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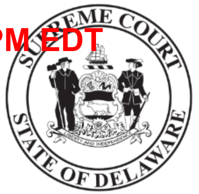

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANTS' REPLY BRIEF AND
CROSS-APPELLEES' ANSWERING BRIEF

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PRELIMINARY STATEMENT

Plaintiffs pretend there's nothing to see here—that the decision below was a straightforward application of settled law to unique facts.

Anything but. Left unreviewed, the decision will overthrow *Williams* and leave lawyers' opinions subject to hostile *de novo* review whenever a trial court's views differ from those of counsel. The decision imposes fiduciary-type obligations inconsistent with the terms of an LP agreement, contrary to long precedent. The decision invokes *contra proferentem* to undermine the reasonable expectations of investors, likewise contrary to long precedent. The decision throws into doubt the reliability of Delaware-law exculpation provisions. The decision sanctions the unprincipled disregard of market evidence in calculating damages, in direct opposition to this Court's teaching. The decision imports appraisal-style remedies into the law of contract. The decision will leave lawyers the world over wondering whether Delaware's courts view them as officers of the court or untrustworthy "rationalizers." The decision awards the largest class damages amount in Delaware's history, based on fact-findings without evidentiary support.

This could have been a simple case. Loews had a call right designed to trigger upon a specific change of FERC tax policy. That change occurred. After months-long review culminating in a reasoned opinion of counsel, supported by a 50-page legal analysis, Baker determined that the call right had been triggered.

Skadden conducted its own careful review and found Baker's opinion reasonable. The Friedlander and Bernstein Litowitz firms aggressively challenged the timing of Loews's exercise, but conceded the call right had been triggered. Bandera's representative privately reached the same conclusion. Even plaintiffs' hired experts were compelled to acknowledge at trial the reasonableness of the assumptions underlying Baker's opinion. Pressed, they could suggest no better methodology for addressing the question.

In these circumstances, *Williams* demanded deference to the reasoned opinions of Baker and Skadden. And yet here we are, with a startling 193-page opinion that looks behind every judgment and accuses everyone involved of bad faith and contrivance.

The case went off the rails when plaintiffs persuaded the trial court that the call right operated—or *should* have operated—like a merger-agreement MAE clause, triggered only by likely "real world" business impact within a 1-2-year horizon. From that atextual perspective, the court viewed every judgment Baker made based on the contract's *actual* language as "bad faith." Every internal and external assurance of no short-term business impact became a smoking gun. This Court need not examine every finding in the improbably one-sided novel-length decision below to see how dramatically the trial court went off track. A selection of plaintiffs' generative misrepresentations suffices:

Plaintiffs say Baker "was unable to identify a settled meaning" for the key term "maximum applicable rate." PAB (D.I. 19) 43. False: Everyone agreed the term meant recourse rate, and neither plaintiffs nor their FERC expert identified a single time the term was used to mean anything else.

Plaintiffs say Baker had to find rate case risk within "1-2 years." PAB 19, 41-42, 49, 51 n.8. False: As Bandera itself acknowledged, the call right was triggered even if FERC's changes "won't affect rates until 1,000 years from now." A4346. Plaintiffs nevertheless resort to sleight-of-hand to equate future recourse rates (the call right provision's concern) with current or near-term actual rates and revenues. That trick worked below.

So did another: Plaintiffs told the story that Loews timed the call exercise to "beat FERC's anticipated [ADIT] guidance by one day." PAB 80; *see also id.* 12-13, 28, 35; Op. 3, 122, 146-47. False: No evidence supports this. Plaintiffs' own expert acknowledged no one expected FERC to announce its ADIT treatment at the July 19, 2018 meeting, and no one at Baker, Boardwalk, or Loews expected the treatment at *any* point to be elimination. The timing, moreover, was driven by plaintiffs' lawyers, not Loews.

Plaintiffs say Alpert was annoyed that Skadden would not support Baker on MAE, PAB 20, and that he wanted to fire Skadden and bullied the firm because it disagreed with Baker's reasoning on acceptability, PAB 27-28. False: The

evidence shows that Alpert's annoyance related only to Skadden's handwringing about how its advice was described given its firm-wide no-MAE-opinion policy—nothing to do with substance.

Plaintiffs say Skadden thought assigning acceptability to the Sole Member would be "akin to permitting the fox to guard the henhouse." PAB 20, 65, 80. False: The quoted sentence from Skadden's analysis—the beginning of which plaintiffs excise—identifies *not* Skadden's view but a "misguided" "theme" that an opportunistic plaintiff might advance. A3779.

Plaintiffs claim Loews thought exercise of the call right would generate "$1.5 billion in 'Value Creation.'" PAB 1, 87. False: The actual number (as plaintiffs know well) is less than half that, discounted by five years, confirming that exercise would yield a "mediocre" return for Loews.

Reading the contract as written and the facts with anything like a neutral eye, as *Williams* requires, yields the inescapable conclusion that Baker acted in good-faith exercise of its professional duties. The remaining contractual question is whether the Sole Member board had the authority to find Baker's opinion acceptable on behalf of the General Partner. Plaintiffs (like the trial court) reject plain text, favoring instead an interpretation that discovers in the LPA an invisible "purpose" of protecting limited partners. All that was error.

But even if the Court were to conclude that the call right condition was not met—or to decline to reach that issue—two other grounds supply independent bases for reversal: exculpation and damages.

The LPA bars damages against the General Partner absent "willful misconduct" or "bad faith" by a majority of the Sole Member's directors, and erects a "conclusive presumption" of good faith by those decisionmakers if they relied on legal advice they reasonably believed was within the legal advisor's expertise. That presumption applied here. The Sole Member board relied on Skadden's advice that Baker's opinion was acceptable, and that they—the Sole Member board—were authorized to make that determination. What plaintiffs offer to dodge this conclusion are the Orwellian proposition that Skadden did not actually render advice, and a too-late, evidence-free allegation of bad faith as to the Sole Member's directors.

Finally, plaintiffs offer no coherent defense of the made-up expert damages number endorsed by the decision below. As they do not dispute, Boardwalk's units traded in an efficient market. Yet the trial court ignored this Court's long-standing deference to market prices, the conclusive market evidence, and the LPA's own market benchmarks for valuing partnership units to craft a per-unit award over 60% higher than Boardwalk's trading price. To justify this windfall to

the class and its lawyers, the court erroneously transplanted remedial principles from appraisal to the law of contract. The award cannot stand.

The trial court's failure to apply the LPA as written and refusal to accord deference to Baker's reasoned opinion mark departures from law. Its unsupported flagellation of the bar marks a departure from Delaware custom. Making matters worse—much worse—these departures are accompanied by a Texas-sized damages award, untethered to any market reality. All this upsets the expectation of commercial actors and their attorneys, not just in Delaware but across the nation, who place their faith in Delaware law.

Reversal is imperative.

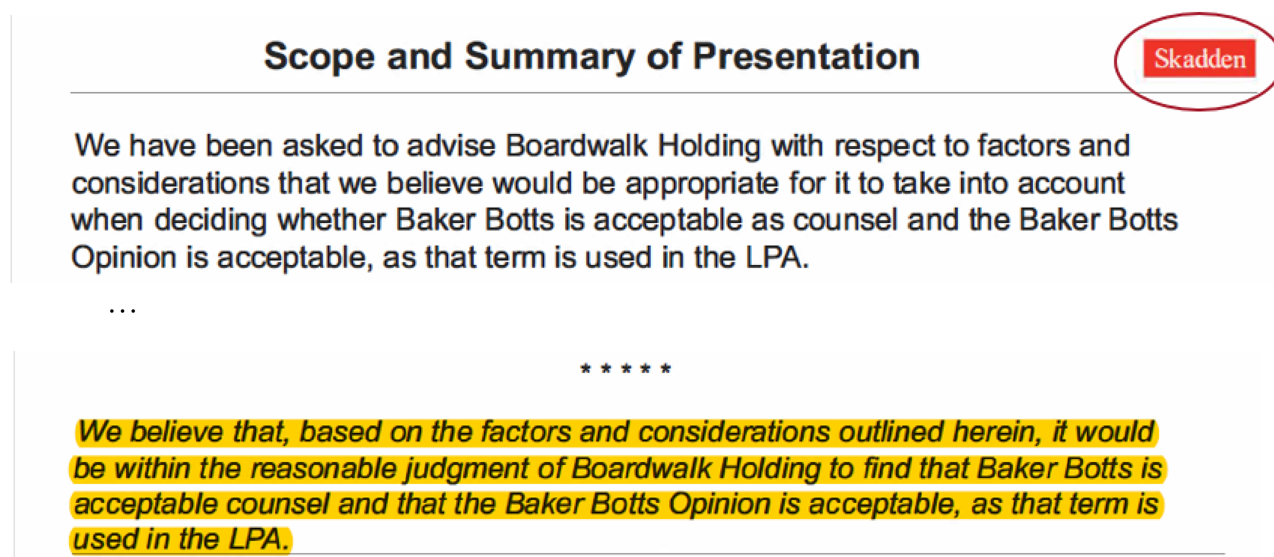
SUMMARY OF ARGUMENT ON CROSS-APPEAL

5. Denied. The trial court did not abuse its discretion in declining to credit every aspect of plaintiffs' expert's damages model.

ARGUMENT

I. THE OPINION OF COUNSEL WAS RENDERED IN GOOD FAITH

Under *Williams Cos., Inc.* v. *Energy Transfer Equity, L.P.*, the trial court was obligated to accept Baker's opinion of counsel so long as it was rendered in subjective good faith "based on [Baker's application of its] independent expertise." 2016 WL 3576682, at *11 (Del. Ch. June 24, 2016), *aff'd*, 159 A.3d 264 (Del. 2017). Baker toiled over its opinion for months, and produced a reasoned 50-page analysis concluding that Boardwalk's call right had been triggered. Skadden looked over Baker's shoulder at every turn, then advised the Sole Member board in a 23-page presentation about the acceptability of Baker's opinion. Here's what Skadden wrote:



A4736 (emphasis added).

Skadden's view of Baker's work was not idiosyncratic. Representing a putative class of limited partners, the Friedlander and Bernstein Litowitz firms

concluded that Loews's call right was an "easy option to trigger" and the "FERC ruling trigger[ed]" it. A158/9:8-24; A205-08/56:17-59:24. Even Bandera's representative believed the only sound strategy was "to argue that [the call right] has been triggered and that [Loews] need[s] to exercise it immediately." A4346. At trial, replacement plaintiffs' FERC expert agreed with Baker's key premises in concluding the Revised Policy was final, A784/887:8-888:7 (Court); that Baker reasonably interpreted "maximum applicable rate" to mean recourse rate, A787/898:12-901:7 (Court); and that Baker's approach to ADIT was "[n]ot unreasonable," A786/894:2-5 (Court). Plaintiffs' rate expert could supply no alternative measurement method superior to Loews's indicative-rate approach. A804-05/968:24-970:16 (Webb).

This all matters—not because it proves that Baker's opinion was correct (though it strongly suggests as much), but because it demonstrates that the opinion was within the bounds of reason. Baker's conclusion cannot be unreasonable if dozens of lawyers, investors, and experts reached the same conclusion with the same information. Under *Williams*, that should have concluded the issue.

But the trial court determined to reach a decision as to Baker's opinion shared by no one who contemporaneously considered the question. The court changed the contractual question, deciding that the call right should only ripen if Baker could reasonably conclude that "real world" effects on Boardwalk's charged

rates would materialize within the near-term. ***But that is not the question Section 15.1(b) asks.***

The trial court then convicted Baker of "bad faith" for having answered the question Section 15.1(b) ***does*** ask—evaluating the "reasonably likely" impact of tax status on recourse rates at any point "in the future" based on neutral rate models. Not only did the court ignore *Williams*'s admonition to refrain from second-guessing counsel's judgments, it applied the contrary methodology, drawing unsupported inferences to criticize every aspect of Baker's work. That complicates appellate review, as defendants must address each unwarranted criticism without the luxury of 193 pages. But fair review of the contract's words through the lens of *Williams* reveals a rotten core in each position plaintiffs advanced and the trial court accepted.

A. Section 15.1(b) does not entail analysis of near-term business impact

The trial court's chief error in rejecting Baker's opinion was its conclusion that Section 15.1(b) required an analysis of near-term business impact. Plaintiffs defend that error with the position that "maximum applicable rate" is "ambiguous" and therefore must be interpreted to favor their claims. PAB 43. And they say the requisite "material adverse effect" must materialize within a near-term horizon. PAB 19, 41-42, 49, 51 n.8. Neither position can be squared with the LPA.

1. "Maximum applicable rate" means recourse rate

"Maximum applicable rate" is not ambiguous. A recourse rate, under FERC rules, is the maximum applicable rate a pipeline can charge. No surprise, then, that Baker, like everyone who touched the subject, thought "maximum applicable rate" meant recourse rate. DOB (D.I. 12) 14-15, 32. Every document plaintiffs cite for the contrary proposition identifies a single meaning: "recourse rates." B474; B560. Plaintiffs attack Baker's conclusion, repeating the trial court's finding that it was "non-explained." PAB 56. That finding is contrary to the evidence. Baker's opinion was explained by a learned 50-page legal memorandum and 200 pages of documentary support. A4826-5080. Plaintiffs also fuss that Baker acknowledged it used "judgment" in reaching its conclusion. PAB 44. That is no concession of ambiguity. How can a lawyer determine the meaning of words without exercising judgment?

In fact, Baker did just what was required. A term is "ambiguous" only if susceptible to more than one reasonable interpretation. DOB 33. To determine whether it is, one may consult the very documents Baker consulted here—public regulatory filings. SEC documents are not a "grab-bag of extrinsic evidence," PAB 44, but definitive commercial context. Plaintiffs do not cite, much less distinguish, the authorities establishing the propriety of consulting these contextual materials. *See* DOB 33 (citing *Chicago Bridge & Iron Co. N.V.* v. *Westinghouse*

Elec. Co. LLC, 166 A.3d 912, 926-27 (Del. 2017)); *see also* Samuel Williston & Richard A. Lord, 11 *Williston on Contracts* § 30:4 (4th ed. 1990) (ambiguity determination requires examination of "the context of the entire integrated agreement and [the] customs, practices, usages, and terminology as generally understood in the particular trade or business").

Nor do plaintiffs offer any coherent competing interpretation of "maximum applicable rate," let alone defend any alternative as reasonable. Instead, they point to internal deliberations of defendants' lawyers considering (before ultimately rejecting as unreasonable) alternative interpretations. PAB 21, 43-44. Legal diligence cannot prove "ambiguity" in the absence of an alternative reasonable interpretation. DOB 32-34. And these communications only underscore the reasonableness of Baker's interpretation and the absence of a reasonable alternative:

First, plaintiffs observe that Skadden's Naeve (whom they never deposed) discussed with Baker two potential meanings of the term "maximum applicable rate"—*before* Naeve had reviewed the SEC filings. A4251-52. Naeve immediately recognized that "recourse rate" was the "more reasonable" interpretation, A4250, and never concluded that the other possible interpretation—which would implausibly equate "maximum applicable rate" with discounted and/or negotiated rates—was reasonable. After considering the context, Naeve

further confirmed "that the maximum applicable rate … means recourse rates"—as he advised the GPGP board. A4751; AR143/88:1-16 (Grossman Dep.) (Naeve was "very comfortable that the term 'maximum applicable rate' … was interpreted synonymously with recourse rates").

Second, plaintiffs cite a V&E communication (PAB 43-44) that makes the very point plaintiffs seek to obscure: Maximum applicable rates are *different from* revenues. B551. V&E never suggests that "maximum applicable rate" is susceptible of two reasonable interpretations. *Id.*

Even if "maximum applicable rate" were ambiguous, application of *contra proferentem* would require an interpretation consistent with the "reasonable expectation[s] of investors." DOB 34. Under this Court's precedent, "public disclosures," like Boardwalk's S-1, set these expectations. *Bank of N.Y. Mellon* v. *Commerzbank Cap. Funding Tr. II*, 65 A.3d 539, 551-52 (Del. 2013); *Dieckman* v. *Regency GP LP*, 155 A.3d 358, 366-67 (Del. 2017). Plaintiffs do not answer these authorities—which confirm as a matter of law that Baker properly looked to Boardwalk's S-1 to determine the meaning of "maximum applicable rate."

Plaintiffs' counter-textual insistence that "maximum applicable rate" might mean "discounted and negotiated" rates undergirds their attack on Baker's opinion. Plaintiffs refer repeatedly to negotiated and discounted rates in arguing no material adverse effect—when the call right turned only on undiscounted recourse rates.

See, e.g., PAB 52 (arguing that Baker was required to evaluate "real world" effects); PAB 72 (stating that Boardwalk "internally" concluded the opposite of Baker in an analysis focused on near-term revenues). They even launch a broadside on the fairness of the plain-language construction by pointing to the handwritten notes of an undeposed Baker litigator about arguments a plaintiff might make. PAB 25-26 (quoting B1126 ("[N]o effect yet screw min[.] Challenging [f]act.")). But these notes confirm the contract focuses on future recourse rates rather than "real world," short-term effects; as they make clear, "[i]nvestors knew this term from Day One." B1128.

Plaintiffs thus seek to sustain a ruling based on a contract different than the one before the Court. It would be bad enough if they did so outside the context of an opinion-of-counsel clause. But here we have *Williams*—which mandates deference to *Baker's* good-faith interpretation.

2. Plaintiffs read "in the future" out of the contract

Plaintiffs do the same in arguing that there could be no material adverse effect unless Boardwalk faced near-term rate case risk, PAB 19, 41-42, 49, 51 n.8—a position the trial court adopted, Op. 55-56, 123-26. The question posed by the contract was whether, as a result of the Revised Policy, Boardwalk's rates would face a material adverse effect "*in the future*"—without any time limitation. Bandera understood that "[o]n its face" the call right could be triggered even if a

"change in law won't affect rates until 1,000 years from now." A4346. Baker knew that "pipelines are long-lived assets" and so concluded that its contractual "analysis need not be affected by discounts or moratoria that will be lifted within the next several years." A4252. Plaintiffs nowhere dispute—nor could they—that it is "reasonably likely" any given pipeline will face or bring a rate case at some point "in the future." Without inserting "near-term" into the contract, plaintiffs' attack on Baker's opinion crumbles.

Lacking any support in the contractual text, plaintiffs cite Loews's internal discussions about rate case risk, including Wagner's preliminary assessment that he could not make predictions "with any confidence" beyond "1-2 years" out. PAB 19, 24, 49 (citing B1153); *see also id.* 41-42, 51 n.8. Plaintiffs apparently mean to suggest that Baker should have implausibly assumed there would never be a rate case. Wagner's report, delivered as part of his business diligence, shows the opposite: His point was that Boardwalk could not—as a business matter—count on a *low* rate case risk after 1-2 years:

> [G]iven the existing workload of FERC staff and the influx of other pipeline 501-G filings over the coming year, all of which will reflect either an eliminated or reduced income tax allowance, we are of the opinion that FERC's historical standards will be relaxed for the next 1-2 years. Beyond that timeframe, there are too many variables to make a prediction with any confidence.

B1153. That is: The rate case risk might well *increase* after 1-2 years. And Wagner's unrebutted testimony showed that Texas Gas, at least, faced substantial rate case risk after 1-2 years, with an accompanying estimated $74 million annual hit to Boardwalk's EBITDA. A622-23/244:7-245:21 (Wagner); A721/636:7-637:4 (Johnson).

Plaintiffs also say Naeve "flagged" for the MAE analysis that "any potential impact on recourse rates depended both on rate case risk and the full ratemaking exercise." PAB 21 (citing A4252). Naeve said no such thing. He just summarized Baker's approach and noted FERC's practice of updating all inputs during a rate case—just as Boardwalk did in the rate model. A4251; *cf.* pp. 23-25, *infra*.

Nothing plaintiffs cite—and nothing the trial court relied upon—and nothing in the long-lived nature of gas pipelines—supports the atextual premise that Section 15.1(b) requires a near-term assessment of rate case risk or gives any reason to doubt a rate case would materialize at some point "in the future." At a minimum, Baker's judgment not to read plaintiffs' and the trial court's preferred language into the call right provision cannot be called bad faith—which is what *Williams* requires to set aside the opinion. DOB 42-46.

B. The contract required prediction of "reasonable likel[ihood]," not certainty

The trial court tagged Baker with "bad faith" on the premise that Baker rendered its opinion in June 2018, when it purportedly knew the Revised Policy

was not final and ADIT would be eliminated. Plaintiffs' defense of this unsupported premise fails as a matter of law and fact.

As for law: Section 15.1(b) required counsel to evaluate whether Boardwalk's tax treatment under the Revised Policy was "reasonably likely" to have a material adverse effect on Boardwalk's recourse rates "in the future." Nothing in the contract limited when Baker should consider these questions, provided it could make a good-faith judgment about the "reasonably likely" future impact of FERC action.

And it plainly could. Plaintiffs' own FERC expert agreed with the key premises underlying Baker's conclusion that the Revised Policy was final and would not be altered. A784/887:8-888:7 (Court). After all, FERC applied the policy in a real-world case the day it was adopted, creating precedent binding on Boardwalk.[1] And Baker's prediction proved correct—the Revised Policy was affirmed by FERC on July 18, 2018. A5391.

The only open issue as of June 2018 was FERC's treatment of ADIT. Here again, Baker's predictive judgment was reasonable. The industry consensus, reflecting FERC's comments, actions, and precedent, was that FERC would

[1] Plaintiffs insinuate this oil-pipeline case was somehow irrelevant to Boardwalk. PAB 12. False. The Revised Policy explicitly "affect[ed] both oil and natural gas MLP pipelines," A3658, and FERC later confirmed the March 2018 rate case applied to both oil and gas pipelines, *see* A5410.

require Reverse South Georgia or, worse, accelerated amortization. DOB 36-37. The trial court found the witnesses' testimony on this issue "convincing," Op. 133, and plaintiffs do not dispute it. Sullivan said no fewer than *seven times* that "everyone in the industry believed the Commission would stay with … Reverse South Georgia." B2592-93/105:13-106:25; B2605/156:13-19; B2606/159:4-15; B2607/164:5-18; B2610-11/176:16-178:2; B2615/196:7-21; B2619/211:18-213:13 (Sullivan Dep.). No one, including the FERC experts, thought ADIT elimination was likely.

Plaintiffs claim their expert, Court, said "no one could reasonably discount the possibility FERC would eliminate ADIT." PAB 34 n.1 (citing A786/894, A780/871-73 (Court)). Court didn't say anything like that. Pressed on cross, she conceded that her bottom-line view was much closer to the opposite—that it was "[n]ot unreasonable" for "Baker Botts to have assumed Reverse South Georgia." A786/894:2-5 (Court). Plaintiffs pretend this crushing admission never happened, preferring to point to Court's content-free snark on direct that it was "convenient" for Baker to make the same assumption as the rest of the industry, A780/873:13-23 (Court), and that Baker's approach was "oblivious to the comments that had been filed in [FERC's ADIT] docket," *id.* Baker wasn't oblivious; it just recognized the difference between advocacy and prediction.

Plaintiffs assert that Boardwalk representatives were secretly lobbying to eliminate ADIT through INGAA. PAB 34, 74-75. This is both irrelevant and inaccurate. Irrelevant, because one can advocate for an outcome one thinks highly unlikely, as the pipeline industry in fact was. Inaccurate, because Johnson and McMahon both testified that their involvement in INGAA's advocacy had nothing to do with ADIT elimination. A697/542:4-11 (McMahon); A719-720/629:12-631:23 (Johnson). They had no incentive to advocate elimination, which would only benefit an MLP. By the time INGAA filed its reply comments on June 4, 2018, Loews had decided that remaining an MLP was no longer a reasonable option and was negotiating the exercise date with the original plaintiffs. A5438-43.

Likewise contrary to the evidence is plaintiffs' assertion that Loews timed the exercise of the call right to "beat FERC's anticipated [ADIT] guidance by one day." PAB 80; *see also id.*12-13, 28. A mountain of unrebutted but ignored evidence proves the exact opposite: Loews expected a decision on ADIT no earlier than late 2018. A607/181:21-182:6 (Rosenwasser); A620/233:5-234:15 (Wagner); A661/399:19-400:1 (Alpert). The evidence is equally clear that Loews *wanted* to postpone the exercise date because with additional time came greater business visibility. A660-61/395:24-399:3 (Alpert); A743/724:2-10, A747-48/741:24-743:1 (Siegel); A5438-43. And the record is unrebutted that the July exercise date was

demanded *by the original plaintiffs*, who refused Loews's request to wait until September to exercise. A5438-43; A661/398:1-21 (Alpert). In open court, original plaintiffs' counsel told the trial court, "[w]e are the ones" who pushed Loews to exercise in July, before settlement approval and the July 19, 2018 FERC meeting. A180-81/31:23-32:14. The fable that Loews timed the exercise to "beat" the ADIT ruling was thus conjured by plaintiffs and adopted below, Op. 3, 122, 146-47, against overwhelming evidence, to sustain an unfair narrative.

Finally, plaintiffs suggest Skadden thought the opinion of counsel could not issue absent further regulatory action. PAB 50. But the early internal email supporting this assertion says nothing like what plaintiffs claim. It says only that Skadden "would prefer to wait" were they in Baker's position. B1156. Of course they would. Everyone preferred to wait. Loews also wanted more time—but the original plaintiffs demanded exercise by quarter's end as the price of settlement. And Skadden ultimately advised the Sole Member board that despite industry efforts "to persuade the FERC to abandon or modify the revised policy, we think it is reasonable for Baker Botts to assume that the new FERC policy will continue to apply," A5075—a judgment that proved correct.

Baker did what the contract required: evaluate what was "reasonably likely" "in the future." The trial court's contrary findings pair disregard of the contractual text with unsupported inferences from the record. But even were Baker wrong, or

the evidence equivocal, reversal would still be required. *Williams* and related authority require deference, not *de novo* review. DOB 29.

C. Nothing in the rate model suggests bad faith

The court buttressed its "bad faith" findings by criticizing subsidiary judgments baked into the rate model. This, too, ran afoul of *Williams*. It also rested on untenable factual findings.

1. Boardwalk's use of indicative rates was appropriate

Baker's task was to determine, on the basis of reasonable information, whether Boardwalk's recourse rates were reasonably likely to suffer a material adverse effect in the future. To fulfill that task, Baker asked Boardwalk to model hypothetical future recourse rates—the maximum rates applicable by law—for each of its three pipelines. In response, Boardwalk produced an indicative rate model that permitted Baker to assess the likely average effect on Boardwalk's 167 recourse rates across its three pipelines. DOB 15-16.

Plaintiffs complain that the modeled indicative rates are not identical to recourse rates. PAB 53. That is true but misses the point. The question is whether the indicative rates supplied Baker with a reasonable informational predicate to evaluate the foreseeable rate effects of FERC's Revised Policy.

All evidence says yes—that the indicative rates provided an accurate measure of, and proxy for, the effect on recourse rates aggregated across each

Boardwalk pipeline. That is the precise inquiry demanded by the LPA, which speaks of "maximum applicable rate" in the singular. *See* A710/594:6-595:9 (Johnson); A620/236:1-20 (Wagner). Even plaintiffs' own expert could not meaningfully disagree or offer an alternative methodology. A804-05/968:24-970:16 (Webb); *see also* A710/596:8-13 (Johnson) (no reason to think results would have been materially different had model broken rates out by service).

Plaintiffs falsely claim that Sullivan, Boardwalk's rate model expert, testified otherwise. PAB 54. He said only the obvious: that FERC, in conducting an actual rate case rather than an aggregate impact analysis, would not use an indicative rate. B2608/167:24-169:23 (Sullivan Dep.); *see also* A710/594:12-595:9 (Johnson). Sullivan emphatically agreed indicative rates were an appropriate methodology to compare "apples-to-apples" the effect of the Revised Policy across Boardwalk's pipelines. B2621-22/220:6-223:10 (Sullivan Dep.).

Everything in this record shows that indicative rates supplied a sensible, transparent, and technically appropriate proxy for expected impact of FERC's Revised Policy on Boardwalk's future recourse rates. Precisely as *Williams* requires, Baker relied on this reasonable factual basis for the exercise of its legal judgment. Name-calling aside, plaintiffs do not offer argument to the contrary, still less evidence. Even plaintiffs cannot bring themselves to insist the LPA

required Boardwalk to conduct 167 full-fledged rate case analyses for each of its pipelines' services.

Finally, compounding its error, the trial court drew from an unexplained question in disembodied notes, *see* A3702-03, that the Boardwalk model was designed to estimate not recourse rates but "a hypothetical world that assumed there was a full market for the pipelines' services." Op. 129-30. That issue is complicated but the finding is flat wrong. The Boardwalk model did not assume a "full market" but rather calculated separate "demand" and "commodity" rates based on actual costs and volumes of shipped and reserved gas. A712-13/603:1-608:4 (Johnson). The trial court would have discovered this had plaintiffs actually argued the position the court decided to adopt, affording defendants the opportunity to rebut. Instead, the court made a finding of complex fact with no basis—demonstrating the perils of adjudicating unbriefed issues, and the good sense of deference to expert counsel's reasonable opinions regarding complex technical issues.

2. Boardwalk's model was not "single-issue ratemaking"

The trial court also criticized the rate model as "single-issue ratemaking." Op. 138. Plaintiffs repeat that charge throughout their brief, PAB 29, 50, 52, 55 & n.9, but provide no analysis to defend it. That is because here again the trial court

not only substituted its own judgment for Baker's (and Skadden's) in violation of *Williams*, but committed clear factual error in doing so.

Single-issue ratemaking involves taking the existing recourse rate and adjusting a single cost-of-service input (*e.g.*, the income tax allowance) to generate a new rate, without updating any other inputs. A797/940:3-8 (Webb); A728/663:16-20 (Johnson). The rate model did not do that. It updated *all* cost-of-service elements to yield the indicative rates across the two income tax scenarios. A715/613:22-614:24 (Johnson); A688/508:1-13 (McMahon). After those updates, the only variable that changed between the two scenarios was the income tax allowance. That is not single-issue ratemaking; it was the only way to isolate the tax effects of Boardwalk's status as a pass-through entity—which was the entire point of the exercise. DOB 40.

Plaintiffs dispute none of this. Nor do they offer any alternative methodology. They just repeat the charge of "single-issue ratemaking" and point to Boardwalk's criticism of FERC's Form 501-G. PAB 52. But the 501-G did what Boardwalk's rate model did not: It asked pipelines to apply "the potential modifications to a pipeline's cost of service due to tax policy changes" to current recourse rates, *without* updating other relevant inputs to those rates. A4300; *see* B320-21 (criticizing FERC's approach that if "taxes go down [cost of service] goes down," without analyzing any other changes to cost-of-service inputs).

The trial court's criticism here, and its related digs at the rate model that plaintiffs summarize through strung-together sound bites, PAB 55-56, again underscore the wisdom of *Williams*'s deference principle. The rate model was no "syllogism": It reflected a detailed, bottoms-up calculation of indicative rates, using updated cost-of-service and billing determinant data, across Boardwalk's three pipelines, with and without a tax allowance. AR23-133; A710-13/596:14-606:6 (Johnson). The court erred in second-guessing Baker's approach, which was in turn predicated on the sound technical expertise of Boardwalk personnel and ratified by a FERC expert.

D. Baker's MAE conclusion was no "stretch"

Boardwalk's rate model projected a reduction in recourse rates of approximately 12-15%—*in perpetuity*—for each of Boardwalk's pipelines. On the strength of detailed research and advice from Delaware specialist RLF, Baker made the reasonable legal judgment that this effect was "material" under the LPA. DOB 40-41. Skadden, with its own Delaware expertise, held that conclusion reasonable. A5078-79.

This was no "stretch." Op. 142. FERC's Revised Policy was the very trigger contemplated by the call right provision—a fact plaintiffs nowhere dispute. Baker prepared a reasoned 16-page analysis before concluding that a decline in maximum applicable rates of 12-15% qualifies as "material." A4845-60.

Plaintiffs do not engage with the substance of that analysis, much less offer anything showing it was undertaken in bad faith. *See* PAB 56-58. Instead, they repeat the trial court's *sua sponte* suggestion that a "non-Delaware law firm" cannot reliably analyze a contractual provision governed by Delaware law. PAB 56. Corporate entities from all over the world retain lawyers from all over the country to advise on Delaware law matters. Before the decision below, Delaware's courts had never suggested that non-Delaware lawyers were unqualified to address Delaware corporate law matters. Corporations and practitioners would benefit from this Court's clear statement if Delaware intends to adopt the parochial view plaintiffs now sponsor.

Welcome though such clarity would be, the issue need not be resolved here. That is because two Delaware law firms, RLF and Skadden, separately and specifically endorsed Baker's "material adverse effect" determination. Plaintiffs respond by suggesting RLF and Skadden had substantive concerns about Baker's analysis. PAB 20-21, 23, 26-28, 32, 56-57. That is not true. RLF and Skadden did not "refuse" to provide an opinion about material adverse effect. They were never asked—as *Baker* was the one tasked with the opinion and Skadden and RLF had firm policies against rendering MAE opinions. *See* AR151/93:7-94:24 (Raju

Dep.); A769/828:13-22 (Raju); AR42-43/113:19-117:5 (Grossman Dep.); B559; AR22; Op. 60.[2]

What advice RLF did give was the same as Baker's: that the 12-15% perpetual decline in recourse rates was material. A4823-24; A763-64/805:8-807:13 (Raju). At trial, Raju confirmed his personal assessment that it was the "much better argument" that a 10% or higher change in rates in perpetuity was material. A762-63/800:3-802:17 (Raju). Plaintiffs offer no criticism of RLF's analysis or conclusion. They just quibble that RLF called Baker's opinion "the better view" in one draft and acknowledged the possibility of contrary arguments. PAB 31, 67.

Skadden was also asked to opine whether Baker's MAE determination was reasonable, advised it was, and never wavered. *See* A5551-52/233:7-237:16 (Grossman Dep.). Again, plaintiffs offer no criticism of Skadden's analysis. They

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[2] Plaintiffs repeat the trial court's suggestion that Loews selected Rosenwasser because his 13-year-earlier drafting of the call right predisposed him to favor Loews, and then "attempted to paper over" that supposed conflict. PAB 14. No evidence supports this finding. Rosenwasser was uniquely qualified as "[D]ean of the MLP Bar," Op. 38; everyone was aware he had helped draft the LPA, which none of the lawyers involved believed created a conflict (let alone a non-waivable one). In any event, a committee of senior lawyers at Baker—which had never done work for Loews or Boardwalk—oversaw the opinion process. DOB 12. Finally, plaintiffs' complaint wrongly assumes that the LPA required independent counsel, whereas it in fact expressly permitted even Loews's "regular counsel" to render the opinion. A3030.

offer only the non-sequitur that defendants did not call a Skadden witness at trial. PAB 57, 80. Defendants had no reason to do so. Skadden's documents—chief among them its comprehensive, considered legal presentation, A4732-54—and Grossman's crystal-clear deposition testimony confirmed that Skadden found Baker's opinion reasonable. It was plaintiffs' burden to challenge that record evidence at trial. They did not, and cannot be heard to do so now.

E. There was no conflict between defendants' contemporaneous thinking and the opinion

Plaintiffs claim to perceive a "conflict between what Defendants told themselves, the market and their regulator on the one hand, and what the [opinion] concluded, on the other." PAB 47. Every one of plaintiffs' "conflict[s]" and "contradict[ions]" flows from the trial court's extra-contractual determination that the call right hinges on a short-term impact on Boardwalk's business.

So: Boardwalk knew, plaintiffs say, that there was no MAE because it knew that FERC's Revised Policy would not "automatically translate" into lower recourse rates. PAB 48. This assertion distorts the question. Baker and Boardwalk loudly acknowledged that FERC's actions would have no immediate impact on Boardwalk's revenues. *See* PAB 49; A3623-26. That was the point of Boardwalk's March 19, 2018 press release, which addressed the short-term price protection supplied by fixed "negotiated or discounted rate[s]" and short-term rate moratoria. *See* A3666; B316-18. But the call right had nothing to do with

currently in-force "negotiated or discounted" rates. It turned on the "maximum applicable rate" "in the future." Any "contradiction" is between Boardwalk's public statements and made-up contract terms.

Pointing to Boardwalk's comments to FERC, plaintiffs similarly claim that defendants *knew* Baker could not render the opinion in good faith absent further FERC guidance. PAB 50-51. Boardwalk told FERC it could not perform the calculations required by Form 501-G without knowing FERC's amortization method for ADIT. A691/519:1-23 (McMahon). The uncertainty about the amortization method did not preclude the MAE assessment called for by Section 15.1(b). Baker made the informed judgment that the amortization method with the least impact on rates would be adopted, and still found there would be a MAE. Even the trial court deemed that assumption reasonable. Op. 133.

With similar sleight-of-hand, plaintiffs assert (citing only the trial court's opinion) that "Baker Botts's own rate expert [Sullivan] testified to FERC [in an unrelated proceeding] that it was impossible to assess the rate effect of removing the ITA absent further FERC action." PAB 50-51. Sullivan's testimony had nothing to do with Boardwalk or the opinion and said nothing of the sort. Sullivan simply acknowledged that as of June 2018, FERC's ADIT policy was "indeterminate." B1552. In his deposition, Sullivan confirmed he thought FERC would use Reverse South Georgia to amortize ADIT. A5562/106:2-25.

Then, again like the trial court, plaintiffs strain to manufacture an internal contradiction in defendants' MAE analysis, asserting that "Skadden attorneys 'believed that an 11% change was 'likely insufficient' under Delaware law.'" PAB 56 (quoting Op. 142). Skadden "attorneys" said no such thing. Just one did—a junior associate whose view no senior Skadden lawyer shared, in a preliminary email that neither Baker nor Loews ever saw. *See* A3773-76; A4752-53; DOB 43. Baker and Skadden were fully aligned on the MAE determination, as Skadden's considered advice to the Sole Member reflected. A4752-53.

These claimed "conflicts" are thus phantoms, conjured to distort the application of Section 15.1(b). None justifies the trial court's determination to throw over *Williams* and subject the call-right opinion to hostile *de novo* review.

F. There is zero evidence of corruption

Because effective appellate review requires careful engagement with the findings and conclusions below, defendants demonstrated in detail that none of the documents or testimony the trial court invoked supported its conclusion that Baker and Skadden skewed their advice under corrupt pressure from Loews and Boardwalk. DOB 45-48; *see* Op. 42-43, 148 n.26. The trial court's extreme findings of bad faith rested on "subjective, reflexive impressions based primarily

on suspicion," *see Nixon* v. *Blackwell*, 626 A.2d 1366, 1378 (Del. 1993), rather than a fair review of the record.[3]

Plaintiffs do not respond to this demonstration. They just assert—without record citation—that defendants "preyed on [Rosenwasser's] unwillingness to acknowledge flaws in his own work," PAB 2; that Loews "knew how to manipulate" Baker, PAB 58; and that Baker "'strived' to reach the conclusion that its client wanted," *id.* Later in their brief they repeat the trial court's decontextualized assertions, adding one of their own to the string. PAB 73. They say Alpert put "maximum pressure" on Baker to give a "thumbs up"—but, like the trial court, they chop the "*or thumbs down*" part from the quotation. *Id.*; A607/183:12-15 (Rosenwasser) (emphasis added). They quote Johnson's statement that the rate model "should get us where we need to go," PAB 3, 18, 55, 73—without acknowledging the only testimony that explained the statement. *See* A688-89/508:21-510:9 (McMahon) (explaining Johnson "thought this analysis got us where we needed to go in answering Mr. Rosenwasser's questions"—not that it

[3] The trial court kicked this case off by rejecting a proposed settlement with the original plaintiffs because it "had a bad feeling about [the] case at the outset." A229/80:19-21. Why? Because defendants were "some muggers beating up a guy," and all the original plaintiffs were doing was "stopping a person from getting beat up." A229-30/80:19-81:10. Sure, the court later hedged that this was an "incendiary analogy" that could possibly be proved wrong. A230-31/81:23-82:4. But it in no way "misstates the record" (PAB 38) to note the court's expressed basis for rejecting the settlement.

was "designed to show a particular result"). They quote an email from Alpert saying Wagner's initial take on the March 2018 FERC actions was "[t]oo [] nuance[d]," PAB 16, 73—without acknowledging the unrebutted evidence that this was about not "overus[ing] jargon" in speaking with "biz ppl" or that Wagner confirmed contemporaneously the Revised Policy was "effective now." A5573/195:23-196:12 (Wagner Dep.); A3704; A3698; DOB 46. None of this shows an effort—much less a successful effort—to alter the substance of any legal advice.

The evidence plaintiffs cite (and distort) most is that reflecting Alpert's frustration with Skadden. PAB 20-21, 27, 32, 70, 73, 79-80. That frustration had nothing to do with Skadden's substantive advice. When the Court reviews the surrounding correspondence and testimony of those involved, it will see that when Alpert said he "threatened to fire Skadden," B1211, he was venting frustration with Skadden's comments on Baker's written description of Skadden's consistent oral advice—comments that stemmed from Skadden's worry about crossing its own no-MAE-opinion policy. A590/114:21-115:6 (Rosenwasser); A652-53/364:16-367:2 (Alpert); A5544/170:19-181:19 (Grossman Dep.). Plaintiffs repeatedly asked whether Skadden had any disagreement with Baker's substantive views and were repeatedly told no. A590/114:21-115:6 (Rosenwasser); A652-53/364:16-367:2 (Alpert); A5544-46/170:19-181:19 (Grossman Dep.). As for the handwritten notes

reflecting Alpert's comment that Skadden was a "PITA," A4253, no evidence connected this to any substantive position Skadden took. A5551-52/233:7-237:16 (Grossman Dep.).

Plaintiffs charge that "Defendants repeatedly claim that the Court of Chancery's inquiry should have started and ended with key witnesses' self-serving trial accounts." PAB 47. No. Defendants challenge the trial court's findings based on the whole record—not just trial testimony. True, the many lawyers plaintiffs cross-examined consistently refuted plaintiffs' corruption fable; true, also, that defendants believe the testimony of respected members of the bar is entitled to weight and that it was error for the trial court to reject all of it. But there is far more. Plaintiffs subjected the lawyers to days and days of deposition testimony. In all of that they elicited no testimony—none—indicating that any lawyer felt client pressure to alter her advice, let alone that any lawyer did so.

And then there are the documents. The trial court ordered a sweeping waiver of attorney-client privilege. Every email, every scrap of paper, every internal musing that any lawyer created having anything to do with the call right was handed over. And in all that, plaintiffs have not found even one complaint about client pressure, or even a whisper that any lawyer's views were compromised. Nothing.

There is thus an astonishing gulf between the deafening exculpatory silence of this unexpurgated evidentiary record and the trial court's extreme findings of corrupt bad faith. These unsupported findings of bad faith defy ready explanation.[4] But they are not the product of an orderly analysis of the record evidence. Because they were essential to the decision below, reversal on this ground is in order.

[4] At an address at the University of Iowa in February about several cases he had previously decided, the trial judge expressed the view that "big firm" lawyers are "elite rationalizers," "willing to be untruthful when it advances the client's interests." AR185-88/27:24-28:3, 32:3-8, 39:8-11; Iowa Law, *Guest Lecture: Hon. J. Travis Laster, Vice Chancellor of the Court of Chancery State of Delaware*, YouTube (Feb. 21, 2022), at 36:47-37:02, 42:40-43:13, 1:00:08-1:00:29, https://www.youtube.com/watch?v=QJ0mp1MiKAI. To address this issue, the speech continued, courts should become "instrument[s] of value transmission." AR189/44:17-22. Whatever the merits of this analysis, there is no evidence that any lawyers at Baker, Skadden, RLF, or V&E were in any way untruthful.

II. THE TRIAL COURT'S ACCEPTABILITY ANALYSIS IMPROPERLY REWRITES THE LPA

The acceptability issue reduces to whether the LPA authorized the General Partner to act through its Sole Member in accepting Baker's opinion. It did.

A. The LPA allows the Sole Member to make the acceptability determination

The LPA assigns to the General Partner the authority to determine whether the opinion of counsel is "acceptable," but does not dictate how the General Partner should make that decision. DOB 49-51. The court below and plaintiffs on appeal agree that the LPA is silent on this issue. Op. 155; PAB 61. The LPA's prescription is thus limited. Plaintiffs cannot complain of breach of a provision—some further specification of *who* at the General Partner must do the accepting—that appears nowhere in the LPA.

The matter is instead left to the General Partner's own governing documents, and specifically the LLC agreement for the GPGP.[5] But plaintiffs are not even party to that agreement and therefore cannot seek relief under it or invoke *contra proferentem* to benefit from it—a point the court below (Op. 151-52) failed to recognize. In any event, the LLC agreement confirms that, at the General Partner

[5] The LPA defines "General Partner" as the General Partner (*i.e.*, the GP LP) *or* the GPGP, depending on the context. A3024/LPA § 1.1; *see also* A1789 (Boardwalk S-1: "We sometimes refer to Boardwalk GP and BGL collectively as 'our general partner.'").

level, the Sole Member was authorized to accept the opinion. It provides that "Opinion of Counsel" means "a written opinion of counsel … acceptable *to the Sole Member*." A1309 § 1.1 (emphasis added). The trial court recognized that the text supported defendants' position. Op. 151-52. Plaintiffs ask this Court to infer from the LPA's lack of such language that the LPA intended to *bar* the Sole Member from accepting the opinion. PAB 66. Leave aside that the LLC agreement and the LPA are different agreements between different parties. The LPA itself defeats plaintiffs' argument: Where the LPA drafters sought to assign matters specifically to the GPGP board, they stated *that* expressly. *See, e.g.*, A3061/LPA § 5.11(f). On acceptability, they did not so state, instead deferring to the General Partner's internal governance—which in turn made plain the determination rested with the "Sole Member."

Other provisions of the LLC agreement fortify the Sole Member's authority to accept. Section 5.6 gives the Sole Member "exclusive authority" to act for the General Partner as to the rights in Section 15.1 of the LPA. A1316-18 § 5.6. Plaintiffs sputter that the acceptability determination is part of LPA Section 1.1, not Section 15.1. PAB 66. But as a matter of law, the LPA's definition of "Opinion of Counsel" is "incorporated into Section [15.1] and made a part thereof as if set forth therein." *Borealis Power Holdings Inc.* v. *Hunt Strategic Util. Inv., L.L.C.*, 233 A.3d 1, 11 (Del. 2020) (Vaughn and Montgomery-Reeves, JJ,

concurring). So Section 5.6's "exclusive" grant necessarily includes accepting the opinion "incorporated … and made a part" of that Section. *Id.*

And Section 5.6 separately gives "the Sole Member [] exclusive authority over the business and affairs of the Company that do not relate to management and control of the MLP." A1316 § 5.6. Plaintiffs and the trial court try to say the acceptability determination "relate[s] to [] management and control" because under analogous corporate-law principles a "decision that would affect the success of a take-private transaction would relate to the business and affairs of the corporation." Op. 162-63 (citing 8 *Del. C.* § 141(a)); PAB 66. The analogy fails. The comparable decision here, if any, was the exercise of the call right, and *that* was indisputably vested in the Sole Member. Acceptance of the predicate opinion was not itself an instance of "management or control"—it was just an appraisal of whether counsel was qualified and competent and its opinion not facially wrong.

B. There is no "surplusage" in Section 15.1(b)

Faced with silence in the LPA compounded by clear LLC agreement text authorizing the Sole Member to accept, plaintiffs parrot the trial court's "surplusage" holding to insist upon different decisionmakers for acceptability and exercise.

Contrary to plaintiffs' claim (PAB 65), this argument was not raised below. The word "surplusage" appears nowhere in the trial court briefing or argument.

Neither does any mention of the interpretive canon disfavoring surplusage or any case addressing that canon. It was unfair for the court to rule against defendants based on an argument never raised. DOB 51-52.

It was also wrong on the merits. The argument the trial court conceived and then blessed is that one decisionmaker at the General Partner must make the exercise decision and a different decisionmaker within the General Partner must make the acceptability determination, because otherwise there would be "surplusage" in the LPA. Op. 158-59. The LPA's text refutes this argument—its provisions refer to the "General Partner" for both purposes. A3030-104/LPA §§ 1.1, 15.1(b). The court's construction would have "General Partner" carry two different meanings in the same provision—the GPGP board (determining acceptability), and the Sole Member board (deciding exercise). PAB 63. All without an express textual directive. That is not a reasonable reading. *Comerica Bank* v. *Glob. Payments Direct, Inc.*, 2014 WL 3567610, at *11 (Del. Ch. July 21, 2014).

Nor is the "surplusage" conclusion logically correct. Acceptance and exercise are separate, non-redundant steps. Once the General Partner accepts the opinion of counsel, it has 90 days to decide as a business matter whether to pay the substantial costs of repurchasing all outstanding shares. A3117/LPA § 15.1(b). These are different inquiries—one legal, one commercial. One creates an option;

the other addresses whether to exercise it. Plaintiffs' assertion that Loews would not seek out an opinion unless it had already decided to exercise, PAB 64, is refuted by the record: Loews sought additional time to conduct business diligence even after it expected to receive the opinion. A5438-43; A661/398:3-21 (Alpert).

C. The LPA confers no extra-contractual "protection"

Nor can the trial court's extra-textual interpretation be justified by an imagined structural mandate to "protect" the limited partners.

Again ruling *sua sponte*, the court cited a 400-year-old decision to hold that the Sole Member should not be the "judge in [its] own cause." Op. 159. The proposition that an MLP agreement should be interpreted to create judicial-type protections for limited partners is made up and contrary to defendants' unanswered showing (DOB 54) that this Court will not impose fiduciary obligations incompatible with the standards LP agreements specifically provide. This analysis below strays so far from the question presented under Boardwalk's LPA that even plaintiffs do not defend it. They instead say the LPA's drafters intended for acceptability to be determined in the General Partner's *representative* capacity. PAB 65, 68-69.

This makes no sense. A representative-capacity decision is one made "in the best interests of the Partnership," A3091/LPA § 7.9(b)—a definition plaintiffs nowhere acknowledge. Exercise of the call right is committed to the General

Partner's sole discretion, guided only by its self-interest; that point is clear from the LPA's text, A3091-117/LPA §§ 7.9(c) & 15.1(b), and underscored in Boardwalk's relevant filings, *e.g.*, A1366. Even the trial court would not hold that acceptability was a "representative capacity" decision, because requiring the General Partner to serve the "best interests of the partnership" in deciding whether to accept an opinion authorizing exercise would nullify the grant of discretion in the exercise itself and effectively gut the right.

Nor does the contractual structure of the GPGP board suggest an intent to "protect" limited partners. Plaintiffs point to the residual alleged protection afforded by "independent director input" even on a board that could be populated by majority insiders. PAB 65. But that is an impossibly thin reed on which to hang a specific mandate, articulated nowhere in the LPA and at odds with the conceded "textual hooks" of the LLC agreement, Op. 151, that the GPGP board rather than the Sole Member must—with respect to one aspect of the call right but not the other—have exclusive authority.

D. "Ambiguity" cannot be manufactured through citation of lawyer correspondence

To create ambiguity in the LPA, plaintiffs, like the trial court, rely on a preliminary Skadden email (which Loews never saw, and which ran contrary to the advice of every other firm) suggesting the GPGP board was the correct entity to accept. PAB 31-33, 60-61. But the course of events here is clear. Having heard

from Skadden and then RLF on acceptability—and having properly solicited each firm's independent views—Alpert asked them to discuss and reach a consensus. When they did so, all agreed the Sole Member had authority to accept. B1323; A764-65/807:24-813:16 (Raju); AR140/27:22-28:22 (Grossman Dep.).

Plaintiffs claim Skadden was "cut out" after this. PAB 80. The opposite is true. Skadden occupied center stage in advising the Sole Member whether it had authority to accept the opinion, culminating in its detailed June 29, 2018 presentation. There, Voss, Naeve and Grossman advised the Sole Member:

> We believe that it is reasonable for the directors of Boardwalk Holding to conclude that they have the authority, under the LPA and the BGL Limited Liability Company Agreement, to make the determinations called for under Article XV of the LPA, including the exercise of the Call Right and the acceptability of Bakers Botts as counsel and of the Baker Botts Opinion.
>
> 3 Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates

A4734.

That the firms acknowledged there could be alternative arguments does not show the language was "fairly susceptible" to more than one ***reasonable*** interpretation. *See Rhone-Poulenc Basic Chems. Co.* v. *Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992). Rather, their collective efforts to scrutinize the relevant provisions and reach consensus reflect diligence in approaching the issue.

Finally, even if the LPA were ambiguous, plaintiffs have no answer to defendants' showing that *contra proferentem* in this context should vindicate the "reasonable expectation[s] of investors" as established through public filings.

DOB 34. Boardwalk's filings repeatedly disclosed that the authority to exercise the call fell to the General Partner's sole discretion and would be made in its interest, not "the best interests of the [P]artnership." A1365-66. No reasonable investor could have understood differently about any part of the call right or its attendant processes. *Contra proferentem* is not a license for courts to undermine lawyers' good-faith judgments or to impose outcomes reasonably foreseen by no one.

III. THE DAMAGES AWARD IS BARRED BY EXCULPATION

Recovery here is barred by the LPA's exculpation provision. A3090/LPA § 7.8(a). That provision is "conclusively presumed" to apply because the General Partner, acting through its three Sole Member directors, relied on Skadden's advice that Baker's opinion was reasonable and could be accepted by the Sole Member. A3092/LPA § 7.10(b); DOB 57; A4732-54. The trial court's contrary ruling is an independent ground for reversal.[6]

A. The General Partner reasonably relied on Skadden's advice

The General Partner's reasonable reliance on Skadden's advice should have been the start and end of the court's analysis. Instead, the court dismissed Skadden's advice—without elaboration—as "whitewash." Op. 174. Rather than defend the indefensible, plaintiffs pretend Skadden never provided its final advice, and that the General Partner did not rely on it. PAB 80. Neither is true.

1. Skadden delivered final advice about the opinion and acceptability

Skadden advised the Sole Member board it could determine acceptability, that all of Baker's conclusions were reasonable, and that it was reasonable to rely on the financial data Boardwalk supplied. A4732-54. Skadden has stood by that

[6] Plaintiffs' suggestion that "[t]he GP bears the burden to prove exculpation applies," PAB 71, is wrong, as this Court's recent precedent confirms. *See* DOB 56; *Brinckerhoff* v. *Enbridge Energy Co., Inc.*, 159 A.3d 242, 260 (Del. 2017).

advice. A5551-52/233:7-237:16 (Grossman Dep.). Plaintiffs' riff that the firm was "beaten, ignored, misled and threatened by the GP's agents," PAB 70, 80, is preposterous (and contrary to the evidence). Skadden is not a schoolyard doormat that just forks over its lunch money. It is among the world's toughest, most prestigious, most sophisticated law firms. It was working through complex issues with similar firms on a timetable truncated by the original plaintiffs. Skadden rendered its advice in good-faith discharge of its professional responsibilities; even the trial court did not find otherwise. The General Partner reasonably relied on that.

2. The General Partner relied on the advice

Plaintiffs argue that because Skadden advised the Sole Member rather than the GPGP board, its advice to the General Partner was somehow ineffective. PAB 79. That's wrong, even if plaintiffs are right that the GPGP board had to determine acceptability. The GPGP acted for the General Partner, and both the GPGP board and the Sole Member acted, by turns, for the GPGP. In advising the Sole Member, Skadden was advising the General Partner, as a matter of law. *See Norton* v. *K-Sea Transp. Partners L.P.*, 67 A.3d 354, 367 (Del. 2013) ("[B]ecause K–Sea GP is a 'pass-through' entity controlled by KSGP, the only reasonable inference is that K–Sea GP relied on the fairness opinion" received by KSGP).

Moreover, V&E's Ramey Layne advised the GPGP board that the Sole Member had authority to accept the opinion on behalf of the General Partner,

which the Sole Member did. A4593. So even under plaintiffs' theory, the GPGP board's reliance on V&E—pursuant to which it acceded to the Sole Member undertaking the challenged action—confers the conclusive presumption upon the General Partner under Section 7.10(b).

3. Section 7.9(a) does not apply

Finally, plaintiffs contend for the first time on appeal that exercise of the call right was governed by the conflicted-transaction standard of Section 7.9(a). A3090-91/LPA § 7.9(a). The argument is forfeited, *Lemos* v. *Willis*, 858 A.2d 955, 957 n.5 (Del. 2004), and meritless. As the trial court recognized, Op. 23, the LPA expressly committed exercise of the call right to the sole discretion of the General Partner. A3084-117/LPA §§ 7.1(b)(iii), 7.9(c), 15.1(b). Exercise was therefore governed by Section 7.9(c), not Section 7.9(a).

B. There was no willful misconduct

Plaintiffs invoke various theories of willful misconduct to skirt the conclusive presumption. All fail.

1. The Sole Member's directors are the relevant decisionmakers

Under *Dieckman* v. *Regency GP LP*, 2021 WL 537325 (Del. Ch. Feb. 15, 2021), *aff'd*, 2021 WL 5112499 (Del. Nov. 3, 2021), a court considering exculpation for board action must examine the scienter of the majority of the board. *Id.* at *36. Plaintiffs seek to distinguish *Regency* on the ground that the

challenged action related to "manage[ment]" rather than governance. PAB 76. Not so. The acceptance of the opinion of counsel was plainly board rather than management action—it was the board that acted—as was the exercise of the call right that is supposed to have caused plaintiffs' purported damages. Thus, the relevant states of mind were those of the Sole Member board's three directors.

2. There is no evidence of "willful misconduct" by any Sole Member director, much less a majority of them

Try as they might, plaintiffs cannot find the requisite scienter. They train their sights on two of the three Sole Member directors—Siegel and Wang—but none of their shots land.

The assault on Siegel seeks to squeeze "willful misconduct" from apparent acts of diligence. Yes, as plaintiffs point out, Siegel discussed acceptability with GPGP's independent directors; he requested an impact analysis; he focused on ADIT; he addressed Barclays' accusations of securities fraud. PAB 74, 77. Unexplained is how any of this constitutes "willful misconduct." The only other thing plaintiffs cite is the trial court's undifferentiated, uncited utterance finding that Siegel, along with Alpert, McMahon, and Johnson, "orchestrated the sham Opinion … and diverted the acceptability determination … from the GPGP Board to Holdings." Op. 171. That finding is insupportable, DOB 59-60, leaving plaintiffs stitching together bits of the trial court's opinion talking about other

people, PAB 74-75. The evidence does not support plaintiffs' claim that Siegel engaged in willful misconduct.

Moreover, plaintiffs need not one but two corrupt directors. Hence their newly-minted attack on Jane Wang, which is both forfeited and meritless. The sum total of the attack on Wang—whom plaintiffs did not even depose—is that she was involved in the financial modeling and diligence for Loews's business alternatives; understood that near-term negotiated rates would be safe; and worked on Boardwalk's press release disclosing the same. PAB 77-78. Not even the trial court attempted to find either "willful misconduct" or "bad faith" on these bases.

3. Other agents' supposed "willful misconduct" does not vitiate exculpation

Unable to paint a majority of the Sole Member directors as bad actors, the trial court instead imputed the supposed bad faith of others to the General Partner. Even putting *Regency* aside, this was reversible error.

First, as defendants explained in their opening brief, the trial court's findings of willful misconduct as to Loews and Boardwalk personnel are clearly erroneous. DOB 45-48, 59-62. Plaintiffs all but ignore that discussion, opting instead to repeat what the trial court said without defending its legal sufficiency. PAB 73-74; *see* pp. 31-33 (Alpert), 19, 31-32 (McMahon and Johnson), 46-47 (Siegel), *supra*.

Second, in response to defendants' showing (DOB 62-63) that the trial court erroneously imputed Baker's supposed bad faith to the General Partner, plaintiffs

offer next to nothing. They cite no case permitting the imputation of scienter from a law firm to its client. And rather than dispute that Section 7.8(b) of the LPA bars imputing Baker's state of mind to the General Partner, plaintiffs assert that *the General Partner's agents* acted with scienter in supplying Baker with flawed information, PAB 77—conceding that Baker's alleged scienter is legally irrelevant.

Third, plaintiffs cite no evidence for their claim that "personnel kept the [GPGP] board ignorant," which they argue renders exculpation "perverse." PAB 77. There was no "informational vacuum" here, *id.*; Skadden explained the process to the board in detail, as the Court will see when it reviews Skadden's detailed presentation, A4732-54.

IV. THE DAMAGES AWARD IS INDEFENSIBLE

A. The damages award erroneously disregards Boardwalk's market price

The trial court awarded plaintiffs nearly $700 million in damages—the largest class recovery in Delaware history. This stratospheric award was based entirely on the litigation-driven DDM of plaintiffs' expert and reflected a unit price of $17.60 that was:

- 64% higher than Boardwalk's unaffected market price, $10.74;
- 59% higher than Boardwalk's closing price on the last trading day before Loews's disclosures that it was considering exercising the call right, $11.04;
- 46% higher than the price at which Loews exercised the call right, $12.06; and
- higher than *every* price target set by any analyst covering Boardwalk, DOB 66.[7]

The award is insupportable.

Plaintiffs do not dispute that this Court has long held that the price produced by an efficient market is generally a more reliable assessment of fair value than an expert's judgment-laden, litigation-driven valuation analysis. *See* DOB 64-67; *Dell, Inc.* v. *Magnetar Glob. Event Driven Master Fund Ltd*, 177 A.3d 1, 24 (Del.

[7] That the $12.06 exercise price is well above the $10.74 unaffected price belies plaintiffs' claim that Loews somehow manipulated the market with its securities disclosures, PAB 31—which, as plaintiffs do not contest, were required under federal securities law. DOB 20.

2017); *DFC Glob. Corp.* v. *Muirfield Value Partners, L.P.*, 172 A.3d 346, 369 (Del. 2017). Nor do they dispute that both parties' experts agreed Boardwalk traded in an efficient market, DOB 64-66; A849/1147:16-1148:12 (Hubbard); A829/1067:6-9 (Atkins), or that DDMs, like DCFs, are particularly sensitive to their assumptions. DOB 66.

Instead, plaintiffs assert this Court's guidance in *DFC*, *Dell*, and their progeny "ha[s] no application" here—that the market price must be rejected as an indicium of value—because this is not a statutory appraisal action. PAB 83-84.

This is not the law. Delaware courts routinely rely on market price to value publicly-traded securities outside the appraisal context. *E.g.*, *Regency*, 2021 WL 537325, at *27, *48 (relying on unaffected market price to value MLP units in breach of contract case); *Gotham Partners, L.P.* v. *Hallwood Realty Partners, L.P.*, 855 A.2d 1059, 1080-81 (Del. Ch. 2003) (crediting market price in valuing limited partnership units), *aff'd*, 840 A.2d 641 (Del. 2003). Market prices "should matter in formulating a remedy" where the "[p]artnership's units … were listed on a major exchange." *Id.* at 1080.

The market price is especially pertinent here, where the LPA expressly identified market prices as the benchmark to value the limited partners' units, DOB 67; A3117/LPA § 15.1, and the alternate valuation was prepared by "an expert

witness who caters her valuation to the litigation imperatives of" the client. *Dell*, 177 A.3d at 24.

1. That Boardwalk had a controlling general partner does not justify disregard of market evidence

Where limited partnership units trade in an efficient market, Delaware courts have relied on the market price as an indicator of value, notwithstanding the presence of a controlling general partner. *See* DOB 68-69; *Regency*, 2021 WL 537325, at *27; *Gotham Partners*, 855 A.2d at 1080-81.

Plaintiffs offer no response to this authority. They just reassert in a single sentence that trading price is not a reliable gauge "because Loews controlled Boardwalk." PAB 84. Plaintiffs cite *Dell*, *id.*, but *Dell* says only that "[a] market is more likely efficient" if it has—among several other variables, all present here—"no controlling stockholder." 177 A.3d at 25. Where, as here, over 100 million units traded widely in a market plaintiffs' expert conceded was efficient, that observation is beside the point. DOB 2, 10.

There is no evidence, and the trial court cited none, that a controller's presence affected the price of Boardwalk's public units. DOB 68-69. There is no evidence that Loews ever has or planned to extract private benefits of control through Boardwalk, or that any market participant perceived that Loews might try to do so, or that any Boardwalk unitholder ever discounted the units' value because

Boardwalk had a controller.[8] Plaintiffs concede all of this by disputing none of it. *Compare* DOB 68-69 *with* PAB 84. They are thus left with no basis to sustain the trial court's complete disregard of all market evidence.

2. No "material, nonpublic information" justified disregard of market evidence

Plaintiffs contend the market lacked material information that Boardwalk's "distributions would quadruple in 2023." Op. 179; PAB 85. The record refutes that finding.

First, the market was already and uniformly projecting that Boardwalk would massively increase distributions. DOB 70-71.[9] Analysts' average projected distributions were also higher than those in the Loews model through 2023. DOB 71. Plaintiffs emphasize projections showing a "quadrupl[ing]" of distributions, PAB 85—but ignore that the market expected that increase, and *sooner*, DOB 70-

[8] To the contrary, Bandera conceded that Boardwalk's controllers had a "reputation [for] fair dealing." AR136/203:8-11 (Shrock Dep.).

[9] This expectation aligned with Boardwalk's consistent public guidance that it could potentially increase distributions when its debt-to-EBITDA ratio dropped below 4.0x. AR3; AR17.

71. The market had in every sense a *more optimistic* view of Boardwalk's prospects than reflected in the Loews model.[10]

There is thus no factual basis for a finding that the market's valuation of Boardwalk would have been higher had the internal projections been made public. To the contrary: Had Boardwalk made its own estimates public, the effect on the trading price would have been negative. *See Fir Tree Value Master Fund, LP* v. *Jarden Corp.*, 236 A.3d 313, 326 (Del. 2020) (affirming trial court's holding "that the market did not lack material nonpublic information" after "comparing [] management's projections and those from market analysts").

Plaintiffs seek to undercut the undisputed evidence concerning analysts' projections by asserting that "analysts had been wrongly projecting increased distributions since the 2014 cut." PAB 85. The sole "evidence" plaintiffs cite for this proposition is testimony from their expert Atkins, who admitted he "didn't pay any attention to the analysts' projections" in putting together his reports. A830/1069:13-16 (Atkins). Anyway—so what? Analyst predictions of course baked in previous distribution information, and they uniformly predicted higher distributions than Boardwalk's private estimates.

Plaintiffs then claim that Boardwalk's expert Hubbard "conceded" the

[10] Citing nothing, plaintiffs say that the Loews model "exceeded analyst estimates in key respects." PAB 85-86. Plaintiffs never identify these "key respects."

market did not anticipate increases in distributions as high as were reflected in the Loews model. PAB 86. This is made up. Hubbard was referring to a demonstrative containing *Atkins's* projected distributions, which were even higher than Loews's base case. A860-61/1192:24-1193:21 (Hubbard); AR162; *see also* A853/1163:20-1164:3 (Hubbard) (noting the market does not "assume distributions as high as Mr. Atkins' [model]," and that "analysts were, in fact, more optimistic than the company").

Second, like the trial court, plaintiffs ignore that Boardwalk's own 10-year management projections forecasted flat $0.40 distributions for the entire projection period. DOB 72; A3756. Plaintiffs dismiss these projections as a mere "Restructuring Study" and assert that the distributions were kept "constant" only to assess the "impact of the corporate structure changes" being studied. PAB 86 (quoting A3754). But the email plaintiffs quote does not even mention distributions. *See* A3754. And unrebutted testimony corroborated what the projections showed on their face: "There was no plan for … increased distributions in [20]23 or any year thereafter." A740-41/713:23-714:20 (Siegel).

Third, also like the trial court, plaintiffs cannot explain why the market would view as material "inherently more speculative" distributions out 10 years. DOB 72-73; *Kihm* v. *Mott*, 2021 WL 3883875, at *15 (Del. Ch. Aug. 31, 2021), *aff'd*, 2022 WL 1054970 (Del. Apr. 8, 2022). Plaintiffs claim it is "reasonable" to

project distributions for FERC-regulated pipeline companies out 12 years because "the midstream business … is a very steady-state business" with "long-term contracts" and "very predictable cash flows." PAB 86. This ignores that Boardwalk faced significant re-contracting risk in 2018-2020, DOB 71; A738-39/705:1-706:2 (Siegel), and that none of the 11 analysts covering Boardwalk projected distributions out more than a few years, DOB 70-71. Moreover, as recent geopolitical events have demonstrated, the gas industry is subject to massive volatility.

Finally, the outer-year distribution projections reflected in the Loews model were particularly unreliable, and therefore immaterial, given that they reflected a "gross set of assumptions" used only to "sanity check" the five-year model's terminal multiple. DOB 73; *see In re PNB Holding Co. S'holders Litig.*, 2006 WL 2403999, at *16 (Del. Ch. Aug. 18, 2006) ("our law has refused to deem projections material unless the circumstances of their preparation support" their reliability). The Loews model was neither relied upon by Loews's management nor presented to Loews's board. DOB 73; *see Wayne Cnty. Emps.' Ret. Sys.* v. *Corti*, 954 A.2d 319, 332 (Del. Ch. 2008) (projections immaterial where no evidence board relied on them).

If Loews's below-market-consensus 10-year-out projections invalidate market evidence, then market evidence is a dead letter in Delaware—because every

company has non-public forecasts. The question is whether the projections render market evidence unreliable. These don't.

3. The $1.5 billion "Value Creation" fiction

Plaintiffs continue to press the false narrative that Loews itself believed Boardwalk was undervalued because Loews's "Updated Base Case" supposedly demonstrated that exercising the call would generate "$1.5 billion in 'Value Creation.'" PAB 87. The trial court relied on this same $1.5 billion figure to justify its $690 million damages award, Op. 3, 106, 190, going so far as to characterize its award as "conservative" in light of it, *id.* 190.

But the value creation contention is wrong. And plaintiffs know it. Buried in a footnote on page 87 of their brief, plaintiffs concede that the $1.5 billion figure does not reflect Loews's expected benefits from exercising the call right. PAB 87 n.17. Rather, it reflected Loews's *un*discounted projected growth for *all* of Boardwalk. Loews only acquired 49% of Boardwalk's units through the exercise of the call right, and thus only $760 million of Boardwalk's projected value increase can be attributed to those units. *Id.*

But even that $760 million figure is grossly misleading—because it constitutes Boardwalk's increase in projected value *five years in the future*. This figure results in a "mediocre" 9.9% rate of return on Loews's $1.5 billion investment in exercising the call right—a rate of return lower than the discount

rates set by every analyst covering Boardwalk. A748-49/744:4-747:24 (Siegel); A4713; A5738; A3584; A3448. Discounting Boardwalk's projected value at the analysts' rates would generate a *net loss* on Loews's $1.5 billion investment. A749/747:7-24 (Siegel); A4712. And plaintiffs' suggestion that Loews somehow "expropriat[ed]," PAB 72, any value from the class ignores that the $1.5 billion figure reflected over $200 million in tax benefits available *only* to Loews through the exercise of the call right. A4713. It also ignores the estimated $74 million annual EBITDA impact that Boardwalk would have suffered had it remained an MLP—a hit Loews avoided only by buying out the public units and converting its structure. A721/636:7-637:4 (Johnson); A744/727:6-17 (Siegel).

Plaintiffs' repeated accusation that Loews was eager to exercise the call right to "'snatch up' units at a 'bargain price'" thus makes no economic sense. PAB 72. Nor is it consistent with the evidence. After substantial diligence, Loews determined "it didn't make sense for Boardwalk to remain a publicly traded MLP," A739/707:11-21 (Siegel), and only then was it apparent that exercising the call right was "the best [among] not particularly attractive alternatives." A748/744:14-24 (Siegel). The $1.5 billion "Value Creation" fiction—which served as a key justification for the unprecedented departure from market evidence below—has no basis in fact. And the trial court's determination to accord market evidence no

weight is a pure error of law which, unchecked, will undermine this Court's recent case law and the reliability of Delaware's law of remedies.

B. The trial court erroneously relied upon appraisal-law principles

The trial court's rejection of the market evidence must be reversed for an additional, independent reason: If, as the court hypothesized, Boardwalk's units traded at a discount by virtue of its controller, then that discount was inherent in the units' value. DOB 74-75. By failing to recognize as much, the court effectively "import[ed] into the limited partnership context all the artificial complexities of our corporate appraisal jurisprudence," and awarded plaintiffs a windfall *pro forma* share of Boardwalk's value without consideration of any minority discount. DOB 74; *Gelfman* v. *Weeden Invs., L.P.*, 859 A.2d 89, 125 (Del. Ch. 2004).

Plaintiffs offer no explanation for this legal error. Nor can they challenge the obvious impact of the error: Loews was required to pay full-market price for shares that by hypothesis traded (and were purchased at) a large discount. Plaintiffs respond only that "[a]pplying a market-based discount to [the damages] calculation would defeat its purpose and mix marke[t]-based and income-based approaches." PAB 88. This misses the point. If, as the court imagined, Boardwalk's units reflected a minority discount, plaintiffs were not entitled to the

bonanza of an undiscounted payout. The court gave them one anyway. That was reversible error.

V. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO AWARD EVEN MORE DAMAGES

A. Question Presented

Whether the trial court abused its discretion in declining to credit every aspect of plaintiffs' expert's damages model.

B. Scope of Review

Damages determinations are reviewed for abuse of discretion. DOB 64.

C. Merits of Argument

Plaintiffs ask this Court to compound the trial court's determination to exclude all market evidence by accepting their demand to set the "FERC switch" to the "Off" position. PAB 89-90. Plaintiffs claim "uncertainty" about the measure of damages, the risk of which defendants should bear under the "wrongdoer rule." PAB 90.

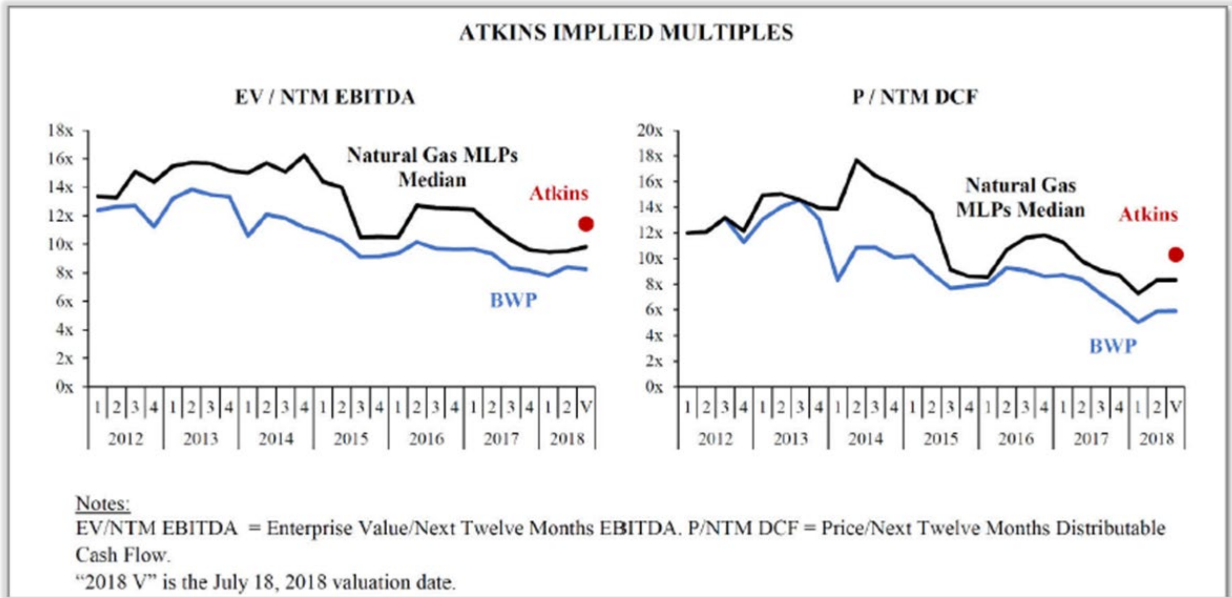
The wrongdoer rule applies where the defendant's breach caused uncertainty about the amount of damages. *See Siga Techs., Inc.* v. *PharmAthene, Inc.*, 132 A.3d 1108, 1132 (Del. 2015). Here, the purported breach was exercising the call based on FERC's actions, the EBITDA impact of which was known, not uncertain. Loews's model incorporated Boardwalk's projection that, if Boardwalk remained an MLP, it risked losing approximately $74 million in EBITDA per year due to a potential FERC rate case as to Texas Gas. A721/635:24-636:20 (Johnson).

Plaintiffs suggest that Loews's alleged "opportunistic timing of the exercise

of the Call Right" "just before FERC published its final rule" on ADIT caused uncertainty. PAB 90. But the original plaintiffs, not Loews, drove that timing. DOB 37. Moreover, the unrebutted testimony establishes that FERC's elimination of ADIT did not affect the $74 million impact estimate. A721/636:7-637:4 (Johnson) (noting that impact of ADIT policy on $74 million estimate "would have been minimal"); A744/727:6-17 (Siegel).

To justify disregarding the $74 million impact estimate, Atkins cited nothing but the report of another plaintiffs' expert, Webb—which he conceded he had not even read. A827/1059:21-1060:19 (Atkins). Simply put, there was no uncertainty about FERC's impact on Boardwalk, let alone uncertainty caused by defendants. The wrongdoer rule has no application in this case.

Further, plaintiffs' proposed modification to the model would yield valuations of Boardwalk even more grotesquely unrealistic than the one the trial court adopted:



AR176; A5681-82; A851/1153:17-1154:20 (Hubbard). The result would be a damages award of $20.20 per unit, an *88.1%* premium to the unaffected market price of $10.74. The trial court did not abuse its discretion in declining to pile more absurdity onto its already absurd award. *See Siga Techs.*, 132 A.3d at 1130-32.

CONCLUSION

The judgment should be reversed and plaintiffs' cross-appeal should be denied.

Dated: April 20, 2022

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CERTIFICATE OF SERVICE

I hereby certify that, on April 20, 2022, true and correct copies of *Appellants' Reply Brief and Cross-Appellees' Answering Brief* were caused to be served by File & Serve*Xpress* on the following counsel of record:

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