IN THE SUPREME COURT OF THE STATE OF DELAWARE

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, Appellants	)	
v.	)	No. 439, 2024
BOARDWALK PIPELINE PARTNERS, LP, BOARDWALK PIPELINES HOLDING CORP., BOARDWALK GP, LP, BOARDWALK GP, LLC, and LOEWS CORPORATION,	)	Court Below: Court of Chancery of the State of Delaware C.A. No. 2018-0372-JTL
Defendants Below, Appellees	)	

<u>APPELLANTS' OPENING BRIEF</u>

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NATURE OF PROCEEDINGS

In *Williams Companies v. Energy Transfer Equity, L.P.*, 159 A.3d 264 (Del. 2017), this Court affirmed a basic principle that remains the foundation of legal opinion practice everywhere. A party satisfies a contractual condition requiring the receipt of a legal opinion if, *and only if*, the opinion reflects the good-faith exercise of professional judgment.

Plaintiffs respectfully submit that *Williams* should remain the law of Delaware. To hold otherwise would render contractual opinion conditions meaningless and opinion practice functionally extinct.

On November 12, 2021, following a live trial and a searching review of a mountain of contemporaneous evidence, the Court of Chancery issued a 193-page opinion concluding that Baker Botts did not render the legal opinion at issue in this case in good faith. Under *Williams*, the legal consequence of that factual determination was straightforward: the Baker Botts opinion failed to satisfy the contractual precondition for exercising the call right by which Defendants cashed out Boardwalk's minority units at a formula price well below their intrinsic value.

On appeal, Defendants raised a host of arguments challenging the Court of Chancery's decision. On December 19, 2022, this Court issued an *en banc* decision that declined to disturb the Court of Chancery's factual findings. Instead, this Court focused on two discrete legal questions. First, this Court overruled the Court of

Chancery's legal conclusions regarding a separate precondition for exercising the call right. Second, this Court found that, under an exculpatory provision in the partnership agreement, *one defendant* (Boardwalk's general partner) was contractually insulated from the *one remedy* (monetary damages) awarded by the Court of Chancery on the *one claim* it addressed (breach of the call right provision). Accordingly, this Court reversed the Court of Chancery's partial final judgment and remanded for further proceedings.

On remand, the Court of Chancery struggled to apply this Court's decision and ultimately adopted what it called the "No Breach View." Under this interpretation, Defendants' exercise of the call right did not breach the partnership agreement. The Court of Chancery also denied Plaintiffs' alternative claims, reasoning that Boardwalk's minority unitholders lacked any path to recovery given the *en banc* decision's impact on the most "straightforward" claim. Plaintiffs respectfully submit that the Court of Chancery's decision should be reversed.

First, the "No Breach View" is inconsistent with *Williams*, which remains Delaware law. Under *Williams*, a party satisfies an opinion condition only by securing an opinion that reflects the good-faith exercise of professional judgment. Because Defendants failed to do so here, they breached the partnership agreement by exercising the call right without satisfying the opinion condition.

Second, the "No Breach View" contravenes the partnership agreement. The opinion condition existed to protect minority unitholders. If Defendants could satisfy the opinion condition *without* securing an opinion that reflected the good-faith exercise of professional judgment, the opinion condition would be meaningless. Minority investors and market participants rightly expect the opposite. Opinion practice exists only because opinions provide meaningful protection.

Third, the "No Breach View" misapprehends Skadden's limited role. Skadden could not satisfy the *Williams* test, because it only answered the narrow question posed to it: whether it was reasonable to conclude that *the form* of Baker Botts' opinion was acceptable. Skadden did not sign off on *the substance* of that opinion. Skadden refused to opine on the substance as a matter of firm policy, and Baker Botts misled Skadden on key issues.

Fourth, the "No Breach View" effectively eliminates the implied covenant of good faith and fair dealing, which is not possible under Delaware law. Defendants breached the implied covenant by subverting the opinion condition.

Because the Court of Chancery adopted the "No Breach View" on remand, it never grappled with the partnership agreement's exculpatory provisions. Under this Court's prior ruling, Section 7.10(b)'s conclusive presumption of good faith protects the general partner from monetary damages. But it does not bar equitable relief against the general partner, and it does not protect any other Defendant at all.

The Court of Chancery separately denied Plaintiffs' claims challenging Defendants' distortion of the call right exercise price after holding that Defendants' disclosures complied with the federal securities laws. The express terms of the partnership agreement and the implied covenant require a different inquiry. Defendants violated both by issuing misleading disclosures that disserved the partnership's interests.

SUMMARY OF ARGUMENT

1. This Court's *en banc* decision declined to disturb the Court of Chancery's well-supported factual findings, including that the Baker Botts opinion did not reflect the good-faith exercise of professional judgment. Accordingly, Defendants failed to satisfy the opinion condition under *Williams*, and they were not entitled to exercise the call right.

2. Defendants breached the implied covenant by obtaining an opinion of counsel that they knew depended upon counterfactual assumptions and inputs.

3. Defendants' breaches should have consequences. The partnership agreement's conclusive presumption protects the general partner against money damages, but it does not protect it against equitable relief, and it does not protect any other Defendant at all.

4. Defendants' distortion of the call right exercise price violated the express and implied terms of the partnership agreement and provides an independent basis for relief.

STATEMENT OF FACTS

The facts of this case span nearly 200 pages across three judicial decisions. *See* Remand Op. ("RO") 5-67; Post-Trial Op. ("PTO") 7-109; Supreme Court Op. ("SCO") 5-35.[1]

Boardwalk Pipeline Partners LP ("Boardwalk" or the "Company") began operating as a publicly traded limited partnership in 2005. Boardwalk operates natural gas pipelines through three subsidiaries: Texas Gas, Gulf South, and Gulf Crossing. PTO 7.

In July 2018, Loews Corporation ("Loews"), Boardwalk's ultimate controller, invoked a call right (the "Call Right") in the Company's partnership agreement (the "Partnership Agreement") to cash out Boardwalk's minority unitholders at a formula price. The Partnership Agreement required Defendants to satisfy multiple conditions before exercising the Call Right.

One condition (the "Opinion Condition") required a legal opinion concluding that Boardwalk's tax status has, or reasonably likely will have, a "material adverse effect" on the "maximum applicable rate" its subsidiaries could charge their customers. Another condition (the "Acceptability Condition") required a conclusion

[1] The Remand Opinion is attached as Exhibit A, the Post-Trial Opinion is included at A621-A814, and the Supreme Court Opinion is included at A815-A909.

from Boardwalk's general partner that the legal opinion obtained was "acceptable." PA §15.1(b) (A1305).

A. Boardwalk's Structure

Prior to exercising the Call Right, Loews owned a majority of Boardwalk's units and controlled its general partner, Boardwalk GP, LP (the "General Partner"). The General Partner had its own general partner, Boardwalk GP, LLC (the "GPGP"). The GPGP had a board of directors (the "GPGP Board") and a sole member: Boardwalk Pipelines Holding Corp. (the "Sole Member"). The Sole Member was a wholly owned subsidiary of Loews, and Loews insiders controlled its board (the "Sole Member Board"). SCO 10-11.

B. FERC's Regulation of Interstate Pipelines

FERC regulates interstate pipelines and sets the maximum rates—known as "recourse rates"—that pipeline owners can charge. SCO 5-6. FERC adjusts recourse rates through an adversarial proceeding known as a "rate case." A pipeline can initiate a rate case and argue that its recourse rates are too low. FERC or a pipeline's customers can initiate one if they believe the pipeline's recourse rates are too high. *Id*.

In a rate case, FERC uses a methodology called "cost-of-service" ratemaking under which rates are designed based on a pipeline's cost of providing service. Cost-of-service ratemaking is complex and fact-specific. *Id.*

Recourse rates can go up, down, or stay the same as a result of a rate case. PTO 14. Critically, though, "*[r]ecourse rates do not change without a rate case, even with significant cost-of-service changes*." SCO 6 (emphasis added). If a "pipeline is unlikely to face a rate case, then it is all the more unlikely that its recourse rates will change." PTO 14.

In a rate case, "a change in one cost-of-service variable generally does not support a change in recourse rates without a complete review of all other components: focusing only on one factor is known as 'single-issue ratemaking,' which FERC generally prohibits." SCO 6.

C. FERC Proposed Changes and Sought Public Comment

On March 15, 2018, FERC took four related actions (the "March 15 FERC Actions"). First, FERC proposed a new policy (the "Revised Policy") that "could have made limited partnerships" less attractive entities for owning pipelines by prohibiting them from including in their cost-of-service calculations a tax allowance for the income taxes paid by their partners. The Revised Policy would not impact pipelines until FERC adopted final rules, however, so it had no effect on the recourse rates Boardwalk's subsidiaries could charge. RO 5-7.

Second, FERC issued a notice of proposed rulemaking (the "NOPR"), confirming that it would promulgate regulations to address the tax allowance. The

NOPR was not an actual rule, so it had no effect on the recourse rates Boardwalk's subsidiaries could charge. RO 8.

Third, FERC issued a notice of inquiry ("NOI") seeking comment on how to treat accumulated deferred income taxes ("ADIT")[2] for cost-of-service calculations going forward, including whether pipelines should be permitted to eliminate ADIT balances from their books (which would be a boon to pipelines). The NOI only asked for comment, so it had no effect on the recourse rates Boardwalk's subsidiaries could charge. *Id.*

Fourth, FERC issued an order in the case that had prompted FERC to take the March 15 FERC Actions. The ruling did not apply to Boardwalk, so it had no effect on the recourse rates Boardwalk's subsidiaries could charge. *Id.*

The March 15 FERC Actions triggered an industry frenzy. Pipelines, their customers, trade associations and others filed more than 135 requests for rehearing, comments, and other submissions with FERC. "Matters were very much in flux. Nothing was final." *Id.*

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[2] Due to different rules for depreciating assets, a pipeline owner may pay lower federal taxes in a given year than anticipated by FERC's cost-of-service calculations and subsequently carry an ADIT balance on its books. *See* SCO 7.

FERC indicated that it would provide clarity on these regulatory developments soon. "Boardwalk expected FERC to address the March 15 FERC Actions again at its next regular meeting on July 19, 2018." RO 9.

D. Loews Sought to Capitalize on the Temporary Regulatory Uncertainty

Boardwalk and Loews promptly concluded that the March 15 FERC Actions would *not* have a material adverse effect on Boardwalk's recourse rates. RO 10-12; PTO 33-36. But they thought they might be able to claim that the Call Right had been triggered and eliminate Boardwalk's minority unitholders at the formula price.

Loews engaged Michael Rosenwasser, a Baker Botts partner that had prepared Boardwalk's organizational documents and drafted the Call Right (while at Vinson & Elkins), and "worked to secure a contrived opinion" to allow them to exercise it before FERC finalized the March 15 FERC Actions. RO 3.

E. FERC Signaled that Recourse Rates Would Not Change for a "Significant Number of Pipelines"

FERC emphasized from the outset that a "rate reduction may not be justified for a significant number of pipelines" despite the newly proposed elimination of the tax allowance for MLP-owned pipelines. PTO 29-30 (citation omitted). FERC's original notice described multiple scenarios that would "obviate the need to adjust" recourse rates and a path for pipelines to prove why that result was warranted, which

Boardwalk's General Counsel (McMahon) recognized was "tailor-made" for Boardwalk's subsidiaries. PTO 29-30, 34; *see also* SCO 21-22.

F. Boardwalk Management Promptly Recognized the Company's Recourse Rates Would Not Be Materially Impacted

Boardwalk's President and CEO (Horton) instructed its Vice President of Rates and Tariffs (Johnson) to analyze the possible impact on the Company's three subsidiaries. PTO 32-33.

Johnson explained that two subsidiaries were protected from *any* impact on their rates. *Id*. Johnson observed that Texas Gas was the only subsidiary that had potential exposure to a rate case, and multiple factors would help defend it against any rate challenge. *Id.* Assuming a rate case was filed, Johnson estimated the downside impact on Texas Gas would be only $20.5 million, ignoring "any bounce from rate base increase associated with removal of ADIT." PTO 33-34.

G. Boardwalk Reported to Loews

"Having reached the conclusion that the March 15 FERC Actions would not have a material adverse impact on the rates that Boardwalk's subsidiaries could charge," Boardwalk management relayed its findings to Loews. PTO 34; 35 (discussing Boardwalk's CFO & SVP (Buskill) email to GPGP director explaining factors mitigating against rate change and concluding "we don't think it will have a material impact to Boardwalk"); *id.* (Buskill "convey[ing] similar information" to Loews' SVP (Siegel)).

Siegel immediately forwarded the report from Buskill to Loews' CEO (Jim Tisch) and another senior officer (Ben Tisch). *Id.* Ben Tisch separately tapped a Loews employee to analyze the March 15 FERC Actions, who reported that losing the tax allowance "would be a flesh wound" for pipeline owners like Boardwalk. *Id*.

Boardwalk's subsequent ratemaking presentation to Loews hammered home the fact that two of its subsidiaries' recourse rates *would not change at all*, despite the cost-of-service change from the proposed elimination of the income tax allowance. JX-0676 at 8 (A1332) (observing that: (i) "Gulf South would experience a reduction in Cost of Service; however, *it is not anticipated Gulf South's return will substantiate a rate change*"; and (ii) "Gulf Crossing would experience a reduction in Cost of Service but all contracts are under negotiated or discounted rates *so no impact anticipated*") (emphasis added); PTO 125 (discussing JX-0676).[3]

H. Baker Botts Recognized that Boardwalk's Recourse Rates Were Unlikely to Change

Baker Botts recognized that Boardwalk's recourse rates were unlikely to decrease as a result of the March 15 FERC Actions. A Baker Botts partner and FERC practitioner (Wagner) explained to Loews' SVP and General Counsel (Alpert)

[3] As Plaintiffs' rate expert explained at trial, this presentation modeled no rate or revenue impact for Gulf South and Gulf Crossing and projected only a 1.5% revenue decrease (approximately $20 million) for Texas Gas in the "worst case" scenario where it both faced and lost a rate case. Webb Tr. A553.

that, absent further regulatory developments, FERC's recent actions would *not* have an effect on Boardwalk's rates. PTO 42.

Baker Botts' ensuing review of each subsidiary and consultation with an independent rate expert (Sullivan) confirmed why Boardwalk's rates were safe. Two of the subsidiaries would not face rate cases due to the proposed change in tax policy and were in "no danger" of having their recourse rates lowered. PTO 51; 70. As for the third subsidiary, Wagner and Sullivan concluded (and advised Loews) that there was a "low probability" it would even face—let alone lose—a rate case during the two-year period during which predictions could be made "with any confidence." PTO 51, 55-56, 70.

I. Boardwalk's Press Release Explained Why Rates Were Unlikely to Change (Until Loews Got Ahold of It)

Consistent with Boardwalk's internal analysis of this critical issue, Horton directed McMahon "to draft a short press release that described the extent to which Boardwalk's pipelines were protected from any impact on their rates." PTO 34. After McMahon did that, Buskill "proposed making the release stronger by stating that the overall impact to Boardwalk and its rates would not be material." *Id*. McMahon "agreed that 'the elimination of the income tax allowance will not result in a material impact.'" PTO 35.

Loews obtained the draft and heavily edited it with an eye towards exercising the Call Right. Loews switched the release's focus from Boardwalk's rates to its revenues and struck the explanation of factors FERC had identified that would weigh against a rate change. PTO 39-40.

J. Baker Botts Concocted a Syllogism to Skirt Reality

To give Loews a "yes" despite the real-world facts, Baker Botts' lead attorney (Rosenwasser) crafted a syllogism devoid of "any real factual analysis about the effect of the March 15 FERC Actions." PTO 45. Rosenwasser's syllogism dodged "any type of predictive exercise about when an actual rate case might be brought or what the outcome" might be, and was predicated instead on elementary subtraction (that violated FERC's policy against single-issue ratemaking). PTO 45, 55-56.

This syllogism embodied an approach McMahon and Boardwalk's regulatory counsel (Van Ness Feldman) ridiculed as "priceless" and incorrect "1:1 thinking[.]" PTO 136. Publicly, Boardwalk attacked this approach in FERC comments emphasizing it was "misleading" to equate a cost-of-service change stemming from the loss of the tax allowance with a "rate reduction" because a cost-of-service change has "little bearing" on whether or not a rate reduction will occur, and doing so would violate FERC's policy against single-issue ratemaking. *Id*.[4]

[4] FERC agreed and updated a required form—as Boardwalk had proposed—to reflect the fact that pipelines were providing calculations demonstrating an "Indicated *Cost of Service* Reduction," not an "Indicated *Rate* Reduction." *See* A1418-A1419 (emphasis added); A1534, ln.34.

K. When Baker Botts Needed Numbers, Defendants Delivered

To "generate the [o]pinion," Baker Botts needed numbers that "implement[ed] Rosenwasser's syllogism." PTO 45, 49. Johnson "took charge of providing" them, even though his original analysis had determined that Boardwalk's rates would not decline materially (and could even "bounce" upward following the finalization of the treatment of ADIT). *Id.*; *supra* PART F.

Johnson reported to McMahon that his newly prepared analysis "should get us where we need to go." It did so by using the same misleading methodology Boardwalk privately and publicly criticized to claim a double-digit impact on hypothetical "indicative rates" for each subsidiary (when the actual recourse rates Baker Botts was purporting to assess were unlikely to change). PTO 49-52.

Loews and Baker Botts recognized the new "analysis" for what it was: sleight of hand. *See* PTO 61 (Loews in-house counsel observing that the MAE analysis "only worked under Rosenwasser's syllogism based on 'hypothetical future max FERC rates'" where the "answer was baked into the assumptions," but not "in the real world"); 130 (Wagner observing: "This is *not* the recourse rate.") (emphasis added); 74 (Baker Botts partner noting there "would be 'no actual change—no effect yet screw min[ority],'" which was "obviously a 'challenging fact'"):

Qualitative peice

Hypothetical Rates — not analyzed

No actual change

-no effect yet screw

min

Challenging Fact

L. Defendants' Own Rate Expert Refused to Sign Off

Baker Botts tasked their outside rate expert with evaluating the "analysis" that Boardwalk had prepared. Sullivan advised Wagner by email that "the spreadsheet work done by Boardwalk appropriately represents the *cost of service* for each Boardwalk interstate pipeline … and the *potential reduction in the cost of service* for each pipeline if FERC reduces the income tax allowance to 0." PTO 69 (emphasis added).

But Wagner "did not think that a statement about a cost of service analysis was sufficient." He asked Sullivan to let him know "[o]nce you're able to state definitively that you agree with their *rate* analyses." *Id.*; *see also* PTO 13-14 (Wagner recognizing that a cost-of-service change is not the same as a recourse rate change because the ideas reflect "different things"). Sullivan again refused to bless Boardwalk's purported rate change calculations. Instead, Sullivan stressed (four more times) that he agreed with the *cost of service* calculations. PTO 69.

Defendants did not produce Sullivan at trial to defend their rate analysis. That is unsurprising: Sullivan testified at his deposition that it was "meaningless." *See* PTO 138-39 (Sullivan explaining that: (i) FERC would not focus on an "indicative rate" because it does not "mean anything"; (ii) deriving an indicative rate reduction by changing one cost-of-service variable was "kind of meaningless" because rate change does not depend on one cost-of-service variable; (iii) Johnson's analysis could not be used to calculate change to Boardwalk's actual recourse rates; and (iv) Johnson's analysis calculated a cost-of-service reduction, not a rate reduction); 70 ("Sullivan explained persuasively that [Johnson's analysis] did not attempt to engage with the principles of rate design and did not address the risk of a rate case.").

M. Baker Botts Buried Sullivan's Refusal and Snowed Skadden

Baker Botts swept Sullivan's refusal to approve the rate analysis under the rug, and they "misrepresented" in their final opinion and supporting materials that "Sullivan had signed off." RO 62. This deception was particularly important to Skadden's review.

Skadden's ultimate presentation[5] to the Sole Member Board stressed that "Baker Botts Retained and Consulted with an Expert" to "consult on the cost-of-service rate changes" even though the Partnership Agreement did not require it.

[5] Skadden was adamant that the firm did not render a legal opinion here, only legal advice about "acceptability." *See* Grossman Dep. A1547-A1548, A1550, A1551, A1552, A1555.

A1524. The presentation touted Sullivan's extensive experience, but it never indicated what conclusion—if any—Sullivan reached. *Id.* At his deposition, Skadden's 30(b)(6) designee professed ignorance about the substance of Sullivan's advice to Baker Botts. *See* Grossman Dep. A1554-A1555.

N. Baker Botts Continued the Cover-Up

Internal drafts of their opinion further illustrate the steps Baker Botts took to conceal the fact that they were purporting to find that a material decline in recourse rates was reasonably likely when they knew the opposite was true. For example, an early draft included an express assumption that Boardwalk would act against its own interests by filing rate cases to *lower the rates* they charged their customers. Subsequent drafts scrubbed this language (while maintaining the counterfactual assumption) and simply claimed that recourse rates would change "without addressing how those rates would come about." PTO 64.[6]

O. Baker Botts and Defendants Plowed Ahead Despite the Known Unknown of ADIT

Baker Botts' "prediction" of likely material recourse rate decline also flew in the face of everyone's contemporaneous recognition of a known unknown: FERC's

[6] Unable to defend this approach at trial, Wagner instead claimed that the likelihood of a rate case was "not relevant" to Baker Botts' analysis. In fact, it was essential for assessing the likelihood of a rate change. *Compare* Wagner Tr. A371, *with* PTO 62 (Skadden recognizing that recourse rate impact "depended on both the risk of a rate case *and* on the full ratemaking exercise").

undetermined treatment of ADIT. As the Court of Chancery detailed, Defendants and their advisors recognized that:

(i) FERC's treatment of Boardwalk's *$750 million* ADIT balance would impact any rate analysis "substantially";

(ii) Boardwalk publicly admitted it could not "correctly assess" the cost-of-service impact of the March 15 FERC Actions (let alone any potential rate impact) prior to FERC's resolution of the ADIT debate; and

(iii) the ADIT treatment FERC adopted with its final rule (just hours after Loews completed the take-private) meant Boardwalk's recourse rates would *not* decrease.

See PTO 33-34, 68-83, 97-100, 105-08.

Rosenwasser even underlined and double-starred Boardwalk's devastating admission that it could not assess what Baker Botts' opinion was purporting to assess:

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

PTO 79. The Court of Chancery assessed Rosenwasser's attempt to downplay these markings at trial: "That was not credible. Really not credible." RO 45-46.

ARGUMENT

I. DEFENDANTS BREACHED THE PARTNERSHIP AGREEMENT

A. Question Presented

Did the Court of Chancery commit legal error when it interpreted this Court's decision as holding that there was "no breach" of the Partnership Agreement? Plaintiffs raised an alternate interpretation below (A922-A928), and the Court of Chancery considered it (RO 79-88).

B. Scope of Review

This Court reviews questions of law *de novo*. *Dematteis v. RiseDelaware Inc.*, 315 A.3d 499, 508 (Del. 2024).

C. Merits of Argument

The Court of Chancery read this Court's *en banc* decision as holding that Defendants' exercise of the Call Right did not breach the Partnership Agreement. *See* RO 80-87. Plaintiffs interpreted the *en banc* decision differently—as addressing only what was necessary to resolve the appeal before the Court.

Plaintiffs do not believe this Court reached (much less disturbed) the Court of Chancery's factual findings, including that Baker Botts' opinion did not reflect the exercise of good-faith professional judgment. This Court should confirm this narrow reading, which would respect the Court of Chancery's role as trier of fact. Under *Williams*, the natural consequence of that well-supported holding is simple: Defendants failed to satisfy the Opinion Condition.

1. The Court of Chancery Misconstrued this Court's Decision

This Court's *en banc* decision addressed two contractual questions. First, it addressed whether the correct decision-making body made the "acceptability" determination required prior to the exercise of the Call Right. This Court overruled the Court of Chancery's holding that the Sole Member Board lacked authority to make that determination. As a result, Defendants satisfied the Acceptability Condition. SCO 59-60.

Second, this Court concluded that, by operation of Section 7.10(b)'s conclusive presumption of good faith, *one defendant* (the General Partner) was contractually insulated from the *one remedy* (monetary damages) awarded by the Court of Chancery on the *one claim* it addressed below (breach of the Call Right provision). *See* SCO 5, 46-47, 61, 69.

This narrow focus made sense: the appeal did not address other parties, claims, or remedies because the Court of Chancery had entered partial final judgment and stayed Plaintiffs' remaining claims. PTO 191-93. This Court specifically noted it was declining to "address any other arguments on appeal," including Defendants' contention that the Court of Chancery "erred as a matter of law and fact when it found the Baker Botts Opinion was not issued in good faith." SCO 5. The Court of Chancery committed legal error when it read this Court's decision as *implicitly* resolving issues it *expressly* declined to reach.

2. The Court of Chancery's Factual Findings Remain the Law of the Case

The Court of Chancery found that Baker Botts' opinion did not reflect the exercise of good-faith professional judgment. Instead, Baker Botts adopted counterfactual assumptions and inputs, engaged in motivated reasoning, and ultimately opined on a complex issue of Delaware law that a leading Delaware firm and a leading national law firm with a Delaware office would not address. PTO 117-151; RO 57.

Because this Court did not disturb the Court of Chancery's factual findings, they remain the law of the case. *See Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1172 (Del. 1995).

3. The "No Breach View" is Inconsistent with *Williams*

The Court of Chancery decision in *Williams* teaches that, when contracting parties condition an event upon receipt of an opinion of counsel, "it is [counsel's] subjective good-faith determination that is the condition precedent." *Williams Cos., Inc. v. Energy Transfer Equity, L.P.*, 2016 WL 3576682, at *11 (Del. Ch. June 24, 2016). Thus, under *Williams*, a court's "role is to determine whether" opinion counsel acted in good faith by applying its "independent expertise" to the facts. *Id.* This Court affirmed those holdings. *See* 159 A.3d 264, 270-71 (Del. 2017); __ A.3d __, 2023 WL 6561767, at *8 (Del. 2023).

If left standing, the Court of Chancery's "No Breach View" would effectively overrule *Williams*. Baker Botts' opinion did not reflect the exercise of good-faith professional judgment. *Williams* controls the outcome here, and it confirms that Defendants failed to satisfy the Opinion Condition.

4. The "No Breach View" is Inconsistent with the Partnership Agreement

"The courts of this State hold freedom of contract in high—some might say, reverential—regard." *Cantor Fitzgerald, L.P. v. Ainslie*, 312 A.3d 674, 676 (Del. 2024). Nowhere is this contractarian disposition more important than in the alternative entity context. *See* 6 *Del. C.* §§17-1101, 18-1101.

Delaware courts "respect the terms of a partnership's governing agreements," and they enforce "the primacy of" these agreements by strictly "interpret[ing] and enforce[ing]" their terms. SCO 42-43. Upholding the "No Breach View" would do the opposite.

The Call Right was a "conditional option." PTO 160-61; *see also* SCO 56 n.253. The Opinion Condition imposed a "meaningful limitation" on the exercise of the Call Right. SCO 57 n.256. Minority unitholders rely on counsel's subjective good faith and professional judgment to protect them.

Yet, under the Court of Chancery's "No Breach View," the Opinion Condition provides no protection at all. If upheld, it would render the Opinion Condition meaningless and its protection illusory. That is not how Delaware courts interpret contracts. *See Estate of Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010).

5. The "No Breach View" Would Upset Opinion Practice

Opinion conditions provide protection by prohibiting certain actions unless they satisfy good-faith review conducted by opinion counsel. Judicial review, in turn, ensures there is recourse in the (hopefully rare) instances where this check falls short of its intended purpose—when opinion givers compromise their standards and render opinions beyond the bounds of good-faith professional judgment.

Contracting parties have long recognized the value of this approach in various contexts, and they have ordered their affairs accordingly. *See Bender v. Memory Metals, Inc.*, 514 A.2d 1109, 1116 (Del. Ch. 1986) (transfer of shares conditioned upon receipt of "opinion of counsel acceptable to the company" regarding exemption from registration requirements); *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund*, 624 A.2d 1199, 1202 n.4 (Del. 1993) (capital contributions prohibited if general partner receives opinion of counsel concluding contributions would likely violate federal law); *SI Mgmt. L.P. v. Wininger*, 707 A.2d 37, 39 (Del. 1998) (amendment conditioned upon receipt of "opinion of special counsel"); *Williams*, 159 A.3d at 266-67 (merger conditioned upon receipt of tax opinion).

Under the "No Breach View," opinion counsel's misconduct does not matter, and judicial review provides no backstop. An opinion procured and rendered in bad faith can satisfy an opinion condition. That is not what parties bargain for when they include opinion conditions in their contracts.

Williams strikes the correct balance by permitting deferential—yet still meaningful—judicial review of opinion counsel's conduct, precisely as contracting parties expect. Accepting the "No Breach View" would upset that balance and put judicial review of legal opinions out of step with the judicial review that Delaware requires in analogous contexts. *See Terrell v. Kiromic Biopharma, Inc.*, 297 A.3d 610, 620 (Del. 2023) (absence of judicial review could permit a contractually-appointed expert to "unfairly—even in bad faith—skew its determinations in the company's favor with impunity"); *Senior Hous. Cap., LLC v. SHP Senior Hous. Fund, LLC*, 2013 WL 1955012, at *28 (Del. Ch. May 13, 2013) (court could evaluate whether appraisal process "was carried out with fidelity" without impermissibly "second-guess[ing]" the appraiser's "valuation judgments").

6. The "No Breach View" is Inconsistent with Market Expectations that Legal Opinions are Meaningful

"[L]egal opinions are almost always required as a condition precedent to the closing" of "important business transactions" like "sales of businesses, mergers, bank loans or sales of securities." James J. Fuld, *Legal Opinions in Business Transactions—An Attempt to Bring Some Order Out of Chaos*, 28 BUS. LAW. 915, 915 (1973) (hereinafter "*Fuld*") (A1584-A1615).

"Every week" lawyers deliver "hundreds, if not thousands," of legal opinions to satisfy such contractual conditions. ABA Comm. Legal Ops., LAW OFFICE OPINION PRACTICES, 60 BUS. LAW. 327, 327 (2004) (A1685-A1697). "Many clients and lawyers believe that, next to the conveyancing instruments, the legal opinions are the most important papers delivered at the closing." *Fuld* at 915.

Many lawyers now specialize in opinion practice. The American Bar Association has a standalone section for these practitioners, and its Legal Opinions Committee (and subcommittees) meet regularly, provide continuing legal education programming, and collect and publish important literature in the field.[7]

Legal opinions are prevalent (and costly) exactly because they provide meaningful protection. Market participants know legal opinions must reflect counsel's good-faith professional judgment:

> *A critical element underlying all opinion practice* is that a legal opinion is a *professional representation* of the opinion giver intended to communicate relevant information to the recipient. The opinion being given *must be fair* (and therefore *not misleading*) and *objective*, based on an *appropriate professional analysis*, and the *opinion preparers must reasonably believe it is "correct"*[.]

[7] *See* ABA Legal Opinions Resource Center, https://www.americanbar.org/groups/business_law/resources/legal-opinions-resource-center/ (last visited Dec. 19, 2024) (A1715-A1723); PTO 113-17 (collecting authorities).

Arthur N. Field, *A Universal Opinion Practice*, IN OUR OPINION (ABA BUS. LAW SECTION OPS. COMM.), Vol. 23, No. 3 (Summer 2024) at 8 (emphasis added) (A1698-A1714); *see also* Comm. Legal Ops., *Third-Party Legal Opinion Report, Including the Legal Opinion Accord, of the Section of Business Law, American Bar Association*, 47 Bus. Law. 167, 180 (1991) (a legal opinion "is an expression of professional judgment on the issues expressly addressed") (hereinafter "*Opinion Report*") (A1616-A1664); PTO 112 (*Williams* requires that counsel apply "expertise to the facts in an exercise of professional judgment").

Market participants know that counsel may not render an opinion they know to be untrue. *See Opinion Report* at 180 (opinion counsel may not engage in conduct that would "constitute fraud or conscious deceit," such as rendering an opinion she actually knows "is wrong"). Yet that is exactly what happened here.

As the Court of Chancery meticulously detailed, Boardwalk management, senior Loews executives, and Baker Botts all recognized that: (i) the March 15 FERC Actions at issue here would *not* materially impact Boardwalk's recourse rates; and (ii) future developments that could impact those rates were too uncertain to predict with any confidence. Nevertheless, Baker Botts rendered an opinion that reached the exact opposite conclusion. *See* PTO 117; RO 3.

This is precisely the type of misconduct that market participants reasonably expect that opinion conditions (and judicial review) will protect against. Accepting the "No Breach View" would effectively excuse this misconduct and render opinion conditions worthless.

7. The "No Breach View" Misconstrues Skadden's Limited Advice

This Court held that Section 7.10(b)'s conclusive presumption of good faith insulated the General Partner from monetary liability because the Sole Member Board relied on Skadden's advice that it would be within its "reasonable judgment" to "accept" Baker Botts' opinion. SCO 66-67. On remand, the Court of Chancery observed that this Court "seems to have determined that Loews also acted in good faith" because there is "no daylight between the Sole Member and Loews." RO 79-80. In other words, Baker Botts' failure to exercise good-faith professional judgment was irrelevant because the Sole Member Board relied on Skadden.

But Skadden's advice did not obviate the need for, or preclude the Court of Chancery from conducting, the assessment *Williams* requires. There is a well-settled legal distinction between determining that a given legal opinion is "acceptable" and rendering the opinion itself. *See Opinion Report* at 196, ¶8.2 (counsel advising that opinion is "satisfactory" is "stating *only* that such opinion on its face—*its scope but not its substance*—appears to cover the specific legal issue [opinion counsel] was to address") (emphasis added); ¶8.3 (advising that opinion recipient "may rely on Other Counsel's opinion" means that counsel believes opinion counsel is "competent" and the opinion "appears to cover" the relevant legal issues but does not "constitute concurrence" in the substance of that opinion); ¶8.4 (concurrence, by contrast, requires counsel to "investigate and agree with the substance of Other Counsel's opinion").

Here, Skadden considered the narrow acceptability question—whether it was within the "reasonable judgment" of the Sole Member to find Baker Botts and the opinion "acceptable"—after performing limited review over a short window of time without the benefit of a litigation record. This framing focused solely on *the form* of Baker Botts' opinion and the firm's qualifications. Skadden did not need to agree with (or even sign-off on the legitimacy of) Baker Botts' underlying conclusion on the occurrence of an MAE, a topic Skadden refused to opine on as a matter of firm policy. PTO 60, 174.

Tellingly, at trial Defendants did not offer any Skadden witness to detail the firm's work or defend Baker Botts' process, despite Defendants' burden to establish exculpation under the Partnership Agreement. This tactical choice made sense.

Defendants did not want to call Skadden witnesses given Loews' bullying and manipulation, *see* PTO 148-49, and the firm's serious misgivings about what was going on. *See, e.g.*, A1454 (Skadden's Voss describing Boardwalk's problematic comments to FERC as "relatively unhelpful"); A1435 (Rosenwasser underlining and double-starring same language); A1502 (Skadden email acknowledging that Boardwalk's comments "could be problematic" and that they had "never heard anything" in response to their questions on this critical topic); A1385 (Skadden's Naeve: "If I were Baker Botts I would prefer to wait until FERC acts on the comments."); A1336 (Naeve expressing doubts about the meaning of "maximum applicable rate"); A1387 (Skadden's Kennedy reacting to Alpert's bullying with "[e]moticon omitted" and predicting litigation).

Defendants also did not want to confront the reality that Baker Botts hid critical facts from Skadden. Skadden's presentation to the Sole Member Board repeatedly emphasized that Baker Botts retained an expert rate consultant. But Skadden's presentation omitted that Sullivan *repeatedly refused* to sign off on Boardwalk's purported rate-impact calculations. Baker Botts concealed this damning fact from Skadden. *See supra* PART N; Grossman Dep. A1554-A1555.[8]

D. Loews Committed Tortious Interference

Loews knew that Baker Botts could not opine in good faith that a material decline in Boardwalk's recourse rates was likely to occur when Boardwalk, Loews, and Baker Botts had each determined that the *opposite* was true. *Supra* PARTS F-H. Nevertheless, Loews exploited a counterfactual opinion to expropriate value from

[8] Baker Botts also "misled" Richards Layton "about the operative facts." RO 21-22, 49. Skadden's presentation, in turn, stressed that Baker Botts had consulted with Delaware counsel and touted Richards Layton's experience. But the presentation said nothing about what Richards Layton actually advised, and Skadden disavowed knowledge about the scope or substance of Richards Layton's work. *See* A1523; Grossman Dep. A1553-A1554.

Boardwalk's minority unitholders, and ultimately caused the General Partner to exercise the Call Right without satisfying the Opinion Condition.

On remand, the Court of Chancery correctly detailed how this intentional, unjustified action constituted tortious interference. *See* RO 90-99. The Court of Chancery nevertheless entered judgment against Plaintiffs because it misinterpreted this Court's *en banc* decision as adopting the "No Breach View." Plaintiffs respectfully submit that was error.

In the alternative, the Court of Chancery intimated this Court had found that Loews acted in subjective good faith (the "Good Faith View"). *See* RO 87-88. Plaintiffs respectfully submit that could not be correct, because that outcome is incompatible with the Court of Chancery's undisturbed factual findings that Loews personnel were directly involved and knew that Baker Botts had adopted counterfactual assumptions. This Court should provide the necessary clarification and direct the Court of Chancery to enter judgment against Loews for tortious interference.

E. Loews Was Unjustly Enriched

"Unjust enrichment is 'the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience.'" RO 115 (quoting *Windsor I, LLC v. CWCapital Asset Mgmt. LLC*, 238 A.3d 863, 875 (Del. 2020)).

Here, Defendants failed to satisfy the Opinion Condition, yet they eliminated the minority unitholders at a formula price as if they had. If Loews is not liable for tortious interference, at a minimum it was unjustly enriched. *See* RO 116 ("Loews would be unjustly enriched if it received benefits arising from [a] breach [of the Partnership Agreement].").

II. DEFENDANTS BREACHED THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

A. Question Presented

Did the Court of Chancery commit legal error when it found there was "no room" for the implied covenant to operate with respect to the Call Right? Plaintiffs raised this question below (A948-A952), and the Court of Chancery addressed it (RO 99-115).

B. Scope of Review

This Court reviews questions of law *de novo*. *Dematteis*, 315 A.3d at 508.

C. Merits of Argument

"The implied covenant is inherent in all contracts and ensures that parties do not frustrate the fruits of the bargain by acting arbitrarily or unreasonably." *Baldwin v. New Wood Res. LLC*, 283 A.3d 1099, 1116 (Del. 2022) (cleaned up). It is "well-suited to imply contractual terms that are so obvious … that the drafter would not have needed to include the conditions as express terms in the agreement." RO 102 (quoting *Dieckman v. Regency GP LP*, 155 A.3d 358, 361 (Del. 2017)).

Here, the Partnership Agreement *expressly* required the General Partner to obtain an opinion of counsel before exercising the Call Right under Section 15.1(b)(ii). But it also *implicitly* prevented Defendants from intentionally procuring an illegitimate opinion.

That condition is so fundamental to the purpose of the Opinion Condition that it literally goes without saying. *See Dieckman*, 155 A.3d at 368. This Court reached the same conclusion a decade ago in *Gerber v. Enterprise Products Holdings, LLC*, where it evaluated the implied covenant in the opinion-obtaining context. This Court noted that examples "readily come to mind of cases where a general partner's actions in obtaining a fairness opinion from a qualified financial advisor" would "frustrate the fruits of the bargain that the asserting party reasonably expected[,]" including the now-prescient example of an eager-to-please advisor that "compromises its professional valuation standards to achieve the controller's unfair objective." 67 A.3d 400, 420-21 (Del. 2013) (cleaned up).

Here, to the extent Defendants complied with the literal terms of Section 15.1(b)(ii), the implied covenant precludes them from benefiting from their corruption of the opinion process. *See Baldwin*, 283 A.3d at 1118-20; *Dieckman*, 155 A.3d at 368.

1. The Court of Chancery Misconstrued *Gerber*

The Court of Chancery deemed *Gerber* "orthogonal" to the present case and ultimately rejected Plaintiffs' implied covenant claim on the basis that the Sole Member Board did not rely on Baker Botts' opinion *directly*, but rather on Skadden's advice regarding the acceptability of that opinion. *See* RO 112.

Plaintiffs respectfully submit that the implied covenant calls for a different inquiry. If, at the time of contracting, anyone had conceived of the possibility that Defendants would deliberately procure an illegitimate opinion to exercise the Call Right, they would have demanded an express term prohibiting it. The fact that a second firm, after being affirmatively misled, subsequently offered limited advice about the form—but not substance—of that illegitimate opinion does not alter the equation.

2. *Williams* Does Not Supplant the Implied Covenant

The Court of Chancery reasoned that, because *Williams* requires a court to analyze the sufficiency of an opinion under a good faith standard, Plaintiffs "already benefited from a *Gerber*-style analysis, leaving no additional work for the implied covenant to do." RO 113-14.

This reasoning "improperly conflates two distinct concepts": the concept of "good faith" under *Williams* and the "very different … good faith concept addressed by the implied covenant." *See Gerber*, 67 A.3d at 419. Good faith under the implied covenant envisions faithfulness to the scope, purpose, and terms of the parties' contract, not loyalty to a contractual counterparty. *Id.*

By contrast, *Williams* focuses on the subjective intent of opinion counsel at the time they render the opinion. Here, Defendants breached the implied covenant by procuring an opinion that subverted the purpose of the Opinion Condition.

III. <u>DEFENDANTS' BREACHES SHOULD HAVE CONSEQUNECES</u>

A. Question Presented

Did the Court of Chancery commit legal error when it assessed the consequences of Defendants' failure to satisfy the Opinion Condition? Plaintiffs raised this issue below (A969-A977), and the Court of Chancery considered it (RO 80-88).

B. Scope of Review

This Court reviews questions of law *de novo*. *Dematteis*, 315 A.3d at 508.

C. Merits of Argument

This Court's *en banc* decision held that the conclusive presumption in Section 7.10(b) of the Partnership Agreement exculpated the General Partner from money damages. But all other remedies against the General Partner remain available. Moreover, no other Defendant can benefit from the conclusive presumption, because Section 7.10(b) protects only the General Partner.

1. Equitable Relief Remains Available

"Equity abhors a wrong without a remedy." *Bardy Diagnostics, Inc. v. Hill-Rom, Inc.*, 2021 WL 2886188, at *42 (Del. Ch. July 9, 2021); *see also In re Del. Pub. Schs. Litig.*, 239 A.3d 451, 510-11 (Del. Ch. 2020).

Accordingly, Delaware courts strictly construe exculpatory provisions, and they have repeatedly held that provisions limiting the availability of monetary damages do not also limit the availability of equitable relief. *See Brinckerhoff v.*

Enbridge Energy Co., 2016 WL 1757283, at *19 n.137 (Del. Ch. Apr. 29, 2016), *rev'd on other grounds*, 159 A.3d 242 (Del. 2017); *Gotham P'rs, L.P. v. Hallwood Realty P'rs, L.P.*, 817 A.2d 160, 175 (Del. 2002).

That distinction is particularly important under DRULPA, which permits exculpation from *all liabilities*, not just money damages. *See* 2003 Del. SB 273 (expanding §17-1101(d)(1) and inserting subsection (f), providing that "[a] partnership agreement may provide for the limitation or elimination of *any and all liabilities* for breach of contract and breach of duties") (emphasis added).

Thus, Boardwalk's Partnership Agreement could have eliminated "any and all liability" for breaches. Instead, the Partnership Agreement exculpates qualifying indemnitees from "monetary damages" only. PA §7.8(a) (A1278) (qualifying indemnitees shall not be "liable for monetary damages … to the Limited Partners"). Consequently, neither the Partnership Agreement nor this Court's *en banc* decision precludes equitable relief against the General Partner.

2. The Conclusive Presumption Protects Only the General Partner

The General Partner benefited from the conclusive presumption of good faith under Section 7.10(b). But, by its terms, Section 7.10(b) protects only the General Partner. The other defendants must qualify for exculpation under 7.8(a). They cannot do so on these facts.

IV. DEFENDANTS DISTORTED THE CALL RIGHT EXERCISE PRICE

A. Question Presented

Did the Court of Chancery err when it declined to hold Defendants liable for their distortion of the Call Right exercise price? Plaintiffs raised this question below (A952-A966), and the Court considered it (RO 116-17).

B. Scope of Review

This Court reviews factual findings for clear error and questions of law *de novo*. *Energy Transfer*, 2023 WL 6561767, at *13.

C. Merits of Argument

The Court of Chancery rejected Plaintiffs' claims challenging Defendants' distortion of the Call Right exercise price after holding that Defendants complied with the federal securities laws. RO 116-17.

But compliance with the securities laws is not the issue. The issue is whether Defendants violated the express or implied terms of the Partnership Agreement by issuing the challenged disclosures. If this Court reaches this claim,[9] it should direct the Court of Chancery to award damages sufficient to ensure that Boardwalk's unitholders receive what the Partnership Agreement called for—consideration based on unit prices *undistorted by disclosures* related to the Call Right exercise.

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[9] Defendants' breach of the Partnership Agreement's pricing mechanism provides an alternative basis for liability that this Court need not reach if it orders a remedy for Defendants' wrongful Call Right exercise.

1. Defendants Manipulated the Potential Exercise Disclosures

In anticipation of the Call Right exercise, Defendants prepared disclosures Boardwalk and Loews would issue in their upcoming Form 10-Qs (the "Potential Exercise Disclosures"). PTO 83. Loews knew that disclosures stating that the General Partner might (but might not) exercise the Call Right at some unspecified future time would impact the exercise price given the 180-day look-back formula in the Partnership Agreement.

Loews began studying the anticipated impact in late March 2018. *See* PTO 86; A1320-A1324. Loews management modeled various scenarios for trading price behavior following the expected disclosures. *See id.*; A244 ¶¶271-74; Siegel Tr. A494-A495. Loews' analysis revealed that they would effectively cap Boardwalk's trading price, resulting in an artificially low exercise price. *See* A1336-A1345.

Loews enlisted Barclays to conduct further analysis. Siegel Tr. A494. Barclays projected a short-term jump in Boardwalk's unit price, followed by a steady decline in the exercise price the longer Loews waited to exercise. *See* A1351, 1365; PTO 86. Like Loews, Barclays projected that the "High Bookend" for Boardwalk's trading price following the disclosures would be the "180 day rolling average redemption price." A1365. Barclays identified several "Key Factors" that would exert downward pressure on the unit price following the disclosures, including "[u]ncertainty regarding timeline" and the "[p]robability Loews doesn't" exercise.

Id.; *see also* Posternack Dep. A1564. In short, Barclays confirmed what Loews knew: disclosing serious consideration of the Call Right without disclosing whether or when it might exercise would drive down the exercise price. *See* PTO 86.

Loews capitalized on this fact during the drafting process. The first drafts of Boardwalk's disclosure, assembled separately by Baker Botts and Boardwalk's outside counsel (Vinson & Elkins), were comparatively neutral. They articulated substantial uncertainty regarding how the March 15 FERC Actions would affect Boardwalk's rates, if at all. *See* PTO 84-85. For example, Baker Botts' draft specified that "[i]mportant details of implementing the [Revised Policy] require clarification and the Company will continue to assess the financial impacts as more information becomes available." *Id.* The Vinson & Elkins draft noted that "[r]equests for rehearing or clarification of the [Revised Policy] may change the outcome of the FERC's decision" and "impacts that such changes may have on the rates we can charge … are unknown at this time." *Id.* It also explained that while FERC's recent actions may decrease two cost-of-service components (the tax allowance and ADIT), "*other components in the cost-of-service rate calculation may increase and result in a newly calculated cost-of-service rate that is the same as or greater than the prior cost-of-service rate*[.]" *Id.* 84-85 (emphasis added).

On April 10, McMahon circulated a draft of Boardwalk's disclosure based on Vinson & Elkin's draft. PTO 85. Less than a day later, Alpert circulated Loews' comments. *Id.* Loews' revisions replaced uncertainty about the impact of FERC's actions with the conclusion "we do not expect the FERC to reverse [the Revised Policy] or otherwise revise the policy in a manner favorable to master limited partnerships." *Id.* Loews even incorporated the language of the Call Right nearly verbatim: "we believe that our status as a pass-through entity for tax purposes will reasonably likely in the future have a material adverse effect on the maximum applicable rates" that Boardwalk's subsidiaries could charge. *Id.* Loews also deleted the truthful concession that "we cannot predict the outcome of the NOPR," and added the statement that "the ultimate outcomes of the NOI and NOPR *may have further material adverse effects*." *Id.* (emphasis added).

Boardwalk pushed back against certain of Loews' edits. PTO 86; A236-A237 ¶¶249-50. In the exchange that followed, Loews deleted the truthful explanation that changes to other components in the cost-of-service calculation meant rates might stay the same or *even increase*. PTO 86. Thomas Watson (Loews' Associate General Counsel) subsequently emailed Alpert the redline removing this critical language with a cover note stating that "[t]his is the draft that it came out [sic]." A239 ¶254. Alpert forwarded Watson's email to other members of Loews management. A1369; A1383. Throughout April, Alpert led Loews' efforts to obscure real-world facts that could undermine Baker Botts' opinion. *See* A238-A240 ¶¶253-57; Alpert Tr. A423.

On April 30, Boardwalk and Loews issued coordinated Form 10-Q disclosures indicating that the Sole Member was "analyzing the FERC's recent actions" and "seriously considering" its purchase right under Section 15.1(b). PTO 87-89. These disclosures omitted:

- language indicating that FERC's cost-of-service ratemaking principles might result in a net *increase* in Boardwalk's rates, depending on how the March 15 FERC Actions were ultimately resolved;

- information confirming that Loews had retained counsel to examine these issues and had obtained commitments regarding the issuance and acceptability of the opinion;

- key details concerning the favorable implications of the NOPR, as well as the importance of rate case risk in assessing the likelihood of any adverse rate impact; and

- the fact that requests for rehearing raised substantial uncertainty regarding whether and how FERC might apply the Revised Policy to Boardwalk's subsidiaries in the future.

See A1491-A1493, A1499; A1461.

The Potential Exercise Disclosures amplified uncertainty over when and whether Loews would exercise the Call Right while signaling the possibility that Loews could exercise. In crafting the disclosures in this way, Loews played on the same factors Barclays observed would have a "dampening impact" on any initial price jump. *See* Posternack Dep. A1566; PTO 86.

During coordinated April 30 earnings calls, Boardwalk and Loews left investors in the dark on Loews' intentions. PTO 90; A1483; A1471-A1473. As

Barclays projected, Boardwalk's unit price initially spiked to a high of $12.70 immediately following the disclosures. PTO 90. Also as predicted, the increase was short-lived. By Loews' earnings call that morning, the price had started to plunge, and the rout continued through the following week. A1574. On May 1, U.S. Capital Advisors downgraded Boardwalk "to Hold from Buy" and reduced its price target from $20 to $11. PTO 90. The research note concluded that any purchase by Loews "would be at a formula-derived price, which, if a deal were consummated, would likely result in limited upside on the price of BWP units." PTO 90-91. McMahon was impressed by the analysis: "Amazing how good they are." PTO 91.

As the unit price fell, so did the exercise price. Market participants cited "lots of confusion" and a "fear feedback loop." A1508; A1507; *see also* A1505 (Barclays: "Loews is incentivized to wait given the lower share price over time"). The Potential Exercise Disclosures removed any investor incentive to hold units above the formula price and resulted in a self-perpetuating sell-off. The uncertainty Defendants fueled regarding the timeline and likelihood of exercise only intensified what Deutsche Bank described as the real-time "prisoner's dilemma" that "Loews had created." PTO 91-92; *see also* 92 (Barclays report questioning purported basis for exercising Call Right and Loews' "teas[ing] the market" to "put[] pressure on the stock"); 93 (JP Morgan report explaining that, if Loews wanted to "avoid the perception of securities manipulation," it should not include prices affected by their disclosures in the exercise price calculation).

Ultimately, Defendants' efforts paid off, shaving $1.10 per unit off the exercise price. *See* Atkins Tr. A567.

2. The General Partner and Boardwalk Breached the Partnership Agreement's Pricing Mechanism

a. Section 7.9(a)

The General Partner acted in its official capacity when it issued Boardwalk's Potential Exercise Disclosure. *See* PA §7.9(a)-(c) (A1278-A1280). Section 7.9(a) of the Partnership Agreement provides the contractual standard for assessing the disclosure, because a conflict of interest existed between the General Partner and the limited partners regarding the disclosures' timing and contents. *See* Horton Dep. A1560. Boardwalk's General Partner wanted to maximize its optionality to exercise the Call Right at the lowest possible price, and Boardwalk's minority unitholders wanted to retain their units or dispose of them at the highest possible price.

This central conflict infected the process. The General Partner failed to secure "Special Approval," and no "unrelated third parties" were involved. Accordingly, Section 7.9(a) required the disclosures be "fair and reasonable to the Partnership." *See Allen v. El Paso Pipeline GP Co.*, 90 A.3d 1097, 1102 (Del. Ch. 2014) (citation omitted).

A transaction that is "highly unfair to the limited partners" cannot be "fair and reasonable to the Partnership" because the "limited partners are one of the Partnership's constituencies." *Bandera Master Fund LP v. Boardwalk Pipeline P'rs, LP*, 2019 WL 4927053, at *15 (Del. Ch. Oct. 7, 2019) (citation omitted); *see also In re CVR Refin., LP Unitholder Litig.*, 2020 WL 506680, at *10 (Del. Ch. Jan. 31, 2020) (conduct "adverse to the interests of the limited partners with no offsetting benefits" would be "adverse to the Partnership as a whole").

Here, the disclosures were not "fair and reasonable to the Partnership" because they were misleading and impacted the exercise price in Defendants' favor at the limited partners' expense. Defendants struck truthful language describing the potential for an offsetting impact to rates because it would undermine Baker Botts' opinion. *See* A1369. Moreover, by omitting the plainly material facts that Baker Botts and Skadden had been retained and provided commitments regarding the opinion, Defendants amplified the uncertainty they knew would put downward pressure on Boardwalk's unit price. *See* A1508 (LO: "do you think L has received special counsel?" Jeremy Tonet: "unsure there … lots of confusion to be honest"); A1507 ("I don't think they can get an opinion of counsel saying this is a material adverse change, esp when the co has said it isn't").[10]

[10] Defendants' *own* disclosure expert opined that Baker Botts' undisclosed April 20 commitment regarding the opinion "would doubtless have been material from [a reasonable investor's] point of view." A1582-A1583 ¶62; A1580 ¶45

The Court of Chancery failed to engage meaningfully on these points. *See* RO 117 (summarily holding that the disclosures were "required by law" and the information Defendants omitted "could have been helpful to limited partners" but "was not material"). This Court should reverse. The securities laws did not require Defendants to issue misleading disclosures and distort the exercise price, and the express and implied terms of the Partnership Agreement prohibited that conduct.

b. Sections 15.1(b) and 16.2

Defendants breached Sections 15.1(b) and 16.2 of the Partnership Agreement by purchasing the public units at a price distorted by the Potential Exercise Disclosures.

The Partnership Agreement set the exercise price at the average of the daily closing prices "for the 180 consecutive Trading Days immediately prior to the date three days prior to the date the notice … is mailed." PA §15.1(b) (A1305). The language was designed to "protect the public unit holders from an exercise that would have picked a time when, for whatever reason, the units might have just fallen during a brief period." Rosenwasser Dep. A1544. To that end, Section 15.1(b) specified that the 180-trading day look-back calculation employ historical trading prices set during a period ending several days *before* the General Partner

(concluding that the securities laws required Boardwalk to update its risk factors "to reflect the Partnership's knowledge that it could, more likely than not, receive an opinion of counsel meeting the [Opinion Condition]").

disseminated notice. This requirement ensured that the purchase price would not be skewed by the notice of exercise itself.

Instead of complying with Section 15.1(b), Defendants distorted the purchase price through their Potential Exercise Disclosures. Those disclosures caused "lots of confusion" in the marketplace and triggered a downward spiral in the unit price. A1508; A1509.

Defendants ultimately underpaid minority unitholders in breach of Section 15.1(b) and Section 16.2, which required Defendants to "take or refrain from taking action as may be necessary or appropriate to achieve the purposes of" the Partnership Agreement. *Id*. The Court of Chancery's focus on the securities laws overlooked these breaches.

3. The General Partner and Boardwalk Breached the Implied Covenant by Issuing the Potential Exercise Disclosures

Section 15.1(b)'s formula reflected an intent to ensure the exercise price would be undistorted by the public announcement of the exercise. *See* A350 (Rosenwasser acknowledging formula was designed "to establish a price that best reflects the actual value of the underlying securities"); *In re CVR Refining*, 2020 WL 506680, at *15 (finding similar provision "appear[ed] designed to ensure the exercise of the Call Right at a price unaffected by the public announcement of the exercise").

By announcing the potential exercise of the Call Right in advance, Loews effectively locked in its maximum purchase price because unitholders had no incentive to trade above the formula price. And by introducing additional uncertainty regarding whether and when Loews might exercise, Defendants sparked an "unfortunate race to the bottom" where the market assumed the "worst / longest timeframe possible, … creating momentum to spiral down." A1509. When they included closing prices distorted by their disclosures in the exercise price calculations, Defendants exploited the price decline they caused. Had the Partnership Agreement's drafters anticipated this type of opportunism, they would have prohibited it. *See Dieckman*, 155 A.3d at 361.

4. The Potential Exercise Disclosures Amounted to Tortious Interference and Unjust Enrichment

Even if the General Partner were somehow exculpated from liability for the Potential Exercise Disclosures, Loews, the GPGP and the Sole Member tortiously interfered with the Partnership Agreement via the disclosures.

In their capacities as officers of Loews and officers or directors of either the GPGP or the Sole Member, Loews and Boardwalk personnel (including Alpert, Siegel and McMahon)[11] crafted misleading disclosures to maximize investor uncertainty and exploit the resulting tumult.

[11] *See* A148 ¶47, A150 ¶49, A151 ¶53, A152-A153 ¶¶54, 57 (detailing Alpert, Siegel, and McMahon's various positions).

Alternatively, the exercise of the Call Right at a price depressed by the Potential Exercise Disclosures unjustly enriched Loews, the GPGP and the Sole Member at the expense of the class, who not only lost their units but were underpaid for them.

This sort of abuse will continue if Defendants are not held to account for their misconduct. *See In re CVR Refining*, 2020 WL 506680, at *4 (declining to dismiss complaint alleging controller followed the new "'Boardwalk playbook' that sets out 'how the controller of an MLP could weaponize a call right with a trailing-market-price-based price by artificially manipulating the stock price'").

CONCLUSION

Plaintiffs respectfully submit that the Court of Chancery's judgment should be reversed.

<u>/s/ A. Thompson Bayliss</u>
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