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Case Number 439,2024

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	)	

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Rules & Statutes

Other Authorities

INTRODUCTION

This long-running litigation turns on a simple truth: Baker Botts could not legitimately opine that it was "more likely than not" that Boardwalk's recourse rates would decline materially when Boardwalk, Loews, and Baker Botts had all concluded that those rates were "unlikely to change at all." Because Baker Botts' opinion did not reflect the good faith exercise of professional judgment, Defendants never satisfied the Opinion Condition under *Williams*. Accordingly, Defendants were not entitled to exercise the Call Right, and they breached the Partnership Agreement when they purported to do so.

The Class is entitled to a remedy for this breach. The "conclusive presumption" in Section 7.10(b) exculpates the General Partner from damages, but it remains subject to equitable relief. The conclusive presumption does not protect any of the remaining defendants at all, and they have not proved entitlement to exculpation under Section 7.8(a).

Defendants deploy a host of arguments to avoid this straightforward conclusion. They ask this Court to re-weigh the evidence. They contend that the Opinion Condition never existed or was satisfied despite *Williams*. They advance an interpretation of the Partnership Agreement foreclosed by decades-old caselaw. All of their arguments fail.

ARGUMENT

I. FACTUAL FINDINGS DESERVE DEFERENCE

The key factual findings here are straightforward and well-supported:

- Defendants and Baker Botts "knew from the outset that Boardwalk's recourse rates" were "*unlikely to change at all*," let alone decrease materially, as a result of the March 15 FERC Actions.

- Nevertheless, Baker Botts delivered an opinion that purported to reach the exact "opposite" conclusion.

- The opinion "did not reflect a good faith effort to discern the actual facts and apply professional judgment." Rather, it "contradicted the real world facts" that both the firm "and its client knew, understood, and acknowledged."

RO 35, 60, 63 (original emphasis).[1]

In defiance of the Court of Chancery's factual findings, Defendants press a sanitized narrative. Defendants never even acknowledge the contemporaneous notes acknowledging that what Defendants were doing would "screw min[ority]" unitholders. PTO 74. Nor do they even attempt to explain away how Loews "beat on" Skadden until they "fell into line." PTO 78.

A. Clear Error Review

"[T]ime-honored principles of appellate review" require upholding a trial court's factual findings unless they "are clearly wrong and the doing of justice

[1] Undefined capitalized terms have the meanings ascribed to them in Plaintiffs' Opening Brief ("POB"). "DAB" refers to Defendants' Answering Brief.

requires their overturn is this Court free to make contradictory findings of fact." *Wheeler v. State*, 296 A3.d 363, 373 (Del. 2023); *Kellner v. AIM Immunotech Inc.*, 320 A.3d 239, 257 (Del. 2024) (cleaned up).

Here, following an exhaustive review of the record and multiple credibility assessments, the Court of Chancery found that the Baker Botts opinion did not reflect the good faith exercise of professional judgment. That is precisely the type of finding entitled to deference on appeal. *See Williams Companies v. Energy Transfer Equity, L.P.*, 159 A.3d 264, 267-68 (Del. 2017) ("The Court of Chancery concluded that [counsel's] determination that it could not issue the [tax] opinion was a *good faith determination* made by it…. *This finding of fact* is not challenged on appeal.") (emphasis added); *In re Prudential Ins. Co. Am. Sales Practice Litig. Actions*, 278 F.3d 175, 180-81 (3d Cir. 2002) ("Bad faith is a factual determination reviewable under the clearly erroneous standard."); *Burton v. State*, 925 A.2d 503, 1 (Del. 2007) (TABLE).

This Court has repeatedly affirmed this type of good faith assessment. *See Energy Transfer, LP v. Williams Cos.*, 2023 WL 6561767, at *8 (Del. Oct. 10, 2023); *In re Tesla Motors, Inc. S'holder Litig.*, 298 A.3d 667, 723 (Del. 2023); *El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff*, 152 A.3d 1248, 1250 (Del. 2016).

B. The Court of Chancery's Findings Are Amply-Supported

Baker Botts had no good-faith basis to opine that a material decline in Boardwalk's recourse rates was "more likely than not." *See* RO 5-67; PTO 7-109. This finding was not "clearly wrong." *Kellner*, 320 A.3d at 257.

- FERC indicated from the get-go that recourse rates for a "significant number of pipelines" would not change as a result of the March 15 FERC Actions. Boardwalk's executives immediately recognized that its subsidiaries fit that bill. POB 10.

- Boardwalk, Loews, and Baker Botts each independently evaluated the March 15 FERC Actions and concluded that Boardwalk's recourse rates would *not* be materially impacted. POB 11-12.

- Boardwalk drafted a press release explaining why its rates were safe (which Loews scrubbed prior to publication). POB 13.

- Boardwalk's Vice President of Rates—who had just determined there would be no material impact on rates—drafted a new analysis reaching the opposite conclusion to "get us where we need to go." POB 15.

- The expert rate consultant Baker Botts retained explained at deposition that this new analysis was "meaningless" and could not assess the March 15 FERC Actions' potential impact on recourse rates. POB 17. Boardwalk told FERC that the methodology was "misleading" and violated its policies. POB 14.

- Boardwalk filed comments detailing why it could not "correctly assess" exactly what Baker Botts' opinion purported to assess. Baker Botts' lead lawyer underlined and starred this devastating admission. POB 19.

- Baker Botts' rate expert (Sullivan) testified to FERC—on the *same day* that Baker Botts delivered its opinion—that it was "impossible to assess" what the firm was purporting to assess. PTO 105-06.

In short, Boardwalk management, senior Loews executives, lawyers at Baker Botts, and Sullivan all recognized that the March 15 FERC Actions would *not* materially impact Boardwalk's recourse rates. They likewise recognized that future regulatory developments that could impact those rates were too uncertain to predict with any confidence. PTO 51, 55. Yet Loews used an opinion purporting to reach the opposite conclusion to take out Boardwalk's minority unitholders. Defendants have never been able to reconcile these contradictory positions. *See* SCO 17 (Valihura, J., concurring) ("Boardwalk was telling its regulators and the market one thing, while taking a different position with its counsel in drafting the Opinion.").

C. Defendants' Revisionist History Fails

After paying lip service to the clear error standard, *see* DAB 13, 32, 34, 43, Defendants wrongly contend that this Court should reverse on key factual findings. *See Tesla Motors*, 298 A.3d at 702 (rejecting request to "re-weigh the evidence" and "reach the opposite conclusion" on appeal); *SIGA Techs., Inc. v. PharmAthene, Inc.*, 132 A.3d 1108, 1130 (Del. 2015) ("Where there is more than one permissible determination to be drawn from the evidence, and the trial court chooses one, its finding cannot be clearly erroneous.").

1. A Confession Is Not Required

Defendants argue that Baker Botts' opinion was rendered in good faith. For support, they point to the "unwavering" trial testimony of star Baker Botts witnesses

(Rosenwasser and Wagner) claiming that "they gave their advice in good faith." *See* DAB 19, 30. But these same individuals: (i) provided Loews a detailed write-up explaining why the March 15 FERC Actions would *not* impact Boardwalk's recourse rates; (ii) highlighted Boardwalk's public comments explaining that it could not "correctly assess" what Baker Botts was purporting to assess with its opinion; (iii) covered up their own rate expert's refusal to sign-off on their analysis; and (iv) misrepresented that he had. RO 12, 26, 45.

The Court of Chancery credited the contemporaneous record over these witnesses' self-serving trial testimony. There are no grounds to revisit these "consequential credibility" determinations. *Wheeler*, 296 A.3d at 371; *see also CDX Hldgs., Inc. v. Fox*, 141 A.3d 1037, 1041 (Del. 2016) ("Although several defense witnesses tried to disavow such evidence, the Court of Chancery assessed their credibility, reviewed the contemporaneous evidence and decided not to credit their unsubstantiated trial testimony.").

2. Defendants Cannot Escape Their Own Rate Expert

Defendants claim that Sullivan deemed the "indicative rate" calculations at the heart of their opinion an "appropriate methodology" to assess the effect of the Revised Policy on Boardwalk's recourse rates. *See* DAB 21. In fact, Sullivan did the opposite. He testified that the "indicative rate" calculations were "meaningless," and could not be used to assess the recourse rate impact of the Revised Policy.

PTO 138-39 (collecting testimony). Likewise, Boardwalk told FERC that the same methodology was "misleading," had "little bearing" on the potential recourse rate impact of the Revised Policy, and violated FERC's prohibition against single-issue ratemaking. PTO 136. FERC ultimately agreed. POB 14 n.4.

Given Sullivan's damning testimony, Defendants did not call him at trial. Their attempt to convince this Court to reinterpret his testimony is a meritless "quibble with the trial court's fact-finding." *Wheeler*, 296 A.3d at 373.[2]

3. Boardwalk's Subsidiaries Were Protected

"Recourse rates do not change without a rate case, even with significant cost-of-service changes." SCO 6. 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. Because Boardwalk's subsidiaries were unlikely to even face—let alone lose—a rate case because of the March 15 FERC Actions, their recourse rates were unlikely to decrease. RO 17-19.

[2] The "apples-to-apples" language Defendants now flag to support their take on Sullivan's testimony is consistent with the Court of Chancery's findings. *See* DAB 21. Sullivan testified that the work he reviewed accurately reflected the potential *cost of service* impact, without blessing its purported *rate* impact calculations. *Compare* PTO 69 *with* Sullivan Dep. B1036-37. Baker Botts recognized this critical distinction, tried—unsuccessfully—to get Sullivan to sign off on the latter, and ultimately swept his repeated refusals to do so under the rug. PTO 13-14, 69.

Unable to dispute this, Defendants claim the record "showed *only* an absence of *near-term* rate case risk" for Boardwalk's subsidiaries and "said nothing" about their "rate case risk in the future." DAB 26 (emphasis added). Defendants mischaracterize the record.

Loews and its advisors recognized that two of Boardwalk's three subsidiaries were in "no danger of having their rates lowered" as a result of the March 15 FERC Actions. PTO 17; 70. Those "subsidiaries met the characteristics where FERC indicated there would be no effect on rates…." RO 59. Boardwalk's own ratemaking presentation to Loews concurred. *See* POB 12 (predicting "no impact" on two subsidiaries despite cost-of-service change).

This held true "*over the long-term*"—not just the near-term. *See* PTO 126 (emphasis added). The return on equity these subsidiaries would achieve following the loss of the income tax allowance would remain below the "allowable RoE" threshold that could trigger a rate case. *Id.*; *see also* Webb Tr. A552-53.

Baker Botts and Sullivan advised Loews that the third subsidiary faced only a "low" risk of a rate case for the next two years, and that it was "*impossible to 'make a prediction with any confidence*'" beyond that time period. PTO 126 (emphasis added); RO 59 (Wagner and Sullivan "agreed that there was no threat of a rate case within the time frame where any reasonable predictions could be made").

4. Baker Botts Assumed Boardwalk Would Harm Itself

Defendants claim that Baker Botts "properly assumed that each of the three pipelines would face a rate case not *immediately*," but "*in the future*." DAB 26-27 (emphasis added). But Baker Botts knew that Boardwalk's recourse rates could not change without a rate case, which was unlikely to occur for the foreseeable future.

To deliver the "yes" that Loews wanted, the opinion assumed that Boardwalk would act *against* its own interests by *immediately initiating* rate cases to *lower* its own rates. Baker Botts covered up this assumption (by scrubbing the language from the opinion) and ran from it at trial (by claiming that rate case risk was not actually relevant to their analysis, when everyone knew it was critical). *See* PTO 62-64. This is a world apart from the anodyne alternative reality that Defendants proffer.

II. DEFENDANTS BREACHED 15.1(B)

When—as here—contracting parties condition a right upon receipt of an opinion of counsel, "it is [counsel's] subjective good-faith determination that is the condition precedent." *Williams Cos. v. Energy Transfer Equity, L.P.*, 2016 WL 3576682, at *11 (Del. Ch. June 24, 2016). According to Defendants, *Williams* does not "directly govern." DAB 17. Instead, the "acceptability" of Baker Botts' opinion is the "only contractual obligation" that matters. DAB 14. Because Defendants satisfied the Acceptability Condition by operation of Section 7.10(b)'s conclusive presumption of good faith, there was no breach of contract. DAB 14-18. Decades-old precedent forecloses Defendants' argument.

A. *Gerber* Forecloses Defendants' Interpretation

In *Gerber v. Enterprise Products Holdings, LLC*, the plaintiff challenged an MLP transaction that benefited the general partner's controllers at the expense of the minority. 67 A.3d 400 (Del. 2013). The plaintiff brought breach of contract claims against the general partner and tortious interference and unjust enrichment claims against its controllers. *Id.* at 408-09.

The defendants moved to dismiss. The Court of Chancery granted the motion, reasoning that: (1) Section 7.10(b) "foreclosed contractual liability" because the general partner was entitled to a conclusive presumption of good faith due to its reliance on a fairness opinion from Morgan Stanley; and (2) the transaction validly

received "special approval" under one of Section 7.9's safe harbor provisions. *See id.* at 411-13.

On appeal, the defendants asserted that, due to the general partner's reliance on an advisor's opinion, the conclusive presumption precluded "*any claim of liability*" against *every* defendant, including the tortious interference and unjust enrichment claims against the general partner's controllers. *Id.* at 415 (emphasis added). This Court flatly rejected that argument and held that the conclusive presumption did not "bar," "preclude," or "foreclose" the secondary liability claims against the general partner's controllers. *Id.* at 415-16; 425-26.

Here, Defendants advance the losing argument in *Gerber*: that Section 7.10(b)'s conclusive presumption provides absolution to *all* Defendants on *all* claims. *See* DAB 14-18. *Gerber* confirms that it does not.

B. *Brinckerhoff* Forecloses Defendants' Interpretation

Four years after *Gerber*, this Court assessed another limited partnership agreement's conclusive presumption of good faith in *Brinckerhoff v. Enbridge Energy Co.*, 159 A.3d 242 (Del. 2017). This Court *again* rejected the notion that it provided "immunity from suit," and held instead that the partnership agreement's plain language "only immunize[d]" qualifying indemnitees "from monetary damages." *Id.* at 255.

The Court repeatedly stressed that the exculpatory provisions did not excuse violations of the partnership agreement's other "specific requirements" and "affirmative obligations." *Id.* at 247, 252, 254. According to the Court, "precisely because" DRULPA allows for elimination of fiduciary duties, "it is essential that unitholders be able to hold the GP accountable for not complying with the terms of the LPA." *Id.* at 247.

Here, the conclusive presumption *exculpates* the General Partner from monetary damages, but it does not exempt the General Partner or anyone else from *liability* for violating the Partnership Agreement's "specific requirements," including the need to secure a good-faith opinion of counsel under *Williams* before exercising the Call Right. *See* PTO 4; SCO at 1 n.1 (Valihura, J., concurring) ("[A]ccording to my reading of the Majority's opinion, Baker's Opinion did not satisfy Section 15.1(b)(ii), and, thus, a necessary precondition to the exercise of the Call Right was not satisfied[.]").

C. The Partnership Agreement Forecloses Defendants' Interpretation

Defendants' argument that they satisfied the Opinion Condition by satisfying the Acceptability Condition would effectively merge two distinct conditions into one. *See* DAB 29, 15 (criticizing the "imagined" and "supposedly separate" opinion condition). This reading would vitiate the protection the Opinion Condition was designed to confer and render key contractual language superfluous. *See* SCO 57

n.256 (distinguishing the Acceptability and Opinion Conditions and noting that an "Opinion of Counsel is itself a meaningful limitation regardless of who accepts it"); POB 23-24.

Before this litigation, Defendants acknowledged the distinction between the Acceptability Condition and the Opinion Condition. Rosenwasser's handwritten notes identified the Acceptability Condition as separate. PTO 57; AR001; Rosenwasser Tr. A352. Skadden's Voss distinguished the conditions. PTO 58-59. Even Alpert recognized the distinction, both when he first approached the GPGP Board about making the acceptability determination, and—after the independent directors expressed a "hostile reaction"—when he pivoted to obtain the determination from the Loews-controlled Sole Member Board. PTO 86-87.

Defendants' pre-litigation interpretation (rather than their made-for-litigation interpretation) comports with well-settled opinion practice, which recognizes a distinction between: (i) giving a legal opinion on a particular subject; and (ii) making the separate determination of whether that opinion is "acceptable." Skadden relied heavily on that distinction here, because it could not opine on the substantive issue addressed by Baker Botts' opinion as a matter of firm policy. *Infra*, PART III.

D. Defendants' New Interpretation Would Overrule *Williams*

Defendants insist that, by including the Acceptability Condition, the Partnership Agreement rendered the "General Partner … the arbiter of the opinion's

sufficiency." DAB 17. According to Defendants, this interpretation would "fortify rather than undercut *Williams*." DAB 18. In fact, Defendants' interpretation would eliminate a reviewing court's assessment of opinion counsel's subjective good faith and replace it with a totally different question: whether the form of the opinion was "acceptable." This would overrule *Williams* and the protections Defendants agreed to provide in the Partnership Agreement. *See* POB 24-27 (collecting authorities).

Ignoring just how extreme the facts are here, Defendants assert that the Court of Chancery failed to accord Baker Botts sufficient deference. In fact, the Court of Chancery afforded Baker Botts substantial deference. RO 59-67. But *Williams* is not a blank check, and "[i]f a law firm can claim that a material adverse effect on recourse rates is likely when everyone knows the opposite is true, then an opinion becomes a blank check." RO 64.

III. SKADDEN IS NOT A CURE-ALL

To avoid the conclusion that they breached Section 15.1(b) by exercising the Call Right without satisfying *Williams,* Defendants invoke Skadden. But Skadden could not satisfy *Williams*, because it did not render any opinion at all. Skadden provided *advice* to the Sole Member Board on the "acceptability" of the Baker Botts opinion. Skadden did not endorse—explicitly or implicitly—Baker Botts' bottom-line conclusion regarding an MAE.

A. Skadden's Advice Focused on "Acceptability"

As a matter of firm policy, Skadden refuses to render opinions about the occurrence (or non-occurrence) of an MAE. PTO 60, 174. Skadden's stance makes sense: opinion literature recognizes the notoriously difficult factual analysis that MAE opinions require and advises against rendering them. *See* Donald W. Glazer et al., *Glazer & FitzGibbon on Legal Opinions*, at 227 (3d ed. 2008) (AR164) ("As a general rule, concepts of materiality are best avoided in legal opinions[.]"); *id.* at 638 (AR166) (assessing materiality is "notoriously difficult"); TriBar Op. Comm., *Third-Party "Closing" Opinions: A Report of the Tribar Opinion Committee*, 53 Bus. Law. 591, 646 (1998) (AR122) (opining that something "would have a material adverse effect on [the company's] financial condition" requires an "inquiry by the opinion preparers" that is "impractical if not impossible").

Skadden stood by its no-MAE policy. The firm ensured that none of its work could be construed as passing judgment on the MAE subject. PTO 59-62 (detailing Skadden's refusal to "give Baker Botts any analysis that might be construed as expressing an opinion" on the MAE question); 77-78 (Skadden blocking Baker Botts' "backdoor" attempt to rely on the firm to support its MAE position). Alpert threatened to fire Skadden over these efforts and later punished them by hiring another firm to handle this litigation. *Id.*

Skadden's advice to the Sole Member board toed this line by focusing exclusively on the acceptability of the form and scope of Baker Botts' opinion, not the substance of its conclusion. *See* POB 28-30. Opinion practitioners recognize this distinction: passing on the acceptability of an opinion's form and scope is an entirely separate inquiry from verifying (or concurring in) its substance. *Id.* (collecting authorities); *see also* Opinion Report at § 8(e) (A1645) (counsel that "does not state concurrence in Other Counsel's legal opinion" does not "*assume responsibility to verify the substance of that opinion*") (emphasis added); *id.* at A1679 (noting that "verification of the substance" of other counsel's opinion "should not normally be requested"); *Gotham P'rs, L.P. v. Hallwood Realty P'rs, L.P.*, 2000 WL 1476663, at *17 (Del. Ch. Sep. 27, 2000) (counsel "*was careful not to opine on the substantive merits* of the Transactions but simply to inform the board

that the General Partner *had the authority* to approve them if the board concluded that the Transactions met these criteria") (emphasis added).

Skadden's 30(b)(6) designee maintained this distinction, stressing that the firm *did not* opine that Baker Botts' conclusion about the likelihood of an MAE was reasonable:

> **Q.** So, Skadden did not, for example, opine that Baker Botts' conclusion or assumption of the occurrence of an MAE, either now or in the future, was reasonable?
>
> **A.** No, we … advised Boardwalk Holdings as to the reasonableness of accepting the opinion.

Grossman Dep. A1547. Defendants never called Grossman (or any Skadden witness) at trial. If they had, Skadden could not have defended the MAE conclusion.

B. Defendants Cannot Speak for Skadden

Defendants assert that Skadden did not limit its advice to the scope/form of Baker Botts' opinion, that it endorsed Baker Botts' MAE conclusion, and that its assessment exceeded what *Williams* requires. *See* DAB 19. These mischaracterizations clash with the record and the distinction between endorsing the "acceptability" of an opinion's form and verifying/concurring in its substance. Skadden did the former, not the latter.

IV. DEFENDANTS BREACHED THE IMPLIED COVENANT

Boardwalk's Partnership Agreement required the General Partner to obtain an opinion of counsel before exercising the Call Right under Section 15.1(b)(ii). The implied covenant prohibited Defendants from undermining that provision by intentionally procuring an illegitimate opinion. *See* POB 33-34.

Defendants contend that there is "no room" for the implied covenant to operate here and "no gap" for it to fill. DAB 34-35. Delaware courts have rejected similar arguments. *See Dieckman v. Regency GP LP*, 155 A.3d 358, 367-68 (Del. 2017) (conflict resolution provision implicitly required that the "General Partner not act to undermine the protections afforded unitholders"); *id.* at 368 (drafters "do not include obvious and provocative conditions" like "the General Partner will not subvert the Special Approval process by appointing conflicted members to the Conflicts Committee"); *Gotham P'rs, L.P. v. Hallwood Realty P'rs, L.P.*, 795 A.2d 1, 33-34 (Del. Ch. 2001) (finding "implicit" in reliance-on-advisors provision "unstated but self-evident proposition that the General Partner would select counsel who did not suffer a conflict of interest").

Defendants argue that they satisfied any implied obligation here because the Sole Member Board reasonably relied on Skadden's advice regarding the "acceptability" of Baker Botts' opinion, thus triggering the conclusive presumption. *See* DAB 36-37. But *Gerber* confirms that the "conclusive presumption" does not

affect and cannot waive the implied covenant. 67 A.3d at 418-20 (holding that conclusive presumption "does not bar a claim under the implied covenant" because of the "temporal" difference between the inquiries and because the implied covenant is nonwaivable under 6 *Del. C.* §17-1101(d)).

Here, senior executives at Boardwalk (i.e., the Partnership itself) and the General Partner subverted the opinion process. Both entities breached the implied covenant. *See Gerber*, 67 A.3d at 418-20; *Bako Pathology LP v. Bakotic*, 288 A.3d 252, 268 n.68 (Del. 2022).

V. LOEWS COMMITTED TORTIOUS INTERFERENCE

The Court of Chancery recognized that Loews' use of a manufactured opinion to expropriate value from Boardwalk's minority satisfied the elements of tortious interference. But it entered judgment against Plaintiffs after misinterpreting this Court's *en banc* decision as adopting a "No Breach View." *See* POB 30-31.

Defendants contend that even if they *did* breach the Opinion Condition, there was no tortious interference because Loews' actions were "justified." DAB 27.

Delaware courts have correctly found justification lacking where parties "exploited their control" to "enrich" themselves to the "detriment" of others, "purposely injured" others to "reap gain," "divert[ed]" value, and played a "zero-sum-game" to obtain a valuable asset for "very cheap." *See NAMA Hldgs., LLC v. Related WMC LLC*, 2014 WL 6436647, at *1-2, *26, *30 (Del. Ch. Nov. 17, 2014); *Skye Mineral Inv'rs, LLC v. DXS Cap. (U.S.) Ltd.*, 2021 WL 3184591, at *16 (Del. Ch. July 28, 2021); *id.*, 2020 WL 881544, at *33 (Del. Ch. Feb. 24, 2020); *Allied Cap. Corp. v. GC-Sun Hldgs., L.P.*, 910 A.2d 1020, 1042 (Del. Ch. 2006).

Here, Loews' Alpert and Siegel worked with Boardwalk personnel and Baker Botts to "manufacture[] grounds for exercising the Call Right…. That motive reflected a desire to take what Loews was not entitled to have." RO 95. Nothing about that conduct was "justified." *See* Restatement (Second) of Torts

("Restatement") § 767 (describing factors for weighing justification element); RO 92-98.

The Court of Chancery's conclusion that "Loews[']s actions were sufficiently justified" under the Good Faith View conflicts with its factual findings about Loews' conduct and its holding that "Loews did not have a right to breach the Partnership Agreement, even if it acted in good faith." RO 98, 96.

Defendants claim protection under the "limited affiliate privilege," AB 27-29, but Defendants' approach would short-circuit the Restatement factors and effectively import a version of the stranger rule Delaware courts reject. *See Sorrento Therapeutics, Inc. v. Mack*, 2023 WL 5670689 at *22 (Del. Ch. 2023) (holding affiliate's interference unjustified notwithstanding affiliate privilege); Restatement § 767 cmt. b ("[T]his brand of tort law has not developed a crystallized set of definite rules as to the existence or non-existence of a privilege…."). Holding Loews liable for tortious interference would not disrespect the corporate form.

Defendants claim that Plaintiffs failed to prove causation, but that argument conflicts with the Court of Chancery's undisturbed factual findings. PTO 4-5, 39-49, 60-61, 75-78, 148-49. Loews caused the *General Partner* to breach by exercising the Call Right based on an opinion its executives knew was contrived. RO 90-91; PTO 173.

VI. LOEWS WAS UNJUSTLY ENRICHED

Loews was unjustly enriched when it caused the General Partner to exercise the Call Right without satisfying its preconditions. *See* RO 116 ("Loews would be unjustly enriched if it received benefits arising from breach.").

Unable to contest any specific element, Defendants instead point to the trial court's decision in *Nemec v. Shrader*, 2009 WL 1204346 (Del. Ch. Apr. 30, 2009), and argue that *Nemec* bars the claim because the Partnership Agreement governs the relevant parties' relationship. *See* DAB 32.

Defendants ignore that this Court declined to endorse that holding as the "correct view of the law." *See Nemec*, 991 A.2d 1120, 1131 (Del. 2010). And unlike the cases Defendants cite, Plaintiffs here never sued Loews for breach of contract. *Compare BAE Sys. Inf. & Elec. Sys. Integration, Inc. v. Lockheed Martin Corp.*, 2009 WL 264088, at *7-*8 (Del. Ch. Feb. 3, 2009) *with* B520-24. The Partnership Agreement does not displace Plaintiffs' unjust enrichment claim because Loews is *not* a party to the Partnership Agreement. Unjust enrichment applies precisely where a wrong cannot be remedied through a breach of contract claim. *See ID Biomedical Corp. v. TM Tech., Inc.*, 1995 WL 130743, at *15 (Del. Ch. Mar. 16, 1995); *The Frederick Hsu Living Tr. v. ODN Hldg. Corp.*, 2017 WL 1437308, at *42 (Del. Ch. Apr. 14, 2017) ("[U]njust enrichment is a flexible doctrine that a court can deploy to avoid injustice.").

VII. DEFENDANTS ARE NOT ENTITLED TO EXCULPATION

A. Equitable Relief Remains Available

DRULPA affords drafters broad flexibility, including the ability to incorporate provisions exculpating individuals for "any and all liabilities." By contrast, Boardwalk's Partnership Agreement exculpates qualifying indemnities from "monetary damages" *only*. *See* POB 37. This is true for the General Partner even though it is entitled to a conclusive presumption of good faith. A1280 § 7.10(b). As a result, "[e]quitable remedies are still available." *Brinckerhoff*, 159 A.3d at 255.

To avoid their own drafting, Defendants contend that the Court of Chancery's broad discretion to order rescission, impose a constructive trust, or require Defendants to disgorge their ill-gotten gains is constrained by Plaintiffs' failure to demand those specific remedies. *See* DAB 39-40. This argument runs headlong into black-letter Delaware law. *See* Ct. Ch. R. 54(c) ("[E]very final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, *even if the party has not demanded such relief in the party's pleadings*.") (emphasis added); *Bata v. Hill*, 143 A.2d 728, 733 (Del. Ch. 1958).

Alternatively, Defendants argue that it is too late to award equitable remedies. DAB 40-41. But equitable relief remains practicable here, and the passage of time presents no bar. *See Gotham P'rs, L.P. v. Hallwood Realty P'rs, L.P.*, 855 A.2d

1059, 1069 (Del. Ch. 2003) (concluding rescission remained practicable remedy eight years after the challenged actions and granting alternative equitable relief for general partner's breach).

To the extent monetary relief is unavailable here, this Court should direct the Court of Chancery to craft an "equitable remedy tailored to address the harm caused by the breach." *Brinckerhoff*, 159 A.3d at 247.

B. Monetary Relief Remains Available

Only the General Partner benefits from Section 7.10(b)'s conclusive presumption. *See In re K-Sea Transp. P'rs L.P. Unitholders Litig.*, 2012 WL 1142351, at *5 (Del. Ch. Apr. 4, 2012) ("[N]o other Defendant is entitled to [Section 7.10(b)'s] conclusive presumption."); *Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 368 (Del. 2013) (The "conclusive presumption only applies to [the general partner]…."); *Thomas v. Am. Midstream GP, LLC*, 2024 WL 5135828, at *8 (Del. Ch. Dec. 17, 2024) ("Section 7.10(b)'s plain language offers the conclusive presumption only to GP, not the Conflicts Committee.").

"All of the other actors in the drama" (PTO 170) must prove their entitlement to exculpation. *See* PTO 56-57 (discussing §7.8(a)). They failed to do so. Boardwalk management and Loews' senior executives determined that Boardwalk's recourse rates were unlikely to change in the real world before manufacturing a counterfactual opinion. PTO 117; RO 3. Under well-settled law, their scienter and

misconduct is imputed to the entities they operated. *See* PTO 171 (collecting authorities); *BDO USA, LLP v. EverGlade Glob., Inc.*, 2023 WL 1371097, at *11-12 (Del. Super. Jan. 31, 2023).

Defendants contend that the "complete alignment" between the Sole Member and Loews "demonstrated that Loews acted in good faith" here. DAB 42. But the individuals that actively participated in manufacturing the contrived opinion are differently situated than the Sole Member. They cannot benefit from the conclusive presumption, nor can they be said to have "relied" on Skadden. *See Gotham P'rs*, 795 A.2d at 33-34 (defendant could not "rely in good faith" on knowingly-conflicted counsel's advice despite "implausible protestations to the contrary").[3]

[3] Plaintiffs respectfully submit that the Court of Chancery's observation that this Court could be viewed as having found that Loews acted in subjective good faith is incompatible with the Court of Chancery's undisturbed findings regarding the involvement of Loews personnel. *Compare* RO 87-88 (describing "Good Faith View") *with* POB 31.

VIII. DEFENDANTS DISTORTED THE CALL RIGHT EXERCISE PRICE

Defendants breached the express and implied terms of the Partnership Agreement by crafting deliberately alarmist disclosures to depress the Call Right exercise price. *See* POB 38-49. They advance several unavailing arguments on appeal to avoid this straightforward conclusion.

First, Defendants contend that "the federal securities laws required *a* disclosure of potential exercise[.]" DAB 44 (emphasis added). But even if *some* disclosure was required, nothing in the securities laws required alarmist and misleading disclosures. Here, even well-known Wall Street research analysts castigated Defendants for their disclosures. PTO 91-92 (Deutsche Bank), 93 (JPMorgan).

Second, Defendants claim four law firms "unanimously signed off" on the disclosures. DAB 45. But Defendants never called their securities lawyers at trial, and Defendants' record citations do not support their overly-broad characterization of the advice. *See* A1085-86 (collecting citations). Even Defendants' own expert stopped short of endorsing their disclosures' substance. *See* AR090-91 (concluding securities laws required Boardwalk "to update" its prior risk-factor disclosure).

Third, Defendants attempt to defend the "particulars" of their disclosures. DAB 45. But they cannot explain away their material omissions, including that Baker Botts had committed to render the opinion of counsel (when asked) and

Skadden had committed to deem it acceptable. Defendants own disclosure expert opined that these undisclosed commitments "would doubtless have been material" to investors. POB 45 n.10; *see also* AR087 (Skadden observing "[Loews] may not want to receive [Baker Botts' opinion] until later so there's no disclosure event").

Nor can Defendants justify Loews' campaign to delete the disclosure drafts' original language explaining that Boardwalk's rates were unlikely to change, and could even increase, as a result of the March 15 FERC Actions. PTO 83 (detailing how Loews "pushed the disclosures" in a counterfactual direction to "facilitate the exercise of the Call Right"); POB 40-41.

Finally, Defendants claim that they are exculpated because they acted in good faith, whether in reality or by operation of the conclusive presumption. DAB 46. But the conclusive presumption does not apply to the disclosures. *See* POB 44; *Thomas*, 2024 WL 5135828, at *8 (holding that 7.9(a) superseded 7.10(b)'s conclusive presumption) (collecting authorities). Moreover, Defendants' argument ignores the Court of Chancery's undisturbed factual findings regarding their conduct and overstates the record Defendants mustered to support their claimed reliance on counsel. PTO 83-86, 87-94; A1085-86.

CONCLUSION

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

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