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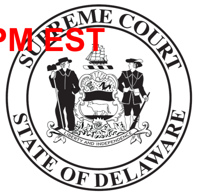

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANT'S REPLY BRIEF

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I. Exit's Appeal Is Not Barred

Appellee Festival Retail Fund BH, L.P. (the "Partnership")'s lead-off argument is that appellant Exit Strategy ("Exit")'s appeal against the Partnership is precluded because Exit did not also pursue an appeal against defendants-below FRFBH, LLC (the "General Partner") and Mark Schurgin (AB2, 16).[1] The Partnership asserts that Exit cannot argue that the Partnership breached the Limited Partnership Agreement (the "LPA") by impermissibly applying a deduction for defeasance because Exit "has conceded that the Court correctly decided the same claim against the General Partner" (AB2). The argument concludes by contending that "Exit has conceded the correctness of the Court's rulings and findings based on the same claims and facts, which have now conclusively been adjudicated against Exit" (*id.*).

This argument fails because the General Partner and Schurgin have a defense of good faith that the Partnership does not have. The Court of Chancery (the "Court") ruled in favor of both Schurgin and the General Partner because Exit failed to prove that those two defendants acted in bad faith. *See, e.g.*, Op. 1, 43[2].

[1] "AB" references are to the Partnership's Answering Brief on Appeal (Dkt.11).

[2] "Op." citations are to the Court's opinion, attached to Appellant's Opening Brief ("OB") (Dkt.10), as Exhibit A.

By contrast, Exit sued the Partnership on a straight-forward claim of breach of contract, which is not dependent on Exit's showing that the Partnership acted in bad faith. Section 18 of the LPA (A368-69) provides that "Covered Persons" shall not be liable for "any loss, liability, damage, claim, cost or expense incurred by reason of any act or omission performed or omitted by such Covered Person in good faith…"). "Covered Persons," however, does *not* include the Partnership (*Id*.). Thus, the proof needed to sustain a claim against the Partnership is distinct from that applicable to Schurgin and the General Partner.

Because the proof is different, this Court can reverse the Court of Chancery's determination that the Partnership did not breach the LPA by failing to pay Exit the Special Limited Partner's Portion without needing to analyze that Court's determination that Schurgin and the General Partner did not act in bad faith. The General Partner could have believed—incorrectly as a matter of contract interpretation, but nonetheless in good faith—that it was entitled to deduct defeasance charges.

It is no surprise that the Partnership cites nothing to support its claim that the appeal is barred. The Partnership lists various legal doctrines: *res judicata*, collateral estoppel, waiver and law-of-the-case (AB17-18), but never attempts to explain how these doctrines apply here. And the Partnership could not do so, because collateral estoppel requires that the issue decided below is identical to that

on appeal, and *res judicata* prevents subsequent suits based on the same cause of action in a prior suit. *State v. Machin*, 642 A.2d 1235, 1238 (Del. Super. Ct. 1993). Neither doctrine applies because the Partnership has no good faith defense to the breach of contract claim—the basis for the Court of Chancery's decision in favor of the General Partner and Schurgin.[3]

The Partnership also argues that the Court of Chancery's "findings of fact or conclusions of law…are now binding on Exit" and include "the Court's interpretation of the LPA and Net Resale Price" and the Court's determination "that the Defeasance Deduction was proper" (AB18). Despite the breadth of this claim, no supporting authority is cited—it is an *ipse dixit*. Nor does the Partnership explain how Exit acceded to the Court's interpretation of the LPA that a defeasance deduction was appropriate when Exit *expressly* appealed those determinations. *See, e.g.*, OB3 ("The Court of Chancery improperly determined that defeasance was an

[3] There are other reasons why these doctrines do not apply: (a) *Res judicata* and collateral estoppel do not apply on appeal, *Cf*. Restatement (Second) of Judgments § 17 (1982), (b) waiver requires an "intentional relinquishment of a known right," *cf*. *Manti Holdings, LLC v. Carlyle Group, Inc.*, 2022 WL 444272, at *2 (Del. Ch. Feb. 14, 2022), (Exit's appeal of the Court's ruling in favor of the Partnership shows that Exit did not "intentionally relinquish" its right to appeal this point), and (c) law of the case does not prevent appellate courts from considering an issue on appeal. *See Thorpe v. CERBCO, Inc.*, 1997 WL 67833, at *4 (Del. Ch. Feb. 6, 1997), *aff'd,* 703 A.2d 645 (Del. 1997) ("Unless the appellate court has either expressly or impliedly overturned the trial court's findings, however, the doctrine of law of the case dictates that ordinarily prior findings of the trial court continue as authoritative in the case).

appropriate deduction under the provisions of the limited partnership agreement."); OB19 ("*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").

Finally, the Partnership argues that "Exit's claim against the Partnership is dependent on a finding that the General Partner did not meet its contractual standard of conduct in taking the Defeasance Deduction" (AB19). But the Court never said that (and elsewhere (AB1, 3, 14) the Partnership acknowledges that the Court did not say that). As explained above, Exit's appeal of the denial of its breach of contract claim against the Partnership can exist comfortably with the factual findings made by the Court regarding Schurgin and the General Partner.

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

At OB24-30, Exit explained that one of the Court's critical errors was focusing on the "broad enabling provisions" of the LPA as a substantial part of its justification for allowing the Partnership to deduct defeasance costs in computing the Net Resale Price of the Gucci Property (the "Property") as of January 2014 (the "Resale"). The Court adopted the Partnership's argument that it was allowed to deduct, as part of its determination of "Net Resale Price," essentially all of its costs and expenses from the beginning to the end of the Partnership's ownership of the Property (Op. 37; AB10, 24, 31-32).

Nothing in the LPA supports this use of "broad enabling provisions" to interpret "Net Resale Price" (OB25). If the parties had intended the result for which the Partnership argues, Net Resale Price could have stated: '"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"' (*id.*). The Court's interpretation of the LPA essentially leaves the entire definition of Net Resale Price as surplusage, an interpretation that is frowned on by Delaware courts (OB26). Neither the Court in its opinion, nor the Partnership in its answering brief, ever comes to grips with these facts.

The Court also relied on other "broad enabling provisions" of the LPA to justify its interpretation of "Net Resale Price." *See, e.g.*, Section 14 of the LPA (OB26), the definition of Resale Proceeds (OB29) and Section 7(b) of the LPA (OB27-28). That latter section allows the Partnership to execute the "Basic Documents," including the "Loan Agreement," which addresses possible defeasance of the Loan that the Partnership entered into to purchase the Property. The Court determined that the LPA "incorporates" the terms of the Loan, including the term "defeasance," thus allowing "defeasance" to be deductible in determining Net Resale Price, despite that term never being mentioned there. The Court cited nothing for its novel use of "incorporation"–the LPA only authorized the Partnership to execute the Loan Agreement—and Exit is aware of no legal principle that permits such an "incorporation" (OB28). Indeed, if one wanted to use the parties' knowledge of defeasance for any purpose, that knowledge more logically would support the opposite interpretation—if the parties had wanted to include defeasance in determining Net Resale Price, they certainly knew how to use that term (OB29).

The Partnership's response (AB22-29), does little more than repeat the Court's mistaken analysis of the LPA. The Partnership argues that, to determine how to interpret "Net Resale Price," the Court needed to look at the other provisions of the LPA "particularly how the Partnership's overall governance scheme centers around maximizing the General Partner's good faith discretion to make decisions

that impact the Partnership and all its partners, . . . including calculating Resale Proceeds and Net Resale Price" (AB23).

But Net Resale Price never mentions *any* of the sections of the LPA on which the Court relied and thus there is no need to "harmonize" these other sections with the language of "Net Resale Price" to make that definition work. While the Partnership argues that "[i]gnoring these sections as Exit suggests would be inconsistent with Delaware law" (AB23), the only case it cites for this proposition, *Axis Reinsurance Co. v. HLTH Corp.*, 993 A.2d 1057, 1062-1063 (Del. 2010), does not support the Partnership, but rather Exit. *Axis* only determined that an insured's reading of an insurance policy's endorsement clause concerning retention amounts would supersede all other endorsements to the insurance policy, including endorsements having nothing to do with retention amounts. This Court declined to follow the insured's reading, because it "would render many provisions of the policy a nullity." That is precisely Exit's argument here—the interpretation by the Court would cause the language of Net Resale Price to be superfluous.

The Partnership next claims that the Court "harmonized" the provisions of the LPA and reached the "only interpretation and result supported by a harmonious interpretation of the LPA" (AB23-24). There are two major problems with this analysis.

First, the General Partner has almost no discretion in determining "Net Resale Price."[4] Although the Partnership claims that Net Resale Price permits "deductions that are discretionary, require additional calculations, or are enumerated by category rather than by name"), none of the LPA provisions it supplies–"any other costs," "including without limitation," and "similar costs" (AB23-24) support any such discretion or additional calculations. What the Partnership actually is referring to is "interpretation"–what does this language mean? But "interpretation" of a document is a legal act, performed by a trial court, subject to this Court's review *de novo*. *Motorola Inc. v. Amkor Technology, Inc.*, 958 A.2d 852, 859 (Del. 2008). The Partnership does not have the "discretion" to interpret the LPA the way it wants to do.

Second, the Partnership's claim that the Court reached the "only interpretation and result supported by a harmonious interpretation of the LPA" is wrong on its face. The contrary determination—that "defeasance" never is mentioned as a permissible deduction under Net Resale Price—is (a) obviously true, and (b) not inconsistent with anything in the LPA. That certain documents referred to in the LPA discuss defeasance as a potential result of a sale or refinancing of the Property (AB24-27)

[4] The final sentence of subsection (f) gives some discretion to the Partnership in incurring loans, but that is irrelevant to the issues here.

does not determine whether any resulting defeasance expense is deductible in calculating Net Resale Price; only the provisions of that definition can do so.[5]

No one disputes that all parties knew about the concept of defeasance and that defeasance expenses could be required upon a Resale. That knowledge, however, only means that, had the parties wished to include defeasance as a deductible expense, they logically would have included it by name in the list of deductible expenses. And that would have been so easy to do so: "defeasance expenses." The Partnership now argues that the "inverse is more apt" (AB26)–*i.e.*, if the parties wanted *not* to include defeasance they should have said so. But that argument makes no real sense. The provisions in Net Resale Price are overwhelmingly (with only a few exceptions) a list of items that *can* be deducted, not a list of items that *cannot* be deducted.[6]

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[5] The Partnership's citation to *Florida Chemical Co., LLC v. Flotek Industries, Inc.*, 262 A.3d 1066 (Del. Ch. 2021) (AB26) is misleading. While the Partnership cites this case for the proposition that "all writings that are part of the same transaction are interpreted together," *Florida Chemical* continues by stating: '"contemporaneous contracts *between the same parties* concerning the same subject matter should be read together as one contract."' *Id.* at 1081 (emphasis added). Because Exit was not a party to the Loan documents, this principle does not apply here.

[6] Nor is Exit's reliance on *Fortis Advisors LLC v. Shire US Holdings, Inc.*, 2017 WL 3420751 (Del. Ch. Aug. 9, 2017) "misplaced" (AB27). Exit cited to *Fortis* for the proposition of *expresio unius est exclusion alterius*—an omission is presumptively intentional when other terms are included instead; the Partnership never responds to this principle.

The Partnership then argues that Exit needed to "shar[e] in the burdens of paying Partnership expenses" (AB24), but later says that Exit overstated the Court's ruling about what costs the Partnership can deduct (AB28-29). The Partnership, however, never explains what Partnership expenses would *not* be included under the Court's determination that Exit needed to pay for them before it could receive a distribution (Op. 37).

Finally, the Partnership continues to argue that the definition of Resale Proceeds trumps the provisions of Net Resale Price (AB28). Nowhere, however, does the Partnership confront Exit's demonstration (OB30, n.21) that the definitions of Resale Proceeds and Net Resale Price *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–a very logical reading.

III. The Court of Chancery Erred in Determining that the good faith of the General Partner was relevant to whether Exit was entitled to receive the Special Limited Partners' Portion

The Partnership also argues, separately, that the General Partner's good faith is relevant to Exit's breach of contract claim against the Partnership (AB20-21). It is not. As explained above, while the Court found that the General Partner determined, in good faith, that it was entitled to deduct defeasance charges when calculating Net Resale Price, that finding has no bearing on Exit's ability to maintain a breach of contract claim *against the Partnership*.

The Partnership posits that Section 18(a) of the LPA "conditions potential recovery" on "a determination that the General Partner did not act in good faith" (AB20-21). But this just misreads Section 18(a) insofar as *the Partnership* is concerned. Section 18(a) exculpates "Covered Persons" from certain liabilities, but that definition, while including the General Partner, does *not* include the Partnership.

The cases cited by the Partnership in support of its argument do not do so. The Partnership cites *Bandera Master Fund LP v. Boardwalk Pipeline Partners, LP*, 2019 WL 4927053 (Del. Ch. Oct. 7, 2019) (AB21-22) for the proposition that, because the LPA sets forth a contractual standard of conduct for the General Partner, the same standard of conduct must apply to a contract claim against the Partnership. But nothing in *Bandera* says that. And, in any event, Section 18(a) shows that the parties intended to treat the General Partner and the Partnership differently by

exculpating the General Partner for acts undertaken in good faith, whereas the Partnership receives no such exculpation.

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

At OB32-33, Exit explained that the Court of Chancery was "just wrong" when it determined that the parties *agreed* that the LPA is unambiguous. Exit argued that the LPA unambiguously did *not* include "defeasance" as a deductible expense while Festival argued the opposite—that the LPA unambiguously *did* include "defeasance." But that is not "agreement"–it is disagreement over a central point.

Exit's position at trial is set forth in the quotes from Exit's post-trial briefs (OB33). There, Exit stated: "The Limited Partnership Agreement unambiguously does not permit a deduction for defeasance," explaining that "[t]he LPA never mentions, anywhere, either the term "defeasance" or any of its variants, such as "defease." (OB32-33). Exit then concluded: "Thus, there is no ambiguity about whether the definition of Net Resale Price permits any deduction for defeasance–it does not."[7] (OB33).

Exit then explained (OB33) that "the Court should not have used Exit's argument that defeasance unambiguously does not appear in the LPA to justify the

[7] Disturbingly, when the Partnership cited to this quote, it *omitted* the crucial last three words: "it does not." (AB29-30). The Partnership made the same omission when quoting from the post-trial oral argument on this issue (AB30). There, in response to the Court's question: "So your first argument is that "Net Resale Price" is unambiguous? Exit's counsel responded "With respect to whether or not defeasance is included, yes, Your Honor. It's not." (B080).

Court's contrary finding that the LPA's definition of Excess Loan Costs unambiguously does include defeasance among the appropriate deductions."

The defendant in *Sunline Commercial Carriers, Inc. v. CITGO Petroleum Corp.*, 206 A.3d 836 (Del. 2019) made the same argument about ambiguity as the Partnership does. This Court rejected it:

> CITGO asserts that whether the contract is ambiguous is not properly before this Court because Sunline did not argue that the contract was ambiguous below. … But whether 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*. Indeed, in many contract disputes, both parties argue for different interpretations, but claim that the contract is unambiguous.

Sunline, 206 A.3d at 847, n.68 (emphasis added).

This Court then concluded that the contract term in question was ambiguous, so that the court "*must resort to extrinsic evidence* to determine the parties' contractual intent." *Id.*

The Partnership also claims that "Exit does not identify any specific terms or provisions of the LPA that it contends are ambiguous with respect to defeasance" (AB30). This is again just wrong, because the ambiguity is based on the Partnership's position that the definitions of Net Resale Price and Excess Loan Costs *do* include a deduction for defeasance (OB32-33). Because those words concededly never are used in the LPA, the Partnership's position is based on the interpretation

of language other than "defeasance" or "defease"—interpretations that create obvious ambiguity.

The Partnership next argues (without legal citation): "That the LPA does not include every possible deduction in a list does not make it ambiguous" (AB31). But this fact actually reinforces Exit's argument, because the most logical reading is that non-included terms were omitted deliberately. And if the omitted words create ambiguity, then extrinsic evidence must be examined. *Vianix Delaware LLC v. Nuance Communications Inc.*, 2010 WL 3221898, at *21 (Del. Ch. Aug. 13, 2010) (finding the omission of certain words indicative of a lack of clarity as to the parties' intent and looking "to the proffered extrinsic evidence to resolve the ambiguity").

V. The Court of Chancery erred in determining that defeasance could be deducted as an Excess Loan Cost under subsection (f) of Net Resale Price

The Answering Brief chose to change the order of its analysis of the provisions of Net Resale Price from the order in Exit's opening brief (*compare* OB34-44 *with* AB31-44). Here, Exit returns to the initial order.

Excess Loan Costs (subsection (f) of Net Resale Price) indisputably does not mention defeasance, or any variation of that word (OB32-33). Therefore, to reach a result that permits deducting defeasance as an Excess Loan Cost, the Court had to find that words other than "defeasance" or "defease" were sufficient to incorporate that concept. And, in doing so, the Court necessarily introduced ambiguity (because if other words *might* include that concept, they also *might not*). *Active Asset Recovery, Inc. v. Real Estate Aset Recovery Services, 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).

Because of the ambiguity the Court introduced through its analysis, the Court should have considered the substantial extrinsic evidence presented by Exit. After all, the Court expressed obvious puzzlement why "the parties spent most of trial discussing extrinsic evidence" (Op.1), so whether to examine that evidence was squarely before the Court. As Exit explained at length (OB12-16, 34-36), *all* the extrinsic evidence supports Exit's position concerning the interpretation of Excess Loan Costs, not the Partnership's contrary position.

This extrinsic evidence shows why only annual "loan interest costs" greater than $1.125 million (the amount of the Gucci rent in the first few years) plus $875,000 (the extra amount necessary to ensure that Festival would receive its expected Internal Rate of Return assuming likely loan interest costs–OB13-16) could be considered as Excess Loan Costs. That extrinsic evidence also showed that the Court's two reasons for not using that evidence have no support in the factual record.

The *first* reason was that the definition of Excess Loan Costs was invented by Mr. Emanuel, Exit's principal (Op. 2). In reality, only one term–negative accruals–was invented by him. But negative accruals has nothing to do with defeasance, and Mr. Emanuel's definition of negative accruals never was adopted by Exit (OB36).

The *second* reason was that Mr. Emanuel's definition of Excess Loan Costs was "rejected" by Festival. Exit showed in detail (OB37-39) that this was not so, as the changes used by the Court to support its "rejection" argument were either solely grammatical changes, or wording changes that did not affect the substance of Mr. Emanuel's initial draft as to what amounts could be deducted as Excess Loan Costs.

Exit also explained that the Court erred in determining that the defeasance charges deducted by the Partnership fit within the definition of Excess Loan Costs (OB39-40). To do so, the interest charges replaced by defeasance would need to exceed, on an annual basis, the Gucci rent plus $875,000. But the interest costs replaced by defeasance never did so (OB40). This latter issue was an example of

where the Court of Chancery's misreading of Excess Loan Costs caused it to commit error.

In response, the Partnership has two arguments–that the definition of "Excess Loan Costs" is unambiguous (AB38-40), and that analyzing extrinsic evidence does not change the result (AB40-44).

The Partnership's *first* argument attempts to side-step the Court of Chancery's obvious misreading of Excess Loan Costs. The Partnership's only response to Exit's detailed showing that the Court misread this definition (OB21-23), is in a footnote (AB38, n.11), where it states that the Court "intermittently referred to the $875,000 as a Rental Payment threshold." Although "intermittently" is the Partnership's word, it never attempts to show where the Court referred to $875,000 as anything else than a "Rental Payment threshold." Thus, the Partnership's inability to disagree with Exit's showing is an implicit agreement that the Court misunderstood the definition of Excess Loan Costs. Therefore, everything that flows from that misunderstanding also is incorrect.

In any event the Partnership appears to have changed its understanding of Excess Loan Costs so that it now agrees with Exit's interpretation. The following

analysis uses the Partnership's formula at AB38,[8] but produces the opposite result from what the Partnership argues it produces:[9]

Under Excess Loan Costs, the loan to purchase the Property was capped at $30.75 million, with an interest rate of 5.75% (A0382-A0383). Because the loan was interest-only (A1769), the interest paid during each loan year was $1,768,125.[10]

Thus, "A" in the Partnership's formula is $1,768,125 (because everything else under "A" is zero).

"B" in this formula never meets the requirement for deduction that "interest costs exceed Gucci rent by more than $875,000 in a given year." The Gucci rent is never less than $1.125 million (A1756-(Emanuel)). Thus, the maximum interest costs of $1,768,125 never exceed the Gucci rent by more than $643,125 ($1,768,125 minus $1,125,000).

So, under the circumstances that actually existed, nothing is deductible as an Excess Loan Cost (precisely what the parties intended).

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[8] Exit would define it slightly differently, but the end result is the same.

[9] Both parties agree that there were no points or loan origination fees and that "negative accruals" were never decided by the Court, so all those amounts are zero.

[10] This was true both prior to and after the Resale, because the interest rate and principal remained the same, but the defeasance caused Treasury securities to provide the interest loan costs.

Only if the annual total "loan interest costs" for a year were over $2,000,000 could there be any Excess Loan Costs to deduct (because loan interest costs in "A" would be over $2,000,000 (everything else in "A" still being zero), while "B" would be above $2,000,000 if Gucci rent stayed the same and loan interest costs exceeded $875,000.[11] But that circumstance never occurred.

In the Partnership's *second* argument (AB40-44), it claims that "no extrinsic evidence contradicts the parties' expressed intention in the LPA that Net Resale Price would be calculated after the Partnership was reimbursed for costs associated with the Property, including defeasance" (AB40-41). Of course, the parties *never* expressed an "intention in the LPA" that the costs of defeasance would be deductible in computing Net Resale Price and the extrinsic evidence, particularly the "Deal Memo" (defined at OB13) directly contradicts its position in this case.

The Partnership argues that the Deal Memo should be disregarded because, as "Emanuel admitted [] and the Court found[] Festival never agreed to [it]." (AB40-41). But this is just wrong–Mr. Emanuel did not testify that Festival never agreed to the concepts in the Deal Memo; to the contrary, he explained (without contradiction) that Festival *never responded to* the deal memo, which it should have done had it disagreed with its contents (A1780-(Emanuel)). *Brittingham v. Board*

[11] Gucci rent actually increased in the later years of the Loan (AB12), which would have increased the amount of loan interest costs that would need to exist before Excess Loan Costs could occur.

of Adjustment of the City of Rehoboth Beach, 2005 WL 170690, at *6 (Del. Super. Ct. Jan. 14, 2005) ("[I]n all of the cases where silence is said to impute consent there lies a common thread. Circumstances arose in which a party would naturally have been expected to object or to speak but did not. Because of the lack of objection it appeared to all parties present that the silent party assented to what was being said or done."). The Partnership also argues that the LPA "materially modifies other "Deal Memo" language, including a complete rewrite of subparagraph (f)'s formula" (AB41-42). This is again wrong, as Exit has explained in detail (OB37-38; *supra* p. 17)–an explanation to which the Partnership never has responded.[12]

Finally, the Partnership notes that Exit contends that the defeasance deduction "should be assessed across multiple years past 2014 because it replicates interest that would have been due in those years had the CMB's loan not been paid off" (AB44) The Partnership claims that Exit's argument fails because "all defeasance was actually paid in 2014." But that is irrelevant. As the Court explained, "defeasance economically replicates the cost of interest due on a loan" (Op. 33). The "cost of

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[12] The Partnership also claims, incorrectly, that Exit is using extrinsic evidence to "vary or contradict" the unambiguous terms of the LPA (AB42). The Court only refers to extrinsic evidence if the underlying text is ambiguous. While the Partnership now appears to agree with Exit about the interpretation of Excess Loan Costs, if there is still ambiguity, the extrinsic evidence confirms Exit's interpretation.

interest" being replicated here was the total interest for the remainder of the 10-year loan—$1,768,125 per remaining year (*supra*., p. 19-20).[13]

Furthermore, while the defeasance cost was *funded* by the Partnership on a single day, this sum was not *disbursed* to the lender on that day – rather, the Treasury securities bought with that sum were paid to the lender month-by-month throughout the remaining term of the loan. The period over which the funds were paid to the lender, not the day on which the Partnership purchased and escrowed the securities, is the one that should count in determining the year(s) in which the defeasance/interest payments were made.

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[13] The actual interest payments over the remainder of the Loan are much less than the $6 million-plus in defeasance charges that the Partnership deducted because of a computational error by the Partnership. The defeasance charges it deducted were computed based on the *entire $40 million loan principal*, whereas Excess Loan Costs specify that only "the first $30,750,000" of principal was to be counted (A0382-A0383).

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

As with the other subsections of Net Resale Price, (h) (concerning "out-of-pocket closing costs and costs of sale") does not mention defeasance by name (OB41-43). And there are two major reasons why "defeasance" does not properly fit into the actual language of (h).

First, under Delaware law, if an item (such as defeasance) fits best within one definition section, then it needs to be considered there, not in a broader category. Because defeasance (assuming ambiguity) fits best as "loan interest costs" under Excess Loan Costs, it should not also be deductible under (h). The Court rejected this argument, stating it required a showing that the two subsections were "inconsistent," which the Court did not find. But the Court was wrong. Excess Loan Costs has a specific formula for determining whether "loan interest costs" were deductible, and (h) has no such limitation. Therefore, applying (h) to defeasance would produce a result inconsistent with the result if defeasance were a deduction only under Excess Loan Costs.

Second, the doctrine of *noscitur a sociis* (a word is known by the company it keeps) shows that defeasance, which is nothing like the specific "out-of-pocket closing costs and costs of sale" actually set forth in (h), really should not be considered there. The Court of Chancery never analyzed this doctrine in its opinion.

The Partnership responds by saying that the cases on which Exit relies are not analogous "because permitting a deduction under one subparagraph does not impact its deductibility under another…" (AB35). But this is wrong–allowing a full deduction under (h) (the Partnership's desired result) would render all the language in Excess Loan Costs surplusage because the tighter restrictions on deductibility in (f) would just get ignored.

With respect to *noscitur a sociis*, Festival chides Exit for not acknowledging that this doctrine only applies when the contract term is ambiguous (AB36). But this limitation is obvious–if defeasance unambiguously was covered by (h) then further analysis (including use of this doctrine) would be unnecessary. But defeasance is not unambiguously covered; therefore the Court must determine the meaning of other words. The Partnership also attempts to distinguish the cases on which Exit relies by arguing that they involve statutory, not contract, construction (AB36). However, construing statutes follows the same general rules as construing contracts. *Pike Creek Recreational Services, LLC v. New Castle County*, 238 A.3d 208, 213 (Del. Super. Ct. 2020), *aff'd,* 259 A.3d 724 (Del. 2021) ("Delaware applies equivalent interpretive rules in the statutory and contractual contexts…") (citation omitted).

VII. The Court of Chancery erred in determining that defeasance is covered by subsection (d) of Net Resale Price

Like (h), subsection (d) of Net Resale Price says nothing about defeasance, nor about deducting expenses involved in the sale or financing of the Property (OB43-44). Here, as elsewhere, the Court was wrong to focus on the "discretion" of the General Partner in running the Partnership's business, because that discretion only grants power to run the business–nowhere can the Partnership deduct defeasance in computing Net Resale Price because the General Partner thinks it appropriate to do so.[14]

The Partnership responds by claiming that (d) allows deduction of all expenses incurred in connection with the Partnership's ownership of the Property (AB31-33). In the Partnership's view, these expenses relate to the "sale or financing" of that Property, the concept of which supposedly is included within the word "ownership" (AB33). But in making this claim, the Partnership again ignores that if (d) covers all ownership-related expenses, why did the parties spend so much time on the other subparagraphs of Net Resale Price, including (f)? No response is forthcoming. And, of course, the same argument that applies to subsection (h)—that if a deduction fits best within one definition, it should be considered only there—also applies here to subparagraph (d).

[14] Festival claims that the Court never mentioned the General Partner's discretion here (AB33), but it is wrong (Op. 31-32).

VIII. Exit properly raised damages in the Court of Chancery

Because Exit set forth the amount of its damage request directly in its post-trial reply brief (A2157), Exit does not understand the Partnership's argument that "Exit never…quantif[ied] its damages" (AB45).

CONCLUSION

For the reasons set forth above and in Appellant's Opening Brief, 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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