IN THE SUPREME COURT OF THE STATE OF DELAWARE

EXIT STRATEGY, LLC,	)	
	)	
Plaintiff,	)	
	)	No. 318, 2023
v.	)	
	)	
FESTIVAL RETAIL FUND BH, L.P.,	)	On appeal from the
FRFBH, LLC, and MARK SCHURGIN,	)	Court of Chancery
	)	C.A. No. 2017-0017-NAC
Defendants.	)	

APPELLEE'S ANSWERING BRIEF

Of Counsel:

Andrew W. Zepeda (*pro hac vice*)
LURIE, ZEPEDA, SCHMALZ,
HOGAN & MARTIN
1875 Century Park East, Suite 2100
Los Angeles, CA 90067
Telephone: (310) 274-8700
azepeda@lurie-zepeda.com

Douglas D. Herrmann (Del. Bar No. 4872)
James H. S. Levine (Del. Bar No. 5355)
TROUTMAN PEPPER
HAMILTON SANDERS LLP
Hercules Plaza, Suite 5100
1313 Market Street, P.O. Box 1709
Wilmington, DE 19899-1709
Telephone: 302.777.6500
Douglas.Herrmann@troutman.com
James.Levine@troutman.com

Attorneys for Defendant-Below, Appellee Festival Retail Fund BH, L.P.

Dated: December 7, 2023

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

NATURE OF THE PROCEEDINGS

In a Memorandum Opinion dated July 17, 2023 ("Opinion"), issued after a three-day trial, the Court of Chancery entered judgment for all Defendants on all counts of Plaintiff Exit Strategy's ("Exit") Amended Complaint, in which Exit contended it was owed a substantial payment following the sale of real property in Beverly Hills, California.

Exit asserted that (1) the owner of the property, Festival Retail Fund BH, L.P. ("Partnership"), and its general partner FRFBH, LLC ("General Partner"), breached the Partnership's limited partnership agreement ("LPA") by not making the payment to Exit; and (2) the General Partner's president Mark Schurgin breached his fiduciary duties to Exit (despite Exit having waived them in the LPA). Exit sought a declaratory judgment that all three Defendants' grounds for not making the payment were invalid. Exit also asserted that the January 7, 2014 sale of the property actually happened in December 2013.

The Court rejected each of Exit's arguments and ruled in Defendants' favor on all of Exit's claims. The Court found that the General Partner and Schurgin acted in subjective good faith in determining the Net Resale Price (the LPA's contractual standard), the Partnership and the General Partner had not breached the LPA, and Exit was not entitled to any payment.

Exit has appealed the Court's ruling against it in favor of the Partnership only. Exit has not appealed the Court's determinations that the General Partner and Schurgin did not breach the LPA and acted in good faith in causing the Partnership to take the deductions that resulted in Exit not receiving a payment. Thus by waiving any appeal against the General Partner, Exit has conceded the correctness of the Court's rulings and findings based on the same claims and facts, which have now conclusively been adjudicated against Exit. Exit cannot assert that the Court incorrectly determined that the Partnership was permitted to deduct expenses associated with "defeasance" when calculating whether Exit was owed a payment because it has conceded that the Court correctly decided the same claim against the General Partner.[1]

[1] Because the Court concluded that the Defeasance Deduction was proper, it did not rule on two other deductions Exit challenged. The Court also did not rule on two of Defendants' defenses concerning (1) a prior sale of the property, and (2) Exit's failure to bring its claims timely.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly interpreted the LPA and determined that defeasance was a permitted deduction in calculating the Net Resale Price following the Ponte Gadea Sale, resulting in Exit not being entitled to any Special Limited Partner's Portion. Exit's appeal also fails because Exit has not appealed – and has therefore conceded – the Court's rulings and determinations in favor of the General Partner and Schurgin, which are now binding on the parties, and cannot result in a contrary result against the Partnership.

STATEMENT OF FACTS

This section is drawn predominantly from the findings of facts in the Opinion, which are based on three days of live testimony, 12 depositions, 191 exhibits, 159 pages of post-trial briefing, and more than half a day of post-trial argument.

A. Formation of the Partnership

In 2005, Exit paid $3,000,000 for an option to purchase the building that houses the retail Gucci store on Rodeo Drive in Beverly Hills ("Property"). (Op. 2). Lacking the capital to exercise the option itself, Exit sought to "flip" the Property to an experienced real estate operator, the Festival Companies ("Festival"). (*Id.*; A1748).

B. Negotiation of the LPA

The parties agreed that Festival would acquire the option through a limited partnership. (Op. 2). Exit and Festival each retained sophisticated counsel to negotiate the sale terms. (*Id.*). Exit's counsel was Ross Yustein, a New York lawyer with extensive transactional real estate experience. (A1791). Although Yustein was Exit's only trial witness involved in the negotiations, he recalled <u>none</u> of the details. (A1795). During the negotiations, one of Exit's principals[2] – Steven

[2] Exit's other principal is Peter Friedman, an experienced real estate investor. (A1839-40).

Emanuel, who is also an attorney – proposed the inclusion of certain terms that he "invented," (Op. 2; A1745), including terms relating to Exit's role in the Partnership, and the possibility of a payment contingent on a future sale of the Property, which he called "Additional Purchase Price." (A0142-47). These terms were proposed in what he called a "Deal Memo."

Emanuel's "Deal Memo" was not an agreement between the parties. (Op. 2). Neither Exit nor Festival executed it, and Festival never agreed to the "Additional Purchase Price" language in Emanuel's "Deal Memo." (A1837). Emanuel's "Deal Memo" contemplated memorializing its terms in a letter of intent no later than December 12, 2006. (A0142). A letter of intent was never signed. Emanuel's "Deal Memo" provided for a $4M deposit that would become non-refundable on December 22, 2006. (A0143). That also never occurred.

At trial, the evidence conclusively showed that Exit rejected the "Deal Memo," that Emanuel never communicated his subjective understanding[3] of the parties' financial intentions to Festival (Op. 36-37 n.161), and that the actual negotiations of LPA provisions relating to Exit were scant. (A1795). The terms

[3] Exit' Opening Brief extensively describes Emanuel's subjective thought process, none of which was ever communicated to Festival (or even Festival's counsel). (OB 12-16; A1751-70).

governing the Partnership were memorialized in the LPA. (Op. 2). The parties agreed after trial that the LPA is unambiguous. (Op. 27; A2013, 2079).

In January 2007, the parties signed the LPA, and the Partnership acquired the option from Exit. (Op. 3). In exchange, Exit (1) received approximately $11,000,000 in cash, and (2) became a "Special Limited Partner" of the Partnership. (*Id.*).

C. Governance of the Partnership

Under the LPA, Defendant FRFBH, LLC is the Partnership's "General Partner." (Op. 3). Defendant Mark Schurgin served as the General Partner's President, and in that role, controlled the General Partner. (*Id.*). In the LPA, Exit waived "any and all fiduciary obligations owed by the General Partner" and acknowledged that it "has no voting or other rights under this Agreement save and except the right to receive certain distributions under limited circumstances in accordance with Section 15," (LPA §10, A0364), and was not a "limited partner" as contemplated in DRULPA.

1. <u>The General Partner's Broad Discretion</u>

The LPA grants the General Partner "exclusive" and extensive authority to manage the Partnership. (Op. 3). That broad authority encompasses "the power to do any and all acts necessary, convenient or incidental to, or for the furtherance of," or "in connection with," the Partnership's "purposes." (Op. 3, 23 n.97, 28).

The LPA affirms the General Partner's broad discretion in terms that are adverse to Exit's appeal, including determining the Net Resale Price based on the General Partner's assessment and calculation of deductions. (LPA A-5, A0384).

The LPA further authorizes the General Partner to cause the Partnership to "enter into and perform…any [] agreement or arrangement…in the sole judgment of the General Partner," that is related or incidental to, or for the furtherance of, or in connection with, the Partnership's purposes of acquiring, owning, and selling the Property. (Op. 5; LPA §7(a)-(b), A0361).

2. The Special Limited Partner's Limited Rights

In contrast to the General Partner's sweeping authority and discretion, Exit had no role in the management of the Partnership, no ownership interest, no voting or liquidation rights, and no say in its affairs. (Op. 5). Rather, Exit's only right was an extremely narrow right to potentially receive a partial distribution of proceeds from a future sale of the Property, but even then, only under certain "limited circumstances" outlined in the LPA. (*Id.*). The "special limited partner" title was coined under the LPA to reflect Exit's very limited role. (Op. 3). The LPA refers to any payout that might have arisen after such potential future qualifying sale (defined as a "Resale") as a "Special Limited Partner's Portion" ("SLPP"). (Op. 5).

3. The Special Limited Partner's Portion

Under the LPA, Exit could only be entitled to an SLPP following a Resale. (Op. 5). The LPA defines Resale, in relevant part, as "a *bona fide* arm's-length-sale…by the Partnership at any time of all of its interest in the Property to an unaffiliated third party." (Op. 6).

The LPA defines the SLPP as, "the amount equal to (i) the Base Resale Distribution Amount…for the applicable Resale Year plus (ii) an amount equal to 10% of the amount by which the Net Resale Price exceeds the Resale Price Threshold for such Resale Year." (Op. 5).

Exit would only be eligible for an SLPP if the Net Resale Price exceeded the Resale Price Threshold for a given year. (*Id.*). The LPA provides:

> If for any Resale, the Net Resale Price is less than the Resale Price Threshold for the applicable Resale Year, the Base Resale Distribution Amount shall be reduced by one dollar for each dollar by which the Resale Price Threshold exceeds the Net Resale Price until the Base Resale Distribution Amount has been reduced to zero.

(*Id.*). If the applicable Resale Price Threshold exceeds the Net Resale Price by $3,000,000 or more, Exit is not entitled to any SLPP. (*Id.*). The Base Distribution Amount and Resale Price Threshold are fixed in Schedule D to the LPA and vary by Resale Year (the year in which the Resale occurred). The 2014 Resale Price Threshold was $100,000,000. (Op. 7).

The LPA defines Net Resale Price as "the gross price derived from [a] Resale, as shown in the Resale Contract," minus deductions for "one or all" of eight expansive categories of costs incurred by the Partnership. (Op. 7-8). The Opinion implicates three of those categories: Subparagraphs (d), (f), and (h). (Op. 8).

Subparagraph (d) permits deductions for "costs or expenses associated with the ownership…operation [or] management…of the Property reasonably borne by…the Partnership…." (LPA A-3, A0382; Op. 8).

Subparagraph (f) permits deductions for "excess costs associated with any loan on the Property…during the Partnership's ownership." (Op. 8). "Excess Loan Costs" includes "loan interest costs…, negative accruals and similar costs[.]" (*Id.*). In relevant part, Excess Loan Costs are deductible if the costs exceed the aggregate of (i) loan origination fees, and (2) the amount by which loan interest costs exceed the amount of Rental Payments (defined as a threshold amount of payments from the Property's sole tenant) received by the Partnership, but only where the loan interest costs exceed Rental Payments by more than $875,000 in a given year. (*Id.*; LPA A-3-4, A0382-83).

Subparagraph (h) permits deductions for:

> <u>All</u>…out-of-pocket closing costs and costs of sale incurred in connection with [a] Resale, including <u>without limitation</u>…out-of-pocket survey and title costs, documentary transfer taxes,

> recording fees, escrow charges and reasonable attorneys' fees and costs.

(Op. 8) (emphasis added).

The LPA defines Resale Proceeds as "any proceeds received by the Partnership upon a Resale less the portion thereof used to pay all Partnership expenses [or] indebtedness…*all as determined by the General Partner*." (Op. 9) (emphasis in Opinion). The LPA also affords the General Partner "sole discretion" to allocate all "income, gain, loss, deduction or credit" in accordance with the partners' "economic interests in the Partnership[.]" (*Id.*).

Exit was only entitled to an SLPP if there was (i) a Resale that generates (ii) Resale Proceeds equating, after the General Partner's deductions, to a (iii) Net Resale Price above – or not $3,000,000 or more below – (iv) the Resale Price Threshold for the applicable Resale Year. (*Id.*).

Exit would only have received a SLPP if the Property's value rose substantially, because of the Partnership's efforts and financial contributions. (Op. 37). Because of that, it would not have been commercially reasonable for Exit to expect to receive a distribution before the Partnership deducted its costs. (*Id.*).

D. The Property

In 2007, the Partnership exercised the option and acquired the Property for $39,000,000. (Op. 9). To finance the acquisition, the Partnership took out a commercial mortgage-backed securities loan ("CMBS Loan") under a loan agreement from Column Financial, Inc. ("Loan Agreement"), secured by a mortgage on the Property. (*Id.*).

One of the Partnership's obligations under the CMBS Loan relates to "defeasance." (Op. 10). Defeasance is the process by which a borrower replaces collateral for a loan with a portfolio of securities, *e.g.*, low-risk bonds, that yields a rate of return sufficient to replicate the interest due to the lender, if the collateral is sold before the CMBS Loan matures. (*Id.*; A0422-24). Defeasance removes the lender's mortgage from the asset, allowing the borrower to sell it unencumbered, while maintaining the lender's right to repayment on the agreed schedule with equivalent collateral. (Op. 10). The Loan Agreement required the Partnership to defease the CMBS Loan at its own expense if the Property was sold before November 2016. (*Id.*; A0422).

The Loan Agreement (and other transaction documents concerning the acquisition and financing of the Property) was signed contemporaneously with the LPA on January 18, 2007. (A0376; A0390). Exit was aware of the structure of the transaction, including the CMBS Loan, through the parties' negotiations (B192) and because before Exit agreed to assign its option to the Partnership, Exit had also explored seeking a CMBS loan from Column Financial. (Op. 9-10; A1786-87).

The Loan Agreement and its provisions (including the defeasance obligation) are incorporated into the LPA. (Op. 10). The LPA (to which Exit is a party) authorizes the General Partner to cause the Partnership to execute the "Basic Documents," which include the "Loan Documents," and the Loan Documents include the Loan Agreement. (Op. 10-11). The substantive provisions of the LPA (including the terms governing the SLPP) cannot be amended without Column Financial's approval. (Op. 11; LPA §9(c)(ii), A0362).

E. The Partnership Sells the Property[4]

After several years of owning the Property and making substantial investments in it (including a valuable extension of the Gucci lease that more than doubled annual rent), on September 26, 2013, the Partnership agreed to sell the Property for $108,000,000 to Ponte Gadea California, LLC ("Ponte Gadea Sale"). (Op. 11). The terms of the Ponte Gadea Sale are memorialized in a purchase agreement ("PGSA"). (*Id.*; B233-318).

The PGSA required the Partnership to remove any mortgages from the Property before closing the Ponte Gadea Sale. (Op. 11-12; B246-249). The Ponte

[4] A prior Resale of the Property occurred in 2011. At trial, Exit disputed whether the 2011 transaction was a Resale within the LPA's definition. Because the Opinion does not address the 2011 Resale, it is not discussed in this brief. Had the Court addressed the issue, the Partnership is confident the Court would have resolved questions concerning it in Defendants' favor.

Gadea Sale closed on January 7, 2014[5] (Op. 12) and the Partnership defeased the CMBS Loan at a cost of $6,250,155 ("Defeasance Deduction"). (*Id.*).

After the Ponte Gadea Sale closed, the General Partner calculated the Net Resale Price. (*Id.*). Following the LPA's formula, the Partnership deducted $18,077,752 in expenses, resulting in a Net Resale Price of $89,922,248, more than $10,000,000 below the 2014 Resale Price Threshold ($100,000,000). (*Id.*). Exit did not receive an SLPP. (Op. 13).

In taking the deductions, the General Partner relied on the LPA's Net Resale Price definition and reviewed the Partnership's books and records, including the Loan Agreement and PGSA. (Op. 13). The General Partner's process followed Festival's regular accounting procedures for distributions following a property sale. (Op. 13, 35 n.151; A1890-93). Based on this information and its experience, the General Partner took the Defeasance Deduction because defeasance was deductible under Subparagraphs (d), (f), and (h), which the Court concluded was proper. (Op. 30, 43).

Because the 2014 Resale Price Threshold exceeded the Net Resale Price by more than $3,000,000, Exit was not entitled to an SLPP. (Op. 13).

[5] At trial, Exit contended that Ponte Gadea Sale – which indisputably closed on January 7, 2014 – actually closed in December 2013. (Op. 24-25). The Court rejected that argument (*id.*) and Exit has not appealed that ruling.

F. Procedural History

On January 12, 2017, Exit filed its original Complaint, which was amended on December 22, 2017 ("FAC"). The FAC set forth three counts. In Count One, Exit sought a declaration that all Defendants' (the Partnership, General Partner, and Schurgin) grounds for not paying the SLPP were invalid. In Count Two, Exit asserted the Partnership and General Partner breached the LPA. In Count Three, Exit asserted Schurgin breached his contractual fiduciary duties. The basis for each count was that Defendants had injured Exit by taking three deductions that Exit challenged (including the Defeasance Deduction).[6]

After a three-day trial during which both of Exit's principals, Schurgin, and Festival's CFO testified, and post-trial briefing and argument, the Court concluded that Defendants had not breached the LPA, the General Partner and Schurgin acted in subjective good faith, and no Defendant had breached any duty to Exit. The Court also found that Exit's Count One (declaratory judgment) was subsumed by Count Two (breach of contract). (Op. 14 n.54).

[6] Exit also challenged two other deductions for "negative accruals" and "preferred return on equity." (Op. 12-13). Because the Opinion does not address these deductions, they are not discussed in this brief. Had the Court addressed them, the Partnership is confident that those deductions would also have been resolved in Defendants' favor.

ARGUMENT

QUESTION PRESENTED

Whether the Court of Chancery correctly held that the LPA permitted a deduction for defeasance in determining the SLPP? Exit raised this issue below. (A101-06, 132, 2012-18, 2135-46).

SCOPE OF REVIEW

Exit claims that *de novo* review is appropriate. (OB 24). This is the correct standard of review for conclusions of law, but the review of findings of fact is much more deferential. *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010). Factual findings underpinning the Court's rulings shall only be disturbed if they are "clearly erroneous or not the product of a logical and orderly deductive reasoning process." *See Dep't of Fin. v. AT&T Inc.*, 253 A.3d 537, 547 (Del. 2021).

MERITS OF THE ARGUMENT

Exit's appeal is a last-ditch effort to be awarded an unjustified fee after the Court made final, binding rulings against Exit on all its claims. After more than six years of litigation and a three-day trial, the Court found Exit failed to prove any entitlement to an SLPP following the Ponte Gadea Sale. The Court also found the General Partner and Schurgin had acted in good faith. Exit was therefore not entitled to any recovery.

Exit is not appealing all the Court's rulings, but only the judgment in favor of the Partnership on Exit's breach of contract claim. Exit's appeal fails for two separate and independent reasons: (1) Exit has not appealed the Court's rulings in favor of the General Partner, which the Court found to be based on the same facts and legal principles as the claim against the Partnership, and those rulings are now final, conclusive, and binding on Exit precluding this appeal; and (2) the Court's analysis and rationale in ruling for the Partnership and against Exit were correct, whether the LPA is unambiguous (which it is) or if extrinsic evidence is considered.

Exit's nearly seven-year effort to rewrite the LPA must come to an end. The Court should affirm the trial Court's rulings and deny Exit's appeal.

A. Exit's Appeal Is Entirely Barred Because Exit Did Not Appeal the Court's Rulings that the Defeasance Deduction Was Proper and that the General Partner and Schurgin Acted in Good Faith

As a threshold matter, Exit's appeal fails because Exit has not appealed – and is therefore bound by – the Court's rulings that the General Partner did not breach any duty and has no liability to Exit under any of Exit's theories. If a party does not timely contest a trial court ruling, the party has abandoned the issue and it is deemed waived. *Roca v. E.I. du Pont de Nemours & Co.*, 842 A.2d 1238, 1242 (Del. 2004).

Exit's FAC alleged the Partnership and General Partner were each liable for the same causes of action (declaratory judgment, breach of contract) based on the same facts. (B040). The Court determined Exit's declaratory judgment claim was subsumed by its breach of contract claim and found in favor of Defendants on both counts. (Op. 14 & n.54). Exit now appeals only as against the Partnership, conceding the Court correctly ruled in favor of the General Partner. But because (1) Exit has waived its right to appeal as to the General Partner's conduct and lack of liability, and (2) the grounds for the Court's ruling in favor of the Partnership are the same as those that precluded liability against the General Partner, Exit is bound by the Court's findings of fact and conclusions of law and this appeal must fail as futile. *Accord, e.g.*, *Roca*, 842 A.2d at 1242.

A party only gets a single day in court. *Accord InterMune, Inc. v. Harkonen*, 2023 WL 3337212, at *16 (Del. Ch. May 10, 2023). Established doctrines prohibit a party from relitigating a claim or essential fact that has been conclusively decided against that party in a final, binding judgment, including res judicata, collateral estoppel, and waiver. *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 520 (Del. 1999). Similarly, the law-of-the-case doctrine precludes a party from challenging a specific legal principle that is applied to an issue presented by facts which remain constant throughout litigation. *Carlyle Inv. Mgmt. L.L.C. v. Moonmouth Co. S.A.*, 2015 WL 5278913, at *7 (Del. Ch. Sept. 10, 2015).

The elements of res judicata and collateral estoppel are satisfied here. The Court undisputedly had jurisdiction over the subject matter and the parties, and the parties on appeal (Exit and the Partnership) were parties in the proceedings below. The issues on appeal are the same as those decided below, were all decided against Exit, and the decree is final as to the General Partner (and Schurgin).[7] Exit's appeal should be denied on that basis alone.

Those doctrines further doom Exit's appeal because the Court found the facts underlying Exit's claims against all Defendants did not give rise to any liability, and that the General Partner and Schurgin acted in subjective good faith. Exit has not challenged the Court's findings of fact or conclusions of law with respect to the General Partner (or Schurgin) (OB 2 n.1), which are now binding on Exit. That includes the Court's interpretation of the LPA and Net Resale Price, its determinations that the Defeasance Deduction was proper and no damages had been proven, and the legal conclusion that the General Partner met its contractual standard of conduct (subjective good faith).

[7] Res judicata also requires that the adverse parties are the same as or in privity with the parties in favor of whom the judgment was entered. Here, the parties are the same as in the trial court, and the Partnership is in privity with the General Partner because, among other reasons, the General Partner is liable for all Partnership liabilities, including any judgment Exit may have obtained. 6 Del. C. §17-403(b).

Because these issues were determined at trial and not appealed as to the General Partner or Schurgin, the Court's findings of fact and conclusions of law are final and Exit cannot ask this Court to revisit them, even in the context of its claim against the Partnership. Nevertheless, Exit attempts to sidestep that finality by purporting to appeal only against the Partnership. Exit's entire appeal is an unlawful effort to relitigate facts and claims that have been conclusively and finally decided against Exit. Exit's primary argument at trial was that the Defeasance Deduction was improper, and the Court disagreed, concluding that the General Partner acted in good faith, the Defeasance Deduction was proper, and therefore no Defendant could have breached the LPA. (Op. 1, 35, 43). And, as the Court determined (Op. 21-22), Exit's claim against the Partnership is dependent on a finding that the General Partner did not meet its contractual standard of conduct in taking the Defeasance Deduction.

But if the General Partner acted properly in taking the Defeasance Deduction (which it did), the Court cannot have erred in ruling that the Partnership (acting through the General Partner) breached the LPA while applying the parties' contractually agreed-upon standard. Exit's concession that the Court ruled correctly in favor of the General Partner on the same facts and same claim (Counts I and II) precludes Exit from further challenging the judgment in favor of the Partnership.

The Court's ruling that the General Partner acted properly and in good faith in calculating the Net Resale Price and causing the Partnership to take the Defeasance Deduction is also the law of the case. It is a final judgment that Exit has not appealed, and cannot and should not be disturbed (indeed, Exit has not argued that it should). Accordingly, Exit's position on appeal – that the Partnership, acting through the General Partner, acted improperly – is plainly barred.

Foundational notions of justice permit a plaintiff only a single bite at the proverbial apple. Exit took its bite, found a worm, yet now inexplicably returns for a second. But the same facts and claims that are conclusive and final against Exit and in favor of the General Partner cannot support an appeal against the Partnership. Principles of equity and finality do not permit such a result, and Exit's appeal should be denied.

B. The Court Did Not Err By Considering the General Partner's Good Faith

Exit contends the Court erred when it determined the General Partner's good faith was relevant to a determination of whether Exit was entitled to an SLPP. (OB 30-32). In so doing, Exit misreads the LPA. Exit posits that the LPA only limits the types of claims Exit is permitted to bring, but that interpretation is improperly restrictive. Section 18(a) does more than limit Exit's remedy (an accounting) and potential damages (the amount of any SLPP owed); it conditions potential recovery for "any loss, liability, damage, cost, or expense" upon a determination that the General Partner did not act in good faith. (LPA §18(a), A0368-69).

1. The LPA Restricts Breach of Contract Claims Where the General Partner Acts in Good Faith

As a limited partnership, the Partnership may limit or restrict the nature of any claims – including breach of contract claims – arising under the LPA. DRULPA (§17-1101(f)) allows a partnership to limit or eliminate "any and all liabilities for breach of contract and breach of duties (including fiduciary duties) of a partner or other person to a limited partnership or to another partner or to another person that is a party to or is otherwise bound by a partnership agreement." *Accord Boardwalk Pipeline Partners, LP v. Bandera Master Fund LP*, 288 A.3d 1083, 1108 (Del. 2022); *see also* Op. 19.

Delaware courts respect the terms of limited partnership agreements to preserve the "maximum flexibility" of contracts. *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 170 (Del. 2002); *see also* 6 Del. C. §17-1101(c). Courts should construe an agreement's overall scheme when considering a contractual good faith requirement. *DV Realty Advisors LLC v. Policemen's Annuity & Benefit Fund*, 75 A.3d 101, 110 (Del. 2013).

Because the LPA provides a contractual standard of conduct for the General Partner, that standard applies in analyzing breach of contract claims against the Partnership based on the General Partner's actions. *See, e.g.*, *Bandera Master*

Fund LP v. Boardwalk Pipeline Partners, LP, 2019 WL 4927053, at *8 (Del. Ch. Oct. 7, 2019).

In the LPA, the parties contractually agreed on a "good faith" standard to govern the General Partner's acts or omissions. The Partnership acts through its agents – in this case, the General Partner – whose conduct Exit waived the right to challenge unless it constitutes bad faith. And because the General Partner determined that Exit was not owed an SLPP following the Ponte Gadea Sale, the good faith standard is directly applicable to Exit's claims, as the Court correctly held. Exit's assertion that the General Partner's good faith is not relevant to its claims is inconsistent with the LPA.

2. The Court Correctly Analyzed the Entire LPA in Evaluating the General Partner's Conduct

The Court interpreted the LPA as a whole, concluding that the General Partner has extensive authority and discretion in all aspects of managing the Partnership. That conclusion is supported by the numerous times the LPA authorizes the General Partner to make determinations, notably in the definition of Resale Proceeds. (Op. 5-9, 23).

(a) *The Court Followed Delaware's Contract Interpretation Canons*

The Court's approach is consistent with Delaware's contract interpretation canons. A court must construe an agreement as a whole, giving "each provision and term effect, so as not to render any part of the contract mere surplusage." *Osborn*, 991 A.2d at 1159. Only by reading the LPA in its entirety can one determine how the Net Resale Price definition is intended to function in the broader scheme of Resale Proceeds. Although Exit purports to embrace this principle (OB 26), the entire premise of its appeal is that the Court should <u>only</u> have looked at the definition of Net Resale Price. Exit would have the Court disregard all of the LPA's other provisions that impact the definition, particularly how the Partnership's overall governance scheme centers around maximizing the General Partner's good faith discretion to make decisions that impact the Partnership and <u>all</u> its partners –including Exit as the Special Limited Partner – including calculating Resale Proceeds and Net Resale Price. *Accord Boardwalk Pipeline Partners*, 288 A.3d at 1116-17. Ignoring these sections as Exit suggests would be inconsistent with Delaware law. *See Axis Reinsurance Co. v. HLTH Corp.*, 993 A.2d 1057, 1062-63 (Del. 2010).

The Court interpreted the LPA correctly. It read the LPA as a whole, harmonized its various provisions, and reached the only logical conclusion: that the General Partner's broad discretion extends to the calculation of Net Resale Price. (Op. 1). Many of the subparagraphs of the Net Resale Price definition permit deductions that are discretionary, require additional calculations, or are enumerated by category rather than by name (*see, e.g.*, "any other costs" (Subparagraph (c)), "including without limitation" (Subparagraph (c)), "and similar costs" (Subparagraph (d)), and "including without limitation" (Subparagraph (h)). Acting on behalf of the Partnership, the General Partner exercised its discretion in good faith in making those calculations (Op. 21-22), as the LPA instructs it to do. That is the only interpretation and result supported by a harmonious interpretation of the LPA, and Exit has not challenged the Court's good faith findings.

In short, no objective third party could read the LPA in the manner Exit advocates. Exit's interpretation would provide it all the upside from a Resale without sharing in the burdens of paying Partnership expenses. (Op. 37). Such an interpretation cannot be correct as a matter of law. *Axis Reinsurance*, 993 A.2d at 1063; *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985).

(b) *Exit Knew Defeasance Was Likely to Occur and Was Incorporated Into the LPA*

In its newfound effort to disclaim its knowledge that the Partnership might incur defeasance costs as a deductible expense upon a sale of the Property, Exit contends the Court erred in finding that the concept of defeasance in the Loan Agreement was incorporated into the LPA. (OB 27-28). In support of its argument, Exit downplays the role of the Loan Agreement and the Basic Documents in the LPA. Exit's argument cannot hold water.

As an initial matter, Exit was admittedly aware that the Partnership could incur defeasance costs upon a sale of the Property. Exit knew the terms of the CMBS Loan through the parties' negotiations, in large part because before it assigned its purchase option, Exit also explored taking out a CMBS loan on the Property with Column Financial. (A1786-87). Emanuel also testified about his familiarity with CMBS loans, including their terms. (A1748, 1787).

The LPA also contains numerous references to the Basic Documents and Loan Documents. (A0361, 0363, 0369-72, 0375, 0380-83). Indeed, the LPA's Rules of Construction provide that "Section, paragraph, clause, Exhibit or Schedule references not attributed to a particular document shall be references to such parts of this Partnership Agreement." (LPA A-6, A0385). That rule of construction demonstrates that the parties intended to (and did) refer to and incorporate other agreements throughout the LPA, including the Basic Documents.

Exit was also directly aware of the inter-relation of the Basic Documents (particularly the Loan Agreement) and the LPA. In fact, Exit expressly agreed in the LPA that it would not engage in any business activities prohibited by the Basic Documents. (LPA §17, A0368). Exit's argument that a sophisticated real estate investor (Friedman) and a "deal guy" lawyer (Emanuel) would agree to restrict their business activities without knowing what they were agreeing to, is not credible. Also, during the negotiation process, Exit's counsel was included on correspondence with Column Financial's counsel concerning the Loan Agreement and other Basic Documents, including how their provisions would dovetail with the LPA. (B192). Further, in the LPA, Exit expressly authorized the General Partner to enter into the Loan Agreement, which Exit knew required defeasance. (LPA §7(b), A0361). Exit was no babe in the woods when it came to defeasance.

As a general rule, "all writings that are part of the same transaction are interpreted together." *Fla. Chem. Co., LLC v. Flotek Indus., Inc.*, 2021 WL 3630298 (Del. Ch. Aug. 17, 2021) (citing Restatement (Second) of Contracts §202(2)). Here, the LPA expressly authorized the General Partner to enter into the Loan Agreement (which provides for defeasance), making the Loan Agreement a part of the LPA. And, at the very least, the Court's factual determination that Exit was aware of defeasance and did not seek to exclude defeasance from the Net Resale Price definition defeats any claim that Exit was not aware that the Partnership may incur defeasance costs upon a sale of the Property.

Exit further contends that if the parties had intended to permit a deduction for defeasance, they would have expressly said so in the LPA. (OB 28-29). But the inverse is more apt here. The parties knew the CMBS Loan would be securitized, and defeasance would be required if the property was sold prior to maturity (Op. 9-10, 29). If the parties had intended to exclude defeasance (or any other specific expense) from Net Resale Price deductions, they could have done so with express exclusion or limitation language, as they did in most subparagraphs of the Net Resale Price definition. (*See, e.g.*, LPA A-3, A0382 at (a) ("…only to the extent that…"); (b) (same); (c) ("…except to the extent…"); (d) ("…to the extent not…"); (e) (same)). Instead, the parties relied on broad, inclusive language, intended to maximize the Partnership's available deductions, consistent with the LPA's overall purpose and scheme. (Op. 27-28).

Exit's reliance on *Fortis Advisors v. Shire US Holdings* is misplaced. There, the plaintiff's proposed construction would have required the court to render other provisions of the merger agreement superfluous. 2017 WL 3420751, at *8 (Del. Ch. Aug. 9, 2017). By contrast, the Court's interpretation of Net Resale Price as permitting the Defeasance Deduction under Subparagraphs (d), (f), and (h) does not render any provisions of the LPA as superfluous. Nor does Exit so contend. In fact, as Exit itself asserts (OB 25, 30), the Court should not adopt an interpretation that would render other provisions of an agreement surplusage.

3. <u>The Court Correctly Considered the General Partner's Broad Discretion Under the LPA</u>

As the Court explained in detail, the LPA gives the General Partner broad discretion to manage the Partnership. (Op. 6-9, 23, 30-31). Part of that managerial authority includes a determination of the Partnership's expenses in calculating Resale Proceeds following a Resale. (LPA A-5, A0384).

Exit's argument that there is no connection between Resale Proceeds and Net Resale Price is inconsistent with the plain language of the LPA. The LPA defines Resale Proceeds as "any proceeds received by [the] Partnership upon a Resale less the portion thereof used to pay all Partnership expenses, indebtedness, capital improvements, replacements, and contingencies, *all as determined by the General Partner*." (*Id.*) (emphasis added). More simply, the General Partner is responsible for calculating all Partnership expenses that are deducted from Resale Proceeds. When Resale Proceeds are distributed following a Resale, Section 15(b) states that the first distribution should be an SLPP (if one is owed). Because an SLPP is a Partnership expense that is deducted from Resale Proceeds, the General Partner has the discretion to calculate the SLPP (including the deductions under Net Resale Price). And because calculating the Net Resale Price is a discretionary act, the contractual good faith standard for evaluating its conduct applies.

4. Exit's "Surplusage" Argument Is Deficient

Exit also accuses the Court of wrongfully interpreting the LPA to permit the Partnership to deduct "all of its costs," rendering the Net Resale Price as surplusage. (OB 25, 30). Exit is wrong for two reasons.

First, Exit doesn't cite to the Court's Opinion to support its assertion that the Court permitted the deduction of "all" of the Partnership's costs. Why not? Because the Court never held that the Partnership was entitled to deduct all of its expenses. Rather, the Court held that the Partnership was entitled to deduct its costs "when those costs would make Exit's distribution possible in the first place." (Op. 37). Exit attempts to distract this Court's attention from the Vice Chancellor's principled and thorough analysis by objecting to an adverse ruling he never made.

Second, in the 12 pages preceding the above sentence in its Opinion, the Court carefully analyzed and explained in detail why the Defeasance Deduction is permissible under three separate subparagraphs of Net Resale Price – Subparagraphs (d), (f), and (h). (Op. 25-37).[8] The Court did not reduce any provisions of the LPA to surplusage; it applied the definition to the facts and found – based on the language of the LPA and the evidence presented at trial – that the Defeasance Deduction was proper.

C. The Court Did Not Err in Determining that the LPA Unambiguously Permitted the Defeasance Deduction

1. <u>The LPA is Unambiguous</u>

As a threshold matter, the Court correctly ruled that the LPA unambiguously permits the Defeasance Deduction. In its opening post-trial brief, Exit asserted that "there is no ambiguity about whether the definition of Net Resale Price permits any

---

[8] As Emanuel conceded at trial, the LPA does not prevent an expense from being deductible under more than one subparagraph (A1789).

deduction for defeasance." (A2013). And at post-trial argument, in response to a direct question about how the LPA was unambiguous, Exit's counsel only identified "negative accruals" – a phrase irrelevant to the defeasance deduction analysis – as being ambiguous. (B080-081). Counsel further stated that "defeasance is not ambiguous." (*Id.*). Despite these concessions, now that the Court has ruled against Exit on all its claims, Exit denies that it conceded the LPA was unambiguous.

In its Opening Brief, Exit does not identify any specific terms or provisions of the LPA that it contends are ambiguous with respect to defeasance.[9] Exit only argues that because the LPA doesn't use the word "defeasance," it is unambiguous and the Defeasance Deduction is improper, and that alternatively, the LPA must be ambiguous simply because it doesn't use the word "defeasance." (*See, e.g.*, OB 34). This "heads I win, tails you lose" position is inconsistent with the LPA's plain language and Exit's prior positions. Both parties argued that the LPA was unambiguous with respect to defeasance. (Op. 27). The Court agreed and (correctly) interpreted the LPA accordingly.

The fact that the parties assign different interpretations to a contract does not make the contract ambiguous. As the Court aptly ruled:

[9] As at post-trial argument, Exit solely identifies "negative accruals" as an ambiguous term in the LPA. (OB 36).

> Even the most steadfast disagreement over interpretation will not, alone, render the contract ambiguous. Instead, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings. By contrast, a contract is unambiguous if the plain, common, and ordinary meaning of its words lends itself to only one reasonable interpretation. An unambiguous contract must be enforced as written and not as hoped for by litigation-driven arguments.

(Op. 16 (cleaned up)).

Additionally, as the Court correctly concluded, an agreement does not need to explicitly use a term for that term to be captured by the agreement. (Op. 34). That the LPA does not include every possible deduction in a list does not make it ambiguous. Contract drafters are not required to identify by name every possible term that could ever be included in a contract's terms. *Credit Lyonnais Bank Nederland, N.V. v. Pathe Commc'ns Corp.*, 1991 WL 277613, at *23 (Del. Ch. Dec. 30, 1991) (Allen, C.); Op. 34. Accordingly, defeasance did not need to be specifically identified to be deductible.

2. <u>The Defeasance Deduction Is Proper as an Ownership, Operation, and Management Cost Under Subparagraph (d)</u>

The Court correctly determined that the Defeasance Deduction is proper as a cost of ownership. Subparagraph (d) permits deductions for <u>any</u> costs or expenses associated with the ownership, operation, or management of the Property. (LPA A-3, A0382).

Subparagraph (d) is undisputedly unambiguous. Exit has never contended that Subparagraph (d) is ambiguous, nor has it ever identified any extrinsic evidence that would compel a different result. Nor could it. Subparagraph (d) permits the deduction of any expenses associated with the ownership, operation, or management of the Property. The language is clear and not susceptible of more than one interpretation. *See Rhône-Poulenc Basic Chem. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992). The ability to borrow against (and pay off a loan on) a property is inherent in the bundle of rights that come with property ownership, as is the right to sell that property. *Fleer Corp. v. Topps Chewing Gum, Inc.*, 539 A.2d 1060, 1062–63 (Del. 1988). After trial, the Court found that "[o]nce secured, the CMBS Loan became related or connected to the Partnership's right to use, manage, and enjoy the Property. By the same token, defeasing the CMBS Loan became related or connected to the Partnership's right to convey the Property to Ponte Gadea." (Op. 31). The Court concluded the Defeasance Deduction was an ownership cost.

Arguing against deductibility, Exit first contends that the word defeasance does not appear in Subparagraph (d). That is not disputed but also doesn't matter. Subparagraph (d)'s language is very broad and as discussed above, parties need not specify each potential expense by name, nor would it be possible to do so.

Exit next argues that Subparagraph (d) does not include expenses resulting from a "sale or financing of the Property." (OB 44). This is wrong because under Delaware law, the bundle of rights associated with ownership includes a sale or financing of the Property. *See Fleer Corp.*, 539 A.2d at 1062-63. Exit cites no contrary authority. Nor is the Partnership aware of any. Even Exit's principal Emanuel – an author of law school study guides – agrees that property ownership rights include the ability to sell. In his eponymous leading treatise, he writes: "[O]wnership consists of a number of different rights, often called a 'bundle': the right to possess the object; the right to use it; the right to exclude others from possessing or using it, <u>and the right to transfer it</u>." STEVEN L. EMANUEL, EMANUEL LAW OUTLINES, PROPERTY 1 (9th ed. 2017) (emphasis added) (attached as Exhibit A). Yet now Exit – without any legal support – takes a contrary position, contending that "ownership" does not include a "sale or financing of the Property." (OB 44). The Court should reject Exit's opportunistic misinterpretation.

Finally, Exit contends that the Court erred by focusing "on the discretion of the General Partner to have the Partnership enter into agreements" in ruling in the Partnership's favor. (OB 44). But there is a simple, fatal problem with that argument – the Court never discussed the General Partner's discretion to enter into agreements in connection with deductions under Subparagraph (d). (Op. 31-32). The analysis Exit complains about simply does not appear in the Opinion.

3. <u>The Defeasance Deduction Is Proper as a Closing Cost Under Subparagraph (h)</u>

The Court correctly determined that the Defeasance Deduction is also proper as a closing cost. Subparagraph (h) is not ambiguous. It permits the deduction of "[a]ll actual documented out-of-pocket closing costs and costs of sale incurred in connection with such Resale." (LPA A-4, A0383). This plain language is broad and the use of "all" unmistakably demonstrates the parties' intent to permit the deductibility of an expansive set <u>of</u> expenses.

As the Court correctly ruled, the Defeasance Deduction was a closing cost. (Op. 32). Closing costs plainly include costs incurred in connection with closing a Resale transaction. It is undisputed that the Defeasance Deduction was incurred and documented in the Ponte Gadea Resale. (A1788). The PGSA required the Partnership to pay off its loan to Column Financial because Ponte Gadea would not assume the CMBS Loan in the transaction. (B246-249). Because the Loan Agreement required defeasance, the Partnership was required to incur the Defeasance Deduction to close the transaction. (A0422). Defeasance is deductible under Subparagraph (h)'s unambiguously broad language.

Exit advances three meritless arguments in support of its position that the Court erred in finding the Defeasance Deduction was a closing cost. First, Exit posits that "if an item fits best in a particular definition…then it needs to be considered there, not in a broader category." (OB 41). But Exit seeks to add words to the LPA's unambiguous language. The parties never agreed to such a restriction.

In support of its position, Exit cites two cases for the principle that where language conflicts, specific language controls over general language. (*Id.*). Both are distinguishable.

In *DCV Holdings v. ConAgra,* the court identified a conflict that giving effect to one provision would render another provision meaningless. 889 A.2d 954, 962 (Del. 2005). In *Stasch v. Underwater Works*, the court found that two provisions created an actual conflict as to ownership of a salvaged ship. 158 A.2d 809, 812 (Del. Super. 1960). One provision was "general," "in the nature of standard contract clauses," while the other was "of a specific and special character with reference to the particular work in question."

Neither case is analogous. The Net Resale Price definition contains no specific or general provisions, and no "standard contract clauses." The entire definition is bespoke to the LPA, a notable distinction from *Stasch*. And because permitting a deduction under one subparagraph does not impact its deductibility under another, as Emanuel admitted at trial, (A1789), this case is dissimilar from *DCV Holdings*.

There is no inconsistency or conflict in Net Resale Price. Exit attempts to manufacture a conflict between Subparagraphs (h) and (f) (OB 41-42), but that is artificial because, even Emanuel admitted that the same expense can fall within more than one Subparagraph. (A1789). There is no conflict between Subparagraphs (h) and (f).

Exit's second argument is that even though Subparagraph (h) permits the deduction of "all" closing costs, defeasance is too different from the few discrete examples that follow the broadly permissive qualifier "including, without limitation" to be deductible. (OB 42-43). In support of its argument, Exit relies on the doctrine of *noscitur a sociis*. (*Id.*). But Exit fails to disclose that the doctrine only applies where a contract term is ambiguous. *Zimmerman v. Crothall*, 2012 WL 707238, at *7 (Del. Ch. Mar. 5, 2012). Exit does not argue any ambiguity within Subparagraph (h) aside from not specifically using the word "defeasance," which, as discussed above, is not an ambiguity. Exit's support for its argument is not analogous. The only cases Exit cites – *Agar v. Judy* and *Zambrana v. State* – both presented questions of statutory, rather than contract, interpretation and Exit only cites them for their statement about the existence of the doctrine. (OB 43). Neither case fits here.

Exit also argues that defeasance cannot be a closing cost because it "is nothing like these other costs, and therefore does not belong with them." (OB 42-43). That argument is nonsensical. Each of the closing cost examples is separate and distinct from the others. "Transfer taxes" are dissimilar from "survey costs," which are dissimilar from "attorneys' fees." And all of them are dissimilar from defeasance. The common thread is that they had to be paid to allow the Ponte Gadea Sale to close, which makes them deductible closing costs.

Accepting Exit's argument would require the Court to blue pencil Subparagraph (h) to delete the words "all" and "including, without limitation." But courts cannot rewrite agreements, *Murfey v. WHC Ventures, LLC*, 236 A.3d 337, 355 (Del. 2020), and there is no basis to do so here (nor does Exit argue one exists).

Exit's third argument posits that defeasance is not a closing cost because it "could [be incurred] independently of a sale." (OB 43).[10] Exit's only support is the trial testimony of its rebuttal expert James Finkel, who thought defeasance was not a closing cost because it could be incurred independent of a sale. (A1951). Because Exit does not assert Subparagraph (h) is ambiguous, the Court should not consider Finkel's opinion. But even if Finkel's testimony were considered, Exit ignores that defeasance <u>was actually incurred</u> in connection with the Ponte Gadea Sale. The Property could not be conveyed with the mortgage, so defeasance was

---

[10] Other enumerated closing costs can be incurred in non-closing situations. For example, attorneys' fees and survey costs are not exclusively closing costs.

Also, even if Exit were correct (it is not), its position would be a tacit admission that costs to refinance or satisfy a mortgage are ownership, operation, or management expenses, deductible under Subparagraph (d).

required. Had defeasance not been paid, the sale could not have occurred. As an actual cost incurred in connection with a Resale, it is deductible under Subparagraph (h).

4. The Defeasance Deduction Is Proper as an Excess Loan Cost Under Subparagraph (f)

(a) *Subparagraph (f) Is Unambiguous*

The Court correctly found the plain language of relevant portions of Subparagraph (f) unambiguously permits the deduction of "Excess Loan Costs," which are defined through a formula. The Partnership can deduct the amount by which A exceeds B, where:

> A = loan interest costs, points, loan origination fees, negative accruals and similar costs; and
>
> B = (loan origination fees up to $550,000) + (the amount of interest costs that exceed Gucci rent BUT ONLY where the interest costs exceed Gucci rent by more than $875,000[11] in a given year)

The $875,000 figure is subject to proration for any partial year.

All relevant terms in Subparagraph (f) are common and should be ascribed their ordinary meaning, including those that relate to interest costs. Although "defeasance" is not identified by name in the Excess Loan Costs definition, the

[11] In its Opinion, the Court intermittently referred to the $875,000 as a Rental Payment threshold. (Op. 8, 11, 33). Whatever name the Court gave to this figure, its calculation of Excess Loan Costs under Subparagraph (f) was correct and should not be disturbed.

Defeasance Deduction is certainly a "loan cost" and also a "loan interest cost," because it was a cost associated with the CMBS Loan and the cost to provide a substitute for interest.[12] Excess Loan Costs include, "loan interest costs, points, loan origination fees, negative accruals and similar costs." (LPA A-3, A0382). Defeasance is the cost of bonds required to generate cash flow equivalent to interest as it becomes due under a CMBS Loan. (Op. 10). It is analogous to a prepayment penalty and as a cost associated with a loan on the Property, is a "similar cost," like "loan interest costs, points, loan origination fees," that are paid to a lender in connection with a loan. *Accord State v. Rogers*, 2001 WL 1398583, at *2 (Del. Super. Oct. 9, 2001), *aff'd*, 798 A.2d 1042 (Del. 2002). Emanuel even admitted that defeasance "would be interest costs and would, therefore, go into the computation of excess loan costs, which included all interest costs and other stuff." (A1801).

Furthermore, defeasance is fully deductible because it had to be paid to close the transaction and is "interest costs" under Subparagraph (f)(B). (LPA A-4,

---

[12] The LPA does not define "loan interest cost." But that term is broader than "loan interest," which is limited to interest only. Many costs are incurred with commercial loans like the CMBS Loan, and the sophisticated parties chose not to enumerate each one, instead relying on a non-exhaustive list, presumably so not to inadvertently omit an item. *Accord Credit Lyonnais Bank Nederland*, 1991 WL 277613, at *23.

A0383; B321-323). The Defeasance Deduction entirely related to the payoff of the CMBS Loan and interest on that loan.

Excess Loan Costs are permitted deductions under Subparagraph (f) if they do not exceed a specified amount of loan origination cost or a specified amount of interest in excess of rental payments. After trial, the Court found that the Defeasance Deduction was properly calculated and deducted. (Op. 12-13). The Court found: "Defendants have offered considerable evidence supporting a finding that the General Partner took the Challenged Deductions based on standard accounting principles, the Partnership's books and records and outstanding obligations, and its prior experience in distributing proceeds to Festival investors." (Op. 22). Specifically, the Court credited Festival's CFO's detailed explanation of how he applied Subparagraph (f)'s formula for calculating Excess Loan Costs. (Op. 13; *accord* A1889-93; A503-47). The Court's factual findings and legal determinations should not be disturbed.

(b) *Extrinsic Evidence Does Not Support a Different Conclusion*

Exit claims <u>all</u> extrinsic evidence supports its interpretation of Net Resale Price. (OB 34) (emphasis in original). Not so. Even if the Court finds Subparagraph (f) ambiguous (which it is not), no extrinsic evidence contradicts the parties' expressed intention in the LPA that Net Resale Price would be calculated after the Partnership was reimbursed for costs associated with the Property, including defeasance.

"[T]he drafting history of particular disputed provision(s) is often especially revealing of the process by which the parties reached a meeting of the minds and the ground on which that meeting occurred." *Zayo Grp., LLC v. Latisys Holdings, LLC*, 2018 WL 6177174, at *12 (Del. Ch. Nov. 26, 2018). But where the parties rejected terms in negotiating an agreement, a court may not impose them on the party that previously rejected them. *Id.* ("The parties were purposeful in their negotiation of the Material Contracts representation and warranty. They chose not to include [certain obligations]…. There is no room for this Court to impose those obligations now.").

There is limited drafting history about Subparagraph (f), and Exit relies exclusively on Emanuel's "Deal Memo," which Emanuel admitted (A1837), and the Court found (Op. 2), Festival never agreed to.

While the LPA's SLPP language is similar in some respects to "Additional Purchase Price" in Emanuel's "Deal Memo," the LPA's Net Resale Price permits many more deductions than the "Deal Memo," and materially modifies other "Deal Memo" language, including a complete rewrite of Subparagraph (f)'s formula and the additions of Subparagraph (g) and (h). (*Compare* LPA A-3-4, A0382-83, *with* A0144-47). Exit contends these changes are merely cosmetic. (OB 37-39). But a comparison of the two documents, used as a demonstrative at trial, unmistakably shows that the final LPA contains a <u>different formula</u> than the "Deal Memo" – one that permits the Partnership to deduct substantially more Excess Loan Costs than Exit proposed (and Festival rejected) in Emanuel's "Deal Memo."

Additionally, the evidence shows the parties knew the CMBS Loan would be securitized, and defeasance would be required if the Property was sold prior to maturity. (A1787; A0422-25). But there is no evidence of discussions about excluding defeasance from the Net Resale Price definition, despite most of its subparagraphs containing express limitations on permissible deductions. (*See, e.g.*, LPA A-3, A0382 at (a) ("…only to the extent that…"); (b)(same); (c) ("…except to the extent…"); (d) ("…to the extent not…"); (e) (same)).

Trial testimony on the negotiation history similarly does not support Exit's position. Emanuel testified extensively at trial about his <u>subjective</u> understanding of Subparagraph (f) and his views of the economic principles behind Net Resale Price. (OB 12-16; A1751-70, 1807, 1834-35). Exit relies on his testimony to support its position – that Emanuel's "Deal Memo" terms should govern over the contrary language of the LPA. (OB 22). But extrinsic evidence is not admissible to vary or contradict the unambiguous terms of an integrated agreement, which the LPA is. *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997); (LPA §26, A0374). And Emanuel, who considered his "Deal Memo" the first draft of Subparagraph (f) (A1752-53), never discussed excluding defeasance from the Net Resale Price definition with anyone. (A1736, 1798). Exit's extensive discussion of Emanuel's subjective intent is merely an effort to distract from the fact that the parties never discussed – let alone agreed – to exclude defeasance from deduction. *Accord Progressive Int'l Corp. v. E.I. du Pont de Nemours & Co.*, 2002 WL 1558382, at *7 (Del. Ch. July 9, 2002). Yustein – Exit's counsel and principal negotiator –recalled none of the LPA negotiations, including concerning defeasance. (A1795). No other witnesses testified about defeasance-related LPA negotiations.

Rather than supporting Exit's position, extrinsic evidence instead reinforces the Court's ruling that the Defeasance Deduction was proper under Subparagraph (f). Despite Exit's *post hoc* position here, during the litigation, Emanuel testified that Exit was "not contesting that [defeasance] are loan interest costs…." (A0703-04), and that "loan costs" means "everything else [besides principal] that was a kind of direct cost of the bringing into existence of this loan and satisfying it. That whole bundle of things ought to be considered" (A0918-19). These statements by Exit's principal are party admissions that if defeasance is a "loan cost," then it must be permitted as a deduction under Subparagraph (f).[13]

[13] And aside from Emanuel's admission, the Defeasance Deduction is also deductible under Subparagraphs (d) or (h).

Aside from Emanuel's subjective views on Excess Loan Costs and Yustein's inability to remember anything, Exit introduced no evidence to support its position that the parties intended to agree to Emanuel's "Deal Memo" terms rather than the terms in the final, integrated LPA. Accordingly, no basis exists to conclude that extrinsic evidence supports overturning the Court's informed and reasoned rationale that the Defeasance Deduction was an Excess Loan Cost.

(c) *Exit's Concession that the Defeasance Deduction Is a Loan Cost, By Itself, Precludes Recovery by Exit*

As discussed above, Exit concedes that defeasance is a "loan cost" and a "loan interest cost," making it deductible under Subparagraph (f). The Defeasance Deduction was incurred in connection with the Ponte Gadea Sale in 2014, meaning nearly the entire amount is deductible (even based on Exit's interpretation[14]) because under Subparagraph (f)'s formula:

A = interest loan costs ($6,250,155)

B = loan origination fees ($0) **PLUS** the amount that interest exceeds Gucci rent **IF** the overage is more than $875,000, **prorated for 7 days** (($875,000 × 7/365) = $16,780.82)

[14] To avoid the effects of its own concession, Exit pretends that the Defeasance Deduction should be assessed across multiple years past 2014 because it replicates interest that would have been due in those years had the CMBS Loan not been paid off. (OB 40). Exit's argument fails for the simple reason that all defeasance was actually paid in 2014.

Subtracting B ($16,780.82) from A ($6,250,155) under the formula still permits a deduction of $6,233,374.18. Even that slightly reduced Defeasance Deduction would leave Exit out of the money on the SLPP, still resulting in a judgment for the Partnership.

D. Because Exit Never Quantified Its Damages, Its Breach of Contract Claim Would Fail Regardless of the Court's Interpretation of the LPA

Finally, as the Court noted (Op. 37-38 n.163), Exit never sought to quantify its damages, a required element of a claim for breach of contract. *CSH Theatres, L.L.C. v. Nederlander of S.F. Assocs.*, 2018 WL 3646817, at *25 (Del. Ch. July 31, 2018), *aff'd in part, rev'd in part*, 213 A.3d 39 (Del. 2019). Because a plaintiff must prove <u>all</u> elements of its claims to prevail, Exit's breach of contract claim would fail even had the Court adopted all of Exit's contract interpretation arguments. (*Id.* (collecting cases)).

CONCLUSION

For the reasons set forth above, this Court should affirm the Court of Chancery's Opinion.

Respectfully submitted,

/s/ James H. S. Levine
Douglas D. Herrmann (Del. Bar No. 4872)
James H. S. Levine (Del. Bar No. 5355)
TROUTMAN PEPPER HAMILTON SANDERS LLP
Hercules Plaza, Suite 5100
1313 Market Street, P.O. Box 1709
Wilmington, DE 19899-1709
Telephone: 302.777.6500
Douglas.Herrmann@troutman.com
James.Levine@troutman.com

Attorneys for Defendant-Below, Appellee Festival Retail Fund BH, L.P.

Of Counsel:

LURIE, ZEPEDA, SCHMALZ, HOGAN & MARTIN
Andrew W. Zepeda (*pro hac vice*)
1875 Century Park East, Suite 2100
Los Angeles, CA 90067
Telephone: (310) 274-8700
azepeda@lurie-zepeda.com

Dated: December 7, 2023