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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

Defendant Below/Appellant Rockpoint Group, L.L.C. ("Rockpoint or the "Company") appeals from a summary judgment ruling in which the trial court erroneously determined that a passive, minority equity investment by Blackstone's Strategic Capital Holdings Fund ("BSCH") in two new parent companies of Rockpoint, entitling BSCH to a profit-sharing percentage in the parent companies, triggered a contractual provision addressing asset sales by Rockpoint. The trial court departed from the plain language of the relevant contractual provision and the overall structure and clear intent of the heavily negotiated contract which differentiates between asset sales and equity investments. It compounded that error by interpreting the contract term "sale" to have different meanings within the same provision. The trial court's flawed analysis runs counter even to the arguments advanced by Plaintiff. If left uncorrected by this Court, the decision below not only would produce a manifestly erroneous (and unfair) result, but would have implications beyond this appeal, as it injects uncertainty into settled law distinguishing between sales of equity in an issuer and asset sales by that issuer of the issuer's property.

Rockpoint is an investment firm that sponsors and manages real estate investment funds, each of which is a limited partnership managed by a general partner (each a "Fund GP"). Plaintiff Below/Appellee Jonathan H. Paul ("Plaintiff" or "Paul"), is a former managing member of Rockpoint who worked at Rockpoint

for four years before leaving in 2007 pursuant to a heavily negotiated agreement that provided him defined economics for a finite term. The departure agreement (the "Ninth Amendment") provided Plaintiff the right to proceeds if a future "Company Sale" occurred, a defined term limited to six specifically-enumerated circumstances. This appeal involves only one of those definitions: "Company Partial Asset Sale."

Prior to the BSCH investment (the "BSCH Equity Investment"), all the economic interests in the Fund GPs were held directly or indirectly through the Company by the Company's managing members (the "Managing Members") and others including Plaintiff, each of whom had the right to sell the interests to third parties and to transfer the interests. The Company served as a conduit through which the Managing Members held their underlying individual limited liability company interests (including the Promote Interests, or Carried Interests, the only interests at issue) in the relevant Fund GPs (the "Fund GP Interests"). But the Company held legal title for the benefit of the individuals who owned interests in the Company corresponding to 100% of the Fund GP Interests. In other words, the individuals held tracking interests in the Company that equated to underlying ownership of a portion of the Fund GP Interests. For each Rockpoint fund, the entirety of the economic interest in Rockpoint funds belonged to and was allocated to the Managing Members, former managing members, and non-managing members. No interests were allocable to the Company itself. The Company was obligated to distribute all

income from the Fund GP Interests (following payment of certain expenses and deductions) to the individual owners of the Company in accordance with their allocated percentages, which totaled 100% of each Fund GP.

In March 2018—nearly eleven years after Plaintiff's departure—BSCH acquired a non-voting 21.687% profit-sharing interest in two newly formed limited partnerships (the "New Parent Entities") that held certain Rockpoint and Fund GP Interests of the individual Managing Members (not Plaintiff) that had been reorganized.

In advance of the BSCH Equity Investment, the Company and its affiliates engaged in an internal reorganization (the "Reorganization," and collectively with the BSCH Equity Investment, the "Transactions"). This Reorganization was undertaken in part to facilitate BSCH's subsequent equity investment, but the Company did *not* deliver any asset of the Company to BSCH. It was not until the BSCH Equity Investment—which took place *after* the Reorganization—that BSCH acquired a non-voting equity stake from the Managing Members, not from Plaintiff or the Company, in proportion to the Managing Members' equity holdings.

Through the Reorganization, the Investor and Promote (or Carried) Interests allocable to certain Managing Members and former managing members (the "Participating Individuals") were transferred from the Company to a New

Parent Entity (Rockpoint GP Holdings L.P. ("GP Holdings")). In exchange for contributing the Participating Individuals' Fund GP Interests to GP Holdings, the Company received limited partnership interests in GP Holdings, and immediately distributed those LP interests to the Participating Individuals in redemption of their equity interests in the Company. The Reorganization did not change the economic ownership in the Fund GP Interests in any way, and the Fund GP interests never left the control of the Company and its affiliates. Each individual's percentage allocation in the Fund GP Interests (which collectively comprised 100%) remained exactly the same, unchanged by the Reorganization. The sole difference was that legal title for the Fund GP Interests allocable to the Participating Individuals moved up a level to the New Parent Entities. It is undisputed that none of Plaintiff's interests was transferred in the Reorganization and he had no claim on the value of the Managing Members' transferred interests. Plaintiff's interests in Rockpoint's funds today are exactly what they were before the Reorganization and BSCH's subsequent investment in GP Holdings.

Plaintiff nevertheless alleges that he is entitled to proceeds from the BSCH Equity Investment because he contends it constituted a sale of assets by the Company under the Ninth Amendment. On July 28, 2021, the trial court granted Plaintiff's motion for summary judgment, issuing a declaration that the Reorganization constituted a Company Partial Asset Sale. Order Granting

Declaratory Judgment Regarding Definition of Company Partial Asset Sale, Exhibit A hereto (the "Order").

The trial court erred in at least three critical ways that resulted in a flawed contract interpretation. First, rather than looking to the overall purpose and economic effect of the investment transaction—which the court acknowledged was an equity sale to a passive investor that acquired no assets of Rockpoint—the court erroneously concluded there was a sale of Rockpoint's assets by disaggregating the transaction and focusing on an intermediate step in which, prior to the BSCH Equity Investment, individual Managing Member interests in the general partners of certain investment funds were reorganized without changing the owners' underlying economic interests. The trial court erroneously held that this internal reorganization among related parties was a "sale"—a position that not even Plaintiff advanced in his summary judgment motion. The court failed to make the crucial distinction between a "sale," in which underlying economic interests change, and a "reorganization," in which underlying economic interests do not change.

The trial court erred by determining that a Company Partial Asset Sale occurred when it was undisputed that—as the court acknowledged—BSCH's investment (i) was an equity investment in the two New Parent Entities, and (ii) did not result in BSCH owning any Rockpoint assets. The structure of the Company Sale provision makes clear that the Company Partial Asset Sale definition does not

cover equity transactions. If the parties had intended Company Partial Asset Sale to encompass sales of equity interests, then the parties could and would have included language making that clear, particularly because such a meaning would contradict the defined term itself, which refers to an "asset sale." The parties knew how to and did separately address "equity interests" through the definition of "Company Stock Sale," which is a different definition in the Ninth Amendment that expressly uses that term. Company Stock Sale is the only definition triggered by a sale "by . . . the owners of the Company's outstanding equity interests." A189, Annex A. In contrast, the definition of Company Partial Asset Sale does not reference equity interests, nor does it contain any broad language (for example, a reference to sales of indirect interests in the Fund GPs) that could implicitly capture sales of equity interests.

Second, the Order rests on an inconsistent interpretation of the phrase "owned by" within the same provision of the contract (Article 6 and its annex, containing all provisions addressing what qualifies as a "Company Sale"). The trial court disregarded the cardinal canon of construction that the same word—here "sale"—must be construed consistently in the same provision and in accordance with its use in the context of the provision. This produced a result that contravenes the plain language of the Company Sale provision and clearly-expressed intentions of the parties.

Finally, the trial court erroneously ordered the parties to engage in a contractual appraisal proceeding to determine the amount ("if any") of proceeds from the Transactions due to Plaintiff, even though it is undisputed that Plaintiff did not transfer or sell any of his interests in the transaction (he declined Rockpoint's voluntary offer to participate). The Ninth Amendment states unambiguously that "Paul's share of the proceeds realized in a Company Sale shall be based on the portion of such proceeds that are allocable to the *interests then owned by Paul*." A174, § 6.3 (emphasis added). Unlike the Managing Members who contributed their individual interests, Plaintiff kept all his interests and associated income stream intact and undiluted. Even if the Reorganization were a Company Partial Asset Sale (it was not), no assets allocable to interests owned by Plaintiff were transferred. Thus, there is nothing for determination in the appraisal proceeding.

SUMMARY OF ARGUMENT

1. The trial court incorrectly held that an internal corporate reorganization was a "sale" of assets. Delaware law sensibly distinguishes between a reorganization, in which underlying economic interests do not change, and a sale, in which they do. Here, the underlying economic interests remained unchanged by the transfer of Managing Member Fund GP Interests from the Company to the New Parent Entities. The only change in underlying economic interests, and hence the only "sale," was the sale of limited partnership equity interests in the New Parent Entities to BSCH corresponding to the membership interests relinquished by the Managing Members. BSCH did not purchase any Fund GP Interests, or obtain a right to receive a stream of income from the underlying Fund GPs. There was no sale of assets. Instead, it was a sale of equity below the 25% threshold under the Company Stock Sale definition. Accordingly, the trial court's misinterpretation of the term "sale" in the Ninth Amendment requires reversal. *See* Section I.C, *infra*.

2. The trial court erroneously interpreted the phrase "owned by the Company" in the Company Partial Asset Sale definition to refer to bare legal title in the Fund GP Interests, rather than the broader sense of ownership in which the Ninth Amendment uses that phrase. The Ninth Amendment, the transaction documents, and even Plaintiff's testimony, reflect the common and agreed understanding that the Fund GP Interests were owned by individuals, such as the Managing Members

and Plaintiff, and not by the Company. The court correctly recognized that the Ninth Amendment used the parallel phrase "interests then owned by" to reference a "broader sense of ownership," not legal title. But the court erred in concluding that the parties intended a far narrower ownership meaning elsewhere in the same part of the contract. The trial court's departure from the canon of contractual construction requiring that the same term or phrase be interpreted consistently throughout a contract is an independent ground necessitating reversal. *See* Section II.C, *infra.*

3. Plaintiff is only entitled to "the portion of [Company Sale] proceeds that are allocable to the interests then owned by" him. A174, § 6.3. Even if assets of the Company were sold (they were not), it remains undisputed that no assets *allocable to interests owned by Plaintiff* were sold. Plaintiff concedes that his economic interests today remain exactly as they were before the Transactions. That is because the Transactions involved only interests allocable to the Managing Members, and Plaintiff has no claim on the value of the Managing Members' individual interests that were transferred. Thus, even if there were a Company Partial Asset Sale, it remained error for the trial court to order the parties to engage in appraisal proceedings to determine what percentage of the proceeds may be allocable to interests owned by Plaintiff because the answer is 0%. *See* Section III.C, *infra*.

STATEMENT OF FACTS

A. Plaintiff Negotiates Certain Contractually Defined Rights In His Departure From Rockpoint In 2007

Rockpoint's funds generate three revenue streams: Promote Interest, Investor Interest, and Fee Interest. A81, ¶ 19. Promote Interest (or carried interest) references profits based on the performance of the funds. *See* A157. Investor Interest references the return of and return on capital that is directly invested in the funds. *See id*. Fee Interest references management fees and ancillary fees that Rockpoint receives for managing the funds. *See id*.; A81, ¶ 19.

Plaintiff is a former managing member of Rockpoint. *See* A778 at 28:18-29:6. In connection with his departure from Rockpoint in 2007, Plaintiff and Rockpoint negotiated a separation agreement, called the "Ninth Amendment," *i.e*. the ninth amendment to the Amended and Restated LLC Agreement of Rockpoint (the "LLC Agreement"). A956-1025; A81-82, ¶ 22.

Under the Ninth Amendment, Plaintiff retained his interests related to pre-existing Rockpoint funds and received certain passive interests from all additional funds that Rockpoint formed during the finite ten-year period before January 1, 2018, even though he was no longer working at Rockpoint. The sole interests relevant to this litigation are Plaintiff's (a) 5% promote percentage in Rockpoint "Fund IV," (b) 3.3% promote percentage in "Fund RGI I," (c) 3.3%

promote percentage in "Fund V," and (d) 3.3% promote percentage in "Fund RGI II". *See* A901.

B. The Company Sale Provision Of The Ninth Amendment

Article 6 of the Ninth Amendment is an integrated provision addressing a potential "Sale of the Company." A174-76. Section 6.1 provides that: "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 this Article 6." A174, § 6.1. The term "Company Sale" is defined by six enumerated defined terms: "'Company Sale' means a Company Merger, Company All Assets Sale, a Company Partial Asset Sale, a Company Stock Sale, a Company Stock Issuance, or a Company IPO." A189, Annex A. If a transaction does not fall within one of the defined terms that comprise the "Company Sale" definition, it is not a Company Sale and Plaintiff has no right to receive proceeds from it. *See* A174, § 6.1.

The sole Company Sale definition relevant to this appeal is Company Partial Asset Sale, which 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, Annex A. Even in the event of a Company Sale, Plaintiff is only entitled to "the portion of [the Company Sale] proceeds that are allocable to the interests then owned by [Plaintiff]." A174, § 6.3.

C. Pre- Reorganization Ownership Structure

Before the Transactions, the Managing Members, Plaintiff and other former managing members, and non-managing members (collectively, the "Individual Owners") held their Promote Interests in the funds through the Company. The Company periodically distributed to the Individual Owners the proceeds allocable to their respective interests in the funds. Each held membership interests in the Company, and the Company, in turn, held interests in the underlying Fund GPs which corresponded to the Individual Owners' equity interests in the Company. *See, e.g.*, A640 (the Fund GP Interests "represent[] the Investor Interests and/or the Promote Interests of each Transferring [Managing] Member"). Payments from the Individual Owners' Promote Interest and Investor Interest were distributed from the Fund GPs to the Company and then were distributed to the Individual Owners. *See* A204; A672 at 51:24-52:13. The Fee Interest in Rockpoint funds flowed from the limited partners of the underlying funds to the Company, which then distributed fee income to the Individual Owners in accordance with any Fee Interest allocable to them. *See* A204.

Rockpoint did not track ownership percentages in the Company itself. A684 at 101:6-15. Individual Owner ownership interests were based on percentage allocations to the Promote Interest, Investor Interest, and Fee Interest in the Fund GPs. Rockpoint's operative limited liability company agreement at the time of the Transactions specified the percentage of the Promote Interest, Investor Interest, and Fee Interest of each fund that was allocable to each Individual Owner. *See* A1217-22, Ancillary Schedule. For each of the funds, the entirety of these Interests belonged to and was allocated to the Individual Owners. *See id.* None of these Interests was allocable to the Company itself. *See id.*

D. The Reorganization: Rockpoint Reorganizes Its Holding Structure

Before BSCH's investment, Rockpoint reorganized the structure through which the Managing Members and certain former managing members held their interests in the Promote, Investor, and Fee Income of the funds. As described below, the Managing Members moved certain of their ownership interests in certain Fund GPs up a level by creating two new parent entities: Rockpoint Manager Holdings L.P. ("Manager Holdings") and GP Holdings. Among other things, the Reorganization created a "unitized" structure, which allowed for Rockpoint to track the Managing Members' ownership interests as percentages in the New Parent Entities, in contrast to the more complicated pre-Reorganization structure in which the Managing Members' ownership interests were tracked as percentages of the

Promote, Investor, and Fee Interest in each of the Fund GPs. A684 at 101:6-15; A690 at 123:18-124:5.

In the Reorganization, Promote Interest comprising 70% of the total Promote Interest in the funds was transferred to GP Holdings and 100% of the Investor and Fee Interests in the funds was transferred to Manager Holdings. A694 at 138:13-139:20; *see* A258-59 § 2.2(d). A third entity, RPG GP, L.L.C. ("RPG GP"), was created as the general partner of the New Parent Entities and is owned and controlled by the Managing Members, through which they continue to control the Fund GP Interests, as they did before the Transactions. BSCH has no interest in RPG GP. This Reorganization did not change the Managing Members' economic interests in the Promote, Investor, and Fee Interest from the Fund GPs.

The Reorganization was accomplished through a series of Contribution and Distribution Agreements. A694-95 at 140:15-142:2. The Managing Members' Investor and Promote Interests were reorganized by simply moving those interests up a level in Rockpoint's structure, as follows:

- The Company transferred to GP Holdings "limited liability company interests" that the Company held in the Fund GPs "representing the Investor Interests and/or or the Promote Interests" of the Managing Members (the "GP Holdings Transferred Interests").
- In exchange for the transfer of the GP Holdings Transferred Interests, GP Holdings issued GP Holdings limited partnership interests to the Company.

- The Company distributed all of the GP Holdings limited partnership interests to the Managing Members in redemption of the Managing Members' Investor Interests and Promote Interests in the Company.

See A640.[1] The Contribution and Distribution Agreement effecting this transfer described the Managing Members as the "Transferring Members." *Id.* The agreement also included a schedule entitled "Managing Members and Transferred Interests," which confirms that the transferred Fund GP interests were specifically allocable to the Managing Members; they were not unallocated interests belonging to the Company generally. A654-55 at Schedules 1, 2.

The Managing Members' Fee Interests were reorganized as follows:

- The Managing Members transferred to Manager Holdings "limited liability company interests" that they held in the Company "representing the Fee Interests" of the Managing Members (the "Manager Holdings Transferred Interests").
- In exchange for the Manager Holdings Transferred Interests, Manager Holdings issued Manager Holdings limited partnership interests to the Managing Members.

See A625.[2]

Following the Reorganization, the Managing Members no longer held their interests in the funds through the Company. Rather, they held their Fee Interest

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[1] The trial court characterized the reorganization of the Managing Members' Investor and Promote Interests as the "Distribution and Redemption." *See* Order ¶15(b).

[2] The trial court characterized the reorganization of the Managing Members' Fee Interests as the "Member-Level Exchange." *See* Order ¶15(c).

through Manager Holdings and their Promote and Investor Interest through GP Holdings. Post-Reorganization, the Managing Members continued to retain the same ownership percentages in Fee, Promote, and Investor Interest in the underlying funds as they did before the Reorganization. The Reorganization did not change the economic ownership interests one iota. The disclosure schedule for the Transactions demonstrates that after the Reorganization and immediately before the BSCH Equity Investment, the Managing Members' proportionate economic interests in the underlying Fund GP Interests were the same as they were before the Reorganization. *See* A1244-52.

Ownership Capitalization Table	Pre-Closing	Post-Closing
Rockpoint GP Holdings, L.P.		
RPG GP, L.L.C.	0.000000%	0.000000%
Walton	26.424475%	20.693799%
Walton Irrevocable Trust	3.835525%	3.003715%
Gelb	25.071277%	19.634069%
Gelb Trust	0.738723%	0.578516%
Gilbane	18.690000%	14.636700%
Shalev	14.240000%	11.151771%
Boney	11.000000%	8.614430%
BSCH	0.000000%	21.687000%
Total Rockpoint GP Holdings, L.P.	100.000000%	100.000000%

A1254.

The table above shows that the interests acquired by BSCH were acquired from the economic interests allocable to the Managing Members and other individuals other than Plaintiff. *See* A1254. The first column shows ownership percentages after the Reorganization but before the BSCH Equity Investment. The

second column shows ownership percentages after the BSCH Equity Investment. *See also* A157 ("Prior to Blackstone's investment on March 13, 2018, Manager Holdings' and GP Holdings' limited partners were the same 5 individuals [the Managing Members] that own 100% of [the Company]. After Blackstone's investment, Blackstone became the sixth limited partner in both Manager Holdings and GP Holdings."). The Managing Members' ownership percentages decreased as a result of the BSCH Equity Investment, not as a result of the Reorganization. Consistent with this fact, the Memorandum of Understanding among the Managing Members related to the Transactions specifies that the "contributions/redemptions," *i.e.*, the Reorganization, "will be non-taxable for U.S. federal income tax purposes." A221.

E. The Investment: BSCH Makes A Passive, Minority Equity Investment In Two Newly Formed Parent Entities Of Rockpoint That Hold A Portion Of The Managing Members' Interests In The Funds.

After the Reorganization, BSCH acquired a minority, non-voting equity stake of 21.687% in the New Parent Entities pursuant to an Equity Subscription and Investment Agreement (the "BSCH Equity Agreement") between BSCH on the one hand and Manager Holdings, GP Holdings, and RPG, LLC on the other. The Company was not a party to the BSCH Equity Agreement. In exchange for its investment in the New Parent Entities, BSCH received in both entities "in its capacity as a Limited Partner . . . a Profit Sharing Percentage . . . initially of

21.687%." A254-58, §§ 2.2(a)-(b). Unlike the Reorganization, the BSCH Equity Investment reduced the Managing Members' economic interests in the funds by an amount corresponding to the equity interest that BSCH acquired in the Parent Entities. *See supra*, Section D.

F. Plaintiff Declines Rockpoint's Offer To Participate In The Transactions; His Interests Remain The Same.

Shortly after the Transactions, Rockpoint offered Plaintiff the opportunity to participate in the proceeds from the Transactions by transferring a portion of his Promote Interest in certain Rockpoint funds formed before January 1, 2018 to GP Holdings on an equal *pro rata* basis with the current Managing Members with respect to equivalent interests in exchange for a portion of the proceeds paid by BSCH. *See* A687 at 113:2-23. Rockpoint's offer was voluntary. Plaintiff had no contractual right to transfer his interests alongside the Managing Members. A698-99 at 157:18-158:1; A701 at 169:16-23. Plaintiff did not accept Rockpoint's offer. *See* A717 at 233:1-4. All of Plaintiff's interests therefore remained unchanged, he continued to hold them through the Company, and none was transferred to GP Holdings or to BSCH. After the Transactions, Plaintiff continued to receive payments from Rockpoint consistent with the same interests he held before the Transactions. *See* A1040; A790-91 at 77:9-78:2.

G. Procedural History

On December 14, 2018, Plaintiff initiated this lawsuit. The original complaint contained three counts. Count I sought a declaration that the Transactions were a Company Sale under the Company Partial Asset Sale, Company Stock Sale, and/or Company Merger definitions. Count II sought a declaration regarding the allocation of proceeds from the Transactions and Count III sought breach of contract damages. On December 13, 2019, the trial court *sua sponte* dismissed Counts II and III for lack of subject-matter jurisdiction. *See* A44, ¶ 11. The trial court also dismissed Count I to the extent it relied on the Company Merger and Company Stock Sale definitions. *See* A149-51, ¶¶ 8-9. On July 9, 2021 the court *sua sponte* vacated its prior dismissal of the Company Stock Sale theory. *See* A1322-23, ¶ 28.

The operative complaint is the Second Amended Complaint, filed on December 30, 2020. Count I of the Second Amended Complaint seeks a declaration that the Transactions constituted a "Company Sale," which Plaintiff alleges entitles him to a portion of the proceeds of the Transaction, to be determined by an independent appraiser pursuant to procedures specified in the Ninth Amendment. *See* A66-68, ¶¶ 89-97. Count II alleged that Rockpoint breached the Ninth Amendment by failing to pay Plaintiff proceeds from a purported Company Sale. *See* A68, ¶ 103. On July 14, 2021, the trial court *sua sponte* dismissed Count II as unripe.

Rockpoint and Plaintiff cross-moved for summary judgment on Plaintiff's Company Partial Asset Sale theory. *See* A108-42, A902-54.

H. The Trial Court's Decision

On July 28, 2021, the trial court granted Plaintiff's motion for summary judgment on Count I under the Company Partial Asset Sale theory. Order ¶30. According to the court, for the provision to be triggered: (i) "the Company must sell 'any portion of the interests owned by the Company in one or more Fund GPs or Other Business GPs'"; (ii) "the sale must not be 'to a wholly owned Subsidiary of the Company'"; and (iii) "'the proceeds' of the sale must be, 'in whole or in part, distributed to Members.'" Order ¶20.

As to the "sale" requirement of element (i), the court concluded that the first step in the internal Rockpoint Reorganization (which the court called "the Company-Level Exchange"), which occurred before BSCH's Equity Investment, was a "sale." Order ¶21(a). The court's entire analysis was based on a conclusion that: "The Company sold interests in the Fund GPs to GP Holdings LP. In return, the Company received consideration in the form of limited partner interests in GP Holdings LP." *Id*.

As to the requirement in element (i) that there be a sale by the Company of "interests owned by the Company in one or more Fund GPs," the trial court focused on the fact that the Company held legal title to the Fund GP interests that

were transferred to GP Holdings in the Reorganization. *See id.* The court stated that "[t]he plain language of the [Company Partial Asset Sale] definition recognizes the separate legal existence of the Company and the fact that the Company—not the Company's members—owned the equity interests in the Fund GPs." *Id.* ¶ 25. Thus, for Article 6's Company Partial Asset Sale definition, the trial court equated the phrase "owned by" with bare legal title. The trial court, however, determined inconsistently that the substantively identical phrase "interests then owned by Paul" in Section 6.3 of the Ninth Amendment "encompasses a broader sense of ownership" in the sense "that 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.*. ¶ 27(a), (d).

As to elements (ii) and (iii), the court determined that GP Holdings as "a newly formed entity . . . was not wholly owned by the Company," *id.* ¶ 22, and the proceeds of the "sale" were distributed to the Managing Members: (a) "through the Distribution and Redemption. In that step of the Transaction, the Managing Members received the limited partner interests that the Company received as consideration in the Company-Level Exchange;" and (b) upon the closing of the BSCH Equity Investment, the Managing Members received proceeds of the Secondary Consideration paid by BSCH "as distributions of the limited partner interests in GP Holdings LP." *Id.* ¶ 23(a), (b).

The trial court's analysis of the Reorganization—*i.e.* the transfer of the Managing Members' membership interests held at the Company in exchange for limited partnership interests in GP Holdings, which were then distributed to the Managing Members—failed to acknowledge the full context and mechanism by which the transfer was accomplished. The transferred Fund GP Interests were *allocable to specific Managing Members* and the transfer was accomplished through Contribution and Distribution Agreements that identified the Managing Members as "Transferring Members." *See supra*, Statement of Facts, Section D. This context makes clear that the Managing Members did not appropriate Company assets. Rather, they simply changed the manner in which the Managing Members owned the economic interests in Fund GPs *specifically allocable to the Managing Members*.

On January 10, 2022, the trial court entered Partial Final Judgment under Court of Chancery Rule 54(b) (the "Partial Final Judgment") "in favor of Paul on Count I of the Complaint to the extent it alleges that the Transaction qualifies as a Company Partial Asset Sale" and specified that the order "is appealable." *See* Partial Final Judgment Pursuant to Rule 54(b), Exhibit B hereto, ¶ 1, 5. Rockpoint timely filed notice of appeal on February 8, 2022. The trial court stayed the Partial Final Judgment pending appeal.[3] *See* A.2, D.I. 131.

[3] Plaintiff's claim under the Company Stock Sale theory remains pending and is stayed.

ARGUMENT

I. THE TRIAL COURT ERRED IN HOLDING THAT THE COMPANY PARTIAL ASSET SALE DEFINITION WAS SATISFIED

A. Question Presented

Whether the trial court erroneously concluded that the Reorganization constituted a "sale" within the meaning of the Company Partial Asset Sale definition, when the Reorganization did not change the underlying economic ownership interests of the Managing Members? A928-44.

B. Scope of Review

Issues of contract interpretation and legal conclusions are reviewed *de novo*. *Seaford Golf & Country Club v. E. I. duPont de Nemours & Co.*, 925 A.2d 1255, 1261 (Del. 2007).

C. Merits of Argument

1. An Internal Reorganization That Does Not Change Underlying Economic Interests Is Not A "Sale"

The trial court's decision depends on the erroneous conclusion that the purely internal Reorganization of Fund GP Interests as an intermediate step before the BSCH Equity Investment was a "sale," even though this internal Reorganization did not change the Managing Members' underlying economic interests. Plaintiff appeared to agree that the Reorganization was not a "sale" because he never advanced that erroneous interpretation of the Ninth Amendment on summary judgment.

On its own, the trial court determined that a "sale" occurred because the Company transferred Fund GP Interests to GP Holdings in exchange for limited partnership interests in GP Holdings, which the Company distributed to the Managing Members. *See* Order ¶21(a). This was accomplished before the BSCH Equity Investment and without changing the Managing Members' underlying economic interests.

According to the trial court, the asset "sale" was not the BSCH Equity Investment which resulted in the payment of monetary proceeds to the Managing Members. Rather, in the court's view the "sale" was the preceding internal Reorganization and the "proceeds" of the "sale" were limited partnership interests that the Managing Members received in GP Holdings corresponding to the interests they relinquished. *See* Order ¶23(a). But the limited partnership interests in GP Holdings were the same economic interests that the Managing Members held previously, only in a different form.

The trial court's analysis portrays the effect of the Reorganization as an appropriation by the Managing Members of unallocated equity belonging in every respect to the Company. In reality, the transferred interests were allocable to specific Managing Members before the Reorganization (as membership interests in the Fund GPs) and remained allocable to the same specific Managing Members (as limited

partnership interests in GP Holdings) after the Reorganization. This was an internal reorganization of existing economic interests, not a sale.

While this Court has never addressed the distinction between a reorganization and a sale in the context of a breach-of-contract dispute, it considered the issue in the tax context in *Vale v. DuPont*, 182 A. 668 (Del. 1936). Before turning to the ultimate question of whether a stock-for-stock exchange was a taxable transaction in *Vale*, this Court analyzed whether the exchange was a "sale" or a "reorganization." *Id.* at 670-71. This Court acknowledged that the essential factor distinguishing a reorganization from a sale is the existence of a continuity of interest before and after the transaction. *Id*. at 671. When considering this distinction, this Court defined the question as: "does the stockholder have the same identity of interest in the new or reorganized corporation as he had in the old, without a severing from the assets of any part thereof in some realizable form for his individual benefit[?]" *Id.* In a sale, "what the sellers had after the transaction [is] something entirely different from what they possessed before," whereas in a reorganization "the stockholders of a company revamp[] its structure but [leave] undisturbed the identity of their business and their relative participations therein." *Id.; c.f., e.g.*, *Lewis v. Ward*, 852 A.2d 896, 904 (Del. 2004) (in the context of stockholder derivative actions, "derivative standing will not be eliminated where the merger is in reality a

reorganization which does not affect plaintiff's ownership of the business enterprise") (internal quotation marks omitted).

Here, the Reorganization before the BSCH Equity Investment changed the *manner* in which the Managing Members held their economic interests in the funds (limited liability company interests versus limited partnership interests), but left unaltered the *quantum* of each of their economic interests, *i.e.*, their Promote, Investor, and Fee Interests. The Managing Members simply moved their economic ownership in their Promote, Investor, and Fee Interests from being held at the Company-level for their benefit to being held by the New Parent Entities for their benefit. No cash or other assets entered or left the Company. Applying the distinction recognized in *Vale*, Rockpoint's Managing Members "revamped" the Company's structure and left "the identity of their business and their relative participations therein" unchanged. *Vale*, 182 A. at 672. Neither Plaintiff nor the trial court identified any evidence to the contrary.

Other courts have enforced the distinction between a sale and reorganization. Nearly a century ago, in *Weiss v. Stearn*, the U.S. Supreme Court evaluated the tax consequences of transactions in which stockholders exchanged (a) half of their shares in an old corporation for cash and (b) the other half of their shares for shares in a new corporation that "took over the entire property, assets and business of the old one." 265 U.S. 242, 251-54 (1924). The exchange of stock

"represent[ed] the same proportionate interest in the enterprise" corresponding to the remaining half of each stockholder's interest. *Id.* at 252-54. The Supreme Court held that the disposal of shares in exchange for cash constituted a taxable "sale," but the exchange of shares in the old corporation for shares in the new corporation was not a sale. *See id.* Rather, the share exchange "amounted to a financial reorganization" because the stockholders did not obtain "a thing really different from what [they] theretofore had." *Id.*

More recently, in *Creque v. Texaco Antilles Ltd.*, the Third Circuit considered whether "a conveyance of real property between two subsidiary corporations, each wholly-owned by the same parent, is the equivalent of a 'bona fide offer to purchase' triggering a right of first refusal on the property." 409 F.3d 150, 151(3d Cir. 2005). The court held that "[t]he conveyance was, in reality, a restructuring and not a sale" because, among other things, "[t]he record reveals no consideration of any particular benefit for either subsidiary, the formal parties to the conveyance," and "the same entity retained control over" the asset in question "after the conveyance." *Id.* at 155; *see also Rathborne v. Rathborne*, 683 F.2d 914, 919-20 (5th Cir. 1982) (holding that a merger which is a simply a restructuring does not involve a sale); *Blau v. Mission Corp.*, 212 F.2d 77, 80 (2d Cir. 1954) (exchange of shares between parent and subsidiary is a "mere transfer between corporate pockets," not a sale), *cert. denied*, 347 U.S. 1016 (1954).

While it is true that the Managing Members' economic interests in the Fund GPs changed as a result of the Transactions as a whole, that change did not occur in the Reorganization. It occurred through the BSCH Equity Investment, when BSCH purchased a profit-sharing percentage in the form of limited partnership interests in the New Parent Entities from the Participating Individuals.[4] As described below, the trial court acknowledged that the sale of limited partnership interests to BSCH was an equity sale, and therefore cannot trigger the Company Partial Asset Sale definition. *See* Order ¶28(a).

Tellingly, Plaintiff never asserted in his summary judgment briefing that the Reorganization was a "sale." Plaintiff instead asserted the BSCH Equity Investment as the alleged sale. He argued:

> [I]n early 2018, Rockpoint ***sold*** portions of its Fund GP interests ***to BSCH***. The Managing Members accomplished the sale by ***contributing*** the Managing Members' Fee, Promote, and Investor Interests to the Parent Entities – formed contemporaneously with the Transactions – and ***then selling*** their membership interests in the Parent Entities to BSCH. Nearly $325 million of cash from the sale was distributed to the Managing Members," which constitutes "a company partial asset sale.

A133-34 (emphasis added). Yet in the Order, the trial court *sua sponte* concluded that the *Reorganization* was a "sale," supporting its conclusion with only a cursory

[4] Plaintiff cannot satisfy the Company Stock Sale definition because less than 25% of the equity interests in the Company was transferred to BSCH. *See* Statement of Facts, Section E.

assertion that "[t]he Company sold interests in the Fund GPs to GP Holdings LP. In return, the Company received consideration in the form of limited partnership interests in GP Holdings L.P." Order ¶21(a). The trial court did not expressly consider—and Rockpoint had no opportunity to address—the dispositive distinction between a reorganization and a sale.

Plaintiff may point to the trial court's observation that, even though his ownership percentages remained the same, the Transactions may have left him worse off because "Paul's right to receive a share of the Promote Income through his Member-Level Promote Interests benefited from the presence of other sources of income that could be used to pay the Company's expenses." Order ¶29(a). However, this does not change the fact that Plaintiff's "relative participation" in the underlying economic interests (*i.e.*, the Promote income) was unaffected by the Reorganization. It is undisputed that the BSCH Transaction did not result in BSCH directly owning any of Rockpoint's assets. *See* A1133 ("BSCH . . . indirectly . . . now own[s] rights to streams of income that Rockpoint owned before the transaction."). Indeed, the relevant assets—the Fund GP Interests—were not sold, the Managing Members simply moved their interests up a level in Rockpoint's legal structure, pursuant to the Contribution and Distribution Agreements, and retained control of their interests. Any number of corporate transactions can create potential

advantages or disadvantages for particular owners, but that does not mean such transactions are "sales."

Plaintiff may also argue that the Reorganization must be viewed alongside BSCH's purchase of limited partnership interests as part of a "series of related transactions." That phrase is standard anti-circumvention language, designed to prevent carrying out piecemeal what would be impermissible if conducted in one transaction (*i.e.* a sale by Rockpoint of a direct interest in the Fund GPs). *See Alta Berkeley VI C.V. v. Omneon, Inc*., 41 A.3d 381, 389 (Del. 2012). It does not authorize the reverse –disaggregating a transaction to artificially trigger a Company Sale on any conveyance of outstanding equity interests. The precise use of terminology in the LLC Agreement (incorporated in the Ninth Amendment) confirms this.[5] Plaintiff's position seeks to recast that protection into a new and different substantive term, one which would—contrary to the precisely defined Company Sale definition and Delaware law—convert a sale of individual Managing Member equity interests into a sale of assets simply because acquiring an equity interest entails the acquisition of an indirect interest in assets. Under Plaintiff's

[5] If the parties had wished to trigger a Company Sale on any conveyance of outstanding equity interests, and not only a "sale," they could have done so expressly, including by using the defined term "Transfer" from the LLC Agreement, which is broadly defined as "a sale, exchange, transfer, assignment, pledge, hypothecation or other disposition of all or any portion of an Interest, either directly or indirectly, to another Person." A975, § 1.01.

theory, the subsequent equity sale of limited partnership interests in the New Parent Entities should be considered a Company Partial Asset Sale because the New Parent Entities held member economic interests that were previously held at the Company-level. *See* A134. In effect, Plaintiff seeks to replace the phrase "series of related transactions" with the wholly different phrase "directly or indirectly," which does not appear in the Company Partial Asset Sale definition. [6]

Accordingly, the trial court erred as a matter of law by concluding that the Reorganization was a "sale."

2. The Trial Court Erroneously Concluded That The Company Partial Asset Sale Definition Was Satisfied

The definition of Company Partial Asset Sale was not satisfied by any aspect of the Transactions. The internal Reorganization was not a "sale." The only sale was BSCH's purchase of limited partnership interests in the New Parent Entities. But the BSCH Equity Investment does not satisfy the Company Partial Asset Sale definition because it was (1) not a sale "by the Company," (2) not a sale of Fund GP Interests owned by the Company, and (3) not a sale of assets.

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[6] The trial court also noted "the multi-stage nature of the Transaction" but makes effectively the opposite point of Plaintiff. Order ¶28(a). Unlike Plaintiff, the court did not assert that the equity sale to BSCH was an indirect sale of assets. Rather, it stated that it could also consider whether any intermediate step of the Transactions (such as the internal Reorganization) constituted a Company Partial Asset Sale. As this section demonstrates, the internal Reorganization cannot satisfy the definition because it was not a "sale."

a. The BSCH Equity Investment Was Not A Sale "By The Company"

BSCH purchased limited partnership interests in the New Parent Entities. The Company was not a party to the BSCH Equity Agreement pursuant to which those limited partnership interests were sold to BSCH. This is confirmed by Section 1.7 of the BSCH Equity Agreement, which states that BSCH's payments of Secondary Consideration are payment for the "sales of partnership interests in the applicable Rockpoint Issuers ***by (directly or indirectly) the Managing Member[s] or former Managing Member[s]*** (including any Estate Planning Vehicles) to the Subscriber." A247, § 1.7 (emphasis added). Neither Plaintiff nor the court below contended otherwise. Accordingly, under the plain language of the agreement the BSCH Equity Investment was not a sale "by the Company."

b. There Was No Sale Of "Interests Owned By The Company In One Or More Fund GPs"

It is undisputed that BSCH purchased *limited partnership interests* in the New Parent Entities owned by the *Managing Members*. *See* A247, § 1.7. The BSCH Equity Investment was not a sale of "interests owned by the Company in *one or more Fund GPs.*" The Fund GP interests and their related income streams remained at all times within the control of Rockpoint's Managing Members through RPG GP, the general partner of GP Holdings, which is wholly owned by the Managing Members and in which BSCH has no interest. BSCH did not purchase

any Fund GP Interests, and has no rights in the underlying Fund GPs. Its equity investment only entitles it to a profit-sharing percentage in the New Parent Entities, which applies only to distributable proceeds, net of expenses and other obligations that are allocated to the interest streams that GP Holdings receives from the Fund GPs. *See* A531-622.

c. There Was No Sale Of "Assets"

The BSCH Equity Investment also was not a Company Partial Asset Sale because it was not a sale of "assets." BSCH did not purchase any assets from the New Parent Entities. Rather, in exchange for its investment, BSCH received in the New Parent Entities: (a) a passive limited partnership interest in the new Parent Entities and (b) "in its capacity as a Limited Partner . . . *a Profit Sharing Percentage*" of 21.687%. A254-57, §§ 2.2(a)-(b) (emphasis added). Unlike the Managing Members' ownership interests before the Reorganization, BSCH's limited partnership interests do not correspond to any particular underlying Fund GP Interests. The trial court agreed that the BSCH Equity Investment, by itself, "would not constitute a Company Partial Asset Sale, precisely because it is an equity issuance." Order ¶28(a).

In short, there is no basis to conclude that a Company Partial Asset Sale occurred.

II. EVEN IF THE INTERNAL REORGANIZATION WERE A "SALE," THE TRIAL COURT ERRED BY CONCLUDING 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 erroneously concluded that the phrase "owned by" in the Company Partial Asset Sale definition refers to legal title, when the use of the provision in the Ninth Amendment indicates the parties' intent to implement a broader sense of ownership? A929-35.

B. Scope of Review

Issues of contract interpretation and legal conclusions are reviewed *de novo*. *Seaford*, 925 A.2d at 1261.

C. Merits of Argument

1. The Trial Court Erred By Failing To Interpret The Phrase "Owned By" In The Ninth Amendment Consistently

The trial court erred by concluding that the phrase "owned by" in the Company Partial Asset Sale definition refers to bare legal title to the Fund GP Interests held by the Company, and not the broader and more pertinent concept of ownership under which all the Fund GP Interests were allocable to the Individual Owners (*i.e.* the individual Managing Members, former managing members, and non-managing members). Any other interpretation contradicts the unambiguous language of the Ninth Amendment, fails to read the Ninth Amendment as a whole, and is in conflict with other specific provisions in the Ninth Amendment.

Rockpoint does not dispute that the Company held legal title to the Fund GP Interests that were transferred to GP Holdings as part of the Reorganization. Nor does Rockpoint contend that the Individual Owners have interests in specific Company property within the meaning of Delaware's Limited Liability Company Act. *See* Order at 14 n.9. But the technical legal status of the Fund GP Interests for other purposes does not answer the question of who "owned" the Fund GP Interests for the purpose of the negotiated provision controlling here—the Company Partial Asset Sale definition.

It is well-established that the meaning of the terms "own" or "ownership" is fact and context-dependent. *See, e.g*, *Bird v. Wilm. Soc'y of Fine Arts*, 43 A.2d 476, 483 (Del. 1945) ("The word 'own' is a generic term embracing within itself several gradations of title dependent upon the circumstances."). The "'legal title' to property by itself does not necessarily confer a right of ownership." 73 C.J.S. Property § 50. The trial court acknowledged the legitimate distinction Rockpoint drew between the Managing Members' "broader sense of ownership" of the Fund GP Interests and the Company's more narrow sense of ownership "in the sense of having legal title." *See* Order ¶27(b), (d). Delaware courts interpret contract terms so as to give them uniform meaning throughout the agreement. *Brinckerhoff v. Enbridge Energy Co.*, 159 A.3d 242, 257 (Del. 2017) ("Lacking a specific definition in the [agreement], we look for [a term's] use in other contexts in the

[agreement] to discern its meaning."); *Comerica Bank v. Glob. Payments Direct, Inc*., 2014 WL 3567610, at *11 (Del. Ch. July 21, 2014) ("Absent anything indicating a contrary intent, the same phrase should be given the same meaning when it is used in different places in the same contract."). The trial court, however, disregarded this cardinal rule and selectively applied this "broader" meaning to some provisions of the Ninth Amendment but not others.

With respect to Section 6.3 of the Ninth Amendment, which states that "Paul's share of the proceeds realized in a Company Sale shall be based on the portion of such proceeds that are allocable to ***the interests then owned by Paul***," A174, § 6.3 (emphasis added), the trial court held that "[t]he Company is correct that the reference in Section 6.3 encompasses a broader sense of ownership," which reflects the understanding that "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." Order ¶27(a), (d). The trial court also acknowledged that "the same generalized concept of an ownership interest" appears elsewhere in Article 6 of the Ninth Amendment. *Id*.

Yet contrary to the fundamental canon of uniform interpretation, the court held that the phrase "owned by" in only the Company Partial Asset Sale definition referred to bare legal title—even though the court acknowledged that the same phrase in Section 6.3 referred to a more "generalized" or "broader" concept of

ownership, *i.e.* the Managing Members' and non-managing members' ownership in the Fund GP Interests allocable to them. *See id*. By failing to interpret the same phrase consistently within the same provision of the Ninth Amendment, the trial court erred as a matter of law. *See, e.g.*, *Radio Corp. of Am. v. Phila. Storage Battery Co.*, 6 A.2d 329, 334 (Del. 1939) ("[W]ords used in one sense in one part of the contract, will ordinarily be considered to have been used in the same sense in another part of the same instrument where the contrary is not indicated."); *Medicis Pharm. Corp. v. Anacor Pharms, Inc.*, 2013 WL 4509652, at *7 (Del. Ch. Aug. 12, 2013) (same); *see also* 11 Williston on Contracts § 32:6 (4th ed. 2021) ("Generally, a word used by the parties in one sense will be given the same meaning throughout the contract in the absence of countervailing reasons.").

The trial court correctly recognized that the phrase "owned by" in Section 6.3 necessarily refers to "a broader sense of ownership." Order ¶27(d). To hold otherwise would produce an absurd result. If "owned by" in Section 6.3 were interpreted to refer to bare legal title, then Plaintiff's interests would actually be owned by the Company because the Company holds the legal title to Plaintiff's interests in the Fund GPs just like—before the Reorganization—it held the legal title to the Managing Members' interests in the Fund GPs. If that were the case, then Plaintiff would by definition not be entitled to any proceeds from the Transactions

because he did not hold legal title to any of the Fund GP Interests (nor did any other Managing Member or former managing member, for that matter).

Based on cardinal contract interpretation principles, the phrase "owned by" in the Company Partial Asset Sale definition has the same meaning as it does in Section 6.3. Instead, the trial court read the same phrase inconsistently, without identifying "countervailing considerations" or indications of "contrary intent" that would require a different meaning. The court thereby created the kind of unpredictable result that the parties sought to avoid by employing uniform language in Article 6.

Moreover, the trial court's interpretation contravenes the Ninth Amendment's purpose: to share with Plaintiff a portion of the proceeds from certain types of transactions where a sale of interests *allocable to Plaintiff* occurs. Contrary to this purpose, the court's interpretation allows a Company Sale to be triggered even where Plaintiff is not entitled to any allocation because none of the proceeds of are allocable to his interests (which he retained). *See* Order ¶27(c) ("It bears noting that the court is not determining the quantum of value, ***if any***, that Paul will receive from the Transaction. . . . The court is only determining whether a triggering event has occurred.") (emphasis added). In effect, the trial court's interpretation would require Plaintiff and Rockpoint to potentially submit to a costly and time-consuming appraisal anytime there is a sale of Fund GP Interests allocable to other Managing

Members—even where (as here) Plaintiff has no conceivable claim on any of the interests involved in the sale because he contributed no interests.

In sum, Rockpoint's interpretation of the phrase "owned by" in the Company Partial Asset Sale definition to refer to what the trial court described as "a broader sense of ownership" is faithful to canons of contractual interpretation and ensures a logical result that enforces the purpose of the Ninth Amendment. The court's holding that the phrase "owned by" meant legal title, in contrast, unjustifiably construes the same phrase inconsistently and produces an untenable result.

2. The Factual Record Demonstrates That The Managing Members, Former Managing Members, And Non-Managing Members Were The "Owners" Of The Fund GP Interests

The record also confirms that the Fund GP Interests were "owned by" the Managing Members, even if the Company held legal title to those interests.

First, the ancillary schedule to the LLC Agreement effective at the time of the Transactions demonstrates that the interests in the Fund GPs reflecting the Promote and Investor Interests were allocated specifically to the Individual Owners. *See* A1217-22, Ancillary Schedule, § 2. These allocations added up to 100% for each fund listed on that ancillary schedule. No residual interests were allocated generally to the Company. *Id.* This was the only way Rockpoint tracked ownership interests. Rockpoint did not track ownership percentages in the Company itself. *See supra*, Statement of Facts, Section D.

Second, the Contribution and Distribution Agreements, which effected the transfer of the Managing Members' Fee Interests to Manager Holdings and the Promote and Investor Interests to GP Holdings, confirm that the Company held legal title to LLC interests in the Fund GPs that represented economic interests specifically allocable to the Managing Members. The Contribution and Distribution Agreement that transferred the Fund GP Interests to GP Holdings expressly specifies that the Company is only "holding limited liability company interests" that "represent[] the Investor Interests and/or the Promote Interests of each Transferring [Managing] Member as set forth on Schedule 1 or Schedule 2 hereto." A640. It also distinguishes between the Company's holding of bare legal title in the "Transferred Interests" (which are the Fund GP limited liability company interests held by the Company) and the Managing Members' ownership of the "Redeemed Interests" which are the Managing Members' "Investor Interests and Promote Interests" in the funds. *Id.* Section 3 specifies that the Company "owns" the LLC interests, but each "Transferring [Managing] Member is the owner of his/its respective Redeemed Interests," *i.e.* the Investor and Promote Interests that are "represent[ed]" by the LLC interests. *See* A641, § 3. Thus, this Contribution and Distribution Agreement confirms that, while bare legal title of the Fund GP Interests was held by the Company, those interests were "owned by" the Individual Owners.

Third, the capitalization tables set forth in the disclosure schedule to the BSCH Equity Agreement also confirm the Individual Owners' "broader sense" of ownership of the Fund GP Interests allocable to them. *See* A1244-55, Schedule 3.3(a). The Carry/GP Owner Capitalization Table for Fund IV table (below) is illustrative.

	Delaware	Limited Liability Compay		Active
Carry/GP Owner Capitalization Table	Investor Owner Pre-Closing	Investor Owner Post-Closing	Carry Owner Pre-Closing	Carry Owner Post-Closing
Rockpoint Group, L.L.C.	100.000000%	24.240877%	100.000000%	36.963402%
Rockpoint GP Holdings, L.P.		75.759123%		63.036598%
Total Rockpoint Real Estate Fund IV GP, L.L.C.	100.000000%	100.000000%	100.000000%	100.000000%
Rockpoint Group, L.L.C., series Rockpoint Real Estate Fund IV GP, L.L.C.				
Walton	18.232082%		14.232282%	
Walton Irrevocable Trust	6.077361%		4.744093%	
Gelb	17.484099%		13.648394%	
Gelb Trust	3.085429%		2.408540%	
Gilbane	13.603867%		10.619415%	
Shalev	10.563326%		8.245916%	
Boney			4.750000%	
Non-Managing Members	30.953836%	100.000000%	41.351360%	100.000000%
Rockpoint Group, L.L.C.	100.000000%	100.000000%	100.000000%	100.000000%

A1245.

The table lists each Managing Member (or their trusts) as a "Carry Owner Pre-Closing" and specifically identifies the percentage of the carry (a/k/a Promote) in each Fund that each Managing Member owned through the Company prior to the BSCH transaction. The capitalization tables confirm that the Individual Owners merely held their interests through the Company (which held legal title to the LLC interests in the Fund GPs) but the Individual Owners—whom the table expressly labels as "Owner[s] Pre-Closing"—were the true "owners" of those interests, as that term is used in the Ninth Amendment.

Finally, Plaintiff himself testified that the Fund GP Interests belonged to the Managing Members. *See* A788 at 66:6-9 ("I understand that [the Managing Members] sold *their* interests to Blackstone, *their* interest in the GPs, in the—in the interest of the GPs.") (emphasis added).

In sum, the text, structure, and purpose of the Ninth Amendment, as well as review of the documentary evidence, all require the same conclusion: in the Ninth Amendment the phrase "owned by" refers to ownership in the broader sense understood by Plaintiff and the Managing Members, not bare legal title. The trial court erred when it concluded that the reorganized Fund GP Interests were "owned by the Company" rather than owned by the Managing Members, former managing members, and non-managing members.

III. EVEN IF THERE WERE A COMPANY PARTIAL ASSET SALE, THE TRIAL COURT ERRED BY ORDERING THE PARTIES TO SUBMIT TO AN APPRAISAL PROCEEDING WHERE IT IS CLEAR THAT NO PORTION OF THE PROCEEDS IS ALLOCABLE TO INTERESTS "THEN OWNED BY PAUL"

A. Question Presented

Whether the trial court erred by ordering the parties to engage in appraisal proceedings to determine what percentage of the proceeds are allocable to interests owned by Plaintiff where no interests owned or allocable to Plaintiff were reorganized, transferred, or sold in connection with the Transactions? A949-50.

B. Scope of Review

Issues of contract interpretation and legal conclusions are reviewed *de novo*. *Seaford*, 925 A.2d at 1261.

C. Merits of Argument

Even if the Court were to determine that a Company Partial Asset Sale occurred under the Ninth Amendment (it did not), the parties should not be required to submit to an independent appraisal proceeding that can only result in one outcome: a finding that Plaintiff is not entitled to any proceeds from the Transactions.

Section 6.3 of the Ninth Amendment provides that in the event of a Company Sale Plaintiff is only entitled to "the portion of such proceeds that are allocable to the interests then owned by Paul." A174, § 6.3. Plaintiff declined Rockpoint's voluntary offer to participate in the Transactions. It is undisputed that no interests allocable to Plaintiff were transferred, reorganized, sold, or moved in

any way in the Transactions. All of the Fund GP Interests that were reorganized in connection with the Transactions were allocable to specific Participating Individuals (*i.e.* the Managing Members and former managing members other than Plaintiff). *See* A157 (the Company "contributed the Investor Interests and Promote Interests allocable to the Managing Members to GP Holdings"); A640 (stating that the Fund GP interests "represent[] the Investor Interests and/or the Promote Interests of each Transferring [Managing] Member"). None of the reorganized interests was allocable to Plaintiff or to the Company generally. *See supra* Statement of Facts, Section C.

Plaintiff conceded in his deposition that his economic and legal interests today are exactly what they were before the Transactions. *See* A787 at 62:14-23. Plaintiff also admitted that he has no claim on the interests that were transferred by the Managing Members and that Plaintiff would only have been entitled to proceeds if his own interests had been transferred. *See* A793-95 at 89:3-92:22, 97:14-17.

Thus, the trial court erred by ordering the parties to engage in appraisal proceedings to determine what portion of the proceeds of the Transactions is "allocable to the interests then owned by Paul" because the answer to that question is clear and not subject to reasonable dispute: nothing.

CONCLUSION

For the foregoing reasons, this Court should reverse the Order and vacate the January 10, 2022 Partial Final Judgment declaring that the Transactions constituted a Company Partial Asset Sale.

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CERTIFICATE OF SERVICE

I hereby certify that, on March 25, 2022, true and correct copies of *Appellant's Opening Brief* were caused to be served on the following by File & ServeXpress:

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