at ASB involved in the deals. Arjomand was the person more likely to have read them. Indeed, Bellinger testified that he relied on Arjomand to do so.

As to the other elements of alleged negligence by ASB, the evidence shows that ASB and Scion did enter into a term sheet — the May 2007 terms. In any event, the Chancery Court did not find any industry practice related to terms sheets on which to base a finding of negligence. Also, while ASB did not send DLA Piper the REIAC Memo for Breckenridge, it had already given its lawyers the terms to use for deals going forward, when it sent them the May 2007 Terms.

#### 2. The Court need not answer *Cerberus's* open question because Scion alleges no more than negligence

This case does not require the Court to answer the question left open in *Cerberus International, Ltd. v. Apollo Management, L.P.*, 794 A.2d 1141 (Del. 2002), "whether, under certain circumstances, a party's *misconduct* could bar a reformation claim." *Id*. at 1154 n. 47 (emphasis added). The conduct of ASB alleged by Scion would amount to no more than negligence. *Cerberus* contemplates, as the Restatement (Second) of Contracts (the "Restatement") requires, a degree of culpability greater than negligence to bar a reformation claim.

*Cerberus* states that (a) a failure to read a contract with care does not bar reformation and (b) Delaware has never adopted a rule under which any degree of fault or misconduct by the proponent of reformation would preclude the claim. Recognizing the nature of reformation, the Court said that "[a]ny mistake claim by definition involves a party who has not read, or thought about, the provisions in a contract carefully enough." *See id.* at 1154. In support, the Court quoted a comment to Section 155 of the Restatement: "Reformation is not precluded by the mere fact that the party who seeks it failed to exercise reasonable care in reading the writing." *Id.* at 1154 n. 47 (quoting Section 155 cmt. a).

The Court noted that, while it is not the rule in Delaware, some jurisdictions "do say that a degree of fault *greater than negligence* bars reformation." *Id*. at 1154 n. 47 (emphasis added). Continuing to rely on the Restatement, the Court cited its Section 157, *id,* which provides that:

> A mistaken party's fault in failing to know or discover the facts before making the contract does not bar him from avoidance or reformation under the rules stated in this Chapter [which includes Section 155], unless his fault amounts to a *failure to act in good faith and in accordance with reasonable standards of fair dealing.*

Restatement § 157 (emphasis added). "This language indicates a much higher standard than simple negligence — it rises to the level of willful behavior where a party has knowingly acted in bad faith." *Young v. Verizon's Bell Atl. Cash Balance Plan*, 667 F. Supp. 2d 850, 904 (N.D. Ill. 2009).

Under Section 157, a reformation proponent's failure to read the contract carefully *or at all* or its other negligence does not amount to a failure to act in good faith or in accordance with reasonable standards of fair dealing. Comment b to Section 157 explains that its rule, and reformation generally, apply only to cases "that come within the scope of § 155, under which there must have been an agreement that preceded the writing." But in those cases, "*a party's negligence in failing to read the writing does not preclude reformation* if the writing does not correctly express the prior agreement. See Illustration 3." Section 157 cmt. b (emphasis added).[3]

Illustration 3 first incorporates Illustration 1 to Section 155, which states:

> A and B agree that A will sell and B will buy a tract of land for $100,000 and that B will assume an existing mortgage of $50,000. In reducing the agreement to writing, B's lawyer erroneously omits the provision for assumption, and neither A nor B notices the omission. At the request of either A or B, the court will reform the writing to add the provision for assumption.

Illustration 3 to Section 157 adds the following:

> [N]either A nor B reads the writing before signing it, although the omission would be obvious to either if he read it. Neither A's nor B's conduct amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing, and neither A nor B is precluded from obtaining a decree reforming the writing.

It is undisputed that the Funds' attorneys created the mistake in the Sale Proceeds Waterfall. Thus, the present case would fall within the Restatement's example if no one at ASB had read the disputed agreements. Such a failure to read the contract would not bar reformation under Section 157.

The level of fault or misconduct that might bar a reformation claim, if Delaware were to recognize fault or misconduct as a defense, is much greater than anything suggested by Scion in this case. In addition to Section 157,

---

[3] Section 157 of the Restatement provides in comment a that the

> mere fact that a mistaken party could have avoided the mistake by exercise of reasonable care does not preclude . . . reformation (§155). Indeed, since a party can often avoid a mistake by the exercise of such care, the availability of relief would be severely circumscribed if he were to be barred by his negligence. Nevertheless, in *extreme cases* the mistaken party's fault is a proper ground for denying him relief for a mistake that he otherwise could have avoided [when it amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing]. (emphasis added).

*Cerberus* cites *Foster v. Gibbons*, 33 P.3d 329 (Or. App. Ct. 2001), as an example of the rule in some other jurisdictions that fault greater than negligence bars reformation. Under Oregon law, failure to read an agreement does not bar reformation. *Pioneer Res., LLC v. D.R. Johnson Lumber Co.*, 68 P.3d 233, 251-52 (Or. App. Ct. 2003). In *Foster*, the plaintiff was required to prove, as an element of a reformation claim based on mutual mistake under Oregon law, that she was not grossly negligent.[4] 33 P.3d at 334-35. The court held that she could not do so, because she knowingly created the alleged mistake. Foster sought reformation of a contract to change the legal description of a parcel of property she had sold to Gibbons to make it smaller by a half-an acre (and thereby increase the size of the retained land), alleging a prior agreement that a line of trees would establish the property's boundary. Rejecting the attempt to decrease the conveyed lot from 2.98 acres to 2.31 acres, the Court noted that Foster gave her attorney a legal description of the lot to incorporate into the land sale contract knowing that it encompassed 2.98 acres. "Under these circumstances, [Foster's] failure to investigate and resolve any alleged discrepancies in the legal description, and her willingness to proceed with the sale without modifying the legal description, constitutes gross negligence sufficient to bar reformation." *Id.* at 335. The court also found that equity did not favor reformation, because Foster had taken advantage of the mistake by letting Gibson pay taxes on 2.98 acres for 6 years (benefitting Foster's son, the abutting land owner) without objection. *Id.* at 335-36. Such facts are far removed from the facts of this case.

**3. The only Delaware precedents cited by Scion in support of its negligence/failure-to-read defense are inapplicable contract avoidance cases**

Faced with an absence of any Delaware precedent in a reformation case holding that a failure to read or negligence is a bar to relief, Scion claims support for its affirmative defense in contract *avoidance* cases applying the rule that a

[4] Delaware law imposes no such burden on the reformation proponent. *Cerberus*'s treatment of the conduct of the plaintiff as a potential defense rather than as an element of the claim is consistent with the weight of authority. *See, e.g.*, 66 Am. Jur. 2d *Reformation of Instruments*, §§ 77-87 (2011) (discussing fault on the part of the proponent as defenses to reformation); 76 C.J.S. *Reformation of Instruments* § 92 (2011) ("The burden is on the party resisting reformation of an instrument to prove matters which tend to defeat the right of reformation."). Scion does not argue otherwise.

party cannot justify avoiding a contract in whole or in part on the ground that the party did not read it. (O.B. 15-16). This requires Scion to treat "cannot justify" as synonymous with "bars" and to ignore the difference between reformation, which affirms the true intent of the parties, and avoidance or rescission, which negates the existence of the contract altogether. It is wrong on both points.

The Chancery Court correctly found the avoidance cases inapplicable in the reformation context because of the fundamental difference in the nature of the relief provided by the two remedies. (Op. 31-32, *discussing* Restatement Section 157, cmt. b.) One who secures reformation remains bound by the actual agreement between the parties, the terms of which have been proven by clear and convincing evidence. The more radical relief of avoidance allows one to escape the contractual obligation altogether by voiding the agreement.

Moreover, even the avoidance cases do not hold, as Scion insists, that "failure to read a contract is a bar to equitable relief" in the form of avoidance. They merely apply the rule that a failure to read and any resulting ignorance of the contents of an agreement does not justify – *i.e.,* does not itself provide sufficient basis for – avoiding the contract. In *Pellaton v. Bank of New York*, 592 A.2d 473, 477 (Del. 1991), this Court held that the plaintiff's not having read the guaranty documents did not "justify its avoidance." In *Graham v. State Farm Mut. Auto. Ins. Co.*, 1989 WL 12233 (Del. Super. Ct. Jan 26, 1989), the Superior Court quoted a Pennsylvania Supreme Court case to the effect that failure to read "'cannot justify an avoidance, modification or nullification of the contract." Contrary to Scion's assertion, the inclusion of this quotation does not constitute the Superior Court barring a party that failed to read an agreement from "all forms of equitable relief," including reformation. The Pennsylvania Supreme Court has no such rule; Pennsylvania law allows reformation where a party has failed to read the contract so long as the elements of reformation are met. *Broida v. Travelers Ins. Co.*, 175 A. 492, 494 (Pa. 1934). Rather, *Graham* turned back the plaintiff insured's attempt to avoid the arbitration provision in its policy that, plaintiff said, had not been explained to it and was buried in the policy. This Court affirmed *Graham* on the basis that "a party's failure to read a contract [cannot] justify its avoidance." *Graham v. State Farm Mut. Auto. Ins. Co.*, 565 A.2d 908, 913 (Del. 1989)).

The Funds do not assert that a failure to read justifies reformation. As the court below found, they are entitled to reformation because they proved its elements by clear and convincing evidence.

#### 4. ***Cerberus*** **and the Restatement are the majority rule**

As the Chancery Court correctly concluded, *Cerberus* and the Restatement reflect the majority rule that a failure to read or other negligence does not bar reformation. There is no basis for Scion's charge to the contrary. *See, e.g., Clipper v. Gordon*, 44 So. 2d 576, 578 (Ala. 1950); *Homeowners' Loan Corp. v. Bank of Ariz.*, 94 P.2d 437, 442 (Ariz. 1939); *Martin v. Hempstead Cnty Levee Dist. No. 1*, 135 S.W. 453, 455 (Ark. 1911) (holding that mere negligence or omission to read or know the contents of writing is not a bar to reformation where requirements of mutual or unilateral mistake are met); *Hess v. Ford Motor Co.*, 27 Cal. 4th 516, 529 (Cal. 2002); *Ramseier v. Oakley Sanitary Dist.*, 17 Cal. Rptr. 464, 466 (Cal. Ct. App. 1961) (failure to read the relevant portion of the contract does not bar reformation where the mistake was known to or suspected by the other party); *Nat'l Asst. Bureau, Inc. v. Macon Mem. Intermediate Care Home, Inc*, 714 F. Supp. 2d 1192, 1196-97 (M.D. Ga. 2009); *Collins v. Parkinson*, 574 P.2d 913, 917 (Idaho 1979); *JPMorgan Chase Bank v. Alecta Real Estate N. Michigan Ave., Inc.*, 2010 WL 375615, *12 (N.D. Ill. Jan. 21, 2010) (citing cases) (Ill. law); *Skelton v. Fed. Sur. Co.*, 15 F.2d 756, 759 (8th Cir. 1926) (Kansas law); *R.R. Land, Inc. v. Illinois Cent. Gulf R.R.*, 988 F.2d 1397, 1405 (5th Cir. 1993) (La. law) (noting that the "contractual negligence defense" only functions as a bar to rescission actions based on unilateral error); *Sinclair v. Home Indem. Co.*, 193 A.2d 177, 178 (Maine 1963); *OneBeacon Am. Ins. Co. v. Travelers Indem. Co. of Ill.*, 465 F.3d 38, 41 (1st Cir. 2006) (Mass. law); *Kopff v. Econ. Radiator Serv.,* 838 S.W.2d 449, 454 (Mo. Ct. App. 1992); *Wallace v. Summerhill Nursing Home*, 883 A.2d 384, 386 (N.J. App. Div. 2005); *E.H. Oftedcal and Sons, Inc. v. State ex rel. Mont. Transp. Comm'n*, 40 P.3d 349, 359 (Mont. 2002); *Eisenhart v. Lobb*, 647 N.W.2d 96, 106 (Neb. Ct. App. 2002); *Realty Holdings, Inc. v. Nevada Equities, Inc.*, 633 P.2d 1222, 1223 (Nev. 1981); *Lawyers Title Ins. Co. v. Golf Links Dev. Corp.,* 87 F. Supp. 2d 505, 512 (W.D.N.C. 1999); *City of Fargo v. D.T.L. Props., Inc.*, 564 N.W.2d 274, 278 (N.D. 1997); *ArcelorMittal Cleveland, Inc. v. Jewell Coke Co., L.P.*, 750 F. Supp. 2d 839, 845-46 (N.D. Ohio 2010); *Anderson, Clayton & Co. v. Farmers Nat'l Bank of Cordell,* 624 F.2d 105, 109 (10th Cir. 1980) (Okla. law) (finding that bank president's negligent failure to read contract before signing was not bar to reformation where other party knew that the written contract failed to represent the terms of the agreement); *Cent. Oregon Indep. Health Servs., Inc. v. Oregon*, 156 P.3d 97, 104 (Or. Ct. App. 2007); *Gen. Elec. Credit Corp. v. Aetna Cas. & Sur. Co.,* 263 A.2d 448, 457 (Pa. 1970); *Crewe v. Blackmon*, 345 S.E.2d 754, 757-58 (S.C. Ct. App. 1986); *Hatch v. Williams*, 110 S.W.3d 516, 522 (Tex. Ct.

App. 2003); *Ocwen Fin. Servs., Inc. v. Gilmore (In re Gilmore*), 284 B.R. 801, 805 (Bankr. E.D. Va. 2002); *Burlington Sav. Bank v. Rafoul*, 209 A.2d 738, 741-42 (Vt. 1965); *Wash. Mut. Sav. Bank v. Hedreen*, 886 P.2d 1121, 1125-26 (Wash. 1994); *Caliber One Indem. Co. v. Wade Cook Fin. Corp.*, 491 F.3d 1079, 1083 (9th Cir. 2007) (Wash. law); *Taylor v. Godfrey*, 59 S.E. 631, 634 (W. Va. 1907); *State Bank of La Crosse v. Elsen*, 383 N.W.2d 916, 920 (Wis. Ct. App. 1986); *W.N. McMurry Const. Co. v. Community First Ins., Inc.*, 160 P.3d 71, 81 (Wyo. 2007) (recognizing majority rule that negligence does not bar reformation).

Scion supports its claim by citing 12 cases from 11 jurisdictions, but at most four of those cases stand for the "negligence bars reformation" rule Scion ascribes to them. Many go only so far as to state the unremarkable proposition that a failure to read does not justify reformation. *See, e.g., Thomas v. Trans World Airline, Inc.*, 457 F.2d 1053, 1056 (3d Cir. 1973) (Fed. law); *General Refractories Co. v. First State Ins. Co*, 2012 WL 262646 (E.D. Pa. Jan. 30, 2012); *RS&P/WC Fields L.P. v. Bosp Invs.*, 829 F. Supp. 928, 969 (N.D. Ill. 1993); *Poly Trucking, Inc. v. Concerta Health Svcs. Inc.*, 93 P.3d 561, 563 (Colo. Ct. App. 2004); *Nichols v. Shelard Nat'l Bank*, 294 N.W.2d 730, 734 (Minn. 1980). As shown in the preceding paragraph, Illinois and Pennsylvania authorities hold that negligence will not bar reformation where the elements of the remedy are met.

The 1907 Wyoming case cited by Scion, which states that the reformation proponent must prove an absence of negligence as an element of its case, is no longer good law. *See W.N. McMurry Const. Co. v. Community First Ins., Inc.*, 160 P.3d 71 (Wyo. 2007). In Scion's North Carolina case, *Meadlock v. Am. Family Life Assur. Co.*, 2012 WL 2891079, there was no allegation or evidence of a prior agreement incorrectly transcribed. Scion's quote is based on an insured's duty to read its policy under North Carolina insurance law. More generally in North Carolina, negligence on the part of one party which induces a mistake does not preclude reformation. *Lawyers Title Ins. Co. v. Golf Links Dev. Corp.,* 87 F. Supp. 2d 505 (W.D.N.C. 1999).

Only the cases Scion cites applying Indiana, Louisiana, New Jersey, and South Dakota law state a minority position that a failure to read is by itself sufficient to bar reformation. *See Holly Stores, Inc. v. Judie*, 179 F.2d 730, 735 (7th Cir. 1950) (Indiana law); *Monroe Guar. Ins. Co. v. Langreck*, 816 N.E.2d 485, 490 (Ind. Ct. App. 2004); *Hall Ponderosa, LLC v. Petrohawk Props., L.P.*, 90 So.3d 512 (La. Ct. App. 2012); *Pierides v. Geico*, 2010 WL 1526377 (N.J. Super. Ct. App. Div. Apr. 19, 2010), *LPN Trust v. Farrar Outdoor Adver., Inc.*, 552 N.W.2d 796 (S.D. 1996). However, the reformation proponents in the Indiana and Louisiana cases were denied relief because they failed to establish the elements of reformation, in particular the required antecedent agreement. Moreover, *Hall Ponderosa's* alternative finding that reformation was barred by negligence is inconsistent with the Fifth Circuit's contrary finding in *R.R. Land, Inc.*, *supra*. In *Pierides*, the New Jersey case, the trial court had ordered reformation after incorrectly determining that the insurer was statutorily obligated to issue a New Jersey, not a New York policy; the appellate court reversed because there was no such obligation. *Compare Bruenn, supra.*

### 5. As Scion acknowledged before trial, DLA Piper's conduct is not relevant to Scion's negligence defense

Scion's negligence defense improperly invokes negligence of DLA Piper However, as Scion agreed during summary judgment proceedings (B1402 n.8), it is the party's conduct, not its counsel's, that is relevant.

In *Cerberus*, the Court reversed dismissal of a reformation claim and remanded for trial even though the lawyers for the proponents of reformation, who had drafted the agreement in question, denied that there was a mistake in the agreement and testified that they were unaware of any prior agreement that the funds in question were to be distributed to their client. 794 A.2d at 1153-54. The Restatement is to the same effect. Illustration 3 to Section 157, discussed above, provides that both parties to the agreement were entitled to reformation of the mistake created by the lawyer of one of them notwithstanding that neither party had read the document. Illustration 3 does not set forth the circumstances that led to the attorney's error. Nothing in the illustration or the rest of Section 157 suggests that how the attorney created the error is relevant.

In any event, a suggestion that DLA Piper did not read the agreement before it was distributed has no basis. DLA Piper prepared the erroneous agreement. Reading a document is inherent in preparing it. Also, Trachtenberg testified that she customarily reviews LLC agreements before they are circulated to other parties and clients, although she could not recall whether she reviewed the Breckenridge Agreement drafts before they were sent out. (Tr. 124, 139-40, 145.) She testified that if she had focused on the Sale Proceeds Waterfall, she would have recognized that it was a mistake. (*Id.* 153-54). A lack of careful review by counsel before distributing an agreement does not preclude reformation.

## II. SCION IS BARRED FROM ASSERTING FOR THE FIRST TIME ON APPEAL THAT ASB'S UNILATERAL MISTAKE COUPLED WITH SCION'S KNOWING SILENCE IS INSUFFICIENT TO PROVE REFORMATION

### A. Questions Presented

Whether Scion may assert for the first time on appeal and after trial that for ASB to make out its case on unilateral mistake, Delaware law requires that it must prove not only knowing silence but also fraud, trickery or other artifice by Scion. This issue was not raised below. Also, whether *Cerberus,* which requires only knowing silence by Scion, states the Delaware law of unilateral mistake*,* as the parties and the Chancery Court agreed below. (Op. 24, A1562-63, B1542.)

### B. Scope of Review

The preservation question is a legal issue to be decided in the first instance. *Murphy v. State,* 632 A.2d 1150, 1152-53 (Del. 1993). The Chancery Court's determination of the elements of reformation is a legal question reviewed *de novo*. *Kahn v. Lynch Comm'n Syst.* 669 A.2d 79 (Del. 1982).

### C. Merits of the Argument

#### 1. Scion cannot insist on more than knowing silence because it failed to raise the additional purported requirement below

From the inception of this case through the Opinion, Scion, the Funds, and the Chancery Court all agreed that *Cerberus* states Delaware law of reformation and that to establish unilateral mistake, the Funds would have to show: (1) they had a prior agreement with Scion contrary to the written contracts; (2) they mistakenly believed that the agreement was correctly transcribed; and (3) Scion knew of the mistake but remained silent. The case was tried on this basis, post-trial arguments were presented on this basis, and the Chancery Court found that the Funds clearly and convincingly proved each element. On appeal, Scion now contends for the first time that *Cerberus* does not state the law of Delaware. It brazenly criticizes the Chancery Court for applying the very formulation that Scion had urged below rather than its new theory of unilateral mistake, which would require the Funds to have also proved that Scion engaged in fraud, trickery, or artifice designed to prevent them from discovering the mistake. (O.B. 21-23.) Scion's request that this Court change the rules at this stage of the case is a patent violation of Supreme Court Rule 8, which provides that "[o]nly questions fairly presented to the trial court may be presented for review." *See also Danby v. Osteopathic Hosp. Ass'n*, 104 A.2d 903, 908 (Del. 1954) ("[I]t is our duty to adhere to the well settled rule which precludes a party from attacking a judgment on a theory which was not advanced in the court below.")

Beginning with its motion to dismiss, Scion contended that a reformation proponent's unilateral mistake had to be "coupled with the other parties' knowing silence." (B1181, B1204.) In its answering pre-trial brief, Scion asserted that, in order to prove unilateral mistake,

> ASB must establish [that it] mistakenly believed the capital-event waterfall was written in a different order, the Scion entity did not so believe (a "unilateral mistake"), but the Scion entity actually and subjectively knew that the waterfall as written was a "mistake" relative to a prior understanding and intentionally remained silent to take advantage of that "mistake" (with "knowing silence").

(B1451.) Finally, in its answering post-trial brief, Scion — again citing *Cerberus* — asserted that "[u]nder Delaware law, the doctrine of unilateral mistake requires not only that the other party *subjectively* knows of the mistake, but also that it *intentionally/knowingly* remain silent to take advantage of it." (A1579-80 (emphasis in original).) At no point below did Scion contend that unilateral mistake required not only knowing silence but also fraud, trickery or other artifice.

The Court should reject Scion's belated contention that the controlling law is something other than what Scion has been claiming all along. *See AT&T Corp. v. Lillis*, 953 A.2d 241, 252 (Del. 2008 ) (holding that plaintiffs waived the argument that Colorado law governs the dispute when they failed to raise it below and, in fact, cited extensively to Delaware law in the Chancery Court). This Court has repeatedly rejected appellants' attempts to change the elements of a cause of action on which they lost below. *See, e.g.*, *Smith v. Del. State Univ.*, 47 A.3d 472, 478-79 (Del. 2012) (plaintiff contended for the first time on appeal that damages were not a required element of her libel claim); *Riedel v. ICI Americas, Inc.*, 968 A.2d 17 (Del. 2009) (rejecting the plaintiff's attempt to lighten her burden of proof by switching the theory of her negligence case from nonfeasance, which required her to show a legally significant relationship with the defendant, to misfeasance, which did not); *Danby*, 104 A.2d at 908 (refusing to allow plaintiff to increase defendant's burden on an affirmative defense by contending it had to prove a separate act of reliance to invoke estoppel affirmative defense).

This case presents no occasion for the Court to employ Rule 8's safety valve, which allows the Court to consider a theory not presented below "if the interests of justice so require." Here, it would be unjust to the Funds if the Court were to change the elements of their claim after evidence was gathered and the trial conducted in accordance with the agreed "knowing silence" standard. *See, e.g.*, *Danby*, 104 A.2d at 908 (noting a party with the burden of proof "is not to be penalized for not meeting arguments which had not yet been suggested" by the other party). Moreover, no reason exists why Scion could not have argued below for its desired addition to the settled elements of unilateral mistake in Delaware. *See Gen. Motors Corp. v. Local 435*, 546 A.2d 974, 980-81 (Del. 1998) (barring a defendant's claim of federal preemption where the "failure to raise the issue in Superior Court lacks any satisfactory explanation").

#### 2. Delaware law does not require proof of fraud, trickery or artifice to deceive to reform a unilateral mistake about which the reformation opponent knew but kept silent

Even if the Court considers Scion's argument that Delaware requires fraud, concealment or other artifice in addition to knowing silence to prove unilateral mistake, it should reject the contention. This Court stated the Delaware criteria for of unilateral mistake in *Cerberus*. Noting that there are two doctrines that allow for reformation, the Court stated, "The second is the doctrine of unilateral mistake. The party asserting this doctrine must show that it was mistaken and that the other party knew of the mistake but remained silent." 794 A.2d at 1151; *see also id* at 1156 (Steele, J., concurring in part, dissenting in part) ("I agree with and, therefore, concur in, the majority's articulation of the three elements that a party must prove to reform a written agreement . . . ."). *Cerberus* drew on *Collins v. Burke*, 418 A.2d 999 (Del. Supr. 1980), which itself drew on a long history of Delaware equity jurisprudence: "The Courts of this State have always insisted in reformation cases on a showing of mutual mistake or, in appropriate cases, unilateral mistake on plaintiff's part coupled with knowing silence on defendant's part.") *Collins*, 418 A.2d at 1002.

This Court has never used the "exceptional cases" phrase that Scion now insists is a standard of proof that requires more than knowing silence. The phrase appears to have originated, as Scion notes, in *AOC Ltd. P'ship v. Horsham Corp.*, 1992 WL 136474, at *7 (Del. Ch. June 17, 1992). But *AOC Ltd.*'s authority was the sentence from *Collins* quoted above. *AOC Ltd*. inserted "exceptional" where this Court stated "appropriate." The switch had no effect on the Chancery Court's understanding of the law as established by this Court or on the outcome of the case. After the sentence on which Scion relies, the Chancery Court went on to state that, to succeed, AOC "must demonstrate this fraud, mutual mistake or *unilateral mistake with knowing silence* with clear and convincing evidence." *Id.*(emphasis added). AOC was denied reformation because there was no evidence of mistake by the other party or of knowledge by the other party that AOC had an understanding contrary to the terms of the document. Neither *AOC Ltd.* nor any other case Scion has cited as "following" the purported exceptionality standard requires a proponent of reformation to prove more than knowing silence to obtain reformation for unilateral mistake.

ASB proved by clear and convincing evidence the elements of unilateral mistake under Delaware law as established by this Court and is entitled to reformation.

## III. DLH IS NOT BARRED FROM REFORMING ITS AGREEMENT

### A. Questions Presented

Whether the Chancery Court correctly determined that ratification is inapplicable to a reformation action when the purportedly ratifying party remains unaware of the mistake. This issue was addressed below at B1359, B1580.

### B. Scope of Review

The Chancery Court's determination of the availability of ratification in a reformation action is a legal question reviewed *de novo*. *Kahn v. Lynch Communication Syst.,* 669 A.2D 79 (Del. 1982).

### C. Merits of the Argument

General principles of ratification law, which permit ratification based on either actual or constructive knowledge, do not apply to reformation. Indeed, one court found that ratification does not apply to reformation at all, based on the difference between avoidance and reformation:

> Ratification does not appear to apply to reformation. Ratification involves the loss of the power to avoid an otherwise voidable contract by taking acts inconsistent with disaffirmance. An agreement subject to reformation is not voidable, and cannot be disaffirmed.

*In re Schick*, 232 B.R. 589, 599 n.11 (Bankr. Ct. S.D.N.Y. 1999) (internal citations omitted). Because the equitable doctrine of reformation is based on mistakes that parties nearly always could have discovered but did not, applying ratification based on constructive knowledge to reformation would significantly undermine the basic purpose of the remedy.

In the context of a reformation claim, ratification, if applicable at all, requires actual knowledge, not constructive knowledge, of the mistake. *See Fitzgerald v. Cantor*, 1998 WL 781188, at *2 (Del Ch. Oct. 28, 1998) ("Ratification or reaffirmation based upon a continuing fraud or misapprehension about the facts will not be sanctioned in equity."); *Great-West Investors LP v. Thomas H. Lee Partners, L.P.*, 2011 WL 284992, at *12 (Del. Ch. Jan. 14, 2011) ("*Great-West I*") ("Great-West had no reason to know of its mistake in August 2008 and did not waive its mistake claims by executing the Amended LP

Agreement at that time."); *Great-West Investors LP v. Thomas H. Lee Partners, L.P.*, 2012 WL 19469, at *8 (Del. Ch. Jan. 4, 2012) (Great-West could not show "prior understanding that differed materially from the written agreement" because "before it agreed to be bound by the LP Agreement it admits that it recognized that the Default Escalator was an ambiguous provision").

In finding no waiver of a mistake claim because of a lack of actual knowledge of the mistake, *Great-West I* cited and quoted part of Restatement (Second) of Contracts § 380. Scion highlights Section 380 in its brief at page 26. Although Section 380 precludes a party from avoiding a contract for mistake "after he knows or has reason to know of the mistake," it does not apply to reformation claims. Section 380 is part of the Restatement's Chapter 16, "Remedies," and its Introductory Note specifically states that Chapter 16 "does not deal with some specialized remedies, such as reformation of a writing . . . ." The Introductory Note to Topic 5 of Chapter 16 explains that Section 380 deals with rules precluding a party by his action or inaction from exercising the "power of avoidance on the ground, for example, of mistake, misrepresentation or duress." Again, reformation does not involve the power of avoidance: reformation is an action to enforce the parties' agreement, not to avoid it. *Catamaran Acquisition Corp. v. Spherion Corp.*, 2001 WL 755387, at *5 (Del. Super. Ct. May 31, 2001). A higher standard of care is required of those who seek to be relieved of their contractual obligations entirely, than of reformation proponents who seek to enforce their true agreements.

Here, the trial evidence was undisputed that ASB did not have actual knowledge of the mistake until August 30, 2010, and questioned Scion within half an hour of learning of it. (Op. 18-20.) The amendment to the Dwight Lofts Agreement on which Scion bases its ratification defense was entered into on March 3, 2008, two and one-half years earlier. Ratification does not apply to bar DLH's reformation claim.

## IV. THE CHANCERY COURT CORRECTLY AWARDED THE FUNDS THEIR COSTS, EXPENSES AND ATTORNEYS' FEES

### A. Questions Presented

Whether the Chancery Court correctly awarded the Funds their attorneys' fees and costs. This issue was addressed below at B1557.

### B. Scope of Review

Awards for attorneys' fees are reviewed for abuse of discretion. *William Penn P'ship v. Saliba*, 13 A.3d 749, 758 (Del. 2011). The Court reviews *de novo* the interpretation of contract language. *Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1181 (Del. 1992).

### C. Merits of the Argument

The fee-shifting provision of the disputed agreements provides that:

> In the event that any of the parties to this Agreement undertakes any action to enforce the provisions of this Agreement against any other party, the non-prevailing party shall reimburse the prevailing par[ty] for all reasonable costs and expenses incurred in connection with such enforcement, including reasonable attorneys' fees, including reasonable attorneys' fees on appeal.

*See, e.g.*, B855 at Section 9.9. Because the Funds' reformation claim and Scion's counterclaims constituted actions to enforce the disputed agreements, the Chancery Court correctly awarded the Funds the costs and expenses incurred in the litigation. (The Chancery Court did not reach the Funds' alternative argument that they are entitled to fees under 10 Del. C. § 5106. In the event this Court determines the Funds are not entitled to fees pursuant to the contract, the Funds request that the Court remand for resolution of the Section 5106 argument.)

#### 1. The reformation claim and the counterclaims were actions to enforce the disputed agreements

The Funds' reformation claim is "an action to enforce" the disputed agreements because it seeks to enforce the parties' true agreement as to the Sale Proceeds Waterfalls. *See, e.g., Wong v. Davidian*, 206 Cal. App. 3d 264, 271 (Cal. Ct. App. 1988) (awarding fees for reformation claim because it is a suit to enforce the contract); *Webb v. Culver*, 509 P.2d 1173, 1175-76 (Or. 1973) (holding that fee-shifting provision supported award of attorneys' fees in a reformation action). In addition, the fees incurred litigating reformation issues were also incurred in defense of Scion's counterclaims for breach of contract and anticipatory breach of contract, which seek to enforce the as-written Sale Proceeds Waterfalls. Scion ignores these counterclaims, as well as the fact that it commenced three federal court enforcement actions asserting the same claims. The reformation claim and the breach of contract counterclaims represent two sides of the same dispute about how the provisions of the disputed agreements are to be enforced. *See Gamble v. Northshore P'ship,* 28 P.3d 286, 289 (Alaska 2001).[5]

Scion's fiduciary-duty counterclaim sought to enforce against DLH the fiduciary duties of the Managing Member set forth in the Dwight Lofts LLC Agreement. (A1323-26 ¶¶204, 206, 214, 216; B1480-84, B1503-05). Scion's counterclaim for breach of the implied covenant of good faith and fair dealing was also a claim to enforce the provisions of the agreements. *See Tomei v. Sharp*, 902 A.2d 757, 769 (Del. Super. Ct. 2006) (stating that a claim for breach of the implied covenant is one "sounding in contract"), *aff'd*, 918 A.2d 1171 (Del. 2007); *Harsch Props., Inc. v. Nicholas*, 932 A.2d 1045, 1051 (Vt. 2007) (holding that implied covenant claim was an effort "to enforce the terms and conditions" of the agreement); *City of Gillette v. Hladky Const., Inc.*, 196 P.3d 184, 211-12 (Wyo. 2008) (same).

#### 2. Scion must pay the expenses incurred enforcing the parties' true agreement and defeating Scion's meritless counterclaims

Obviously, substantial attorneys' fees, costs, and expenses have been "incurred in connection with" this action. Section 9.9 adopts the passive voice and does not specify that the party to the contract itself must "incur" the fees and expenses. Scion nevertheless contends that the Funds cannot recover under Section 9.9 because they are not obligated to pay DLA Piper. The Court should affirm the Chancery Court's rejection of Scion's attempt to avoid responsibility for the fees and expenses it caused to be incurred by compelling the Funds to litigate in four courts to obtain reformation of the mistaken agreements.

[5] The Chancery Court found that the fees and costs of the federal actions were necessarily incurred in connection with this action to avoid the federal actions' preclusive effect here. (A559-561.) Scion does not challenge this finding.

The Funds have found no case considering a contractual fee-shifting provision where the prevailing party has not paid fees because its law firm, acknowledging its contribution to a mistake in the preparation of an agreement, agreed to represent the client free of charge in a reformation action. However, in more common circumstances where a party has not paid fees incurred on its behalf, appellate courts have repeatedly held that the fees are properly awarded under fee-shifting contracts and statutes. For example, reversing a lower court's reliance on the "become liable for or subject to" aspect of a dictionary's definition of "incur," the California Supreme Court stated:

> In practice, it has been generally agreed that a party may 'incur' attorney fees even if the party is not personally obligated to pay such fees. A party's entitlement to fees is not affected by the fact that the attorneys for whom fees are being claimed . . . agreed to represent the party without charge.

*Lolley v. Campbell*, 28 Cal. 4th 367, 373-75 (Cal. 2002). Courts have routinely found fees to be incurred for fee-shifting purposes in pro bono cases such as *Lolley*, *see, e.g., Rodriguez v. Taylor*, 569 F.2d 1231, 1245 (3d Cir. 1977); *Dixon v. Comm'r*, 132 T.C. 55, 94-95 (T.C. 2009) (citing cases); *Henriquez v. Henriquez*, 992 A.2d 446, 453-456 (Md. Ct. App. 2010) (affirming award of statutory attorney's fees to pro bono counsel and holding that the party "incurred" fees despite being represented pro bono), *explained by Weichert Co. of Md. v. Faust*, 19 A.3d 393, 407 n.7 (Md. Ct. App. 2011); *Beverly Hills Props. v. Marcolino*, 221 Cal. App. 3d Supp. 7, 11 (Cal. App. Dep't Super. Ct. 1990) (construing statute "to provide a reciprocal remedy for a prevailing party who has not actually incurred legal fees, but whose attorneys have incurred costs and expenses in defending the prevailing party on the underlying agreement"); in cases where services are performed by in-house counsel, *see PLCM Group, Inc. v. Drexler*, 22 Cal. 4th 1084, 1094 (Cal. 2000), or by salaried union lawyers, *see Devine v. Nat'l Treasury Emps. Union*, 805 F.2d 384, 385-386 (Fed. Cir. 1986); and in cases where a third party pays for the representation as in the context of insurer-paid counsel, *see Rowsey v. Tesh*, 2007 WL 4374910, at *3 (Cal. Ct. App. 2007), or some other contractual arrangement or indemnification, *see, e.g., Cintas Corp. v. Perry*, 517 F.3d 459, 468-69 (7th Cir. 2008) (although prevailing party's new employer had already paid for his defense, the court held that "[t]he fee-shifting provision's use of the word 'incurred' does not mean that [the prevailing party himself] must pay the litigation costs and attorney's fees before being entitled to an award of costs and fees."); *Kansas Penn Gaming, LLC v. HV Properties of Kansas, LLC*, 790 F. Supp. 2d 1307, 1312 (D. Kan. 2011) (holding that prevailing limited liability company incurred attorney's fees under the real estate contract regardless of the fact that its sole member actually paid the fees); *Preseault v. U.S.*, 52 Fed. Cl. 667, 677 (Fed. Cl. 2002) (fees are "actually incurred" under the statute even though the "fees are not paid or owed by the litigant, but rather are born initially by a third party"). These cases establish that fees are incurred when legal services are provided on behalf of a party regardless of its obligation to pay its counsel. They also demonstrate that a losing party who would otherwise have to bear the winner's fees and expenses cannot escape due to a fortuity in the manner in which responsibility for the fees is allocated among the prevailing party, its counsel, and/or a third party. *See Ed A. Wilson, Inc. v. Gen. Serv. Admin.*, 126 F.3d at 1406, 1409 (Fed. Cir. 1997); *Lolley*, 28 Cal. 4th at 373; *Weichert Co.*, 19 A.3d at 408.

**3. The fee award serves the purposes of the fee provision and prevents Scion from obtaining a windfall because DLA Piper did not run from its role in creating the mistake**

Scion closes its brief with the contention that the fee provision is available only to a plaintiff who successfully enforces the agreement, leaving a successful defendant to bear its own costs regardless of the invalidity of a plaintiff's claims or its bad faith in bringing them. (O.B. 30-31). However, the provision awards fees to the "prevailing party" in an "action to enforce the provisions of this Agreement," without limitation to plaintiffs.

Scion could have avoided the payment of any costs or fees by honoring the agreements as the parties intended. After investigating the mistake, ASB sent a detailed letter to Scion (A1145) asking it to join in correcting the agreements. Instead, Scion filed three duplicative lawsuits in federal court and compelled the Funds to file this action. Scion vigorously opposed the Funds' attempts to stay the federal cases is favor of this action. Throughout, the Chancery Court found, Scion proceeded without regard to the costs and fees incurred enforcing and defending the true agreement of the parties, in an attempt to leverage a settlement it did not deserve. (A547.) Scion's tactics caused four courts and the Funds to engage in overlapping, redundant, and otherwise unnecessary activities. (Id.) Scion should not escape the consequences of such conduct.

It would magnify the inequity if this Court were to allow Scion to avoid its contractual obligation for fees and expenses because of DLA Piper's good faith acknowledgement of the scrivener's error, the firm's subsequent legal representation of the Funds in four jurisdictions to rectify that error, and its agreement not to charge ASB for doing so. How the parties on the Funds' side of the "v." allocated responsibility for the litigation costs is no business of Scion's. Scion was not harmed by it and should not obtain a windfall because of it. *Cf. Int'l Billing Servs., Inc. v. Emigh*, 84 Cal. App. 4th 1175, 1193 (Cal. Ct. App. 2000) (stating that "[i]t is difficult to see how IBS is aggrieved by the serendipity of the Engineers, who discovered how to defend the lawsuit without having to pay out of their pockets," and holding that, to prevent IBS from experiencing a windfall, IBS must reimburse the Engineers for their attorney's fees even though the Engineers' new employer had paid the fees).

Allowing Scion to escape liability sends the wrong signal to future litigants. It defeats the intent of a prevailing-party provision, which is to deter parties from breaching a contract and to discourage unwarranted litigation. *See, e.g., Dennis L. Spencer Contractor, Inc. v. City of Aurora*, 884 P.2d 326, 333 n.14, 337 (Colo. 1994). At the same time, failing to hold Scion responsible will discourage law firms from doing the right thing — owning up to their role in creating mistakes and seeking to correct them without charging their clients. In sum, this Court should not allow Scion to take advantage of the fee arrangement between ASB and DLA Piper to avoid an award of fees and expenses incurred by the prevailing parties in this action to enforce the agreements. The Funds also request an award of their reasonable attorneys' fees on appeal.

For the reasons stated in the Chancery Court Opinion and herein, the Funds ask that the Court affirm the judgment of the Chancery Court.

**DLA PIPER LLP (US)**

*<u>/s/ John L. Reed</u>*
John L. Reed (I.D. No. 3023)
Scott Czerwonka (I.D. No. 4844)
919 N. Market Street, Suite 1500
Wilmington, DE 19801
(302) 468-5700
(302) 394-2341 (Fax)

*Attorneys for Plaintiffs-Below / Appellees*

**OF COUNSEL**:

Bruce E. Falby
Bruce S. Barnett
Justin Brown
DLA PIPER LLP (US)
33 Arch Street, 26th Floor
Boston, MA 02110
617-406-6000

Dated: October 23, 2012