IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

HOLMWOOD CAPITAL ADVISORS, LLC, a Delaware limited liability company, and HOLMWOOD CAPITAL, LLC, a Delaware limited liability company,	)	
Plaintiffs/Counterclaim Defendants,	)	
v.	)	C.A. No. 2020-0373-BWD
HC GOVERNMENT REALTY HOLDINGS, L.P., a Delaware limited partnership, and HC GOVERNMENT REALTY TRUST, INC., a Maryland corporation,	)	
Defendants/Counterclaim Plaintiffs.	)	

POST-TRIAL MEMORANDUM OPINION

Date Submitted: October 8, 2026
Date Decided: November 13, 2026

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DAVID, V.C.

Four founders formed a series of companies to acquire commercial real estate properties subject to long-term leases with federal government tenants. Among the entities, the founders formed a real estate investment trust ("REIT") to own a holding company into which they contributed seven special purpose entities each owning a property leased to the government. They also formed a separate company that, for a time, provided management services to the REIT and its holding company. In 2019, over the objection of some of the founders, the REIT's board approved a recapitalization transaction with a new investor and terminated the management company. The parties dispute the termination fee the REIT must pay to the management company and raise other claims and counterclaims arising from their fractured relationship.

This memorandum opinion follows a three-day trial that centered on the proper calculation of the termination fee. For a reader undeterred by the soporific nature of accounting and contractual definitions of stockholders' equity, the selection of securities to pay termination and acquisition fees, public offering expense calculations, un-papered loans, and representations and warranties

regarding lender consent (among other issues), the five dozen pages that follow are sure to delight.[1]

I. BACKGROUND

The following facts are as the Court finds them following a three-day trial held from May 4 through May 6, 2026.[2]

A. The Founders Form Holmwood, HCA, HCM, HC REIT, And Holdings.

In 2010, Edwin M. Stanton, Robert R. Kaplan, Sr. ("Kaplan, Sr."), Robert R. Kaplan, Jr. ("Kaplan, Jr."), and Dr. Philip Kurlander (together, the "Founders") formed plaintiff Holmwood Capital, LLC ("Holmwood"), a Delaware limited liability company, to acquire commercial real estate properties subject to long-term leases with federal government tenants.[3]

In June 2014, the Founders formed a new Delaware limited liability company, plaintiff Holmwood Capital Advisors, LLC ("HCA," and with Holmwood,

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[1] David L. Goodstein's textbook *States of Matter* famously begins: "Ludwig Boltzmann, who spent much of his life studying statistical mechanics, died in 1906, by his own hand. Paul Ehrenfest, carrying on the work, died similarly in 1933. Now it is our turn to study statistical mechanics." David L. Goodstein, *States of Matter* 1 (2014). I understand the law clerks who were privileged to inherit this dense post-trial opinion may share in this sentiment.

[2] JX 80. The Joint Pre-Trial Stipulation and Order is cited as "PTO ¶ __". Dkt. 79. Trial testimony is cited as "Tr. (Witness) at __". *See* Dkts. 81–83. Joint exhibits are cited as "JX __" unless otherwise defined. Dkt. 73, Ex. 1.

[3] PTO ¶¶ 9–10.

"Plaintiffs").[4] Each of the Founders owned a one-quarter interest in HCA.[5] HCA is the sole member and manager of nonparty Holmwood Capital Management, LLC ("HCM").[6]

In March 2016, the Founders formed defendant HC Government Realty Trust, Inc. ("HC REIT"), a Maryland corporation, to acquire, own, and manage government-leased commercial real estate investments.[7] Stanton served as HC REIT's Chief Executive Officer ("CEO"), Kurlander as Treasurer, Kaplan, Sr. as Secretary, and Kaplan, Jr. as Vice President.[8] The Founders also formed defendant HC Government Realty Holdings, L.P. ("Holdings"), a Delaware limited partnership, to hold and operate HC REIT's assets, with HC REIT serving as its general partner.[9]

B. Holmwood Contributes Properties To Holdings Under A Contribution Agreement.

Prior to March 2016, Holmwood owned seven special purpose entities ("SPEs"): GOV Silt, LLC; GOV Ft. Smith, LLC; GOV FBI Johnson City, LLC;

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[4] *Id.* ¶ 12.

[5] *Id.* ¶ 13; Tr. (Hale) at 13:1–13.

[6] PTO ¶ 16.

[7] *Id.* ¶ 18; JX 350 at 3.

[8] PTO ¶ 19; JX 350 at 4.

[9] PTO ¶¶ 20–21; JX 350 at 2, 22.

GOV CBP Cape Canaveral, LLC; GOV PSL, LLC; GOV Jonesboro, LLC; and GOV Lorain, LLC.[10] Each of the SPEs owned a property leased to the federal government.[11] The SPEs were parties to property management agreements with HCM (collectively, the "Property Management Agreements") under which HCM served as property manager.[12] HCM charged each SPE expenses related to its management.[13] Under the Property Management Agreements, HCM could "subcontract some or all of the property management functions . . . to local property managers and certain other parties," but the "fees to be paid to [HCM]" covered "fees payable to such third parties."[14]

On March 31, 2016, Holmwood and Holdings entered into a Contribution Agreement under which Holmwood agreed to contribute its "complete and entire membership interests" in the seven SPEs (the "Contributed Properties") to Holdings in exchange for limited partnership units in Holdings ("OP Units") valued at $10 per unit (the "Exchange Transaction").[15] The Contribution Agreement provided that the total consideration exchanged would be determined when the Exchange Transaction

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[10] PTO ¶ 26.

[11] *Id.* ¶ 17; Tr. (Stanton) at 302:1–4.

[12] PTO ¶ 23; *see* JX 55; JX 75; JX 109; JX 120.

[13] JX 55 §§ 2.5.1–2.5.2; *see* JX 75; JX 109; JX 120.

[14] JX 55 § 2.14; *see* JX 75; JX 109; JX 120.

[15] PTO ¶ 25; JX 71 [hereinafter Contr. Agt.] §§ 1, 3.

closed.[16] The Contribution Agreement conditioned closing of the Exchange Transaction on the closing of HC REIT's contemplated initial public offering under Regulation A (the "Offering").[17]

The Contribution Agreement also conditioned closing on Holmwood "procur[ing], at the sole cost and expense of [Holdings], any consents required from . . . holders of . . . Existing Loans . . . ."[18] When the Contribution Agreement was signed, three of the SPEs—GOV PSL, LLC; GOV Jonesboro, LLC; and GOV Lorain, LLC (the "CMBS Properties")—were parties to a loan agreement with Starwood Mortgage Capital LLC (the "CMBS Loan Agreement").[19] The CMBS Loan Agreement required "the prior written consent of [the] Lender" before Holmwood could "sell, convey, mortgage, grant, bargain, encumber, pledge, assign or transfer [a CMBS] Property or any part thereof . . . ."[20] However, Holmwood did not procure consent from the lender under the CMBS Loan Agreement before consummating the Exchange Transaction.[21]

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[16] Contr. Agt., Ex. B (providing that the value of the OP Units would equal "$9,678,471, increased by principal amortization from debt service . . . from January 1, 2016 to the Closing Date"); Tr. (Hale) at 44:17–45:21.

[17] Contr. Agt. § 9.A.

[18] *Id.* § 6.A; Tr. (Hale) at 43:4–44:5.

[19] JX 402.

[20] *Id.* § 4.2.1.

[21] Tr. (Stanton) at 328:10–12, 330:24–331:6.

C. HCA Serves As Manager For HC REIT And Holdings Under A Management Agreement.

Also on March 31, 2016, HC REIT, Holdings, and HCA entered into an agreement (the "Management Agreement") under which HC REIT and Holdings retained HCA "to administer the business activities and day-to-day operations of" HC REIT and Holdings.[22] The Management Agreement vested HCA with the power to:

> direct the management, operation and policies of [HC REIT and Holdings] . . . [,] to carry out any and all of the objectives and purposes of [HC REIT and Holdings] and to perform all acts and enter into and perform all contracts and other undertakings that it may in its sole discretion deem necessary, advisable or incidental thereto . . . .[23]

The Management Agreement also made HCA responsible for "(1) the selection, purchase, sale and disposition of Investments, (2) [HC REIT and Holdings]'s financing activities, and (3) providing [HC REIT and Holdings] with advisory services."[24] In exchange for these services, HC REIT agreed to pay HCA an "Asset Management Fee," an "Acquisition Fee," and a "Leasing Fee."[25]

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[22] PTO ¶ 29; JX 70 [hereinafter Mgmt. Agt.] at 2. The Management Agreement defines the "Company" to mean HC REIT and Holdings. Mgmt. Agt. § 1(a).

[23] Mgmt. Agt. § 2(b).

[24] *Id.* § 2(c).

[25] *Id.* § 6(a).

Asset Management Fee. The Management Agreement defines the "Asset Management Fee" to mean "the annual management fee in an amount equal to 1.5% of the amount of Stockholder[s'] Equity, which will be calculated and paid on a quarterly basis."[26] In turn, the Management Agreement defines "Stockholders' Equity" to mean:

> (a) the sum of (1) the net proceeds from (or equity value assigned to) all issuances of the Company's equity and equity equivalent securities (including Common Stock, Common Stock Equivalents, preferred stock and units of limited partnership interest in the Operating Partnership) since inception (allocated on a pro rata daily basis for such issuances during the fiscal quarter of any such issuance), plus (2) the Company's retained earnings at the end of the most recently completed calendar quarter (without taking into account any non-cash equity compensation expense incurred in current or prior periods), less (b) any amount that the Company has paid to repurchase the Company's equity or equity equivalent securities. Stockholders' Equity also excludes (1) any unrealized gains and losses and other non-cash items (including depreciation and amortization) that have impacted stockholders' equity as reported in the Company's financial statements prepared in accordance with GAAP, and (2) one-time events pursuant to changes in GAAP, and certain non-cash items not otherwise described above, in each case after discussions between the Manager and the Independent Directors and approval by a majority of the Independent Directors.[27]

Acquisition Fee. The Management Agreement defines the "Acquisition Fee" to mean:

> 1.0% of the Acquisition Cost for each Investment made on behalf of the Company at the closing of the acquisition of such Investment for

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[26] *Id.* § 1(a).

[27] *Id.*

> [HCA's] services in identifying Investments for purchase, arranging for the purchase of such Investments, coordinating the closing on such Investments and following up on and resolving post-closing transaction issues on behalf of the Company.[28]

The Management Agreement further provides that:

> The Acquisition Fee shall be paid in Common Stock, or such other equity securities of the Company, including without limitation LTIP Units, as may be determined by the mutual consent of the [HC REIT] Board (including a majority of the Independent Directors) and [HCA] (the "Acquisition Fee Securities").[29]

Further,

> [U]ntil the earlier of (x) the date on which [HC REIT] engages in a Listing Event with respect to [HC REIT's] Common Stock or (y) the fourth anniversary of the date of this Agreement (such earlier date, the "*Payment Date*"), all Acquisition Fees payable to [HCA] shall be accrued but not paid. All Acquisition Fees accrued pursuant to this Section 6(e)(iii) shall be paid to [HCA] in Acquisition Fee Securities as of the Payment Date.[30]

Termination Fee. The Management Agreement states that it shall "automatically renew" for one-year terms "unless the Company or [HCA] elects not to renew this Agreement in accordance with Section 10(b) or Section 10(c), respectively."[31] To terminate the Management Agreement without cause, HC REIT and Holdings must provide HCA with "180 days' prior written notice" and pay a

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[28] *Id.* § 6(e)(i).

[29] *Id.* § 6(e)(ii).

[30] *Id.* § 6(e)(iii).

[31] *Id.* § 10(a).

"Termination Fee" "before or on the last day of the" contract term, the "Effective Termination Date."[32] The Management Agreement defines the "Termination Fee" to mean:

> a termination fee equal to three (3) times the sum of (i) the Asset Management Fees, (ii) Acquisition Fees, and (iii) Leasing Fees in each case, earned by [HCA] during the 24-month period ending as of the most recently completed fiscal quarter prior to the Effective Termination Date; provided, further that if Acquisition Fees have been accrued in accordance with Section 6(e)(iii) but are unpaid as of the Effective Termination Date, then all such accrued Acquisition Fees (whether accrued in the applicable 24-month period or prior thereto) shall be included in the calculation of the Termination Fee.[33]

The Termination Fee may be paid in cash, securities, or some combination of the two:

> Any Termination Fee payable to [HCA] pursuant to Section 10(b), 10(e) or 11(b) hereof shall be payable, at the election of the [HC REIT] Board (including a majority of the Independent Directors) in cash, Termination Fee Securities, or a combination thereof. "*Termination Fee Securities*" shall mean Common Stock, or such other equity securities of the Company, including without limitation LTIP Units, as may be determined by [HCA] in its reasonable discretion. Termination Fee Securities shall not be subject to any vesting requirements.[34]

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[32] *Id.* § 10(b).

[33] *Id.* § 1(a).

[34] *Id.* § 10(f).

D. Holmwood And Holdings Amend The Contribution Agreement And HC REIT Conducts A Regulation A Offering.

On September 28, 2016, HC REIT issued a preliminary offering circular to raise up to $30 million in the Offering.[35] HC REIT initiated the Offering in November but raised only $3 million over the following six months.[36]

On May 26, 2017, Holmwood and Holdings amended the Contribution Agreement (the "Amendment") to change the closing date of the Exchange Transaction from the closing of the Offering to the business day after the Offering raised $3 million.[37] The Amendment also amended the Contribution Agreement to provide that only the beneficial economic interest, rather than legal title, to the CMBS Properties would be contributed to Holdings at closing.[38] The parties agreed that full legal title to the CMBS Properties would be deemed contributed and transferred to Holdings as follows:

> On the business day (the "*Open Interest Closing Date*") next following the first to occur of: (a) the receipt by [Holmwood] of all Lender Consents to the consummation of the transactions contemplated by the Amended Agreement with respect to the transfer of Open LLC Interests of [a CMBS Property], or (b) the sale or other disposition by [Holmwood] with the written consent of [Holdings] and the receipt of all required Lender Consents of all Open LLC Interests in, or all or

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[35] PTO ¶ 24; JX 77; Tr. (Stanton) at 357:10–358:15.

[36] JX 352; Tr. (Hale) at 32:1–20, 34:16–21.

[37] PTO ¶ 28; Contr. Agt. § 9.A; JX 95 [hereinafter Contr. Agt. Am.] § 2; Tr. (Hale) at 48:23–49:4.

[38] PTO ¶ 44; Contr. Agt. Am. § 3.

> substantially all of the assets of, [a CMBS Property], regardless of how structured, including without limitation outright sale for cash or other consideration to, merger or consolidation with, or recapitalization that results in a change of control of the [CMBS Property] from [Holmwood] to, a third party or parties, who or which are unrelated to [Holmwood], [Holdings], the [CMBS Property] or any affiliated company (as defined in Section 19 of the Amended Agreement) of any of the foregoing, or (c) the payment or defeasance in full of all Existing Loans, secured by Existing Mortgage Liens on the assets of any [CMBS Property], without the necessity of any further action, or the execution and delivery of any other instruments or documents on the part of [Holmwood], ***all of the LLC Interests in the Property LLCs***, which in accordance with clause (a), (b), or (c) of this Section 3(b)(iv), as applicable, have ceased to be [CMBS Properties], ipso facto ***shall be deemed to have been contributed and transferred*** (the "*Open Interest Closing*") ***to*** [***Holdings***] ***as of the Open Interest Closing Date*** . . . .[39]

The Amendment required that, upon the Open Interest Closing, Holmwood and Holdings "shall deliver, each to the other a certificate . . . remaking and republishing as of the Open Interest Closing Date" certain "Bring-Down Representations," including that "[n]either the entry into nor the performance of, or compliance with, [the Contribution Agreement] by [Holmwood] has resulted, or will result, in any violation of, or default under" any "mortgage indenture, lien agreement, note, [or] contract . . . ."[40]

The Exchange Transaction closed on May 26, 2017, and Holmwood contributed to Holdings all of the membership interests in four of the SPEs and a

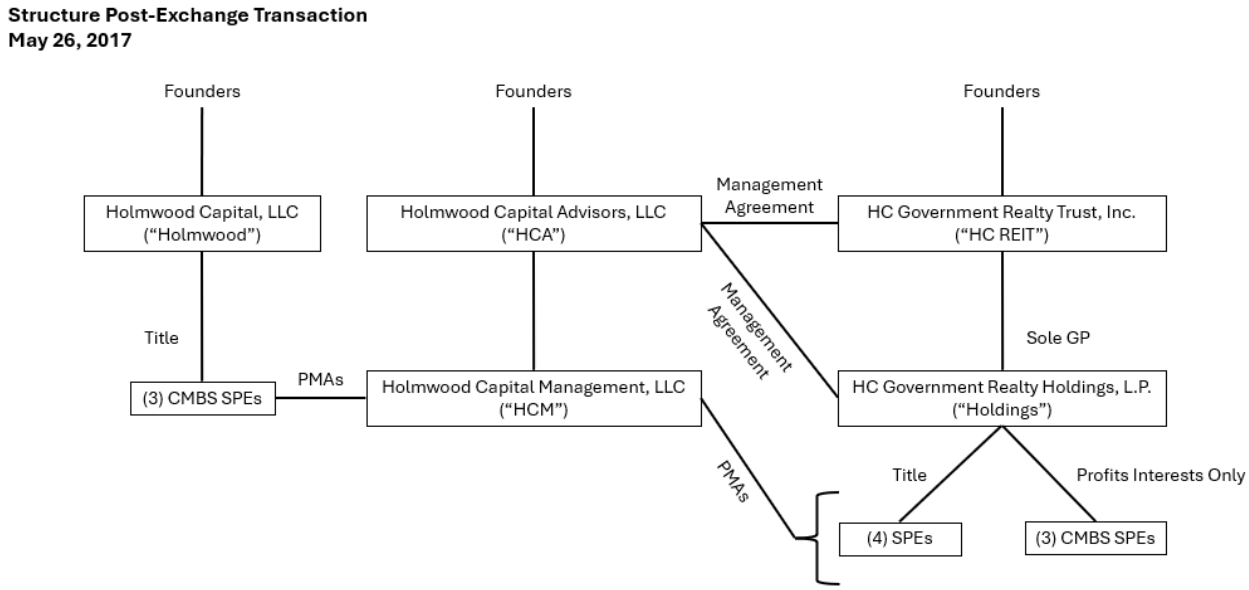
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[39] Contr. Agt. Am. § 3(b)(iv) (emphasis added).

[40] *Id.* § 6; Contr. Agt. § 11.C.

"Profits Interest" in the CMBS Properties.[41] At closing, Holmwood received 1,078,416 OP Units in Holdings, valued at $10,784,161.[42]

The following graphic summarizes the Holmwood entity structure as of May 26, 2017, after closing of the Exchange Transaction:



E. HCA, HC REIT, And Holdings Execute A Side Letter.

During the Offering, HCA retained Mick Law P.C. ("Mick Law") to provide "an independent due diligence review" to assess HC REIT's structure and governance and recommend improvements.[43] On June 26, 2017, Mick Law issued

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[41] PTO ¶¶ 40–41; Contr. Agt. § 1; Contr. Agt. Am. § 3. The Amendment defines "Profits Interest" to mean "all of [Holmwood's] right, title and interest in and to any and all profits, losses and distributed cash flow, if any, of each [CMBS Property]." Contr. Agt. Am. § 3(b)(ii).

[42] PTO ¶¶ 41–42; Contr. Agt. § 1; Contr. Agt. Am. § 3.

[43] PTO ¶¶ 34–36; Tr. (Hale) at 35:15–36:3; Tr. (Stanton) at 318:22–319:7; JX 102 at 1.

a diligence report (the "Mick Law Report") recommending changes HCA should implement at HC REIT.[44] Mick Law advised that HCA and HC REIT should "cap [Organization and Offering Expenses ("O&O Expenses")] at 3.0% of Offering proceeds . . . such that [HCA] would be responsible for covering any O&O expenses exceeding the cap."[45]

In response to the Mick Law Report, HCA, HC REIT, and Holdings amended two terms of the Management Agreement through a side letter (the "Side Letter"), dated November 1, 2017.[46] First, the Side Letter modifies the Termination Fee to eliminate the fee if Stockholders' Equity does not "build" to $15 million, and to reduce the fee by half if Stockholders' Equity does not "build" to $35 million:

> (i) if [HC REIT] fails to build Stockholders' Equity equaling $15 million, the Termination Fee shall be waived in its entirety;
>
> (ii) if [HC REIT] builds Stockholders' Equity equaling or exceeding $15 million but fails to build Stockholders' Equity equaling $35 million, the Termination Fee shall be capped at an amount which is the quotient when the Termination Fee, as calculated under the Management Agreement, is divided by two;
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> (iii) if [HC REIT] builds Stockholders' Equity equaling or exceeding $35 million and a Listing Event has not occurred, then, for purposes of calculating the Termination Fee, Stockholders' Equity will be capped

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[44] PTO ¶¶ 35–36; Dep. of Edwin Stanton [hereinafter Stanton Dep. Tr.] at 137:6–16, Dkt. 77, Tab D; Tr. (Stanton) at 318:22–319:7; *see* JX 102.

[45] JX 102 at 14.

[46] PTO ¶ 37; JX 107 [hereinafter Side Ltr.]; Tr. (Hale) at 39:1–6.

> at $150 million in determining the Asset Management Fees payable to [HCA] under the Management Agreement . . . .[47]

Second, the Side Letter limits HCA's right to reimbursement of O&O Expenses to 15% of the Offering proceeds:

> Notwithstanding anything contained in the Management Agreement or any term of the Offering, after the termination of the Offering and expiration of the 120 Day Period . . . , [HCA] shall repay a portion of the reimbursements it has received in connection with the Offering (the "Manager Reimbursements"), to the extent that Organization and Offering Expenses exceeds 15% of the gross proceeds received from the Offering. In the event any portion of the Manager's Reimbursements are repayable to [HC REIT] under this Agreement, the amount to be repaid will equal an amount that when deducted from the Organization and Offering Expenses causes the difference to equal 15% of the gross proceeds received from the Offering.[48]

F. HC REIT's Board Approves A Recapitalization Transaction And Terminates The Management Agreement.

On March 13, 2019, HC REIT's board of directors (the "Board") held a meeting to consider a transaction between HC REIT, Holdings, and Hale Partnership Capital Management ("HPCM"), under which HPCM would purchase up to 2,050,000 shares of HC REIT Series B preferred stock for a maximum aggregate offering amount of $20,500,000; purchase 300,000 shares of HC REIT common stock for $3,000,000; and issue Holdings a secured loan for up to $20,500,000,

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[47] Side Ltr. § 3(i)–(iii). The Side Letter defines the "Company" to mean HC REIT. Side Ltr. at 1; Mgmt. Agt. § 1(a).

[48] Side Ltr. § 1.

guaranteed by HC REIT (the "Recapitalization Transaction").[49] A majority of the Board voted to approve the Recapitalization Transaction.[50] Stanton voted against the Recapitalization Transaction.[51]

At the same meeting, a majority of the Board also voted to adopt "Amended Investment Guidelines" requiring that "[n]o investment shall be made for which its investigation, pursuit, negotiation, financing and/or acquisition did not receive prior approval from the [HC REIT] Board"; "[n]o investment shall be sold, exchanged or otherwise disposed of without prior approval of the [HC REIT] Board"; and "[n]o refinancing of any investment nor any negotiation of any refinancing of an investment without prior approval of the [HC REIT] Board."[52] Stanton voted against the Amended Investment Guidelines.[53]

In addition, a majority of the Board voted to not renew the Management Agreement.[54] Stanton voted against termination of the Management Agreement.[55]

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[49] PTO ¶ 51; JX 153 at 5–8; *id.* at Ex. G; JX 161 § 2.1.

[50] PTO ¶ 53; JX 153 at 5.

[51] JX 153 at 5.

[52] *Id.* at 11, Ex. I.

[53] *Id.* at 11.

[54] PTO ¶ 54; JX 153 at 10.

[55] JX 153 at 10.

The next day, March 14, HC REIT delivered a written notice (the "Termination Notice") informing HCA that HC REIT would not renew the Management Agreement, effective March 31, 2020 (the "Termination Date").[56]

The Recapitalization Transaction closed on March 19, 2019.[57] After closing, HC REIT's investors elected a new board of directors.[58] The new board appointed Steve Hale as HC REIT's CEO and Chairman.[59]

G. HC REIT's New CFO Calculates Stockholders' Equity For Asset Management Fees.

After the Recapitalization Transaction, HC REIT installed Jacqlyn Piscetelli as its new Chief Financial Officer ("CFO").[60] Piscetelli became responsible for calculating HCA's quarterly Asset Management Fee.[61] As a starting point for her calculations, Piscetelli used a spreadsheet that HCA provided (the "Workbook") that contained a framework for calculating Stockholders' Equity, a component of the Asset Management Fee.[62]

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[56] PTO ¶ 55; JX 155.

[57] PTO ¶ 57; *see* JX 161.

[58] PTO ¶ 58.

[59] *Id.*

[60] Tr. (Piscetelli) at 130:11–131:1.

[61] *Id.* at 186:17–21.

[62] *Id.* at 190:14–191:8, 193:7–12.

Using the Workbook, on July 22, 2019, Piscetelli calculated Stockholders' Equity at $35,916,217 for Q1 2019 and $37,133,134 for Q2 2019.[63] Based on that calculation, HC REIT paid HCA $135,643.82 in Asset Management Fees for Q2 2019.[64]

On September 27, HC REIT filed a Form 1-SA containing its financial statements for the six months ended June 30, 2019.[65] To prepare the filing, Piscetelli worked to close the books for the previous six months and ensure their accuracy.[66] As a part of that process, Piscetelli and HC REIT's auditors concluded that U.S. Generally Accepted Accounting Principles ("GAAP") required HC REIT to report an estimate of the Termination Fee on its financial statements (the "Termination Fee Estimate") because the Termination Fee was "probable and reasonably estimable" as of March 2019, the month in which HC REIT issued the Termination Notice.[67] As such, HC REIT's Form 1-SA listed an "Accrued management termination fee"

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[63] JX 170; JX 169 [hereinafter Q2 2019 Workbook] at "Management Fees 1.5%" cells Q33, S33.

[64] JX 171; Q2 2019 Workbook at "2019 AMF True Up Calc" cell E27.

[65] *See* JX 175.

[66] Tr. (Piscetelli) at 165:8–17.

[67] *Id.* at 166:11–168:3, 212:13–21, 214:23–215:23; JX 155.

of $1,750,000 as a liability in HC REIT's financial statements.[68] The Termination Fee Estimate presumed a 1.5x multiplier under the Side Letter.[69]

On November 1, Piscetelli calculated Stockholders' Equity at $34,904,007 for Q2 2019.[70] Piscetelli told Jason Post, HC REIT's former CFO and HCA's then-CFO, that there had been a "small adjustment" to Stockholders' Equity from Q2 2019, due to the Termination Fee Estimate.[71] Based on this calculation, HC REIT paid HCA $129,628.16 in Asset Management Fees for Q3 2019.[72]

H. HC REIT Acquires New Properties And The Offering Closes.

In October 2019, HC REIT acquired three new properties in Fort Lauderdale, Florida; Lawrence, Kansas; and Oklahoma City, Oklahoma for a total price of $17,272,766 (the "Disputed Acquisitions").[73] HC REIT did not pay Acquisition Fees to HCA for these acquisitions.[74]

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[68] JX 175 at 6.

[69] Tr. (Piscetelli) at 245:15–246:17.

[70] JX 327 [hereinafter Q3 2019 Workbook] at "Management Fee 1.5%" cell S33.

[71] JX 184; Tr. (Piscetelli) at 256:1–12.

[72] JX 184 at "2019 AMF True Up Calc" cell E28.

[73] PTO ¶¶ 59, 61; JX 230 at "N10 - Leases" cells B41–E43; Tr. (Hale) at 86:20–87:4.

[74] PTO ¶ 60.

The Offering expired in November.[75] The Offering generated $8,871,660 in gross proceeds and resulted in $2,054,681 in O&O Expenses.[76] HC REIT reimbursed HCA $284,279 in "costs for SEC filings."[77]

I. The Parties Dispute The Termination Fee.

On January 27, 2020, Piscetelli calculated Stockholders' Equity at $33,958,385 for Q4 2019.[78] Based on this calculation, HC REIT paid HCA $125,646.05 in Asset Management Fees for Q4 2019.[79]

The Management Agreement terminated effective March 31, 2020.[80] That day, HC REIT emailed HCA a notice stating:

> HC Government Realty Trust, Inc. (the "Company") provides notice of payment of the Termination Fee payable due with respect to Section 10(b) of the HCA Management Agreement for a total amount of $1,645,453. . . . In accordance with Section 10(f) of the HCA Management Agreement, the Company will satisfy the Termination Fee payable with $1,275,000 in cash and $370,453 in shares of common stock of the Company at a per share price of $7.17 for a total of 51,667 shares . . . . A wire transfer has been processed today in the amount noted. Please confirm receipt of the wire transfer at your earliest convenience. The shares of common stock of the Company will be recorded with our stock transfer agent as of the end of the day today.[81]

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[75] *Id.* ¶ 74; JX 274 at 39.

[76] PTO ¶ 75.

[77] JX 346 at "2. O&O" cells E21–W21, D93–W93.

[78] JX 200; JX 199 [hereinafter Q4 2019 Workbook] at "Management Fee 1.5%" cell W33.

[79] Q4 2019 Workbook at "2019 AMF True Up Calc" cell E30.

[80] PTO ¶ 63; *see* JX 155.

[81] JX 218.

HC REIT attached a "summary schedule of the Termination Fee calculation for [HCA's] reference."[82] HC REIT's calculation reflected that Stockholders' Equity did not exceed $35 million and therefore used a 1.5x multiplier for the Termination Fee.[83]

The same day, HC REIT also informed HCA that it was electing to issue HC REIT common stock to HCA as payment for Acquisition Fees.[84] HC REIT sent a wire to HCA for $1,275,000 and noted that the common stock issuances were recorded with its stock transfer agent.[85]

Separately, HC REIT demanded that HCA repay $723,932 in O&O Expenses and $76,322 in property management fees.[86] To offset these payments, HC REIT withheld declared dividends and distributions from Plaintiffs.[87]

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[82] *Id.*

[83] PTO ¶ 67; JX 218 at "1. Termination Fee Calc" cell F9.

[84] PTO ¶ 71; JX 225.

[85] PTO ¶ 70.

[86] JX 344; JX 346 at "1. Summary" cells G4, G7–G11.

[87] PTO ¶ 79.

J. HC REIT's Lender Claims The Exchange Transaction Caused A Default, And HC REIT Is Forced To Negotiate Consent Six Years After The Initial Closing.

In January 2020, HC REIT decided to defease the loans on the CMBS Properties.[88] When interest rates declined as a result of the COVID-19 pandemic, however, the defeasance cost was no longer economically advantageous.[89] When HC REIT asked the lender to consent to Holmwood contributing its ownership interest in the CMBS Properties to HC REIT, it learned that the lender was never informed of the Exchange Transaction.[90]

On November 16, 2022, LNR Partners, LLC ("LNR"), the servicer under the CMBS Loan Agreement, issued a notice of default to Holmwood and the CMBS Properties.[91] On March 27, 2023, HC REIT and the lender entered into a Consent and Loan Modification Agreement.[92] HC REIT spent $517,463.35 pursuing the consent.[93]

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[88] Tr. (Hale) at 64:6–65:13.

[89] *Id.* at 65:15–66:4.

[90] *Id.* at 66:5–21.

[91] JX 264.

[92] JX 273.

[93] JX 358; Tr. (Piscetelli) at 160:1–5.

K. HC REIT Investigates Management Fees Charged Under the Property Management Agreements.

In October 2019, HC REIT terminated the SPEs' Property Management Agreements with HCM, contracting with local property managers instead.[94] During this period, at Piscetelli's direction, HC REIT reviewed each SPE's books and records and purportedly discovered "four individual properties where it appeared that [HC REIT] w[as] being charged duplicative fees for similar services."[95]

When Piscetelli asked HCA for an explanation, Post responded that the payments HC REIT identified related to "building engineering services," explaining that subcontracting for such services was separately governed by Section 2.10.1 of the Property Management Agreements.[96]

L. Plaintiffs Cover HC REIT's Operating Expense Shortfalls.

Between May 2017 and April 2018, Holmwood transferred $408,514 to HC REIT to cover gaps in operating cash needs, including for property acquisitions and distributions to stockholders (the "Shortfall Amounts").[97]

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[94] Tr. (Piscetelli) at 140:14–141:9.

[95] *Id.* at 141:20–143:5, 143:6–11.

[96] JX 192 at 2; JX 55 § 2.10.1.

[97] JX 353 at "HC REIT Loans" cells B16–F19 (reflecting HPCM payment records); JX 274 at 18; Tr. (Piscetelli) at 183:6–24; Tr. (Stanton) at 321:11–18.

Although the parties did not sign contracts memorializing the terms under which the Shortfall Amounts were provided, HC REIT does not deny that it received Shortfall Amounts from Holmwood.[98] On May 13, 2019, Holmwood sent HC REIT and Holdings a written demand for repayment of the Shortfall Amounts.[99]

On April 27, 2023, HC REIT filed a Form 1-K with the SEC acknowledging that "[HC REIT] has outstanding payables to our predecessor for various expenses paid on our behalf by our predecessor in the amount of $408,514."[100] The Shortfall Amounts remain outstanding.[101]

M. Procedural History

On May 14, 2020, Plaintiffs initiated this action through the filing of a Verified Complaint (the "Complaint"), alleging claims against Holdings and HC REIT (together, "Defendants") for breaches of the Management Agreement and alleged loan agreements.[102] Plaintiffs also seek an order compelling Defendants to specifically perform their obligations under the Management Agreement and

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[98] Tr. (Stanton) at 321:19–322:8; *id.* (Piscetelli) at 286:2–8.

[99] JX 165.

[100] JX 274 at 18.

[101] PTO ¶¶ 45–48.

[102] Verified Compl. [hereinafter Compl.] ¶¶ 71–78, Dkt. 1.

declaring that HC REIT is not entitled to repayment of O&O Expenses or management fees.[103]

On January 8, 2024, Defendants answered the Complaint and filed amended counterclaims (the "Counterclaims") alleging claims against Plaintiffs for breaches of the Management Agreement and Contribution Agreement and for unjust enrichment.[104] Defendants also seek an order declaring that HC REIT is entitled to repayment of O&O Expenses and management fees.[105]

On September 12, 2025, the parties cross-moved for summary judgment on all claims and counterclaims,[106] which the Court granted in part and denied in part on November 3.[107]

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[103] Compl. ¶¶ 85–96.

[104] Defs.' Answer to Pls.' Verified Compl., Affirmative Defenses, and Verified Suppl. Countercl. [hereinafter Countercl.] ¶¶ 93–109, Dkt. 12.

[105] *Id.* ¶¶ 110–13.

[106] Pls. Holmwood Capital Advisors, LLC and Holmwood Capital, LLC's Cross-Mot. for Summ. J., Dkt. 46; Defs./Countercl. Pls. HC Government Realty Holdings, L.P. and HC Government Realty Trust, Inc.'s Mot. for Summ. J. as to Pls.' Claims, Dkt. 50.

[107] Dkt. 65.

The Court held a three-day trial from May 4 to May 6, 2026.[108] The parties completed post-trial briefing on September 14.[109] The Court heard post-trial oral argument on October 8.[110]

II. ANALYSIS

The parties proceeded to trial on Plaintiffs' claims for breach of contract and declaratory judgment and Defendants' counterclaims for breach of contract, unjust enrichment, and declaratory judgment.

To prove a claim for breach of contract, a claimant must show: "(1) the existence of a contract; (2) a breach of an obligation imposed by that contract; and (3) resultant damages." *Thomas v. Am. Midstream GP, LLC*, 2024 WL 5135828, at *5 (Del. Ch. Dec. 17, 2024) (quoting *Wenske v. Blue Bell Creameries, Inc.*, 2018 WL 3337531, at *9 (Del. Ch. July 6, 2018)), *appeal refused*, 339 A.3d 752 (Del. 2025). "Plaintiffs, as well as Counterclaim-Plaintiffs, have the burden of proving each element, including damages, of each of their causes of action against each Defendant or Counterclaim-Defendant . . . by a preponderance of the evidence."

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[108] Dkt. 80.

[109] Pls. Holmwood Capital Advisors, LLC and Holmwood Capital, LLC's Opening Post-Trial Br. [hereinafter POB], Dkt. 87; Defs.' Post-Trial Br. [hereinafter DAB], Dkt. 89; Pls. Holmwood Capital Advisors, LLC and Holmwood Capital, LLC's Answering/Reply Post-Trial Br. [hereinafter PRB], Dkt. 90; Defs.' Post-Trial Sur-Reply Br. [hereinafter DRB], Dkt. 92.

[110] Dkt. 96.

Revolution Retail Sys., LLC v. Sentinel Techs., Inc., 2015 WL 6611601, at *9 (Del. Ch. Oct. 30, 2015). "Proof by a preponderance of the evidence means proof that something is more likely than not." *Id.*

"Delaware adheres to the 'objective' theory of contracts, *i.e.* a contract's construction should be that which would be understood by an objective, reasonable third party." *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) (quoting *NBC Universal v. Paxson Commc'ns Corp.*, 2005 WL 1038997, at *5 (Del. Ch. Apr. 29, 2005)). A "contract must . . . be read as a whole, giving meaning to each term and avoiding an interpretation that would render any term 'mere surplusage.'" *Sunline Com. Carriers, Inc. v. CITGO Petroleum Corp.*, 206 A.3d 836, 846 (Del. 2019) (quoting *Osborn*, 991 A.2d at 1159). "When the contract is clear and unambiguous, [Delaware courts] will give effect to the plain-meaning of the contract's terms and provisions." *Osborn*, 991 A.2d at 1159–60. "Language is ambiguous if it is susceptible to more than one reasonable interpretation." *Manti Hldgs., LLC v. Authentix Acq. Co., Inc.*, 261 A.3d 1199, 1208 (Del. 2021).

The following analysis begins with the crux of the parties' dispute—calculation of the Termination Fee. It then addresses numerous other claims and issues raised concerning (among others) the value of the Contributed Properties, the form of consideration for Acquisition Fees and the Termination Fee, purported loans to HC REIT, reimbursement of O&O Expenses, and property management fees.

A. Calculating The Termination Fee

Count I of the Complaint asserts that HC REIT and Holdings breached the Management Agreement in various ways, including by refusing to pay the "full and correct" Termination Fee due to HCA.[111]

Plaintiffs claim that Defendants breached Section 10(b) of the Management Agreement by failing to pay a Termination Fee calculated according to the terms of the agreement. The Management Agreement states that the "Termination Fee" shall equal "three (3) times the sum of (i) the Asset Management Fees, (ii) Acquisition Fees, and (iii) Leasing Fees in each case, earned by [HCA] during the 24-month period ending as of the most recently completed fiscal quarter prior to the Effective Termination Date . . . ."[112] The formula requires calculating Stockholders' Equity (a component of the Asset Management Fees), Asset Management Fees, and Acquisition Fees. HC REIT did not pay Leasing Fees.[113]

1. Stockholders' Equity

To calculate the Termination Fee, the parties must add the Asset Management Fees, Acquisition Fees, and Leasing Fees. To determine the Asset Management

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[111] Compl. ¶ 75.

[112] Mgmt. Agt. § 1(a).

[113] Tr. (Hale) at 77:4–5; *id.* (Piscetelli) at 210:21–24.

Fees, the parties must calculate Stockholders' Equity.[114] The Management Agreement defines Stockholders' Equity to mean:

> (a) the sum of (1) the net proceeds from (or equity value assigned to) all issuances of the Company's equity and equity equivalent securities (including Common Stock, Common Stock Equivalents, preferred stock and units of limited partnership interest in the Operating Partnership) since inception (allocated on a pro rata daily basis for such issuances during the fiscal quarter of any such issuance), plus (2) the Company's retained earnings at the end of the most recently completed calendar quarter (without taking into account any non-cash equity compensation expense incurred in current or prior periods), less (b) any amount that the Company has paid to repurchase the Company's equity or equity equivalent securities. ***Stockholders' Equity also excludes*** (1) any unrealized gains and losses and ***other non-cash items (including depreciation and amortization) that have impacted stockholders' equity as reported in*** [***HC REIT***]***'s financial statements prepared in accordance with GAAP***, and (2) one-time events pursuant to changes in GAAP, and certain non-cash items not otherwise described above, in each case after discussions between the Manager and the Independent Directors and approval by a majority of the Independent Directors.[115]

On July 22, 2019, Piscetelli calculated Stockholders' Equity at $35,916,217 for Q1 2019 and $37,133,134 for Q2 2019.[116] When Piscetelli calculated Asset Management Fees for Q3 2019, however, she began including the Termination Fee

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[114] The Asset Management Fees equal 1.5% of Stockholders' Equity.

[115] Mgmt. Agt. § 1(a) (emphasis added).

[116] JX 170; Q2 2019 Workbook at "Management Fees 1.5%" cells Q33, S33.

Estimate as an accrued liability.[117] Doing so adjusted Stockholders' Equity for Q2 2019 from $37,133,134 to $34,904,007, bringing it below the $35 million threshold for a 3.0x multiplier under the Side Letter.[118] Piscetelli calculated Stockholders' Equity for Q3 2019 at $34,764,079.[119] HC REIT never calculated Stockholders' Equity above $35 million thereafter, including in its Termination Fee calculation, which continued to include the Termination Fee Estimate as an accrued liability.

Defendants maintain that the Termination Fee Estimate properly reduced Stockholders' Equity in the Asset Management Fee and Termination Fee calculations.[120] Plaintiffs, on the other hand, argue that including the Termination Fee Estimate as an accrued liability was improper under the definition of Stockholders' Equity in the Management Agreement.[121] They say the Termination Fee Estimate should have been excluded as an "other non-cash item[] (including

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[117] JX 184; Q3 2019 Workbook; Tr. (Piscetelli) at 204:18–205:5. Every workbook Piscetelli used to calculate Stockholders' Equity also included two rows titled "Add back: AMF Accrual Estimate" and "Less: AMF Accrual Actual." These rows show HC REIT estimated Asset Management Fees for each quarter, accrued them as liabilities in accordance with GAAP, and added back the estimates. This is the process that Defendants now challenge for the Termination Fee Estimate. Neither party has raised this issue in briefing, however.

[118] *Compare* Q2 2019 Workbook at "Management Fee 1.5%" cell S33 *with* Q3 2019 Workbook at "Management Fee 1.5%" cell U33; *see* Side Ltr. § 3.

[119] Q3 2019 Workbook at "Management Fee 1.5%" cell S33.

[120] DAB at 49.

[121] POB at 22–23.

depreciation and amortization) that ha[s] impacted stockholders' equity as reported in the Company's financial statements prepared in accordance with GAAP."[122] In accounting parlance, Plaintiffs argue that the Management Agreement requires that the Termination Fee Estimate be "added back" to Stockholders' Equity.

In addition, Defendants argue that even if the Termination Fee Estimate was improperly included, Stockholders' Equity never exceeded $35 million prior to the Termination Date.[123] To support that argument, they argue that dividends and distributions should not have been "added back" to Stockholders' Equity and that the Contribution Agreement artificially inflated the value of the Contributed Properties in the Exchange Transaction.

Finally, the parties offer conflicting interpretations of what it means to "build" Stockholders' Equity under the Side Letter.

a. Defendants Improperly Included The Termination Fee Estimate As An Accrued Liability.

Under the Management Agreement, Stockholders' Equity "excludes . . . other non-cash items (including depreciation and amortization) that have impacted stockholders' equity as reported in [HC REIT]'s financial statements prepared in

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[122] POB at 22; Mgmt. Agt. § 1(a).

[123] DAB at 49, 57–61.

accordance with GAAP" ("Adjustment One").[124] Stockholders' Equity also "excludes . . . one-time events pursuant to changes in GAAP, and certain non-cash items not otherwise described above, in each case after discussions between the Manager and the Independent Directors and approval by a majority of the Independent Directors" ("Adjustment Two").[125] The parties agree the Termination Fee Estimate does not fall within Adjustment Two.[126] They dispute whether the Termination Fee Estimate falls within Adjustment One.

Under the plain language of the Management Agreement, the Termination Fee Estimate falls within Adjustment One because it is an "other non-cash item[]" that has "impacted stockholders' equity as reported in [HC REIT]'s financial statements prepared in accordance with GAAP." The Termination Fee Estimate is a non-cash item; HC REIT did not expend cash to pay the Termination Fee until March 31, 2020. And recording the Termination Fee Estimate as an accrued liability impacted lowercase "s" stockholders' equity—a GAAP term—as reported in HC REIT's

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[124] Mgmt. Agt. § 1(a).

[125] *Id.*

[126] *See* DAB at 48 ("There is no dispute that Adjustment Two only applies in the event there is Board approval to exclude a non-cash item and there is no evidence that the Board approved making an adjustment for any non-cash item, and certainly not the Termination Fee accrual."); PRB at 9 (agreeing that "[t]he second [adjustment] addresses one-time GAAP-change events and residual non-cash items requiring Board approval").

financial statements. The Termination Fee Estimate therefore falls squarely within the plain language of Adjustment One.

This plain reading is largely consistent with GAAP accounting principles, with one modification. Lowercase "s" stockholders' equity is a GAAP accounting term that describes the value of a company's assets minus its liabilities.[127] Stockholders' equity is the sum of contributed capital, retained earnings, and accumulated other comprehensive income ("AOCI"), less treasury stock.[128] Those concepts map onto the definition of Stockholders' Equity in the Management Agreement as follows:

Contributed Capital	"(1) the net proceeds from (or equity value assigned to) all issuances of the Company's equity and equity equivalent securities . . . ."
(+) Retained Earnings	"(2) the Company's retained earnings at the end of the most recently completed calendar quarter . . . ."
(+) AOCI	"Stockholders' Equity also excludes (1) any unrealized gains and losses . . . ."
(–) Treasury Stock	"less . . . any amount that the Company has paid to repurchase the Company's equity or equity equivalent securities."

[127] JX 347 [hereinafter Harris Report] at 23.

[128] *Id.* at 23–24.

The first subpart of Adjustment One, "any unrealized gains and losses," tracks AOCI under GAAP.[129] This phrase captures items that directly increase or decrease stockholders' equity but do not impact net income.[130] The second subpart then departs from GAAP by further excluding "other non-cash items (including depreciation and amortization) that have impacted stockholders' equity as reported in [HC REIT]'s financial statements prepared in accordance with GAAP." Like an accrued fee, the specific non-cash items referenced—depreciation and amortization—are not unrealized losses, but operating expenses that have a direct impact on net income (but only an indirect impact on stockholders' equity).[131] The Termination Fee Estimate falls into this second subpart.[132]

Defendants argue that reading "other non-cash items" to include the Termination Fee Estimate would render the phrase "certain non-cash items not otherwise described above" in Adjustment Two superfluous. I disagree. Adjustment One captures "other non-cash items . . . that have impacted stockholders' equity as reported in [HC REIT's] financial statements prepared in accordance with GAAP."

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[129] *See id.* at 26.

[130] *See id.*

[131] JX 175 at 4 (showing a "[d]epreciation and amortization" expense directly impacting HC REIT's net income in the second quarter of 2019).

[132] *Id.* (showing a "[m]anagement termination fee" expense directly impacting HC REIT's net income in the second quarter of 2019).

Adjustment Two could capture other "non-cash items" that GAAP would not permit HC REIT to record. Plaintiffs identify internally generated goodwill as one example.[133] Internally generated research and development, trademarks and brands, or workforce value could be others. Adjustment Two provides the Board additional flexibility to take into account "one-time events" and other "non-cash items" even if GAAP would not otherwise permit it.

To summarize, the Termination Fee Estimate must be excluded from the calculation of Stockholders' Equity. Stated differently, the Termination Fee Estimate, which was included as an accrued liability on HC REIT's financial statements, must be "added back" to Stockholders' Equity.

b. Defendants' Other Belated Adjustments To Stockholders' Equity Are Improper.

Defendants argue that even if the Termination Fee Estimate must be "added back," Plaintiffs nevertheless failed to prove that Stockholders' Equity equaled or exceeded $35 million.[134] They contend that both parties have been calculating Stockholders' Equity incorrectly from the start. First, Defendants argue that when they calculated Stockholders' Equity, they used Plaintiffs' incorrect formula that

[133] PRB at 9.

[134] DAB at 57.

improperly "added back" dividends and distributions.[135] Second, Defendants argue that their Termination Fee calculation accepted Plaintiffs' overvaluation of the Contributed Properties in the Exchange Transaction, which inflated Stockholders' Equity.[136] Defendants say that if the Termination Fee calculation is adjusted to account for their own errors, Stockholders' Equity never reached $35 million.

i. Dividends And Distributions

Defendants argue that the parties' practice of "adding back" dividends to the calculation of Stockholders' Equity was improper under the Management Agreement.[137] Stockholders' Equity includes "the Company's *retained* earnings at the end of the most recently completed calendar quarter . . . ."[138] Retained earnings should reflect income a company earned net of dividends because dividends are not "retained," but paid out.[139] The plain language of the Management Agreement therefore does not permit "adding back" dividends.

Historically, however, that is what the parties did. The section of the Workbook that calculates Stockholders' Equity began with stockholders' equity as

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[135] *Id.* at 57–59.

[136] *Id.* at 37.

[137] *Id.* at 58–59.

[138] Mgmt. Agt. § 1(a) (emphasis added).

[139] Harris Report at 29.

reported on HC REIT's balance sheet for the year ending December 31, 2016.[140] As an initial adjustment, depreciation, amortization of intangibles, *and dividends* were "added back."[141] In subsequent years, the Workbook did not include a separate line item for dividends but also did not reduce retained earnings to account for dividends,[142] the effect of which was to "add[] . . . dividends and distributions back to the calculation."[143]

Piscetelli learned that the Workbook effectively added back dividends when she assumed the Stockholders' Equity calculations. Post, HCA's then-CFO, told Piscetelli in a July 12, 2019 email that "dividends and distributions" were "excluded from common stock."[144] Piscetelli responded that she would "probably work through getting comfortable with the rollforward of the equity balance more for next quarter and we can adjust, if necessary, at that time."[145] Piscetelli never attempted to make this adjustment. Instead, she continued to include dividends in future

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[140] JX 223 at "4. Management Fee 1.5%" cells A6–G6.

[141] *Id.* at "4. Management Fee 1.5%" cells B7–G9.

[142] Tr. (Piscetelli) at 202:22–203:10 ("[Dividends are] not even a component listed under retained earnings to . . . consider for being included or adjusted in the calculation."); *id.* (Harris) at 610:19–611:10.

[143] *Id.* (Harris) at 611:2–10.

[144] JX 171 at 1.

[145] *Id.*

calculations of Stockholders' Equity.[146] On March 31, 2020, when HC REIT delivered its final calculation of the Termination Fee to HCA, HC REIT followed this approach.[147] HC REIT never raised an issue over dividends until five years later, in a June 18, 2025, expert report.[148]

Plaintiffs do not argue that it was proper under the Management Agreement to add back dividends.[149] Instead, they argue that the doctrines of waiver, acquiescence, and/or laches prevent Defendants from belatedly challenging their own calculation of Stockholders' Equity.[150]

"Waiver is the voluntary and intentional relinquishment of a known right." *Realty Growth Invs. v. Council of Unit Owners*, 453 A.2d 450, 456 (Del. 1982). "It implies knowledge of all material facts and an intent to waive, together with a willingness to refrain from enforcing those contractual rights." *AeroGlobal Cap. Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 444 (Del. 2005). "A party asserting waiver must demonstrate that (1) there is a requirement or condition to be waived; (2) the waiving party knew of the requirement or condition; and (3) the waiving party

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[146] *See* Q2 2019 Workbook; Q3 2019 Workbook; Q4 2019 Workbook.

[147] JX 223 (calculating Stockholders' Equity for the Termination Fee).

[148] Harris Report at 29.

[149] *See* POB at 31–32; JX 500.

[150] PRB at 23–26.

intended to waive that requirement or condition." *In re Coinmint, LLC*, 261 A.3d 867, 893 (Del. Ch. 2021).

The exacting standard for waiver has been met here. The Management Agreement includes precise language addressing which inputs must be included and excluded in the calculation of Stockholders' Equity. The contract uses the unambiguous term "retained earnings," which does not include dividends paid out. Despite this, Piscetelli was informed that the Workbook added back dividends.[151] Though she now claims to have "lost sight" of the issue, HC REIT was plainly on notice of what the Management Agreement required and how the Workbook deviated.[152]

HC REIT unequivocally waived its right to argue that the Management Agreement prohibits "adding back" dividends when, on March 31, 2020, it delivered its final calculation of the Termination Fee doing exactly that. By sending HCA a notice claiming that it owed a Termination Fee of $1,645,453, based on a calculation of Stockholders' Equity that included dividends, HC REIT waived its right to argue five years later that dividends should have been excluded from its calculation.

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[151] JX 171.

[152] Tr. (Piscetelli) at 266:22–267:9; *see id.* at 198:1–9 ("[The Stockholders' Equity calculation] process was finite, given that we only had a couple more quarters of asset management fees to pay, and we did not rework the process in its entirety.").

ii. Value Of The Contributed Properties

Defendants also argue that the Contributed Properties were overvalued in the Exchange Transaction, inflating the value of Stockholders' Equity by $3.2 million.[153]

When the Exchange Transaction closed on May 26, 2017, the parties to the transaction—Holmwood and HC REIT, at the time both controlled by the Founders—deemed the net value of the Contributed Properties to be $10,784,161.[154] At all times, both HCA and HC REIT used that valuation to calculate Stockholders' Equity.[155] By sending HCA a notice claiming that it owed a Termination Fee of $1,645,453 based on a calculation of Stockholders' Equity that did not adjust the value of the Contributed Properties, HC REIT waived its right to argue five years later that those properties were overvalued.

Even if Defendants had not waived this issue, however, the record does not support a finding that the Contributed Properties were incorrectly valued in the Exchange Transaction. Assuming, without deciding, that it is appropriate for the Court to second-guess the value of a publicly disclosed transaction that occurred

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[153] DAB at 26–27.

[154] JX 378 at 27; Tr. (Harris) at 545:24–546:8.

[155] JX 223 at "4. Management Fee 1.5%" cell G21.

nearly a decade ago, I am not convinced that the Contributed Properties were overvalued.

At trial, certified appraiser John Scott testified for Defendants that the value of the Contributed Properties was $31,320,000, implying an overvaluation of approximately $3.2 million.[156] The valuation contains obvious errors, including statements that the valuation accounted for the COVID-19 pandemic (which occurred after the valuation date) and vacancy deductions for properties that were never vacant.[157]

Scott reached lower valuations of the Contributed Properties for two primary reasons. First, his appraisers exercised discretion to apply different capitalization rates, resulting in different—some lower and some higher—valuations for each of the properties. The ranges of capitalization rates that Scott's appraisers used were similar to the rates Holmwood employed and resulted in a combined valuation that was just $1.2 million lower than Holmwood's, representing nearly 96% of the value Holmwood attributed to the Contributed Properties.

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[156] This figure reflects the difference between the net contribution value of the Contributed Properties as calculated by Hale ($10,784,161) and as calculated by Scott and Nicholas R. Harris, Defendants' accounting expert ($7,602,678). Harris Report at 21.

[157] Tr. (Scott) at 411:10–412:10, 447:13–18; *see* JX 45 at 2; JX 97 at 57; JX 99 at 51.

Second, the primary driver of Scott's lower valuation was his decision to include a $2 million defeasance fee to account for the less-than-full transfer of title to the CMBS Properties. But nothing in the record suggests HC REIT's use of the CMBS Properties was restricted in any way, title to the CMBS Properties eventually was transferred to HC REIT free and clear, and HC REIT never paid a defeasance fee. Reducing the value of the Contributed Properties in the manner Scott suggests would therefore result in an improper windfall to Defendants.

Thus, the record does not support Defendants' position that the Contributed Properties were overvalued in the Exchange Transaction.

c. "Builds" Stockholders' Equity

Section 3 of the Side Letter amended the Management Agreement to impose a multiplier for the Termination Fee based on Stockholders' Equity that HC REIT "builds":

> (i) if [HC REIT] fails to *build* Stockholders' Equity equaling $15 million, the Termination Fee shall be waived in its entirety;
>
> (ii) if [HC REIT] *builds* Stockholders' Equity equaling or exceeding $15 million but fails to *build* Stockholders' Equity equaling $35 million, the Termination Fee shall be capped at an amount which is the quotient when the Termination Fee, as calculated under the Management Agreement, is divided by two;
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> (iii) if [HC REIT] *builds* Stockholders' Equity equaling or exceeding $35 million and a Listing Event has not occurred, then, for purposes of calculating the Termination Fee, Stockholders' Equity will be capped at $150 million in determining the Asset Management Fees payable to [HCA] under the Management Agreement; and

> (iv) if [HC REIT] *builds* Stockholders' Equity equaling or exceeding $35 million and a Listing Event has occurred, then, for purposes of calculating the Termination Fee, Stockholders' Equity will be capped at $500 million in determining the Asset Management Fees payable to [HCA] under the Management Agreement.[158]

The parties disagree about the meaning of "builds." Plaintiffs argue that "builds" means "achieves," setting "a high-water mark, not a termination-date snapshot."[159] Under that reading, if Stockholders' Equity ever reached the $15 million or $35 million thresholds, the corresponding multiplier (1.5x or 3.0x) applies. Defendants counter that "builds" means "maintains," such that HCA would not receive the higher multiple if Stockholders' Equity hits the threshold but later declines.[160]

Plaintiffs offer the only reasonable interpretation based on the plain language of the agreement. The word "builds" means to "construct," "establish," or "develop."[161] It implies no temporal limitation. Defendants' reading would therefore require the Court to add terms that the parties did not include in the

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[158] Side Ltr. § 3 (emphasis added).

[159] PRB at 16.

[160] DRB at 24.

[161] *See Build*, Oxford English Dictionary, https://www.oed.com/dictionary/build_v?tab=meaning_and_use#12571265 (last visited Nov. 13, 2026) (defining "build" to mean "[t]o construct" or "[t]o establish, develop, or construct"); *Build*, Merriam-Webster, https://www.merriam-webster.com/dictionary/build (last visited Nov. 13, 2026) (defining "build" to mean "to develop according to a systematic plan, by a definite process, or on a particular base").

agreement. "[I]t is axiomatic that courts cannot rewrite contracts or supply omitted provisions." *Murfey v. WHC Ventures, LLC*, 236 A.3d 337, 355 (Del. 2020); *see Golden Rule Fin. Corp. v. S'holder Representative Servs. LLC*, 2021 WL 305741, at *11 (Del. Ch. Jan. 29, 2021) ("It is not the role of this court to second-guess the parties and read into their agreement what they have omitted."), *aff'd*, 267 A.3d 382 (Del. 2021).[162]

If Stockholders' Equity equaled or exceeded $35 million at any time prior to the Termination Date, the 3.0x multiplier governs.

2. Asset Management Fees

Count I of the Complaint also asserts that Defendants breached the Management Agreement by improperly calculating Asset Management Fees, which

[162] The parties knew how to impose temporal limitations in other sections of the Management Agreement. *See, e.g.*, Mgmt. Agt. § 1(a) (specifying that the Termination Fee is calculated "during the 24-month period ending as of the most recently completed fiscal quarter prior to the Effective Termination Date"); *id.* § 6(c) (specifying that "[t]he Asset Management Fee shall be calculated within 30 days after the end of each quarter, based upon the Stockholders' Equity as of the end of such quarter"); *id.* § 6(e)(iii) (providing that "[a]ll Acquisition Fees accrued pursuant to this Section 6(e)(iii) shall be paid to the Manager in Acquisition Fee Securities as of the Payment Date"); *id.* § 6(f) (stating that "if this Agreement is terminated for any reason other than a termination pursuant to Section 11(a) hereof, then the vesting of any Grant shall accelerate such that the Grant shall be fully vested as of the Effective Termination Date, Internalization Termination or Manager Termination Date, as applicable"); *id.* § 10(f)(3) (providing that "if the Common Stock is neither traded on a Securities Exchange nor actively traded over-the-counter, the value shall be the fair market value thereof, . . . as of the Effective Termination Date").

equal 1.5% of Stockholders' Equity, paid quarterly in cash.[163] Because Asset Management Fees are an input in the Termination Fee, calculation of the Asset Management Fees impacts the Termination Fee to which HCA is entitled.

Plaintiffs argue that Defendants improperly reduced the value of the Asset Management Fees beginning in Q1 2019 by including the Termination Fee Estimate as an accrued liability in their calculation of Stockholders' Equity.[164] As explained above, the Termination Fee Estimate must be "added back" to Stockholders' Equity. The Asset Management Fees used in the Termination Fee calculation must be recalculated to correct this error.[165]

3. Acquisition Fees

Plaintiffs claim that Defendants further breached the Management Agreement by not paying the full and correct Acquisition Fees owed to HCA.[166] Because Acquisition Fees, like the Asset Management Fees, are an input in the Termination Fee, calculation of the Acquisition Fees also affects the Termination Fee to which HCA is entitled.

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[163] Compl. ¶ 75.

[164] POB at 42.

[165] On summary judgment, the Court ruled that the Termination Fee "must include the 24-month period ending March 31, 2020," since "HCA served as Manager every day of the first quarter of 2020." Dkt. 65. The parties must make this adjustment as well.

[166] Compl. ¶ 75.

Specifically, Plaintiffs argue that (1) HC REIT failed to include all accrued and unpaid Acquisition Fees when it calculated the Termination Fee,[167] and (2) HC REIT improperly withheld Acquisition Fees for the Disputed Acquisitions.[168]

First, on the question of accrued and unpaid fees, Section 6(e)(iii) of the Management Agreement states that:

> [U]ntil the earlier of (x) the date on which [HC REIT] engages in a Listing Event with respect to [HC REIT's] Common Stock or (y) the fourth anniversary of the date of this Agreement (such earlier date, the "*Payment Date*"), all Acquisition Fees payable to [HCA] shall be accrued but not paid. All Acquisition Fees accrued pursuant to this Section 6(e)(iii) shall be paid to [HCA] in Acquisition Fee Securities as of the Payment Date.[169]

This language provides that all Acquisition Fees earned by HCA will be accrued and unpaid until the Payment Date, and accrued Acquisition Fees "shall be paid" by HC REIT "as of the Payment Date." The definition of Termination Fee then provides:

> [I]f Acquisition Fees have been accrued in accordance with Section 6(e)(iii) but are unpaid as of the Effective Termination Date, then all such accrued Acquisition Fees (whether accrued in the applicable 24-month period or prior thereto) shall be included in the calculation of the Termination Fee.[170]

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[167] POB at 38.

[168] Compl. ¶ 75; POB at 39.

[169] Mgmt. Agt. § 6(e)(iii).

[170] *Id.* § 1(a).

Acquisition Fees were accrued but unpaid before the Payment Date.[171] The Payment Date, the fourth anniversary of the Management Agreement, fell on March 31, 2020.[172] This was also the Effective Termination Date.[173] That day, Piscetelli told HCA:

> In accordance with Section 6(e)(ii) and 6(e)(iii) of the HCA Management Agreement, HC Government Realty Trust, Inc. will be issuing common stock of the REIT as payment of the Acquisition Fees payable effective March 31, 2020. Attached please find the summary schedule of the acquisition fee by property for which such Acquisition Fee Securities will be issued. ***These shares have been recorded with our stock transfer agent as of March 31, 2020***.[174]

"Paid" means "marked by the receipt of pay." *Paid*, Merriam-Webster, https://www.merriam-webster.com/dictionary/paid (last visited Nov. 13, 2026); *see Township Cap., LLC v. Audent Glob. Asset Mgmt., LLC*, 2026 WL 62905, at *2 (Del. Ch. Jan. 6, 2026) (applying this definition to an unambiguous contract). Plaintiffs bear the burden to prove that the accrued Acquisition Fees were not paid on the Effective Termination Date. Without further evidence that recording the Acquisition Fee Securities with the stock transfer agent failed to accomplish payment, Plaintiffs have not met this burden.

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[171] Tr. (Piscetelli) at 182:11–183:1.

[172] Mgmt. Agt. at 1; Tr. (Piscetelli) at 244:12–14.

[173] JX 155.

[174] JX 225 (emphasis added).

Second, as to Acquisition Fees for the Disputed Acquisitions, Section 6(e)(i) of the Management Agreement states that:

> The Manager will receive an Acquisition Fee of 1.0% of the Acquisition Cost for each Investment made on behalf of [HC REIT and Holdings] at the closing of the acquisition of such Investment for its services in identifying Investments for purchase, arranging for the purchase of such Investments, coordinating the closing on such Investments and following up on and resolving post-closing transaction issues on behalf of [HC REIT and Holdings].[175]

Plaintiffs argue that Defendants failed to pay HCA an Acquisition Fee for the Disputed Acquisitions that closed in October 2019. Under the plain language of Section 6(e)(i), HCA is entitled to a fee "for its services in identifying Investments for purchase, arranging for the purchase of such Investments, coordinating the closing on such Investments and following up on and resolving post-closing transaction issues . . . ."[176] Stanton conceded that HCA did not provide services in connection with the Disputed Acquisitions.[177] Because HCA did not provide these services, it is not entitled to a fee.

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[175] Mgmt. Agt. § 6(e)(i).

[176] *Id.*

[177] Tr. (Stanton) at 367:5–368:20. At trial, Stanton testified that HCA "did identify these [Disputed Acquisitions]," *id.* at 367:20–21, but at his deposition, he conceded that HCA "did not provide those services for those three transactions." Stanton Dep. Tr. at 225:13–14.

Plaintiffs counter that HCA should nonetheless receive Acquisition Fees for the Disputed Acquisitions because Defendants prevented HCA from performing its duties under the Management Agreement.[178] The trial record does not support that position. Plaintiffs point to the Amended Investment Guidelines, which state that "[n]o investment shall be made for which [HCA's] investigation, pursuit, negotiation, financing and/or acquisition did not receive prior approval from the [HC REIT] Board."[179] According to the minutes of a March 13, 2019 Board meeting, when Stanton "asked how the Manager w[ould] operate until the termination of the Management Agreement between the Company and the Manager," Kaplan, Jr. "explained that the amended Investment Guidelines under the Management Agreement, to be considered by the Board, w[ould] effectively strip [HCA] of any control over the Company."[180] Although Kaplan, Jr. told Stanton that HCA would no longer have "control over the Company," this did not prevent HCA from proposing acquisitions to the Board. The March 13 meeting minutes also note that Stanton "asked how [HCA] c[ould] continue to meet its requirements under the Management Agreement," and Kaplan, Jr. responded that HCA was "subject to the direction and supervision of the [HC REIT] Board which shall direct [HCA] to

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[178] POB at 41.

[179] JX 153, Ex. I.

[180] *Id.* at 10.

withhold any further action on behalf of the Company" such that HCA "w[ould] not be violating any duties under the Management Agreement."[181] In other words, Kaplan, Jr. explained that by refraining from acting on behalf of the Company, HCA would not be in breach of the Management Agreement. Again, although HCA could not control or act on behalf of the Company without Board approval, nothing "prevented" HCA from proposing potential acquisitions to the Board.

The record therefore does not support a finding that HC REIT prevented HCA from performing its duties under the Management Agreement.

* * *

With the benefit of the analysis above, the parties are directed to meet and confer on the proper calculation of the Termination Fee, including the calculation of Stockholders' Equity and Asset Management Fees. The parties must work together in good faith to jointly prepare a revised calculation.

B. The Management Agreement Authorized HC REIT To Pay The Termination Fee And Acquisition Fee In Common Stock.

Count I of the Complaint also asserts that HC REIT and Holdings breached the Management Agreement by "unilaterally selecting" the Termination Fee Securities and Acquisition Fee Securities.[182] On the Termination Date, HC REIT

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[181] *Id.*

[182] Compl. ¶ 76.

notified HCA that it would pay the Termination Fee in cash and HC REIT common stock.[183] The same day, HC REIT notified HCA that it would pay outstanding Acquisition Fees in HC REIT common stock.[184] Plaintiffs argue that under the Management Agreement, Defendants could not unilaterally select the form of securities with which to pay those fees.[185]

1. Termination Fee Payment

Section 10(f) of the Management Agreement states that the Termination Fee must be paid as follows:

> Any Termination Fee payable to [HCA] pursuant to Section 10(b), 10(e) or 11(b) hereof shall be payable, at the election of the [HC REIT] Board (including a majority of the Independent Directors) in cash, Termination Fee Securities, or a combination thereof. "*Termination Fee Securities*" shall mean ***Common Stock, or such other equity securities of the Company***, including without limitation LTIP Units, ***as may be determined by the Manager in its reasonable discretion***.[186]

The parties offer conflicting interpretations of the italicized language above. Defendants argue that "as may be determined by the Manager in its reasonable discretion" modifies "such other equity securities of the Company."[187] Under that reading, Defendants may elect to pay Termination Fee Securities in common stock

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[183] JX 223.

[184] JX 225.

[185] POB at 43–45.

[186] Mgmt. Agt. § 10(f) (emphasis added).

[187] DAB at 65.

or "other equity securities," but only if they choose the latter may HCA determine the form of those "other equity securities" in its reasonable discretion. Plaintiffs, on the other hand, argue that "as may be determined by the Manager in its reasonable discretion" modifies both "Common Stock" and "such other equity securities of the Company," meaning HCA can determine the form of securities in either case.[188] On summary judgment, I held that "[b]oth parties offer reasonable interpretations of the provisions" such that "the contract language is ambiguous."[189]

To resolve the ambiguity, I must either apply the doctrine of *contra proferentem* or look to extrinsic evidence. Because the Founders negotiated the Management Agreement on behalf of HCA, on one side, and HC REIT and Holdings, on the other, the only extrinsic evidence available is the testimony of Stanton, who (unsurprisingly) now claims the Founders intended that HCA would have the discretion to choose the form of security.[190]

"[I]t is proper to consider extrinsic evidence of bilateral negotiations when there is an ambiguous contract that was the product of those negotiations." *SI Mgmt. L.P. v. Wininger*, 707 A.2d 37, 43 (Del. 1998). But "[w]hen an agreement . . . makes promises to parties who did not participate in negotiating the agreement, Delaware

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[188] POB at 44.

[189] Dkt. 65.

[190] POB at 43–45; Tr. (Stanton) at 316:21–318:3.

courts apply the general principle of *contra proferent[e]m*, which holds that ambiguous terms should be construed against their drafter." *Stockman v. Heartland Indus. P'rs, L.P.*, 2009 WL 2096213, at *5 (Del. Ch. July 14, 2009).

> Where one party chooses the terms of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party. He is also more likely than the other party to have reason to know of uncertainties of meaning. Indeed, he may leave meaning deliberately obscure, intending to decide at a later date what meaning to assert. In cases of doubt, therefore, so long as other factors are not decisive, there is substantial reason for preferring the meaning of the other party.

Restatement (Second) of Contracts § 206 cmt. a (Am. L. Inst. 1981). Delaware courts apply the doctrine of *contra proferentem* to construe ambiguous terms in a corporate instrument to "protect[] the reasonable expectations of people who join [an investment entity] after it was formed and must rely on the face of the [document] to understand their rights and obligations when making the decision to join." *Stockman*, 2009 WL 2096213, at *5; *see also Dieckman v. Regency GP LP*, 155 A.3d 358, 366 (Del. 2017) ("[I]n the case of an ambiguous partnership agreement of a publicly traded limited partnership, ambiguities are resolved as with publicly traded corporations, to give effect to the reading that best fulfills the reasonable expectations an investor would have had from the face of the agreement.").

The doctrine of *contra proferentem* compels Defendants' reading here. When HCA, HC REIT, and Holdings entered into the Management Agreement, the Founders controlled all three entities. They expected that HC REIT would be

marketed to outside investors; indeed, HC REIT issued a preliminary offering circular within months of the Management Agreement's execution.[191] It was therefore incumbent upon the Founders to make the terms of the Management Agreement clear. *See Stockman*, 2009 WL 2096213, at *5 (explaining that "where an entity's governing instruments are involved, the onus is on the drafter to be clear" because investors have "very little say about those terms except to take them or leave them") (quoting *Penn Mut. Life Ins. Co. v. Oglesby*, 695 A.2d 1146, 1150 (Del. 1997)).

Applying the doctrine of *contra proferentem*, the ambiguity in Section 10(f) must be construed against Plaintiffs. Defendants' interpretation controls; HC REIT was permitted to pay the Termination Fee in common stock without consulting HCA.

2. Acquisition Fee Payment

Section 6(e)(ii) of the Management Agreement provides that the Acquisition Fee must be paid as follows:

> The Acquisition Fee shall be paid in ***Common Stock, or such other equity securities of the Company***, including without limitation LTIP Units, ***as may be determined by the mutual consent of the*** [***HC REIT***] ***Board*** (including a majority of the Independent Directors) ***and the Manager*** (the "*Acquisition Fee Securities*").[192]

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[191] Tr. (Stanton) at 300:3–13; JX 77.

[192] Mgmt. Agt. § 6(e)(ii) (emphasis added).

The parties again offer conflicting interpretations of the italicized language above. Defendants argue that "as may be determined by the mutual consent" modifies "such other equity securities of the Company." Under that reading, Defendants may elect to pay the Acquisition Fee in Common Stock or "other equity securities," but only if they choose the latter must HC REIT's board and HCA mutually agree on the form of securities. Plaintiffs, on the other hand, argue that "as may be determined by the mutual consent" modifies both "Common Stock" and "such other equity securities of the Company," meaning in either case, HC REIT's board and HCA must mutually agree on the form of securities. As with the form of Termination Fee Payment, on summary judgment, I held that "[b]oth parties offer reasonable interpretations of the provisions" such that "the contract language is ambiguous."[193]

For the reasons explained above, applying the doctrine of *contra proferentem*, the ambiguity in Section 6(e)(ii) is construed against Plaintiffs. Defendants' interpretation controls; HC REIT was permitted to pay the Acquisition Fee in common stock without consulting HCA.

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[193] Dkt. 65.

C. Plaintiffs Did Not Prove Defendants Breached The Management Agreement By Failing To Repay Loans.

Count III of the Complaint asserts that HC REIT has refused to repay "loans" that Plaintiffs purportedly made to HC REIT between May 2017 and April 2018.[194]

As set out above, the record shows that between May 2017 and April 2018, Holmwood transferred $408,514 to HC REIT to cover the Shortfall Amounts.[195] The parties did not sign contracts memorializing the terms under which the Shortfall Amounts were paid, but Defendants do not deny that HC REIT received Shortfall Amounts from Holmwood.[196] They contest only the terms on which the Shortfall Amounts must be repaid. Plaintiffs assert that the Shortfall Amounts were made as loans with the understanding that they would be payable on demand and accrue at least 8% interest.[197]

To prove a claim for breach of contract, a plaintiff must first prove "the existence of a contract" by a preponderance of the evidence. *Thomas v. Am. Midstream GP, LLC*, 2024 WL 5135828, at *5 (Del. Ch. Dec. 17, 2024), *appeal refused*, 339 A.3d 752 (Del. 2025); *Revolution Retail Sys., LLC v. Sentinel Techs.,*

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[194] Compl. ¶¶ 85–89; *see supra* pp. 22–23.

[195] JX 353 at "HC REIT Loans" cells B16–F19; JX 274 at 18; Tr. (Piscetelli) at 183:6–24; *id.* (Stanton) at 321:11–18.

[196] Tr. (Stanton) at 321:19–322:8; *id.* (Piscetelli) at 286:2–8.

[197] PRB at 58–60; Tr. (Stanton) at 323:7–22. In briefing, however, Plaintiffs point to internal Holmwood documents that list the interest rate as 12%. POB at 12.

Inc., 2015 WL 6611601, at *9 (Del. Ch. Oct. 30, 2015). Plaintiffs have not satisfied their evidentiary burden here. Aside from Stanton's self-serving testimony, the record evidence does not support Plaintiffs' claim that the Shortfall Amounts were paid pursuant to a loan agreement (written or oral) under which the amounts would be payable on demand and accrue interest. Nevertheless, the parties agree that the Shortfall Amounts were not a gift, and I am convinced that the parties intended for HC REIT to repay those amounts. The parties' briefing does not address the terms on which the Shortfall Amounts should be repaid if they were not loans. The parties should meet and confer on a proposal for repayment in the first instance.

D. HCA Is Responsible For O&O Expenses Above The 15% Cap.

Count IV of the Complaint seeks a declaratory judgment that HCA is not required to pay additional O&O Expenses under the Side Letter.[198] Count I of the Counterclaims asserts that HCA breached the Management Agreement by refusing to reimburse Defendants for O&O Expenses above the 15% cap in the Side Letter.[199] Because the parties assert mirror-image claims, each side bears the burden to prove its respective position.

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[198] Compl. ¶¶ 90–96.

[199] Countercl. ¶ 95.

Section 7 of the Management Agreement governs payment and reimbursement of expenses as follows:

> (a) [HCA] shall be responsible for the expenses related to any and all personnel of [HCA] and its Affiliates who provide services to the Company Entities pursuant to this Agreement . . . .
>
> (b) [HC REIT and Holdings] shall pay (or cause to be paid) all of the costs and expenses of each Company Entity and shall reimburse [HCA] or its Affiliates for documented expenses of [HCA] and its Affiliates incurred on behalf of any Company Entity that are reasonably necessary for the performance by [HCA] of its duties and functions hereunder . . . . Without limiting the generality of the foregoing, it is specifically agreed that the following costs and expenses of the Company Entities shall be paid by [HC REIT and Holdings] and shall not be paid by [HCA] or Affiliates of [HCA]: . . .
>
> > (vi) costs associated with . . . any of [HC REIT's] securities offerings; . . .
> >
> > (ix) expenses incurred by . . . [HCA] for travel on [HC REIT's and Holdings'] behalf and other out-of-pocket expenses incurred by . . . [HCA] in connection with the . . . establishment of any of [HC REIT's] securities offerings . . . .
>
> (c) Costs and expenses incurred by [HCA] on behalf of [HC REIT and Holdings] shall be reimbursed monthly to [HCA].[200]

Section 1 of the Side Letter then modifies the Management Agreement by limiting HCA's right to reimbursement of O&O Expenses:

> Notwithstanding anything contained in the Management Agreement or any term of the Offering, after the termination of the Offering and expiration of the 120 Day Period (as defined below), [HCA] shall repay

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[200] Mgmt. Agt. §§ 7(a)–(c). The Management Agreement defines "Company Entities" to mean HC REIT, Holdings, and their respective subsidiaries. *Id.* § 1(a).

> a portion of the reimbursements it has received in connection with the Offering (the "Manager Reimbursements"), to the extent that Organization and Offering Expenses exceeds 15% of the gross proceeds received from the Offering. In the event any portion of the Manager's Reimbursements are repayable to [HC REIT and Holdings] under this Agreement, the amount to be repaid will equal an amount that when deducted from the Organization and Offering Expenses causes the difference to equal 15% of the gross proceeds received from the Offering.[201]

Focusing on the first sentence of Section 1, Plaintiffs argue that HCA is required only to "repay" amounts that it has received as "reimbursements."[202] Focusing on the second sentence of Section 1, Defendants counter that HCA must pay "an amount that when deducted from the [O&O] Expenses causes the difference to equal 15% of the gross proceeds received from the Offering"—in other words, HCA must pay all O&O Expenses over the 15% cap.[203] On summary judgment, I explained:

> The Side Letter Agreement first appears to limit repayment to "the reimbursements [the Manager] has received in connection with the Offering," but then further provides that "the amount to be repaid will equal an amount that when deducted from the [O&O] Expenses causes the difference to equal 15% of the gross proceeds received from the Offering." The language taken together is ambiguous, rendering summary judgment inappropriate.[204]

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[201] Side Ltr. § 1.

[202] POB at 56–57.

[203] DAB at 69.

[204] Dkt. 65.

Because the language is ambiguous, and because (as discussed above) the doctrine of *contra proferentem* applies, the ambiguity in Section 1 of the Side Letter must be construed against Plaintiffs.[205] HCA must pay all O&O Expenses that exceeded the 15% cap.

The Offering generated $8,871,660 in proceeds. O&O Expenses exceeded the 15% cap by $723,932. HC REIT paid some of the O&O Expenses directly, while HCA advanced other O&O Expenses, received reimbursement for $284,279, then repaid those reimbursements to HC REIT. It is not clear from the trial record, after accounting for HCA's initial payments, reimbursement, and repayment, whether HCA did, in fact, pay less than $723,932 for the excess O&O Expenses. The parties should meet and confer on this issue and, if necessary, submit additional payment documentation.[206]

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[205] *See supra* pp. 51–54.

[206] HC REIT withheld declared dividends and distributions from Plaintiffs to offset O&O Expenses. Whether HCA did or did not pay less than $723,932 for the excess O&O Expenses will determine whether that offset was proper.

E. Defendants Did Not Prove HCA Breached The Management Agreement By Causing HC REIT To Pay Duplicative Property Management Fees.

Count I of the Counterclaims asserts that HCA breached the Management Agreement by failing to perform its duties in good faith by causing HC REIT and Holdings to pay $76,322 in duplicative management fees to HCM.[207]

HCM served as the property manager for the SPEs prior to the Recapitalization Transaction and for a short time after.[208] The Property Management Agreements with each of the SPEs gave HCM "the right, in its sole discretion, to subcontract some or all of the property management functions . . . to local property managers . . . ."[209] HCM routinely exercised this right to contract with "boots-on-the-ground" property managers.[210]

Following the Recapitalization Transaction, Piscetelli reviewed the SPEs' books and records and identified what she believed were duplicative property management fees charged to four of the SPEs.[211] When Piscetelli requested an explanation, HCM responded that the identified charges "pertain[ed] to building

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[207] Countercl. ¶ 96; *see* Mgmt. Agt. § 8(a) ("[HCA] assumes no responsibility under this Agreement other than to render the services called for hereunder in good faith . . . .").

[208] Tr. (Piscetelli) at 140:14–141:9.

[209] JX 55 § 2.14.

[210] Tr. (Piscetelli) at 138:19–139:15.

[211] *Id.* at 142:18–143:11.

engineering services," which the Property Management Agreements do not require HCM to pay.[212]

Defendants bear the burden to prove by a preponderance of the evidence that HCA breached the Management Agreement by failing to act in good faith. Defendants' sole evidentiary support for this claim is an October 2019 email sent by Piscetelli and a spreadsheet generated in connection with HCA's termination on March 31, 2020.[213] Defendants failed to prove by a preponderance of the evidence, meaning it is more likely than not, that HCA overcharged the SPEs.[214]

Judgment on Count I of the Counterclaims is entered for HCA.

F. Defendants Proved Holmwood Breached The Contribution Agreement.

Count II of the Counterclaims asserts that Plaintiffs breached the Contribution Agreement by failing to obtain lender consent to enter into the Exchange Transaction and failing to provide the Bring-Down Representations after the Open Interest Closing.[215]

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[212] JX 192 at 2.

[213] *Id.*; JX 224.

[214] Defendants also claim that HCA acted in bad faith by causing HC REIT to pay $7,500 in undocumented expense reimbursements associated with the CMBS Properties. DAB at 75–77. Defendants failed to meet their evidentiary burden on that issue.

[215] Countercl. ¶ 100.

Under the Contribution Agreement, Holmwood represented and warranted as of the closing date that "[n]either entry into nor the performance of, or compliance with, [the Contribution Agreement] by [Holmwood] has resulted, or will result, in any violation of, or default under," any "mortgage indenture, lien agreement, note, [or] contract" (the "No-Default Representation").[216] Defendants argue that Holmwood failed to obtain consent from the lender under the CMBS Loan Agreement before entering into the Contribution Agreement. Section 4.2.1 of the CMBS Loan Agreement required Holmwood to obtain "the prior written consent of Lender" to "sell, convey, . . . assign or transfer the Property or any part thereof, or any interest, direct or indirect, in Borrower or Sole Member, whether voluntarily or involuntarily" or to enter into "an agreement by Borrower for . . . a sale, assignment or other transfer of, or the grant of a security interest in, Borrower's right, title and interest in and to any Leases or any Rents . . . ."[217]

When the Exchange Transaction closed, Holmwood "assign[ed] to [Holdings] . . . all of [Holmwood's] right, title and interest in and to any and all profits, losses and distributed cash flow, if any, of each [CMBS Property] . . . ."[218] Holmwood

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[216] Contr. Agt. § 11.C.

[217] JX 402 § 4.2.1. The CMBS Loan Agreement defines "Borrower" to mean the CMBS Properties and "Sole Member" to mean Holmwood. *Id.* at 1; *id.* § 1.1.

[218] Contr. Agt. Am. § 3(b)(ii).

failed to obtain consent from the lender before entering into the Contribution Agreement, causing the lender to issue a Notice of Default.[219] This violated the No-Default Representation. Defendants did not cure the default by obtaining lender consent until March 27, 2023, incurring $517,463.35 in expenses to do so.[220]

Plaintiffs argue that they could not have breached the Contribution Agreement by failing to deliver clear title to the CMBS Properties because the parties agreed that Holmwood would not "have any obligation to procure releases of the Existing Mortgage Liens or the [CMBS Loan Agreement] as a condition precedent to [Holdings'] obligation to close hereunder."[221] This argument conflates Holmwood's obligations under the Contribution Agreement. Although the parties agreed Holmwood would not transfer full title to or procure releases of liens on the CMBS Properties at closing, Holmwood nonetheless separately agreed in the No-Default Representation that entering into the Contribution Agreement would not cause a default under any contract. That representation proved false and represents a breach of the agreement.

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[219] JX 264 at 2 ("The assignment by Holmwood (as Sole Member) of its rights in the profits, losses and cash flow of Borrower was a 'Transfer' and, without the prior written consent of Lender having been obtained, a violation of Section 4.2.1 of the Loan Agreement.").

[220] JX 273; JX 358; JX 422; Tr. (Hale) at 71:16–72:4; *id.* at 72:19–73:19.

[221] PRB at 54; Contr. Agt. § 6.A.

Plaintiffs argue that Defendants cannot prove damages for this breach because Section 6.A of the Contribution Agreement already allocates to Defendants the responsibility to pay the expense of obtaining consents. Section 6.A states:

> Prior to or at Closing, and as a condition precedent to the obligations of [Holmwood] and [Holdings] to close hereunder, [Holmwood] shall procure, ***at the sole cost and expense of*** [***Holdings***], any consents required from any or all of the holders of the Existing Loans and the [CMBS Loan Agreement] as a result of the contribution of the LLC Interests without repayment of the Existing Loans or the [CMBS Loan Agreement].[222]

By its plain language, Section 6.A provides that when Holmwood procures consents from lenders prior to closing, Holdings will bear the expense. Here, Holmwood did not procure the necessary consents prior to closing, and by its terms, Section 6.A does not apply.

Defendants incurred $517,463.35 to obtain lender consent.[223] They are entitled to damages in that amount. Plaintiffs also failed to provide Defendants with the Bring-Down Representations as required under the Amendment.[224] Defendants did not prove additional damages resulting from this breach.

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[222] Contr. Agt. § 6.A (emphasis added).

[223] JX 358 at cells C22–F22; JX 384 at 33 (showing that Holdings "paid approximately $520,000 in consent fees, legal fees, and other closing costs to complete the transfer").

[224] Tr. (Stanton) at 359:8–10; *id.* (Hale) at 74:1–21.

G. Defendants Did Not Prove Their Counterclaim For Unjust Enrichment.

Count III of the Counterclaims asserts a claim against Plaintiffs for unjust enrichment on the theory that the Contributed Properties were overvalued by approximately $3.2 million in the Exchange Transaction.[225] As explained above, Defendants failed to prove that the Contributed Properties were overvalued.[226] Judgment on Count III of the Counterclaims is entered for Plaintiffs.

III. CONCLUSION

The parties went to trial on numerous claims for breach of contract, raising more than a dozen interpretive questions for resolution. The result is a mixed bag in which Plaintiffs prevailed on some issues and Defendants prevailed on others. The parties are directed to meet and confer on a proposed form of order to implement the rulings herein.

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[225] Countercl. ¶¶ 102–09; DAB at 26–27.

[226] *See supra* pp. 39–41.