EFiled: May 02 2022 03:18PM EDT
Filing ID 67574856
Case Number 41,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROCKPOINT GROUP, L.L.C.,	)	
	)	
Defendant Below/Appellant,	)	
	)	
v.	)	No. 41, 2022
	)	
JONATHAN H. PAUL,	)	Case Below: Court of Chancery of the
	)	State of Delaware C.A. No. 2018-
Plaintiff Below/Appellee.	)	0907-JTL)
	)	
	)	
	)	

APPELLEE'S CORRECTED ANSWERING BRIEF

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Dated: April 25, 2022
Corrected: May 2, 2022

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NATURE OF PROCEEDINGS

Appellee Jonathan H. Paul ("Paul") is a co-founder and former Managing Member of a real estate private equity firm, Rockpoint Group, LLC (the "Company"). Paul brought this action on December 14, 2018 to recover the portion of the transaction proceeds that the Company is contractually obligated to pay him upon a Company Sale, as defined in the parties' contract. This is a straightforward breach of contract case that the trial court properly decided by analyzing the plain language of the parties' contract and by applying basic principles of corporate law. The trial court's decision should be affirmed.

Before Paul left the Company, Paul and the Company entered into the Ninth Amendment to the Amended and Restated Limited Liability Company Agreement of Rockpoint and Consent of Voting Managing Members ("Ninth Amendment"), which memorializes the terms of Paul's severance from the Company. Article 6 of the Ninth Amendment protects Paul's ongoing minority interest should the Company experience certain liquidity events after his departure. More specifically, Paul is entitled to share in the proceeds of a Company Sale. The Ninth Amendment defines six different types of events that qualify as a Company Sale. Only one of the six definitions is at issue in this appeal – Company Partial Asset Sale.

The definition of Company Partial Asset Sale contains just three requirements. First, the Company must sell "in a single transaction or series of related transactions . . . any portion of the interest owned by the Company in one or more Fund GPs or Other Business GPs." A189. Second, the sale cannot be "to a wholly owned Subsidiary of the Company." *Id*. Third, the sale's proceeds must be "in whole or in part, distributed to Members." *Id*.; *see also* A970 (defining "Members" as "the Managing Members and the Nonmanaging Members").

Understanding how the Company and its related entities were and are structured is important to understanding how a liquidity event could satisfy this definition. The Company established four main private equity funds (the "Funds"). Each of the Funds is a limited partnership and managed by a wholly-owned general partner (the "Fund GPs"). The Fund GPs provide three primary revenue streams – management fees ("Fee Income"), returns on invested capital ("Investor Income"), and success fees awarded to the Fund GPs ("Promote Income"). Prior to the events at issue here, the Company owned all of the equity, i.e. limited liability interests in each Fund GP (the "Fund GP Interests") and, received all of the Fee Income, Investor Income, and Promote Income generated by the Fund GPs. Order Granting Declaratory Judgment Regarding Definition of Company Partial Asset Sale, Exhibit A (the "Order"), ¶ 7; A1042-43; A1244-52. The Managing Members

owned membership interests *in the Company* with rights to distributions that reflected their respective indirect interest in the Fund GPs. Order, ¶¶ 10, 11.

In 2018, the Company was involved in a multi-step transaction (the "Transaction") that met all three requirements of the Company Partial Asset Sale definition and triggered Paul's right to an allocation of Transaction proceeds. As the trial court correctly found, the Transaction was more than a simple internal reorganization as the Company claims. It involved the sale by the Company of some of its assets—its ownership of the Fund GP Interests—to newly-formed entities that were not subsidiaries of the Company, the proceeds of which were distributed to the Managing Members.

Specifically, the Transaction involved four steps, all of which occurred "virtually simultaneously." Order, ¶ 15. First, the Managing Members created two new parent entities—Rockpoint GP Holdings, L.P. ("GP Holdings") and Rockpoint Manager Holdings, L.P. ("Fee Holdings") (collectively, the "Parent Entities")—in anticipation of receiving an investment from BSCH Master I Sub (Rhino), L.P. ("BSCH"), a subsidiary of the Blackstone Group, L.P. ("Blackstone"). A156. Second, and importantly for this appeal, the Company sold certain of the Fund GP Interests it owned to GP Holdings in exchange for GP Holdings limited partner interests, and then the Company distributed the limited partner interests it just received to the Managing Members. Third, the Managing

Members sold their right to receive Excess Fee Income from the Company, i.e. their Fee Interests, to Fee Holdings. A625-26. Fourth, BSCH purchased a 21.687% membership in the Parent Entities for $450 million. A88, ¶ 40. Of that amount, $325 million was distributed to the Managing Members. A243-44, ¶¶ 1.3, 1.4. After the Transaction, the Company only held a small portion of the Fund GP interests that related to Investor Income and Promote Income. *See, e.g.*, Appellant's Br. at 41; A1244-55, Schedule 3.3(a).

Because these four steps satisfied all three elements of the Company Partial Asset Sale definition—they involved a sale by the Company of interests it owned to entities that are not Company subsidiaries, the proceeds of which were distributed to the Managing Members—the trial court correctly found that the Transaction qualified as a Company Partial Asset Sale and granted Paul's Motion for Summary Judgment on that issue.

The Company raises several arguments on appeal, none of which are supported by the plain language of the Ninth Amendment or the law. First, the Company argues that there was no sale of interests owned by the Company. As the trial court correctly found, though, the Company transferred limited liability interests it owned in the Fund GPs to GP Holdings in exchange for LP interests. The Company then distributed the same limited partner interests in GP Holdings the Company just received to the Managing Members. Further, the Company's

argument that there was no sale because BSCH did not purchase any Fund GP Interests ignores the multi-step nature of the Transaction. As a result of the Transaction, the Parent Entities (and BSCH and the Managing Members indirectly) now own rights to income streams from the Fund GPs that the Company owned before the transaction.

Second, the Company argues that the trial court misinterpreted the phrase "owned by" that appears in two separate provisions of the Ninth Amendment. However, the trial court properly interpreted the plain meaning from language of the phrases in context with the associational words in the respective provisions. The phrases were not interpreted more broadly, but rather the objective nouns they were paired with gave them different meanings. This interpretation effectuated the intent of the parties, which was to define what would constitute a liquidity event and to ensure that "Paul would receive his fair share of the value that the liquidity event generated." Order ¶ 27(a).

Third, the Company creates out of whole cloth a requirement that Paul's interests must have been transferred in order for the Company Partial Asset Sale definition to be satisfied. That requirement simply does not exist in the definition. Further, as the trial court correctly observed, the conclusion that the Transaction satisfied the Company Partial Asset Sale definition is consistent with the purpose of Article 6.

The trial court entered an Order Granting Declaratory Judgment Regarding Definition of Company Partial Asset Sale on July 28, 2021. The Company filed a Notice of Appeal on February 8, 2022 and filed its Opening Brief on Appeal on March 25, 2022. This is Paul's Answering Brief on Appeal.

SUMMARY OF ARGUMENT

1. Appellant's summary of argument is denied. The trial court correctly held that there was a sale of assets because the Company: (1) transferred assets it owned at the Company level (interests in the Fund GPs) to GP Holdings and received limited partner interests in GP Holdings in exchange; and (2) distributed the same limited partner interests in GP Holdings the Company just received to the Managing Members. The Company's argument that the Transaction was a "purely internal Reorganization" because the Managing Members' underlying economic interests did not change ignores the multi-step nature of the Transaction in which the "reorganization" was a necessary part. Looking at the Transaction as a whole, as the Ninth Amendment and Delaware law requires, the Managing Members' economic interests did change: they were diluted in exchange for $325 million dollars in proceeds from BSCH.

Further, the Company's argument is a red herring. The test under the unambiguous language in the Ninth Amendment to determine whether there was a Company Partial Asset Sale is whether ***the Company*** sold "any portion of the interest owned by the Company in one or more Fund GPs" (A189) and not whether the Managing Members' economic interests were sold, transferred, or changed.

The Company's additional argument that there was no sale because BSCH did not directly purchase any Fund GP Interests fails for two separate reasons.

First, the argument again ignores the plain language of the definition of Company Partial Asset Sale which focuses on whether the Company sold any of the Fund GP Interests it owned and not on what an ultimate investor in the entities acquired. Second, the Company ignores the multi-step nature of the Transaction, and in particular, the step involving the partial asset sale of the Fund GP Interests (Promote and Investor Interests) to GP Holdings. As a result of the Transaction, the Parent Entities (and BSCH and the Managing Members indirectly) now own rights to income streams from the Fund GPs that the Company owned before the Transaction.

2. Appellant's summary of argument is denied. The Company's argument that the trial court inconsistently interpreted the phrase "owned by" ignores the plain language of the Company Partial Asset Sale definition and § 6.3. The Company narrowly and improperly isolates the two-word phrase from the rest of the associational words in their respective provisions such as their separate accompanying objective nouns. The Company Partial Asset Sale definition references "interests owned by ***the Company***," meaning the limited liability interest it owned in the Fund GPs, while the § 6.3 allocation provision references "interests owned ***by Paul***," meaning his indirect interest in the Fund GPs. The trial court properly interpreted their meanings by looking at the full phrases, including their respective objective nouns.

3. Appellant's summary of argument is denied. On appeal, the Company argues for the first time in response to Count I that even if there was a Company Partial Asset Sale, the parties should not be ordered to submit to an appraisal where no portion of the proceeds is allocable to interests owned by Paul. The Company's argument fails for two primary reasons. First, the Company's argument inexplicably adds a requirement that Paul's allocable interests must be sold in order for him to be entitled to share in the proceeds. No such requirement exists in the Ninth Amendment. Second, the Company's interpretation contradicts the very purpose of Article 6 and guts the contractual provisions protecting Paul's interests because it would require Paul to participate in the very event the Managing Members excluded him from. In any event, notwithstanding its irrelevance to Paul's entitlement to an appraisal, the Company's own documents establish that some of Paul's interests were transferred.

STATEMENT OF FACTS

A. The Parties

Paul is a co-founder and former managing member of the Company. A76 at ¶ 1. The Company is a limited liability company organized under the laws of Delaware. A76 at ¶ 3. Until the time of the Transaction, the Company was principally owned and its business affairs were conducted by its managing members. A76 at ¶ 4. The Managing Members of the Company at the time of the Transaction were five individuals: Keith Gelb, William Walton, Thomas Gilbane, Aric Shalev, and Paisley Boney. A76-77 at ¶ 5; A156.

B. The Ninth Amendment

Paul and the Company entered into the Ninth Amendment on April 20, 2007. A81-82 at ¶ 22. The Ninth Amendment entitles Paul to share in the proceeds of a Company Sale. More specifically, the Ninth Amendment states "[i]n the event a Company Sale is consummated while Paul continues to have an interest in any Fund or Other Business, Paul will be entitled to share in the proceeds of such Company Sale as provided in this Article 6." A174, § 6.1. A "Company Sale" is broadly defined to include "a Company Merger, a Company All Assets Sale, a Company Partial Asset Sale, a Company Stock Sale, a Company Stock Issuance, or a Company IPO." A189, Annex A. "Company Partial Asset Sale" is defined as:

> the sale, in a single transaction or series of related transactions, by the Company of all or any portion of the interests owned by the Company in one or more Fund GPs or Other Business GPs (except where such sale is to a wholly owned Subsidiary of the Company), the proceeds of which sale are, in whole or in part, distributed to Members.

A189.

Since 2007, Paul has received payments from the Company based on his continuing interests in the Fund GPs as per the Ninth Amendment.

C. The Company's Pre-Transaction Structure

Before the Transaction, the Company established four main private equity funds (previously defined as the "Funds").[1] Each Fund is a limited partnership and managed by the Fund GPs. Fee Income, Promote Income and Investor Income flowed to the Company through the Fund GPs, and then, if permitted, to the Managing Members and others. *See*, *e.g.*, A573-74, § 5.04; A204; A231.

D. The Steps Taken by the Company Prior to the Transaction

The Transaction on March 13, 2018 involved multiple steps which occurred nearly simultaneously and culminated in BSCH making an equity investment in Fee Holdings and GP Holdings. A87-88 at ¶ 38; A242.

[1] The Company had established other equity funds prior to the Transaction but those funds were either shut down before the Transaction or their interests were not included in the Transaction.

1. New parent entities

First, in anticipation of receiving BSCH's equity investment, the Managing Members created two new entities "for Blackstone to invest in." A156. On February 14, 2018, the Managing Members created the two Parent Entities – Fee Holdings and GP Holdings. *See, e.g.*, A535. Fee Holdings became the parent of the Company. A625-27. At the same time, the Managing Members also created RPG GP, LLC ("RPG GP") to act as the general partner entity—a non-economic limited liability company managed by the Managing Members—which governs the Parent Entities. A88, ¶ 42; A209.

2. The Company transfers its Fund GP Interests

a. Contribution of Investor Income and Promote Income

The Company contributed its limited liability interests it owned in the Fund GPs—representing nearly all of the Managing Members' Investor Interest and the Promote Interest in the Fund GPs—to GP Holdings in exchange for limited partnership interests in GP Holdings, the latter of which were, in turn, distributed to the Managing Members. A640-41; A654; A694 at 141:5-12. The trial court referred to this part of the Transaction as the "Company-Level Exchange." Order, ¶ 15(a). The relevant Transaction documents show how the Company effectuated this transfer and demonstrate that the Fund GP Interests were sold and not simply moved up a level. The Contribution and Distribution Agreement by and between

(i) [the Company] (ii) GP Holdings and (iii) the Managing Members ("GP Holdings Reorganization Agreement") documents that:

- The Company contributed its "right, title and interest in and to its Transferred Interests" to GP Holdings. A641, ¶ 1.
- "In exchange, GP Holdings issue[d] the GP Holdings Interests to [the Company]." A641, ¶ 2.
- The Company then "distribute[d] to each Transferring Member the GP Holdings Interests attributable to such Transferring Member's Redeemed Interests, in redemption of such Transferring Member's Redeemed Interests." A641, ¶ 3.

The trial court referred to the last part of this step – the distribution of the same limited partner interests in GP Holdings that the Company received to the Managing Members – as the "Distribution and Redemption." Order, ¶ 15(b). The Fund GPs no longer distribute all of the Investor Income and Promote Income to the Company for ultimate distribution to the Managing Members. Instead, the Fund GPs now distribute a significant portion of the Investor Income and Promote Income directly to GP Holdings. A640-42; A205.

b. Contribution of Fee Interests

At the same time, the Managing Members contributed their Fee Interests to Fee Holdings in exchange for limited partnership interests in Fee

Holdings. A625-26, ¶ 1; A1151 ("'Fee Interest' means, with respect to any Managing Member for any Fund or Other Business, such Managing Member's right, if any, to receive any Excess Fee Income pursuant to Section 5.04(b)."); A690-91 at 125:20-126:4. The trial court referred to this step as the "Member-Level Exchange." Order, ¶ 15(c). Fee income from the Fund GPs continues to be paid directly to the Company which then distributes Excess Fee Income to Fee Holdings for ultimate distribution to the Managing Members. A625-26; A208 ("…Fee Income from the Funds would continue to be paid directly to [RPG], and the net fee income allocable to the Managing Members from [the Funds], as well as all future funds, would be distributed up from [RPG] to [Fee Holdings] for further distribution to the Managing Members.").

3. Proceeds from BSCH's investment are distributed to the Managing Members

The Managing Members then sold a 21.687% membership interest in the Parent Entities to BSCH for $450 million dollars. A243, ¶ 1.3 As a result of its investment, BSCH became an owner of a 21.687% interest in the Parent Entities and now indirectly owns assets previously belonging to the Company. A157 ("[BSCH] became the sixth limited partner in both [Fee] Holdings and GP Holdings."). The trial court referred to this step of the Transaction as the "New Holdings Issuance." Order, ¶ 15(f).

BSCH paid the Parent Entities the consideration for the investment in installments over three years. Of that amount, $325 million was distributed to the Managing Members. A243-44, ¶¶ 1.3, 1.4; A704 at 178:14 – 178:20.

E. The Company's Actions after the Transaction

The Company offered Paul an allocation of proceeds immediately following BSCH's investment. The Company's general counsel informed Paul of it the day of or the day after the closing. A819 at 190:13-191:9.

Shortly after the Transaction, the Company's Chief Financial Officer, Spencer Raymond, met with Paul about the Transaction. A714 at 221:8-16. Paul was given a brief written summary that reflected the Managing Members' calculation of the allocation of proceeds, as well as his accelerated payments with respect to his Fee Interest in Fund IV. The written summary, which was titled "Summary of Total Proceeds," stated that Paul is "entitled to receive" a portion of the proceeds from the Company Sale and accelerated payments of fees due to Paul under the Ninth Amendment. A1029. Among other things, it shows Paul's original interests in the four Funds, what was transferred in the Transaction, and what was retained by the Company. *Id.*

1. Paul's Notice of Disagreement ("NOD")

Paul disputed the calculations provided by the Company as to his appropriate share of the sale proceeds. On May 2, 2018, Paul sent a timely Notice

of Disagreement to the Company pursuant to the procedures set out in Annex C to the Ninth Amendment. A101-02, ¶ 81. In response to the NOD, the Company, for the first time and in clear contradiction of its prior communications and conduct, claimed that the BSCH investment was not a Company Sale. A102, ¶ 82. Despite Paul's timely Notice, the Company and the Managing Members refused to engage in the mediation and appraisal procedures to be followed after receipt of a NOD as set forth in Annex C of the Ninth Amendment.

F. Procedural History

Paul filed suit on December 14, 2018 and subsequently filed a Verified Amended Complaint on March 3, 2019.

Count I of the Amended Complaint and operative Second Amended Complaint sought a declaration that the Transaction constituted a Company Sale as defined under the Ninth Amendment and that Paul's rights to a share of the proceeds under Article 6 of the Ninth Amendment were therefore triggered and the appraisal process set forth in Annex C to the Ninth Amendment should be followed. Count II sought a declaration that the proposed allocation did not comply with the Ninth Amendment, and Count III sought damages for breach of contract based on the Company's failure to properly allocate the proceeds and to follow the required procedures under Annex C.

On October 25, 2019, after briefing and oral argument, the trial court found that Paul stated a claim that the Transaction qualified as a Company Partial Asset Sale that entitled Paul to an allocation of proceeds under the Ninth Amendment and denied the Company's Motion to Dismiss Count I. A148, ¶ 7(a). In the same order, the trial court found that Paul failed to state a claim that the Transaction qualified as a Company Stock Sale. A150, ¶ 8.

The trial court also directed the parties to show cause why the other two counts, which related to the parties' dispute over the allocation, should not be dismissed for lack of jurisdiction. On December 13, 2019, the trial court dismissed Counts II and III of the Verified Amended Complaint for lack of subject matter jurisdiction and observed that under the Ninth Amendment, an independent appraiser has the authority to resolve disputes relating to an allocation of proceeds. A44. The Company filed its Answer and Affirmative Defenses on December 30, 2019. A74.

On December 30, 2020, Paul filed his Verified Second Amended Complaint, of which a public version was filed on January 6, 2021. A45. The Second Amended Complaint: (1) added a separate count for breach of contract based on the same facts in the Verified Amended Complaint; (2) clarified Paul's requested relief; and (3) removed claims that were dismissed in the Court's Order of December 13, 2019. Count II of the operative Second Amended Complaint

asserts a cause of action for breach of contract based on the Company's failure to pay Paul for his portion of the Company Sale proceeds which it was obligated to do pursuant to the Ninth Amendment.

The parties completed discovery on December 16, 2020, and on January 22, 2021, Paul filed his motion for summary judgment on all of his claims. On February 19, 2021, the Company filed its Combined Opening Brief in Support of its Cross-Motion for Summary Judgment and Answering Brief in Opposition to Paul's Motion for Summary Judgment.

After oral argument, the trial court issued an order dismissing Paul's breach of contract claim as unripe on July 14, 2021. On July 28, 2021, the trial court issued an order finding that the Transaction qualified as a Company Partial Asset Sale and granting Paul's Motion for Summary Judgment on Count I. Order, ¶ 30. In the same order, the trial court also vacated its earlier ruling granting the Company's motion to dismiss as to whether the Transaction could qualify as a Company Stock Sale. Order, ¶ 28(b); A1295-1323.

On January 10, 2022, the trial court entered Partial Final Judgment Pursuant to Rule 54(b) (the "Partial Final Judgment") "in favor of Paul on Count I of the [Second Amended] Complaint to the extent it alleges that the Transaction qualifies as a Company Partial Asset Sale triggering Paul's rights to share in the proceeds of such Company Sale as provided in Article 6 of the Ninth

Amendment." Partial Final Judgment, ¶ 1. The Partial Final Judgment also ordered the parties "to engage in the Procedures Upon Sale of Company set forth in Annex C to the Ninth Amendment" pending the trial court's resolution of the Company's motion to stay. *Id*. at ¶ 2. The trial court reserved jurisdiction over the rest of the matter, including the issue of whether the Transaction constituted a Company Stock Sale. *Id*. at ¶ 7. The Company filed a notice of appeal on February 8, 2022.

ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THAT THE COMPANY PARTIAL ASSET SALE DEFINITION WAS MET

A. Question Presented

Whether the trial court correctly found that the Transaction constituted a "sale" under the definition of Company Partial Asset Sale when: (1) the Company transferred assets it owned at the Company level (interests in the Fund GPs) to GP Holdings and received limited partner interests in GP Holdings in exchange; and (2) the Company distributed the same limited partner interests in GP Holdings the Company just received to the Managing Members? Paul argued that this transfer and distribution was one step of the multi-step Transaction that constituted a Company Partial Asset Sale in both his opening summary judgment brief and his reply and answering brief. A126-27; A1123-26.

B. Scope of Review

Questions concerning the interpretation of contracts are reviewed d*e novo*. *Paul v. Deloitte & Touche LLP*, 974 A.2d 140, 145 (Del. 2009) (citing *Motorola, Inc. v. Amkor Tech., Inc.*, 958 A.2d 852, 859 (Del. 2008)).

C. Merits of The Argument

1. The Company Sold the Company's Fund GP Interests.

The trial court correctly found that the Company did not simply reorganize its Fund GP Interests, but rather sold a substantial portion of them to GP

Holdings in exchange for limited partner interests in GP Holdings, which were then distributed to the Managing Members. Order at ¶¶ 21; 21(a); 21(b). This qualified as a Company Partial Asset Sale, which must be determined by analyzing the Ninth Amendment's contractual language and not, as the Company suggests, by: (1) narrowly focusing on only three steps of a four-step transaction which the Company gratuitously describes as a "reorganization"; or (2) analyzing how other courts have distinguished between a reorganization and sale in other settings.

a. The Company Partial Asset Sale definition was satisfied.

With a sleight of hand intended to distract the Court from the Company's sale of Fund GP interests, the Company argues that the only sale that took place was BSCH's purchase of limited partnership interests in the newly-formed Parent Entities. Appellant's Br. at 31. The trial court expressly, and correctly, rejected this argument:

> The Company's argument ignores the multi-stage nature of the Transaction. The New Holdings Issuance, if it could be viewed in isolation, would not constitute a Company Partial Asset Sale, precisely because it is an equity issuance. But the New Holdings Issuance cannot be viewed in isolation. It was the final step in a transaction ***that also included the Company-Level Exchange and the Distribution and Redemption***. Those two steps cause the Transaction to qualify as a Company Partial Asset Sale.

Order, ¶ 28(a) (emphasis added).

As explained above, the definition of Company Partial Asset Sale asks whether there was a "sale, in a single transaction *or series of related transactions*" of interests owned by the Company in Fund GPs, the proceeds of which sale are distributed to Members. A189. The Company-Level Exchange, the Distribution and Redemption, and the New Holdings Issuance occurred "virtually simultaneously" during the March 13, 2018 closing. Order, ¶ 15. Moreover, the Company's own documents demonstrate that "the primary purpose of the Transaction was to obtain $325 million in liquidity for themselves personally," which was effectuated through these related transactions. *Id*. at ¶ 14. As such, the Transaction meets the straight-forward elements of the Company Partial Asset Sale definition.

b. <u>The Company's internal reorganization argument erroneously focuses on the Managing Members' economic interests, which are irrelevant to the Company Partial Asset Sale definition</u>.

The Company also argues that there was no sale because there was merely a reorganization in which the Managing Members' economic interests did not change. This assertion is not only wrong, but also a red herring. First, the Company's argument is wrong because it improperly focuses the Court's attention on only 3/4s of the multi-step Transaction. The Ninth Amendment and Delaware law require the Court and the parties to focus on all of the related steps. *See* A189 ("'Company Partial Asset Sale' means the sale, in a single transaction or ***series of***

related transactions, by the Company . . .") (emphasis added); *Twin Bridges Ltd. P'ship v. Draper*, 2007 Del. Ch. LEXIS 136, at *31 (Del. Ch. Sep. 14, 2007) ("It is the very nature of equity to look beyond form to the substance of an arrangement. Equity will not permit one to evade the law by dressing what is prohibited in substance in the form of that which is permissible. . . . [T]ransactional creativity [] should not affect how the law views the substance of what truly occurred.") (internal citations omitted); *Coughlan v. NXP B.V.*, 2011 Del. Ch. LEXIS 166, *20-21 (Del. Ch. Nov. 4, 2011) ("Indeed, 'transactional creativity [ ] should not affect how the law views the substance of what truly occurred.'") (quoting *Gatz v. Ponsoldt*, 925 A.2d 1265, 1281 (Del. 2007)). Focusing on all four steps makes clear that the Managing Members' economic interests did, in fact, change: their indirect interests in the Fund GPs were diluted and they received $325 million from the proceeds of the Transaction.

Further, the Company's argument misleads as to the relevant inquiry under Article 6. The test under the Company Partial Asset Sale definition is not whether the Managing Members' economic interests were sold, transferred, or changed. Rather, the test is whether there was a "sale . . . by ***the Company*** of all or any portion of the interest owned by the Company in one or more Fund GPs." A189 (emphasis added). "Unless there is ambiguity, Delaware courts interpret contract terms according to their plain, ordinary meaning." *Alta Berkeley VI C.V.*

v. Omneon, Inc., 41 A.3d 381, 385 (Del. 2012). Thus, whether the Managing Members' economic interests changed or not is irrelevant to determining whether the Company Partial Asset Sale definition is met.

Here, the trial court correctly determined that what the Company did with its Fund GP Interests constituted a sale. In doing so, the trial court also correctly rejected the Company's argument that the Company was merely a pass-through in which the Managing Members directly owned their shares of the three income streams. Order, ¶ 21(b). As the trial court explained, that view is wrong under Delaware law because "[m]embers of an LLC do not have any rights to the specific property of the LLC" and thus "[a]ll of the Company's income streams, including the Investor Income and Promote Income, belonged in the first instance to the Company . . ." *Id*. (citing 6 Del. C. § 18-701; *id*. § 18-101(10); *Credit Suisse Sec. (USA) LLC v. W. Coast Opportunity Fund, LLC*, 2009 WL 2356881, at *3 (Del. Ch. July 30, 2009); *Iacono v. Capano*, 2016 WL 6877109, at *2 (Del. Ch. Nov. 21, 2016)). In other words, "[t]he members owned equity interests in the Company. The Company owned the equity interests in the Fund GPs." *Id*.

And, as the trial court recognized, the Company and Managing Members represented to GP Holdings that the Company owned the limited liability interests in the Fund GPs that it transferred to GP Holdings. *Id*. (citing Ex. F § 3(v)). Lastly, "the Company immediately distributed the proceeds from the sale

of Company assets to the Managing Members through the Distribution and Redemption." *Id*. at ¶ 23(a). Through this step, the Managing Members received the limited partner interests provided by GP Holdings as consideration for the Company's Fund GP Interests. *Id*. If the parties considered the Managing Members to be the "true" owners of the Fund GP Interests for purposes of the liquidity event definition, they would not have also required the Managing Members to receive the proceeds from a sale to trigger a liquidity event.

The Transaction also met the second requirement of the Company Partial Asset Sale definition because the Company did not sell its Fund GP Interests to a wholly-owned subsidiary of the Company. *Id*. at ¶ 22. After noting that the Company did not raise that argument, the trial court explained that RPG GP held the general partner interest in GP Holdings and that it was clear that the limited partner interest in GP Holdings would be owned not by the Company but by BSCH, the Managing Members, and other participating members after the Transaction. *Id*.

In addition, the Company's reliance on cases discussing reorganizations in other contexts is misplaced. What matters here are the elements of the Company Partial Asset Sale definition, which states that the sale could be in either "a single transaction or series of related transactions." A189, Annex A. In any event, the Company admits that "the Managing Members' economic interests

in the Fund GPs changed as a result of the Transaction as a whole." Appellant Br. at 28. The Parent Entities (and BSCH and the Managing Members indirectly) now own rights to income streams that the Company owned before the Transaction. Thus, assets were transferred from the Company to the Parent Entities (and BSCH) in exchange for consideration.

The Company's own Capitalization Tables demonstrate that after the Transaction, GP Holdings owned Fund GP Interests that were once owned by the Company. For example, the Fund IV table on page 41 of the Company's brief shows that before the Transaction, the Company owned 100% of the Investor Income and Promote Income (referred to as Carry Income in the table). Appellant's Br. at 41. However, following the Transaction, the Company only owned 24.240877% of the Investor Income and 36.963402% of the Promote Income. *Id*.

Moreover, the Company misrepresents Paul's position when it claims that Paul never argued that the "reorganization" of Fund GP Interests before the BSCH investment was a sale. *Id*. at 23. Paul has always contended that the sale of the Fund GP Interests was one step of the series of related transactions that qualified as a Company Partial Asset Sale. To support its argument, the Company cherry-picked one high-level summary of the multi-step Transaction from Paul's brief in support of his motion for summary judgment and even ignored a footnote

noting this argument from the very paragraph that the Company quoted. *See* A134, n.62 (quoting documents from the Company that reflected the series of related transactions and summarizing that "after the 'reorganization,' all rights to receive fees and interests are now owned by one of two new parent entities – Fee Holdings or GP Holdings . . . Rockpoint then sold [BSCH] a 21.687% interest in these parent entities, and thus the interest in the Fund GPs, and proceeds from the sale were distributed to the Managing Members"); A126-27 (describing the Company's transfer of its Fund GP Interests as one step of the Transaction); A1123-26 (describing the GP Holdings Reorganization Agreement).

For all of these reasons, the trial court correctly found that the Transaction constituted a sale within the meaning of the Company Partial Asset Sale definition.

II. THE TRIAL COURT CORRECTLY FOUND THAT THERE WAS A SALE OF INTERESTS "OWNED BY THE COMPANY" WITHIN THE MEANING OF THE NINTH AMENDMENT

A. Question Presented

Whether the trial court correctly interpreted the phrases "owned by the Company" in the Company Partial Asset Sale definition and "owned by Paul" in § 6.3 based on their plain meaning and correctly concluded that the phrase "owned by" in the Company Partial Asset Sale definition refers to the Company's legal title? Paul argued this issue in his summary judgment reply and answering brief. A1117-28.

B. Scope of Review

Questions concerning the interpretation of contracts are reviewed d*e novo*. *Deloitte & Touche LLP*, 974 A.2d at 145 (internal citations omitted).

C. Merits of The Argument

1. The Trial Court Properly Interpreted the Phrase "Owned by the Company."

On appeal, the Company argues that the trial court erred as a matter of law when it interpreted the phrase "owned by" that appears in different sections of the Ninth Amendment differently. However, in doing so, the Company creates ambiguity that simply does not exist by ignoring the plain meaning of the word "owned" and the associated words in the two provisions. The Company Partial Asset Sale definition references "interests owned ***by the Company***" while the § 6.3

allocation provision references "interests owned ***by Paul***." Thus, based on the plain meaning of the language, the phrases have differing meanings and should not be interpreted the same way.

The Company's argument cleverly ignores the distinct objective nouns that complete the phrase in the two separate provisions. The plain meaning of the verb "own" is "to have or hold as property: possess." Merriam-Webster, available at https://www.merriam-webster.com/dictionary/own. The preposition "by" identifies the possessing agent. *See* Merriam-Webster, available at https://www.merriam-webster.com/dictionary/by (defining "by" as "through the agency or instrumentality of"). The objective nouns identify the possessing agent and functionally change the meaning of "owned by." In the Company Partial Asset Sale definition, for example, the objective noun the "Company" meant interests possessed by the Company. The Company concedes it owned legal title to the Fund GP Interests. *See* Appellant Br. at 35 (the Company "does not dispute that the Company held legal title to the Fund GP Interests that were transferred to GP Holdings . . ."). If the parties had intended for "owned" to have a broader meaning like beneficial ownership as the Company argues, they could have said so by identifying the additional agents. But they did not.

The plain language of the entire definition makes clear the parties intended for the phrase "owned by Company" to mean what the Company owned,

and not what other agents like the Managing Members owned indirectly. A189. As the trial court found, the definition requires that the Company sell what it owns and the Managing Members receive proceeds from that sale to trigger a liquidity event. Order, ¶ 25. If the phrase "owned by" was to be broadly defined to include the Managing Members' interests, the parties would not require the Managing Members to receive proceeds to establish a Company Partial Asset Sale.

The same logic applies to the phrase "owned by" in § 6.3. The § 6.3 allocation provision refers to proceeds that are allocable to the "interests then owned by Paul." In this phrase, the verb "owned" is connected to the objective noun, Paul, through the preposition "by" and refers to what Paul owned which could only have been his beneficial interest in the Fund GPs. As such, the parties could not have intended the phrase "owned by Paul" to have the same meaning as the phrase "owned by Company" in the definition.

The Company cites several cases and a treatise to argue that the trial court should have given the same meaning to the phrase "owned by" when interpreting the Company Partial Asset sale definition and § 6.3. Appellant Br. at 37. These cases are inapposite because they involved the differing interpretations of the same words or phrases. The phrases here are not the same. Further, even if the phrase "owned by" had two meanings, the Company's argument still fails because the phrase should be interpreted with reference to the accompanying

associated words. *See* 11 Williston on Contracts § 32:6 (4th ed. 2021) ("The ancient maxim *noscitur a sociis* summarizes the rule of both language and law that the meanings of particular words may be indicated or controlled by associated words."); *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303 (1961) ("[t]he maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings. . .").

The trial court correctly interpreted the Ninth Amendment when it found that the phrase "owned by" in the Company Partial Asset Sale definition refers to the Company's bare legal title to the Fund GP Interests and not a broader concept of ownership that the Company contends exists in § 6.3. The trial court rejected the Company's argument that it only held "bare legal title" to the Fund GP Interests and, therefore, the Managing Members should be treated as the true owners of the Fund GP Interests for two main reasons. First, the trial court found that the Company's argument ignored the Company's separate legal existence and contradicted the plain language of the Company Partial Asset Sale definition. Order, ¶ 25. The definition references "the interests owned by the Company" and refers to proceeds from a Company Partial Asset Sale being "distributed to Members." *Id*. Both of these facts "recognize[ed] that the Company would receive the proceeds from a sale of its own assets, which then would need to be

'distributed to Members' to result in the type of liquidity event that the Amendment contemplates." *Id*. Therefore, the definition itself recognized the Company's separate legal existence and that the Company owned the equity interests in the Fund GPs. *Id*.

Second, the trial court found that the different meaning of the phrase "owned by the Company" in § 6.3 is clear when Article 6 is read as a whole. *Id*. at ¶ 27. More specifically, the parties were aware that both Paul and the Managing Members "(i) owned Member Interests in the Company which (ii) bore a relationship to cash flows generated by the interests that the Company owned in the Fund GPs." *Id*. at ¶ 27(a). The Company Partial Asset Sale definition established one of the tests for determining when a liquidity event occurred, and because the definition "focuses on assets of the Company leaving the Company," "[i]t therefore turns on assets that the Company owns – in the sense of having legal title." *Id*. at ¶ 27(b). In contrast, "[s]ection 6.3 is the allocation provision. It recognizes that the value resulting from a Company Sale needs to be allocated among the equity holders in the Company. It therefore looks more broadly to the 'interests then owned by Paul' to determine Paul's share." *Id*. at ¶ 27(c). "The drafters of the Amendment sought to ensure that if the Managing Members achieved a liquidity event, then Paul would receive his fair share of the value that the liquidity event generated." *Id*. Therefore, it was necessary to have both a test

for identifying liquidity events—the Company Partial Asset Sale definition, for one—and a way to determine how to allocate the value resulting from the liquidity event—§ 6.3 and the corresponding valuation rules in § 6.5. *Id.*

To interpret the phrase "owned by the Company" in the Company Partial Asset Sale definition and the phrase "owned by Paul" in § 6.3 the same way would lead to absurd results and render one of the provisions superfluous. Delaware law does not support such a strained interpretation. *See E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985) ("the meaning which arises from a particular portion of an agreement cannot control the meaning of the entire agreement where such inference runs counter to the agreement's overall scheme or plan"). If one were to interpret Paul's interest in § 6.3 as only what he held in bare legal title, that would mean he had no interest for purposes of a proceeds allocation – and could never have interest – because the Company owned bare legal title to the Fund GP Interests. This interpretation would render the provision meaningless. In contrast, if one were to interpret the phrase "owned by" in the definition of Company Partial Asset sale to only mean the Managing Members' beneficial interest, there could never be a Company Partial Asset Sale because the Company did not own any Fund GP Interests to sell.

The trial court also correctly rejected the Company's mischaracterization of Article 6's purpose. The Company suggests that Article 6's

purpose is "to share with Plaintiff a portion of the proceeds from certain types of transactions where a sale of interests *allocable to Plaintiff* occurs." Appellant Br. at 38 (emphasis in original). This argument is entirely contradicted by: (1) the plain language of Article 6; and (2) the purpose of Article 6 which was to ensure that Paul would receive "his fair share of the value that the liquidity event generated" if the Managing Members achieved a liquidity event. Order, ¶ 27(a). The argument is also nonsensical because Paul would not need an appraisal if his interests were actually sold in a transaction. Thus, the Company's illogical argument that Paul is only entitled to an appraisal if his interests are part a liquidity event should be rejected and the plain protections afforded to Paul in Article 6 should be upheld.

2. The Managing Members, former managing members, and non-managing members did not own the Fund GP Interests.

Contrary to the Company's argument, the record does not demonstrate that the Managing Members owned the Fund GP Interests. In fact, the Company's own documents show that the Managing Members only owned beneficial interests in the Fund GPs. The GP Holdings Reorganization Agreement, for example, clearly distinguishes between what the Company owned and what the Managing Members owned. The "Transferred Interests" are the limited liability interests that represent the Promote and Investor Interests of each transferring member the

Company holds in the Fund GPs. The "Redeemed Interests" are the Promote and Investor Interests of each Transferring Member reflected on Schedules 1 and 2. The Company owns the Transferred Interests, and the Managing Members own the Redeemed Interests.

The Company's argument about legal title relies on the fallacy that Transferred Interests and Redeemed Interests are the same. They are not. As the trial court correctly observed, the Transferred Interests are similar to stock a company holds in a subsidiary. The company's stockholders do not hold legal title to the shares of the subsidiary, but they own the subsidiary indirectly through their stock ownership of the company. When the company sells its stock of the subsidiary to a limited partnership – here, the Transferred Interests – in exchange for limited partner interests, the Company then gives the limited partner interests to the stockholders in exchange for their portion of stock that represents their beneficial ownership of the subsidiary – here, the Redeemed Interests.

Lastly, the Company's description of the Capitalization Table for Fund IV is wrong. Though the Company tries to argue that it shows the individual owners were the "true owners" of the Fund GP Interests, the Company's argument ignores the top two lines of the table. Appellant's Br. at 41. These lines show what the Company and GP Holdings owned pre-closing and post-closing, and demonstrate that though the Company owned 100% of the Investor Interest and

Carry Interest before the closing, it owned significantly less of the Investor Interest (approximately 24%) and Carry Interest (approximately 37%) after the closing. *Id*. Thus, the Company's own Capitalization Table reflects the Company's sale of Fund GP Interests that occurred and establishes that the Transaction meets the definition of a Company Partial Asset Sale.

In conclusion, the trial court correctly found that there was a sale of interests "owned by" the Company to an entity that was not a wholly-owned subsidiary and proceeds of the sale were distributed to the Managing Members, meeting the definition of a Company Partial Asset Sale.

III. THE TRIAL COURT PROPERLY ORDERED THE PARTIES TO SUBMIT TO AN APPRAISAL PROCEEDING

A. Question Presented

Whether the trial court properly ordered the parties to submit to an appraisal proceeding even though interests owned or allocable to Paul were not transferred or sold in connection with the Investment because there is no such requirement in Article 6? Paul argued that whether he had any claim to the value of the interests that were transferred in connection with the Transaction or whether his interests changed after the Transaction was irrelevant as to whether there was a Company Partial Asset Sale in numerous places in his motion for summary judgment reply and answering brief. A1128-33.

B. Scope of Review

Questions concerning the interpretation of contracts are reviewed d*e novo*. *Deloitte & Touche LLP*, 974 A.2d at 145 (internal citations omitted).

C. Merits of Argument

On appeal, the Company for the first time in response to Count I argues that even if there was a Company Partial Asset Sale, the trial court erred by ordering the parties to submit to an appraisal where no portion of the proceeds is allocable to interests owned by Paul based on the language of § 6.3. The Company previously only raised this argument with respect to Count II, which is not the subject of this appeal. A949-50. Nonetheless, the Company's argument that the

trial court erred by ordering the parties to submit to an appraisal proceeding based on § 6.3 because none of Paul's allocable interests were transferred, reorganized, sold, or moved fails for two reasons. First, the Company's argument ignores the plain language of the parties' agreement and inexplicably adds a requirement that Paul's allocable interests must be sold in order for him to be entitled to share in the proceeds. However, no such requirement exists in Article 6. *See* A174, § 6.1 ("In the event a Company Sale is consummated while Paul continues to have an interest in any Fund or Other Business, Paul will be entitled to share in the proceeds of such Company Sale as provided in Article 6."); Company Partial Asset Sale definition ("the sale . . . by the Company of all or any portion of the interests owned by the Company in one or more Fund GPs . . .").

Second, Article 6 is an anti-discrimination provision that protects minority investors by preventing the majority from excluding the minority from liquidity events. The trial court noted that Article 6's purpose is to ensure that Paul receives what he is entitled to if a liquidity event occurs. *See* Order, ¶ 27(a) ("The drafters of the Amendment sought to ensure that if the Managing Members achieved a liquidity event, then Paul would receive his fair share of the value that the liquidity event generated."). The Company's argument contradicts the very purpose of Article 6 and would gut the contractual protections provided to Paul by

requiring him to be part of the event the Managing Members were excluding him from in the first instance.

Notwithstanding its irrelevance to Paul's entitlement to an appraisal, the Company is wrong again on the facts that allegedly support its argument. The record shows that some of Paul's interests were, in fact, transferred as part of the Transaction. Consistent with other Transaction documents, the Summary of Total Proceeds clearly shows that a portion of Paul's interests in the four Fund GPs were transferred as part of the Transaction. A1029 (showing percentages and dollar values of Paul's Transferred and Retained Interests).

To summarize, the trial court properly ordered the parties to submit to an appraisal proceeding.

CONCLUSION

For the foregoing reasons, Appellee Jonathan H. Paul respectfully requests that the Court affirm the Chancery Court's ruling granting Paul's motion for summary judgment on the issue of whether there was a Company Partial Asset Sale.

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Dated: April 25, 2022
Corrected: May 2, 2022