IN THE SUPREME COURT OF THE STATE OF DELAWARE

BOARDWALK PIPELINE PARTNERS, LP, BOARDWALK PIPELINES HOLDING CORP., BOARDWALK GP, LP, BOARDWALK GP, LLC, and LOEWS CORPORATION, Defendants Below, Appellants/Cross-Appellees v. BANDERA MASTER FUND LP, BANDERA VALUE FUND LLC, BANDERA OFFSHORE VALUE FUND LTD., LEE-WAY FINANCIAL SERVICES, INC., and JAMES R. MCBRIDE, on behalf of themselves and similarly situated BOARDWALK PIPELINE PARTNERS, LP UNITHOLDERS, Plaintiffs Below, Appellees/Cross-Appellants	)	No. 1, 2022 Court Below: Court of Chancery of the State of Delaware C.A. No. 2018-0372-JTL

APPELLEES' ANSWERING BRIEF ON APPEAL AND
<u>CROSS-APPELLANTS' OPENING BRIEF ON CROSS-APPEAL</u>

A. Thompson Bayliss (#4379)
J. Peter Shindel, Jr. (#5825)
Daniel G. Paterno (#6365)
Eric A. Veres (#6728)
Samuel D. Cordle (#6717)
ABRAMS & BAYLISS LLP
20 Montchanin Road, Suite 200
Wilmington, Delaware 19807
(302) 778-1000
Attorneys for Plaintiffs Below, Appellees/Cross-Appellants

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NATURE OF PROCEEDINGS

This appeal challenges a judgment favoring a class of former minority unitholders of Boardwalk Pipeline Partners, LP ("Boardwalk"). The Court of Chancery found that Boardwalk GP, LP (the "GP") breached Boardwalk's limited partnership agreement (the "LPA") by invoking a call right to acquire minority units without satisfying its pre-conditions. The GP acted opportunistically, because it expected to capture $1.5 billion in "value creation."

The opinion below turned on a mountain of contemporaneous evidence, the credibility of fourteen live witnesses and elementary principles of contract construction. The record supports the opinion's factual determinations, which reveal unique and extreme conduct warranting its liability determinations.

On appeal, Defendants largely ignore the record, including damning evidence of conflicts, bullying, manipulation and deliberate deception. Instead, Defendants assault the Vice Chancellor for supposedly mounting an "indecorous, unjustified attack on the integrity of reputable attorneys" and substituting "the court's judgment for that of independent counsel." Effectively, Defendants ask this Court to accept the same sanitized story that withered before the contemporaneous evidence presented at trial, while intimating that an illegitimate opinion of counsel operates as a license for intentional misconduct.

This Court should affirm the Court of Chancery's well-reasoned opinion.

First, the Court of Chancery properly found that the GP failed to satisfy the LPA's "Opinion Condition" because it secured a contrived opinion using deliberately counterfactual assumptions and inputs. When FERC announced regulatory proposals in March 2018, Defendants recognized that Boardwalk's rates ***would not*** be materially impacted. They told the market Boardwalk was protected and told FERC it was impossible to assess the rate impact before FERC finalized its proposed regulations. Contemporaneously, Defendants maneuvered to secure a legal opinion that came to ***<u>the opposite conclusion</u>***: FERC's actions "ha[d] or will reasonably likely in the future have a material adverse effect" on Boardwalk's rates.

Beneath this troubling contradiction was a trial record replete with evidence demonstrating that this opinion of counsel (the "OOC") was the product of bad faith. Defendants exploited ambiguities in the LPA, including its bespoke Call Right provision, by seeking the OOC from the very Baker Botts lawyer who had authored the problematic language. Defendants preyed on the lawyer's unwillingness to acknowledge flaws in his own work, and the resulting OOC repeatedly construed ambiguities ***against*** the minority unitholders, including by concluding that the ambiguous phrase "maximum applicable rate" referred to Boardwalk's recourse rates.

After concluding that Boardwalk's recourse rates likely would not change (let alone suffer an MAE), Baker Botts ***pretended*** to examine Boardwalk's recourse rates while instead basing the OOC on theoretical changes to hypothetical "indicative rates" that their own rate expert described as "meaningless." Boardwalk prepared the sham rate analysis on which the OOC relied to "get us where we need to go." Contemporaneous notes reflect the acknowledgement that this would "screw [the] min[ority]" because there would be "no effect" from FERC's proposals and "no actual change" to Boardwalk's recourse rates—a "challenging fact." Instead of exercising good-faith professional judgment, Baker Botts yielded to pressure and adopted counterfactual assumptions and inputs to deliver the business result its client demanded.

Second, the Court of Chancery properly found that the GP breached the LPA by failing to satisfy the "Acceptability Condition." Defendants and their advisors all recognized that the governing language was ambiguous because it did not specify ***which entity*** should determine whether the OOC was "acceptable." Multiple firms advised that the doctrine of *contra proferentem* compelled a minority-friendly reading requiring an entity with outside directors to make that determination.

Defendants initially followed this advice. But they reversed course after the outside directors had a "hostile reaction." They instead arranged for Loews insiders to declare the OOC "acceptable." Defendants' Delaware counsel advised that securing outside director approval would be prudent, but if the outside directors were approached and declined to proceed, that would be a "difficult fact to overcome in any future litigation." Incredibly, Defendants never informed Delaware counsel that this "difficult fact" had already occurred.

Third, the Court of Chancery correctly held that the GP did not qualify for exculpation under the LPA, because the LPA does not shield willful misconduct. The record supports this determination.

The Court of Chancery also correctly held that the LPA's "Reliance Provision" is inapplicable here. Defendants did not rely on the illegitimate OOC they orchestrated. They bullied, manipulated and misled their lawyers into using assumptions and inputs they knew to be false to reach a conclusion they knew to be wrong and repeatedly rejected or mischaracterized legal advice that stood between them and their desired result.

Fourth, the Court of Chancery properly awarded expectation damages representing the present value of the future distributions the limited partners would have received absent Defendants' misconduct, less the price paid for their units. The Court based damages on Defendants' own model, which their internal investment banking team refined over ***ninety-one*** iterations and which Loews ultimately relied upon when deciding to invest $1.5 billion of its own money. If this Court revisits damages, it should apply the wrongdoer rule and award expectation damages based on the scenario in Defendants' model that correctly assumed no impact from FERC's actions.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery properly held that the GP failed to satisfy the Opinion Condition where the facts demonstrate that the OOC was not rendered in good faith.

2. Denied. The Court of Chancery properly held that the GP failed to satisfy the Acceptability Condition. The contractual language was ambiguous regarding which entity should determine whether the OOC was "acceptable." Delaware law compels the reasonable, minority-friendly interpretation.

3. Denied. The Court of Chancery properly held that exculpation under the LPA was unavailable because Defendants engaged in willful misconduct and did not rely on the OOC they orchestrated or the other advice they invoke as a shield.

4. Denied. The Court of Chancery properly exercised its discretion when awarding expectation damages equal to the present value of the future distributions the minority would have received less the price paid for their units.

5. If this Court revisits damages, it should direct the Court of Chancery to award higher damages under the wrongdoer rule.

STATEMENT OF FACTS

A. The Partnership

Boardwalk was a Delaware limited partnership with three natural gas pipeline subsidiaries: Texas Gas, Gulf South, and Gulf Crossing. Op. 7. Loews Corporation ("Loews"), a conglomerate managed by the Tisch family, formed Boardwalk in 2005 and has controlled it ever since. *Id*.

1. Regulation of Pipeline Rates

FERC sets the "maximum rates" (also known as "recourse rates" or "tariff rates") that a pipeline can charge its customers ("shippers") through an administrative proceeding known as a "rate case." Op. 8. A pipeline can initiate a rate case under the Natural Gas Act ("NGA") and argue that its recourse rates are too low. FERC or a shipper can initiate a rate case if they believe the pipeline's recourse rates are too high. *Id*. Recourse rates do not change until FERC approves new rates in a rate case, which follows a five-step process known as "cost-of-service ratemaking." Op. 8-11.

2. Income Tax Allowance and ADIT

A pipeline's "cost of service" is the total revenue that a pipeline needs to cover its expenses and provide a reasonable rate of return on its invested capital. Op. 9. Before 1995, FERC allowed pipelines to include an "income tax allowance" ("ITA") in their cost-of-service calculations, which would increase the estimated total cost of service and generally (though not always) support higher recourse rates. Op. 12.

A related component of cost of service, accumulated deferred income taxes ("ADIT"), results from a mismatch between the accelerated depreciation of assets for tax purposes and the straight-line depreciation FERC uses to calculate recourse rates. *Id*. As pipelines benefit from accelerating depreciation and deferring taxes, their ADIT balances increase. Op. 12-13. Historically, FERC treated a positive ADIT balance as a cost-free source of capital and subtracted the ADIT balance from the pipeline's "rate base" (the total investment in a pipeline) for purposes of calculating its cost of service, which tended to lead to lower recourse rates. Op. 13.

3. Changes in Cost of Service ≠ Changes in Recourse Rates

Calculating cost of service is only step one in a multi-step process for setting recourse rates. A change in a pipeline's cost of service does not automatically change its recourse rates. Op. 13-14. Recourse rates cannot change without a rate case. If a rate case is unlikely, a change in recourse rates is unlikely. Op. 14. Even if a rate case is filed, recourse rates may end up increasing, decreasing, or remaining constant. *Id*. FERC does not simply adjust a single cost-of-service variable (*e.g.*, ITA) when setting a pipeline's rates, and it has a general policy against such "single-issue ratemaking." *Id.* FERC cannot adjust a pipeline's current rates to compensate for previous over- or under-collection, because of a legal prohibition against "retroactive ratemaking." Op. 14-15.

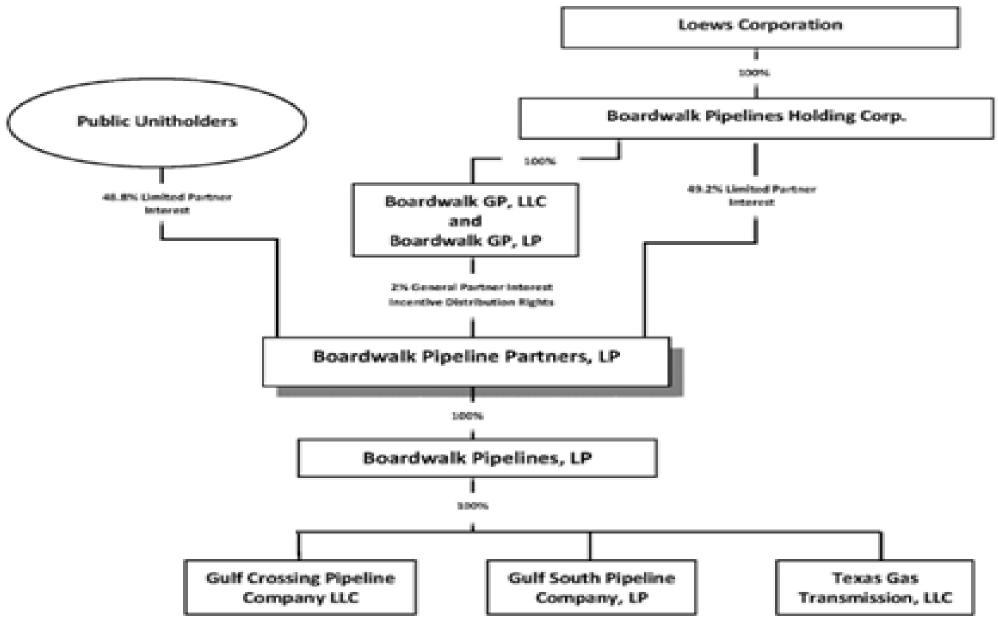
4. FERC's 2005 Policy

In 1995, FERC adopted the "*Lakehead* policy" permitting pipelines organized as limited partnerships to claim an ITA in their cost-of-service calculations to the extent their partnership interests were held by corporations. Op. 16. In 2004, the D.C. Circuit abrogated the policy. Op. 17; *see BP W. Coast Prods., LLC v. FERC*, 374 F.3d 1263 (D.C. Cir. 2004). Afterwards, FERC reverted to its pre-*Lakehead* policy, allowing pipelines' cost-of-service calculations to include an ITA for all partners. This "2005 Policy" made pipelines organized as limited partnerships more attractive investment vehicles. Op. 18.

B. Loews Forms Boardwalk

Loews formed Boardwalk in August 2005. Loews retained Michael Rosenwasser, then-partner at Vinson & Elkins ("V&E"), to prepare Boardwalk's organizational documents, including the LPA. Op. 18.

Boardwalk's general partner (the GP) held a 2% general partner interest in Boardwalk and its incentive distribution rights. Op. 19. The general partner of the GP was defendant Boardwalk GP, LLC ("GPGP"), whose sole member was defendant Boardwalk Pipelines Holding Corp. ("Holdings"), a wholly-owned subsidiary of Loews. *Id*.



Op. 21.

C. The Call Right

Concerned that FERC might change the 2005 Policy after Boardwalk's anticipated IPO, Loews asked V&E to draft an LPA provision that would allow Loews to take Boardwalk private "quickly, easily and without dispute … if there was an adverse change in that tax policy or the way it was implemented." Op. 21-22. Rosenwasser and his team developed the "Call Right" to provide an "off-ramp" if regulatory changes materially threatened Boardwalk's revenues. Op. 22.

To accomplish this business objective, Rosenwasser drafted language allowing the GP to exercise the Call Right if it met three conditions. Op. 22-23. *First*, the GP and its affiliates had to own "more than 50% of the total Limited Partner Interests of all classes then Outstanding." A3117/LPA §15.1(b)(i). *Second*, the GP had to receive an OOC that Boardwalk's status as a pass-through entity for tax purposes "has or will reasonably likely in the future have a material adverse effect on the maximum applicable rate that can be charged to customers." *Id.* §15.1(b)(ii). *Third*, the OOC had to be deemed "acceptable to the General Partner." A3030/LPA §1.1 at 24.

To exercise the Call Right, the GP had to notify the limited partners by mail and purchase all the outstanding limited partner interests "at a purchase price … equal to the average of the daily Closing Prices … for the 180 consecutive Trading Days immediately prior to the date three days prior to the date" notice was mailed. A3117/LPA §15.1(b); Op. 23-24.

D. The IPO

On November 8, 2005, Boardwalk completed its IPO at $19.50 per unit. Op. 24. Between the IPO and May 2013, Boardwalk raised billions of dollars by selling equity to the public at prices ranging from $23.00 to $36.50. *Id.*

In 2014, Boardwalk slashed quarterly distributions by over 80%, making it one of the lowest yielding MLPs. Op. 36. Boardwalk's trading price tumbled from the low $30s to the low $10s. *Id.* Boardwalk reinvested the cash into its growth, including by spending $2.077 billion on capital expenditures between 2014 and 2017. *Id.* Boardwalk's units traded on the NYSE until the GP acquired the minority units for $12.06 per unit on July 18, 2018. Op. 24.

E. The *United Airlines* Decision

In 2016, the D.C. Circuit concluded that "granting a tax allowance to partnership pipelines results in inequitable returns for partners in those pipelines as compared to shareholders in corporate pipelines." *United Airlines, Inc. v. FERC*, 827 F.3d 122, 136 (D.C. Cir. 2016); *see* Op. 25-26. The Court instructed FERC to address the issue. In December 2016, FERC requested industry comments. Op. 26. Before FERC acted, Congress enacted the Tax Cuts and Jobs Act ("TCJA"), which lowered the federal corporate income tax rate from 35% to 21%. *Id*.

F. The March 15 FERC Actions

On March 15, 2018, FERC took four actions related to the treatment of income taxes in connection with cost-of-service ratemaking. *Id*.

First, FERC issued a revised policy statement ("RPS") indicating that FERC would no longer permit pipelines to include an ITA in their cost-of-service calculations. Op. 27; A3627. The RPS had no impact on Boardwalk's rates, both because it was a ***policy*** statement, not a final ***rule***, and because changes to one element of cost of service do not provide meaningful information concerning future rates. Op. 27; *supra* 7.

Second, FERC issued a notice of proposed rulemaking ("NOPR") indicating that it would promulgate regulations to address the effects of the RPS. B347. The NOPR proposed to require natural gas pipelines like Boardwalk to make a one-time filing so FERC could assess the impact of the TCJA and the RPS on those pipelines' rates. Op. 27-28. The NOPR indicated FERC would not finalize its proposed rule until after a comment period. Op. 28. The NOPR provided an option for pipelines to explain why a proposed rate reduction was unwarranted. Op. 29-30. FERC emphasized that natural gas pipelines that were under-recovering their costs or whose rates were negotiated or subject to rate moratoria—like Boardwalk's subsidiaries—might ***not*** need to adjust their rates. Op. 29-30, 34-35.

Third, FERC issued a notice of inquiry ("NOI") seeking comment on the treatment of ADIT, including "whether previously accumulated sums in ADIT should be eliminated altogether from cost of service or whether those previously accumulated sums should be placed in a regulatory liability account and returned to ratepayers." Op. 30; B324; B293.

Fourth, FERC issued an Order on Remand implementing the *United Airlines* decision. A3592. The Order on Remand prohibited SFPP (the ***oil*** pipeline litigant in that proceeding) from claiming an ITA in its rate filings. Op. 30.

FERC intimated it would resolve the outstanding regulatory issues soon, and Boardwalk expected FERC to address the March 15 FERC Actions at its regular meeting on July 19, 2018. Op. 27; B1253.

G. No MAE on Rates

Boardwalk's CEO immediately asked Ben Johnson, Boardwalk's VP of Rates and Tariffs, to assess the potential impact of the March 15 FERC Actions. Op. 32-33. Johnson concluded that Texas Gas was the only Boardwalk pipeline at risk of a rate case. He estimated that, assuming a rate case occurred, the downside impact of eliminating the ITA would be about $20.5 million, Op. 33, approximately 1.5% of Boardwalk's total revenue. A804/965 (Webb).

Johnson noted that his estimate depended heavily on how FERC treated ADIT. Op. 34. Boardwalk's subsidiaries had ADIT balances "totaling at least $750 million." Op. 98. Johnson assumed this total "would just remain until it's amortized off." Op. 34. However, if FERC decided to eliminate ADIT—as it ultimately did––there could be a "bounce from rate base increase." Op. 33-34. In other words, contemporaneous documents demonstrated Defendants' awareness that FERC's resolution of the issues raised on March 15 might support a rate ***increase***.

Boardwalk CFO Jamie Buskill advised a GPGP director that "we don't think [FERC's actions] will have a material impact to Boardwalk." Op. 35. Loews's Senior VP Ken Siegel forwarded a similar report to Jim Tisch, CEO of Loews. Op. 35. Loews quickly realized the importance of FERC's then-unknown treatment of ADIT. Op. 35-36.

1. A Chance to Exercise the Call Right

Both Buskill and Mike McMahon, Boardwalk's General Counsel, thought the March 15 FERC Actions presented an opening to use the Call Right. Both raised the possibility with Loews on March 15. Op. 36-37. Buskill told Siegel that the Call Right presented Loews a "compelling" opportunity to "buy back all units when the units are trading well below book value." Op. 37.

Defendants used the ambiguous language of the Call Right to their advantage by seeking out its author to render the required OOC. When McMahon suggested Rosenwasser, then at Baker Botts, to Marc Alpert, Loews's Senior VP and General Counsel, he noted that Rosenwasser was "one of the principal draftspersons of the call right." Op. 37-38.

Defendants and Baker Botts attempted to paper over Rosenwasser's conflict by executing an engagement letter memorializing the falsehood that his prior work drafting the Call Right was "not substantially related to" his later work interpreting it. Op. 147-48 n.25; B553. Rosenwasser later would resist any suggestion that he drafted ambiguous language. A597/144; *see* Op. 128-30.

2. The Loews-Approved Press Release

On March 15, McMahon drafted a press release explaining that the impact of the March 15 FERC Actions on Boardwalk's rates (if any) would not be material. Op. 34; B309. McMahon's draft recognized that the NOPR's invitation for pipelines to explain why a rate reduction was unwarranted "seemed tailor-made for Boardwalk's pipelines." Op. 34-35.

But Loews edited Boardwalk's draft with an eye towards the Call Right. Among other changes, Loews revised the headline and body to address the effect on Boardwalk's "revenues" rather than its "rates" and struck three statements identifying factors that mitigated any need to adjust Boardwalk's rates. Op. 39-40; *see* B472.

On March 19, Boardwalk issued the press release with the headline: "Boardwalk does not expect FERC's proposed policy revisions to have a material impact on the company's revenues." Op. 40. At his deposition, Rosenwasser tried to distance himself, claiming (inaccurately) the release was just "thoughts and without analysis" and that he would have drafted it differently. Op. 41.

3. "Too Much Nuance"

Baker Botts's initial analysis cut against its ability to render the OOC. Op. 41-42. On March 20, it advised Alpert that the March 15 FERC Actions would ***not*** affect Boardwalk's rates absent further regulatory action. The RPS required implementing regulations and would have uncertain impact (if any) on rates until the resolution of any potential future rate cases, which were not likely to take place "until 2020 at the soonest." Op. 42. Any policy arising from the NOI also would affect the analysis, but FERC had not announced how it would proceed. Moreover, "[a]ny

FERC decision [was] not likely to be self-implementing and would require additional proceedings to reflect the policy in pipeline rates." *Id.*

Alpert immediately complained that the analysis had "[t]oo much nuance" and "pushed" Baker Botts to take the position that the March 15 FERC Actions were sufficiently final to render the OOC. Op. 43, 120. Despite knowing that this was untrue, Rosenwasser provided the answer his client demanded: the RPS was likely a sufficient trigger: the "most important thing <u>has</u> <u>happened</u>" and "we're already there." B3704 (original emphasis); Op. 43; B471.

H. Baker Botts Reframes the Analysis

Rosenwasser acknowledged that the Call Right was not designed to be "easy to trigger." Op. 44. To achieve the result Defendants desired, Rosenwasser invented a path to rendering the OOC even though FERC's March 15 Actions would ***<u>not</u>*** have a material impact on Boardwalk's rates. Baker Botts would interpret the ambiguous term "maximum applicable rate" as an abstract concept tied to changes in cost of service, rather than Boardwalk's recourse rates or the rates they actually charged customers. Op. 44-45.

Rosenwasser's approach could be expressed as a syllogism: (1) pipelines charge cost-of-service rates; (2) cost of service includes the ITA; and thus (3) removing the ITA constitutes a material effect. As memorialized in contemporaneous notes, Rosenwasser was "[j]ust saying" that removing the ITA yields a lower cost-of-service number, and therefore a material adverse effect:

Just saying ~~ITA~~ = lower COS
= MAE or
max applicable rates

B476; Op. 45-46. The syllogism would allow Baker Botts to dodge any real-world considerations, including "examination of FERC actions/shipper actions" or Boardwalk's "over/under-recovery" of its pipelines' cost of service. Op. 45. Among many problems, the syllogism did not account for the treatment of ADIT, which was still unknown. Op. 46.

On March 29, Baker Botts, Alpert and McMahon agreed that the March 15 FERC Actions "met the procedural predicate" for exercising the Call Right. Op. 49. Baker Botts agreed to begin work on the OOC, even though FERC had not implemented the RPS or addressed ADIT. *Id.*

I. The Financial Data

Johnson began preparing the "Financial Data" Rosenwasser needed, including a "Rate Model Analysis." Op. 49-50. Although Johnson's earlier analysis showed that the March 15 FERC actions would not have a material effect on Boardwalk's rates, Johnson reported that for this new assignment he reached results that "should get us where we need to go." *Id.*

Johnson generated the Rate Model Analysis by conducting a hypothetical cost-of-service calculation for each pipeline, subtracting one variable (the ITA), calculating the resulting percentage change in cost-of-service, and translating this percentage into a hypothetical "indicative rate" change. Op. 52-53.

The Rate Model Analysis yielded just three "indicative rates"—one for each pipeline. At the time, Boardwalk's pipelines had 167 recourse rates on file with FERC, covering nine different pipeline zones and incorporating 46 different rate schedules. Op. 54.

At trial, Johnson claimed his "indicative rate" calculations summarized each pipeline's recourse rates. Op. 53. Barry Sullivan, the "renowned" rate expert Baker Botts retained (OB30; Op. 68 n.10), testified that, to the contrary, the Rate Model Analysis was "not a recourse rate calculation," that "an indicative rate doesn't mean anything" and that calculating a credible potential rate reduction requires nuanced analysis that adjusts for "billing determinants" and other variables that impact recourse rates. Op. 53.

Because of its gross simplifications, the Rate Model Analysis consisted of approximately five pages of calculations for each pipeline. By contrast, in their latest rate cases, Texas Gas and Gulf South submitted ***hundreds*** of pages of calculations to support their recourse rates. Op. 54.

Critically, the Rate Model Analysis did not assess the probability of a rate case—a necessary predicate for any change in recourse rates. Op. 55. Effectively, the Rate Model Analysis assumed a ***100% likelihood*** that: (1) each pipeline would face a rate case; (2) each would lose; and (3) the resulting rate reductions would match the decline in cost of service associated with the removal of the ITA, considered in isolation. Op. 55-56. In reality, everyone knew that Gulf South and Gulf Crossing faced virtually no rate case risk. Op. 51, 55-56. Texas Gas faced some rate case risk, but Baker Botts advised that there was "a low probability that Texas Gas would face a section 5 [rate] case in the next 1-2 years" and beyond that "there are too many variables to make a prediction ***with any confidence***." Op. 51 (emphasis added); *see* B1207.

J. Alpert Adds Skadden

Alpert initially hired Skadden to advise the GP on whether the OOC was acceptable. Op. 56. Skadden researched which entity—the GPGP Board or Loews-controlled Holdings—must determine acceptability. Rosenwasser had puzzled over the relevant language and applicable legal standard. Op. 57; B379 (notes observing that "[t]he only standard that would apply is the standard of good faith and fair dealing ***unless the definition of opinion of counsel with its '<u>acceptable to GP'</u>***

somehow brings good faith into play") (emphasis added). Baker Botts had tentatively concluded that Holdings should determine acceptability. Op. 57.

Skadden reached the opposite conclusion. Skadden concluded that the LPA "likely requires that the [GPGP] Board make the determination" and that "at a minimum, it is ambiguous" and advised Alpert that *contra proferentem* would apply: "here, we think any 'question marks' or ambiguities likely would be decided against the 'sophisticated drafter' and not the minority unitholders." Op. 58. Skadden believed the Acceptability Condition could be read to protect the limited partners. Allowing the GP to make the acceptability determination in its individual capacity through Holdings was "akin to permitting the fox to guard the henhouse." Op. 59. Skadden recommended that the GPGP Board determine acceptability.

Alpert and McMahon viewed Skadden as a "pain in the ass" and its recommendation "frustrating" but initially followed the advice. Op. 60.

K. Baker Botts Struggles with MAE

Baker Botts sought Skadden's support for the conclusion that the March 15 FERC Actions would trigger an MAE on rates. Op. 60; B558; A3773. Skadden refused to express an opinion on the subject. Op. 60; B559.

Alpert emailed a Loews colleague that Skadden was "pissing [him] off." Op. 61; B1035. The colleague echoed his frustration that lawyers were focusing on the contractual language. He worried that Baker Botts would not be able to gin up an

MAE unless it looked at "hypothetical future max FERC rates." *Id.* ("Too many lawyers doing nothing but muddying the waters…. If … the relevant test is **what is *__the real world effect__*,** then ***__we have an issue__***.") (emphasis added).

Mike Naeve, a Skadden partner and former FERC Commissioner, recognized that the phrase "maximum applicable rate" was ambiguous. It might reference rates Boardwalk's subsidiaries actually charged customers, including negotiated and discounted rates. Op. 61-62; A4252. Baker Botts sent over 500 pages of extrinsic materials including Boardwalk's form S-1 and FERC orders to get Naeve "more comfortable." Op. 61-62; A4250. Naeve also flagged that any potential impact on recourse rates depended both on rate case risk and the full ratemaking exercise—not simply Rosenwasser's syllogism. Op. 62; A4252; A667/421 (Alpert).

L. Baker Botts Works Towards a "Preliminary" Opinion

Rosenwasser wanted to provide Loews with a "preliminary" version of the OOC by April 20 if Baker Botts "decide[d] [they could] move forward." B1104. Throughout April, senior Baker Botts lawyers raised concerns regarding persistent impediments. Op. 63. Evolving drafts of the OOC buried the problems and counterfactual assumptions on which it relied. Op. 63-71.

First, Baker Botts struggled with "maximum applicable rate." An initial draft of the OOC, dated April 4, failed to explain Baker Botts's interpretation. Op. 63; B545. A later draft disclosed the "judgment" that Baker Botts was not considering the rates Boardwalk actually charged. Op. 63-64. Baker Botts ultimately struck this language so as not to "telegraph[] all the market-based, real-world considerations that Baker Botts was leaving out." Op. 64, 104-05.

Second, Baker Botts knew that the March 15 FERC actions would have no effect on Boardwalk's recourse rates absent a rate case. Op. 64. The April 4 draft expressly assumed, incredibly, that Boardwalk's pipelines would file rate cases and take action to ***reduce*** their own recourse rates. *Id.*; B545. Because this explicit assumption highlighted "the role of rate-case risk and openly assumed that" Boardwalk would act "contrary to [its] own interests," Baker Botts deleted this language but continued to assume that Boardwalk would charge customers new lower recourse rates without addressing how or why. This avoided "advertising the counterintuitive premise." Op. 64-65; B1096.

Third, Baker Botts knew that the March 15 FERC Actions "were not final, could be revised significantly, and required clarification." Op. 65. As the OOC evolved, Baker Botts replaced language acknowledging that "[i]mportant details of implementing the [RPS] require clarification" with the assumptions that the March 15 FERC Actions were final, would be "implemented as written" and would be "applied by FERC in individual regulatory proceedings" to each of Boardwalk's subsidiaries. Op. 65; B1097.

Fourth, Baker Botts recognized that the Call Right tied the MAE inquiry to Boardwalk's "status as an association not taxable as a corporation." Boardwalk's status as an entity taxed as a partnership might not affect the rates it could charge because the RPS did not apply to all partnerships. Op. 65. The phrase "reasonably likely in the future" raised another question. *See* Op. 142; A586/98-99 (Rosenwasser).

Fifth, Baker Botts recognized that the firm was not well-suited to opine whether a "material adverse effect" was reasonably likely. Op. 65-66. Once they focused on Delaware (rather than federal) law, Baker Botts wanted to rely on Skadden. Op. 66; B1053-54; B1056. Skadden refused. Op. 144.

M. Problematic Financial Data

On April 10, Johnson circulated an updated Rate Model Analysis, which generated projected "indicative" rate declines of 12.12%, 11.68% and 15.62% for Boardwalk's subsidiaries. Op. 67-68. The model still assumed that FERC would require Boardwalk to return ADIT to ratepayers using the "Reverse South Georgia Method." Boardwalk's CEO expressed concern that this approach forfeited the argument that "the [RPS] essenti8ally [sic] eliminates ADIT." Op. 68; B1032. He wanted to preserve that argument. *Id.*

Baker Botts knew treatment of ADIT was both uncertain and impactful. Op. 68-69; B469 ("FERC has not stated how to treat ADIT balances" and "[t]his can affect the rate impact on the pipelines substantially."); B3386-87 ("No one knows what is done w/excess ADIT[.]… The effect on ADIT is unknown & unknowable."); B3395 ("Will want to run scenarios on ADIT flowback"); B1317 ("No idea what they'll do w/ ADIT"); B555 ("may want to see the results under a few different scenarios [for ADIT]"); B505 ("lack of clarity on FERC's eventual policy on [ADIT]"; "highly speculative"); B468. Yet the Rate Model Analysis assumed treatment of ADIT was a "known fact." Op. 82.

On April 18, Sullivan, Baker Botts's rate expert, ***declined*** the firm's explicit request that he confirm agreement with Boardwalk's "rate analyses." Op. 69-70; A4261-62; B1036. Sullivan instead confirmed only that the Financial Data accurately conveyed "the ***cost of service impact*** … if FERC eliminates the federal income tax allowance" for MLP-owned pipelines. Op. 69-70; A4261 (emphasis added). Sullivan testified that the Financial Data failed to apply principles of rate design or address rate case risk. Op. 70.

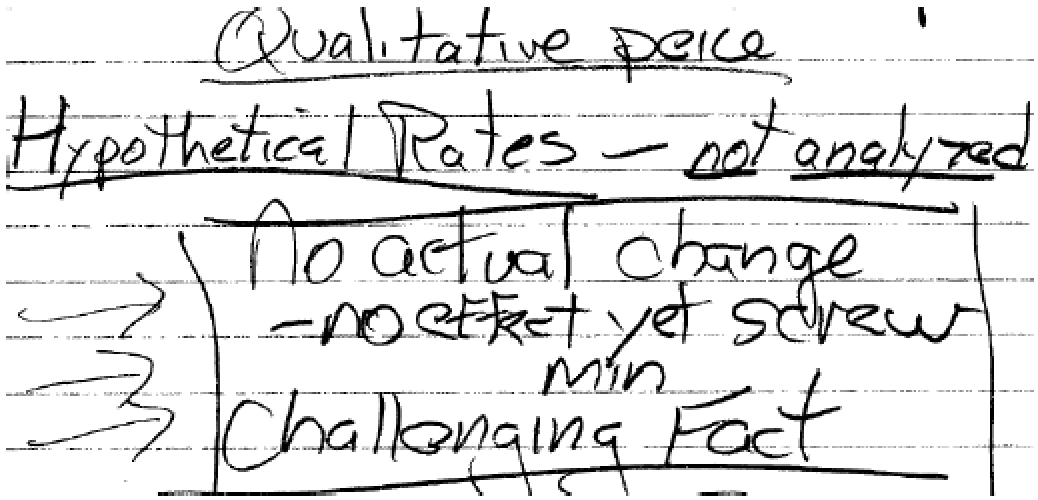
Sullivan's work confirmed what everyone knew. No one could assess the effect on Boardwalk's rates without a FERC determination regarding ADIT. *Id.* Moreover, even if FERC implemented the March 15 FERC Actions, the regulations were not "reasonably likely" to have an MAE on Boardwalk's rates because there was no risk of a rate case at Gulf Crossing or Gulf South and only low risk at Texas Gas. Op. 70; B1153.

N. Baker Botts Calls on RLF

On April 18, Rosenwasser called RLF partner Srinivas Raju and explained that a FERC expert had modeled "top line revenue" decreases in perpetuity of 12.19%, 11.70% and 15.62% for Boardwalk's three pipelines. Op. 72; B1123. This was false. These figures did not reflect revenue decreases for Boardwalk because its subsidiaries did not charge recourse rates for a high percentage of their volumes and because these indicative rates were not reasonable proxies for actual recourse rates—they were "meaningless." Op. 72; B317; B2591/101 (Sullivan).

Rosenwasser also told Raju that the FERC expert had projected that distributable cash flow and EBIT would decrease by more than 20%. This, too, was false. Op. 72. Rosenwasser asked Raju whether RLF could support the assertion that an adverse effect in "excess of 10%" would constitute an MAE. Op. 73-74.

Within twenty-four hours, Raju and his team orally advised Baker Botts that the "[b]etter [r]eading" was to "look [at] rates" for the MAE analysis, "not effects." Op. 74; B1126. He cautioned that a Delaware court would "construe ambig[uity] ag[ai]nst [the] drafter." B1126. Baker Botts clarified that their rate expert had never analyzed the RPS's effect on rates. Instead, the analysis considered "Hypothetical Rates." *Id.* During the call, everyone focused on the core issue: if Defendants exercised the Call Right even though Boardwalk faced "no actual change—no effect" on its rates, they would "screw min[ority]" unitholders. *Id.* That was a "[c]hallenging [f]act":


Qualitative peice
Hypothetical Rates — not analyzed
No actual change
—no effect yet screw min
Challenging Fact

Id.

Raju advised that he would have a "hard time saying [12% in perpetuity is] not material." B1127; Op. 74. Raju agreed to memorialize his advice in an email but cautioned it would say "[n]othing stronger" than that the existence of an MAE based on a rate decrease of 12%-13% in perpetuity represented the "better argument." Op. 75; B1123. Raju stressed that Baker Botts could ***not*** reference RLF's advice in the OOC. Op. 75.

O. Baker Botts Commits

Before committing to provide the OOC, Rosenwasser needed approval from Baker Botts's chairman, who was out of the country. Op. 75; B1125. Loews was displeased and pressed Rosenwasser for an answer. Op. 76; B1136.

Rosenwasser lobbied his partners, telling them that Jim Tisch "need[ed] board support for his plans" and "need[ed] to tell [the] board this afternoon" about whether Baker Botts could issue the OOC. Op. 76; B1133. Loews's pressure paid dividends. On April 20, Rosenwasser committed to issuing the OOC "if and when requested" and sent Alpert a draft that afternoon. Op. 77 & n.12; B1138; B1143; B1330. The draft was in substantially the same form as the final version delivered more than two months later. Op. 77.

P. Loews Throttles Skadden

Alpert wanted to "button[] down" the Acceptability Condition by securing confirmation that, if and when asked, Skadden would advise the GPGP Board that the OOC was acceptable. Op. 77. Alpert demanded an answer by April 24. *Id.*

Skadden objected to language in the draft OOC stating "other counsel 'has advised you that your reliance on this opinion when delivered should provide the benefits set forth in Section 7.10(b) of the [LPA].'" Op. 78.

In response, Alpert "threatened to fire Skadden." B1211. He told Rosenwasser he was "in no mood to negotiate with [Skadden]" and that he had "senior management back-up to move to another firm if [Skadden] is not reasonable." B1209.

Alpert made his intentions "absolutely clear." B1209-10; Op. 78. Skadden ultimately "fell in line," Alpert said, but he "[r]eally had to beat on [them]." B1247.

Because Skadden had been "ridiculous," Alpert decided to "look to other firms re potential litigation." B1247; Op. 78.

Q. Boardwalk's NOPR Comments Undermine the OOC

On April 25, Boardwalk submitted NOPR comments to FERC that fatally undermined the syllogism driving the OOC. Op. 79-81 & n.13. Rosenwasser printed a hard-copy of the comments to review for problematic language. *Id.* Rosenwasser recognized the problem, underlining and double-starring the following key text:

> Until the Commission provides a final decision on the treatment of ADIT, Boardwalk cannot correctly assess the impact of the Revised Policy Statement and ADIT on its pipelines' costs of service, and any response in the Form No. 501-G will be misleading and inaccurate.

Id.; B1228. The OOC purported to do exactly what Boardwalk characterized publicly as impossible: to assess correctly the impact of FERC's actions on its pipelines' costs of service, while relying on a Rate Model Analysis that largely paralleled the Form 501-G analysis, which Boardwalk said "will be misleading and inaccurate" until FERC addressed ADIT. Op. 79. When Skadden attorneys saw the NOPR comments, they noticed the same problem. Op. 80; B1310-11 ("this seems to be relatively unhelpful" and "could be problematic?"). As Skadden partner and former FERC Commissioner Naeve put it: "If I were Baker Botts I would prefer to wait until FERC acts on the comments." B1156.

Boardwalk's comments also contradicted other assumptions driving the OOC. Op. 82. First, there was no basis for the OOC's assumption that the RPS was binding and would be applied as drafted to Boardwalk's subsidiaries. Second, the Rate Model Analysis underpinning the OOC engaged in "single-issue ratemaking," which Boardwalk's comments criticized. Third, FERC's future treatment of ADIT was unknown, so there was no basis to pretend application of the Reverse South Georgia Method was a sure thing. *Id.*

R. Preparing the Potential Exercise Disclosures

Boardwalk and Loews began preparing Form 10-Qs they would issue on April 30. Op. 83. The evolution of the disclosures reveals two things. First, everyone involved knew that the March 15 FERC Actions were not final, their effects could not be predicted, and they were not likely to trigger an MAE on Boardwalk's rates. Second, Loews pushed to alter the disclosures to obscure these facts, thereby facilitating the exercise of the Call Right. Op. 83-86; *see* B1109.

Loews began lining up the members of the GPGP Board to make the acceptability determination, consistent with Skadden's "pain in the ass" advice. Op. 59-60, 87. Siegel explained to each director that, while Holdings would determine whether to exercise the Call Right, the GPGP Board would determine whether the OOC was acceptable. Op. 86-87; *see* B1152. The independent directors had a "hostile reaction" and asked "shouldn't we have independent counsel[?]" Op. 87; A4257:

5/1/2018 - update w/ McMahon
- independent directors had a hostile reaction
- and they asked "shouldn't we have independent counsel!"
→ Alpert's view - getting board involved was to take an issue off the table.
= probably not going to the directors, or he will exercise.

S. Issuing the Potential Exercise Disclosures

On April 30, Boardwalk and Loews filed their Form 10-Qs. Op. 87. Boardwalk reported that it had been "informed by [Holdings] that it is analyzing the FERC's recent actions and seriously considering its purchase right under our partnership agreement[…]." B1304. Loews made similar disclosures while disclaiming any certainty about satisfying the preconditions for, or the timing of, any potential exercise. Op. 89; B1194.

This coy disclosure—suggesting the units ***might*** be called without actually triggering the contractual 180-day look-back pricing mechanism—produced the market reaction that Loews expected. The unit price rose initially and then steadily declined once "the implications of the Call Right" and the overhang from §15.1(b)'s pricing formula "began to sink in." Op. 89-91. When U.S. Capital Advisors downgraded Boardwalk from "Buy" to "Hold" and slashed its price target from $20 to $11, McMahon marveled: "[a]mazing how good they are." B1318; Op. 91.

Investors were outraged. Op. 91; B1342; B1453. Deutsche Bank wrote that Loews had trapped public holders in a "Prisoner's Dilemma." B1338; Op. 91. Barclays suggested Loews was exploiting a "loophole" and "teas[ing] the market" to purchase the minority units at an "extremely attractive price." Op. 92. J.P. Morgan publicly pressed Loews to exercise at a price unaffected by its "seriously considering" disclosures to "avoid the perception of securities manipulation." Op. 92-93; B1385.

T. Loews Ties Off Acceptability

Because the GPGP Board's independent directors had expressed a "hostile reaction," Alpert shopped around for new legal advice. He tapped RLF to assess the Acceptability Condition, without telling them that Skadden had already analyzed the issue. Op. 87. RLF advised orally that the "far better view" was that Holdings was empowered to make the acceptability determination. Op. 94. With RLF locked in, Alpert asked the two firms to try to "get on the same page." *Id.* When the firms connected, Skadden's "main point" was that "there is ambiguity and ambiguity is construed against the General Partner." *Id.*; B1323.

On May 1, RLF sent Alpert an email advising that, "[w]hile there is some ambiguity and arguments can certainly be made to the contrary, we think that the ***better view*** is that the [acceptability determination] is within the sole authority of the

Sole Member [Holdings] pursuant to Section 5.6 of the LLC Agreement." Op. 94; B1321-22 (emphasis added). The email included the following caveat:

> [I]f the Board of Directors is approached and declines to determine that the Opinion of Counsel is acceptable and the Section 15.1(b) call right is exercised by the Sole Member anyway, ***that would be a difficult fact to overcome in any future litigation*** regarding the exercise of the Section 15.1(b) call right.

B1322 (emphasis added). Incredibly, Alpert never told RLF that the "difficult fact" had already occurred. Op. 166; A773/843-44 (Raju).

Within two hours of receiving the RLF memo, Alpert drafted and circulated talking points for the GPGP directors. B1313. They represented that "***[w]e and outside counsel agree*** that the documents provide that [Holdings'] authority to exercise the call right includes the ability to determine that the opinion of counsel is acceptable." B1314 (emphasis added). Skadden did not agree, so they struck the "[w]e and outside counsel agree" and substituted "[w]e believe the better reading … is[.]" *See* B1326; B1327; Op. 95. Disregarding the import of Skadden's changes, Alpert added back the reference to "outside counsel" and inserted something untrue: "***<u>we are confident</u>*** that the sole member has the ability and authority to make the determination of an acceptable opinion." B1325 (emphasis added). Alpert never sent the new draft to Skadden. Op. 95. That evening, Alpert, McMahon, Rosenwasser, Layne and RLF (but not Skadden) had a call to "get on the same page" regarding the acceptability determination. *Id*.

After Siegel delivered the misleading talking points to the independent directors, they requested a call. *See* B1377; Op. 96. Alpert tapped Ramey Layne of V&E to lead the discussion. Op. 96; A660/394 (Alpert). Alpert sidelined Skadden by instructing them to drop the GPGP as a client hours before the meeting. *See* B3451 (redline comparing 4/23 and 5/14 Skadden engagement letters); B1383 (Alpert approving revised letter). The independent directors were relieved to hear from Layne that they could avoid the "awkward process." Op. 97.

U. The ADIT Issue Gets Worse

Meanwhile, uncertainty regarding ADIT grew worse. In its May 14 compliance filing, SFPP eliminated ADIT from its cost-of-service calculations. B1378. If SFPP's treatment of ADIT was correct, it would be great for Boardwalk's bottom line but fatal to the OOC. Op. 97. Defendants and their advisors immediately focused on this development. *Id*. Baker Botts was particularly tuned-in because it represented clients opposing SFPP's compliance filing. Op. 97.

Between May 21 and June 20, sixty industry participants filed comments in the ADIT NOI proceeding. B2860. The vast majority of pipeline-friendly comments argued for elimination of ADIT. Op. 98; B3234 ¶40 n.46 & B3249-50. Two of Boardwalk's go-to law firms argued for elimination on behalf of multiple pipeline clients (but not Boardwalk). Op. 98. Boardwalk could not advocate publicly for eliminating ADIT balances without undercutting the Rate Model Analysis and the OOC. *Id.*

Privately, however, Boardwalk lobbied FERC through the Interstate Natural Gas Association of America ("INGAA"). Op. 98. Defendants' privilege log reveals that Boardwalk's executives and its regulatory counsel were "heavily involved" in INGAA's push for elimination of ADIT, a fact McMahon and Johnson denied at trial. Op. 99 & n.15.

Everyone knew that different outcomes for ADIT—including elimination—were possible.[1] Baker Botts continued to assume amortization of ADIT was certain, despite real world developments undermining that assumption. Op. 100.

V. Litigation and Proposed Settlement

On May 24, 2018, two then-unitholders (the "Original Plaintiffs") filed this action and moved for expedited proceedings. They sought to prevent the GP from exploiting §15.1(b)'s 180-day trading price formula through Defendants' April 30 disclosures. The Court denied their motion as unripe. Op. 100.

The next day, Defendants contacted the Original Plaintiffs to explore settlement. The Original Plaintiffs understood the dynamic. B29 ("Your clients

[1] Defendants contend that Plaintiffs' FERC expert conceded that Baker Botts's ADIT assumption was reasonable. OB44. In fact, she testified the assumption reflected one of four possible outcomes, and that no one could reasonably discount the possibility FERC would eliminate ADIT. A786/894, A780/871-873 (Court).

wants [sic] to make this purchase. Getting a release on a deal they want to make anyway is actually an amazing outcome for them.”).

Less than a month after the litigation began, the parties filed a stipulation of settlement. B1. Under its terms, the GP could secure a release if it exercised the Call Right by June 29—the exact day that Loews earlier projected it might exercise. B15-16; B1092. That date ensured a closing *before* FERC’s regularly scheduled meeting on July 19, when FERC was expected to make additional announcements related to the March 15 FERC Actions that could fatally contradict the assumptions driving the OOC. Op. 101-02; A3117-18/LPA §15.1(c) (governing timing of exercise, notice and purchase date); B1029 (Johnson explaining that FERC “indicated its desire to issue an order on the [NOPR] in its July meeting which will take place on July 19.”). The proposed settlement contemplated a $1.8 million fee award for the Original Plaintiffs’ quick work. Op. 102.

W. Baker Botts Renders the OOC

Believing that they had purchased a settlement that would release any challenges to the Call Right, Loews asked its advisors to finalize their work product. Op. 102; B1456. To satisfy the Opinion Condition, Baker Botts had to conclude in good faith that Boardwalk’s status as a pass-through entity for tax purposes “has or will reasonably likely in the future have a material adverse effect on the maximum applicable rate that can be charged to customers.” Op. 123; A3117/LPA §15.1(b)(ii).

On June 29, Baker Botts rendered the OOC, but the substance fell far short of what the LPA requires. A5123; *see* Op. 102-05.

The same day, Sullivan—Baker Botts's rate expert—testified before FERC that it was impossible to assess the effects of removing the ITA on pipeline rates without knowing how FERC would treat ADIT. Op. 105-06.

X. The GP Exercises the Call Right

After receiving the OOC, Loews management recommended that the GP exercise the Call Right. Op. 106. In their "Updated Base Case," management estimated the transaction would generate more than $1.5 billion in "Value Creation" for Loews. *Id.*; B1467. Loews authorized Holdings to proceed. Op. 106.

Skadden submitted a presentation to Holdings concluding that "it would be within the reasonable judgment of [Holdings] to find" the OOC acceptable. *Id.*; A5122; B1484. Holdings adopted resolutions deeming the OOC acceptable and exercising the Call Right. Op. 106. Later that day, Boardwalk announced that the GP had exercised the Call Right for $12.06 per unit—approximately $1.5 billion in total consideration. The transaction closed on July 18, 2018. Op. 106; B1594.

Y. FERC Eviscerates the OOC's Assumptions

Hours after closing, FERC issued an order on rehearing of the RPS and a "Final Rule" in response to the NOPR. Op. 106; A5391; A5189. Critically, FERC stated that MLPs no longer entitled to an income tax allowance could ***eliminate their***

overfunded ADIT balances without returning those balances to rate payers. *See* A5211/¶10. According to FERC, doing otherwise would violate the prohibition against retroactive ratemaking. A5277-79/¶¶133-34. The D.C. Circuit later agreed and dismissed shippers' contrary arguments as "non-starters." *SFPP, L.P. v. FERC*, 967 F.3d 788, 801 (D.C. Cir. 2020).

The Final Rule validated Baker Botts's early prediction that the March 15 FERC Actions would not affect Boardwalk's recourse rates and completely eviscerated their OOC. Op. 107-08; B1153. When a colleague commented that the news "sounds pretty good for MLPs," Rosenwasser responded: "Seems all mitigates adverse effect without changing policy. Loews buy in of [B]oardwalk closed day before order came out." B1597; *see* B1599. Boardwalk's Vice President of Regulatory Affairs was more direct: "Maybe I wish we were still publically [sic] traded…." Op. 108; B1592. The timing of Loews's "heavy handed treatment of the [Boardwalk] investors" felt like "salt [was] being poured on the wound." B1596.

In their required filings in response to the NOPR, each of Boardwalk's subsidiaries filed a statement explaining why its recourse rates should not be changed. FERC agreed, just as McMahon had predicted almost immediately following the March 15 FERC Actions. *See* A786/869:10-20; *supra* 14-15. Trial testimony confirmed that Boardwalk's recourse rates remained unchanged since March 15, 2018. A793/936, A802/957 (Webb); A627/263-64 (Wagner); B3000-01.

Z. The Current Litigation and the Decision Below

The current plaintiffs objected to the proposed settlement, and the Court of Chancery rejected it. Op. 108. Defendants attack the Vice Chancellor for characterizing them as "some muggers beating up a guy" at the settlement hearing and "casting aspersions on all counsel involved." OB24. That misstates the record. *See* A230-31 (Court: "I don't know whether defendants are accurately portrayed as muggers or not. Maybe they are … doing what their contract permits.").

Defendants claim credit for "voluntarily waiv[ing] privilege." OB25. But they fought and lost a motion to compel that forced them to reveal their machinations regarding the Acceptability Condition, which they characterized initially as irrelevant "corporate plumbing." *See* A332, 346-47.

Trial took place on February 22-25, 2021. Defendants did not call Layne or anyone from Skadden. Nor did they call Sullivan, their own rate expert. Defendants did not even call Jane Wang, the executive principally responsible for the projections Defendants now attempt to discredit.

On November 12, 2021, the Court issued a post-trial memorandum opinion holding that the GP had breached the LPA. Op. 5-6. Because the GP "acted intentionally and opportunistically," "participated knowingly in the efforts to create the contrived [OOC] and provided the propulsive force that led" Baker Botts to its conclusion, neither of the LPA's exculpatory provisions applied. *Id.* The Court awarded $689,827,343.38 in damages plus interest and costs. *Id.*

The Court did not reach Plaintiffs' claims for breach of the Call Right exercise price formula (Count II), breach of the implied covenant (Count III), tortious interference (Count IV), or unjust enrichment (Count V). Op. 191-93. On December 2, 2021, the Court entered a partial final judgment severing and staying those counts pending appeal. OB, Ex. B.

ARGUMENT

I. THE COURT OF CHANCERY PROPERLY HELD THAT THE GP FAILED TO SATISFY THE OPINION CONDITION

A. Question Presented

Whether the Court of Chancery properly held that the GP failed to satisfy the Opinion Condition because Defendants orchestrated an OOC that was not a good faith effort to discern the facts and apply professional judgment. A931-51.

B. Scope of Review

The "factual findings that provide the basis for" a bad faith "determination will not be overturned unless they are clearly erroneous." *DV Realty Advisors LLC v. Policemen's Annuity & Benefit Fund of Chi., Ill.*, 75 A.3d 101, 108 (Del. 2013). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* (cleaned up). This Court affords particular deference where factual findings are based on credibility assessments. *RBC Cap. Mkts., LLC v. Jervis*, 129 A.3d 816, 861 (Del. 2015); *AB Stable VIII LLC v. MAPS Hotels & Resorts One LLC*, 268 A.3d 198, 209 n.34 (Del. 2021). The legal determination of whether these found facts constitute bad faith is reviewed *de novo*. *DV Realty*, 75 A.3d at 109.

C. Merits of Argument

The record supports the Court of Chancery's conclusion that the OOC was the product of a deliberate and illegitimate effort driven by Defendants to circumvent the requirements of the LPA and procure an OOC that reached conclusions the real-world facts would not support.

1. The Contractual & Legal Framework

The Call Right was designed to protect against particular regulatory changes that would have a substantive and meaningful impact on Boardwalk. Op. 22 (observing that "no one intended the Call Right to be triggered by a change that 'wasn't substantive, wasn't meaningful'") (quoting A573/46 (Rosenwasser)).

To achieve this "business" point, the architects of the LPA drafted §15.1(b) to serve as "an off-ramp if FERC reverse[d] its policy in a way that materially threatened revenues." Op. 22 (internal quotation marks omitted). Section 15.1(b) required counsel to assess whether Boardwalk's tax status would materially impact Boardwalk's rates "because rates generate revenue." Op. 44. "[T]he Call Right was ***not*** intended to create a trapdoor that Loews could open based on a regulatory change that had ***no real-world effect***." Op. 44 (emphasis added); A698/545 (McMahon).

Evaluating what they wish the LPA said, Defendants focus only on the regulatory change portion of the Call Right's triggering language. OB1. They gloss over the reality that §15.1(b) requires a reasonably likely MAE on Boardwalk's rates. Defendants elide the MAE portion of the trigger because they have no other option: they knew at the time that the March 15 FERC Actions were unlikely to cause an MAE on Boardwalk's rates during the period predictions could be made with any confidence. *Supra* 19; B1153; Op. 56.

2. The Opinion Condition Protects Minority Unitholders

The structure of the LPA demonstrates that the Opinion Condition existed to protect minority unitholders. If the GP holds more than 80% of Boardwalk's limited partner interests, it may purchase the remaining limited partnership interests ***without*** obtaining an OOC. A3117/LPA §15.1(a). The GP need only notify the limited partners and pay the current market price for their units (or, if higher, the price the GP paid to purchase any such units in the preceding 90 days). *Id.*

By contrast, when the GP holds only 50% or more of the interests, it cannot call in the remaining units unless it obtains an "acceptable" OOC that Boardwalk's tax status "has or will reasonably likely in the future have a material adverse effect on the maximum applicable rate that can be charged to customers." *Id.* §15.1(b)(ii). At this lower ownership threshold, the LPA includes a deliberately retrospective pricing mechanism: the GP must pay the average daily closing price for the 180 trading days preceding the GP's notice of its intent to exercise. *Id.*

Defendants claim that the Opinion Condition operates as a "buffer" for the GP's benefit. *See* OB9, 42. But the Opinion Condition ***limits*** the power of the GP, which is unfettered at a higher ownership threshold. Op. 159 (finding that the "difference between the two call rights indicates that the Opinion Condition and the

Acceptability Condition were intended as meaningful limitations on the [GP]'s ability to exercise the Call Right at the lower ownership level").

3. The Phrase "Maximum Applicable Rate" is Ambiguous

The Opinion Condition requires counsel to address whether there has been or will be an MAE on the "maximum applicable rate that can be charged to customers." A3117/LPA §15.1(b). Neither the LPA nor FERC has defined or explained the phrase "maximum applicable rate." Op. 127.

Because Baker Botts was unable to identify a settled meaning for the phrase, multiple law firms generated analyses regarding its meaning. *Id*. (citing B474 (email from Baker Botts interpreting the term); B560 (same); A4252 (Skadden notes interpreting phrase); B1425 (memorandum from Baker Botts interpreting phrase); B1433 (email from Van Ness Feldman interpreting phrase)). These analyses confirm the phrase is ambiguous.

Skadden partner and former FERC commissioner Naeve recognized it could mean either: (1) the "maximum rate" contained in Boardwalk's tariff (i.e., the highest recourse rate); or (2) the maximum rate applicable to a customer, accounting for discounted and negotiated rates.[2] *See* Op. 46, 127 (quoting A4252). V&E observed that there were multiple interpretations and that the phrase was an "odd

[2] The maximum rate that applies to a customer for a particular service could be a negotiated or discounted rate, or one of the 167 recourse rates listed in Boardwalk's tariffs. Op. 54.

split." B551; *see also* A4254 ("Max app rate = negotiated or tarrif [sic] (see S-1). ***We don't have to agree the reading is the best***; just in the range of reasonableness") (emphasis added)); B1911/233-34 (McMahon Dep.) (expressing view that "maximum applicable rate" was not intended to refer to a "single rate" but rather to the actual applicable tariff rate).

The OOC "implicitly conceded" this ambiguity. Op. 128. Rather than asserting that the phrase "had a plain meaning," it stated that "we have, *in using our judgment*, interpreted the words … to mean the recourse rates of the Subsidiaries now and in the future as that term is used by the FERC in its regulations, rulings and decisions[.]" *Id.* (quoting and emphasizing A5126).[3]

Defendants now claim the Court of Chancery erred in recognizing the same ambiguity their own advisors flagged. Their resort to a grab-bag of extrinsic evidence to establish their preferred interpretation of "maximum applicable rate" underscores the ambiguity.[4] OB33.

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[3] As explained *infra* 53-55, Baker Botts pretended to analyze "recourse rates" as FERC uses that term while instead evaluating meaningless "indicative rates."

[4] *See SI Mgmt. LP v. Wininger*, 707 A.2d 37, 44 (Del. 1998) (finding extrinsic evidence "irrelevant" in assessing "the intent of all parties" to a partnership agreement where "the 1,850 investors comprising the limited partnership reacted to a 'take it or leave it' proposal by the General Partner without meaningful individualized negotiations").

Defendants have only themselves to blame for using an undefined and ambiguous phrase. *See Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 399 (Del. 1996) (it is not a court's role to save an agreement from "foundering on the reef of its own ambiguity."); *Bank of N.Y. Mellon v. Commerzbank Cap. Funding Tr. III*, 65 A.3d 539, 551-52 (Del. 2013) (noting that "Defendants could have easily drafted the 'hopelessly ambiguous' Parity Securities definition in the LLC Agreement in a straightforward manner" and "[y]et they did not").

4. Good Faith Requires an Opinion Giver to Apply Expertise to the Facts and Exercise Professional Judgment

Where "parties to a contract agree that the delivery of an opinion of counsel is necessary to satisfy a condition precedent, 'it is [counsel]'s subjective good-faith determination that is the condition precedent.'" Op. 112 (quoting *Williams Cos., Inc. v. Energy Transfer Equity, L.P.*, 2016 WL 3576682, at *11 (Del. Ch. June 24, 2016), *aff'd*, 159 A.3d 264 (Del. 2017)). Counsel renders an opinion "in subjective good faith by applying expertise to the facts in an exercise of professional judgment." Op. 112; *Williams*, 2016 WL 3576682, at *11 (the court's "role is to determine whether [counsel]'s refusal … to issue [the] opinion is in good faith, that is, based on [counsel]'s independent expertise as applied to the facts of the transaction”).[5] Here, the Court of Chancery conducted the required assessment and concluded that Baker Botts did not act in good faith. Op. 150.

Dissatisfied with the ***results*** of this inquiry, Defendants contend that the Court of Chancery improperly reviewed Baker Botts’s work *de novo* and afforded no deference. OB28, 45. In fact, the Court did only what was necessary to assess whether Baker Botts acted in subjective good faith: it compared the contemporaneous evidence showing what the relevant actors knew and did against their contradictory claims at trial.

This inquiry is essential because a trial court lacks “the ability to read minds” and must instead look to “external indications” to assess whether counsel acted in subjective good faith in rendering an opinion. *Allen v. El Paso Pipeline GP Co., L.L.C.*, 113 A.3d 167, 178 (Del. Ch. 2014), *aff’d*, 2015 WL 803053 (Del. Feb. 26, 2015); *see also Allen v. Encore Energy P’rs, L.P.*, 72 A.3d 93, 106 (Del. 2013) (“Even after a trial, a judge may need to make credibility determinations about a defendant’s subjective beliefs by weighing witness testimony against objective facts.”) (internal quotation marks omitted).

[5] The Vice Chancellor explained that to prevail, a plaintiff must “prove by a preponderance of the evidence that the party in question ***knew it was not acting legitimately*** when it performed the actions in question.” Op. 150 (emphasis added).

Defendants repeatedly claim that the Court of Chancery's inquiry should have started and ended with key witnesses' self-serving trial accounts. *See, e.g.*, OB29 ("Every lawyer who testified said he acted in good faith[.]"); 46 ("Every lawyer involved who testified said he did not feel pressure[.]"). But "[a] finding that a party did not act in good faith does not require a confession." Op. 150. The Vice Chancellor properly credited the copious contemporaneous documents over conflicting, self-serving, after-the-fact testimony. *See CDX Holdings, Inc. v. Fox*, 141 A.3d 1037, 1041 (Del. 2016) ("Although several defense witnesses tried to disavow such evidence, the Court of Chancery assessed their credibility, reviewed the contemporaneous evidence and decided not to credit their unsubstantiated trial testimony.").

Troubled by the conflict between what Defendants told themselves, the market and their regulator on the one hand, and what the OOC concluded, on the other, the Court of Chancery properly examined whether the OOC was the product of good faith and found that it was not. Op. 150.

5. The Evidence Supports the Court of Chancery's Assessment

This Court observed in *Williams* that the Court of Chancery had "carefully and extensively considered the facts and circumstances" surrounding whether opinion counsel's conclusion "was made in good faith." *Williams Cos., Inc. v. Energy Transfer Equity, L.P.*, 159 A.3d 264, 270 (Del. 2017). The same is true here:

the Court of Chancery meticulously catalogued and thoroughly explained its extensive assessment of the facts and circumstances surrounding the OOC. *See* Op. 4; 36-83; 97-100; 102-08; 112-151.

Defendants claim that the Court of Chancery's finding of bad faith "lacks all support in the evidence." OB48. They also call it "legal error." OB32. They are wrong on both counts. The Vice Chancellor's conclusions were amply supported findings of ***fact***: Baker Botts "knowingly made unrealistic and counterfactual assumptions, knowingly relied on an artificial factual predicate, and consistently engaged in goal-directed reasoning to get the result that Loews wanted." Op. 4; 150.

a. Everyone Knew Boardwalk's Recourse Rates Would Not Suffer An MAE

The evidence supports the Court of Chancery's finding that Defendants concluded that the March 15 FERC Actions would not trigger an MAE on Boardwalk's rates or revenues. *Supra* 13, 15-16; Op. 32-36 (describing contemporaneous record). Boardwalk was protected because a change in cost of service (like one stemming from the potential elimination of the ITA) would not automatically translate into a corresponding change in Boardwalk's rates, whether recourse, negotiated, or discounted.[6]

[6] Boardwalk's CFO explained this fact in a presentation for Loews titled "Basic Rate Methodology." B517; B523; Op 125 (citing same); B3539. Boardwalk predicted that: (1) Gulf South "would experience a reduction in Cost of Service; *however, it is not anticipated Gulf South's return will substantiate a rate change*";

Determining the recourse rate impact required an assessment of the likelihood that Boardwalk's subsidiaries would face rate cases and the likely outcome of those rate cases. Op. 62; A4251; B2888-90/¶¶113-14. As both Baker Botts and Defendants knew (and conceded at trial), recourse rates cannot change without a rate case—the litigated administrative proceeding that serves as the "vehicle" for any recourse rate change. Op. 8, 14; A627-28/264-66 (Wagner); A682/481 (McMahon); B60.

Baker Botts and Defendants knew that two of Boardwalk's subsidiaries faced "no risk of a rate case" and the third faced only "low" risk for the time period about which predictions could be made "with any confidence." Op. 56; B1153; *see also* Op. at 125. In sum, Boardwalk's "recourse rates were unlikely to change for the foreseeable future." Op. 138; Op. 55 (noting that "rate changes are not self-implementing" and that "[i]f a pipeline is unlikely to face a rate case, then it is all the more unlikely that its recourse rates will change"); A688/507-08, A689-90/512-13 (McMahon); B2670-71/77-79 (Wagner Dep.); B2586/79-80 (Sullivan Dep.).

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and (2) "Gulf Crossing would experience a reduction in Cost of Service *but all contracts are under negotiated or discounted rates so no impact anticipated*." B523 (emphasis added). In the worst-case scenario that Texas Gas both faced and lost a rate case, Boardwalk modeled a roughly $20 million potential revenue decrease, an approximate 1.5% hit to Boardwalk's total revenues. *See id.*; A804/965 (Webb).

To side-step this reality, Baker Botts counterfactually assumed a 100% likelihood that all three of Boardwalk's subsidiaries would face a rate case, lose and suffer a rate decline determined by "single-issue ratemaking," in contravention of FERC policy. Op. 14, 56; B2831-32/¶39; A728/663 (Johnson). The Court of Chancery recognized that this assumption was illegitimate: "[r]endering [the OOC] required assessing the risk of a material adverse effect on rates, not making the unstated counterfactual assumption that each subsidiary would face and lose a rate case." Op. 126; A3117/LPA ¶15.1(b); A627-28/264-66 (Wagner); B1153.[7]

b. Boardwalk Told FERC it Could Not "Correctly Assess" What Baker Botts Claimed to Assess

The Court of Chancery found that Baker Botts "could not have believed in good faith" that it could render the OOC before FERC provided further guidance. Op. 146. The record supports this finding.

Baker Botts advised Loews that the March 15 FERC Actions would not affect Boardwalk's rates absent further regulatory developments. *Supra* 15-16. Skadden likewise "observed in real time" that Baker Botts "needed to wait" because there were "too many known unknowns." Op. 146; B1156. Baker Botts's own rate expert

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[7] Baker Botts initially addressed this issue by expressly assuming that Boardwalk would act against its own interest by initiating rate cases to ***lower*** its subsidiaries' recourse rates. Baker Botts subsequently scrubbed this language but maintained the fallacious assumption. Op. 124-25; *compare* B545 *with* A5123-24.

testified to FERC that it was impossible to assess the rate effect of removing the ITA absent further FERC action. Op. 105-06; B1552; A800/949 (Webb).

The most damning evidence comes from Boardwalk's mouth and Rosenwasser's hand. Boardwalk's comments to FERC made clear that, absent further guidance, it could not do the very thing that Baker Botts was purporting to do: "correctly assess the impact of the [RPS] and ADIT on its pipelines' costs of service." Op. 79. Rosenwasser recognized, underlined, and double-starred this critical text because it fatally undermined the OOC. Op. 79-81 & n.13.

By falsely claiming that it could correctly assess what it knew it could not, Baker Botts "accelerated the date when it could render" its OOC so that "Loews could exercise the Call Right during a period of maximum market uncertainty" and "benefit[] itself" by paying a lower exercise price (Op. 122), one day before FERC laid bare Baker Botts's fallacious assumptions.[8]

c. Baker Botts Crafted a Syllogism to Skirt the Issues

To avoid these showstoppers, Rosenwasser crafted a syllogism designed to get to "yes": (1) pipelines charge cost-of-service rates; (2) cost of service includes

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[8] Defendants claim Baker Botts merely made "predictive judgments" that the LPA "*required* counsel to make." OB35 (original emphasis). But the Call Right required a finding that an MAE on rates *had* occurred or was *reasonably likely* to occur. Baker Botts had already advised why change was unlikely during the period in which experts could make predictions "with any confidence." Op. 126; *supra* 19; B1153.

the ITA; and thus (3) removing the ITA constitutes a material adverse effect. *Supra* 16-17; Op. 136; B476. Under this syllogism, Baker Botts dodged any "real factual analysis about the effect of the March 15 FERC Actions" (Op. 45) because "the answer was baked into" the syllogism's assumptions (Op. 61) and nothing more than "elementary subtraction" (Op. 134) was required to claim an MAE on rates when there was no "meaningful effect" in the "real world." Op. 61; B1035; B532 (Baker Botts not addressing the "question of what the actual impact will be"); B476; A797-98/937-41 (Webb).

Defendants knew this syllogism did not reflect the reality-based assessment required by the LPA. Boardwalk itself "rejected" this "simplistic approach" and filed comments with FERC explaining that it was "misleading" to equate a cost-of-service change with recourse rate change since: (1) "a cost-of-service change has 'little bearing' on whether or not a rate reduction will occur"; and (2) doing so violates FERC's "policy against single-issue ratemaking." Op. 136; A4300-01; B1350-55; *see also* Op. 14 n.2 (collecting testimony from Defendants' officers acknowledging same); B321 (McMahon and outside regulatory counsel criticizing as "priceless" the "1:1 thinking" that "taxes go down[,][cost of service] goes down").

Skadden's former FERC commissioner flagged for Loews that the March 15 FERC Actions' impact on recourse rates depended both on rate case risk and the full ratemaking exercise. Op. 62; A4252; A667/421 (Alpert). Baker Botts's own rate expert testified that changing one cost-of-service variable—like the ITA—does not provide "meaningful information" regarding potential impact to recourse rates. Op. 14 n.2; B2592/102 (Sullivan Dep.).

d. Baker Botts Pretended to Examine Recourse Rates But Focused on "Meaningless" Hypothetical Rates Instead

Baker Botts's "analysis" was dishonest. It ***pretended*** to examine impact on Boardwalk's recourse rates—its preferred interpretation of the ambiguous phrase "maximum applicable rate." In reality, Baker Botts did not even examine recourse rate impact. Instead, it treated "maximum applicable rate" as an abstract concept tied to changes in cost of service, rather than recourse rates applicable to Boardwalk's pipelines. Op. 44-45. In other words, Baker Botts based the OOC on the idea that the highest hypothetically possible rate each of Boardwalk's subsidiaries could charge would decrease in theory (though not in reality) following the removal of the ITA.

Baker Botts knew that these "maximum hypothetical rates" were not the same thing as Boardwalk's recourse rates:

> "max hypothetical rate"
>
> This is not the recourse rate

A3703; *see* Op. 130 (collecting contemporaneous documents alternatively describing these rates as "indicative rates," "theoretical maximum rates," and "maximum hypothetical rates"). Defendants knew, too. When Skadden attorneys raised the issue, Loews was "annoy[ed]" that they were "muddying the waters." B1035.

These hypothetical rates did not provide any insight into potential changes to Boardwalk's recourse rates (nor the actual rates it charged its customers). Op. 138-39; B2608/169, B2591/101, B2604/150 (Sullivan Dep.) (Baker Botts's rate expert testifying that an "indicative rate" does not "mean anything," describing the indicative rate calculations as "kind of meaningless," and explaining that the exercise could not be used to calculate changes to Boardwalk's recourse rates).

Baker Botts focused on these hypothetical rates because it allowed the firm to point to a theoretical decrease even though the rates that Boardwalk's customers "***actually paid*** had not changed at all" and Boardwalk's "***recourse rates*** were unlikely to change for the foreseeable future." Op. 138 (emphasis added); B244; B311; B523; A803/961-63 (Webb).

To obscure these challenging facts, the OOC claimed that Baker Botts interpreted the phrase "maximum applicable rate" to mean "the recourse rates of the Subsidiaries now and in the future as that term is used by the FERC in its regulations, rulings and decisions[.]" Op. 128 (quoting A5126). But "[o]nce Baker Botts expressly assumed" that the "maximum applicable rates" the LPA required them to assess were the same as Boardwalk's recourse rates, "Baker Botts had to stick with that assumption" and actually examine recourse rates, not meaningless, hypothetical "indicative" rates. Op. 130. It did not do so. *Id.* Thus, Defendants' assertion that "maximum applicable rate" unambiguously means "recourse rate" (*see* OB14, 34) defeats their cause, because Baker Botts focused instead on "max hypothetical rates."

e. Financial Data to "Get Us Where We Need to Go"

The Court of Chancery found that the Rate Model Analysis did not "provide an adequate factual basis for the Opinion." Op. 141. The Rate Model Analysis "avoided any meaningful assessment" of how the RPS might impact Boardwalk's recourse rates, "departed from ratemaking principles," "skipped essential steps in the ratemaking process," engaged in impermissible "single-issue ratemaking,"[9] "ignored critical elements of rate design," disregarded the "reality that rate changes are not self-implementing," "made no effort to incorporate the risk of a rate case" when it "easily could have," and, despite all this, remained "highly sensitive" to Defendants' many questionable assumptions. Op. 55, 138-41. The Vice Chancellor carefully detailed how the testimony of Johnson, Sullivan, Greg Wagner (Baker Botts partner and FERC practitioner), and Dr. Michael Webb (Plaintiffs' rate expert)

[9] Defendants allege that the Court of Chancery clearly erred in recognizing the single-issue ratemaking problem (OB39-40) without addressing Boardwalk's own comments pointing it out (or their own witnesses' recognition of the issue). *Supra* 29; A728/663 (Johnson); B320-21; Op. 136 & 14 n.2 (collecting testimony).

supports each of these determinations. *See* Op. 138-41 (citing A722/640, A725/651-53 (Johnson); B2580/55 (Sullivan Dep.), B2591/101, B2596/118, B2604/150, B2608/169; A626/258 (Wagner); A790-91/913-14, A797/938, A802/959, A804/967 (Webb).

f. Orchestrating Defendants' Desired Result

Despite the syllogistic framework underlying the OOC, Baker Botts still needed to effectively "rewrit[e] the Call Right" in order to render the OOC. Op. 144. Baker Botts "stretched on what constituted a material adverse effect," claiming that a 10% reduction in rates qualified when Skadden attorneys "believed that an 11% change was 'likely insufficient' under Delaware law" and RLF advised only that the "better argument" was that a 12-13% decline would qualify (while insisting that Baker Botts not reference that advice). Op. 142. Baker Botts also assumed away the "incorrect terminology" regarding Boardwalk's tax status in §15.1(b) and simply decided that "reasonably likely" meant "more likely than not." Op. 142-43; B1100; B3395. The record supports the Court of Chancery's factual determination that these "strained conclusions" were "signs of motivated reasoning." Op. 142.

g. Knowingly Going Where Others Would Not Tread

Baker Botts, a non-Delaware law firm, rendered a non-explained opinion on the likelihood of an MAE—based on an ambiguous provision in a Delaware contract—when both a Delaware law firm (RLF) and a national law firm with a Delaware office (Skadden) refused to opine on the issue. Op. 105, 144-46.

Defendants incorrectly assert the Court erred in "repeatedly labell[ing]" the OOC as "non-explained" and by ignoring Rosenwasser's supporting memorandum. OB30-31. The Vice Chancellor correctly observed that the OOC ***itself*** "resembled a closing opinion" and "proceeded as if Baker Botts were opining on a routine issue" because "it expressed a conclusion, without supporting reasoning or citations to legal authority" and "did not reference a single case or statute, much less provide any discussion or application." Op. 102. Rather than ignoring Rosenwasser's "backup" memorandum, the Court cited it repeatedly to illustrate how it undercut his testimony. *See* Op. 74, 120, 134 (citing A4755).

Defendants also assert that, "[i]n ***advice both firms stood by at trial***, RLF said the effect at issue ***was material***, and Skadden determined that Baker's MAE opinion was reasonable." OB41-42 (emphasis added). Skadden did not stand by anything at trial. Defendants called no Skadden witnesses. And RLF never said the rate impact "was material." The firm would say "[n]othing stronger" than that the existence of an MAE based on a rate decrease of 12%-13% in perpetuity—which it was asked to assume—represented the "better argument." Op. 75; B1123. At trial, the sole witness from RLF conceded that reasonable arguments could be made either way. A770/832 (Raju) (conceding that "there were reasonable arguments that could be made that the 10 percent decrease of rates into perpetuity would ***not*** constitute" an MAE) (emphasis added).

h. The Bottom Line on Bad Faith

In *Williams*, this Court credited the Court of Chancery's analysis of outside counsel's "competing interests," including the fact that the decision to withhold an opinion cut against the firm's "reputational interests," when assessing good faith. 159 A.3d at 270. Here, the Vice Chancellor found that "Baker Botts strived" to reach the conclusion "that its client wanted," and that its "forceful" client "knew how to manipulate [its] outside counsel so that counsel would deliver the answers that [it] wanted to receive." Op. 147-48; *infra* 73.

Rosenwasser had "an additional, personal incentive to push the limits" because he was the drafter of the LPA's ambiguous Call Right provision "and he understandably wanted that provision to accomplish what his client thought it should do." Op. at 147. Defendants and Baker Botts even "attempted to deal" with this conflict in their engagement letter by agreeing to the falsehood that drafting the LPA was not related to interpreting it. Op. 148; B1058.

The Court of Chancery carefully weighed the evidence and found that "the record as a whole depicts a contrived effort to generate the client's desired result when the real-world facts would not support it." Op. 151. In their failed attempt to establish clear error on appeal, Defendants have offered nothing beyond what the

Court below properly considered and rejected. The Court of Chancery's "findings are supported by the record and [its] conclusions are the product of an orderly and logical deductive process." *William Penn P'ship v. Saliba*, 13 A.3d 749, 756 (Del. 2011) (citation and internal quotation marks omitted).

II. THE COURT OF CHANCERY PROPERLY HELD THAT THE GP FAILED TO SATISFY THE ACCEPTABILITY CONDITION

A. Question Presented

Whether the Court of Chancery correctly held that the GP failed to satisfy the Acceptability Condition, where ambiguity and *contra proferentem* required the GPGP Board to make the acceptability determination, but Defendants steered the decision to Holdings. A933, A952-53, A962.

B. Scope of Review

This Court reviews the trial court's construction of the relevant operating agreements *de novo*. *Gerber v. Enter. Prods. Holdings, LLC*, 67 A.3d 400, 416-17 (Del. 2013); *AB Stable*, 268 A.3d at 209.

C. Merits of Argument

The GP could not exercise the Call Right without first satisfying the Acceptability Condition, which required the GP to find the OOC "acceptable." But the relevant agreements are unclear about whether Holdings or the GPGP Board must make the acceptability determination on behalf of the GP. Op. 157-64. Because of this ambiguity, the Court of Chancery applied the doctrine of *contra proferentem* and adopted the minority-friendly reading that the GPGP Board must make the acceptability determination. Op. 159.

At the time, Defendants and their advisors all recognized that ambiguity infected the Acceptability Condition. Skadden and RLF both advised that the language was ambiguous and would be construed against the drafter. Op. 93-94. Loews initially planned to comply, until the independent directors' "hostile reaction" required reversal—a fact Defendants hid from RLF. Op. 87, 94-95.

Defendants pretend that there is no ambiguity and act as if the prior (contrary) advice on this subject never existed. OB50-54. Defendants also claim incorrectly that the Court of Chancery unfairly raised an issue *sua sponte*. *Id.*

1. The Operative Agreements Are Ambiguous

The Call Right provision uses the defined term "Opinion of Counsel." Section 1.1 of the LPA defines "Opinion of Counsel" as "a written opinion of counsel … ***acceptable*** to the General Partner." A3030/LPA §1.1 at 24 (emphasis added). The LPA defines "General Partner" to mean "Boardwalk GP, LP … except as the context otherwise requires." A3024/LPA §1.1 at 18 (punctuation omitted).

When Loews created Boardwalk, it structured the GP as a limited partnership with GPGP as its general partner. GPGP is a limited liability company with both a board of directors (the GPGP Board) and a sole member (Holdings), which in turn had its own board composed of Loews insiders. Op. 153. Nothing in the LPA defines or discusses which of these two entities should determine whether an OOC is "acceptable." Op. 152. Instead, the LPA distinguishes between actions taken by the GP in its individual capacity and its official capacity, which affects the contractual standard of review. Op. 153-54 & n.28.

The LPA identifies the decision to ***exercise*** the Call Right as an "individual capacity" decision by using the phrase "at its option," but the decision to ***accept*** the OOC is distinct, and the LPA's definition of "Opinion of Counsel" (the source of the Acceptability Condition) lacks signaling language. Op. 153-54 (comparing A3030/LPA §1.1 at 24 with 15.1(b)).

The LLC agreement governing GPGP (the "LLCA") also fails to specify which decision-maker must determine acceptability. Section 5.2 of the LLCA grants GPGP authority to manage the "business and affairs" of the GP except as provided elsewhere. B217/LLCA §5.2. Section 5.6 grants Holdings authority over decisions "that do not relate to management and control" of Boardwalk. B220/LLCA §5.6. The LLCA also grants Holdings "exclusive authority" over "exercise" of the rights in LPA §15.1(b). B222/LLCA §5.6(xi) (the "Authority Provision"). But it is silent on who must find the OOC "acceptable." Op. 155-56.

Read together, the agreements distinguish between: (i) the exercise and acceptability determinations, (ii) individual and official capacity decisions, and (iii) decisions related to the business and affairs of the GP and those unrelated to Boardwalk's management and control. Op. 156-57. A limited partner could not readily determine from either the LPA or the LLCA who would make the acceptability determination for the GP. Op. 155-57.

Under one reading, the GPGP Board must make the acceptability determination. This reading accords with the notion that the Acceptability Condition serves as an independent check on the GP's exercise right. Under another reading, the Acceptability Condition is simply a part of §15.1(b), and Holdings' authority to exercise includes the acceptability determination. As the Court below recognized, this reading has some superficial "textual support," but interpretive difficulties render it "suspect" and "weaker than [it] initially seem[s]." Op. 152, 160.

2. The Minority-Friendly Interpretation

The Call Right provision is structured as a conditional option. Op. 160. First, the GP must satisfy certain conditions, including receiving an OOC that addresses in an acceptable way the substantive issue identified in the Call Right. A3117/LPA §15.1(b)(ii); Op. 160. Second, ***if*** the GP satisfies those conditions, "***then*** the [GP] shall ***then*** have the right … exercisable at its option" to purchase the outstanding units. A3117/LPA §15.1(b)(ii). (emphasis added). The Acceptability Condition must be satisfied ***before*** the GP can determine whether to exercise. Op. 161.

The if/then structure of §15.1(b) suggests that the GPGP Board must make an official-capacity determination regarding "acceptability" before the GP may exercise the Call Right free of any good-faith requirement. *Compare* A3090-91/LPA §§7.9(a)-(c). If Loews-dominated Holdings—rather than the GPGP Board with independent directors—could make the acceptability determination, the

Acceptability Condition would serve no independent purpose. Holdings would simply make the acceptability determination and the exercise decision in one step.

Defendants' observation that Holdings could spend the time, money and effort to accept an OOC and decide later not to exercise fails to cure this "redundancy." OB52. If Loews decided it wanted to exercise, Holdings would deem any OOC it received "acceptable." Critically, any decision by Holdings to deem an OOC "acceptable" likely would be unreviewable as an "individual capacity" decision under §7.9(c). *See* OB53; Op. 154 & n.28.[10]

The Court below correctly observed that this reading would render the definitional "acceptable to the General Partner" language mere "surplusage"—a result Delaware law eschews. Op. 158 (citing *Sunline Com. Carriers. Inc. v. CITGO Petroleum Corp.*, 206 A.3d 836, 846 (Del. 2019)); *see also Osborne ex rel. Osborn v. Kemp*, 991 A.3d 1153, 1159 (Del. 2010). If the decision belongs to the GPGP Board, the Acceptability Condition serves a genuine purpose because it "ensures that the General Partner cannot obtain a contrived opinion." Op. 159.

[10] Defendants argue that the acceptability determination is one that the GP may make in its sole discretion under §7.9(c), but their support conflates the exercise decision and the acceptability determination. OB53. The better reading is that the acceptability determination is one the GP must make in its general partner capacity under §7.9(a) or §7.9(b).

Defendants wrongly claim that the Court "unfair[ly]" raised this issue "*sua sponte*." OB51. Skadden partner Jennifer Voss flagged the surplusage problem in ***April 2018***: "allowing the would-be acquirer to receive the [OOC] and deem it 'acceptable' is akin to permitting the fox to guard the henhouse; the added 'layer' of LLC Board involvement ***serves a purpose*** and must occur before the right to call arises." A3779 (emphasis added); Op. 58-59. Plaintiffs advanced this argument below, citing Skadden. *See* A916; A1117.

Defendants claim that "nothing about the contractual 'structure' bespeaks an intent to erect a 'protection' for the limited partners." OB52. Skadden's fox/henhouse analysis refutes that argument. Defendants protest that, because the LLCA "required only three independent directors" and Holdings could expand the board, GPGP review might not afford minority protection. OB53. Even in Defendants' hypothetical, the GPGP directors would be bound to exercise this official capacity determination in good faith rather than blindly following Loews's whims. Defendants also understate the importance of independent director input.[11]

[11] In Delaware, "[w]e proceed on the premise that … even a director in the minority could, like the 12th juror, sway the rest of his board colleagues to what he believed was the right answer." *Perry v. Sheth*, C.A. No. 2020-0024-JTL, at *51-52 (Del. Ch. Jan. 16, 2020) (Transcript); *OptimisCorp v. Waite*, 137 A.3d 970 (Del. 2016) ("[I]t has long been the policy of our law to value the collaboration that comes when the entire board deliberates on corporate action….").

Defendants incorrectly assert that the Court of Chancery's "surplusage" argument was "[t]he only textual basis" offered for its ambiguity determination. OB51. The Court observed that the agreements' different definitions of "Opinion of Counsel" independently support the GPGP Board's authority to determine acceptability. *See* Op. 160. The LLCA defines "Opinion of Counsel" as one "acceptable to the ***Sole Member [Holdings]***." The LPA's definition requires one "acceptable to the ***General Partner***." *Compare* B213/LLCA §1.1 at 7 *with* A3030/LPA §1.1 at 24 (emphasis added). This divergence confirms the drafters "knew how to craft" an Acceptability Condition empowering Holdings but decided against it. *See* Op. 160 (citing *Int'l Rail P'rs LLC v. Am. Rail P'rs, LLC*, 2020 WL 6882105, at *9 (Del. Ch. Nov. 24, 2020)).

Critically, Defendants never challenge the Court of Chancery's finding that the acceptability determination "relate[s] to [the] management and control" and the "business and affairs" of the Partnership—categories over which LLCA empowers the GPGP Board. Op. 162-63. The Authority Provision empowers Holdings to "***exercise*** the rights of the Company and those of the MLP General Partner" provided in "Section 15.1." B221-22/LLCA §5.6(xi) (emphasis added). But the Acceptability Condition is ***<u>not</u>*** part of LPA §15.1; it appears in §1.1. Moreover, it does not contain the "at the option of" language demarcating individual capacity decisions. Op. 158-59.

3. ***<u>All</u>*** of Defendants' Advisors Recognized the Ambiguity

Baker Botts recognized the ambiguity in the Acceptability Condition. B379 (Rosenwasser notes); A4864 (OOC back-up memo); Op. 166.

Skadden recognized the ambiguity. A3750 (Voss analysis); A3777, A3779 (4/9 Skadden analysis); B1323 ("Their main point is there is ambiguity and ambiguity is construed against the General Partner"); B2061/70-71 (Grossman Dep.) 70-71 (refusing to go beyond "better reading" characterization); Op. 58-60.

RLF recognized the ambiguity. Op. 94-95; B1320 (May 1 RLF memo) ("better view"); B1333 (revised RLF memo). Even V&E's Layne—who presented to the GPGP Board regarding Loews's sudden reversal—recognized the ambiguity. Op. 167 & n.32 (citing B3400 (Layne markup of May 1 RLF memo)).

Only Defendants' litigators claim to see unambiguous language here. Op. 164-67. Those litigators worked hard to shield documents regarding the acceptability determination—which they characterized as irrelevant "corporate plumbing"—from scrutiny. *See supra* 38; A332, A335. Absent a successful motion to compel, Plaintiffs never would have discovered that Loews approached the independent directors, changed course following their "hostile reaction," and never told RLF, who advised that this exact paradigm would be a "difficult fact" to overcome in any future litigation. *See supra* 29-32.

4. Ambiguity Required the GPGP Board to Determine Acceptability

The Court of Chancery properly held that *contra proferentem* required the GPGP Board to determine acceptability, because ambiguities in the LPA must be interpreted in favor of the minority unitholders. Op. 167 (citing *Norton*, 67 A.3d at 360). Skadden, Baker Botts and RLF repeatedly advised as much. *See, e.g.*, B539; B551; B1323; B1126 ("Construe ambig angst drafter").

Defendants argue that, because the limited partners were not party to the LLCA, "*contra proferentem* cannot apply to that contract and nothing 'protective' can be gleaned from it." OB54. This is misdirection. *Contra proferentem* "protects the reasonable expectations of people who join a partnership or other entity after it was formed and ***must rely on the face of the [entity] agreement*** to understand their rights and obligations when making the decision to join." Op. 111-12 (quoting *Stockman v. Heartland Indus. P'rs, L.P.*, 2009 WL 2096213, at *5 (Del. Ch. July 14, 2009)) (emphasis added); *see also SI Mgmt.*, 707 A.2d at 43 (holding that ambiguous terms in a partnership agreement drafted by the general partner should be construed against the general partner). The Acceptability Condition in the LPA, which governed the GP's relationship with the limited partners, was ambiguous. *Contra proferentem* compelled the reasonable, minority-friendly reading: that the LPA required an official capacity decision by GPGP regarding acceptability as a protective check.[12]

[12] Defendants wrongly claim that disclosures warning unitholders that a Call Right exercise could force an unwanted buyout preclude any reasonable expectation that the Acceptability Condition might protect them. OB54. An exercise following an acceptability determination by the GPGP Board could still force a sale of units at "an undesirable time or price." *See id.*

III. THE COURT OF CHANCERY CORRECTLY FOUND THE LPA'S EXCULPATORY PROVISIONS INAPPLICABLE

A. Question Presented

Whether the Court of Chancery properly held that the GP failed to qualify for exculpation under the LPA because Defendants engaged in willful misconduct and did not rely on the OOC they orchestrated. A961-70; B190 ¶425.

B. Scope of Review

This Court reviews the Court of Chancery's construction of the LPA's exculpatory provisions *de novo* and related factual findings for clear error. *AB Stable*, 268 A.3d at 209 & n.34; *RBC*, 129 A.3d at 861.

C. Merits of Argument

The Court below weighed copious evidence showing that Defendants "orchestrated the sham [OOC], supported the sham [OOC] with the inadequate Rate Model Analysis, and diverted the acceptability determination for the sham [OOC] from the GPGP Board to Holdings." Op. 171. It then applied well-settled principles of contract and agency law to hold the GP accountable.

Defendants suggest that the LPA's exculpatory provisions insulate the GP from liability no matter what its agents did or knew, so long as: (1) the drafter of §15.1(b) subsequently put the conclusion required by §15.1(b) in writing; and (2) another law firm—beaten, ignored, misled and threatened by the GP's agents—advised Holdings it could reasonably accept the OOC. OB56-58. Delaware law provides otherwise. The GP "cannot rely on either" of the LPA's exculpatory provisions to "escape liability." Op. 168.

1. Willful Misconduct Renders §7.8(a) Inapplicable

Section 7.8(a) insulates the GP from liability unless the GP "acted in bad faith or engaged in fraud [or] willful misconduct." Op. 169. Defendants' misdeeds here were not the product of mere negligence. The Court below found that the "exception for willful misconduct best fits the facts of this case." Op. 169.[13] Willful misconduct exists where a general partner executes "a secret plan to snatch up a large number of units … at a bargain price before an expected up-turn in the market [without] disclos[ing] that plan." Op. 170 (quoting *Gotham P'rs. L.P. v. Hallwood Realty P'rs, L.P.*, 2000 WL 1476663, at *14 (Del. Ch. Sept. 27, 2000)).

The GP bears the burden to prove exculpation applies. *See Emerald P'rs v. Berlin*, 726 A.2d 1215, 1223-24 (Del. 1999); 29 Am. Jur. 2d Evidence §173. Here, the Court below found sufficient evidence of willful misconduct even assuming that ***Plaintiffs*** bore that burden. Op. 172 n.34.

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[13] A finding of "willful misconduct" necessarily constitutes a finding of "bad faith," a type of willful misconduct with a lower scienter requirement. *See Mennen v. Wilmington Tr. Co.*, 2015 WL 1914599, at *23 (Del. Ch. Apr. 24, 2015) ("[I]t is arguable that all willful misconduct is bad faith conduct, but not all bad faith conduct may be characterized as willful misconduct.")

2. The GP's Wrongdoing Constituted "Willful Misconduct"

The Court below properly found that Baker Botts produced a contrived OOC concluding that the March 15 FERC Actions were reasonably likely to have an MAE on Boardwalk's rates, even after Boardwalk concluded the opposite internally and told FERC the impact would be impossible to assess absent further guidance. *Supra* 13, 28-29. Baker Botts did so by using assumptions and inputs it (and Defendants) knew to be false to obtain the result that Loews desired. *Supra* 53-56; Op. 4.

The Court also found that Defendants "participated knowingly" by providing the "propulsive force" that led Baker Botts to reach the result Loews wanted, including by preparing the results-oriented Rate Model Analysis on which the OOC relied. Op. 5; *supra* 17-19, 55-56. This scheme allowed Loews to "expropriat[e]" substantial value from the class by capitalizing on a period of "maximum uncertainty" and closing the acquisition "at a highly attractive price" just one day before expected developments from FERC were likely to (and did) tear down the counterfactual inputs driving the OOC. Op. 3, 4. Defendants' "secret plan" to "snatch up" units at a "bargain price" while circumventing the contractually-required involvement of independent directors was willful misconduct. *Gotham P'rs. L.P.*, 2000 WL 1476663, at *14.

Defendants criticize the Court of Chancery for "indict[ing]" Alpert, McMahon, Johnson and Siegel "in undifferentiated fashion," supposedly without any "evidentiary basis" in the record. OB59. But the record is bountiful.

The Court below recognized Alpert's "intent to corrupt" his advisors' "substantive analysis." OB60. Alpert "manipulate[d] his outside counsel so that counsel would deliver the answers that he wanted to receive." Op. 148. Alpert neutralized contrary advice by criticizing it has as having "[t]oo much nuance." Op. 43 (quoting A3704); *id.* 148. He put maximum pressure on Rosenwasser to give him the "thumbs up." Op. 148 n.26 (citing A607/183-84 (Rosenwasser)); B1131-32. He played his advisors against one another to remove "problematic" language from the OOC. *Id.*; *see also* B1332 ("Mike told Marc that he thought his opinion cmte would be more likely to take it out if [Davis Polk] thought it was problematic"); B3441 (redline showing Baker Botts edits to accommodate subsequent Davis Polk comments). He used RLF to push back on Skadden without informing RLF that Loews had already consulted the independent directors. Op. 148 n.26. He "really beat on Skadden" until they "fell in line" and ultimately punished Skadden by "look[ing] to other firms re potential litigation." Op. 149 (quoting B1247).

The Court below made express factual findings based on substantial evidence that Johnson and McMahon "believed their inputs" to the Rate Model Analysis were improper. OB60. Johnson boasted his analysis would "get us where we need to go."

Op. 138 (quoting B542). McMahon "ridiculed" the logic underpinning that syllogism. Op. 136 (citing B320-21). Johnson and McMahon built a Rate Model Analysis assuming FERC would amortize ADIT while advocating for elimination of ADIT ***through INGAA***. Op. 99 & n.15 (collecting evidence); B1443.

Defendants claim incorrectly that the Court below "declined to examine Siegel's [scienter] or his conduct." OB60. Instead, the Court simply rejected the notion that the *scienter* of ***all three Holdings board members*** was necessary. Op. 170-71; *see also infra* 76-77. Siegel helped "orchestrate[] the sham [OOC]" and "divert[] the acceptability determination … from the GPGP Board to Holdings." Op. 171. Siegel told the independent directors they would determine acceptability and then told them the opposite after their "hostile reaction." Op. 20, 86-87, 95.

Siegel knew that FERC's actions were unlikely to impact Boardwalk. Op. 32-33, 35 (citing B307 (Siegel request for impact analysis); A3623-24 (Johnson analysis); B244 (Buskill summary of analysis)). Siegel focused on the importance of ADIT. Op. 37 (citing B307). He balked when Rosenwasser implied that Baker Botts might not provide its "thumbs up" commitment on Loews's timeline. Op. 75-76 (citing B1125; B1130). Siegel harassed Barclays for its accurate report regarding Loews's manipulation of the exercise price through its disclosures. Op. 92.

Defendants ask this Court to reject not only the Court of Chancery's factual findings but its credibility determinations. *See* Op. 149; *Allen*, 72 A.3d at 106;

Johnson v. Shapiro, 2002 WL 31438477, at *4 (Del. Ch. Oct. 18, 2002)). The Court discredited denials by McMahon and Johnson regarding the import of Defendants' privilege log. Op. 99 & n.15. It observed that Johnson claimed: (1) not to know what "bounce" meant in his own email, A731/675-76 (Johnson); and (2) that he followed all cost-of-service ratemaking steps in preparing the Rate Model Analysis when he "plainly did not." Op. 53. It weighed the credibility of Rosenwasser, Alpert and McMahon when they claimed that Rosenwasser's work drafting the LPA was not "substantially related" to interpreting it. A599-600/152-53 (Rosenwasser); A664/410 (Alpert); A700/553-54 (McMahon). Siegel's testimony "didn't cohere" for the Vice Chancellor. A741/715 (Siegel). This Court should not second-guess credibility determinations. *See AB Stable*, 268 A.3d at 209 n.34.

3. The Court Properly Imputed Willful Misconduct to the GP

The Court below properly imputed the "actions and intent" of Alpert, McMahon, Johnson and Siegel[14] to the GP. Op. 171. "A basic tenet of corporate law, derived from principles of agency law, is that the knowledge and actions of the corporation's officers and directors, acting within the scope of their authority, are

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[14] Defendants concede that Alpert, McMahon, Johnson and Siegel acted as "General Partner agents." OB58. At all relevant times, Alpert was Loews's General Counsel, Senior Vice President, and "point-person" on the Call Right process (Op. 37; B2427/104 (Alpert Dep.)), McMahon was Senior Vice President, General Counsel and Secretary of the GPGP (Op. 34; B1855-56/12-13 (McMahon Dep.)), Johnson was Boardwalk's Senior Vice President, Rates and Tariffs (Op. 32), and Siegel was Senior Vice President of Loews and Chair of the GPGP Board (Op. 20).

imputed to the corporation itself." *Id.* (collecting authorities). That principle extends to alternative entities. *Id*.

Defendants cite *Dieckman v. Regency GP LP* for the proposition that there is no remedy because Plaintiffs supposedly failed to prove that the Holdings board engaged in willful misconduct. OB58 (citing 2021 WL 537325, at *36-38 (Del. Ch. Feb. 15, 2021), *aff'd*, 264 A.3d 641 (Del. 2021)) (TABLE)). Defendants mischaracterize *Dieckman*, in which the plaintiffs challenged: (1) the board's appointment of an allegedly conflicted committee to evaluate a merger; and (2) allegedly misleading disclosures characterizing those committee members as independent. *Id.* at *36. The *Dieckman* court focused its exculpation analysis on the directors who selected the special committee and approved the challenged proxy because their scienter controlled the liability analysis. *See id.* at *42 (holding that the exculpation analysis "logically should turn on Defendants' state of mind ***on the issue that provides the rationale for damages***: the fairness of the merger.") (emphasis added). If a majority of the *Dieckman* board lacked scienter, there was no wrong to remedy.

Dieckman explains that "[a]n entity … can only make decisions or take actions through the individuals who govern ***or manage*** it[.]" *Id.* at *36 (emphasis added). Here, the GP engaged in willful misconduct through the officers who ***managed*** it. Construing *Dieckman* to preclude recovery in this case would eradicate decades of well-settled Delaware imputation law and leave no remedy for wrongs committed by those acting for the GP. *See* Op. 170. Shielding a GP from liability because its personnel kept the board ignorant would be perverse. *See RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816, 862 (Del. 2015) (affirming Court of Chancery's liability determination where alleged aider and abettor knowingly induced a breach by creating an informational vacuum).

Defendants contend that Baker Botts's misconduct cannot be imputed to the GP. OB62. The Vice Chancellor acknowledged that an attorney's bad faith is not automatically imputed to its client. "Here, however, the [GP] wanted Baker Botts to render the [OOC] and pushed for the outcome that Baker Botts reached." Op. 172. The GP not only pushed Baker Botts to go where Boardwalk told FERC it could not (*supra* 15-16, 28-29), it also supplied Baker Botts with a Rate Model Analysis predicated on a syllogism it knew lacked merit. *Supra* 73-74. This warrants imputation of Baker Botts's misconduct to the GP.

Alternatively, while the court below did not reach the issue, Defendants' argument independently fails because there is ample evidence to conclude that Seigel and Wang, a majority of Holdings' board, engaged in willful misconduct. Siegel's involvement is detailed above. *Supra* 74. Wang also knew the score. She built the model estimating that exercising the Call Right would yield Loews more than $1.5 billion in "Value Creation." *See* Op. 106; 184 n. 37. She understood that

Gulf South and Gulf Crossing would not suffer rate impacts and that the potential revenue hit from an unlikely rate case involving Texas Gas was minimal. *Supra* 48 & n.6. Wang helped craft Boardwalk's press release to avoid interfering with the Call Right, understood the impact of ADIT, and knew that Boardwalk's subsidiaries faced little to no rate case risk. *See* B303; B373 (recognizing that "we won't be getting clarity on the treatment of ADIT for awhile"); B375 (sending "Loews's collective comments" revising Boardwalk press release); B507 (considering Boardwalk presentation regarding FERC ratemaking and impact of FERC actions); B534 (planning "workstream and timeline" for considering Call Right); B2410/35, B2418/68-69 (Alpert Dep.) ("Jane Wang attended all of the [diligence] calls" with Boardwalk); B1124; B1154-55 (considering "probability of a section 5 rate case" for Texas Gas).

4. Section 7.10(b) Does Not Apply

Defendants seek to avoid monetary liability under LPA §7.10(b), which provides that any act taken by the GP "***in reliance*** upon the advice or opinion … of such [counsel] … shall be conclusively presumed to have been done … in good faith." A3092/LPA §7.10(b) (emphasis added). The Court below correctly rejected this contention. The GP did not "actually rel[y]" on the OOC because it knew "that the opinion in question was contrived to generate a result" and its "representatives participated actively in [its] manufacturing." Op. 173-74.[15]

Instead of contesting this factual determination, Defendants ignore damning evidence against the GP's agents. *See supra* 73-75. They also wrongly contend that ***Holdings'*** supposed reliance on Skadden somehow absolves ***the GP*** of liability. OB57-58.

First, the GP cannot "rely" on advice it never received. The acceptability determination rested with the GPGP Board, not Holdings. *See supra* 63-69. Alpert originally retained Skadden to represent GPGP, but he changed Skadden's engagement letter hours before the GPGP Board met on May 14 to identify Holdings as its client. *Supra* 19, 33. Skadden advised ***Holdings***, not the GP or the GPGP Board.

Second, the GP did not "rely" on Skadden. Skadden identified multiple interpretations of "maximum applicable rate" and warned that ambiguities would be

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[15] Reliance requires dependence, trust and confidence. *See In re Nat'l Collegiate Student Loan Trs. Litig.*, 2020 WL 3960334, at *7 & n.70 (Del. Ch. July 13, 2020). The Vice Chancellor's finding comports with the Reliance Provision, as well the DGCL and DRULPA, each of which requires reasonable, good faith reliance to qualify for protection. *See* Del. Code Ann. tit. 8, §141(e); 6 *Del. C.* §17-407(c); *see also Smith v. Van Gorkom*, 488 A.2d 858, 875 (Del. 1985) ("[F]or a report to enjoy the status conferred by § 141(e), it must be pertinent to the subject matter … and otherwise be entitled to good faith, *not blind, reliance*.") (emphasis added).

construed against the GP. A4251; A667/421 (Alpert); A3777. Defendants were undeterred. Skadden refused to offer an opinion regarding an MAE. *Supra* 20; B559. Defendants went around them. *Supra* 25-26. Skadden expressed concern that Baker Botts should wait for FERC guidance. *Supra* 28; B1156. Defendants timed the close of the transaction to beat FERC's anticipated guidance by one day. *Supra* 35; B1029. Skadden objected to language in the OOC. *Supra* 27. Alpert bullied them and retaliated by hiring different litigators. *Supra* 27-28; B1247. Skadden expressed concern about Boardwalk's NOPR comments. *Supra* 28; B1310-11. Defendants pressed forward anyway.

Skadden advised that the GPGP Board should determine acceptability based on *contra proferentem*. Defendants characterize Skadden's written advice as play-acting as an "enterprising plaintiff." OB61. But Skadden advised that, "at a minimum," there was "an arguable ambiguity" that would be construed against the "sophisticated drafter." A3779, A3777; Op. 58; A676-77/460-61 (Alpert). Defendants only abandoned Skadden's advice after the independent directors' hostile reaction, and then they cut out Skadden. *Supra* 31-33. Defendants failed to call Skadden at trial for a reason.

Third, Defendants cannot avail themselves of §7.10(b) because it does not apply to the acceptability determination. The agreements are ambiguous as to whether the determination is an individual or official capacity decision. *See supra*

64 & n.10, 66-69. *Contra proferentem* requires the minority-friendly reading that the determination is an official capacity decision.

Because a potential conflict of interest existed between the GP and the limited partners regarding whether the GP satisfied the Acceptability Condition and could force the limited partners to sell their units, §7.9(a) applies. *See* A3090-91/LPA §7.9(a). Section 7.9(a) includes its own presumption, which overrides and supersedes the presumption in §7.10(b). *See Dieckman*, 2021 WL 537325, at *24-26.

IV. THE DAMAGES RULING SHOULD BE AFFIRMED

A. Question Presented

Whether the Court of Chancery properly exercised its discretion in awarding expectation damages equal to the present value of the future distributions the limited partners would have received, less the price paid for their units. A971-77.

B. Scope of Review

This Court reviews a damages award for abuse of discretion. *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1251-52 (Del. 2012) (affirming award where "the Court of Chancery properly exercised its broad historic discretionary powers in fashioning a remedy").

C. Merits of Argument

"[T]he standard remedy for breach of contract is based upon the reasonable expectations of the parties *ex ante*." *Duncan v. TheraTx, Inc.*, 775 A.2d 1019, 1022 (Del. 2001). Here, the Court of Chancery found that, "[b]y exercising the Call Right improperly, the [GP] deprived the plaintiffs of the stream of distributions that they otherwise would have received as unitholders." Op. 176. The proper measure of damages was "the difference between the present value of those future distributions and the transaction price." *Id.*

Both sides' experts used a distribution discount model ("DDM") to calculate the present value of future distributions. Op. 177. The principal inputs to a DDM are cash flow projections, the company's cost of equity capital, and a terminal growth rate. Op. 180. Plaintiffs' expert used more conservative estimates of Boardwalk's cost of equity capital and its terminal growth rate, so Defendants did not quarrel with them. The Court adopted those figures. *Id*.

The experts' principal dispute involved the cash flow projections. Loews management created a model (the "Loews Model") which Loews used to determine whether it should deploy $1.5 billion of its own money to exercise the Call Right. Op. 182. Both experts used the Loews Model as a starting point.[16] The Court ultimately used the distribution projections in the Loews Model without modification. *Id.* The resulting calculation yields approximately $690 million in damages before interest. Defendants' challenges to this calculation fail.

1. This is Not an Appraisal Case

Defendants claim the damages ruling "defies the lesson of *DFC*, *Dell*, and the many cases following them." OB67. According to Defendants, "the trial court should have credited the unaffected market price as a reliable measure of fair value." *Id.* None of this makes sense.

Appraisal and the "fair value" standard have no application in this contract case. Boardwalk was not a corporation. The transaction at issue was not a merger. The plaintiffs were not afforded appraisal rights. There was no arms-length

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[16] Plaintiffs' expert used version ninety-one of the Loews Model. Defendants' expert used version ninety. Both projected the same distributions. Op. 182.

bargaining of any kind. The GP, with access to highly material non-public information concerning the value of Boardwalk, purported to exercise the Call Right and cashed out minority unitholders unilaterally. Defendants excluded the GPGP Board's independent directors after they expressed a hostile reaction and requested independent counsel. *See supra* 31-33.

Even if this were an appraisal case, Defendants' appeal to trading price would fail, because Loews controlled Boardwalk. *See In re Appraisal of Regal Ent. Grp.*, 2021 WL 1916364, at *26 (Del. Ch. May 13, 2021); *see also Glob. GT v. Golden Telecom, Inc.*, 993 A.2d 497, 503, 508-09 (Del. Ch. 2010), *aff'd*, 11 A.3d 214 (Del. 2010); *Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd*, 177 A.3d 1, 25 (Del. 2017) (addressing importance of trading price ***absent*** a controlling stockholder).

2. The Market Price of Boardwalk's Units Did Not Reflect the Distributions Loews Projected

The damages question turns on the present value of the projected stream of cash flows taken from minority unitholders. Had Defendants disclosed the Loews Model prior to its "seriously considering" disclosures, Boardwalk's trading price ***might*** have reflected its contents. But Defendants kept Loews's planned distribution increase secret. Op. 179. Defendants' protestations that Boardwalk traded in a semi-strong form efficient market are therefore irrelevant. OB65; *see Verition P'rs Master Fund Ltd. v. Aruba Networks, Inc.*, 210 A.3d 128, 139-40 (Del. 2019).

Defendants argue the projections in the Loews Model were immaterial. OB69-73. But everyone agreed that Boardwalk's unit price was highly sensitive to distributions. B2148/52 (Horton Dep.); A860/1192 (Hubbard); A823/1041-42 (Atkins). When Boardwalk cut its quarterly distribution from $0.5325 to $0.10 in 2014, Boardwalk's unit price plummeted 46% in a day. Op. 36; A5639. Loews controlled those distributions, and the final version of its internal model projected that Boardwalk's distributions would ***<u>quadruple</u>*** starting in 2023. Op. 179; B1591 at "Side Model" tab. The record supports the Court of Chancery's materiality determination. Op. 179; *see In re Emerging Commc'ns, Inc. S'holders Litig.*, 2004 WL 1305745, at *23 (Del. Ch. May 3, 2004) (concluding that company's "unaffected stock market price merits little or no weight" because "the market never had the benefit of any disclosed … projections of future results"); *see* B1606 n.140 (Defendants' expert describing projections as "material information"); B239; B243.

Defendants contend that Boardwalk's trading price already "reflected a projected increase in distributions" because "[a]nalysts foresaw Boardwalk increasing distributions." OB70. But analysts had been wrongly projecting increased distributions since the 2014 cut, their estimates varied wildly, and they lacked access to private information. A830/1069-70 (Atkins). Loews had unfettered access to private information from Boardwalk, and it had the unilateral power to make its projected distribution increases come true. Op. 179. Contrary to

Defendants' suggestions, the projections in the Loews Model exceeded analyst estimates in key respects. As Defendants' expert conceded at trial, "the market price assumed higher distributions, [but] ***not this high***." A861/1193 (Hubbard) (emphasis added).

According to Defendants, "the court ignored *Boardwalk*'s own 10-year management projections, which assumed distributions would remain flat at $0.40 per unit for the entire projection period." OB72. What Defendants call "Boardwalk's projections" was a "Restructuring Study" prepared in April 2018 to assess various tax structures. *See* A3754, A3756. The distribution assumption reflected an attempt to "keep as many variables constant so the true impact of the corporate structure changes could be seen." A3754. Defendants' own expert used as his starting point the Loews Model, ***not*** the Restructuring Study. *See* Op. 182.

Defendants question whether the "market would credit as material projected distributions up to ten years down the road." OB72. But Loews's decision to keep its massive future distribution plan secret underscores how important this information would be to public holders. Defendants also forget that Boardwalk was a FERC-regulated pipeline company and that Loews management projected out twelve years. B1591 at "Side Model" tab. Modeling out twelve years was reasonable because "the midstream business … is a very steady-state business" with "long-term contracts" and "very predictable cash flows." A820/1029 (Atkins).

3. Loews Recognized Boardwalk Was Undervalued

Defendants resort to disparaging the Loews Model as "back-of-the-envelope" and incorporating a "gross set of assumptions" never relied upon. OB73. In fact, the Loews executives responsible for the projections are Stanford and Oxford-trained former investment bankers from Morgan Stanley and Barclays. A750/753 (Siegel). Loews relied upon them lieu of an investment bank. *Id.*; *see* B2371/142-44 (Posternack Dep.). With input from Boardwalk and others, the Loews executives refined their work over ***ninety-one*** versions. Op. 182; B1039; B1101.

In support of their recommendation to exercise the Call Right, Loews management delivered a presentation to the Loews Board. B1458 ("Loews Board Deck"). In their "Updated Base Case," management estimated that the transaction would yield Loews more than $1.5 billion in "Value Creation." B1467; Op. 3. The Loews Board Deck's numbers come from the final version of the Loews Model. *Compare* B1467 *and* B1591 at "L Buyout vs Corp" tab.[17] At trial, Defendants declined to call the executives who created the Loews Model. Instead, they called someone who claimed ignorance. Op. 184 n.37.

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[17] Defendants contend this $1.557 billion "reflected the estimated future increase in value of Boardwalk *as a whole*" and that, "[a]s Loews owned 51% of Boardwalk's units, the gain attributable to units subject to the call right was less than half that amount." OB66 n.5. Defendants ignore that 49% of $1.557 billion is more than $760 million, substantially *higher* than the Court of Chancery's damages award.

4. No Minority Discount Applies

According to Defendants, the Court of Chancery "improperly transplanted a remedial principle idiosyncratic to the Delaware appraisal statute into the law of contracts" by failing to reduce damages by a minority discount. OB74. Neither Defendants nor their expert raised this argument below, and it is misconceived. The Court of Chancery calculated expectation damages by discounting the projected distributions back to present value and subtracting the Call Right exercise price. Applying a market-based discount to this calculation would defeat its purpose and mix marked-based and income-based approaches.

V. IF THIS COURT REVISTS THE DAMAGES AWARD, IT SHOULD APPLY THE WRONGDOER RULE

A. Question Presented

Whether the Court of Chancery should have applied the wrongdoer rule when calculating damages. A977-78; A1147.

B. Scope of Review

This Court reviews damages awards for abuse of discretion. *Supra*, 82.

C. Merits of Argument

The Loews Model included a switch incorporating three settings to capture the possible impact of the March 15 FERC Actions: (1) "Base FERC Impact," (2) "Downside FERC Impact" and (3) "Off." *See* B557. Plaintiffs' damages expert set the switch to "Off" based on testimony confirming that the March 15 FERC Actions would not have a material impact on Boardwalk. A821/1033 (Atkins); *see* B3034-39. The Court of Chancery concluded that setting the FERC switch to the "Off" position "was reasonable" and "finds support in the broader record," but it declined to do so out of a desire to be "conservative" and to avoid "an alteration to the Loews Model." Op. 188. The Court ultimately used the Base FERC Impact scenario, which projected a $73.9 million annual reduction in EBITDA. Op. 188. If this Court is inclined to revisit damages, it should direct the Court of Chancery to turn the FERC switch "Off."

Under the wrongdoer rule, whenever the "defendant's wrongful act" causes uncertainty in estimating damages, "justice and sound public policy alike require that [the wrongdoer] should bear the risk of the uncertainty thus produced." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 565 (1931); *SIGA Techs., Inc. v. PharmAthene, Inc.*, 132 A.3d 1108, 1131-32 (Del. 2015) (explaining that the wrongdoer rule is a "corollary to [the] presumption" that "doubts about the extent of damages are generally resolved against the breaching party.").

Here, "uncertainty about the FERC Impact switch only existed because of the timing of the willful breach, which resulted in the take-private transaction being completed just before FERC published its final rule." Op. 189. In other words, "[t]he uncertainty embodied in the Base FERC Impact scenario would not have existed but for the opportunistic timing of the exercise of the Call Right." *Id.*

Accordingly, the wrongdoer rule warrants turning the switch "Off." *See Great Hill Equity P'rs IV, LP v. SIG Growth Equity Fund I, LLLP*, 2020 WL 948513, at *22 (Del. Ch. Feb. 27, 2020). This would not modify the Loews Model in any respect. It would select an input the creators of the Loews Model expressly contemplated. *See* B557; B1591 at "Side Model" tab. It would also serve the policy goals behind the wrongdoer rule by ensuring that those who willfully trample the rights of others do not benefit from any uncertainty over the magnitude of the harm they inflict.

CONCLUSION

The Court of Chancery's judgment should be affirmed. To the extent this Court revisits damages, it should direct the Court of Chancery to use the Loews Model with the FERC switch turned "Off."

<u>/s/ A. Thompson Bayliss</u>
A. Thompson Bayliss (#4379)
J. Peter Shindel, Jr. (#5825)
Daniel G. Paterno (#6365)
Eric A. Veres (#6728)
Samuel D. Cordle (#6717)
ABRAMS & BAYLISS LLP
20 Montchanin Road, Suite 200
Wilmington, Delaware 19807
(302) 778-1000

Attorneys for Plaintiffs Below, Appellees/Cross-Appellants

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