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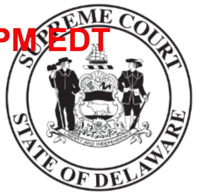

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

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INTRODUCTION

BSCH purchased a passive, minority equity stake in the New Parent Entities from the Managing Members and certain of its former managing members (but not Plaintiff, who declined Rockpoint's voluntary offer to participate in the Transactions).[1] BSCH did not purchase an interest in any Fund GP. There was no Company Partial Asset Sale. The trial court's Order should therefore be reversed.

To be sure, the Company Sale provision does include a provision covering potential equity sales by the Managing Members: Company Stock Sale. But that provision is inapplicable because "the owners of the Company's outstanding equity interests" did not sell "more than twenty-five percent (25%) of then-outstanding equity interests of the Company." On appeal, Plaintiff strains the provisions of the Ninth Amendment at every turn to attempt to get around the fact that the BSCH transaction did not meet that 25% threshold. Plaintiff's answering brief ("Opp.") largely turns away from the trial court's Order, instead (a) repeating arguments he made below that were not accepted by the trial court; and (b) advancing arguments never made below that contradict Plaintiff's prior positions.

Plaintiff makes little effort to defend the trial court's flawed conclusion that the Reorganization itself constituted a Company Partial Asset Sale. Plaintiff ignores Rockpoint's authorities demonstrating the well-established legal distinction between

[1] Defined terms have the same meaning used in Rockpoint's opening brief ("Br.").

a reorganization and a sale, simply dismissing them, without explanation, as inapposite. The Reorganization was not a "sale," and the only sale was BSCH's Equity Investment, which it is undisputed was an equity transaction, not a sale of Fund GP Interests or any other assets. On appeal, Plaintiff shifts to an alternative argument that the Reorganization was a "sale" because it was part of "a series of related transactions" that included BSCH's Equity Investment. Even considered as a series of related transactions, however, the Transactions as a whole constituted an equity sale, not an asset sale.

Similarly, Plaintiff's effort to reconcile the trial court's inconsistent interpretations of the words "owned by" as used in the Ninth Amendment misses the mark. According to Plaintiff, the phrase "interests owned by the Company" has a different meaning than the substantively identical phrase in the same Article, "interests then owned by Paul." Plaintiff admits that "interests then owned by Paul" refers to a broader sense of ownership, but says the substantively-identical language in the same Article—"owned by the Company"—changes to mean bare legal title. Basic canons of contract construction require consistent interpretation of the same phrase, "owned by."

Plaintiff paints himself into a corner by interpreting "owned by the Company" to refer to the holder of bare legal title in Fund GP Interests. That interpretation would mean Rockpoint could sell Plaintiff's interests, but only allocate to him a

small share of the proceeds because other Members who contributed nothing would be entitled to most of the proceeds. Likewise, Plaintiff's argument that the Company Partial Asset Sale provision was triggered even though all of the interests included in the Transactions were specifically allocable to Individual Owners *other than Plaintiff* is irreconcilable with the text, structure, and purpose of the Company Sale provision, which all ensure Plaintiff receives proceeds when there is a sale of interests allocable to Plaintiff specifically, or allocable generally to the Company. The only coherent interpretation of the phrase "owned by" in the context of Fund GP Interests is to mean the broader sense of ownership analogous to beneficial interest.

Finally, Plaintiff does not dispute that he seeks to require the parties to submit to an appraisal proceeding even though the undisputed facts show that he is not entitled to any proceeds from the Transactions. Section 6.3 of the Ninth Amendment entitles Plaintiff only to the portion of any proceeds "allocable to the interests then owned by Paul." None of Plaintiff's interests were sold. Accordingly, no proceeds were allocable to interests then owned by Paul.

At bottom, Plaintiff is seeking a windfall by trying to obtain a portion of the proceeds that BSCH paid for interests relinquished by others. Confronted with this insurmountable problem, Plaintiff changes course and—for the first time in nearly four years of litigation—half-heartedly says in the final paragraph of his brief that

some of his own interests were in fact transferred. Plaintiff's about-face contradicts his sworn testimony acknowledging that he retained all the same interests after the Transactions that he had pre-Transactions (along with all other record evidence).

ARGUMENT

I. THERE WAS NO SALE OF FUND GP INTERESTS

A. The Reorganization Was Not A "Sale"

Rockpoint's opening brief detailed the well-established legal distinction between (a) a "reorganization," in which the owners' underlying economic interests do not change, and (b) a "sale," in which the owners' underlying economic interests change. *See* Br. 23-28. Plaintiff does not dispute that the Reorganization did not change the underlying economic interests of the Individual Owners or that the only change in underlying economic interests occurred when BSCH purchased equity interests in the New Parent Entities. Opp. 7. These facts establish the requisite continuity of interest showing that the Reorganization was not a sale and therefore not a Company Partial Asset Sale. As the trial court acknowledged, while BSCH's purchase of limited partnership interests in the New Parent Entities was a "sale," it was a sale of equity, not assets. Order ¶ 28(a). BSCH purchased equity, not Fund GP interests or any other assets.

Plaintiff makes no effort to distinguish Rockpoint's legal authorities, which demonstrate that a "sale" requires a change in the owners' underlying economic interests. Instead, Plaintiff tries to sidestep the core question of whether a "sale" occurred, skipping that contractual requirement and narrowing his discussion to "whether there was a 'sale . . . by ***the Company*** of all or any portion of the interest

owned by the Company in one or more Fund GPs." Opp. 23 (emphasis in original). By its nature, every reorganization involves changes in the ownership interests of *legal entities*. Yet courts evaluate whether the economic interests of the *ultimate owners* have changed for purpose of evaluating whether *the company* engaged in a "sale" or a "reorganization." *See*, *e.g.*, *Vale v. DuPont*, 182 A. 668, 672 (Del. 1936) (a reorganization is a transaction in which the "stockholders of a company revamped its [*i.e.* the company's] structure but left undisturbed the identity of their business and their relative participations therein"); *Weiss v. Stearn*, 265 U.S. 242, 254 (1924) (defining a reorganization as a change in the "technical ownership of an enterprise" without "giv[ing] the stockholder a thing really different from what he theretofore had").

Moreover, while Plaintiff dismisses the sale-reorganization distinction as "sleight-of-hand" (Opp. 21), the Ninth Amendment itself recognizes the distinction. The "Company Merger" definition expressly includes certain types of "reorganization[s]." A189. The parties understood the difference between a "reorganization" and "sale" but chose not to include the word "reorganization" in the Company Partial Asset Sale definition. The Reorganization was not a Company Partial Asset Sale. And Plaintiff has abandoned any contention that either the

Reorganization or the Transactions constituted a Company Merger under the Ninth Amendment.[2]

B. Even Viewed As A "Series of Related Transactions," The Transactions Remain An Equity Sale, Not A Company Partial Asset Sale

1. The Anti-Circumvention Provision Does Not License Plaintiff To Change The Character Of The Transactions

Unable to show that the Reorganization itself was a "sale," Plaintiff pivots to arguing that the Company Partial Asset Sale definition was satisfied through a "series of related transactions."[3] The phrase is standard anti-circumvention language, designed to prevent carrying out piecemeal what would be impermissible if conducted in one transaction, not language intended to recharacterize an equity investment as an asset sale. *Bank of N.Y. Mellon Tr. Co., N.A. v. Liberty Media*

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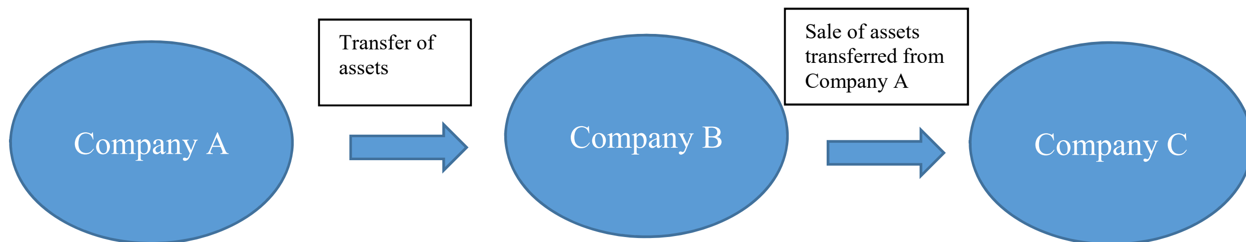
[2] The trial court dismissed Plaintiff's claim alleging that the Transactions constituted a "Company Merger." A150-51, ¶ 9.

[3] While Plaintiff purports to derive support from the trial court's Order, the trial court did not rely on the "series of related transactions" language. Order ¶ 28(a). The trial court held that the Reorganization by itself (which it described as two steps: the "Company-Level Exchange" and the "Distribution and Redemption") "cause[d] the Transaction to qualify as a Company Partial Asset Sale." Order ¶ 28(a). The trial court rejected Plaintiff's argument that the Reorganization and the BSCH Equity Investment *in combination* constituted a Company Partial Asset Sale. Instead, the trial court disregarded the final step and ultimate effect of the Transactions, and focused exclusively on an intermediate step (the Reorganization) *in isolation*. The Reorganization by itself cannot satisfy the Company Partial Asset Sale definition because it was not a "sale."

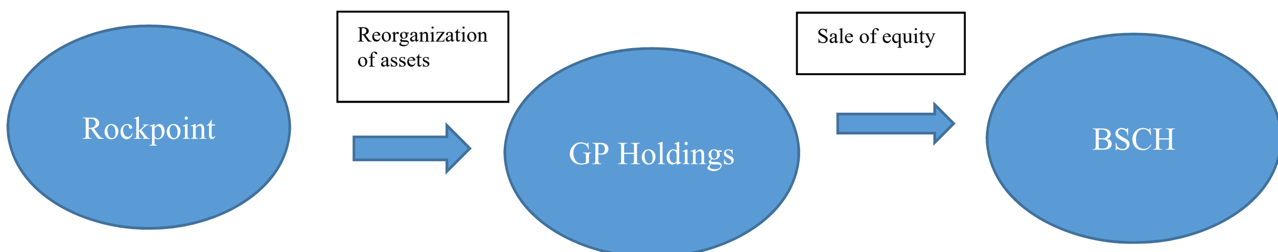
Corp., 29 A.3d 225, 241-42 (Del. 2011). Whether viewed as one transaction or a series of related transactions, the Transactions did not involve a sale of assets.

A Company Partial Asset Sale definition would be triggered through a "series of related transactions" if, counterfactually, the Company had transferred Fund GP Interests it owned (*e.g.* Fund GP Interests not specifically allocable to particular Individual Owners) to GP Holdings and GP Holdings then undertook an *asset sale* of those Fund GP interests to BSCH. That is not what happened here. Instead, the series of related transactions culminated in an *equity sale*, not an asset sale. The diagrams below contrast the Transactions with a hypothetical multi-step transaction in which an asset sale is achieved.

Asset Sale Through a Series of Related Transactions



The Transactions (simplified)



The "series of related transactions" analysis essentially collapses a multi-step transaction into a single step. If BSCH had made its equity investment in Rockpoint

directly in a single transaction, rather than in the New Parent Entities after the Reorganization, there would indisputably be no Company Partial Asset Sale. The fact that BSCH's equity investment occurred after a Reorganization does not change the fundamental nature of the equity investment and does not make it a Company Partial Asset Sale.

Coughlan v. NXP B.V., a Court of Chancery case cited by Plaintiff, demonstrates that the relevant inquiry is the end result of the series of transactions (here, a sale of equity). 2011 WL 5299491, at *7 (Del. Ch. Nov. 4, 2011). *Coughlan* considered whether a transaction satisfied a contractual provision triggered if NXP transferred or sold a business called GloNav to a non-subsidiary.[4] *Id.* at *5-6. In a two-step transaction, NXP first transferred the GloNav business to a subsidiary and then used the subsidiary to transfer ownership of GloNav to a joint venture in exchange for cash. The court held that these two transactions satisfied the contractual provision because they achieved the "ultimate result" contemplated by the provision: the transfer or sale of GloNav to a non-subsidiary. *Id.* at *7. The court reasoned: "[t]o allow NXP to circumvent the protections of [the relevant contractual provision] simply by using a subsidiary to transfer the assets of GloNav to the Joint Venture would render those protections meaningless." *Id.* at *8. Here,

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[4] The relevant provision in *Coughlan* was much broader than the Company Partial Asset Sale definition, as it covered the sale or transfer of either assets or equity. 2011 WL 5299491, at *2.

the "ultimate result" of the Transactions considered together was an equity sale—*i.e.* the sale of equity interests owned by the Managing Members to BSCH. This sale of a passive minority equity interests (limited partnership interests in the New Parent Entities) to BSCH was not a sale of Fund GP interests or any other assets.

2. Plaintiff Incorrectly Redefines "Series Of Related Transactions" To Mean "Directly Or Indirectly"

Plaintiff's remaking of non-circumvention language in the Company Partial Asset Sale definition spotlights exactly what he is trying to do: reshape an equity investment into an "asset sale" by replacing the phrase "series of related transactions" with the substantively different phrase "directly or indirectly" (which the parties did not include in the Company Partial Asset Sale definition). *See* Br. 31.

Unable to show that the Transactions resulted in a sale of Fund GP Interests or any other Company asset to BSCH, Plaintiff tries to recast BSCH's equity investment in the New Parent Entities—which (like any other equity investment) entitles it to a profit-sharing percentage at the New Parent Entity level—as receipt of something different: a direct or specific interest in income streams associated with the Fund GPs. Opp. 26. The trial court rejected this argument, expressly holding that "[t]he New Holdings Issuance [*i.e.*, the BSCH Equity Investment], if it could be viewed in isolation, would not constitute a Company Partial Asset Sale, precisely because it is an equity issuance." Order ¶ 28(a).

Equity ownership is different than ownership of the underlying assets; an *indirect* interest in income streams is not the same as owning the income streams. Acquiring a profit-sharing equity interest at the parent company level is not an acquisition of underlying assets. *See*, *Henke v. Trilithic Inc*., 2005 WL 3578094, at *1 (Del. Ch. Dec. 20, 2005) (observing in appraisal actions that a *direct* "right to receive cash, whether for goods sold or money lent, is an asset that can be bought, sold and valued"); *Hollinger Inc. v. Hollinger Int'l. Inc*., 858 A.2d 342, 355 (Del. Ch. 2004) (observing that receivables *owed directly to the company* are assets that must be considered when evaluating whether a sale involved "substantially all" a company's assets); *Thorpe by Castleman v. CERBCO, Inc.*, 676 A.2d 436, 444 (Del. 1996) (observing that stock in a subsidiary *owned directly by the parent* was an asset of the parent).

Plaintiff's attempt to equate a purchase of equity in a parent company with a purchase of the parent company's assets would upend the fundamental distinction between equity and assets. *See Wilm. Tr. Co. v. Tropicana Ent., LLC*, 2008 WL 555914, at *9, n.45 (Del. Ch. Feb. 29, 2008) ("It should come as no surprise that ownership of a company's stock and a company's ownership of its assets are legally distinct concepts and that the distinction does not routinely blur into meaninglessness . . . ."). Equity sales do not trigger contractual provisions applying only to asset sales. *See Abundance P's LP v. Quamtel, Inc.*, 840 F. Supp. 2d 758,

771 (S.D.N.Y. 2012) ("An asset sale and an equity sale are two very different transactions with two entirely different consequences, and [the loan agreement]'s requirements clearly do not apply to an asset sale."). And Delaware courts have uniformly recognized the substantive distinction between a sale of assets and other types of transactions, including acquisition of equity interests. *See*, *e.g.*, *Manti Hldgs., LLC v. Authentix Acq. Co.*, 261 A.3d 1199, 1209 (Del. 2021) ("[M]ergers and stock sales are two different types of transactions, even if they achieve a similar result."); *Sterling v. Mayflower Hotel Corp.*, 93 A.2d 107, 112 (Del. 1952) ("[A] merger may be said to 'involve' a sale of assets, in the sense that the title to the assets is by operation of law transferred from the constituent corporation to the surviving corporation; but it is not the same thing. It is . . . something quite distinct, and the distinction is not merely one of form, as the plaintiffs say, but one of substance.").

If the parties had wanted to trigger a Company Partial Asset Sale upon a sale of indirect interests in Fund GP Interests, the parties knew how to do that. The phrase "directly or indirectly" is used multiple times in the Ninth Amendment and LLC Agreement in various contexts. *See*, *e.g.*, A178, §8.1.2; A192; *see also* Br. 30 (LLC Agreement broadly defines "Transfer" 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.") (emphasis added); *SV Inv. P'rs, LLC v. Thoughtworks, Inc.*, 7 A.3d 973, 992 (Del. Ch. 2010) (refusing to

"rewrite or supply omitted provisions to" a contract where one party "wishe[d] it had additional rights"), *aff'd*, 37 A.3d 205 (Del. 2011).

In short, Plaintiff is trying to force the square peg of an equity investment into the round hole of the Company Partial Asset Sale definition. Considered holistically as a series of related transactions, the Transactions remain an equity sale. And equity sales *are* covered in the Ninth Amendment. Specifically, the parties addressed equity sales through the "Company Stock Sale" definition in the Ninth Amendment, which expressly references the sale of "equity interests" and is the only Company Sale definition potentially applicable to the Transactions. But the Company Stock Sale definition was not triggered here because BSCH indisputably did not purchase 25% or more of the equity in the Company.

Plaintiff's interpretation of the Company Partial Asset Sale definition would render the Company Stock Sale definition superfluous, violating a cardinal interpretive principle. *See*, *e.g.*, *Manti Hldgs.*, 261 A.3d at 1208 ("Contracts will be interpreted to give each provision and term effect and not render any terms meaningless or illusory.") (internal quotation marks omitted). If a sale of equity of less than 25% could be recast as effectively a sale of an interest in the underlying assets of Rockpoint and therefore a Company Partial Asset Sale, there would be no need to include a separate definition for Company Stock Sale.

Whether the steps of the Transactions are analyzed in isolation or "as a series of related transactions," the Company Partial Asset Sale definition was not satisfied.

II. THE FUND GP INTERESTS WERE NOT "OWNED BY THE COMPANY" WITHIN THE MEANING OF THE NINTH AMENDMENT

Rockpoint demonstrated in its opening brief that the only sale was by the Managing Members to BCSH of a portion of their limited partnership interests in the New Parent Entities. Even if the Reorganization were considered a "sale," it was not a sale of Fund GP Interests "owned by the Company" within the meaning of the Agreement. The Managing Members held all economic rights in the Fund GP Interests allocable to them (as Plaintiff admitted in his deposition, A817-18 at 185:12-186:16) and therefore were the "owners" of those interests within the meaning of the Ninth Amendment.

Discarding hornbook contract law establishing that words require a consistent and uniform meaning throughout the same contract, Plaintiff suggests a novel approach: the meaning of "owned by" changes within the same section of the contract, depending on the noun that follows the phrase. Plaintiff admits that, in some contexts (such as Section 6.3 of the Ninth Amendment, which refers to "interests then ***owned by Paul***,") "owned by" refers to the Individual Owners (including Plaintiff) who alone held all the economic rights and entitlements of the Fund GP Interests. Indeed, Plaintiff contends that he is the "owner" of the Fund GP Interests allocable to him. *See* Opp. 30. Plaintiff likewise acknowledges that "the Company's own documents show that the Managing Members only *owned*

beneficial interests in the Fund GPs."[5] Opp. 34 (emphasis added). Then without offering any textual or structural basis to change the meaning, Plaintiff contends the trial court was right to interpret "owned by" to mean bare legal title when applying the Company Partial Asset Sale definition in the Annex accompanying the same Article, which refers to "interests ***owned by the Company*** in one or more Fund GPs." A189 (emphasis added); *see also* Order ¶ 27.

The parties agree that the Company held bare legal title to the Fund GP Interests while the Individual Owners were understood to be the owners, in a broader sense, of the Fund GP Interests allocable to each Individual Owner.[6] The parties also agree that the purpose of the Company Sale provision is to share with Plaintiff a portion of the proceeds from certain enumerated transactions where there is a sale of interests on which Plaintiff has a claim to a portion of the value. The contract's six integrated Company Sale definitions make clear that the phrase "owned by" in

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[5] Plaintiff refers to "beneficial interest" to describe this broader sense of ownership. Rockpoint agrees that the allocation of Fund GP Interests to specific Individual Owners is analogous to beneficial ownership. Rockpoint does not contend that the Company as a formal matter was structured as a trust or other beneficial ownership structure.

[6] The transaction documents show that the Individual Owners were considered "owners" in a broader sense even though the Company held legal title to the Fund GP Interests. Br. 39-42. Plaintiff concedes the reality of this broader sense of ownership and his citations (Opp. 34-36) show only the uncontested fact that the Company held legal title to the Fund GP Interests.

the Company Partial Asset Sale definition is used in the broader sense, in recognition of the fact that Fund GP interests held by the Company were specifically allocable to Individual Owners. *See Heartland Payment Sys., LLC v. Inteam Assocs., LLC*, 171 A.3d 544, 557 (Del. 2017) ("Before stepping through the specific contractual provisions it is helpful to look at the transaction from a distance, because '[i]n giving sensible life to a real-world contract, courts must read the specific provisions of the contract in light of the entire contract.'") (quoting *Chi. Bridge & Iron Co. N.V. v. Westinghouse Elec. Co. LLC*, 166 A.3d 912, 913-15 (Del. 2017)).

It has long been a bedrock contract interpretation principle that "[w]ords and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight." RESTATEMENT (SECOND) OF CONTRACTS § 202(1). This Court recently reaffirmed that principle by directing that "[t]he basic business relationship between parties must be understood to give sensible life to any contract." *Chicago Bridge & Iron*, 166 A.3d at 927; *see also USA Cable v. World Wrestling Fed'n Entm't, Inc.*, 2000 WL 875682, at *9, *12 (Del. Ch. June 27, 2000), *aff'd*, 766 A.2d 462 (Del. 2000) (finding agreement "containing the same right of first refusal clause and the same language . . . does not have a different meaning than the identical provision the parties agreed to" in a different contract and noting generally where the same language appears within a contract, "[i]t is simply not reasonable to believe that the same words . . . have a

different meaning"). Neither the trial court nor Plaintiff has identified anything justifying a departure from the rule requiring identical words and phrases to be interpreted consistently throughout a contract.

Plaintiff only musters the distinction-without-a-difference that "[t]he phrases here are not the same," as one provision says "owned by *the Company*" and the other says "*owned by* Paul." Opp. 30. The phrase "owned by" is identical in both provisions. Courts sensibly apply the canon to harmonize the meaning of individual phrases within different contractual provisions. *Brinckerhoff v. Enbridge Energy Co.*, 159 A.3d 242, 257-58 (Del. 2017), *as revised* (Mar. 28, 2017) (interpreting the word "obligations"); *Comerica Bank v. Glob. Payments Direct, Inc.*, 2014 WL 3567610, at *11 (Del. Ch. July 21, 2014) (interpreting the phrase "during the term").

Equally unpersuasive is Plaintiff's suggestion that the context of each provision supports his contradictory interpretations of the phrase "owned by." Opp. 31-34. The parties agree that, in Section 6.3 of the Ninth Amendment, "owned by" refers to Plaintiff's broader sense of ownership in the Fund GP Interests allocable to him. *See* Opp. 33. Yet rather than follow cardinal principles of contract interpretation requiring "owned by" to have the same meaning in the Company Partial Asset Sale definition, Plaintiff erroneously contends that the same phrase has a different meaning—bare legal title—in the Company Partial Asset Sale definition.

Plaintiff argues that adherence to interpretive rules—interpreting the phrase "owned by" to refer to a broader sense of ownership analogous to beneficial ownership—"would render the provision meaningless" because a Company Partial Asset Sale could never occur "because the Company did not own any Fund GP Interests to sell." Opp. 33. This is incorrect. A Company Partial Asset Sale could occur in at least two circumstances.

First, a Company Partial Asset Sale would occur if the Company (as opposed to the Managing Members) had sold Fund GP interests to a third party without specifying whose Promote and Investor Interests those Fund GP interests represented. The third party's purchase could include the acquisition of the management contract for the underlying funds as well as other general partner entitlements. Such a transaction would dilute the interests of the Individual Owners (including Plaintiff). Plaintiff would then have been entitled to a portion of the proceeds commensurate with his ownership in the relevant Fund GPs pursuant to Sections 6.3 and 6.5 of the Ninth Amendment.

Second, a Company Partial Asset Sale would occur if Rockpoint sold Fund GP interests that were allocable to the Company generally, as opposed to Fund GP interests allocable to specific Individual Owners. At the time of the Transactions, all of the Fund GP interests in the Funds at issue were allocated to specific Individual Owners, but the Company Partial Asset Sale provision would have applied had the

Company at that time owned and transferred unallocated shares beneficially owned by the Company itself.

In both scenarios, there would be a sale *by the Company* (not the Managing Members) of *assets* (not equity) *owned by the Company* (not beneficially owned by Managing Members). While the Transactions did not present these circumstances, they were by no means an impossibility under an Agreement carefully negotiated in 2007 to address a variety of scenarios in which Plaintiff's economic interests could be affected by future transactions.

Nor does the Company Partial Asset Sale definition's requirement that proceeds be distributed to the Managing Members, indicate that the phrase "owned by the Company" must refer to interests in which the Company owns bare legal title. Opp. 28-29. That requirement is intended to exclude a possible transaction in which unallocated Fund GP Interests are sold and the proceeds are re-invested in the Company, as opposed to a theoretical transaction in which unallocated Fund GP interests are sold and the proceeds are distributed to the Individual Owners. Here, all of the Fund GP Interests included in the Transactions were specifically allocable to Individual Owners other than Plaintiff.

In contrast to Plaintiff's strained construction, Rockpoint's reading of the two provisions accords with interpretive principles and the purpose and structure of the Agreement. *Stonewall Ins. Co. v. E.I. du Pont de Nemours & Co.*, 996 A.2d 1254,

1260 (Del. 2010) ("[T]he controlling rule of construction is that '[a] single clause or paragraph of a contract cannot be read in isolation, but must be read in context.'") (internal quotation marks omitted). In the event of a transaction (like the Transactions) that only involves Fund GP Interests specifically allocable to other Managing Members, none of the interests could possibly be allocable to interests "then owned by Paul." All the interests at the time of the Transaction were owned by other Individual Owners. However, if there were a transaction involving unallocated Fund GP Interests (*i.e.* interests "owned by the Company") then the Company Sale procedures require the parties to determine what portion those unallocated Fund GP Interests should be allocated to the "interests then owned by Paul" commensurate with his ownership interests in the Company. Plaintiff's inconsistent interpretation, in contrast, finds no footing in the purpose of the Company Sale provision. In a transaction where every Fund GP Interest is specifically allocable to a specific Individual Owner other than Paul, the interest the Company Sale provision protects is not implicated because it is already obvious that no "proceeds are allocable to the interests then owned by Paul." *See* Section III, *infra*.[7]

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[7] Plaintiff incorrectly suggests Rockpoint's argument requires the Court to overlook the separate legal existence of the Company. Opp. 23. Rockpoint has never claimed that the Company is "merely a pass-through" nor does Rockpoint dispute that "a member has no interest in specific limited liability company

III. AN APPRAISAL PROCEEDING IS UNWARRANTED BECAUSE PLAINTIFF DOES NOT HAVE A CLAIM ON ANY OF THE TRANSFERRED INTERESTS

Section 6.3 of the Ninth Amendment states that if a Company Sale occurs, "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. As demonstrated above, an irreconcilable inconsistency exists between Plaintiff's argument that "owned by" in the same Article refers to bare legal title as to ownership by the Company, but refers to the broader sense of ownership as to ownership by Plaintiff. Even if Plaintiff's inconsistent interpretation of "owned by" were reconcilable, there is still no point to an appraisal proceeding because it was undisputed below that Plaintiff did *not* transfer any of his interests in connection with the Transactions (having declined Rockpoint's voluntary offer to participate). *See* Br. 18; *see also Manti Hldgs.*, 261 A.3d at 1208 ("An interpretation is unreasonable if it produces an absurd result or a result that no reasonable person would have accepted when entering into the contract.") (internal quotation marks

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property." 6 *Del. C.* § 18-701; *see* Br. 35. This is a red herring: the formal status of the Fund GP Interests under the statute does not determine who 'owned' the Fund GP Interests under the negotiated provision here—the Company Partial Asset Sale definition. *Cf. Manti Hldgs.*, 261 A.3d at 1210 ("Whether a merger meets the statutory definition for a sale of securities under federal or state securities law has no bearing on whether a merger is 'structured as a sale of Equity Securities' under the Stockholder Agreement. There is no suggestion that the parties looked to the securities laws to construe these terms.").

omitted). All of the reorganized Fund GP Interests belonged to Individual Owners other than Paul. Therefore, no proceeds from that transaction "are allocable to the interests then owned by Paul." Consequently, even if there were a Company Partial Asset Sale (there was not), Plaintiff's allocation is $0 and an appraisal proceeding would be pointless.

Plaintiff invokes the general purpose of Article 6, which he describes as "an anti-discrimination provision" that "prevent[s] the majority from excluding the minority [investors] from liquidity events." Opp. 37. This general purpose, however, is subject to the specific negotiated provisions of the agreement, which limit Plaintiff's economic entitlement to the proceeds "allocable to the interests then owned by Paul." Proceeds may be "allocable to the interests then owned by Paul" in various circumstances, such as (1) if there is a Company Sale transaction involving the sale of undifferentiated interests in Rockpoint, *see*, *supra*, Section II.B, or (2) if Plaintiff sells his own interests through the exercise of a tag-along right in connection with a Company Stock Sale. A183, § 9.2. In those circumstances, Section 6.5 includes provisions aimed at preventing certain types of discrimination against Plaintiff in the valuation and allocation process.

Section 6 of the Ninth Amendment does not give Plaintiff the right to receive something in exchange for nothing. Nothing in Section 6 entitles Plaintiff to an allocation in the event of a transaction that involves neither the sale of

undifferentiated Rockpoint assets nor the sale of Paul's own interests. Plaintiff is trying to extract a windfall by obtaining a portion of the proceeds paid to the Managing Members in exchange for *the contribution of the Managing Members' interests* while keeping the entirety of his interests and associated income stream intact and undiluted.

Perhaps recognizing the brazenness of his position, Plaintiff drops into the last paragraph of his brief for the first time at any stage that "some of Paul's interests were, in fact, transferred as part of the Transaction." Opp. 38. Plaintiff never made this assertion in the trial court and it is waived. Supr. Ct. R. 8. Moreover, this misstatement flatly contradicts Plaintiff's own sworn deposition testimony, where he repeatedly acknowledged that "I still own the promote interests . . . that I owned prior to the transaction." A786 at 60: 9-12. *See also* A787 at 62:14-23 (acknowledging Plaintiff's 5% Promote Interest in Fund IV both before and after the Transactions); *id.* at 62:24-63:23 (acknowledging Plaintiff's 3.3% Promote Interest in Fund V both before and after the Transactions); *id.* at 64:1-7 (acknowledging Plaintiff's 3.3% Promote Interest in each of Funds RGI and RGII both before and after the Transactions); A50 ¶ 20 (pleading that "Mr. Paul has a 5% interest in the Promote Interest earned from Fund IV and a 3.3% interest in the Promote Interest earned from each of the other Funds").

Plaintiff's sole purported "evidence" for his new assertion is a one-page "Summary of Proceeds," which Rockpoint shared with Plaintiff *before* he declined Rockpoint's voluntary offer for him to participate in the Transactions. Plaintiff correctly acknowledged in the court below that he continues to receive timely "payments from Rockpoint based on his continuing interests in the Fund GPs." A123; *see also* A1038 (showing Plaintiff's interests are not reflected on the schedule of Transferred Interests of Current Departed Members).

CONCLUSION

For the foregoing reasons and the reasons set forth in Rockpoint's opening brief, this Court should reverse the Order and vacate the Partial Final Judgment.

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