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

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NATURE OF PROCEEDINGS

In December 2022, this Court reversed the Court of Chancery's nearly $700 million judgment against the General Partner of Boardwalk Pipeline Partners, LP for breach of Boardwalk's Limited Partnership Agreement ("LPA"). The Court of Chancery had read the LPA to impose two independent preconditions to the General Partner's exercise of its contractual call right: (1) acceptance of an opinion of counsel that the right had been triggered and (2) good-faith rendering of the underlying opinion of counsel. According to the trial court, neither condition was satisfied.

On appeal, this Court disapproved the trial court's splitting of the call right trigger into different conditions, and held that the General Partner did what was required for exercise: it properly accepted an opinion of counsel finding that the call right had been triggered. *Boardwalk Pipeline Partners, LP* v. *Bandera Master Fund LP*, 288 A.3d 1083, 1088, 1121-23 (Del. 2022). The Court therefore reversed the trial court's partial final judgment on plaintiffs' claim for breach of contract arising from exercise of the call right (Count I), and remanded for "further proceedings consistent with [its] opinion" to address the other four claims pled but not then adjudicated: breach of contract and of the implied covenant for paying unit prices affected by exercise-related disclosures (Counts II & III); tortious interference (Count IV); and unjust enrichment (Count V). *Id.* at 1123.

The question on this appeal is whether the trial court on remand correctly dismissed these remaining claims and an unpled claim for breach of the implied covenant arising from exercise of the call right. The answer is an easy yes.

To succeed on the call-exercise-related tortious interference claim, plaintiffs had to show that (1) the General Partner breached an express or implied term of the LPA and that (2) the partnership's sponsor, Loews, took unjustified action (3) to cause that breach. Plaintiffs established none of these elements. *First*, there was no breach; this Court has already held that the General Partner, relying on advice from Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden"), properly accepted the opinion rendered by Baker Botts LLP ("Baker"). The General Partner had no other relevant obligation under the LPA. *Second*, Loews's actions as parent and sole owner of the General Partner were justified. And, *third*, the actions plaintiffs impugn did not cause the rendering or acceptance of Baker's opinion.

Plaintiffs' claims that defendants breached or caused breaches of the LPA's terms governing the price paid for the bought-back units fail for the reasons the trial court gave: the federal securities laws required defendants to issue the disclosures of which plaintiffs complain, and those disclosures contained no material omissions.

Finally, plaintiffs' tag-along claim for unjust enrichment cannot proceed where, as here, the relevant relationship of the parties is governed by a contract.

Trying to make something of nothing, plaintiffs argue that failure to resurrect their claims will "effectively overrule" *Williams Cos.* v. *Energy Transfer Equity, L.P.*, 159 A.3d 264 (Del. 2017), in which this Court affirmed Vice Chancellor Glasscock's decision about a closing condition that called for issuance of an opinion of counsel to non-clients. POB 22. Setting aside the different context here, plaintiffs have it backward. *Williams* stands for deference to opinions of counsel and judicial restraint. *See Boardwalk*, 288 A.3d at 1124 (Valihura, J., concurring) (citing *Williams Cos.* v. *Energy Transfer Equity, L.P.*, 2016 WL 3576682 (Del. Ch. June 24, 2016), *aff'd*, 159 A.3d 264 (Del. 2017)). Its teachings would be honored, not undercut, by affirmance here, particularly where—as this Court found—Skadden's acceptability advice implicitly concluded that Baker's opinion "was rendered in good faith." *Id.* at 1121.

SUMMARY OF ARGUMENT

1. **Denied**. The court below properly rejected plaintiffs' claims premised on an express breach of the LPA, including their claims of tortious interference and unjust enrichment against Loews.

2. **Denied**. The court below properly rejected plaintiffs' claim that the General Partner breached the implied covenant with respect to the exercise of the call right.

3. **Denied**. Defendants are exculpated from money damages, and plaintiffs are not entitled to equitable relief.

4. **Denied**. The court below properly entered judgment for defendants on plaintiffs' claims related to the April 30, 2018 exercise disclosures.

STATEMENT OF FACTS

Boardwalk operates natural gas pipelines. Boardwalk's parent, Loews, took Boardwalk public as a Master Limited Partnership ("MLP") in 2005 to leverage a new Federal Energy Regulatory Commission ("FERC") policy permitting MLPs to claim an allowance for income taxes paid by public investors. *Boardwalk*, 288 A.3d at 1083, 1090-91. Loews controlled Boardwalk through its 100% ownership of Boardwalk Pipelines Holding Corp. (the "Sole Member"), which in turn had a 100% indirect ownership of Boardwalk GP, LP, Boardwalk's General Partner. *Id.* at 1091-92. In creating the MLP, Loews "took full advantage of the flexibility permitted under Delaware law" governing MLPs, which allows for a "sponsor's lopsided rights." *Id.* at 1087. The LPA disclaimed fiduciary duties on the part of the General Partner and any other "Indemnitees" (including Loews); provided that most determinations made by the General Partner are subject only to a duty of good faith; included a presumption of good faith for reliance on advice of counsel; and exculpated the General Partner and its "Affiliates" (including Loews) from damages. *Id.* at 1087, 1093-94, 1109-10; *see* A1278-80/LPA §§ 7.8(a), 7.9(b), 7.9(e), & 7.10(b).

Loews knew FERC's tax policy might change, so it included in the LPA a call right allowing the General Partner to buy out the public investors in that circumstance. A1305/LPA § 15.1(b); *Boardwalk*, 288 A.3d at 1092-93. Section

15.1(b) provided that the General Partner could repurchase Boardwalk's public units if it received "a written opinion of counsel . . . acceptable to the General Partner" that Boardwalk's "status as an association not taxable as a corporation . . . has or will reasonably likely in the future have a material adverse effect on the maximum applicable rate that can be charged to customers . . . ." A1218, A1305/LPA §§ 1.1, 15.1(b). The reason the call right was conditioned on acceptance of an opinion of counsel, rather than directly on a contractually-defined event, was to give the General Partner more certainty, and less litigation risk, in exercising the right. A322-23/48:17-49:15 (Rosenwasser). Following its IPO, Boardwalk's public filings consistently alerted investors to the existence of the call right, described the triggering events for exercise, explained the absence of fiduciary duties applicable to exercise, and cautioned that the call right could force limited partners to sell their common units at "an undesirable time or price." *Boardwalk*, 288 A.3d at 1094-96.

On March 15, 2018, FERC announced the policy change that the call right was designed to address. *Id.* at 1097-98. Following the announcement, Loews explored whether the LPA's call right had been triggered, and, if so, whether exercise of the call made business sense. A390-91/320:11-322:1 (Alpert); A486-87/701:21-703:4 (Siegel). Acting on a recommendation from Boardwalk General Counsel Michael McMahon, Loews General Counsel Marc Alpert contacted Michael Rosenwasser, then a partner at Baker, to engage Baker to evaluate whether

the call right had been triggered. A391-92/324:15-325:16 (Alpert); *Boardwalk*, 288 A.3d at 1099. At the same time, Loews contacted Skadden to review Baker's work and conclusions, and to provide disclosure advice in connection with the call right. *See* A392/325:24-327:6, A400/357:18-358:11, A412/407:3-8 (Alpert); B1025-26/Grossman Dep. 17:10-19:20.

Over the ensuing months, Baker investigated whether it could provide the opinion required by Section 15.1(b). *See Boardwalk*, 288 A.3d at 1099-1102. As part of its work, Baker assessed the finality of FERC's revised policy and interpreted the key terms of the call right, including "maximum applicable rate" and "material adverse effect." *Id.* at 1101-02. It also worked with Boardwalk to develop a financial model to help it assess the impact of FERC's actions on Boardwalk's future recourse rates. *Id.* at 1102.

On April 30, 2018, Boardwalk and Loews each filed a Form 10-Q disclosing that the General Partner was "seriously considering its purchase right" under Section 15.1(b) in light of FERC's actions. B740; B685. The 10-Qs and related disclosures on April 30 (together, the "April 30 Disclosures") were issued on the advice of, and with input and approval of, several different counsel. *See* A228-29 ¶ 229; p. 45, *infra*. As counsel advised, and as plaintiffs no longer dispute, the federal securities laws required Boardwalk to disclose its potential exercise of the call right at this

time. B542 ¶ 30; RO 116.[1]

On May 24, 2018, two limited partners brought suit claiming that the April 30 Disclosures constituted a breach of the LPA and that Boardwalk's unitholders would be harmed by further delay in exercising the call right. *Boardwalk*, 288 A.3d at 1105. As part of an agreed resolution with those plaintiffs, Loews and the General Partner undertook to make the exercise decision no later than June 29, 2018. *Id.*; A410/398:3-21 (Alpert).

On June 29, 2018, following three months of work, Baker issued a five-page opinion, finding the condition to the call right met. *Boardwalk*, 288 A.3d at 1099-1100; B1011-15. Baker also prepared "a comprehensive memorandum explaining the basis for its opinion." *Boardwalk*, 288 A.3d at 1100; B755.

The Sole Member was charged with determining the acceptability of the Baker opinion for the General Partner. To advise the Sole Member on that determination, Skadden shadowed Baker for months, reviewing its assumptions and the rate model developed in conjunction with Boardwalk, and then made a 23-page presentation to the Sole Member board based on its review of Baker's process and analysis. *Boardwalk*, 288 A.3d at 1103-03, 1121; A326/61:15-62:16, A328:71:10-

[1] "RO" is the trial court's September 9, 2024 opinion on remand (POB Ex. A); "MTDO" is the trial court's October 7, 2019 ruling on defendants' motion to dismiss the initial substitute complaint (B1-B63); "PTO" is the trial court's post-trial November 12, 2021 opinion (A621-A814); and "POB" is plaintiffs' opening brief on this appeal.

14 (Rosenwasser); A410-11/400:2-404:23 (Alpert); B1027-28/Grossman Dep. 89:16-92:12; A1511-33. Skadden advised the Sole Member board that Baker's construction of Section 15.1(b) and the assumptions underlying the opinion were reasonable. *Boardwalk*, 288 A.3d at 1103-04. Skadden further advised that it would be reasonable for the Sole Member board to accept the opinion. *Id.* at 1104. The Sole Member, relying on Skadden's advice, found Baker's opinion acceptable, then concluded that exercise of the call right made business sense and directed the General Partner to exercise the right. *Id.*

On September 28, 2018, the trial court rejected the proposed settlement with the original plaintiffs and substituted the current plaintiffs. *Id.* at 1105. Following trial, the court held that the General Partner breached the LPA by exercising the call right and awarded damages of $689,827,343.38 plus interest. The court determined that the General Partner breached Section 15.1(b) because Baker, in issuing its opinion, acted with bad faith under pressure from Loews. PTO 112-51. The court also found that the Sole Member was not the proper entity to decide the opinion's acceptability, PTO 151-67, and that exculpation was not available because Baker and certain of defendants' agents had engaged in "willful misconduct" imputable to the General Partner. PTO 168-72.

On December 19, 2022, this Court reversed the trial court's judgment. *Boardwalk*, 288 A.3d at 1123. The Court held that the Sole Member properly

decided the opinion's acceptability. *Id.* at 1112-17. In so holding, the Court noted that detaching acceptance of the opinion of counsel from reliance thereupon, as the trial court had done, "would make the Sole Member's exclusive authority [to exercise the call right] non-exclusive." *Id.* at 1115. The Court thus held that even though the trial court found that Baker provided a "compromised opinion," "the proper focus" under the governing agreements "was on the Sole Member and the opinion it received from Skadden." *Id.* at 1123. And Skadden, "having full knowledge of Baker Botts' analytical framework, including its assumptions, models, and its interactions with Boardwalk's officers," concluded it would be reasonable for the Sole Member to accept Baker's opinion. *Id.* at 1121. "Implicit in th[at] acceptability opinion [wa]s Skadden's conclusion that the Baker Botts Opinion was not contrived and that it was rendered in good faith." *Id.* Because the Sole Member, acting on behalf of the General Partner, reasonably relied on Skadden's advice, under Section 7.10(b) of the LPA the General Partner was conclusively presumed to have acted in good faith in exercising the call right. *Id.* at 1088, 1123. Even without the conclusive presumption, the Court held, the evidence showed good faith. *Id.* at 1122-23. The Court therefore held that the General Partner was exculpated from damages under Section 7.8(a). *Id.* at 1118-23. It reversed the trial court's partial final judgment and remanded for the trial court to address the remaining counts. *Id.* at 1123.

Justice Valihura, writing separately in concurrence for herself and for then-Judge LeGrow, likewise rejected the trial court's finding of breach, but on a different ground. *Id.* at 1123-35. Analogizing the trial court's decision to using the wrong Scantron to grade Baker's work, the concurrence found that the trial court had misapplied existing law by "view[ing] the [Baker] Opinion through a *de novo* lens, instead of the more deferential standard set forth in" *Williams*. *See id.* at 1124. Applying *Williams*, the concurrence found that the Baker opinion was rendered in good faith, and would have reversed the trial court's breach holding on that ground. *Id.*

After additional briefing on remand, the trial court entered judgment for defendants on all remaining claims. First, it dismissed plaintiffs' tortious interference claim related to the call right exercise on the grounds that (1) under this Court's decision, there was no breach of the LPA, RO 78-88, 90; and (2) even if Loews intentionally caused a breach of the LPA, any such interference was justified, RO 91-98. Second, having rejected defendants' argument that plaintiffs waived their call-right-exercise-related implied covenant claim, the court held that the claim could not support recovery. RO 99-115. Third, the trial court rejected plaintiffs' unjust enrichment claim on the basis that any benefits Loews received from exercise were consistent with the LPA. RO 115-16. Finally, the trial court rejected plaintiffs' claims that the April 30 Disclosures distorted the exercise price, finding that the

alleged omissions were not material and that by providing the disclosures required by law the General Partner had satisfied any obligations under the LPA. RO 116-17.

ARGUMENT

I. THE COURT OF CHANCERY PROPERLY REJECTED PLAINTIFFS' CLAIM THAT LOEWS TORTIOUSLY INTERFERED WITH THE LPA BY PROCURING A "CONTRIVED OPINION"

A. Question Presented

Did the Court of Chancery properly dismiss plaintiffs' claim that Loews tortiously caused a breach of the LPA provisions governing exercise of the call right? A1002-19.

B. Scope of Review

This Court reviews questions of law and contract interpretation *de novo* and factual findings for clear error. *CompoSecure, LLC* v. *CardUX, LLC*, 206 A.3d 807, 816 (Del. 2018). This Court "review[s] the Court of Chancery's law of the case determination[s] *de novo*." *Siga Techs., Inc.* v. *PharmAthene, Inc.*, 132 A.3d 1108, 1128 (Del. 2015).

C. Merits of Argument

A claim for tortious interference cannot succeed unless the plaintiff establishes that the defendant's unjustified actions caused a breach of contract. *See Bhole, Inc.* v. *Shore Invs., Inc.*, 67 A.3d 444, 453 (Del. 2013). The trial court correctly held that: (1) the call right's exercise did not breach the LPA; and (2) Loews, as the ultimate parent of the General Partner, was justified in its actions relating to the call right exercise. Plaintiffs' tortious interference claim fails for the additional reason that (3) no improper act of Loews caused exercise of the call right.

1. Having fulfilled its only contractual obligation respecting the call right exercise, the General Partner did not breach the LPA

The Boardwalk LPA specified that the call right was exercisable at the sole discretion of the General Partner. A1272, A1279, A1305/LPA §§ 7.1(b)(iii), 7.9(c), 15.1(b). Pursuant to Section 15.1(b)(ii), the only precondition to exercise—aside from a 50% ownership threshold—was that the General Partner secure "a written opinion of counsel . . . acceptable to the General Partner" that Boardwalk's tax status as an MLP rather than a corporation "has or will reasonably likely in the future have a material adverse effect on the maximum applicable rate that can be charged to customers." A1218, A1305/LPA §§ 1.1, 15.1(b).

That condition was satisfied. RO 87. In its *en banc* decision, this Court held that "the General Partner's decisionmaker for the call right exercise—the Sole Member—reasonably relied on the Skadden Opinion to cause the call right exercise." *Boardwalk*, 288 A.3d at 1118. Skadden's advice "addressed the ultimate question required by the governing agreements . . . – whether the Baker Botts Opinion should be considered reasonable and acceptable to [the Sole Member] Board." *Id.* at 1121 n.289. The Sole Member, acting on behalf of the General Partner and in reliance on Skadden's advice, answered that question in the affirmative and properly accepted a written opinion of counsel directed at the issue identified in Section 15.1(b). *Id.* at 1117-18, 1120-21.

Plaintiffs dispute that this resolved the question of breach. They say the Court held only that "the correct decision-making body made the 'acceptability' determination" and that the General Partner was exculpated from money damages. POB 21. Accordingly, they say, whether the General Partner breached a supposed separate "Opinion Condition" has not been answered, and the trial court's original determination that such a breach occurred should stand. POB 20.

That position cannot be squared with this Court's analysis, which in turn is grounded in the text of the LPA. As the Court explained, LPA Section 7.1(b) "frees the General Partner and its controlling entities from 'any duty that the General Partner may owe the Partnership or Limited Partners . . . or any duty stated or implied by law or equity' in its performance of the [LPA]." *Boardwalk*, 288 A.3d at 1109. "Section 7.9 sets forth the standards of conduct and duties that do apply." *Id.* Assuming the General Partner had a duty to act in "good faith" under Section 7.9(b) in determining whether to accept Baker's opinion—an issue this Court did not resolve, *see id.* at 1112-13—that duty was discharged by operation of the conclusive presumption under Section 7.10(b), *id.* at 1121-22; *see Norton* v. *K-Sea Transp. Partners L.P.*, 67 A.3d 354, 368 (Del. 2013), and, independently, by the good-faith conduct of a majority of the Sole Member board, *Boardwalk*, 288 A.3d at 1122-23.

Plaintiffs' position that the General Partner nonetheless breached requires locating in the LPA some *other* obligation the General Partner owed in connection

with exercise of the call right—separate and apart from its good-faith acceptance of Baker's opinion. It requires resurrecting the trial court's original tripartite conception of Section 15.1(b), under which the steps to exercise the call right were: (1) satisfaction of an "Opinion Condition," (2) satisfaction of a separate "Acceptability Condition," and (3) the decision to exercise. RO 81; *see* POB 20. But this Court has rejected that conception, finding it "conflicts with the overall scheme of Boardwalk's sponsor-friendly MLP framework" and introduces protections for the limited partner "untethered" to the LPA's text. *Boardwalk*, 288 A.3d at 1116. The Boardwalk LPA was designed to "allow[] a streamlined privatization process in the event of changes to FERC policies." *Id.* at 1115. "Detaching the Acceptability Condition from the Opinion Condition" would undermine this process. *Id.* There are thus just two steps: "acceptance and exercise." *Id.* at 1116. The first step was satisfied by the Sole Member's good-faith acceptance of Baker's opinion, and the second by the Sole Member's business decision. That satisfied the LPA. RO 84-87.

Plaintiffs are wrong that this ignores the "meaningful limitation[]" that the opinion of counsel places "on the General Partner's ability to exercise the Call Right." *Boardwalk*, 288 A.3d at 1116 n.256; *see* POB 23. The General Partner was not free to forgo a legal opinion, or to accept an opinion that did not address the matter called for by the contract. *See Gerber* v. *Enter. Prods. Hldgs., LLC*, 67 A.3d 400, 409, 422 (Del. 2013) (where LPA did not specifically reference fairness

opinion, plaintiff could invoke implied covenant to argue that conclusive presumption was not satisfied by fairness opinion that failed to address key issue). But that is not because of a standalone "Opinion Condition." The acceptance condition itself requires these things.

Nor is it true, as plaintiffs argue, that affirming the trial court's opinion on remand would undermine *Williams*. POB 22, 24-25. *Williams* does not directly govern whether the General Partner satisfied its obligations under the terms of the LPA, because the language and context at issue in *Williams* and here differ. The opinion-of-counsel provision in *Williams* was a closing condition of a "heavily negotiated" merger agreement that required the acquirer's outside tax counsel to deliver the opinion to both the target and the acquirer. *Williams*, 2016 WL 3576682, at *1, *5. As one might expect given the character of the transaction and the parties' relationship, there was no clause vesting in the acquirer alone the authority to determine the opinion's acceptability. The target there was unwilling to dispense with the judicial "backstop." POB 24-25. Here, by contrast, consistent with the "streamlined privatization process" contemplated by "Boardwalk's sponsor-friendly MLP framework," *Boardwalk*, 288 A.3d at 1116, the LPA defines an "Opinion of Counsel" as one "acceptable to the General Partner," thereby making the General Partner, through the Sole Member, the arbiter of the opinion's sufficiency. A1218, A1305/LPA §§ 1.1, 15.1(b); *Boardwalk*, 288 A.3d at 1117.

For similar reasons, it is not true that declining to read a standalone "Opinion Condition" into Section 15.1(b) will upset opinion practice and market expectations. POB 24-28. As plaintiffs' own authorities acknowledge, there is no established "opinion practice" outside of "third party closing opinions," meaning opinions—like the one contemplated in *Williams*—issued to non-clients as a condition for closing a transaction. Arthur N. Field, *A Universal Opinion Practice*, In Our Opinion (ABA Bus. Law Section Ops. Comm.), Vol. 23, No. 3 (Summer 2024) (A1698-A1714) at 8. The LPA did not call for a third-party opinion. It called for an opinion from the General Partner's counsel to its own client. *Id.* at 10; *see also* Amicus Br. 12.

More fundamentally, affirmance here would fortify rather than undercut *Williams*. The lesson of *Williams* is that even third-party opinions warrant substantial judicial deference. *See Boardwalk*, 288 A.3d at 1124 (Valihura, J., concurring) (finding that trial court erred by "view[ing] the Opinion through a *de novo* lens, instead of the more deferential standard set forth in" *Williams*); *Williams*, 2016 WL 3576682, at *11. What's more, in advising the Sole Member, Skadden considered whether, consistent with *Williams*, the Baker opinion was a product of good-faith legal judgment. The answer, as this Court recognized, was yes: "Implicit in [Skadden's] acceptability opinion is Skadden's conclusion that the Baker Botts Opinion was not contrived and that it was rendered in good faith." *Boardwalk*, 288 A.3d at 1121.

2. Any standalone "Opinion Condition" was satisfied

If the General Partner's good-faith acceptance of Baker's opinion were not enough, and there was a separate "Opinion Condition" to satisfy before the General Partner could exercise the call right without breach, that condition was met: Baker's opinion satisfied *Williams*. It was rendered in good faith. B586-B607.

That was the conclusion reached by the concurring justices on the first appeal, in a thorough opinion that the majority did not join but acknowledged raised "important concerns" about the trial court's contrary finding. *See Boardwalk*, 288 A.3d at 1130-1136 (Valihura, J., concurring); *id.* at 1117 (majority opinion). The conclusion also follows from the majority's own opinion, which held that Skadden, with full visibility into Baker's "analytical framework, including its assumptions, models, and its interactions with Boardwalk's officers," reasonably concluded that Baker had acted in good faith. *Id.* at 1121. As the Court found, the trial court's summary dismissal of Skadden's work as a "whitewash" was untenable. *Id.* at 1120-21; *see* PTO 174. Indeed, Skadden's "[i]mplicit" blessing went further than what *Williams* requires, because it was grounded not just in Baker's subjective beliefs but in Skadden's objective assessment of the reasonableness of Baker's methodology and conclusions. *See Boardwalk*, 288 A.3d at 1121 & n.289 (noting that Skadden advised the Baker opinion "should be considered reasonable and acceptable"); *compare Williams*, 2016 WL 3576682, at *11 (subjective good faith suffices).

a. Skadden's advice was not limited to "form," and not the product of deception

Plaintiffs offer two bases to resist this conclusion: they contend Skadden "focused solely on *the form* of Baker Botts' opinion" and not the substance (POB 29), and they claim that Skadden's opinion was infected by Baker's "conceal[ment]" of its rate expert's supposed refusal to sign off on Boardwalk's rate model (POB 30). Neither assertion is true.

As this Court has already observed, Skadden shadowed Baker from the beginning and reviewed Baker's process, assumptions, models, and analysis in depth. *Boardwalk*, 288 A.3d at 1103, 1121. Informed by that work, Skadden advised the Sole Member board that "it would be within the reasonable judgment" of the Sole Member to find "that the Baker Botts Opinion is acceptable." A1533. This was not an independent determination that the trigger for the call right had been met; defendants have never portrayed it as such, and this Court did not characterize it as such. *Cf.* RO 1 n.3 & 43 n.80 (falsely accusing defendants of mischaracterizing Skadden's opinion as a "formal opinion" and this Court of "adopt[ing] that characterization"); *see Boardwalk*, 288 A.3d at 1121 n.289 ("Skadden was not offering a duplicate opinion"). But it was, inescapably, an assessment of the reasonableness of Baker's approach and opinion, guided by expertise in both Delaware and FERC law. *Boardwalk*, 288 A.3d at 1121 & n.289.

As for plaintiffs' argument that Skadden's advice was infected by Baker's supposed deception—an argument not raised until remand or ever adopted by the trial court—it misrepresents the record and is in any event untenable. Far from "refus[ing] to sign off" on Boardwalk's rate model, POB 16, Baker's rate expert agreed that indicative rates were an appropriate methodology to compare "apples-to-apples" the effect of FERC's revised policy on Boardwalk's pipelines, B1036-37/Sullivan Dep. 220:6-223:10. And even if Baker had failed to share with Skadden a criticism of its rate model, that would not have affected Skadden's advice—Skadden, whose team included a former FERC Commissioner, had direct access to the rate model and the ability and expertise to judge the model for itself, as it did. *Boardwalk*, 288 A.3d at 1102-03 & n.137, 1121.

b. The trial court's discussion on remand does not rehabilitate its bad faith finding

On remand, the trial court reasserted its finding that, notwithstanding Skadden's advice, Baker acted in bad faith. That discussion, which occupies the bulk of the trial court's 117-page remand opinion, is littered with charges that defendants led this Court into error with mischaracterizations of the evidence and of the trial court's post-trial opinion. Defendants lack the space to address these unfair charges, but a few warrant focus for purposes of the appeal:

i. The form of Baker's opinion provided no basis to infer bad faith

The trial court suggested defendants led this Court into error by claiming ignorance of the "non-reasoned" and "non-explained" character of the Baker opinion and the supposed implications of that designation, *i.e.*, that it "sent a negative signal about Baker Botts' mindset." RO 39-41. This accusation is groundless.

First, if by calling Baker's opinion "non-explained" the trial court meant it did not satisfy the technical definition of a "reasoned opinion," that was neither clear from the post-trial opinion nor, in any event, correct. An "explained" or "reasoned" opinion is one that "spells out" sources of uncertainty in the "legal analysis," such as "a lack of judicial authority." Donald W. Glazer et al., *Glazer & FitzGibbon on Legal Opinions* § 3.3 (3d ed. 2008) (B1056-62). This serves "to put the [recipient] on notice concerning the [opinion's] uncertainties and limitations." Comm. Legal Ops., *Third-Party Legal Opinion Report*, 47 Bus. Law. 167, 231 (1991) (A1685-97). Baker's opinion did just that. For example, as this Court observed, in "address[ing] the term 'material adverse effect,'" the opinion "explained" that Baker "considered Delaware case law construing such term" and concluded "there is no case directly applicable to this situation and no bright-line test," but nonetheless looked to the case law for "guidance." *Boardwalk*, 288 A.3d at 1101-02 (quoting B1014).

Second, nothing about Baker's opinion supports the trial court's accusation that Baker was attempting to pass off the question presented as "a routine issue,"

PTO 146, or that Baker did not want its analysis "open and subject to criticism," RO 41. Quite the opposite: Baker prepared a detailed back-up memorandum, supported by 200 pages of documentation, that elaborated the bases for its opinion. B755-B1010. And Skadden, at Loews's request, shadowed Baker's work from the outset so that it would be well-positioned to opine on the reasonableness of Baker's methodology and determination. *Boardwalk*, 288 A.3d at 1103, 1117-18, 1121. Baker's process was transparent, not shrouded.

ii. The trial court's bad faith finding was grounded in its invalid criticism of Baker's interpretation of Section 15.1(b)

In its post-trial opinion, the trial court found that Baker acted in bad faith by facilitating an "opportunistic" call right exercise with an opinion that assessed "material adverse effect" by reference to predicted impact on recourse rates (as measured with modeled indicative rates), instead of by the "real-world," near-term impact of FERC's actions on Boardwalk's business. PTO 109, 137-38, 145-46, 189. That finding was grounded in a construction of Section 15.1(b) at odds with the architecture of the LPA. As this Court recognized, under the LPA "there was nothing improper about Boardwalk's consideration of the call right at th[e] time" it did; Boardwalk was free "to exercise the call right to its advantage—and to the disadvantage of the minority unitholders." *Boardwalk*, 288 A.3d at 1099. And the Court noted that Baker's focus on recourse rates "now and in the future" rather than

on "market-informed negotiated and discounted rates" was supported by Section 15.1(b)'s requiring an opinion of counsel rather than of another kind of advisor, by the text of the provision, and by "Boardwalk's securities filings and FERC documents." *Id.* at 1101.

On remand, the trial court tried in three ways to undercut this Court's construction of the LPA and to deflect challenge to its own approach: (1) it denied having criticized Baker for interpreting "maximum applicable rate" to mean "recourse rates"; (2) it argued that record testimony supported a focus on "real-world" business effects in interpreting Section 15.1(b); and (3) it denied having adopted the view that "near-term" effects were what mattered. *See* RO 6 n.6, 15 n.18, 53-59. None of this pulls through.

First, the trial court *did* find bad faith in Baker's construction of "maximum applicable rate" to mean "recourse rate." To be sure, the court faulted Baker for failing to "account[] for the implications" of that interpretation. RO 15 n.18; *see also* RO 53-55. But those "implications" were the whole ball game. According to the trial court, "maximum applicable rate" could mean "recourse rate" only if Baker was prepared to conduct "full ratemaking analyses" for each of Boardwalk's *167* rates. PTO 129-30, 138-39. It was bad faith, the court said, to instead measure the predicted recourse-rate impact by modeling the effects of FERC's actions on indicative rates. By "sidestep[ing]" the doctrine of *contra proferentem* to construe "maximum

applicable rate" to mean "recourse rate" instead of "real-world rates" without undertaking the impossible exercise the trial court prescribed, Baker "fatally undermined the Opinion." PTO 123-24, 128-29. In the trial court's rendering, Baker's only *real* option was to construe "maximum applicable rate" as "real-world" (including discounted and negotiated) rates—even though "recourse rate" was the more natural reading, *Boardwalk*, 288 A.3d at 1101, 1103; *id.* at 1124, 1130 (Valihura, J., concurring); *see also* PTO 129, and even though plaintiffs' own FERC expert agreed that it was reasonable for Baker to equate "maximum applicable rate" with recourse rate, A536/901:2-7 (Court).

Second, contrary to the trial court's repeated suggestions on remand, Rosenwasser's testimony did not support construing the call right provision as measuring a "business issue, not an abstract legal point." RO 6 n.6; *see also* RO 56-59. Rosenwasser testified only that the genesis of the call right came from Loews or Boardwalk, not the lawyers drafting the LPA, because it was "a business point . . . not a legal point." B1020/Rosenwasser Dep. 40:7-8. He made clear that the overall purpose of the call right was to protect against a reversion to the *Lakehead* policy or other change to the tax allowance policy that "would be adverse to maximum applicable rates," B1020/Rosenwasser Dep. 39:15-25; *see also* B1018-21/Rosenwasser Dep. 32:20-36:11, 41:16-42:2; A321/41:16-42:16 (Rosenwasser), and that the call right was triggered by an opinion of counsel and not

a banker opinion because "maximum applicable rate" is a "legal concept," A323/49:4-51:18 (Rosenwasser).

Third, the trial court *did*—and continues to—improperly infer bad faith from Baker's failure to treat Section 15.1(b) as "requiring a near-term effect on Boardwalk, rather than on Boardwalk's rates" over a longer time horizon. RO 7 n.6; *see* RO 61 (referring to "the two-year period during which predictions could be made with any degree of confidence" about rate case risk). The post-trial opinion stated that "there was no risk of a rate case at Gulf Crossing or Gulf South and only a low risk of a rate case at Texas Gas." PTO 70; *see also* PTO 125. But the evidence relied on for this was that "Boardwalk and their advisors concluded there was '[n]o expected *near-term* rate case risk for Gulf South or Gulf Crossing,'" and that "the rate case risk at Texas Gas was 'low' through *April 2020* [*i.e.*, for the next two years]," PTO 126 (emphasis added)—and then only because FERC's workload made immediate action less likely, B647. These facts showed only an absence of near-term rate case risk; they said nothing about Boardwalk's rate case risk "in the future." A1305/LPA § 15.1(b); *see also* B753 (Bandera's recognition that "the change triggers the option even if [it] won't affect rates until 1,000 years from now"). Baker knew that "pipelines are long-lived assets" and so properly concluded its contractual "analysis need not be affected by discounts or moratoria that will be lifted within the next several years." B639. Baker also properly assumed that each

of the three pipelines would face a rate case not "immediately," *cf.* RO 19, but "in the future," A1305/LPA § 15.1(b). Nothing in the record belies that assumption, much less renders it bad faith.

3. Even assuming a breach of an "Opinion Condition," there was no tortious interference because Loews's actions were justified

That the General Partner did not breach the LPA is determinative of plaintiffs' tortious interference claim. As the trial court found, the claim fails for another reason: even if the General Partner breached the LPA by accepting an opinion that was rendered in bad faith, and even if Loews procured that "contrived" opinion, Loews's actions were justified because there was "no daylight" between Loews and the Sole Member, RO 79—an entity the Court has already found acted in good faith.

To establish tortious interference, plaintiffs were required to show not only that Loews interfered with the call right but that it did so without justification—an element generally governed by Section 767 of the Restatement (Second) of Torts. RO 92 (citing *WaveDivision Hldgs., LLC* v. *Highland Cap. Mgmt., L.P.*, 49 A.3d 1168, 1174 (Del. 2012)). Where, as here, the alleged tortfeasor controls the party alleged to have breached the contract, application of the Restatement factors must be "filtered through [the] limited affiliate privilege." *Intel Corp.* v. *Fortress Invs. Grp.*, 2021 WL 4470091, at *11 (Del. Ch. Sept. 30, 2021); *see also* MTDO 56 ("When the defendant that a plaintiff has sued for tortious interference controls an

entity that was a party to the contract, the weighing of factors becomes more complex . . . ."). This privilege "recognizes that the close economic relationship of related entities requires enhanced latitude in defining what improper interactions would be." *Id.* Under the doctrine, a parent cannot be held liable for tortious interference "unless the plaintiff pleads and proves that [the parent] sought not to achieve permissible financial goals but sought maliciously or in bad faith to injure plaintiff." *Bhole*, 67 A.3d at 453.

In its remand opinion, the trial court did not expressly apply the affiliate privilege. But it analyzed the Restatement factors from two different perspectives (the "Good Faith View" and the "Separate Breach View"), the first of which—and the one the trial court properly found most consistent with this Court's analysis—tracked in some respects the approach called for under the affiliate privilege doctrine, and landed the court at the same place. RO 87-99. The nature of Loews's conduct favored a finding of justification, the court explained, because "Loews could cause the Sole Member to exercise the Call Right self-interestedly and free of fiduciary obligation." RO 94. Loews's motive favored justification too, because its motives were inseparable from those of the Sole Member, whose actions were found to be in good faith. RO 95. And while other factors, in the trial court's view, favored a finding of improper interference, the overall weighing did not. RO 98-99.

That was the right conclusion, and plaintiffs' cursory objection that the trial court should have ignored the relationship between the Sole Member and Loews in assessing justification (*see* POB 31) finds support in neither law nor logic. Applying the affiliate privilege makes particular sense in the context of an MLP like Boardwalk. The very structure of the MLP is intended to give the sponsor "maximum flexibility" to disclaim liability for exercise by the General Partner of its "lopsided rights." *Boardwalk*, 288 A.3d at 1087. As this Court noted, Section 7.1(b) of the LPA frees not only the General Partner but also "its controlling entities" from any duty other than those defined in the agreement, and "Section 7.9(e) reiterates that the General Partner is subject to no duties or obligations '[e]xcept as expressly set forth in [the LPA].'" *Id.* at 1109-10. And Loews was not just an "Affiliate" under the LPA but a named third-party beneficiary. *See* A1309/LPA § 16.12. Its direct, express economic interest in its subsidiary's contract meant that its actions respecting that contract were presumptively inseparable from those of the General Partner. *See* MTDO 57 ("a general partner and its controllers 'share the commonality of economic interests which underlay the creation of an interference privilege'").

4. Loews's actions were not in any event a significant factor in causing any breach

Finally, plaintiffs' tortious interference claim fails for the independent reason that Loews's actions did not cause breach of the imagined "Opinion Condition." *See Soterion Corp.* v. *Soteria Mezzanine Corp.*, 2012 WL 5378251, at *17 (Del. Ch. Oct.

31, 2012) (discussing causation element). The trial court's contrary ruling—that causation was established by "Alpert's conduct in soliciting the Baker Opinion," RO 91—was clear error.

First, neither Alpert nor anyone else at Loews caused Baker to deliver its opinion. Rosenwasser and Baker's other lawyers gave unwavering testimony that they were not pressured to give any particular advice about Section 15.1(b) or the exercise of the call right, that they gave their advice in good faith, and that they stood by their advice. A327/66:3-6, A332/87:6-8, A334/95:8-13, A335-36/100:19-101:2, A336-37/104:19-105:3, A337/106:24-107:18, A338/110:1-6, A342/125:21-126:18 (Rosenwasser); A373/250:11-24 (Wagner). The concurring justices on the first appeal recognized this fact expressly: "No one on the Baker team, the Richards Layton team, or the Skadden team testified that they felt pressure from Loews and acted accordingly. In fact, the record evidence demonstrates the exact opposite." *Boardwalk*, 288 A.3d at 1136. The concurrence further found "no record evidence that Baker changed course due to Loews' action," and Baker's fees were not contingent on delivery of an opinion. *Id.* at 1135 & n.66.

Second, any causal chain between Loews's actions and Baker's opinion was broken by Skadden's role in the process. With full knowledge of Baker's analytical framework, Skadden concluded that Baker's opinion was not contrived but rather rendered in good faith, and that it would be reasonable for the Sole Member board

to accept the opinion, and the Sole Member relied on that advice in finding Baker's opinion acceptable. *Id.* at 1117-18, 1121, 1123.

II. THE COURT OF CHANCERY PROPERLY REJECTED PLAINTIFFS' CLAIM THAT LOEWS WAS UNJUSTLY ENRICHED BY EXERCISE OF THE CALL RIGHT

A. Question Presented

Did the Court of Chancery properly reject plaintiffs' claim that Loews was unjustly enriched by exercise of the call right? A1019-21.

B. Scope of Review

Questions of law and contract interpretation are reviewed *de novo* and factual findings for clear error. *See* p. 13, *supra*.

C. Merits of Argument

The trial court properly rejected plaintiffs' claim that Loews was unjustly enriched by the exercise of the call right. As the trial court observed, "Delaware courts . . . have consistently refused to permit a claim for unjust enrichment when the alleged wrong arises from a relationship governed by contract." RO 115-16 (quoting *Nemec* v. *Shrader*, 2009 WL 1204346, at *6 (Del. Ch. Apr. 30, 2009), *aff'd on other grounds by* 991 A.2d 1120 (Del. 2010)). Here, not only does the LPA govern the relationship between the parties—including Loews, as a third-party beneficiary, *see* A1309/LPA § 16.12—but it expressly disclaims any "duties or liabilities" that Loews, as an Affiliate and Indemnitee, might have to any limited partner unless otherwise provided for in the LPA itself, A1272, A1280/LPA §§ 7.1(b), 7.9(e). Because the LPA "comprehensively governs the parties' relationship," "it alone must provide the measure of the plaintiff's rights and any

claim of unjust enrichment [must] be denied." *BAE Sys. Info. & Elec. Sys. Integration, Inc*. v. *Lockheed Martin Corp*., 2009 WL 264088, at *7 (Del. Ch. Feb. 3, 2009).

III. THE COURT OF CHANCERY PROPERLY REJECTED PLAINTIFFS' CLAIM THAT THE GENERAL PARTNER BREACHED THE IMPLIED COVENANT BY PROCURING A "CONTRIVED OPINION"

A. Question Presented

Did the Court of Chancery properly conclude that the General Partner did not breach the implied covenant of good faith and fair dealing in its exercise of the call right? A1021-29.

B. Scope of Review

Questions of law and contract interpretation are reviewed *de novo* and factual findings for clear error. *See* p. 13, *supra*.

C. Merits of Argument

The implied covenant "is a limited and extraordinary legal remedy" that occasionally allows courts to "imply[] terms in the agreement . . . to analyze unanticipated developments or to fill gaps in the contract's provisions." *Oxbow Carbon & Minerals Hldgs., Inc.* v. *Crestview-Oxbow Acquisition, LLC*, 202 A.3d 482, 507 (Del. 2019) (cleaned up). The covenant "does not apply when the contract addresses the conduct at issue, but only when the contract is truly silent concerning the matter at hand." *Id.* (cleaned up).

There is no gap for the implied covenant to fill here. Plaintiffs ask this Court to find that the General Partner was "*implicitly* prevented . . . from intentionally procuring an illegitimate opinion." POB 33. But the LPA, whose "terms clearly set

out the rights and obligations of all parties," leaves no room for such an implied term. *Inter-Mktg. Grp. USA, Inc.* v. *Armstrong*, 2020 WL 756965, at *9 (Del. Ch. Jan. 31, 2020). Section 15.1(b) sets forth the conditions for exercising the call right, and Section 7.9 defines the "contractual duty that directly governed the General Partner[]" in meeting those conditions and exercising the right. *Id.* (addressing provision analogous to LPA § 7.9(b)); *Boardwalk*, 288 A.3d at 1109 ("Section 7.9 sets forth the standards of conduct and duties that do apply."). There is thus no sense in which the LPA was "truly silent" on the General Partner's obligations respecting exercise of the call right. *Inter-Mktg. Grp.*, 2020 WL 756965, at *9.

Confirming as much, plaintiffs' evidence of a breach of the implied covenant is—as the trial court observed—"largely coextensive with the evidence for the express breach of contract claim." RO 107. The trial court, in its original post-trial opinion, relied on that evidence to find that the General Partner breached its obligations by "act[ing] 'intentionally and opportunistically'" to secure a "contrived opinion," thus breaching the express terms of the LPA. *Boardwalk*, 288 A.3d at 1111. But this Court rejected that finding, holding that the Sole Member's reliance on Skadden's advice to accept the Baker opinion fulfilled the General Partner's contractual obligation. *Id.* at 1117-18. Plaintiffs' implied covenant claim thus is a strained attempt to repackage the express contract claim this Court has already rejected. *See C. Mortg. Co.* v. *Morgan Stanley Mortg. Capital Holdings LLC*, 27

A.3d 531, 539 (Del. 2011) ("duplicative" implied covenant claim is "subject to dismissal").

For similar reasons, the term plaintiffs would have implied into the LPA was satisfied. This Court has already held that the Sole Member—the party whose intentions matter for purposes of Section 15.1(b), *Boardwalk*, 288 A.3d at 1119-20—reasonably relied in good faith on Skadden's conclusion "that the Baker Botts opinion was not contrived and that it was rendered in good faith," *id.* at 1122, and that the opinion could reasonably be deemed acceptable and consistent with Section 15.1(b), *see id.* at 1120-22. It further held that no "fraud, bad faith, or willful misconduct" could be imputed to the Sole Member. *Id.* at 1221. That holding is irreconcilable with a claim that the General Partner knowingly and intentionally procured an illegitimate opinion.

Plaintiffs' reliance on *Gerber* v. *Enterprise Products Holdings, LLC*, 67 A.3d 400 (Del. 2013), *see* POB 34-35, is unavailing. *Gerber* involved a provision "nearly identical" to Section 7.10(b) of the LPA, which permitted the general partner to "conclusively establish" that it met its duty of contractual good faith "through reliance on expert advice." *Boardwalk*, 288 A.3d at 1121-22 (quoting *Gerber*, 67 A.3d at 420). There, plaintiffs alleged that the general partner breached the implied covenant by "engag[ing] in a manifestly unfair transaction" and then procuring "an unresponsive fairness opinion" to activate the conclusive presumption and escape

liability. *Gerber*, 67 A.3d at 422-23. The Court of Chancery rejected the claim, holding that the conclusive presumption "bar[red] a claim under the implied covenant." *Id.* at 421. On appeal, this Court reversed, explaining that it would be "nonsensical" if an opinion procured by, for example, "intentionally conceal[ing] material information" or "brib[ing] the financial advisor" could preclude claims for breach of the implied covenant. *Id.* at 420-21. Plaintiffs point to alleged *Gerber*-like faults with the Baker opinion as the basis for their implied covenant claim. POB 35. But Baker's opinion is not what triggered application of Section 7.10(b). What entitled the General Partner to a conclusive presumption of good faith was the Sole Member's reliance on *Skadden*'s advice. *Boardwalk*, 288 A.3d at 1121, 1123. As the *en banc* majority observed, plaintiffs did "not independently challenge[]" the Skadden advice, and this Court found that the Sole Member's reliance on Skadden was reasonable and consistent with the LPA. *Id.* at 1121; *see also* RO 112-13. *Gerber* is accordingly—as the trial court correctly noted—"orthogonal" to plaintiffs' claims. RO 112.

As with their express contract claim, plaintiffs now seek to dodge Skadden's advice and their own concession of its good faith with the new theory that Baker misled Skadden about its rate expert's conclusion. POB 17-18, 35. That theory founders on the record, *see* p. 21, *supra* (citing B1036-37/Sullivan Dep. 220:15-223:10), but even were it factually supported it would not mean Skadden's advice

(or Baker's opinion) "did not fulfill its basic function," *Gerber*, 67 A.3d at 422. Skadden, with all the necessary expertise, rendered its acceptability advice "having full knowledge of Baker Botts' analytical framework, including its assumptions, models, and its interactions with Boardwalk's officers," and concluded in good faith that it was reasonable for the Sole Member to find Baker's opinion acceptable. *Boardwalk*, 288 A.3d at 1121. Plaintiffs' objections to the Sole Member's reliance on Skadden's advice cannot stand in the face of these findings.

And even were the proper focus on Baker's opinion, there still would be no room for the implied covenant. Unlike the opinion in *Gerber*, there is nothing "unresponsive" about Baker's opinion. *Cf. Gerber*, 67 A.3d at 422; *id.* at 406, 412-13 (observing that fairness opinion failed to address "the fairness of the portion of the total consideration specifically allocable to the 2009 Sale"). Baker's opinion hit the mark by addressing the inquiry called for by LPA Section 15.1(b). Moreover, if direct judicial review of the Baker opinion is warranted—a position this Court has already rejected, and that the trial court properly rejected on remand—that review is governed by the subjective good faith standard supplied by *Williams* and there is no gap for the covenant to fill. RO 114.

IV. EVEN HAD LIABILITY BEEN ESTABLISHED ON THE CALL-RIGHT-BASED CLAIMS, PLAINTIFFS' REMEDY DEMANDS WOULD BE FORECLOSED BY THE LPA AND BY THEIR OWN LITIGATION STRATEGY

A. Question Presented

Do the LPA and plaintiffs' prior filings foreclose the relief they demand? A1021, A1029, A1044-49.

B. Scope of Review

Issues of contract interpretation are reviewed *de novo*. *See* p. 13, *supra.* Whether an equitable remedy is available is an issue of law and reviewed *de novo*, though embedded factual determinations are reviewed for abuse of discretion. *Lingo* v. *Lingo*, 3 A.3d 241, 243 (Del. 2010).

C. Merits of Argument

1. Equitable relief is not available against the General Partner

Plaintiffs concede that under this Court's *en banc* decision, "the Partnership Agreement exculpated the General Partner from money damages" in connection with the call right exercise. POB 36. On remand, the trial court did not need to reach the question whether any other remedies were available, because it found no claim against the General Partner had been established.

Plaintiffs ask this Court not only to reverse the trial court's determination as to liability, but to hold "all other remedies" available against the General Partner, POB 36—a demand they raised for the first time on remand, *see* A969-77 (seeking

rescission, constructive trust, and/or disgorgement). Even if plaintiffs had any viable contract claim against the General Partner, none of the equitable remedies they seek would be available.

Rescission. Plaintiffs waived any right to rescission. "It is a well-established principle of equity that a plaintiff waives the right to rescission by excessive delay in seeking it." *Gaffin* v. *Teledyne, Inc.*, 1990 WL 195914, at * 18 (Del. Ch. Dec. 4, 1990), *aff'd in part*, 611 A.2d 467 (Del. 1992); *see also Gotham Partners, L.P.* v. *Hallwood Realty Partners, L.P.*, 817 A.2d 160, 174 (Del. 2002) (affirming denial of rescission where plaintiff "substantially and unjustifiably delayed seeking rescission"). Here, plaintiffs not only failed to plead rescission in their complaint or their amended complaint but, also, asked only for damages in the pre-trial order. *See* A293 ¶ 417, A295 ¶ 436 (requesting "damages" relief and ruling thereon). The time for seeking rescission has long passed. *Brinckerhoff* v. *Enbridge Energy Co.*, 2012 WL 1931242, at *1 (Del. Ch. May 25, 2012) (plaintiffs' failure to argue rescission even while exculpation provision was being debated resulted in waiver).

Rescission—which would require every limited partner to return its consideration and receive back its units—is in any event not feasible. Plaintiffs essentially acknowledge this, as the "rescission" they seek is not rescission at all. They propose "returning the net consideration received" by defendants to the class members. A974-75. That is just a disguised demand for rescissory *damages*, which

are "the monetary equivalent of rescission" and are available where "the equitable remedy of rescission is impractical." *In re Orchard Enters., Inc. S'holder Litig.*, 88 A.3d 1, 38 (Del. Ch. 2014). Damages are exculpated.

Constructive trust. A constructive trust is similarly unavailable. When the trial court dismissed plaintiffs' fiduciary claims, plaintiffs amended their complaint to *delete* their request for a constructive trust. *See* B324. That was a knowing abandonment of any claim for a constructive trust.

That plaintiffs abandoned their claim for a constructive trust is not surprising: a "mere breach of contract" is generally insufficient for imposition of that remedy. Wolfe & Pittenger, 2 Corp. & Comm. Prac. in Del. Ct. of Chancery, § 16.07[b][3] (2022); *see also Prestancia Mgmt. Grp., Inc.* v. *Va. Heritage Found., II LLC*, 2005 WL 1364616, at *5-6 (Del. Ch. May 27, 2005). Entitlement to a constructive trust instead requires a showing of at least a fiduciary relationship, unjust enrichment, or fraud. *See, e.g.*, *Teachers' Ret. Sys. of La.* v. *Aidinoff*, 900 A.2d 654, 670 n.22 (Del. Ch. 2006). Plaintiffs have not pled, let alone proved, fraud; their unjust enrichment claim is manifestly untenable; and both the trial court and this Court have confirmed what the face of the LPA makes evident: no defendant owed any fiduciary duties to plaintiffs. *See* A1272, 1280/LPA §§ 7.1(b), 7.9(e).

Disgorgement. Plaintiffs' request for disgorgement is similarly barred. To the extent the "disgorgement" plaintiffs seek is by imposition of a constructive trust,

A976, that remedy is unavailable for the reasons stated above—including waiver, since the amended complaint does not demand "disgorgement" other than as a measure of "damages." B531 (requesting "all available damages, including rescissory damages, unjust enrichment and disgorgement, for Defendants' breaches of contract"); A295 ¶ 436 (similar formulation in pre-trial order); *see Metro Storage Int'l LLC* v. *Harron*, 275 A.3d 810, 863 (Del. Ch. 2022) (discussing disgorgement as measure of damages). And, as with rescissory damages, damages measured by disgorgement are precluded by operation of Section 7.8(a).

2. Loews is exculpated

Plaintiffs acknowledge that Section 7.8(a) covers "Indemnitee[s]" and thus "Affiliate[s] of the General Partner" like Loews. *See* POB 37; *see also* A1213, A1278/LPA §§ 1.1, 7.8(a). Plaintiffs nonetheless contend—in a single unsupported and conclusory sentence—that Loews cannot qualify for exculpation under Section 7.8(a) "on these facts." POB 37.

Loews's exculpation follows straightforwardly from this Court's prior decision. Pursuant to Section 7.8(a), an Indemnitee is exculpated from monetary liability absent bad faith, fraud, willful misconduct, or criminality. The trial court correctly held that the complete alignment between the Sole Member and its parent, Loews, demonstrated that Loews acted in good faith. *See* RO 79-80. Accordingly, Section 7.8(a) exculpates Loews from liability as well.

V. THE COURT OF CHANCERY PROPERLY REJECTED PLAINTIFFS' CLAIMS RELATED TO THE APRIL 30, 2018 EXERCISE DISCLOSURES

A. Question Presented

Did the Court of Chancery properly conclude that the April 30 Disclosures could not ground a cause of action against any defendant because (1) as plaintiffs now concede, disclosure was mandated by the federal securities laws and (2) any alleged defects in the disclosures were not material? A1030-44.

B. Scope of Review

Questions of law and contract interpretation are reviewed *de novo* and factual findings for clear error. *See* p. 13, *supra*.

C. Merits of Argument

1. The April 30 Disclosures did not breach the LPA

On defendants' motion to dismiss plaintiffs' initial substitute complaint, the trial court allowed plaintiffs' claims challenging the April 30 Disclosures to proceed, reasoning that the disclosures might have been strategically timed to drive down the exercise price. MTDO 28. That ruling assumed that disclosure of potential exercise was not required by the federal securities laws, and the court emphasized that contrary facts would likely defeat the claim. MTDO 26-34, 49-52.

As the trial court noted, plaintiffs no longer contest that disclosure was required under the federal securities laws. RO 116. Nor do plaintiffs dispute that the General Partner paid the price dictated by Section 15.1(b)'s pricing formula based

on the June 29, 2018 exercise date. Plaintiffs nonetheless invoke Sections 15.1(b), 16.2, and 7.9(a) of the LPA, as well as the implied covenant, to argue that the General Partner "underpaid" the limited partners in breach of the LPA. POB 44-48.

The trial court properly made short work of this theory. RO 116-17. Sections 15.1(b) and 16.2 say nothing about disclosure, and Section 15.1(b) necessarily contemplated that the exercise price *could* be affected by pre-exercise disclosure, because it allowed the General Partner to wait up to 90 days after receiving the opinion of counsel before exercising—during which time disclosure would be required and made, and the trailing 180-trading-day average exercise price would start being affected. *See* A1305/LPA § 15.1(b); *see also Kuroda* v. *SPJS Holdings, L.L.C.*, 971 A.2d 872, 888 (Del. Ch. 2009) ("The implied covenant cannot be invoked to override the express terms of the contract.").[2] Section 7.9(a) doesn't apply at all, as that provision concerns transactions not disclosures.[3] But even if it did, it could not support a claim because the federal securities laws required a disclosure of potential exercise, and "[b]y providing the disclosures required by law, the General Partner fulfilled" any obligation under the provision. RO 117. That four

[2] *In re CVR Refining, LP Unitholder Litigation* is not to the contrary. *See* POB 47. There, the court did not consider whether the challenged disclosure was required by federal securities law. *See* 2020 WL 506680, at *15-16 (Del. Ch. Jan. 31, 2020).

[3] Section 7.9(a) applies to transactions where there is an inherent potential conflict because the General Partner or its Affiliate is a counterparty to the Partnership or the limited partners. *See* A1278/LPA § 7.9(a).

outside law firms—Baker, Skadden, Davis Polk, and Vinson & Elkins—reviewed and unanimously signed off on the contents of the April 30 Disclosures underscores the point. A404/373:10-374:11, A404/375:23-376:12, A405-06/378:1-384:8 (Alpert); B1029-32/Grossman Dep. 219:6-221:9; 228:13-231:18; A441/521:16-523:19, A443/530:10-20 (McMahon); B698; B640-46.

The trial court likewise properly disposed of plaintiffs' quibbles with the particulars of the April 30 Disclosures. RO 117. None of the additional bits of information that plaintiffs say should have been included in the April 30 Disclosures was material or otherwise made Boardwalk's disclosures "misleading," POB 45:

- Most of the supposedly omitted facts were disclosed in some form or otherwise public. *See* B738 (noting that Boardwalk did "not expect [FERC's Revised Policy Statement, NOI and NOPR] to have a material impact on our revenues in the near term"; that the prevalence of "negotiated or discounted rate agreements" for two of Boardwalk's three subsidiaries and a "rate moratorium" for the third mitigated any near-term adverse impact; and that "[r]equests for rehearing and clarification" had been filed with FERC); *see* B1048-49/Hubbard Supp. Rep. ¶ 27.

- Disclosure "indicating that FERC's cost-of-service ratemaking principles might result in a net *increase* in Boardwalk's subsidiaries' rates," POB 42, would have been inaccurate given Boardwalk's full cost-of-service analysis. A443/529:11-530:3 (McMahon).

- There was no requirement to state that counsel had been retained. *See* A615/1214:2-1215:15 (Jackson). And disclosing that counsel had committed to issue the opinion as of April 30 would have been false. A336-37/104:19-105:3, A341/121:15-122:11 (Rosenwasser); A394/336:5-20, A399/356:9-22 (Alpert).

2. Plaintiffs' claims against nonparties to the LPA fail

Plaintiffs' disclosure-related tortious interference theory fails because the

April 30 Disclosures did not breach the LPA and, even if they did, the affiliate privilege shields defendants from any liability. In any event, no defendant named in this count could have been the but-for cause of any alleged breach because the April 30 Disclosures were a joint effort with multiple contributors, heavy input and sign-off from four separate counsel, and final consideration and sign-off by the appropriate entity on behalf of the General Partner. *See* p. 45, *supra*.

Plaintiffs' unjust enrichment theory fails because the parties' relationship, governed by contract, leaves no room for a quasi-contractual claim, and any "enrichment" was consistent with the terms of the LPA. *See* pp. 32-33, *supra*.

3. Defendants are exculpated

In all events, any defendant otherwise liable for damages caused by the April 30 Disclosures would be exculpated under Section 7.8(a) of the LPA. By the same reasoning this Court employed in reversing the original judgment, the parties to the LPA are conclusively presumed to have acted in good faith as a result of the General Partner's approval of the disclosures on advice of counsel. *See* p. 45, *supra*. And the nonparties to the LPA are exculpated because there is no showing of bad faith or willful misconduct on their part. They too relied on counsel in working to develop appropriate disclosures. *See* p. 45, *supra*.

CONCLUSION

The judgment of the Court of Chancery should be affirmed.

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CERTIFICATE OF SERVICE

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