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, Defendants Below/Appellants, v. ASB ALLEGIANCE REAL ESTATE FUND, EBREF HOLDING COMPANY, LLC and DWIGHT LOFTS HOLDINGS, LLC, Plaintiffs Below/Appellees.	No. 437,2012 Case Below: On Appeal from Court of Chancery of the State of Delaware, C.A. No. 5843-VCL

APPELLANTS' REPLY BRIEF

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REPLY STATEMENT OF FACTS

A. Robert Bellinger's Failure To Read.

In their Answering Brief, the Funds attempt to re-argue facts that have already been decided by the Chancery Court. For example, there should be no question about whether Robert Bellinger read the disputed agreements before signing them, as the Chancery Court found:

> Having considered Bellinger's testimony and the overall context of the negotiations, I believe that Bellinger read the University Crossing[1] 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 he needed to read. (Mem. Op. p. 29).

This is an express finding that Bellinger read only an earlier agreement for a different venture and then relied on others to review the contracts at issue in this case, despite ASB negotiating new economic terms for the later ventures. That finding is unsurprising because it is the only possible conclusion from the record below.

At deposition, when asked whether he read the agreements and whether he had a fiduciary duty to the Funds to do so, Bellinger answered evasively, claiming first that he did not recall how much of the agreements he read (although he believed he read some of them) and that he did not have a duty to read them anyway.[2] (*See* A1468 at pp. 236-40). Later, in

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[1] "University Crossing" was the first Scion/ASB venture, not at issue here, which contained a one-level promote structure.

[2] Although the disputed ventures were significant transactions for the Funds--for example, the Dwight Lofts venture in which DLH invested $75 million represented approximately three-fourths of all the funds invested by ASB for all of its clients in 2008 (A1441 at pp. 128-31)--Bellinger testified: "I personally, Robert Bellinger, did not have a duty to read the entire document, even though I signed it .... We hire attorneys who are responsible for drafting the documents and different people have different

response to the Scion Members' motions for summary judgment (in federal court), the Funds submitted affidavits from Bellinger in which he stated:

> If, before they were executed, I had reviewed the capital-event waterfalls of the operating agreements for Breckenridge Apartments, 2040 Lofts or Dwight Lofts and seen that they erroneously provided for payment of a promote to Scion prior to the return of the Fund's capital investment, I would have immediately seen that it was a mistake and I would have not allowed the transaction to proceed on those terms. (A1330-34; A1335-39; A1340-44 at ¶ 14).

Even in a supplemental affidavit filed in response to the Scion Members' Motion for Summary Judgment in the Chancery Court, which cited the federal affidavits, Bellinger could only say, "I do not recall how much of each document I read." (B1378)

On cross examination at trial, Bellinger was again evasive about whether he had been in possession of the agreements before signing them. Bellinger first testified that he believed he had read portions of the agreements, but went on under cross-examination to clarify: "I'm not saying that at the time that I signed it that the whole document was there." (A123 at pp. 100-01). The Chancery Court likewise recognized the Scion Members introduced evidence regarding "differences between the signature pages and the agreements, such as different document stamps, that suggested the use of a form signature page." (Mem. Op. p. 28).

The Chancery Court disregarded Bellinger's equivocal statements about other, immaterial provisions that he may have read in earlier iterations of LLC agreements. (*Id.* at p. 29). Inherent in the Chancery Court's finding that "Bellinger relied on Trachtenberg and Arjomand to advise him about any changes, brief him on new terms, and provide him with any portions he needed to read" is a recognition that Bellinger did not

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responsibilities. It's my job to run the company, but I can't do everything." (*See* A1468 at p. 240).

read anything other than the University Crossing agreement. Notably, Bellinger testified that the only way he would have received any of these agreements to read would have been by e-mail. (A123 at p. 103). The evidentiary record is completely devoid of any e-mails showing that Bellinger received any versions of the Breckenridge, 2040 Lofts or Dwight Lofts agreements prior to executing them.

The only marginal evidence that Bellinger might have received an earlier version of one of the disputed agreements was an e-mail excluded from the record by the Chancery Court, which the Funds improperly cite on appeal. The Funds' improper arguments concerning this e-mail should be disregarded by this Court. Even if considered, trial testimony showed that Bellinger was on vacation when the excluded e-mail was sent and, regardless, the subject agreement was later superseded in its entirety months later by an amended and restated agreement, for which Bellinger signed only a loose signature page without receiving a copy of the document.

The Chancery Court's express findings, adequately supported by the record, establish conclusively that Bellinger did not read (at minimum) the economic waterfall provisions in the agreements in question.

B. Whether Keyvan Arjomand May Have Read The Agreements Is Irrelevant.

Because Bellinger's failure to read what he signed may prevent reformation, the Funds now claim for the first time that Bellinger relied on Keyvan Arjomand to ensure the agreements were correct, arguing that the Scion Members have not established Arjomand's failure to read the agreements. (*See* A.B., p. 17). Bellinger, however, was quite clear in his testimony that he relied on counsel at DLA to make sure the agreements were correct. (*See* A108 at p. 43 ("A. Well, Keyvan, as the transactions officer, certainly should be reading the key parts of the document but, frankly, I rely on DLA.")).

Moreover, the Funds understandably distanced themselves from Arjomand in the Chancery Court because his testimony generally favors

the Scion Members' view of events.[3] Arjomand testified: (1) he did not know if the sale proceeds waterfalls in the agreements contain a mistake (in response to a question by the Funds' attorney) (*see* A1397 at pp. 186-87); and (2) the language in the May 2007 e-mail was not an agreement between ASB and the Scion Members regarding the relative order of return of capital and payment of a promote (*See* A1377 at pp. 107-09).[4] Even if Arjomand's review of documents (as someone other than the person signing) were relevant to the dispute, his testimony would not aid the Funds because, among other things, upon reading the agreements at deposition, Arjomand did not know whether they even contained a mistake at all. (*See* A1397 at pp. 186-87).

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[3] During oral argument on the Scion Members' Motion for Summary Judgment, the Chancery Court questioned why the Funds did not have an affidavit or other testimony from Arjomand opposing the Scion Members' version of events. The Funds acknowledged that Arjomand was unwilling to provide any testimony that would have supported the Funds' claim of mistake in the case. (AR46-47).

[4] In their Answering Brief, the Funds erroneously claim that Arjomand's testimony references something other than the May 9, 2007 e-mail. While the questions pointed him to language in a June 15 e-mail, that e-mail was the top e-mail in a chain that included the May 9 e-mail and the language to which the questions referred was identical to the language from May 9 at the bottom of the e-mail. (*See* B44). Arjomand was asked directly whether the operative (identical) language appearing in both e-mails was an agreement between the parties regarding the order of payment in the waterfall and said, "No." (A1377 at p.108-09). The Funds also claim inaccurately that "Arjomand's deposition testimony … 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." (A.B., p. 7). Arjomand's testimony was that it would be typical for the return of capital to come before payment of a promote and that he was not proposing in the email that Scion would receive a promote before a return of capital but, contrary to the Funds' characterization, he did not testify that he proposed that "return of capital would come before the payment of promote[.]" (*See* A1401 at pp. 201-03).

C. The May 9, 2007 E-Mail Is Not A Term Sheet.

Prior to their Answering Brief, the Funds had never taken the position that the May 9, 2007 e-mail was a "term sheet." Now, without any evidentiary support, the Funds claim that e-mail is a term sheet equivalent to a letter of intent for the Breckenridge, 2040 Lofts and Dwight Lofts ventures, none of which were even contemplated as of May 9, 2007.

The "general deal parameters" or "guidelines" of the May 2007 e-mail are quite different from the actual term sheet employed by ASB in the University Crossing venture (although it was never signed). In the actual term sheet, the waterfall order was spelled out in full detail. (*See* AR6). In the May 2007 e-mail, only the general shorthand about "20% over an 8%" was used, despite the introduction of "new economics" in the form of a two-tier structure.

D. The Scion Members Filed First, In The Federal Courts Where Jurisdiction Existed.

The Funds' assertion that the Scion Members "pursued multiple lawsuits to make this litigation as difficult and expensive as possible for ASB" (A.B., p. 15), inverts reality. Scion 2040 was the first to file an action regarding the agreements, in federal court for the Eastern District of Wisconsin, followed within days by parallel actions in the Middle District of Florida and the Northern District of Illinois, the location of the projects. The Funds later chose to pursue their reformation defense as plaintiffs in the Chancery Court.

The notion that the Scion Members, who were responsible for and paid attorneys' fees in these matters, were pursuing multiple lawsuits to make litigation "difficult and expensive" for ASB or the Funds, which paid no fees at all, is absurd. The strategic decision by the Funds' counsel to litigate simultaneously in the Chancery Court led to the dispute remaining active in multiple courts for a time, but it cost the Funds nothing.

ARGUMENT

I. NEGLIGENCE OR MISCONDUCT AS A BAR TO REFORMATION

A. The *Cerberus* Decision.

In footnote 47 of *Cerberus International, Ltd. v. Apollo Management, L.P.*, 794 A.2d 1141, 1145-46, 1154 n.47 (Del. 2002), this Court stated, "[s]ome jurisdictions do say that a degree of fault greater than negligence bars reformation .... This Court has never adopted such a rule. This case takes no position on whether, under certain circumstances, a party's misconduct could bar a reformation claim." The Funds extrapolate from this footnote a conclusion that it is settled Delaware law that negligence is not a bar to reformation (*See* A.B. pp. 17-20), and that the only open question is whether, and under what certain circumstances, a party's "misconduct" would bar reformation. (*See id.* at 17). *Cerberus*, however, did not address a claim that the plaintiff failed to read the agreement or was otherwise negligent. Thus, *Cerberus* merely notes competing theories on what may bar reformation. *Cerberus* never says that Delaware has adopted any approach to the question, and there is a long line of Delaware cases denying any equitable relief to negligent parties *See, e.g.*, *Graham v. State Farm Mut. Auto. Ins. Co.*, 1989 WL 12233 (Del. Super. Ct. Jan. 26, 1989); *aff'd*, 565 A.2d 908 (Del. 1989). The truly "open" question is to what extent this Court will apply that general rule to bar equitable relief in the context of reformation.

B. The Majority Rule Is That Failure To Read/Negligence Is A General Bar To Reformation.

Thirty out of forty-nine states (not counting Delaware) hold that some form of negligence is a bar to reformation. *See Ex parte Metropolitan Life Ins. Co.*, 98 So.2d 20, 28 (Ala. 1957) (violation of a positive legal duty); *Marana Unified Sch. Dist. v. Aetna Cas. & Sur. Co.*, 696 P.2d 711, 717 (Ariz. Ct. App. 1984) (violation of good faith and fair dealing); *Yeargan v. Bank of Montgomery Cnty.*, 595 S.W.2d 704, 706 (Ark. Ct. App. 1980) (violation of a positive legal duty); *Hess v. Ford Motor Co.*, 41 P.3d 46, 55 (Cal. 2002) (gross negligence); *Goodall v. Whispering Woods Ctr., L.L.C.*, 990 So.2d 695, 701 (Fla. Dist. Ct. App. 2008) (gross negligence); *City of Lawrenceville v. Ricoh Elec., Inc.*, 370

F.Supp.2d 1328, 1331 (N.D. Ga. 2005) (failure to exercise "reasonable diligence"); *Stoerger v. Ivesdale Coop. Grain Co.*, 304 N.E.2d 300, 303 (Ill. App. Ct. 1973); *Bush v. Bush*, 6 P. 794, 799 (Kan. 1885); *Mayo Arcade Corp. v. Bonded Floors Co.*, 41 S.W.2d 1104, 1108-09 (Ky. 1931); *Hall Ponderosa, LLC v. Petrohawk Props., L.P.*, 90 So.3d 512, 521 (La. Ct. App. 2012); *Young v. McGown*, 62 Me. 56, 60-61 (Me. 1873); *City of Baltimore v. DeLuca-Davis Constr. Co.*, 124 A.2d 557, 562-63 (Md. 1956); *Washington Mut. Bank v. Smith*, 2006 WL 1506625, at *4 (Mich. Ct. App. June 1, 2006); *Nichols v. Shelard Nat'l Bank*, 294 N.W.2d 730, 734 (Minn. 1980); *Godfrey, Bassett & Kuykendall Architects, Ltd. v. Huntington Lumber & Supply Co.*, 584 So.2d 1254, 1259 (Miss. 1991) (failure to read and negligence bars reformation except in cases of false representations); *Spelman v. Delano*, 172 S.W. 1163, 1164-65 (Mo. Ct. App. 1915) (negligence, including failure to read, bars reformation except in cases of fraud); *Lippire v. Eckel*, 134 N.W.2d 802, 806-07 (Neb. 1965) (negligence bars reformation except in cases of fraud); *Heake v. Atl. Cas. Inc.*, 105 A.2d 526, 530 (N.J. 1954); *Goldberg v. Mfrs. Life Ins. Co.*, 242 A.D.2d 175, 180 (N.Y. App. Div. 1998) (negligence, including failure to read, a bar to reformation except in cases of fraudulent inducement); *Meadlock v. Am. Family Life Assurance Co. of Columbus*, 2012 WL 2891079, at *5 (N.C. Ct. App. July 17, 2012)[5] (negligence, including failure to read, bars reformation except in cases of trick or device); *Diocese of Bismarck Trust v. Ramada, Inc.*, 553 N.W.2d 760, 769 (N.D. 1996) (violation of good faith and fair dealing); *Wells Fargo v. Mowery*, 931 N.E.2d 1121, 1130 (Ohio Ct. App. 2010) (inexcusable negligence); *Stillwater Nat'l Bank & Trust Co. v. Woolley*, 823 P.2d 374, 379 (Okla. Civ. App. 1991) (violation of a positive legal duty); *Foster v. Gibbons*, 33 P.3d 329, 334 (Or. Ct. App. 2001) (gross negligence); *Crewe v. Blackmon*, 345 S.E.2d 754, 757 (S.C. Ct. App. 1986) (negligence, including failure to read, bars reformation except in cases of fraud, inequitable conduct, deceit

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[5] The Funds' claim that the North Carolina failure to read/negligence rule applies only to insurance contracts is incorrect. Rather, North Carolina courts have endorsed a very broad application of the rule, holding "that if no trick or device has prevented a person from reading a paper which he has signed … then the failure to read the paper when he had an opportunity to do so bars any right to reformation." *Richardson v. Webb*, 460 S.E.2d 343, 345 (N.C. Ct. App. 1995) (failure to read release).

or concealment); *LPN Trust v. Farrar Outdoor Adver., Inc.*, 552 N.W.2d 796, 799-800 (S.D. 1996); *Sikora v. Vanderploeg*, 212 S.W.3d 277, 287-88 (Tenn. Ct. App. 2006) (gross negligence); *Mountain States Tel. & Tel. v. Sohm*, 755 P.2d 155, 159 (Utah 1988) (violation of a positive legal duty); *Persinger's Adm'r v. Chapman*, 25 S.E. 5, 5 (Va. 1896) (culpable negligence); *Hennig v. Ahearn*, 601 N.W.2d 14, 27 (Wis. Ct. App. 1999) (failure to read a bar if "mistake" would have been apparent on a cursory examination); and *State Bank of Wheatland v. Bagley Bros.*, 11 P.2d 572, 589 (Wyo. 1932) (inexcusable negligence).

Nearly all of the Funds' citations on pages 22-23 of their Answering Brief limit their holdings to claims of simple or "mere" negligence. Those cases are inapplicable to the situation here, where the Chancery Court's factual findings describe several acts of severe negligence well beyond not reading something "carefully enough." Bellinger failed to read the agreements before he signed them (Mem. Op. pp. 3-4). He received only signature pages for execution, some of which were for non-final versions. (*Id.* at p. 29; A122-23). ASB failed on behalf of the Funds to follow its own policies to ensure the Funds' counsel understood the "core business terms" (A108 at p. 44; A124 at p. 108). And DLA principally relied on a junior associate with little to no experience in the economics of joint venture agreements to draft and negotiate the agreements.[6] (A128 at p. 124; A144 at p. 186).

It is exactly this type of negligence--whether labeled violation of a positive legal duty, gross negligence, inexcusable negligence, culpable negligence, misconduct[7] or something else--that has led courts from around the country to bar reformation claims. Indeed, the Chancery Court

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[6] The Funds correctly note that DLA's failure to read is irrelevant to the inquiry, but they wrongly label DLA's negligence irrelevant; as agent its negligence is imputed to the Funds. *See Grand Ventures, Inc. v. Whaley*, 622 A.2d 655, 665 (Del. Super. Ct. 1992) .

[7] Black's Law defines the term "misconduct" simply as "**[a] dereliction of duty**; unlawful or improper behavior." (emphasis added). Misconduct must be "willful" to mean something more than negligence. *See* Black's Law Dictionary 1089 (9th ed. 2009) ("[*willful misconduct*] has defied definition, but it is clear that it means something more than negligence.").

has recently held, in the context of a reformation claim, that equity "will not rewrite a contract to save a party from its own negligence." *CC Fin. LLC v. Wireless Props., LLC*, 2012 WL 4862337, at *6 (Del. Ch. Oct. 1, 2012).

C. Negligence As A Bar In Unilateral Mistake Cases.

The Funds' string cite on pages 22-23 of their Answering Brief suffers from another fatal flaw—most of the cases cited address only mutual mistake, not unilateral mistake. For example, the Funds claim incorrectly that Pennsylvania law would not bar reformation for negligence where the elements of the remedy are met. (*See* A.B., p. 23 (citing *Gen. Elec. Credit Corp. v. Aetna Cas. & Sur. Co.*, 263 A.2d 448, 457 (Pa. 1970))). The holding of *General Electric Credit Corp.*, however, applies only in the context of a mutual mistake claim. Pennsylvania, like many other jurisdictions, distinguishes mutual mistake, to which negligence is not a bar, and unilateral mistake, to which negligence is a bar. *See, e.g.*, *Gen. Refractories Co. v. First State Ins. Co.*, 2012 WL 262646, at *6 (E.D. Pa. Jan. 30, 2012). *See also Patterson v. Reliance Ins. Co.*, 481 A.2d 947, 951 (Pa. Super. Ct. 1984) ("'[I]f the mistake is not mutual, but unilateral, and not due to the fault of the party not mistaken, but to the negligence of the party acting under the mistake, no basis for relief has been afforded.'") (quotations omitted); *Vonda v. Long*, 852 A.2d 331, 338-39 (Pa. Super. Ct. 2004) (same). This rule has even greater application when it is the party claiming the mistake that was negligent and, as with the Funds here, controlled the drafting of the contract. *See Gen. Refractories*, 2012 WL 262646, at *6; *see also Westchester Fire Ins. Co. v. Treesdale*, 2008 WL 1943471, at *11-12 (W.D. Pa. May 2, 2008).

The Funds also incorrectly cite *Wallace v. Summerhill Nursing Home*, 883 A.2d 384, 386 (N.J. App. Div. 2005), for the proposition that "failure to read or other negligence does not bar reformation[]" in New Jersey. But *Wallace* similarly addressed only mutual mistake. *Id.* Like Pennsylvania, the law on unilateral mistake in New Jersey is that one "is bound by the terms of the [contract] that he has received and had an opportunity to read, and reformation will be denied if he has been negligent in failing to apprise himself of its contents." *Heake*, 105 A.2d at 529-30; *SPJ, Inc. v. W2005/Fargo Hotels (Pool C) Realty, L.P.*, 2010 WL 4237371, at *7 (N.J. Super. Ct. App. Div. Oct. 28, 2010) (reformation of a

lease denied where "mistake is the result of the complaining party's own negligence").

Forty-two states (including Delaware) permit reformation based on unilateral mistake; twenty-eight of these have barred such relief where a party has failed to read or has otherwise been negligent. *See, e.g.*, *Monroe Guar. Ins. Co. v. Langreck*, 816 N.E.2d 485, 490 (Ind. Ct. App. 2004).[8]

D. The Restatement.

The Funds rely heavily on the Restatement (Second) of Contracts §§ 155 and 157 to argue that a party's negligence and/or failure to read does not preclude reformation. (*See* A.B., pp. 17-20). Section 155 states, "[r]eformation is not precluded **by the mere fact** that the party who seeks it **failed to exercise reasonable care in reading the writing**, but the right to reformation is subject to the rule on fault stated in § 157." (emphasis added). Section 155, like *Cerberus*, actually takes no position on whether an actual failure to read, as opposed to the failure to exercise reasonable care in reading, would preclude reformation. It defers the question to § 157, which states that negligence/failure to read bars reformation if it amounts to a failure to act in good faith or in accordance with reasonable standards of fair dealing.

The Supreme Court of California has held that the failure to act in good faith and in accordance with reasonable standards of fair dealing as described in § 157 is "[a] concept similar to neglect of a legal duty." *Donovan v. RRL Corp.*, 27 P.3d 702, 717 (Cal. 2001); *see also Turner v. Terry*, 799 So.2d 25, 36 (Miss. 2001) (citing the good faith and fair dealing standard from § 157 and barring reformation, in part because party failed to read what it signed). Moreover, Delaware courts have suggested that in certain circumstances, parties--particularly sophisticated ones--have a legal duty to read the contracts they sign and that the failure to do so is considered gross negligence. *See, e.g.*, *Sharpless-Hendler Ice Cream Co. v. Davis*, 155 A. 247, 248 (Del. Ch. 1931); *see also Hallowell v. State Farm Mut. Auto. Ins. Co.*, 443 A.2d 925, 928 (Del. 1982) (insured has a

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[8] As discussed *infra*, Section II. B., eight states completely prohibit reformation based on unilateral mistake.

duty to read his insurance contract). In order to satisfy his legal duty, Bellinger, an individual sophisticated in real estate joint ventures, needed to exercise at least a degree of diligence which would fairly be expected of a reasonable person under the circumstances (*Liberto v. Bensinger*, 1999 WL 1313662, at *15 (Del. Ch. Dec. 28, 1999)); that means, at minimum, he had a legal duty to read the waterfall provisions (the economic heart of real estate joint venture documents) the Funds now want reformed.[9]

Similarly, one court has compared the misconduct requirement in § 157 to "gross negligence." *See Goodall*, 990 So.2d at 701 n.2; *cf. McClain v. McDonald's Rests. of Del., Inc.*, 2011 WL 2803108, at *6 n.27 (Del. Super. Ct. July 5, 2011) (citing illustration 2 to § 157 to support denial of a motion to amend to correct a mistake in a complaint because, among other things, a simple check would have revealed the mistake). Still other courts have applied Restatement (Second) of Contracts § 154 to bar reformation if a party executes a contract when it is aware that it has only limited knowledge as to its contents, but treats that limited knowledge as sufficient (sometimes referred to as "conscious ignorance"). *See, e.g., Askinuk Corp. v. Lower Yukon Sch. Dist.*, 214 P.3d 259, 270 (Alaska 2009).

In short, assuming that this Court were to follow the Restatement, the Funds', ASB's and DLA's conduct amounts to a failure to act in good faith or in accordance with reasonable standards of fair dealing.

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[9] These central economic provisions are the antithesis of "boilerplate," as the Funds describe ratification language (*See* A.B., pp. 2, 11). Questioned by the Chancery Court, Bellinger could not think of any provision of the agreement more important than the sale proceeds waterfall. (A108 at pp. 41-42).

II. SILENCE ALONE DOES NOT JUSTIFY REFORMATION.

A. Preservation Of The Issue; Rule 8.

The Scion Members repeatedly preserved the issue of whether silence alone justifies reformation based on unilateral mistake by citing the "exceptional cases" standard for unilateral mistake cases,[10] by arguing in their post-trial brief that there was no "knowing silence" or "active concealment" on the part of the Scion Members (A1561-62; A1577-80), and by arguing that there was no affirmative duty on the part of the Scion Members to "speak up." (*See* A1579-80). These arguments are sufficient to preserve the issue on appeal. *See, e.g.*, *Sears, Roebuck & Co. v. Midcap*, 893 A.2d 542, 547 (Del. 2006). Further, the Scion Members argued at the summary judgment hearing that there was no fraud practiced on the Funds that would have prevented them from discovering the purported mistake, and that the absence of such an allegation distinguished the case from a failure to read induced by fraud. (AR24-25).

The absence of any claim of fraud or trick has always been present in this case. Bellinger admitted there was nothing preventing him from discovering the mistake; he testified that once he obtained the 2040 Lofts agreement and actually reviewed the waterfall in connection with Scion 2040's calculation of its buyout, "it was clear what the document said, and that it was just wrong." (A108-09 at pp. 44-45). The Funds suffered no prejudice from not presenting evidence of fraud, artifice or trick because they admittedly attribute their mistake to their own inattention and not to any deceit by the Scion Members.

Were this Court to find that the Scion Members inadequately preserved this issue, Rule 8 allows the Court to consider the argument in the interests of justice. This Court has previously held it will consider an argument not preserved below when "the issue is outcome-determinative and may have significant implications for future cases[.]" *Sandt v. Del. Solid Waste Auth.*, 640 A.2d 1030, 1034 (Del. 1994).

As noted in the Scion Members' Opening Brief, no reported Delaware case has ever granted or upheld reformation based on unilateral

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[10] *See Emmert v. Prade*, 711 A.2d 1217, 1219 (Del. Ch. Nov. 5, 1997).

mistake. If the Chancery Court's grant of reformation is upheld here, the law of Delaware will be that a unilateral mistake by a party coupled with knowing silence of the other party, standing alone, will be grounds for reformation, regardless of the sophistication of the mistaken party or its ability to discover its mistake without impediment, and notwithstanding the lack of uneven bargaining power or an independent duty to speak. Thus the question of whether an additional fact of a heightened duty on the silent party should be necessary to make the case "exceptional" or "appropriate" for reformation is determinative of this case and is squarely within the interest of justice under Rule 8.

B. The Majority View Is That Fraud Or Inequitable Conduct Is Necessary In Cases Of Unilateral Mistake.

Delaware precedent indicates that reformation based on unilateral mistake is only appropriate when there is "knowing silence" and the case is otherwise exceptional. This policy is in accord with the majority of other jurisdictions that follow such a rule expressly. Eight states prohibit reformation outright if based on unilateral mistake. *See Anco Constr. Co., Ltd. v. City of Wichita*, 660 P.2d 560, 562 (Kan. 1983); *Blue Rock Indus. v. Raymond Int'l, Inc.*, 325 A.2d 66, 77 n.7 (Me. 1974) (unilateral mistake may be ground for rescission, but not reformation of contract); *Midway Excavators, Inc. v. Chandler*, 522 A.2d 982, 984 (N.H. 1986); *Butler Cnty. Bd. of Comm'rs v. City of Hamilton*, 763 N.E.2d 618, 633 (Ohio Ct. App. 2001); *Merrimack Mut. Fire Ins. Co. v. Dufault*, 958 A.2d 620, 625 (R.I. 2008); *Davis v. Mulholland*, 475 P.2d 834, 835 (Utah 1970); *Ohio Farmers Ins. Co. v. Video Bank, Inc.*, 488 S.E.2d 39, 44 (W.Va. 1997); *Schulz v. Miller*, 837 P.2d 71, 76 (Wyo. 1992).

Another thirty-two states require some type of fraud or inequitable conduct in order to permit reformation based on unilateral mistake. *See, e.g., Wyatt v. Ark. Game & Fish Comm'n*, 202 S.W.3d 513, 514 (Ark. 2005); *Boyles Bros. Drilling Co. v. Orion Indus., Ltd.*, 761 P.2d 278, 281 (Colo. App. 1988); *City of Lawrenceville*, 370 F.Supp.2d at 1331; *Klemp v. Hergott Grp., Inc.*, 641 N.E.2d 957, 965 (Ill. App. Ct. 1994); *Meyer v. Marine Builders, Inc.*, 797 N.E.2d 760, 771 (Ind. Ct. App. 2003); *Nichols*, 294 N.W.2d at 734; *U.S. Fid. & Guar. Co. v. Gough*, 289 So.2d 925, 927 (Miss. 1974); *Alea London Ltd. v. Bono-Soltysiak Enters.*, 186 S.W.3d 403, 416 (Mo. Ct. App. 2006); *R & B Farms, Inc. v. Cedar Valley Acres,*

Inc., 798 N.W.2d 121, 130 (Neb. 2011); *St. Pius X House of Retreats v. Diocese of Camden*, 443 A.2d 1052, 1055 (N.J. 1982); *Am. Home Assurance Co. v. Merck & Co.*, 329 F.Supp.2d 436, 444 (S.D.N.Y. 2004); *Meadlock*, 2012 WL 2891079, at *5; *Thompson v. Estate of Coffield*, 894 P.2d 1065, 1067-68 (Okla. 1995); *Regions Mortg., Inc. v. Muthler*, 844 A.2d 580, 582 (Pa. Super. Ct. 2004); *Holiday Hospitality Franchising, Inc. v. States Res., Inc.*, 232 S.W.3d 41, 51 (Tenn. Ct. App. 2006).

In all, forty of forty-nine states (not counting Delaware) would deny reformation for unilateral mistake where there is mere "knowing silence" without some additional conduct that would make the case exceptional. Accordingly, where parties such as the Funds choose not to read and instead rely on their attorneys to "get it right"--as did the plaintiff in *Pellaton v. Bank of New York*, 592 A.2d 473 (Del. 1991)--which results in a unilateral mistake, and where there is no fraud or other inequitable conduct, reformation should not be available.[11] This reasoning was part of the Delaware Chancery Court's recent denial of reformation based on unilateral mistake in the *CC Finance* case, where the plaintiff could not meet the initial threshold for unilateral mistake because, among other things, the language in the agreement was straightforward, plaintiff was represented by sophisticated counsel and no fraud or trick interfered with plaintiff's opportunity to review the language. *See CC Finance*, 2012 WL 4862337, at *8.

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[11] This would not render such a plaintiff remediless; it would have a claim against its attorneys for malpractice. It also would not result in a "loss" for the Funds here, as they continue to own each venture, accruing the benefit of cash flow and the rebounding real estate market. By the March 2012 trial, the appraised values plus cash flow of the three ventures gave the Funds a combined gain of over $13 million on their investments, after accounting for payment to the Scion Members as provided in the agreements. (*See* A218-19 at pp. 392-96). Contrary to the Funds' claim that the Scion Members "would receive 20% of every dollar that ASB originally invested" (A.B., p. 8), each agreement pays the Scion Member 20% of the interest accruing to the Fund as "second preferred return," making the waterfall order entirely moot when the venture gains sufficient value. (*See* A418 at pp. 982-83).

III. DLH'S EXPRESS RATIFICATION PRECLUDES ITS CLAIM FOR EQUITABLE REFORMATION.

General principles of ratification apply in the context of reformation. A party who signs an agreement is presumed to know its contents. *See* 27 SAMUEL WILLISTON & RICHARD A. LORD, WILLISTON ON CONTRACTS § 70:113 (4th ed. 2003) (hereinafter "WILLISTON ON CONTRACTS"). In *Denaxas v. Sandstone Court of Bellevue, L.L.C.*, 63 P.3d 125 (Wash. 2003), the court denied reformation of a contract, in part, based on Purchaser's constructive knowledge of the correct legal description of the property purchased, explaining: "Purchaser had ample opportunity to read the survey, title reports, and closing documents. Had Purchaser exercised reasonable care, it could have known their contents. Purchaser is charged with that knowledge." *Id.* at 131-33.

Likewise, DLH's failure to read the Dwight Lofts agreement when expressly ratifying its terms bars reformation of the earlier contract based on constructive knowledge. This is particularly true where, as here, the Funds and its representatives have repeatedly admitted that the purported mistake was "obvious." (A108 at pp. 42-43; *see also* A134 at p. 147). DLH relies upon non-controlling dicta in a footnote from a New York case, which states, "[r]atification does not **appear** to apply to reformation." *In re Schick*, 232 B.R. 589, 600 n.11 (Bankr. S.D.N.Y. 1999) (emphasis added). However, that court lacked a sufficient record "to permit conclusions about the precise terms of the parties' agreement, the existence of a scrivener's error or the effect of Claimants' conduct on their right to relief." *Id.* at 600. The statement presents no clear rule under New York law.

Further, although the Restatement (Second) of Contracts Chapter 16 Introductory Note suggests that it does not "deal with some specialized remedies, such as reformation of a writing," the underlying principle of waiving avoidance of a contract when avoidance is based on mistake applies equally to reformation. As a practical matter, reformation and rescission for mistake are dealt with together on a regular basis. *See* WILLISTON ON CONTRACTS §§ 70:1-70:207 (reviewing reformation and rescission for mistake together). There is no reason to distinguish ratification and waiver in this context.

Recognizing the similarity of avoidance and reformation, the Chancery Court in *Great-West Investors LP v. Thomas H. Lee Partners, L.P.*, 2011 WL 284992, at *12 (Del. Ch. Jan. 14, 2011) (citing Restatement (Second) of Contracts § 380) found no waiver of a mistake claim because "the Court **must accept**, for purposes of the pending motion to dismiss, that 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." (emphasis added).[12] Following the court's reasoning, if a party had reason to know of its mistake, its constructive knowledge at the time of ratification should bar any claim for reformation. The record here shows there was no impediment to DLH's ability to discover its unilateral mistake. Its agent ASB admits it immediately discovered the error upon reviewing the agreement (A.B. at p. 30) and has repeatedly testified that the mistake was "obvious." (A108 at pp. 42-43; *see also* A134 at p. 147).

In an apparent acknowledgment that it disregarded the ratification provision of the Dwight Lofts amendment, DLH claims for the first time on appeal that such language is "boilerplate." (A.B. at pp. 2, 11).[13] Delaware does not recognize a distinction that would make "boilerplate" less meaningful than any other part of a contract, particularly among sophisticated parties. *See Chartis Warrantyguard, Inc. v. Nat'l Elecs. Warranty, LLC*, 2011 WL 336385, at *9 (Del. Ch. Jan. 28, 2011). Moreover, DLH's own counsel drafted the amendment and had a reason for including the provision, presumably to foreclose any later challenge to the underlying contract.

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[12] In the subsequent *Great-West Investors, LP v. Thomas H. Lee Partners, L.P.*, 2012 WL 19469 (Del. Ch. Jan. 4, 2012), the court found that Great West's actual knowledge of the "ambiguous provision" at the time the agreement was entered barred the reformation claim, not reaching whether its constructive knowledge would have sufficed to find a waiver. *Id.* at *8.

[13] By labeling the ratification "boilerplate," DLH seeks another layer of reformation to avoid the plain effect of the provision, suggesting it should be forgiven for not paying attention to a part of the contract that it characterizes as non-negotiated.

IV. THE CHANCERY COURT ERRED WHEN AWARDING THE FUNDS OVER $3.2 MILLION IN FEES AND COSTS THEY DID NOT INCUR.

The plain language of the attorney-fee provision at issue states that in an "action to enforce the provisions of this Agreement," the non-prevailing party "shall reimburse the prevailing party for all reasonable costs and expenses incurred in connection with such enforcement." The Chancery Court ignored this unambiguous language and awarded the Funds fees and costs that they did not incur and for which no reimbursement could be made. Delaware law is clear that the "literal meaning of the terms in a legally binding agreement should be given effect" by the court. *NAMA Hldgs., LLC v. World Mkt. Ctr. Venture, LLC*, 948 A.2d 411, 418 (Del. Ch. 2007), *aff'd*, 945 A.2d 594 (Del. 2008) (TABLE). The clear language of the contractual provision here extends only to reimburse a successfully enforcing party for costs and expenses actually incurred.

As explained in the Scion Members' Opening Brief, to "incur" a charge or expense, one "must at some point be legally liable to pay that charge" or expense, even if liability is later extinguished. *Metz v. U.S. Life Ins. Co.*, 662 F.3d 600, 602 (2d Cir. 2011); *Deitz v. Univ. of Denver*, 2011 WL 2559829 at *4-5 (D. Colo. June 28, 2011). Neither the Funds nor ASB ever became legally liable to pay DLA anything for its no-charge representation. Further, the term "reimburse" contemplates an actual payment by the holder, which is then repaid by the maker. *Deitz*, 2011 WL 2559829, at *5. No payment was ever made (or due) which would be "reimbursed." Finally, the action of reformation and the counterclaims do not constitute "enforcement of this Agreement." The reformation claim and DLH's defense claims were not intended to enforce the contract containing the clause. *Natarajan v. Horn*, 402 So.2d 596, 597 (Fla. Dist. Ct. App. 1981) (declining to award contractual attorneys' fees because the action was not brought to enforce the contract, but rather to reform the contract).[14] Nothing in the Answering Brief changes these undisputed

[14] In *Gamble v. NorthStore Partnership*, 28 P.3d 286 (Alaska 2001), cited by the Funds, the court acknowledged that a reformation claim is "the opposite of an enforcement action." *Id.* at 289. However, the court

facts. The Funds have not incurred any fees and cannot be reimbursed for fees they did not pay.

As the Funds concede, the parties have not found any cases in which a law firm representing a client without charge in an effort to mitigate potential malpractice litigation was awarded attorneys' fees. There are circumstances, however, where a party has been denied attorneys' fees based on its own negligence. *Warner v. Sirstins*, 838 P.2d 666, 672 (Utah Ct. App. 1992) (party should not receive fee award where it seeks reformation of a mistake it created); *Crockett v. Green*, 1870 WL 1647, at *7 (Del. Ch. Sept. Term 1870) (disallowing costs to the defendant because he is brought here in consequence of his own blunder).

Attempting to overcome the lack of support for their position, the Funds cite cases in which indigent clients have been represented without charge by individuals or firms that provide altruistic pro bono services in order to remedy manifest injustice. *Henriquez v. Henriquez*, 992 A.2d 446 (Md. 2010) (awarding attorneys' fees to House of Ruth after family court dispute); *Lolley v. Campbell*, 28 Cal. 4th 367 (Cal. 2002) (awarding attorneys' fees to indigent employee represented by the Labor Commissioner); *Devine v. Nat'l Treasury Emp. Union*, 805 F.2d 384 (Fed. Cir. 1986) (awarding attorney fees to union for representing employee in an adverse action proceeding); *Dixon v. Comm'r*, 132 T.C. 55 (T.C. 2009) (awarding fees to attorneys representing taxpayers in tax shelter litigation "test cases"). In these cases, attorneys' fees are awarded to pro bono individuals and firms, in large part, to incentivize counsel to take cases for indigent parties. *Dixon*, 132 T.C. at 96 ("Courts have held that allowing fee awards for pro bono representation furthers the purpose of all attorneys' fees statutes by ensuring that legal services groups and other pro bono counsel have a strong incentive to represent indigent claimants."). *See also Perez v. Perkiss*, 742 F. Supp. 883, 891 (D. Del. 1990) (noting that fee shifting statutes "enhance enforcement of important civil rights, consumer protection, and environmental policies" and "fee

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decided, without citation to authority, that the defendants' defense to a suit was comparable to a counterclaim and constituted a "suit or legal action … to enforce [the contract]." *Id.* at 288. That conclusory decision in conflict with the literal contract language should not be persuasive here.

awards at competitive rates help assure that attorneys will take such cases" (quotations omitted)). Moreover, courts realize that "[w]hether we focus on enabling suits by those otherwise unable to pursue the litigation, or deterring misconduct, **an award to lawyers who have vindicated an important interest** achieves the desired result whether they worked for a private firm or a legal services organization." *Lolley*, 28 Cal. 4th at 375 (emphasis added).[15]

DLA had no such altruistic motive here. DLA represented the Funds (which had the financial ability to pay for legal services) at no charge to mitigate the cost the firm might otherwise face from defending a malpractice claim and to salvage a relationship with a high-income client. DLA is well incentivized by its own ethical obligations and desire to avoid malpractice liability. No public policy is served by allowing the Funds to recover costs and fees they never incurred so that DLA can profit off of its own malpractice.

The cases relied on by the Funds in which courts award statutory fees are also inapposite because they represent legislated policy that fees should be paid under those statutes. *See PLCM Grp., Inc. v. Drexler*, 22 Cal. 4th 1084, 1091 (Cal. 2000) (awarding attorneys' fees under Cal. Civ. Code § 1717, pursuant to which "equitable considerations must prevail over both the bargaining power of the parties and the technical rules of contractual construction"); *Dixon*, 132 T.C. at 90 (interpreting "incurred" in light of the statute as a whole and the purpose of sanctioning misconduct).[16] The Chancery Court did not consider any statute with

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[15] Although *Lolley* notes that California courts have awarded attorneys' fees pursuant to an attorney-client relationship (*id.* at 374), the cases cited for this proposition include the same altruistic pro bono scenarios and one case decided under the broad public policy of Cal. Civ. Code § 1717 (discussed *infra*). *Id.*

[16] Even courts applying statutory language have distinguished the question whether "incurred" applies to a pro bono arrangement by focusing on the fact that a litigant "incurs" fees if has obtained pro bono representation on the condition that any fees awarded are to be forwarded to the attorney; *i.e.*, a contingency fee. *Dixon*, 132 T.C. at 96 (citing *Preseault v. United States*, 52 Fed. Cl. 667, 674 (2002) ("When an agreement exists to support

attendant public policy considerations in this case, but was limited to the clear and unambiguous contract language created by the parties. *See, e.g.*, *Deitz*, 2011 WL 2559829, at *5 ("I also note that the attorneys' fee provision serves only a private interest and not a public purpose as in fee-shifting statutes."). The language of the agreements here unequivocally addresses one purpose: making the prevailing party whole for its cost of enforcement. The Funds, as parties to the agreements and to this case, suffered no financial loss or obligation and are already whole.

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the conditional obligation, a plaintiff is not viewed as simply having been given legal aid; instead, this condition is the cost to the plaintiff of obtaining those services.")).

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on November 13, 2012, a copy of the foregoing Appellants' Reply Brief was served on the attorneys below in the manner indicated:

BY E-SERVICE:

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