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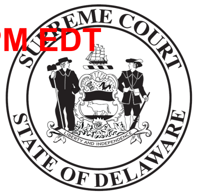

IN THE SUPREME COURT OF THE STATE OF DELAWARE

EXIT STRATEGY, LLC, Plaintiff-Below, Appellant,	)	
v.	)	No. 318, 2023
FESTIVAL RETAIL FUND BH, L.P. Defendant-Below, Appellee.	)	On appeal from the Court of Chancery, C.A. No. 2017-0017-NAC

APPELLANT'S OPENING BRIEF

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NATURE OF THE PROCEEDINGS

This is an appeal from a final order and judgment, dated August 4, 2023, by the Court of Chancery after trial. In that order (which implemented an opinion dated July 17, 2023), the Court determined that plaintiff Exit Strategy ("Exit") was not entitled to any amount upon the resale in 2014 of the building housing the Gucci retail store on Rodeo Drive in Beverly Hills, California (the "Gucci Property").

This resale was made by defendant Festival Retail Fund BH, L.P., a Delaware limited partnership (the "Partnership"), the sole appellee here. Exit was a Special Limited Partner of the Partnership, entitled to certain amounts under the Partnership's limited partnership agreement (the "LPA") if the Net Resale Price on any Resale (both as defined in the LPA) of the Gucci Property exceeded a pre-set amount (which varied with the year of the Resale) and was defined in the LPA as the Resale Price Threshold.

The only issue that is being appealed is the Court's determination that, pursuant to the LPA, the Partnership correctly deducted the cost of "defeasance" (defined below) from the gross resale price of the Gucci Property; that deduction caused the Net Resale Price to fall below the Resale Price Threshold for 2014, and resulted in Exit receiving nothing.

Exit made two other arguments that the Court rejected after trial–that the sale of the Gucci Property constructively occurred in 2013, and that the controller of the

Partnership, defendant Mark Schurgin, was personally liable for acting in bad faith. Exit is not appealing either of these determinations.

Because the Court made the determination that defeasance was properly deductible in computing the Net Resale Price, the Court did not reach two of defendants'[1] other arguments concerning deductions taken by the Partnership in determining Net Resale Price: a deduction for the payment of a preferred return on equity, and a deduction for "negative accruals." Defendants also made two other, non-LPA-based, arguments that were not decided by the Court, and thus also are not involved on this appeal.[2]

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[1] In addition to the Partnership and Mr. Schurgin, the general partner of the Partnership, FRFBH, LLC, (the "General Partner") also was a defendant. Only the Partnership is an appellee on this appeal.

[2] These two arguments were the claim that (a) a sale in 2011 of the limited partner interests in the limited partner of the Partnership extinguished Exit's rights, and (b) Exit had committed laches by filing suit when it did.

SUMMARY OF ARGUMENT

1. The Court of Chancery improperly determined that defeasance was an appropriate deduction under the provisions of the limited partnership agreement. Without that deduction (and other deductions taken by Festival that were challenged by Exit on which the Court did not rule), the Net Resale Price of the Gucci Property would have exceeded the Resale Price Threshold for 2014, and thus Exit would have been entitled to a Special Limited Partner's Portion of $3.205 million (before interest).

STATEMENT OF FACTS

A. The Parties

1. *Exit Strategy*. Exit, the Special Limited Partner, is owned by Peter Friedman and Steven Emanuel. Exit's only current asset is its interest in the Partnership.

2. *The Festival entities*. The Festival entities, including the Partnership and the General Partner, are owned by Mark Schurgin (A1290-(Schurgin)).[3] Festival and related entities are a real estate development business that owns and manages retail properties throughout the United States (A1346-(Schurgin)).

B. Purchase of the Gucci Property

In 2005, Exit signed a contract to purchase the Gucci Property from Elizabeth Luster, an heir to the Max Factor fortune, after determining that the lease on the Gucci Property was well below market value. Exit initially tried to consummate the purchase of the Gucci Property by itself, but eventually decided to partner with Festival, which had greater financial resources (A1746, A1747, A1748-A1749 (Emanuel)).[4]

[3] Citations to "A__" are to the Appendix to Appellant's Opening Brief.

[4] References to the trial transcript (ID 68218295) have the witness's name thereafter, when not obvious from the context.

In January 2007, after having invested about $3 million into the 2005 purchase agreement for the Gucci Property (A1748-(Emanuel)), Exit assigned to the Partnership its rights under that agreement. In return, Exit received a cash payment of approximately $11 million, plus the Special Limited Partner's Portion, as defined in the LPA. The LPA is in the Appendix as A0359-A0389.

C. The Limited Partnership Agreement

The LPA was signed as of January 18, 2007. Several provisions of the LPA are important to this appeal; they are set forth below.

1. Section 15(b): Distributions of Resale Proceeds.

This section states:

In the event of a Resale:

> Upon or promptly after the Resale, the Resale Proceeds shall be distributed first, 100% to the Special Limited Partner until the cumulative amount distributed to the Special Limited Partner equals the Special Limited Partner's Portion;

(A0367).

The Special Limited Partner's Portion is:

> with respect to a Resale, the amount equal to (i) the Base Resale Distribution Amount (as shown on Schedule D) for the applicable Resale Year plus (ii) an amount equal to 10% of the amount by which the Net Resale Price[5] exceeds the Resale Price Threshold for such Resale Year.

[5] Net Resale Price is defined immediately below.

(A0385).

The Resale Price Threshold is set forth on Schedule D of the LPA; with the exception of 2007-2008, the Threshold increases each year (A0384). For a Resale in 2014, the Resale Price Threshold was $100 million, and the Base Resale Distribution Amount was $3 million (A0388-A0389). Thus, for a Resale in 2014, if the Net Resale Price exceeded $100 million, the Special Limited Partner's Portion would have been $3 million, plus 10% of any excess over $100 million.[6]

2. Definition of Net Resale Price.

Under the LPA, "'Net Resale Price' means the gross sales price derived from the Resale, as shown in the Resale Contract, reduced by one or all of the following items:" (A0382).

Three subsections of Net Resale Price are at issue on this appeal:

a. *Subsection (f)* (the "Excess Loan Costs" provision) permits the deduction of:

> Any **excess costs** associated with any loan on the Property ("*Excess Loan Costs*") during the Partnership's ownership. Excess Loan Costs means **loan interest costs**, points, loan origination fees, negative accruals and similar costs to the extent they exceed the aggregate of the

[6] The Court incorrectly claims Exit "did not mention [the Special Limited Partner's Portion] formula until post-trial argument." (Op. 37 n.163). Exit referenced the formula both in its Post-Trial Opening Brief and Post-Trial Reply Brief. *See* A1984; A2134; A2150-51; A2157.

> following items: (i) loan origination fees to the extent actually paid by the Limited Partner or the Partnership, but not more than $550,000.00; and (ii) the amount by which aggregate **loan interest costs in any year** (whether paid or accruing and including any interest that accrues on interest) **exceed Rental Payments** (as defined in clause (A) of the following sentence) **for such year**, **but only to the extent** such excess of such **loan interest costs in such year over Rental Payments in such year exceeds $875,000** (subject to proration for any partial year). In addition, the parties acknowledge and agree that (A) the term "*Rental Payments*" for any year shall be defined to mean the aggregate of all rents collected by any Partner or the Partnership from Gucci or any other tenant pursuant to the existing lease or any renegotiated lease with Gucci or such other tenant during such year and (B) the only loan origination fees and interest costs to be used in the calculation of Excess Loan Costs under this section shall be those origination fees and interest costs attributable to the first $30,750,000 in gross loan or refinancing proceeds (regardless of the total amount of such proceeds).

(A0382-A0383; emphasis added).

Festival claimed that, although the word "defeasance" is never mentioned in the definition of Net Resale Price (or anywhere else in the LPA), it is entitled to deduct from the gross sales price over $6 million in "defeasance" charges because those charges nonetheless are deductible under the definition of "Excess Loan Costs" (and elsewhere under Net Resale Price). As explained below, the Court agreed with this argument.

"Defeasance" typically occurs when the owner of a mortgaged commercial property sells that property, but the purchaser either cannot (because of restrictions

in the loan documents) or does not want to (because interest rates have gone down) assume the existing loan on the property (A1768-A1769-(Emanuel); A1792-A1793-(Yustein)). Defeasance also can occur apart from the sale of a commercial property through a re-financing by the property owner (A1951-(Finkel)).

Where the loan cannot be assumed, defeasance allows the lender to be certain to receive the agreed-upon interest rate over the remainder of the loan term, even if the property is sold in the meantime. As the Court explained: "Defeasance is the process by which a borrower replaces collateral with a portfolio of securities, e.g., low-risk bonds, that yields a rate of return sufficient to economically replicate the interest due to the lender" (Op. 10).[7] To "defease" a property, one contracts with a specialist in defeasance (here, "Commercial Defeasance, LLC"), to purchase government securities with maturity dates that precisely track the interest due dates on the underlying loan. Then, when the interest payments on the loan are due, the amount of those payments will be made from the maturing securities. This explanation assumes an interest-only loan (with the principal being paid when the loan becomes due), which was the case with Festival's purchase of the Gucci Property (A0359-A0389).

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[7] A copy of the July 17, 2023, Post-Trial Memorandum Opinion (the "Opinion" or "Op.") (Ex. A), and a copy of the Final Order and Judgment dated August 4, 2023 ("Judgment") (Ex. B) are attached.

b. *Subsection (d)* of Net Resale Price permits the deduction of:

> Any other costs or expenses associated with the ownership, development, redevelopment, improvement, operating, leasing, management, (including without limitation, property management development, redevelopment and construction management fees and asset management fees), maintenance, repair and renovation of the Property reasonably borne by any Partner or the Partnership during the Partnership's ownership, to the extent not reimbursed by Gucci or other tenant at the Property other than by payment of installments of rent;

(*Id.*).

Festival also relied on this language to deduct its defeasance expenses, claiming that these expenses, although not mentioned by name in this sub-section, must fall somewhere under this language. The Court also accepted this argument in its Opinion.

c. *Subsection (h)* of Net Resale Price permits the deduction of:

> All actual documented out-of-pocket closing costs and costs of sale incurred in connection with such Resale, including without limitation, actual documented out-of-pocket survey and title costs, documentary transfer taxes, recording fees, escrow charges and reasonable attorneys' fees and costs.

(*Id.*).

Festival also relied on this language, claiming that "defeasance" expenses, although again not mentioned anywhere in this sub-section, should be considered

"out-of-pocket closing costs and costs of sale." Again, the Court agreed with this position in its Opinion.

D. Negotiations over the Limited Partnership Agreement

Because, as explained below, the Court incorrectly determined that the LPA unambiguously permitted a deduction for defeasance, it never analyzed the extrinsic evidence on the parties' negotiations over the terms of the LPA. As set forth below in more detail, Exit's only argument about ambiguity was that the LPA unambiguously *did not* include any reference to defeasance, making defeasance an impermissible deduction in determining the Net Resale Price. The Court did not agree with Exit; instead, it reached the *opposite* (and erroneous) conclusion—that the LPA unambiguously *did* include defeasance.[8]

Thus, the extrinsic evidence is critical here, because it uniformly contradicts Festival's position about the deductibility of defeasance and the Court's acceptance of that position. The negotiations over the LPA took place over several weeks in late December 2006 and early January 2007, prior to the signing of the LPA on January 18, 2007. The main negotiators for Exit were its two principals, Friedman (who did

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[8] The Court's misunderstanding of this issue is perhaps best shown by its obvious puzzlement as to why "the parties spent most of trial discussing extrinsic evidence" (Op. 1). The parties spent that time because they never agreed between themselves that the LPA unambiguously *allowed* a deduction for defeasance as part of determining the Net Resale Price.

most of the direct negotiations with Schurgin (A1750-(Emanuel))) and Emanuel, along with Ross Yustein, Exit's attorney from Kleinberg Kaplan Wolff & Cohen ("KKWC"). Emanuel, Friedman and Yustein all testified at trial.[9]

None of Festival's principal negotiators testified. These negotiators were: (a) Julian Wise (an attorney at Schulte Roth & Zabel (A1750-(Emanuel), A1859-(Schurgin)); (b) George Furst (A1792-(Yustein), A1859-(Schurgin)); and (c) Festival's acquisitions director, Jay Kerner (A1751-(Emanuel)). Schurgin was the principal for Festival, but admitted that he had little direct contact with Exit's negotiators (A1376-A1377; A1379-(Schurgin); A1859).

The negotiations between the parties started with a draft Assignment and Assumption Agreement (A0243-A0358 (the "A&A Agreement")), which would have had Festival assume Exit's purchase agreement with Ms. Luster. The parties then agreed that Exit would receive (in addition to cash) a contingent stake in the success of the acquisition. They thus decided to form a limited partnership (the "Partnership") for this purpose (A1753-(Emanuel)), and thereafter formed the Partnership and signed the LPA. In the LPA, the parties described how Exit would be compensated upon an eventual resale of the Gucci Property—the Special Limited Partner's Portion.

[9] Neither Friedman nor Yustein remembered a lot about the negotiations; but what they did remember was helpful to Exit.

There is little or no negotiating history regarding most of the above definitions; they were in the original draft of the A&A Agreement, and were not materially altered thereafter. However, a number of documents show changes in the wording of some of the definitions of Net Resale Price, including sub-section (f) (allowing deduction of Excess Loan Costs).

Understanding the extrinsic evidence here requires a chronological review of the relevant documents. The first such document is A0148-A0149, an e-mail dated December 11, 2006, sent by Friedman (drafted by Emanuel)[10] to Kerner of Festival.[11] As that document explains, the philosophy behind the split of any Resale Proceeds between Festival and Exit was that Festival first needed to achieve its target 16% internal rate of return ("IRR") on the Gucci transaction; thereafter Festival was willing to allow Exit to share in the upside. Exit explained its understanding of the proposed deal to Festival as follows:

> [Festival's] IRR computations assumed a 75% loan against a total deal cost of $41MM (including closing costs), so that you would borrow $30.75 MM @ 6.5%, and that the revised Net Sale Price [changed to "Net Resale Price" in the LPA] thresholds would, if achieved, give you your target 16% IRR before you had to pay us any Base

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[10] Emanuel described himself as the "deal guy," at least when it came to details of the business arrangement (A1751).

[11] Later the same day, Kerner sent this e-mail to Schurgin. (*Id.*).

(or Addt'l) FE Share.[12]

(A0148; A1751-A1752; A1755). Emanuel then explained why allowing Festival to deduct additional interest before paying Exit (he used "FE") its' share of "the 'spoils'" would improperly increase Festival's IRR, with Exit paying for every dollar of that increase (A0148-A0149). No one at Festival ever disagreed with these numbers or the concepts in A0148-A0149, nor did anyone at Festival ever tell anyone at Exit that they had misunderstood anything in this memo (A1752-(Emanuel)).

The concept eventually called the "Net Resale Price" (the critical definition in this suit) was created by Emanuel based on the philosophy in A0148-A0149. He prepared a document known as the "deal memo" that he sent to Kerner and Schurgin of Festival later on December 11, 2006 (A0142-A0147; A1753-(Emanuel)). This "deal memo" set forth the first written statement of how the Special Limited Partner's Portion (which the "deal memo" called "Additional Purchase Price") would be computed (*Id.* at A0144; A1754-(Emanuel)). The "deal memo" included those expenses Festival would be able to deduct upon a Resale to compute the "Additional Purchase Price."

[12] "FE" refers to "Friedman Emanuel"–the entity that became known as Exit; "Base FE Share" became "Base Resale Distribution Amount;" "Addt'l FE Share" became the second part of the Special Limited Partner's Portion (A1754-(Emanuel)).

The deal memo was the first time either party defined in writing the concept of "Excess Loan Costs" (quoting only relevant parts):

> Excess Loan Costs means all loan interest, points, origination fees, negative accruals, and the like, in excess of the total of the following items: (i) up to $550,000 in an origination fee if actually paid to the lender by Purchaser; (ii) the amount of any rents collected by Purchaser from Gucci pursuant to the existing lease or any renegotiated lease ("Rental Payments"); and (iii) the first $875,000 of any loan interest (whether current-pay or accruing) incurred by Purchaser in any year, and interest on that interest, beyond the loan interest amount that is covered by any Rental Payments, . . .

A0145, (vii).

As Emanuel explained in the "deal memo" a few lines later: "The computation of Excess Loan Costs is intended to reflect the concept that Purchaser expects to borrow no more than $30.75MM at no more than 6.5% interest, and the principle that if Purchaser's loan stays within these limits, there will be no Excess Loan Costs." (*Id.* at A0145-A0146).[13]

Emanuel explained at trial that the $875,000 amount in the Excess Loan Costs definition was based on the assumption that, after deducting the annual Gucci Rental Payments (which, in the early years of the Partnership, would be about $1.125

[13] The words "6.5% interest" were dropped in the LPA, because they were not necessary (the concept having been explained in the LPA in other ways) (A1761-A1762-(Emanuel)).

million/year), the annual loan interest costs were expected to be no more than $875,000 (A1755-A1756).[14] If annual loan interest costs over the loan term were no greater than $2 million ($1.125 million plus $875,000) Festival would obtain its desired 16% IRR, and thus no Excess Loan Costs would exist. As a result, nothing further in loan interest costs would need to be deducted from the gross sales price in any Resale before Exit was entitled to receive its Special Limited Partner's Portion. It was only if annual loan interest costs *exceeded* the annual Gucci rent plus $875,000 that they could be deducted from the gross sales price in any Resale, because only then would Festival not be able to obtain its 16% IRR.[15] The Court's misunderstanding of Excess Loan Costs are set forth below.

The wording of Excess Loan Costs from the "deal memo" was changed in some minor respects in the initial draft of the LPA, a draft that was prepared by Exit and its counsel, and then probably sent to one of Festival's outside counsel. (A0210-A0211; A0893-(Emanuel)). There was no intent to have these changes affect the meaning of or the principle behind Excess Loan Costs (A0920-A0921-(Emanuel)). While Festival's counsel made further changes to the A&A

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[14] It was anticipated that the Gucci Rental Payments would increase materially in the later years of the loan, an event that did occur. (A1747-A1748).

[15] No one at Exit ever was told that the excess-interest concept in the deal memo, or the concept behind "Excess Loan Costs," was not accurate (A1756, A1758-(Emanuel)).

Agreement and the LPA, he never changed anything of substance in the definition of Excess Loan Costs.

Exit's trial witnesses testified about other concepts related to Excess Loan Costs. Both Emanuel and Yustein testified that neither the term nor the concept of "defeasance" ever was mentioned in the discussions between the parties (A1769 (Emanuel); A1793 (Yustein)). Yustein also explained that he would have used the term "defeasance" in the LPA if that term had been intended to be included among the deductions to arrive at Net Resale Price (A1793). By contrast, Festival adduced no evidence of the negotiating history surrounding "defeasance."

However, Emanuel also testified that defeasance is something that, under certain circumstances, *could* fall within the concept of "loan interest costs" as used in the definition of Excess Loan Costs. This is so because defeasance is a replacement for interest costs that otherwise would have been paid in the final years of the loan term, had the sale not occurred (A1769-A1770). However, because Excess Loan Costs only would exist if annual loan interest costs were *greater* than $2 million (the Gucci annual rent plus $850,000)--which never occurred--no defeasance costs could properly be deducted in computing the Net Resale Price.

E. The Sale of the Gucci Property to Ponte Gadea

Effective January 7, 2014, the Gucci Property was sold by the Partnership to an entity called Ponte Gadea California, LLC, which was owned by Spanish

billionaire Amancio Ortega (the "Ponte Gadea Sale"). The sale price was $108 million, which (before any deductions permitted in the calculation of Net Resale Price) exceeded the $100 million Resale Price Threshold for 2014.

Festival never informed Exit about the Ponte Gadea Sale.[16] Instead, Exit learned about that sale by reading an article in the *Los Angeles Times*, dated January 13, 2014 (A0548; A1766-(Emanuel); A1842-(Friedman)). As a result, Exit had its counsel from KKWC, Andrew Chonoles, send a letter dated January 17, 2014, to the General Partner of the Partnership (A0549-A0551). This letter (i) informed the General Partner that Exit had learned about the Ponte Gadea Sale, (ii) stated that Exit believed that this sale was a Resale under the LPA, (iii) reminded the General Partner that Exit, as the Special Limited Partner, was entitled to receive "the first distribution of proceeds from the Transaction in an amount equal to the Special Limited Partner's Portion," and (iv) requested a "full accounting" of the Ponte Gadea Sale.

Through a letter dated February 18, 2014, Mr. Schurgin, as President of the General Partner, responded to Chonoles' January 17 letter (A0552-A0555). This letter stated (in relevant part) that the Net Resale Price for the Ponte Gadea Sale was less than $100 million (as a result of the $108 million sales price being reduced by

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[16] Although Section 16 of the LPA required that Festival send a copy of the Resale Contract to Exit, Festival did not do so, nor did they otherwise tell Exit about the sale (A1766-(Emanuel)).

various deductions), and thus no amount was owed to Exit (*Id.*).

The deductions upon which defendants relied for this last claim were set forth in a document entitled "Gucci Sales Analysis Summary Accounting for the 2014 Sale" (A0503-A0547) (the "Summary Accounting"), which was included as part of A0552-A0555. While many of the smaller deductions set forth on the Summary Accounting appeared legitimate, two large deductions struck Exit as highly suspicious, the larger of them being the $6,250,155 in "defeasance" and "defeasance costs" (*Id.*).

F. The Litigation and the Court's Opinion

Exit filed its complaint here on January 12, 2017. After Festival's motion to dismiss was denied (Transaction ID 62664359), the parties commenced discovery, and eventually went to trial on September 20-22, 2022. After post-trial briefing and argument, the Court issued its post-trial opinion on July 17, 2023. The discussion below about the Court's opinion focuses solely on the issues relevant to this appeal.

1. The Court's focus on the "broad enabling provisions" of the LPA

Under the LPA, the determination of whether Exit was entitled to its Special Limited Partner's Portion after the Ponte Gadea Sale should have been based on whether the Net Resale Price resulting from that sale exceeded the Resale Price Threshold for 2014 set forth in Schedule D of the LPA. In answering that question, however, the Court focused on other provisions of the LPA that gave the General

Partner wide freedom to run the Partnership. In the Court's view, these "broad enabling provisions" (Op 27-30) helped to justify the Court's determination that the Partnership could deduct defeasance in determining the Net Resale Price (*Id.*). As explained below, while Exit agrees that the General Partner had broad powers to run the Partnership, *nothing* in the LPA, and *nothing* in the definition of Net Resale Price, supports the Court's use of these "broad enabling provisions" to justify including defeasance among the permitted deductions under Net Resale Price.

2. The Court's analysis of defeasance

a. The Court's conclusion that the LPA unambiguously includes defeasance as an appropriate deduction

The Court began its analysis of defeasance by stating: "The parties spent most of trial discussing extrinsic evidence. But they now agree that their limited partnership agreement is unambiguous" (Op. 1). As explained below, the Court's determination that the parties actually agreed about unambiguity is just wrong.

b. The Court's determination that defeasance is an Excess Loan Cost

In determining that defeasance is an Excess Loan Cost under sub-paragraph (f) of Net Resale Price, the Court truncated, and misunderstood, the language of that provision.

The actual provision states as follows, in its entirety:

> Any **excess costs** associated with any loan on the Property ("*Excess Loan Costs*") during the Partnership's ownership. Excess Loan Costs means **loan interest costs**, points, loan origination fees, negative accruals and similar costs to the extent they exceed the aggregate of the following items: (i) loan origination fees to the extent actually paid by the Limited Partner or the Partnership, but not more than $550,000.00; and (ii) the amount by which aggregate **loan interest costs** in any year (whether paid or accruing and including any interest that accrues on interest) **exceed Rental Payments** (as defined in clause (A) of the following sentence) for such year, **but only to the extent** such excess of such **loan interest costs in such year over Rental Payments in such year exceeds $875,000** (subject to proration for any partial year). In addition, the parties acknowledge and agree that (A) the term "*Rental Payments*" for any year shall be defined to mean the aggregate of all rents collected by any Partner or the Partnership from Gucci or any other tenant pursuant to the existing lease or any renegotiated lease with Gucci or such other tenant during such year and (B) the only loan origination fees and interest costs to be used in the calculation of Excess Loan Costs under this section shall be those origination fees and interest costs attributable to the first $30,750,000 in gross loan or refinancing proceeds (regardless of the total amount of such proceeds).

(A0382, A0383; emphasis added).

Thus, annual loan interest costs can only be "**Excess** Loan Costs" if they exceed annual Rental Payments (from Gucci) plus $875,000.[17] As Exit explained in

[17] Exit here ignores, as it did in the Court of Chancery, "loan origination fees" under (i) above, because there were none. (A2028 n.17). Festival never disagreed.

the trial court in detail, because annual loan interest costs never exceeded the Gucci Rental Payments plus $875,000, there never were any "Excess" Loan Costs (A2014-A2015).

The Court disagreed with this analysis, but its disagreement was based on a basic misunderstanding of the definition of Excess Loan Costs. On page 8 of its Opinion, the Court cited to portions of that definition, but by paraphrasing, rather than quoting from, the definition, it did not accurately explain the meaning of Excess Loan Costs.

The Court analyzed Excess Loan Costs as follows:

> In relevant part, Excess Loan Costs are deductible if 'the amount by which aggregate loan interest costs in any year . . . exceed Rental Payments,' defined as a threshold amount of payments from the Property's tenant. The Rental Payment threshold is fixed at a notational amount of "$875,000 (subject to proration for any partial year[.])"

The Court made two crucial mistakes in this analysis. **First**, the Court determined that Excess Loan Costs "are deductible if 'the amount by which aggregate loan interest costs in any year . . . exceed Rental Payments.'" This is just wrong. As the full definition states, loan interest costs will be Excess Loan Costs if "they exceed Rental Payments. . . but *only* to the extent such excess of such loan interest costs in such year over Rental Payments in such year exceeds $875,000 (subject to proration for any partial year)." (emphasis added). So, the formula for

determining the amount of Excess Loan Costs in a given year is the extent to which:

Annual loan interest costs > (annual Gucci Rental Payments plus $875,000).[18]

Second, the Court apparently realized it needed to deal with the "$875,000" amount, because it had not done so in the first sentence quoted above. So, in the second sentence it determined that "[t]he Rental Payment threshold is fixed at a notational amount of "$875,000 (subject to proration for any partial year[.]"). But this assertion, as well, is just wrong. "Rental Payments" are defined in (A) under Excess Loan Costs as "the aggregate of all rents collected by any Partner or the Partnership from Gucci or any other tenant pursuant to the existing lease or any renegotiated lease with Gucci or such other tenant during such year." As explained above, the Rental Payments, in the early years, were $1.125 million (and were expected to increase). Thus, "$875,000" is *not* the "notational amount" of the annual Rental Payments; instead, it is the amount by which annual loan interest costs must *exceed* annual Rental Payments before loan interest costs can be deducted as Excess Loan Costs.

This basic error infected all of the Court's analysis of whether defeasance fit under Excess Loan Costs. At page 33 of its Opinion, the Court determined that "the

[18] This definition is not a model of clarity. However, if the Court had understood that the definition was ambiguous, and then examined the extrinsic evidence set forth above, it would have realized how and why the Excess Loan Costs definition was designed to operate.

Defeasance Deduction is proper under Subsection (f)." The Court explained why this was so; because "*Rental Payments never exceeded Subsection (f)'s $875,000 threshold*, the General Partner properly determined that the tenant's rent was insufficient to cover defeasance costs" (emphasis added). Not only is this error completely at odds with the actual language of Excess Loan Cost, it would not have occurred had the Court looked at the extrinsic evidence that "[t]he parties spent most of trial discussing." (Op. 1).

c. The Court's determination that defeasance fit under other sub-sections of Net Resale Price

In addition to determining that the defeasance deduction was appropriate as an Excess Loan Cost, the Court also determined that defeasance properly was deductible under two other sub-sections of Net Resale Price, holding that a deduction that falls within more than one section can be deducted under any of them (Op. 35). Specifically, the Court found that defeasance also could be deducted under sub-section (d) (as a cost associated with the Property), and sub-section (h) (as an out-of-pocket closing cost or cost of sale) (Op. 31-32). The Court's improper reliance on those sections is discussed below.

ARGUMENT

I. Question Presented

Whether the Court erred in determining that the Net Resale Price provision of the Limited Partnership Agreement permitted a deduction for defeasance in determining the Special Limited Partner's Portion?

This question was raised in Exit's Pre-trial Brief (A0101-A0106), the Pre-trial Order (A0132), and both the Opening Post-trial Brief (A2012-A2018) and Reply Post-trial Brief (A2135-A2146).

II. Scope of Review

This appeal is from the Court of Chancery's legal interpretation of a contract– the Limited Partnership Agreement. The standard of review for the interpretation of a contract is *de novo*. *Paul v. Deloitte & Touche, LLP*, 947 A.2d 140, 145 (Del. 2009) ("Questions concerning the interpretation of contracts are questions of law, which we review *de novo*.").

III. Merits of the Argument

A. The Court of Chancery erred in determining that the provisions of the LPA giving the General Partner wide discretion in running the Partnership were relevant in interpreting the provisions of Net Resale Price

The Court began its analysis of whether defeasance costs are deductible under the LPA by discussing its view that "the LPA enables the Partnership to do just about

anything 'necessary, convenient, or advisable' for acquiring, owning, and selling the Property" (Op. 27-28). In itself this statement is uncontroversial. But the Court then used this analysis to justify its belief that these "broad enabling provisions" (Op 27-30), allowed the Partnership to deduct the defeasance costs in determining the Net Resale Price (*Id.*). Nothing in the LPA, and especially nothing in the definition of Net Resale Price, supports that determination by the Court.

The Court relied extensively upon these "broad enabling provisions" to justify its determination that the defeasance charges were deductible. For example, at page 37 of the Opinion, the Court stated:

> Based on the LPA's plain terms and management structure, it would be commercially unreasonable to conclude that the parties agreed at the time of contracting that Exit would receive a distribution *before* deductions for the Partnership's costs when those costs would make Exit's distribution possible in the first place" (emphasis in original).

The Court here endorses the concept that Festival argued at trial–that the Partnership, pursuant to the provisions of Net Resale Price, was allowed to deduct *all* of its costs from the beginning to the end of the Partnership's ownership of the Gucci Property. However, if that is the case, why did the definition of Net Resale Price not just say: "Net Resale Price means the gross sales price derived from the Resale, as shown in the Resale Contract, reduced by all of the Partnership's costs with respect to the Property?" Instead, the definition of Net Resale Price,

describing the only appropriate deductions upon a Resale, ran for over a page–all of it surplusage if the Court is correct. Exit raised the "surplusage" question in its post-trial briefs (A2010-A2012; A2133-A2134), but received no response from Festival; the Court never discussed this issue. And Delaware law frowns upon interpretation of contracts that ignore vital provisions of that contract, such as the definition of Net Resale Price here. *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) ("We will not read a contract to render a provision or term 'meaningless or illusory.'").

Elsewhere, the Opinion notes that, under Section 14 of the LPA, "the General Partner has 'sole discretion' to allocate "all income, gain, loss, deduction or credit in accordance with the partners' 'economic interests in the Partnership,'" and uses that quote to justify the deduction for defeasance under the definition of Net Resale Price (Op. 9; *see also* Op. 31). Nowhere, however, does the Court note that (a) Section 14 refers only to "Allocation of Profits and Losses" to the partners' capital accounts, (b) Section 14 never mentions Net Resale Price, and (c) the definition of Net Resale Price never mentions Section 14 in any way, let alone as something that would modify the description of what items were appropriate to deduct in determining the Net Resale Price. Thus nothing in Section 14 has anything to do

with computing the Special Limited Partner's Portion.[19]

Another example of the Court's improper use of other provisions of the LPA to inform its reading of Net Resale Price is its citation to Section 7(b) of the LPA, which "provides that the General Partner may cause the Partnership to execute the 'Basic Documents," which include the "Loan Documents," including the "Loan Agreement" (Op. 10-11).[20] Because the Loan Agreement addresses defeasance of the loan entered into by the Partnership, the Court determined that the LPA incorporates the terms of that Loan, including the term "defeasance." The Court never cites to anything to support this "incorporation," and the LPA itself never mentions that any other document should have any bearing on how the LPA is to be interpreted.

Exit is unaware of any law that allows taking a concept (here, defeasance) found in a document (here, the Loan Agreement) that happens to be mentioned in a

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[19] The only mention of the Special Limited Partner's Portion in Section 14 is: "provided that in calculating such allocation [of "Partnership income, gain, loss, deduction or credit for each taxable year"], for any year in which no Resale occurred, the Special Limited Partner shall not be entitled to receive any Special Limited Partner's Portion." This provision further severs any possible link between the allocation of profits and losses to the partners' capital accounts under Section 14 and the effects on the Special Limited Partner's Portion following the Ponte Gadea Sale.

[20] The "Loan Documents" and the "Loan Agreement" are the documents reflecting the terms of the loan that the Partnership used to buy the Gucci Property. Op. at 9-11.

separate document (here, the LPA), and therefore "incorporating" that concept into a definition (here, Net Resale Price) in that separate document, a definition that otherwise never mentions the concept. *See, e.g.*, *Town of Cheswold v. Cent. Del. Bus. Park*, 188 A.3d 810, 819 (Del. 2018) ("A mere reference in one agreement to another agreement, without more, does not incorporate the latter agreement into the former by reference."); *Wiggs v. Summit Midstream Partners, LLC*, 2013 WL 1286180, at *6 (Del. Ch. Mar. 28, 2013) (explaining that "[p]rovisions in one agreement are not read into another agreement unless the wording of the agreement evidences the parties' intent to incorporate terms from another agreement"); *Agranoff v. Miller*, 734 A.2d 1066, 1075 (Del. Ch. 1999) (finding that two agreements "while related, had independent significance and were not to be considered as one contract"). Further, all the LPA did was authorize the General Partner *to execute* the Loan Agreement. Thus, the Loan Agreement was only relevant to the LPA because the LPA authorized *the execution* of that agreement. *Cheswold*, 188 A.3d at 819 ("[W]hen incorporated matter is referred to for a specific purpose only, it becomes a part of the contract for that purpose only, and should be treated as irrelevant for all other purposes.").

Exit never claimed that Festival acted impermissibly under the LPA when it entered into the Loan Agreement. To the contrary, Exit *used* Festival's extensive knowledge of defeasance to show that, when Festival *wanted* to mention defeasance

it knew how to do so (A2013; A2135), and thus the *failure* to mention defeasance as an appropriate deduction under Net Resale Price is strong evidence that the parties did not intend defeasance to be such a deduction. *Fortis Advisors LLC v. Shire US Holdings, Inc.*, 2017 WL 3420751, at *8 (Del. Ch. Aug. 9, 2017) (analogizing the exclusion of specific terms to the statutory canon of *expresio unius est exclusion alterius*, which provides that an omission is presumptively intentional when other terms are included instead).

Finally, to determine the meaning of Net Resale Price, the Court also focused on the definition of Resale Proceeds, which is defined as "any proceeds received by Partnership upon a Resale less the portion thereof used to pay all Partnership expenses, indebtedness, capital improvements, replacements and contingencies, all as determined by the General Partner" (Op. 30). While the Court again used this language to justify that anything spent by the Partnership should be a permitted deduction, that analysis ignores the critical, and much more specific, provisions of the LPA.

Again, the issue here is the appropriate amount of the Special Limited Partner's Portion. The definition of that term never refers to Resale Proceeds, but rather bases the Special Limited Partner's Portion on the Base Resale Distribution Amount from Schedule D of the LPA. In turn, the Base Resale Distribution Amount on Schedule D relies solely on Net Resale Price, and says nothing about

Resale Proceeds; nor does Net Resale Price mention Resale Proceeds. While the Court tried to read all of these provisions together, in its effort to do so it essentially ignored the actual language of Net Resale Proceeds, an interpretation that is forbidden under Delaware law. *Baltimore Pile Driving & Marine Constr., Inc. v. Wu & Assocs., Inc.*, 2022 WL 3466066, at *3 (Del. Super. Aug. 18, 2022) (the Court will not read provisions selectively and will "read a contract as a whole" and "give each provision and term effect").[21]

And, once again, if the Court is correct and the Partnership is allowed to deduct all of its expenses without regard to whether those deductions are permitted under Net Resale Price, why did the parties do all the work that went into preparing that provision? The Court never says.

B. The Court of Chancery erred in determining that the good faith of the General Partner was relevant to its analysis of whether Exit was entitled to receive the Special Limited Partner's Portion

The Court also determined that Exit's claims here failed because Exit failed to show that the General Partner of the Partnership acted in "subjective bad faith" when it was determining the Special Limited Partner's Portion (Op. 18-23).

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[21] On the other hand, these provisions *can* be read together if one merely assumes that the "Partnership expenses" language in the definition of Resale Proceeds must be read to include the definitions of deductible expenses under Net Resale Price. In this way, both definitions would have meaning without ignoring one of the provisions completely.

That determination, however, misunderstands Exit's claims against the Partnership. While Exit did argue that Mr. Schurgin was personally liable for acting in bad faith under the LPA (and during the litigation below), the Court's determination that Exit had not proved its claim against Mr. Schurgin (Op. 38-43) is not being appealed.

What *is* being appealed is the Court's rejection of Exit's claim against the Partnership for breach of its duty under the LPA by failing properly to pay the Special Limited Partner's Portion–a standard breach of contract claim not dependent on Mr. Schurgin's good or bad faith. Indeed, the LPA states (in language quoted by Festival below in trying to have the claims against the General Partner and Mr. Schurgin dismissed (A2069):

> in the event of any breach by the Partnership of its obligations to the Special Limited Partner under this Agreement, the Special Limited Partner's sole and exclusive remedy shall be to commence and pursue an action against Assignee[22] for an accounting, in which any monetary damages shall be limited to the direct and actual amount of the Special Limited Partner's Portion that the Special Limited Partner proves was due and owing and which the Partnership failed to pay as required pursuant to Section 15.

While this is a limiting provision–it limits Exit's remedies in the case of a

[22] "Assignee," which is not otherwise used or defined in the LPA, appears to be a typographical error. Festival assumed in the Court of Chancery that it meant the "Partnership," (A2069 n.10) which appears to be the most likely interpretation.

breach of contract--it makes it evident that Exit *does* have a remedy against the Partnership for "the direct and actual amount of the Special Limited Partner's Portion that the Special Limited Partner proves was due and owing and which the Partnership failed to pay as required. . ." Nowhere does any of the LPA, the Opinion or any law of which Exit is aware require Exit to prove the "subjective bad faith" of the General Partner before recovering on such a contract claim against the Partnership.

C. The Court erred in determining that the definition of Net Resale Price unambiguously permitted a deduction for defeasance

The Court began its analysis of defeasance by stating: "The parties spent most of trial discussing extrinsic evidence. But they now agree that their limited partnership agreement is unambiguous" (Op. 1). The Court apparently used its conclusion that the LPA is unambiguous to justify ignoring (a) the obvious problems that occur in determining that the LPA, which indisputably does not mention defeasance, actually "unambiguously" permits its deduction in determining the Net Resale Price, and (b) the extrinsic evidence showing that this determination of "unambiguity" must be incorrect.

The Court's determination that the parties actually agreed about unambiguity is just wrong. As explained in detail in Exit's post-trial briefs (A2012-A2014) "The Limited Partnership Agreement unambiguously *does not* permit a deduction for

defeasance" (A2012; emphasis added). There, Exit explained that "[t]he LPA never mentions, anywhere, either the term "defeasance" or any of its variants, such as "defease" (A2013). Exit then cited to Festival's expert, Avery, who testified that "'defeasance' typically is specifically identified as such if it is a proper deduction to take," and Exit's expert, Finkel, who testified that "defeasance is always referred to as defeasance." (A2013). Exit concluded by stating that: "Thus, there is no ambiguity about whether the definition of Net Resale Price permits any deduction for defeasance–it does not." (A2013-A2014).

Accordingly, the Court should not have used Exit's argument that defeasance unambiguously does *not* appear in the LPA to justify the Court's contrary finding that the LPA's definition of Excess Loan Costs unambiguously *does* include defeasance among the appropriate deductions. *Sunline Com. Carriers, Inc. v. CITGO Petroleum Corp.*, 206 A.3d 836, 847 n.68 (Del. 2019) ("[W]hether a contract is unambiguous is a question of law; this Court cannot find an ambiguous contract unambiguous because each party interprets the contract differently to find it unambiguous."). Doing so was error.

D. The Court erred in finding that defeasance could be deducted as an Excess Loan Cost under sub-paragraph (f) of Net Resale Price

1. The Court erred in not considering extrinsic evidence

The definition of Excess Loan Costs indisputably does not mention the word defeasance or any derivative of that word–no one disagrees. Therefore, when the Court rejected Exit's argument that the definition of Excess Loan Costs unambiguously did not include defeasance among the permitted deductions for "excess" loan interest costs, that rejection could not have ended the Court's inquiry as to whether defeasance otherwise can be included within Excess Loan Costs. Precisely because "defeasance" was not mentioned by name, there was a necessary ambiguity as to whether it should be included as an "Excess Loan Cost." *Active Asset Recovery, Inc. v. Real Estate Asset Recovery Servs., Inc.*, 1999 WL 743479, at *11 (Del. Ch. Sept. 10, 1999) (the omission of a term in a contract "speaks volumes" when compared to included terms). As a result, the Court erred in not considering extrinsic evidence as to whether, and how, defeasance fits under Excess Loan Costs.

As set forth above (supra, 12-16), *all* extrinsic evidence supports Exit's position, and does not support Festival's contrary position (or the contrary determination by the Court). In brief, this extrinsic evidence shows that the concept of using Net Resale Price to determine the Special Limited Partner's Portion was created by Exit's principal, Steven Emanuel, based on Festival's explanation that

Festival needed to obtain a 16% internal rate of return (the "IRR") on the Gucci Property before it would share any additional profits with Exit. The original definition of Excess Loan Costs reflected the principle that Festival would be able to obtain that 16% IRR because it expected to borrow no more than $30.75 million at no more than 6.5% interest, and if those parameters were met, there would be no Excess Loan Costs.

The $875,000 amount specified in the LPA definition of Excess Loan Costs (which the Court misunderstood as the "notational" annual Rental Payments) was based on the assumption that, in each of the early years of owning the Gucci Property, the Partnership's total interest costs would be no more than $2 million. Thus, after deducting the annual Gucci Rental Payments (which, in the early years of the Partnership, would be about $1.125 million per year), the net annual loan interest costs were expected to be no more than $875,000 (A1755-A1756). Under that assumption, Festival would be able to obtain its desired 16% IRR, and thus nothing further in loan interest costs needed to be deducted from the gross sales price in any Resale before Exit was entitled to receive its Special Limited Partner's Portion. It was only if annual loan interest costs exceeded the Gucci rent *plus* $875,000 that loan interest costs could be deducted from the gross purchase price in any Resale—because only then would Festival not obtain its targeted 16% IRR. And this is what the definition of Excess Loan Costs in the LPA says.

Although the Court never analyzed the extrinsic evidence, it seems to have realized this evidence contradicted the Court's findings, as it determined that, with respect to Mr. Emanuel, he "proposed terms [for the LPA] that he 'invented.' . . . Counsel rejected almost all of them" (Op. 2). This is wrong in two respects.

First, while Mr. Emanuel did propose a term that he "invented," that term was the concept of "negative accruals," which is a separate item under the Excess Loan Costs definition that has nothing to do with defeasance (A1771). "Negative accruals" became an issue at trial because Festival, nearly seven years after its initial computations of the Gucci Sales Analysis Summary Accounting failed to mention "negative accruals," prepared a second Summary Accounting. This second Accounting claimed that the Partnership was allowed to deduct "negative accruals" as well, putting the Net Resale Price even farther below the Resale Price Threshold for 2014 (A1880). Because Mr. Emanuel testified that he never communicated his interpretation of the meaning of negative accruals to Festival, Festival never asked what that term meant, and Exit's counsel never discussed negative accruals with anyone from Festival, no "mutual understanding" between the parties occurred with respect to that concept (A2024-A2025). Thus, Exit argued that the meaning of "negative accruals" (not "defeasance") necessarily was ambiguous (A2024-

A2025).[23]

Second, the Court found that, with respect to Mr. Emanuel's alleged invented terms, "Counsel rejected almost all of them" (Op. 2). The Court's only cite for this finding is to "a redline comparison" that Festival used at trial (Op. 2, n.5). That comparison, however, revealed no such thing, as Exit explained in its post-trial reply brief.

In Festival's post-trial briefing below, it claimed that the LPA included "a complete rewrite of Subsection (f)," citing to the "redline comparison" mentioned by the Court (it never was introduced as an exhibit, only used as a demonstrative (A2058)). Reviewing that demonstrative (A2112-A2117) shows that this alleged "complete re-write" was mostly grammatical changes that made no substantive difference:

1. Changing terminology (from "Purchaser" to "the Partnership" or something similar);
2. Adding words to better explain a concept (adding "costs" to "loan interest," "loan" to "origination fees," and changing "the like" to "similar costs");
3. Changing "in excess of" to "the extent they exceed," and "total of" to "aggregate of;"
4. Changing the "loan origination fee" sub-paragraph from "up to $550,000 in an origination fee if actually paid to the lender" to "loan origination fees

[23] Because the Court did not decide whether "negative accruals" was an appropriate deduction to get to Net Resale Price, that issue is not involved in this appeal.

> to the extent actually paid . . . but not more than $550,000;"

> 5. Making grammatical changes to the amount of the loan that is subject to deduction under Excess Loan Costs.

Then there is the change on which Festival implicitly relies. In the "deal memo" (A0142-A0147), the language that limits "Excess Loan Costs" only to those amounts over (Gucci rent + $875,000) was expressed as any sums in "excess of the total of the following items:"

> (ii) the amount of any rents collected by Purchaser from Gucci pursuant to the existing lease or any renegotiated lease ("Rental Payments"); and (iii) the first $875,000 of any loan interest (whether current pay or accruing) incurred by Purchaser in any year, and interest on that interest, beyond the loan interest amount that is covered by Rental Payments, which $875,000 shall be pro-rated for any partial year of ownership.

In the LPA, what would count as Excess Loan Costs was again described as any sums "in excess of the total of the following items." The "following items" were described in slightly different words:

> (ii) the amount by which aggregate loan interest costs in any year (whether paid currently or accruing and including any interest that accrues on interest) exceed Rental Payments (as defined in clause (A) of the following sentence) for such year, but only to the extent such excess of loan interest costs in such year over Rental Payments in such year exceeds $875,000 (subject to proration for any partial year).

Where is the complete rewrite? In its post-trial briefing, Festival never said, because these two concepts are the same. Nor does the Court specify any difference, nor did it analyze *anything* to support its determination that "Counsel rejected" Mr. Emanuel's work. This again was error.

2. The Court erred in determining that the defeasance deduction sought by the Partnership fits within the definition of Excess Loan Costs

As Emanuel explained, some portion of the costs of defeasance could, under certain circumstances, fit within "Excess Loan Costs" (A1770-(Emanuel)). This is so because when the Gucci Property was sold, defeasance was a replacement for the post-sale interest payments still due on the loan used to acquire the Gucci Property, and "loan interest costs" are one of the possibly-permitted deductions under that definition.

However, not *all* "loan interest costs" are deductible—after all, the phrase here is "Excess Loan Costs," not "All Loan Costs." As explained above, "excess" was used because only unexpectedly high loan costs would be deductible from the gross purchase price. As Emanuel explained to Festival in the "deal memo:"

> The computation of Excess Loan Costs is intended to reflect the concept that Purchaser [Festival] expects to borrow no more than $30.75MM at no more than 6.5% interest, and the principle that if Purchaser's loan stays within these limits, there will be no Excess Loan Costs.

(A0145-A0146).

The $875,000 amount set forth in the definition of Excess Loan Costs was based on the assumption that, after deducting the Gucci rent (which, in the early years, would be about $1.125 million), the net loan interest costs per year would be no more than $875,000 (*supra* p.13-15). If that assumption proved correct, Festival would obtain its target 16% IRR, and there would be no "Excess" Loan Costs. Only if the total loan interest costs turned out to exceed the annual "Gucci rent plus $875,000" per year, would the excess be deductible from the gross purchase price in computing the Net Resale Price.

Therefore, to fit "defeasance" costs into Excess Loan Costs, those defeasance costs would need to be part of "loan interest costs" that exceeded the annual Gucci rent plus $875,000 per year. The defeasance costs that Festival seeks to deduct are replacements for interest expense that would have been incurred between the Resale of the Property and the end of the loan term. Because that interest expense never would have exceeded $875,000 above the Gucci rent in any year (since by the Resale the Gucci rent had increased, but interest expense remained the same (A1769-A1770; A0794-A0795-(Emanuel)), no defeasance costs are properly deductible under the LPA.

As explained above, the Court's mis-reading of Excess Loan Costs prevented it from properly analyzing whether and to what extent defeasance fit within that definition.

E. The Court erred in determining that defeasance is covered by "out-of-pocket closing costs and costs of sale" under sub-paragraph (h) of Net Resale Price

The Court also determined that the defeasance expenses that Festival chose to deduct fell within two other provisions of Net Resale Price–"out-of-pocket closing costs and costs of sale" under sub-paragraph (h), and ownership-related costs under sub-paragraph (d).

Sub-paragraph (h) allows deduction of:

> All actual documented out-of-pocket closing costs and costs of sale incurred in connection with such Resale, including without limitation, actual documented out-of-pocket survey and title costs, documentary transfer taxes, recording fees, escrow charges and reasonable attorneys' fees and costs.

(A0383). In determining that defeasance charges also fit within this definition, the Court ignored or misunderstood two aspects of Delaware law explaining that a concept such as defeasance should not be included in this general term, and one undisputed fact concerning defeasance.

First, if an item fits best in a particular definition (such as, for example, Excess Loan Costs, where "loan interest costs" are specifically mentioned), then it needs to be considered there, not in a broader category (such as sub-paragraph (h)). *DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005) ("Specific language in a contract controls over general language, and where specific and

general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one.") (citation omitted); *Stasch v. Underwater Works, Inc.*, 158 A.2d 809, 812 (Del. Super. 1960) ("'Where there is an inconsistency between general provisions and specific provisions, the specific provisions ordinarily qualify the meaning of the general provisions.' This is so because of the 'reasonable inference that specific provisions express more exactly what (the) parties intended than broad or general terms.'") (internal citations omitted).

The Court attempted to avoid the effect of this law by determining that the provisions of Excess Loan Costs and those of sub-paragraph (h) were not inconsistent (Op. 35). But this is incorrect–there is a facial inconsistency between the precise category of Excess Loan Costs, which contains a specific formula for determining when "loan interest costs" can be deducted, and the general category of "closing costs and costs of sale," which contains no such restriction. Although Exit made this distinction in its reply post-trial brief (A2143-A2144), the Court ignored this obvious problem.

Second, Exit explained in the post-trial briefing (A2017-A2018) that the examples of those costs in sub-section (h)–-"actual documented out-of-pocket survey and title costs, documentary transfer taxes, recording fees, escrow charges and reasonable attorneys' fees and costs"–sound nothing like defeasance (which is a replacement of *loan interest costs*). Although the language in subsection (h) does

include the phrase "including without limitation," defeasance is nothing like these other costs, and therefore does not belong among them. *See Zambrana v. State*, 118 A.3d 773, 779 n.35 (Del. 2015) (under the doctrine of *noscitur a sociis* "a word is known by the company it keeps"); *Agar v. Judy*, 151 A.3d 456, 473 (Del. Ch. 2017) ("The canon of *noscitur a sociis* requires the court to interpret words as part of the large phrase in which they appear"). The Court never mentioned, or analyzed, the doctrine of *noscitur a sociis* in its opinion.

Third, all of the costs listed under (h) are those incurred on a *sale*. Defeasance, however, is a cost triggered by the borrower's decision either to *refinance* or *pay off* the mortgage on the property prior to its maturity, an event that could happen independently of a sale (A1951).

F. The Court erred in determining that defeasance is covered by sub-paragraph (d)

Finally, the Court determined that defeasance expenses properly could fall under sub-paragraph (d). That sub-paragraph permits the deduction of:

> Any other costs or expenses associated with the ownership, development, redevelopment, improvement, operating, leasing, management, (including without limitation, property management development, redevelopment and construction management fees and asset management fees), maintenance, repair and renovation of the Property reasonably borne by any Partner or the Partnership during the Partnership's ownership, to the extent not reimbursed by Gucci or other tenant at the Property other than by payment of

installments of rent;

This definition says nothing about defeasance, nor does it cover expenses resulting from a “sale or financing of the Property”–neither is mentioned. To justify its determination that sub-paragraph (d) also applied, the Court again focused on the discretion of the General Partner to have the Partnership enter into agreements (such as the Loan Agreement) (Op. 31-32). Again, however, the broad discretion only covers what the Partnership is *empowered* to do; it does not have any bearing under the language of the LPA as to what expenses the Partnership is *allowed to deduct* in computing Net Resale Price–those expenses are set forth under the multi-page definition of the allowable deductions.

Thus, none of the bases used by the Court to justify the Partnership’s decision to deduct the defeasance costs in determining the Net Resale Price are effective under the terms of the LPA.

CONCLUSION

For the reasons set forth above, this Court should reverse the opinion of the Court of Chancery and remand this case to that Court for further proceedings.

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