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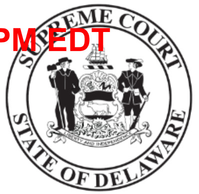

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BOARDWALK PIPELINE PARTNERS, LP, BOARDWALK PIPELINES HOLDING CORP., BOARDWALK GP, LP, BOARDWALK GP, LLC, and LOEWS CORPORATION, Defendants Below, Appellants/Cross-Appellees	)	
v.	)	No. 1, 2022
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	)	Court Below: Court of Chancery of the State of Delaware C.A. No. 2018-0372-JTL

<u>CROSS-APPELLANTS' REPLY BRIEF ON CROSS-APPEAL</u>

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INTRODUCTION

As Plaintiffs demonstrated in their answering brief, this Court should affirm the Court of Chancery's judgment favoring Boardwalk's former minority unitholders and reject Defendants' efforts to conjure a crisis where none exists. The well-reasoned decision below turned on the Court of Chancery's thorough assessment of the extensive evidence before it and routine principles of contract interpretation. It stands for the uncontroversial proposition that an illegitimate opinion of counsel is not a blank check for willful misconduct.

If this Court revisits damages, it should direct the Court of Chancery to apply the wrongdoer rule. Here, application of the wrongdoer rule would require adoption of a scenario Loews built into its highly-refined financial projections which turned out to be correct—the March 15 FERC Actions would have *no impact* on Boardwalk's rates or revenues. This approach would *not* alter the Loews Model. Rather, it would merely set the "FERC Switch" to "Off" and thereby trigger a scenario management contemplated, calculated, and presented to the Loews Board when deciding to spend $1.5 billion of its own money. The scenario came true, as management thought it might.

Selecting the "Off" position would serve the policy goals behind the wrongdoer rule by ensuring that Defendants do not benefit from the uncertainty *they created* by choosing *not* to wait for FERC's final rules before exercising the Call

Right. Instead, they timed their minority take-out to close the day before a regularly scheduled FERC meeting and just hours before FERC issued a final rule that eliminated their claimed basis for exercising the Call Right. The "Off" setting would also align with the Court of Chancery's amply-supported factual findings regarding the lack of real-world negative impact of the March 15 FERC Actions and the willfulness of Defendants' misconduct.

In their answering brief, Defendants fail to explain how selecting one of the Loews Model's *own* inputs could be construed as altering the model. They also contend that the "wrongdoer rule has no application in this case" because there was "no uncertainty" to resolve. Defendants would have this Court ignore the very existence of the FERC Switch, which demonstrates that Defendants contemporaneously recognized—and indeed, *modeled*—the same uncertainty they now deny.

Defendants also rehash their general attack on the Court of Chancery's damages calculations and its finding that Defendants' trading price-based damages analysis was unpersuasive. This is a breach of contract case, not an appraisal. The Court of Chancery adopted the proper approach to measuring the expectation damages caused by the General Partner's intentional and opportunistic breach of the LPA.

ARGUMENT

I. DEFENDANTS CANNOT SHOW THAT SETTING THE FERC SWITCH TO "OFF" ALTERS THE LOEWS MODEL

A. Loews Built the FERC Switch into its Model for a Reason

Loews's sophisticated corporate development team created a model to assess the exercise of the Call Right. That model included alternative scenarios projecting the potential impact—or lack thereof—the March 15 FERC Actions could have on Boardwalk's rates and revenues. The model calculated the value Loews expected to capture by cashing out the minority under each scenario.

Early in the development process, Loews inserted a toggle into the model to make switching between these alternative "FERC Impact" scenarios as easy as clicking a button. *See* B557. After more than ninety versions of the model, the FERC Impact scenarios in the final version ranged from projecting *no impact* on Boardwalk's annual earnings (with the switch set to "Off"), up to a maximum projected annual impact of $73.9 million.[1]

The switch's "Off" position reflected the likely future—which soon came to pass—in which Boardwalk's recourse rates (and resulting revenues) did *not* decrease following the implementation of the March 15 FERC Actions. *See, e.g.*, Op. 3-4 (finding that "the regulatory changes ultimately *did not have any negative effect on*

[1] *See* B1591 at "Side Model" Tab, Row 2, Columns V & W, and Row 11, Columns U-AC (reflecting "Total FERC Impact" in each scenario).

Boardwalk") (emphasis added); POB 37 (collecting trial testimony confirming Boardwalk's recourse rates remained unchanged after March 2018). The maximum impact scenario reflected an unlikely alternate reality—what *could* have happened in the "low" probability event that Texas Gas *faced a rate case* following the March 15 FERC Actions, *lost* that rate case, saw its recourse rates *lowered* as a result, and FERC adopted a *less favorable treatment of ADIT* than it ultimately did.[2]

The images below—excerpted from the native version of the Loews Model (B1591)—illustrate the FERC Switch in action and the resulting "Total FERC Impact" to Boardwalk's EBITDA.

Projecting <u>No</u> FERC Impact

	A	S	T	U	V	W	X	Y	Z	AA	AB	AC	AD	AE
1	Boardwalk Pipeline Par				Case:	Budget			Post Plan Annual Unapproved Capex				$300.0	
2	*Budget*				FERC:	Off			Equity Financing				40%	
3		Maint. Capex Adj		-	Terminal Multiple		10.0x		Set Coverage				1.10x	
4	*($ in millions)*							Forecast						
5	**Distributable Cash Flow**	**2017A**	**2018F**	**2019F**	**2020F**	**2021F**	**2022F**	**2023F**	**2024F**	**2025F**	**2026F**	**2027F**	**2028F**	**2029F**
6	Adjusted EBITDA	$838.5	$735.5	$718.3	$677.7	$730.1	$761.2	$797.6	$847.6	$877.6	$907.6	$937.6	$966.8	$994.9
7	*of which: Existing Assets*	*824.2*	*680.1*	*565.9*	*415.0*	*385.8*	*394.1*	*394.1*	*767.6*	*767.6*	*767.6*	*767.6*	*767.6*	*767.6*
8	*of which: Above Plan (Incl. Recc*	--	*10.0*	*5.0*	*10.0*	*20.0*	*20.0*	*20.0*	*20.0*	*20.0*	*20.0*	*20.0*	*20.0*	*20.0*
9	*of which: Approved Growth*	*14.3*	*37.9*	*128.7*	*178.5*	*192.7*	*192.2*	*192.2*						
10	*of which: Unapproved Growth*	--	*7.5*	*18.7*	*74.3*	*131.6*	*155.0*	*191.3*	*60.0*	*90.0*	*120.0*	*149.9*	*179.2*	*207.3*
11	Total FERC Impact		-	-	-	-	-	-	-	-	-	-	-	-

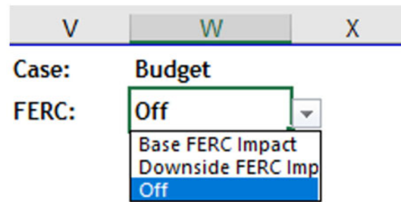
[2] As the Court of Chancery found, Defendants and Baker Botts recognized why the March 15 FERC Actions were unlikely to have a negative impact: (1) Boardwalk's two other pipeline subsidiaries—Gulf South and Gulf Crossing—were in "no danger" of facing a rate case and having their recourse rates changed following the March 15 FERC Actions (Op. 51, 55-56; POB 24, 48-49 & n.6); (2) Texas Gas faced only a "low" risk of a rate case occurring during the period in which predictions could be made "with any confidence" and an indeterminate risk of a rate case after that period (Op. 51, 55-56; POB 19, 49); and (3) in the unlikely event Texas Gas did face a rate case, recourse rates could increase, decrease, or stay the same as a result (Op. 33-34, 84-86; POB 13).

Projecting Maximum FERC Impact

	A	S	T	U	V	W	X	Y	Z	AA	AB	AC	AD	AE
1	Boardwalk Pipeline Par				Case:	Budget			Post Plan Annual Unapproved Capex				$300.0	
2	*Budget*				FERC:	Base FERC Impact			Equity Financing				40%	
3		Maint. Capex Adj		-	Terminal Multiple		10.0x		Set Coverage				1.10x	
4	*($ in millions)*							Forecast						
5	**Distributable Cash Flow**	**2017A**	**2018F**	**2019F**	**2020F**	**2021F**	**2022F**	**2023F**	**2024F**	**2025F**	**2026F**	**2027F**	**2028F**	**2029F**
6	Adjusted EBITDA	$838.5	$735.5	$718.3	$677.7	$730.1	$761.2	$797.6	$847.6	$877.6	$907.6	$937.6	$966.8	$994.9
7	*of which: Existing Assets*	*824.2*	*680.1*	*565.9*	*415.0*	*385.8*	*394.1*	*394.1*	*767.6*	*767.6*	*767.6*	*767.6*	*767.6*	*767.6*
8	*of which: Above Plan (Incl. Recc*	--	*10.0*	*5.0*	*10.0*	*20.0*	*20.0*	*20.0*	*20.0*	*20.0*	*20.0*	*20.0*	*20.0*	*20.0*
9	*of which: Approved Growth*	*14.3*	*37.9*	*128.7*	*178.5*	*192.7*	*192.2*	*192.2*						
10	*of which: Unapproved Growth*	--	*7.5*	*18.7*	*74.3*	*131.6*	*155.0*	*191.3*	*60.0*	*90.0*	*120.0*	*149.9*	*179.2*	*207.3*
11	Total FERC Impact		-	($73.9)	($73.9)	($73.9)	($73.9)	($73.9)	($73.9)	($73.9)	($73.9)	($73.9)	-	-

See B1591 at "Side Model" Tab (highlighting added).

The FERC Switch operates as a straightforward dropdown menu in the model, from which users can select the scenario (arranged alphabetically) they wish to apply.



Id. at "Side Model" Tab, Row 2, Columns V & W.

Loews discussed the switch internally and explained how to operate it. *See, e.g.*, B557 (April 9, 2018 internal Loews email forwarding "updated model" and noting that "to switch FERC cases and growth cases, it's the drop down menu in cells W1 and W2 on the side model tab"). As Defendants' valuation expert testified, the switch and its alternative FERC Impact scenarios were clear from the face of the model itself. *See* BR13/44:9-13 (Hubbard Dep.) ("Q: When did you first become

aware of the fact that these projections included alternative scenarios? A: *I guess when I first saw them. They were clearly there in the model*.") (emphasis added).

Management presented these alternative scenarios—including the "Off" scenario projecting no FERC impact—to the Loews Board prior to the exercise of the Call Right. *See, e.g.*, B1462 & n.1 (Loews Board deck summarizing "Updated … Base Case" of Boardwalk's 5-year plan—which utilizes figures from Loews Model with FERC Switch "Off"—and explaining that the set of projections presented for the Board's consumption "*does <u>not</u> include potential FERC impact*") (emphasis added); *id.* at B1468-69 (presenting "No FERC Impact," "FERC Base Impact," and "FERC Downside Impact" scenarios in sensitivities analysis); Op. 106, 190 (discussing Loews Board deck).

In assessing the damages caused by the General Partner's opportunistic breach of the LPA, 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 instead used the maximum projected $73.9 million annual reduction in EBITDA in its calculations. *Id.*; POB 89.

B. Defendants' Claim of Model Modification is Unsupported

In a single conclusory line in their answering brief, Defendants appear to contend that setting the FERC Switch to its "Off" position improperly modifies the

Loews Model. *See* DAB 61 (criticizing "plaintiffs' proposed modification to the model"). But Defendants fail to explain how using the Loews Model exactly as its creators intended could be construed as "altering" or "modifying" the model. *See Flamer v. State*, 953 A.2d 130, 134 (Del. 2008) (noting that "to develop a legal argument effectively" on appeal, the party "must marshal the relevant facts").

Nor could they reasonably do so. Defendants' own model recognized (and quantified) the manifest possibility that the March 15 FERC Actions would have *no impact* on Boardwalk's rates and revenues, a possibility that became reality when FERC issued its final rule just hours after Loews completed its take-out. *See* Op. 106-08; POB 36-37. Defendants' executives had recognized the high likelihood of this scenario within twenty-four hours of the March 15 FERC Actions. *See* Op. 34 (discussing Boardwalk General Counsel McMahon's early recognition that FERC's invitation for pipelines to explain why *no* rate adjustment was warranted by the March 15 FERC Actions "seemed tailor-made for Boardwalk's pipelines"). Calculating damages with the FERC Switch set to "Off" reflects these realities without modifying the Loews Model in any way.

The "Off" position is also consistent with the Court of Chancery's ultimate factual findings on the issue of FERC impact. In short, the Court repeatedly and unequivocally found that the March 15 FERC Actions had no real-world negative effect on Boardwalk or its rates. *See, e.g.*, Op. 3-4 ("Loews was able to acquire the

limited partners' interest at a *highly attractive price* even though *the regulatory changes ultimately did not have any negative effect on Boardwalk*.") (emphasis added); Op. 61 ("[I]n the real world, the March 15 FERC Actions did not have any meaningful effect, much less a material and adverse effect."); Op. 107 ("[FERC's] Final Rule meant there would be no effect on Boardwalk's recourse rates."). Using the FERC Impact scenario that mirrors these factual findings is appropriate.

II. DEFENDANTS SHOULD NOT BENEFIT FROM THE UNCERTAINTY CREATED BY THEIR OWN MISCONDUCT

A. The Wrongdoer Rule Squarely Applies on These Facts

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.'" Op. 188 (quoting *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 565 (1931)); *see also Am. Gen. Corp. v. Cont'l Airlines Corp.*, 622 A.2d 1, 10 (Del. Ch. 1992) (explaining that "fundamental justice" requires that "the perils of such uncertainty should be laid at defendant's door") (internal quotation marks and citation omitted); *Great Hill Equity P'rs IV, LP v. SIG Growth Equity Fund I, LLLP*, 2020 WL 948513, at *22 (Del. Ch. Feb. 27, 2020) (noting that "as a matter of policy," a "wrongdoer should not be permitted to use a prohibition against award of uncertain damages as a shield, where that uncertainty is attributable to the wrongdoer himself").

Courts in Delaware and other jurisdictions routinely apply this "wrongdoer rule." *SIGA Techs., Inc. v. Pharmathene, Inc.*, 132 A.3d 1108, 1131 n.132 (Del. 2015) (collecting authorities); *see also* Op. 175 (quoting *SIGA*); DAB 60 (Defendants recognizing that "[t]he wrongdoer rule applies where the defendant's breach caused uncertainty about the amount of damages") (citing *SIGA*, 132 A.2d at 1132).

In *SIGA*, this Court summarized the proper application of the wrongdoer rule:

> *The Vice Chancellor applied the wrongdoer rule in a limited and proper way*. For instance, as the Vice Chancellor found, *if* SIGA had negotiated in good faith under the [license agreement term sheet], and the parties had executed a final agreement, there would have been *no uncertainty* about the research and development costs under the final license agreement. *The court resolved the uncertainties about those costs against SIGA. Where uncertainty could not be traced to SIGA's breach, the Court of Chancery did not resolve the uncertainty against SIGA.*

Id. at 1132 (emphasis added, internal footnote omitted).

The same result is warranted here. The Court of Chancery found that Defendants attempted to capitalize on the "period of maximum uncertainty that existed after FERC announced" its "proposed [regulatory] changes" but before FERC finalized and "implemented the actual changes." Op. 3. To do so, the General Partner willfully breached the LPA by exercising the Call Right without satisfying the necessary preconditions. Op. 3, 189. Defendants decided not to wait for FERC to take action following public comments on the NOPR and NOI before exercising the Call Right. *See* Op. 79, 122, 144, 146-47. Instead, Defendants timed their minority take-out to close immediately before FERC's regularly scheduled July 19 meeting, when they expected FERC to make additional announcements related to the March 15 FERC Actions that could fatally contradict the assumptions driving the illegitimate opinion of counsel they orchestrated. *See* Op. 100-02; POB 35; A3117-18/LPA §15.1(c) (governing timing of exercise, notice and purchase date); B1029 (Johnson, Boardwalk's Vice President of Rates and Tariffs, explaining that

FERC "indicated its desire to issue an order on the [NOPR] in its July meeting which will take place on July 19"); *infra* at 20.[3]

As expected, FERC acted hours later, issuing a final rule on the NOPR and eliminating Defendants' claimed basis for exercising the Call Right. *See* Op. 106-08; POB 36-37; B1597 (Rosenwasser email discussing FERC's July 19 actions: "Seems all mitigates adverse effect without changing policy. Loews buy in of [B]oardwalk closed day before order came out."); B1592 (Boardwalk's Vice President of Regulatory Affairs observing: "Maybe I wish we were still publically [sic] traded….").

The Court of Chancery recognized that Defendants' misconduct created the uncertainty regarding which FERC Impact scenario to select from the Loews Model to calculate damages. The Court explained: "The 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 (emphasis added). In other words, just as the breach in *SIGA* created

[3] Defendants' timing also maximized the expected price-depressing effect of their coy April 30 disclosures suggesting that the General Partner *might* exercise the Call Right without actually triggering the LPA's 180-day look-back pricing mechanism: Boardwalk's unit price (and the Call Right exercise price) continued to decline steadily after "the implications of the Call Right" and the overhang from LPA §15.1(b)'s pricing formula "s[a]nk in" with market participants. Op. 90-91; POB 30-31.

the uncertainty about the appropriate measure of research and development costs, "[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.* (emphasis added).[4]

As a result, the Court of Chancery recognized that "[u]nder the wrongdoer rule, that uncertainty *should* be resolved against the defendants, meaning *the proper measure* of damages *should use* the Loews Model with the FERC Switch in the 'Off' position." *Id.* (emphasis added). Nevertheless, the Court "decline[d] to apply the wrongdoer rule." *Id.*

If this Court revisits damages, it should direct the Court of Chancery to apply the wrongdoer rule and recalculate damages with the FERC Switch turned "Off." This would serve the policy goals underpinning the wrongdoer rule, including by ensuring that Defendants—who willfully trampled the rights of Boardwalk's former

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[4] As in *SIGA*, the wrongdoer rule is narrow in its application here. The uncertainty at issue is limited to which FERC Impact scenario to select from the Loews Model, not the other inputs to the Court of Chancery's damages calculations. *See SIGA*, 132 A.2d at 1132 (observing that the license agreement term sheet's "core financial terms were not in dispute" and that the "Court of Chancery did not have to resort to the wrongdoer rule to construe" these financial terms "one way or the other" to calculate damages). Moreover, the propriety of selecting the "Off" position was apparent hours after the transaction closed, and its impact was easily calculable, not "impossible to know." *Cf. id.* at 1153 (Valihura, J., dissenting) (noting that "[r]isks of uncertainty concerning future events that are 'impossible to know' do *not* shift to the defendant in a breach of contract case") (emphasis added).

minority unitholders—do not benefit from any uncertainty over the magnitude of the harm they inflicted. *See Story Parchment Co.*, 282 U.S. at 565; *Am. Gen. Corp.*, 622 A.2d at 10; *Great Hill*, 2020 WL 948513, at *22.

Applying the wrongdoer rule would accord with the Court of Chancery's factual findings regarding the willfulness of Defendants' misconduct. Simply put, Defendants acted with scienter—they knew the March 15 FERC Actions would have no effect on Boardwalk's rates (let alone a material one), orchestrated an illegitimate opinion of counsel to justify exercising the Call Right nonetheless, and expropriated massive value from the minority unitholders in the process. *See* Op. 169-72 (detailing knowledge of Defendants' management-level officers and agents); POB 73-78.[5] As its name implies, the wrongdoer rule is designed to ensure that Defendants do not profit from any uncertainty created by their conscious wrongdoing.

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[5] The record is replete with evidence demonstrating that Defendants knew exactly what they were doing. *See, e.g.*, Op. 79-82 (discussing Boardwalk's public comments to FERC explaining that it could not "correctly assess" what Baker Botts's opinion simultaneously purported to assess); Op. 136 (quoting B321) (McMahon criticizing as "priceless" the logic driving the syllogistic rate model underpinning the opinion); Op. 50, 138 (quoting B542) (Johnson stating that the new rate model "should get us where we need to go" despite his earlier analysis finding FERC's actions would *not* have a material impact on Boardwalk's rates); Op. 147-48 (describing Loews as a "forceful client" and explaining that Alpert, Loews Senior Vice President and General Counsel, "knew how to manipulate his outside counsel so that counsel would deliver the answers that he wanted to receive").

B. Defendants Recognized the Uncertainty They Now Deny

Defendants now argue that the wrongdoer rule is inapplicable here because there was "no uncertainty" regarding the impact of the March 15 FERC Actions. *See* DAB 61 (asserting that "there was no uncertainty about FERC's impact on Boardwalk, let alone uncertainty caused by defendants"); DAB 60 (claiming that the "the EBITDA impact of" FERC's actions "was known, not uncertain").

Defendants' incredible claim is entirely refuted by the contemporaneous record. Defendants modeled and presented different FERC Impact scenarios to the Loews Board because the future was uncertain. B1468-69; Op. 106, 190 (discussing Loews Board deck). The very *existence* of the FERC Switch demonstrates that Defendants recognized the same uncertainty they now deny.

Defendants' current litigation position raises a host of questions for which they have no good answers. If, as Defendants now claim, the impact of the March 15 FERC Actions was certain prior to the exercise of the Call Right, why include *alternative scenarios* regarding this impact in the Loews Model? Why go through the trouble of programming the model to easily toggle between these scenarios with the flip of a switch? Why point out the existence of this switch in internal discussions regarding the development of the model and explain how it works? Why present these switchable scenarios—including the "Off" scenario projecting no

FERC impact—to the Loews Board when deciding whether to invest $1.5 billion of Loews's money and take out the minority unitholders?

The answer is obvious: Defendants did all of this because they recognized uncertainty, and they developed alternative scenarios in their sophisticated model to address it.

In a variation on the same theme, Defendants seek to paint the worst-case scenario included in the Loews Model—which *did not* come to pass—as the singular, proper projection made about the potential impact of the March 15 FERC Actions. *See* DAB 60 (stating that the EBITDA impact "was known" and that "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"). This ignores the fact that the Loews Model similarly incorporated the competing projection that there would be *no FERC impact*—which *did* come to pass—and that the FERC Switch existed to illustrate the differences between these scenarios.

The artful language of Defendants' briefing further illustrates why a negative FERC impact was anything but certain. Defendants are careful not to claim that Texas Gas's recourse rates were certain—or even likely—to decline after March 2018, or that Boardwalk's revenues were certain—or even likely—to decrease by $74 million as a result. Instead, their briefs note only that a decline was *possible*—

i.e., revenues *could* (not would) decline *if* Texas Gas faced (and lost) a rate case. *See, e.g.*, DOB 20 ("Boardwalk estimated that Texas Gas, a Boardwalk pipeline, *could* suffer a $74 million decline in revenues *following a rate case* as a result of the March 15 actions[.]") (emphasis added); Defendants' Post-Trial Brief at A1008 ("Boardwalk estimated that Texas Gas *could* suffer a $74 million decline in revenue *following a rate case* as a result of the March 15 Actions[.]") (emphasis added); DAB 60 (stating that Boardwalk "*risked* losing approximately $74 million in EBITDA per year due to a *potential FERC rate case* as to Texas Gas") (emphasis added); *see also* A721/636 (Johnson) (testifying that "[w]e calculated about a $74 million impact *if* Texas Gas were taken into a rate case") (emphasis added).

Defendants' measured and limited characterizations regarding the potential rate impact on *one* of Boardwalk's subsidiaries stands in stark contrast to Baker Botts's sweeping, unsupportable claim that FERC's actions "ha[d]" already or "w[ould] reasonably likely in the future have a material adverse effect" on the recourse rates for *all* of Boardwalk's subsidiaries, when two were in "no danger" of having their rates reduced on any timeline, and there was only a "low" probability the third would even *face*, let alone *lose*, a rate case during the foreseeable future. *See* Op. 123-26; POB 2; A5124; *supra* 4 & n.2.[6]

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[6] In passing, Defendants claim that Plaintiffs' valuation expert (Atkins) improperly "disregard[ed] the $74 million impact estimate" by using the Loews Model with the FERC Switch set to "Off" in his valuation. DAB 61. Specifically,

C. Defendants Drove the Timing of the Call Right Exercise

As an apparent alternative to their assertion that the impact of the March 15 FERC Actions was certain, Defendants also claim that it was "the original plaintiffs, not Loews" who "drove th[e] timing" of the Call Right exercise. DAB 61. Defendants ignore both the contrary record evidence and the Court of Chancery's factual findings on the subject, which cannot be overturned absent clear error. *See SIGA*, 132 A.3d at 1130 ("Where there is more than one permissible determination to be drawn from the evidence, and the trial court chooses one, its finding cannot be clearly erroneous.") (citation omitted).

Contemporaneous documents demonstrate that Defendants intentionally seized on the uncertainty created by the March 15 FERC Actions and sought to exercise the Call Right before FERC provided necessary guidance. *See, e.g.*, Op. 42-43 (detailing initial March 20 legal analysis from Wagner, Baker Botts's FERC practitioner, to Alpert explaining that "[a]bsent further regulatory developments,"

Defendants note that Atkins relied on the report of Plaintiffs' FERC cost-based ratemaking expert (Webb) as the basis for selecting the scenario from the Loews Model that predicted no FERC impact. *Id.* This critique misses the mark. First, an expert may fairly rely on such information when forming the basis of her own opinion. *See* D.R.E. 703 ("An expert may base an opinion on facts or data in the case *that the expert has been made aware of* or personally observed.") (emphasis added). Second, Defendants' own valuation expert similarly relied on the opinion of others—purportedly gleaned during undocumented interviews with Loews management after the initiation of litigation—to determine which FERC scenario to employ in his valuation analysis. BR13/45:20-21 (Hubbard Dep.) (noting that "I used the scenario *I was guided to* in the interviews") (emphasis added).

the March FERC Actions would *not* "have an effect on Boardwalk's rates," and identifying timeline for further FERC action); B471 (Alpert reporting to Loews that while "there are a number of events to occur over the next several months and even years relating to the recent FERC action, including finalization of certain regs, . . . *one may possibly be able to take the position that the most important event has already occurred* (the adoption of the policy) – so that we may not need wait for finalization of regs or other events to occur") (emphasis added); Op. 79, 122, 144, 146-47. In other words, while the "fatal uncertainty" about the potential impact of the March 15 FERC Actions "could have been mitigated simply by waiting," Op. 144, Defendants instead pushed ahead with the Call Right exercise to capitalize on this "fleeting period of maximum uncertainty." Op. 147.

The Court of Chancery also detailed at length the events Defendants orchestrated to obtain the "ultimate protection" for their plan—a global release of claims. *See* Op. 100-02. On May 24, 2018, two Boardwalk unitholders (the "Original Plaintiffs") initiated this action and moved for expedited proceedings seeking to prevent the General Partner from exercising the Call Right using a formula price impacted by Defendants' price-depressing disclosures. Op. 100. A mere five days later, Defendants persuaded the Court of Chancery to deny the motion to expedite, arguing that the dispute was not ripe because the General Partner had not yet elected to exercise the Call Right. *Id.*

"Having defeated the motion to expedite on the theory that the claims were not yet ripe, defense counsel contacted the lawyers for the Original Plaintiffs *the very next day to explore settling the non-justiciable claims*." *Id.* (emphasis added). As the Court recognized, "[a] settlement in this litigation would give the defendants the ultimate protection: a global release of claims relating to the exercise of the Call Right." *Id.* The lawyers for the Original Plaintiffs similarly understood that Loews "wanted to exercise the Call Right," and they "offered up a settlement, including a global release, if Loews did what it wanted to." *Id.* During negotiations, lead counsel for the Original Plaintiffs "made precisely that argument, telling defense counsel, 'Your clients want to make this purchase. Getting a release on a deal they want to make anyway is actually an amazing outcome for them.'" Op. 100-01 (quoting B29).

The Original Plaintiffs initially proposed settling if the General Partner agreed to exercise the Call Right using June 1, 2018, as the end date for measuring the Call Right exercise price. Op. 101. Defendants countered with an end date of September 1, 2018. "On June 11, 2018, *eighteen days after the lawsuit was filed*, the parties agreed that Loews would exercise the Call Right on or before June 29, 2018." *Id.* (emphasis added).

The selection of June 29 as the exercise date was particularly notable: in its *mid-April 2018* analysis of the potential exercise price and return Loews could

expect to achieve by exercising the Call Right, Loews's financial advisor (Barclays) had assumed that Loews would exercise on that very date. Op. 101 (citing B1092). June 29 was "optimal" for Defendants "because it ensured that purchases under the Call Right would close before FERC's regularly scheduled meeting on July 19, when FERC was expected to make additional announcements regarding the subject matter of the March 15 FERC Actions." Op. 101-02 (citing 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").

On June 22, 2018, the parties informed the Court of Chancery by email that they had reached an agreement in principle and asked it to review the settlement papers *in camera*. The Court rejected that request as seeking a non-public advisory opinion. Op. 101. That night, the parties filed a stipulation of settlement, under which Defendants would receive a global release as long as the General Partner exercised the Call Right on or before June 29, 2018. *Id.* Defendants dangled before counsel for the Original Plaintiffs a fee award "in an amount not to exceed $1.8 million" for their swift work. *See* Op. 102; B1-B28 (settlement stipulation agreeing not to oppose fee request and providing no monetary recovery for Boardwalk's unitholders).

"Believing that they had secured a settlement that would extinguish and release any challenges to the exercise of the Call Right, Loews asked its advisors to finalize their work product." Op. 102. Baker Botts delivered the final version of its opinion on June 29, which "was *substantially unchanged* from the [p]reliminary [o]pinion that Baker Botts had provided" back in April. *Id.* (emphasis added). The General Partner exercised the Call Right that day, and the transaction "closed on schedule" ten days later on July 18. Op. 106. Just "[h]ours after the closing, FERC issued an order on rehearing of the Revised Policy and a final rule in response to the NOPR," which finalized the open regulatory issues and "meant there would be no effect on Boardwalk's recourse rates." Op. 106-07.

Defendants' shrewdly choreographed machinations—resulting in a complete release of claims in exchange for exercising the Call Right on the "optimal" date and paying counsel for the Original Plaintiffs $1.8 million—only ground to a halt when the current Plaintiffs objected to their settlement and the Court of Chancery declined to approve it. Defendants' present claim that they were mere bystanders in a process driven by the Original Plaintiffs defies the record evidence.

III. THE COURT OF CHANCERY ADOPTED THE PROPER APPROACH TO CALCULATING DAMAGES

In assessing the harm here, the Court of Chancery found that, "[b]y exercising the Call Right improperly, the General Partner deprived the plaintiffs of the stream of distributions that they otherwise would have received as unitholders." Op. 176. As a result, the Court concluded the proper measure of damages was "the difference between the present value of those future distributions and the transaction price." *Id.*

To calculate the present value of those future distributions, the Court used the distribution dividend model (DDM) employed by both sides' valuation experts, adopted the "more conservative" inputs used by Plaintiffs' expert, and employed the cash flow projections directly from the Loews Model. Op. 177-80; POB 82-83.

Defendants claimed below that the "best evidence" of the value of the units was their unaffected trading price, and that the Court of Chancery should have adopted their expert's trading price-based analysis (which concluded, unsurprisingly, that Plaintiffs did not suffer *any* damages). Op. 177-78. The Court of Chancery rejected this approach as "unpersuasive" because it "failed to account for" both: (1) "the General Partner's control over [Boardwalk] and the resulting valuation overhang"; and (2) "the fact that the market did not possess material information about the level of distributions that Boardwalk could make in the future." Op. 178-79. In other words, the Court of Chancery properly recognized that this is a breach of contract case, not an appraisal, and that the trading price of

Boardwalk's units did not reflect the value of the stream of cash flows that its controlling unitholder anticipated based on projections it never disclosed to market participants. *See* POB 83-88.

Going back to this same well, Defendants now contend that setting the FERC Switch to "Off" would further "compound the trial court's determination to exclude all market evidence[.]" DAB 60. Defendants' answering brief reiterates this same point in increasingly melodramatic fashion. *See* DAB 61-62 (characterizing damages with FERC Switch "Off" as even "more grotesquely unrealistic"[7] and as "pil[ing] more absurdity" on the Court of Chancery's "already absurd award").[8]

Defendants' histrionics are meritless. The Court of Chancery adopted the proper approach to measuring damages here. *See Duncan v. TheraTx, Inc.*, 775 A.2d 1019, 1022 (Del. 2001) ("[T]he standard remedy for breach of contract is based upon the reasonable expectations of the parties *ex ante*."); *SIGA*, 132 A.3d at 1130 (citing

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[7] Defendants incorrectly claim that "the result" of setting the FERC Switch to "Off" would "be a damages award of $20.20 per unit[.]" DAB 62. In reality, it would increase the Court of Chancery's $5.54 per unit award by $1.70 per unit. *See* Op. 189; B3318; B3562.

[8] Curiously, Defendants cite *SIGA* to support their claim that *declining to apply* the wrongdoer rule would prevent piling more absurdity on absurdity. *See* DAB 62 (citing *SIGA*, 132 A.3d at 1130-32). But the portion of *SIGA* that Defendants cite is the same portion in which this Court explained that "[t]he Vice Chancellor" in that action had "*applied* the wrongdoer rule in *a limited and proper way*" by resolving against the defendants the uncertainty they created regarding the proper measure of research and development costs. *See supra* at 9-10 (quoting 132 A.3d at 1132) (emphasis added).

Duncan and noting the Court of Chancery "applied the correct legal standard to evaluate expectation damages").

The end result of this approach is neither "grotesque" nor "absurd"—it simply reflects the fact that Defendants expropriated enormous value from Boardwalk's former minority unitholders by wrongly exercising the Call Right. The Court of Chancery's award is large only because the damages caused by Defendants' misconduct are large. Setting the FERC Switch to "Off"—consistent with a potential scenario Defendants contemporaneously modeled—would prevent Defendants from benefitting from the uncertainty they created.

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."

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