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IN THE SUPREME COURT OF THE STATE OF DELAWARE

BOARDWALK PIPELINE PARTNERS, LP, BOARDWALK PIPELINES HOLDING CORP., BOARDWALK GP, LP, BOARDWALK GP, LLC, and LOEWS CORPORATION, Defendants Below, Appellants-Cross Appellees, v. BANDERA MASTER FUND LP, BANDERA VALUE FUND LLC, BANDERA OFFSHORE VALUE FUND LTD., LEE-WAY FINANCIAL SERVICES, INC., and JAMES R. MCBRIDE, on behalf of themselves and similarly situated BOARDWALK PIPELINE PARTNERS, LP UNITHOLDERS, Plaintiffs Below, Appellees-Cross Appellants.	No. 1, 2022 Court Below: Court of Chancery of the State of Delaware, C.A. No. 2018-0372-JTL

APPELLANTS' CORRECTED OPENING BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

NATURE OF PROCEEDINGS

Boardwalk, an operator of natural gas pipelines, went public as a Master Limited Partnership ("MLP") in 2005. It did so to leverage a new Federal Energy Regulatory Commission ("FERC") policy permitting MLPs to claim an allowance for income taxes paid by public investors. Boardwalk's founders knew this policy might change, undermining the commercial basis for the IPO. So they included in the MLP's governing limited partnership agreement ("LPA") a call right allowing the general partner to go private if the policy changed.

The design of the call was simple: If counsel provided an opinion acceptable to the general partner that the triggering event had occurred, exercise was allowed. The LPA confided the decision on the call to the sole discretion of the general partner and exculpated the general partner from liability for exercise except in extreme circumstances.

In SEC filings accompanying the IPO, and continuously thereafter, Boardwalk made clear the existence and purpose of the call right, the risk it created for public investors, and that the decision to exercise fell within the sole discretion of the general partner. Those filings were equally clear that Boardwalk was and would remain a controlled entity. Every investor who ever purchased Boardwalk units did so on express notice that a controlling general partner held the option to go private in the event FERC reversed its 2005 tax policy.

For the next 13 years, Boardwalk's public units traded on the New York Stock Exchange. Boardwalk's performance was covered by 11 equity analysts. Millions of units changed hands on a weekly basis.

In 2018, the triggering event happened: FERC reversed the tax allowance policy. The general partner retained Baker Botts ("Baker") to evaluate whether the condition to the call right was satisfied. Upon detailed analysis, Baker determined that it was; a committee of senior Baker attorneys approved that determination. The general partner also hired Skadden to determine whether Baker's opinion was acceptable. Skadden determined that it was. Richards Layton & Finger ("RLF") advised on key points, agreeing with Baker and Skadden. Based on this extensive legal review, and following lengthy business diligence, the general partner exercised the call right, just as the LPA anticipated.

That should have been the end of the matter.

But rather than enforce the LPA, the Court of Chancery discerned a nefarious conspiracy of top-flight lawyers, somehow bullied into professional malfeasance to the point of delivering "whitewash[ed]" "contrivances" instead of reasoned legal opinions rendered in good faith.

The court theorized, without support, that the call right was meant to operate like a MAE clause in a merger agreement, broadly measuring the impact of regulatory action on Boardwalk's business. Memorandum Opinion, Exhibit A

hereto ("Op.") 2. But that was not what the contract said. The call right was unambiguously pegged to the effect Boardwalk's tax status would have on the maximum rates it could charge in the future. So the court rewrote the call right provision; embraced arguments never raised by plaintiffs; convicted every lawyer who disagreed with its analysis of acting in "bad faith"; and on that basis concluded the call right had not been properly exercised and none of the LPA's protections from liability applied. Then, in fashioning a remedy, the court ignored conclusive market evidence and applied the wrong body of law to confer upon plaintiffs a whopping windfall of nearly $700 million plus interest, representing a premium of over 60% to market.

There are four issues on appeal:

First, in concluding that the call right's opinion-of-counsel condition had not been met, did the trial court err by misconstruing the LPA, applying the wrong standard of review to the opinion, and finding that counsel acted in bad faith?

Second, did the trial court commit legal error in concluding that the wrong decisionmaker accepted the opinion?

Third, did the trial court erroneously rule that defendants forfeited the exculpatory protections of the LPA by engaging in "willful misconduct"?

Fourth, did the trial court commit legal error in awarding plaintiffs nearly $700 million in value that an efficient market did not recognize?

The answer to all these questions is yes. The opinion below rests on systematic errors of law and fact, mounts an indecorous, unjustified attack on the integrity of reputable attorneys, substitutes the court's judgment for that of independent counsel, departs without justification from market evidence and this Court's valuation precedents, and in all those ways rewrites rather than enforces the LPA.

SUMMARY OF ARGUMENT

1. Defendants did not breach Section 15.1(b) of the LPA. The opinion they secured was a good-faith application of legal expertise. The trial court's contrary conclusion rests on reversible legal and factual errors.

2. The correct decisionmaker deemed the opinion acceptable. To conclude otherwise, the trial court committed legal error by effectively reading a new provision into the LPA.

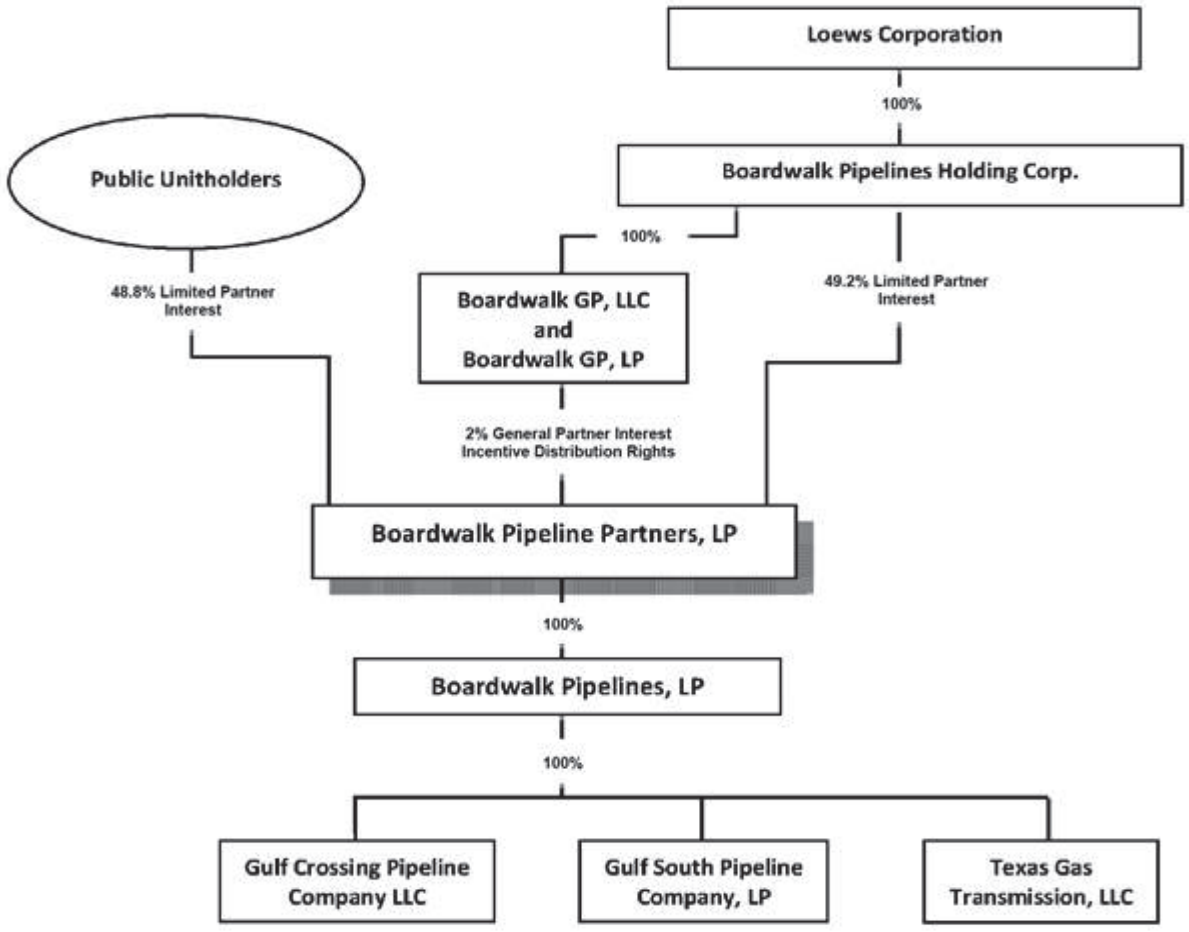
3. The LPA protected defendants from a damages award because no decisionmaker acted in bad faith or engaged in willful misconduct. The trial court's unfounded dismissal of the LPA's exculpation provisions was legal error.

4. The trial court's calculation of damages contravenes governing law, all market evidence, and common sense.

STATEMENT OF FACTS

A. Boardwalk

Boardwalk operates natural gas pipelines. It is controlled by Boardwalk Pipelines Holding Corp. (the "Sole Member"), a wholly owned subsidiary of the Loews Corporation ("Loews"). As of June 29, 2018, the Sole Member held approximately 50.2% of Boardwalk's outstanding units and was the sole member of Boardwalk GP, LLC ("GPGP"), which was the general partner of Boardwalk GP, LP (the "General Partner"), the general partner of Boardwalk:



Op. 18-21.

B. FERC and recourse rates

Boardwalk's pipelines are regulated by FERC, which determines the maximum rates—often called "recourse rates"—that pipelines can charge customers for their services. Op. 8. These maximum rates are designed to allow pipelines to recover their cost of service, including a return on invested equity ("ROE"). Op. 9. A pipeline's cost of service, and the corresponding recourse rates, are determined in "rate cases" filed by the pipeline or FERC. Op. 13-14.

Although pipelines can contract with customers for "negotiated" or "discounted" rates, customers always have recourse to the FERC-approved rates. Op. 8-9. Recourse rates are thus the ceiling against which contracted rates are negotiated. Lower recourse rates put downward pressure on a pipeline's negotiated rates at the time of re-contracting. A5748-49/69:24-71:18 (Kelly Dep.); A5781-82.

A key component of a pipeline's cost of service is income taxes. Pipelines that are corporations have been and are allowed to include a tax allowance in their cost of service. In 1995, FERC ruled that MLPs—publicly traded limited partnerships—could only add a tax allowance to their cost of service to the extent their partnership units were owned by corporate partners. Op. 15-16. This policy, called the "*Lakehead* policy," lowered MLPs' cost of service and therefore the maximum rates MLPs could charge relative to their corporate counterparts.

A related component of a pipeline's cost of service is accumulated deferred income tax ("ADIT"). Pipelines use accelerated depreciation for tax purposes, but use straight-line depreciation in calculating their cost of service, which creates a deferral of taxes paid until the accelerated depreciation period ends. The pipeline records the value of the resultant tax deferral as a liability on its balance sheet as ADIT. ADIT balances gradually decline after the accelerated depreciation period ends and the deferred taxes are paid. FERC historically subtracted ADIT balances from pipelines' rate bases, lowering the cost of service. Op. 12-13.

C. FERC abandons *Lakehead*, so Loews takes Boardwalk public

In 2005, FERC reversed *Lakehead* and permitted MLPs to recover income taxes paid by *all* taxable limited partners—including public unitholders. This generated a higher FERC-recognized cost of service, created an opportunity for MLPs to charge higher recourse rates, and thus made the MLP an attractive structure for pipeline entities. Op. 18.

In response, Loews reorganized its pipelines into the MLP structure depicted above. Op. 18; A571/40:3-8 (Rosenwasser). But Loews was concerned that FERC might revert to *Lakehead*, rendering the MLP structure less attractive. A681/479:7-22 (McMahon); A572/42:17-24 (Rosenwasser). Loews told underwriters it would not take Boardwalk public unless it could guard against

"los[ing] any substantial portion of the tax allowance if there was a reversion to *Lakehead*." A572/41:16-42:24 (Rosenwasser).

The LPA addressed that concern. It gave the General Partner the right to unwind the MLP if there was a change in tax allowance policy that disfavored the MLP structure. Section 15.1(b) provided that the General Partner could repurchase Boardwalk's public units if it "receive[d] an Opinion of Counsel that the Partnership'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 …." A3117/LPA § 15.1(b). Early drafts of the LPA referred to this provision as the "*Lakehead* call." A1301.

The call was conditioned on receipt of an opinion of counsel, rather than directly on a contractually-defined event, to give the General Partner more certainty, and less litigation risk, in exercising the right. A573-74/48:17-49:15 (Rosenwasser).

In the event of exercise, the LPA required the General Partner to acquire all public units at the average of the daily closing prices for the 180 trading days ending three days before the notice of exercise is mailed. A3117/LPA § 15.1(b).

The IPO prospectus, which attached the LPA, expressly advised potential investors that the call right could be triggered "[i]f the FERC [tax allowance] policy is reversed." A1356. The prospectus warned that exercise could require

holders "to sell [their] common units at an undesirable time or price." A1365. The prospectus further disclosed that the decision to exercise would be made by the General Partner in its "individual capacity," meaning it could "consider only the interests and factors that it desire[d], and it ha[d] no duty or obligation to give any consideration to any interest of, or factors affecting … any limited partner." A1366.

D. Boardwalk units trade in an efficient market following the IPO

On November 15, 2005, Boardwalk offered 17.25 million limited partner units—a 16.7% stake in the partnership—in an IPO on the New York Stock Exchange. A2237. By early 2018, the number of publicly traded Boardwalk units increased to 124.7 million, or 49.8% of Boardwalk's outstanding units. A5582, A5603. Boardwalk's units were widely traded, and covered by 11 equity analysts. A5603.

From its IPO onward, Boardwalk disclosed the existence of the call right in every 10-K. *See, e.g.*, A2811; A2914, A2921-22; A3287; A3471.

E. FERC eliminates the tax allowance for MLPs

On March 15, 2018, the very thing the call right was designed to address happened. FERC issued a Revised Policy Statement announcing it would "no longer permit MLPs"—in contrast to corporations—"to recover an income tax allowance in their cost of service," A3630; Op. 25-27. The Revised Policy was

even worse for MLPs than *Lakehead*, which had allowed MLP pipelines to claim at least a portion of their income taxes as part of the cost of service.

On the same day, FERC issued an order applying the Revised Policy to a pending rate case, creating binding precedent for other MLPs, including Boardwalk. A3592-620; A838/1102:6-12 (Kelly); Op. 30. FERC also issued a Notice of Proposed Rulemaking requiring pipelines to file a Form 501-G detailing how the Revised Policy would affect their cost of service, and a Notice of Inquiry inviting comments on how to address ADIT in light of the 2017 federal tax cuts and the Revised Policy. Op. 27-30.

FERC's actions "dropped a bombshell on the industry." A3672. Like other MLP pipelines, Boardwalk issued a press release saying it did not anticipate the March 15 actions would have an *immediate* impact on its results. A3662-64; A3665; A3666-67; A686-87/500:21-501:17 (McMahon).

F. Loews explores a potential exercise of the call right

Shortly after FERC's March 15 actions, Boardwalk General Counsel Michael McMahon alerted Loews General Counsel Marc Alpert to the Revised Policy. A641/318:19-320:3 (Alpert). Alpert then discussed the call right with Loews's senior management, who determined to explore (i) whether Loews had the right to exercise the call right under the LPA, and, (ii) if it did, whether exercise made business sense. A641-42/320:11-322:1 (Alpert). Alpert led the

opinion-of-counsel process and Ken Siegel, Senior Vice President of Loews and Chairman of the GPGP Board, led the business diligence. A642/321:3-322:2 (Alpert); A737-38/701:21-702:4 (Siegel).

G. Loews engages both Baker and Skadden to analyze the call right

Based on McMahon's recommendation, Alpert retained Michael Rosenwasser, a partner at Baker, to consider whether Baker could give the opinion called for in Section 15.1(b). A575/55:8-56:13 (Rosenwasser); A642-43/324:15-325:16 (Alpert). Rosenwasser, a 50-year legal veteran, was the "[D]ean of the MLP Bar." Op. 38. When Boardwalk went public in 2005, Rosenwasser was with Vinson & Elkins, and led the drafting of the LPA and Boardwalk's S-1. He understood the background and reasons for the call right. A642-43/324:21-325:11 (Alpert); A687/503:12-18 (McMahon); A571/39:16-40:22 (Rosenwasser). Baker was also expert in the pipeline business, with a nationally ranked Oil & Gas Regulatory & Litigation practice. A4743.

Rosenwasser assembled a team of Baker lawyers, including FERC practitioner Greg Wagner, to analyze the substantive issues. A575-76/56:14-58:7 (Rosenwasser); A612/203:3-204:1, A615-16/216:21-217:15 (Wagner). Rosenwasser also assembled an opinion committee of senior lawyers, including Baker's chair, to review the substantive work and approve any resulting opinion. A576/59:9-13 (Rosenwasser).

Loews engaged Skadden to review Baker's work and to advise as to the acceptability of any opinion Baker might provide. A643/326:14-21, A651/357:16-358:11, A663/407:3-8 (Alpert). The Skadden team, which included former FERC commissioner Mike Naeve, was well versed in FERC and MLP matters and in Delaware law. A643/326:14-327:6 (Alpert); A577/62:2-16 (Rosenwasser).

H. Loews begins business diligence on the call right

Meanwhile, Loews explored whether exercising the call right made business sense. Before the Revised Policy, Loews "had no plans to buy Boardwalk units." A737/700:2-18 (Siegel). Cost overruns had left Boardwalk overleveraged and at risk of breaching its debt covenants, and it faced substantial short-term re-contracting risk. A736/696:4-697:6 (Siegel). Its EBITDA was expected to fall from $840 million in 2017 to $680 million in 2020. A737/698:15-699:15 (Siegel).

Moreover, exercise entailed a substantial investment—about $1.5 billion. Loews had other uses for its capital, and given its poor track record in other energy investments was reluctant to make another. A738/702:21-704:2 (Siegel). So Loews reviewed a variety of options beyond exercise, including keeping Boardwalk a publicly traded MLP and converting to other corporate structures. A738/704:3-11 (Siegel). At the end of March, Loews "had no idea whether or not [it] wanted to exercise"—supposing it could. A739/708:19-22 (Siegel); *see also* A3710, A3727.

I. Baker works through the issues relevant to the opinion

Over the ensuing months, Baker examined whether Boardwalk's tax status following FERC's actions "ha[d] or w[ould] reasonably likely in the future have a material adverse effect on the maximum applicable rate that can be charged to customers." A3117/LPA § 15.1(b)(ii). Skadden shadowed the Baker process and found it reasonable. A4732-54.

1. The finality of the Revised Policy

A threshold issue was whether the Revised Policy was sufficiently final to trigger the call right. The answer was clearly yes: The policy was adopted in response to a D.C. Circuit ruling that the tax allowance for MLPs was unjustified, after a long deliberative process in which FERC solicited industry comments, and it was accompanied by a same-day FERC order applying the policy in a litigated proceeding, demonstrating FERC's commitment to the policy. *See* A578/65:1-66:9, A578/67:14-22 (Rosenwasser); A613/207:12-208:1 (Wagner); *see also* A3627; A5830-31; A784/887:8-888:7 (Court).

2. "Maximum applicable rate" means recourse rate

Baker also determined that "maximum applicable rate" in Section 15.1(b) meant FERC's recourse rate. A573-75/47:12-54:15 (Rosenwasser); A644/330:9-331:20 (Alpert). Recourse rates are the maximum applicable rates a pipeline can charge; Baker could identify no other plausible interpretation. A585/93:8-94:6 (Rosenwasser); A614/209:1-10 (Wagner) (maximum applicable

rate meant "the recourse rate in a gas pipelines tariff" because "[i]t's common for recourse rates to be referred to as maximum rates or max rates"); *see also, e.g.*, A1421 ("The rates we charge for transportation services are subject to a *maximum tariff rate authorized by FERC* .... Currently, most of our transportation services are provided at less than *the current maximum applicable rate*.") (emphases added). Baker found no instance in which the term was used to refer to a discounted or negotiated rate. A614/212:5-20 (Wagner); A4355.

Wagner shared these findings with Naeve at Skadden, who agreed that Baker's interpretation was "more reasonable" than any alternative. A614-15/212:22-214:8 (Wagner); A4751; A4349; A4249-50.

3. The Revised Policy's effect on Boardwalk's rates

To assess the likely effect of the Revised Policy on Boardwalk's recourse rates, Baker asked Boardwalk to prepare a rate model comparing the maximum applicable rates Boardwalk could charge with and without the tax allowance. Loews had no input in the model. A709/590:20-591:4 (Johnson); A688/505:2-7, A689/510:4-9 (McMahon).

McMahon and Ben Johnson, Boardwalk's Vice President of Rates and Tariffs, determined the best way to measure the effect of Boardwalk's MLP status under the Revised Policy was to update Boardwalk's most recent cost-of-service data and calculate an indicative rate for each of Boardwalk's three pipelines, with

and then without a tax allowance. A710/593:4-594:11 (Johnson); A580/74:21-75:11 (Rosenwasser); *see also* A3747. Although Boardwalk has 167 different recourse rates for different services and geographical zones, Op. 54, the indicative rates allowed Boardwalk to assess the system-wide impact of the Revised Policy—essentially the average effect on Boardwalk's rates across its pipelines. A710/594:12-595:2 (Johnson); *see also* A839/1106:5-1107:21 (Kelly). All the FERC practitioners working with Baker agreed with this approach. A714/610:10-14, A721/637:12-16 (Johnson); A689-90/512:20-513:11 (McMahon); A620-21/236:1-237:21 (Wagner).

To calculate the indicative rates, Boardwalk had to make a judgment about ADIT. FERC had not yet decided what to do with already-accumulated ADIT under the Revised Policy. There were four options: (i) require pipelines to refund ADIT to customers; (ii) require pipelines to amortize ADIT on an accelerated basis; (iii) require pipelines to amortize ADIT over the remaining life of the pipeline (the "Reverse South Georgia" method); or (iv) allow pipelines to eliminate ADIT altogether. Op. 50-51; A836/1093:2-18 (Kelly).

Everyone predicted FERC would require amortization. *See* A716/619:3-19 (Johnson); A616/217:16-218:21 (Wagner); A686/497:19-498:1, A690/514:20-515:6 (McMahon); A581-82/77:17-81:12 (Rosenwasser); A5569/210:17-211:17 (Sullivan Dep.); A845-46/1132:9-1134:4 (Kelly); *see also* A3621. And for good

reason. FERC had a "long-standing policy … requir[ing] natural gas companies to flow back" to customers excess ADIT. A5283. The closer question was whether amortization was likely to be accelerated; FERC's draft Form 501-G instructed pipelines to amortize without specifying how quickly. *See* A5520; A616/219:18-220:6 (Wagner). For the rate model, Boardwalk assumed that FERC would require Reverse South Georgia rather than accelerated amortization—a conservative assumption, since accelerated amortization would have resulted in a greater reduction in projected rates. A717/622:12-24 (Johnson); A690/515:7-16 (McMahon); A836/1093:23-1094:22 (Kelly).

The rate model applied an industry-standard ROE of 12%, which FERC ultimately adopted as the "target ROE" in its Final Rule promulgating the Form 501-G. A838-39/1104:15-1105:4 (Kelly).

The model showed that absent an income tax allowance indicative rates for Boardwalk's three pipelines would be 11.68% to 15.62% less, in perpetuity. A3749.

To corroborate Boardwalk's work, Baker retained Barry Sullivan, a leading FERC rate expert. A578/68:15-22 (Rosenwasser); A3743-44. Sullivan reviewed the rate model and underlying assumptions and determined they were "reasonable" and "acceptable." A620-21/236:21-238:22, A622/242:10-243:12 (Wagner); A4261-62; A5571-72/220:6-223:23 (Sullivan Dep.).

4. MAE

Baker then evaluated whether a 11.68%-15.62% adverse impact on rates in perpetuity was "material." Delaware courts had considered MAE clauses in merger agreements, but those require examination of economic effects rather than tax status-generated rate differentials. A602/164:5-17 (Rosenwasser); A4783-85. Drawing partially from Delaware MAE law but also from materiality concepts in accounting and securities law, Baker reasoned that a 10% or more adverse effect on maximum applicable rates in perpetuity was material. *See* A585-86/96:3-98:10, A601/160:13-18 (Rosenwasser); A4774-89.

To cross-check its analysis, Baker engaged RLF, who, after undertaking further research, agreed. A586/99:8-100:2 (Rosenwasser); A762/800:4-801:16 (Raju); *see also* A4823-24.

J. The acceptability determination

Under the LPA, any opinion of counsel had to be "acceptable" to the General Partner. A3030/LPA § 1.1. In March, Baker advised Loews that the "determination of the acceptability of an opinion of counsel … should be made by the Sole Member as opposed to the board of directors of [GPGP]." A3739; A591/119:14-120:3 (Rosenwasser); *see also* A4864-65.

Alpert then asked Richard Grossman of Skadden to "check with [his] corporate MLP specialists, and confirm they view the redemption as the sole

decision of the GP." A3730; A658/386:9-14 (Alpert). In an April 9, 2018 memo to Loews, Grossman and his partner Jennifer Voss suggested that a plaintiff could argue that GPGP's board, rather than the Sole Member, should determine acceptability because the condition might constitute a "protection" for unitholders. A3777-80. Skadden told Loews there was at least an "arguable ambiguity." A3779; A658/386:23-387:5, A676-77/460:24-461:4 (Alpert).

Given Skadden's advice, Loews initially planned to have both the GPGP board and the Sole Member board accept the opinion. A658/387:22-388:15 (Alpert). But when Siegel raised the issue with the independent directors of GPGP, they did not want to address it, explaining they "were uncomfortable being asked … to accept an opinion [when] they had no input on whether or not Loews actually exercised the call right or what the price would be." A747/738:6-12 (Siegel).

Loews then asked RLF to offer its view on acceptability. A659/389:12-390:3 (Alpert). RLF told Loews it was not a close question: the Sole Member, not GPGP, should make the decision. A659/390:8-15 (Alpert); A764/808:8-23 (Raju); A4342. Alpert then sent Skadden's memo to RLF, asking RLF and Skadden to try to reach a consensus. A659/390:24-391:5 (Alpert). They did and agreed the Sole Member should determine acceptability. A659/391:6-8 (Alpert); A765/811:24-813:16 (Raju); A5541/28:16-22 (Grossman Dep.). Vinson & Elkins, as

Boardwalk's counsel, and Davis Polk, as counsel to Loews, independently reached the same conclusion. A660/394:9-15 (Alpert); A4593; A5871-72/240:5-241:6 (Layne Dep.).

K. Loews says it is considering exercising the call right and unitholders sue

On April 30, 2018, consistent with its obligations under federal securities law, Loews disclosed in its 10-Q that it was "seriously considering" exercising the call right. A656/378:6-379:10 (Alpert); A5548/219:6-221:9 (Grossman Dep.). Boardwalk's limited partners—including the eventual plaintiffs—urged Boardwalk to exercise promptly, to avoid a potential decline in the 180-day average exercise price. *E.g.*, A4343-44; A4348; A4356-59.

During this same period, Baker continued its work on the opinion, including preparing a detailed memorandum summarizing its analysis. A4362-398; A4399-548.

Loews continued its business diligence. Boardwalk estimated that Texas Gas, a Boardwalk pipeline, could suffer a $74 million decline in revenues following a rate case as a result of the March 15 actions, A721/635:24-636:20 (Johnson), which would have been devastating to both Loews and the public unitholders. A748/744:14-745:21 (Siegel). Loews concluded that maintaining the status quo, with Boardwalk remaining an MLP, was not viable, and that it needed

to consider conversion to a C-Corp or exercise of the call right. A745/730:2-5, A748/744:14-20 (Siegel); A4313.

On May 24, 2018, two limited partners represented by Friedlander & Gorris and Bernstein Litowitz Berger & Grossmann brought suit alleging that Boardwalk's unitholders would be harmed by further delay in exercising the call right. A4549-90. The trial court warned Loews that failure to "exercise[] within a reasonable time" could strengthen these plaintiffs' claims. A144-45/27:10-28:20. In settlement talks, Loews sought until September to make the exercise decision to conduct further business diligence; the plaintiffs pushed for an immediate exercise decision. A5438-39; A661/398:3-21 (Alpert). The parties reached a settlement-in-principle that set June 29 (the last business day of the second quarter) as the date by which Loews would decide whether to exercise, and, if applicable, for the 180-day exercise price calculation. A661/398:3-21 (Alpert); A5443.

L. Baker finalizes the opinion, Skadden advises the Sole Member that the opinion is acceptable, and the General Partner exercises the call right

To comply with the settlement agreement, Loews asked Baker to opine by June 29 whether the condition to the call was satisfied. Baker concluded it was. Its reasoning was memorialized in a 50-page memorandum—supported by 200 pages of documentation. A4825-5080. Baker's opinion committee approved issuance of the opinion. A4742. The 180-day look-back implied a call price of

approximately $1.5 billion. Loews expected to achieve a mediocre internal rate of return of 9.9% on that investment, which was nevertheless the best of several unattractive options. A748/744:4-13 (Siegel); A4705.

On June 29, Baker delivered the opinion to Loews. A5094-99; A4825-5080. Also on June 29, Skadden delivered a 23-page presentation to the Sole Member board based on its independent review of Baker's process. A661-62/400:1-401:4 (Alpert); A4732-54; A5081-89. Skadden advised that "it is reasonable for the directors of [the Sole Member] to" conclude they had authority to accept the opinion; Baker was acceptable counsel; the opinion was acceptable; and Baker's conclusions—including as to the finality of the Revised Policy, the interpretation of "maximum applicable rate," and the finding of a material adverse effect—were reasonable. A4748-53; A5081-85; A662/401:1-402:13 (Alpert).

Siegel also made a presentation to the Sole Member board regarding the economics of the call. A4704-26.

The Sole Member board then caused Boardwalk's General Partner to accept the opinion and exercise. *See* A5085-88. Based on the 180-day trailing average, the exercise price was set at $12.06, reflecting a 12% premium to the market price of the units. A5083; A5611.

M. FERC affirms the Revised Policy and unexpectedly permits elimination of ADIT balances

Consistent with industry expectations, on July 19, 2018, FERC affirmed the Revised Policy. A5391. It also made the unexpected announcement that it would permit MLPs to eliminate rather than amortize ADIT balances. A5393. The announcement was unexpected not just in substance but in timing; Loews had been advised not to expect a decision on ADIT until late 2018 at the earliest. A607/181:23-182:6 (Rosenwasser); A620/233:5-234:15 (Wagner); A661/399:19-400:1 (Alpert); A4360; A786/894:6-9 (Court) (plaintiffs' expert admitting there was no sign "FERC was going to take up the ADIT NOI at the July 19th meeting"). The "whole industry was absolutely shocked by" the ADIT elimination. A5563-64/110:24-111:9 (Sullivan Dep.).

N. The trial court rejects the proposed settlement

On September 28, the trial court considered the proposed settlement. Mark Lebovitch of Bernstein Litowitz explained that he and the Friedlander firm, acting on behalf of a hedge-fund holder of Boardwalk units, had negotiated with Loews to ensure an early exercise of the call right. Early exercise benefitted the public unitholders, Lebovitch explained, because the consideration they would receive under the 180-day lookback was a "melting ice cube," given Boardwalk's declining share price. A163/14:10-19. Lebovitch added that Loews wanted to decide whether to exercise far later than June 29, but agreed to that date in

consideration of the settlement. A170/21:3-12, A178-79/29:21-30:4, A180-81/31:23-32:9. The original plaintiffs presented evidence that the early exercise of the call right preserved $100 million of value for public investors. A173/24:3-22.

The settlement should be approved, then-plaintiffs' counsel believed, because the LPA made any other recovery unlikely. The reason? The call right is "a pretty easy option to trigger"; by its terms, "if FERC changes the maximum rate, the option is available, even if it doesn't have any impact on the business." A158/9:8-14. Quoting internal communications involving then-objector (later plaintiff) Bandera Partners, plaintiffs observed that to challenge the legitimacy of the exercise "requires a considerable departure from the actual text of the contract." A179-80/30:5-31:2; A4346. While the contract was favorable to Loews, "an unfair contract is not a basis for relief under Delaware law." A159/10:12-15, A180/31:3-11. Bandera's internal thinking at the time of exercise was not "to argue that Loews' option hasn't been triggered[, but] to argue that it has been triggered and that they need to exercise it immediately." A179/30:11-15.

The trial court rejected the settlement. It said it had a "bad feeling" about the case and—remarkably given the preliminary posture—characterized defendants as "some muggers beating up a guy." A230/80:19-81:10. Casting aspersions on all counsel involved, the court said the settlement had "effectively greased the skids for" exercise of the call right. A232/83:17-20.

O. Substitution and privilege waiver

On February 3, 2019, the trial court granted a motion to substitute Bandera Partners and James McBride as lead plaintiffs. A235-42.

Given their intended reliance on the opinion of counsel, defendants voluntarily waived privilege over the internal and external Baker and Skadden communications regarding the opinion's preparation. On April 7, 2020, the court ruled that privilege had been waived over *all* communications by and among Boardwalk, Loews, and all their advisors concerning the opinion. A345-51.

P. The trial court's opinion

Following a four-day trial, the trial court found a breach and ordered damages in the amount of $689,827,343.38 plus interest. Op. 6.

The court held that the opinion condition had not been met because Baker had acted with subjective bad faith under pressure from Loews. Op. 150-51. The court dismissed the unanimous sworn testimony of Loews's and Boardwalk's outside counsel as "a reshaping" of the facts. Op. 149; A1249/92:21-93:9. The court also ignored the testimony from plaintiffs' own FERC expert that Baker's rate model assumptions were reasonable. *See* A786/894:2-5, A787/901:2-7 (Court). In a handful of emails capturing counsel's preliminary discussion of some of the questions at issue, the court saw an effort to produce a "contrived" opinion rooted in purportedly manipulated financial data.

The court also decided that the wrong entity had deemed the opinion acceptable. It acknowledged the stronger textual position was that the Sole Member could make the acceptability determination—but nevertheless invoked a "surplusage" argument raised by no party to reject that position. Op. 151-57. It dismissed Skadden's advice adopting the stronger textual position. Op. 174.

Next, the court concluded that the LPA did not exculpate the General Partner from damages for the breach because Baker, Alpert, Siegel, McMahon, and Johnson engaged in "willful misconduct," and their "scienter" should be imputed to the General Partner. Op. 168-72.

Following the lead of plaintiffs' expert, the court assessed damages based on a Distribution Discount Model rather than Boardwalk's market price. The court declined to consider market price at all and concluded—contrary to the views of both parties' experts—that Boardwalk's shares did not trade in an efficient market. Op. 175-91; A849/1147:22-24 (Hubbard); A829/1067:6-9 (Atkins). The trial court's expert-fueled DDM-based analysis yielded a premium of over 60% to Boardwalk's trading price, inconsistent with all market evidence. Op. 189-91; A850-51/1152:19-1153:16 (Hubbard).

ARGUMENT

I. THE TRIAL COURT ERRONEOUSLY REJECTED THE OPINION OF COUNSEL

A. Question Presented

Did the Court of Chancery err in concluding that the opinion of counsel was not rendered in good faith? This question was raised below (A1019-53) and considered by the Court of Chancery (Op. 112-51).

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).

C. Merits of Argument

The trial court found the call right condition was not satisfied because Baker's opinion "did not reflect a good faith effort to discern the facts and apply professional judgment." Op. 150. This holding rested on three reversible errors.

First, the court accused Baker of relying on a contrived "syllogism" and "counterfactual assumptions," and then "stretching" to a MAE. Op. 117-50. These accusations all reflect the trial court's unwillingness to accept the language of the LPA, which unambiguously called for a prediction of future impact on maximum applicable rates rather than an assessment of immediate economic

impact on Boardwalk in the wake of final regulations. Had it adhered to the contract, the court could not have made these "findings."

Second, the trial court improperly reviewed Baker's reasoning *de novo*. The law required the court to defer to counsel's analysis. *See Williams Cos., Inc.* v. *Energy Transfer Equity, L.P.*, 2016 WL 3576682, at *11 (Del. Ch. June 24, 2016), *aff'd*, 159 A.3d 264 (Del. 2017).

Third, the trial court erroneously concluded that the lawyers who rendered the opinion acted inconsistent with their professional responsibilities. Op. 147-51. There was no evidence that Baker or Skadden succumbed to pressure from Loews on any aspect of their analyses, or even that Loews attempted to exert such pressure. Absent that evidence, the opinion of counsel was due to be accepted, as a matter of law.

1. Legal and contractual framework

"[T]he Delaware Revised Uniform Limited Partnership Act is intended to give 'maximum effect to the principle of freedom of contract.' Accordingly, [a court's] analysis … must focus on, and examine, the precise language of the LPA that is at issue in [each] case." *Brinckerhoff* v. *Enbridge Energy Co.*, 159 A.3d 242, 253 (Del. 2017).

The Boardwalk LPA specified that the call right was exercisable at the sole discretion of the General Partner. A3084, A3091, A3117/LPA §§ 7.1(b)(iii),

7.9(c), 15.1(b). The only precondition to exercise—aside from the ownership threshold—was that the General Partner secure an 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." A3030, A3117/LPA §§ 1.1, 15.1(b). As the trial court acknowledged (Op. 23), the exercise did not have to be in "good faith," *i.e.*, serve "the best interests of the Partnership." *See* A3091/LPA § 7.9(b).

The opinion had only to be rendered in counsel's subjective good faith, "based on [its] independent expertise as applied to the facts of the transaction." *Williams*, 2016 WL 3576682, at *11. An opinion of counsel necessarily relies on the reasoned judgment of counsel, typically amid uncertainty. Although an assessment of counsel's subjective good faith may entail some objective evaluation, *see Allen* v. *Encore Energy Partners, L.P.*, 72 A.3d 93, 107 (Del. 2013), the court's role in reviewing the substance of the opinion is limited and deferential. *See Williams*, 2016 WL 3576682, at *11; *NHB Advisors, Inc.* v. *Monroe Cap. LLC*, 2013 WL 3790745, at *3 (Del. Ch. July 19, 2013).

2. The opinion of counsel was a good-faith exercise of professional judgment

The opinion Baker rendered was a good-faith application of well-supported expertise. Every lawyer who testified said he acted in good faith and stood by the

opinion. A578/66:3-6, A592/122:15-17, A592/123:20-124:6 (Rosenwasser); A624/250:11-251:5 (Wagner); A764/806:23-807:13, A766-67/817:18-818:11 (Raju); A5551-52/233:7-237:16 (Grossman Dep.); A5871-72/240:14-241:23 (Layne Dep.).

The process was sound. Rather than ask their regular counsel for the opinion, as they could have, defendants turned to Rosenwasser, the foremost expert in MLPs. Rosenwasser arranged for an opinion committee of Baker attorneys to review his work, and for further assistance from a FERC lawyer at his own firm (Wagner), a renowned rate expert (Sullivan), and an expert Delaware law firm (RLF). What's more, Rosenwasser had Skadden—with its own strong energy and Delaware practices and FERC expert Naeve—looking over his shoulder, testing his conclusions at Loews's behest. One would have been hard-pressed to assemble a more qualified team.

The analysis was rigorous. From March through June 2018, Baker alone spent over 1,200 hours on the opinion. A5156-88.

The resulting work product carefully addressed the elements of Section 15.1(b). The trial court repeatedly labelled Baker's opinion "non-explained." Op. 105, 144-46. This finding cannot be sustained. The opinion was supported by a 50-page legal memorandum and 200 pages of documentary back-up that the trial

court ignored without explanation. This Court need only review the analysis—A4826-5080—to see that Baker's opinion was explained exhaustively.

The opinion was no "contrivance." The trial court's bases for concluding otherwise stem from its own legal errors in misreading the contract and adopting the wrong standard of review, and from its clearly erroneous factfinding.

a. There was no questionable "syllogism"

As a predicate for its assessment, Baker properly sought to estimate the likely effect Boardwalk's tax status as an MLP would have on its recourse rates "in the future" given the March 15 FERC actions—not the potential near-term economic impact of those actions. This was no self-serving "syllogism" designed to justify taking "the view that the Call Right was not concerned with the actual economic impact." Op. 44-45, 135. It was the inquiry compelled by the contract.

Section 15.1(b) speaks of the "maximum applicable rate that can be charged to customers" by Boardwalk given its MLP status. Boardwalk's initial prospectus likewise discussed tax-related impact on maximum rates—not economic impact. *See, e.g.*, A1355-56, A1365; A2607-08, A2618-19. So did every later 10-K. *See, e.g.*, A2921-22; A3471.

This was by design. Recourse rate impact is a harbinger of business impact; lower maximum rates exert downward pressure on all rates. A5748-49/69:24-71:18 (Kelly Dep.); A5781-82. But the drafters of Section 15.1(b) chose as their

trigger not the ultimate economic impact, as measured by an investment banker, but the harbinger, as determined by an attorney. A574/49:21-51:18 (Rosenwasser). The question posed was not meant to be "extremely difficult" to answer. A602/163:19-164:17 (Rosenwasser). The original plaintiffs reached the same conclusion, noting the call right is "a pretty easy option to trigger" because "if FERC changes the maximum rate, the option is available, even if it doesn't have any impact on the business." A158/9:8-14; p. 24, *supra*.

The trial court's contrary ruling—its excoriation of Baker for having ignored "actual economic impact" (Op. 135)—was legal error. So was its analysis of the term "maximum applicable rate," which undergirded its "syllogism" criticism. Op. 126-30. The court acknowledged that the most natural construction of "maximum applicable rate that can be charged to customers" was the recourse rate. Op. 128-29; *see* p. 14-15, *supra*. Plaintiffs' alternative construction—maximum *negotiated* rate—had no textual, contextual, or other support; would read the "can be charged" language out of the condition; and would inject unwarranted complexity into the analysis. Plaintiffs identified no instance in which "maximum applicable rate" meant anything but recourse rate, and their expert conceded that Baker's construction was reasonable. *See* A787/898:12-901:7 (Court).

Yet the trial court criticized Baker's interpretation, suggesting *contra proferentem* required resolving "ambigu[ity]" in the words "maximum applicable

rate" against Loews and in favor of the limited partners. Op. 46-47, 127-29. That was wrong on two levels.

First, there was no ambiguity to resolve, and the court erred in concluding otherwise. Op. 128-29; *see Norton* v. *K-Sea Transp. Partners L.P.*, 67 A.3d 354, 365 n.56 (Del. 2013) (*contra proferentem* applies only in event of ambiguity). A phrase is ambiguous only if susceptible to more than one reasonable construction. *Rhone-Poulenc Basic Chems. Co.* v. *Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).

There was no reasonable alternative construction. As Baker confirmed by consulting contextual documents like Boardwalk's prospectus and the filings of other pipelines, shippers, and FERC itself, *see* p. 14-15, *supra*; A5842-43; A4840-45; A3781-4248, there was *only* one meaning given "maximum applicable rate" in *any* context, anywhere: recourse rate. Baker's diligence in confirming as much was no concession of ambiguity (*cf.* Op. 128); "commercial context," which here uniformly supported Baker's position, is a proper point of reference in identifying whether ambiguities exist in the first place. *See, e.g.*, *Chicago Bridge & Iron Co. N.V.* v. *Westinghouse Elec. Co. LLC*, 166 A.3d 912, 926-27 (Del. 2017). The only improper resort to extrinsic evidence came from the court, which found "ambiguity" based on an internal Skadden email in which Naeve mused—before reviewing relevant documents—that the phrase might mean the maximum rates

applicable to customers including discounts. Op. 127; A4251-52; *see Eagle Indus., Inc.* v. *DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997) (extrinsic evidence cannot create ambiguity). Nowhere did Naeve say this other reading was reasonable; from the get-go Naeve believed that "recourse rates" was the "more reasonable reading"—a view he confirmed after reading Boardwalk's S-1. A4250.

Second, even where applicable, *contra proferentem* requires not an automatic default to an interpretation that maximally favors a unitholder-plaintiff but acceptance of the interpretation that reflects the "reasonable expectation[s] of investors." *Bank of N.Y. Mellon* v. *Commerzbank Cap. Funding Tr. II*, 65 A.3d 539, 551-52 (Del. 2013); *see also Dieckman* v. *Regency GP LP*, 155 A.3d 358, 366-67 (Del. 2017) ("When investors buy equity in a public entity, they necessarily rely on the text of the public documents and public disclosures about that entity, and not on parol evidence."). The court cited this standard, Op. 111-12, but failed to apply it, *see* Op. 129. Boardwalk's public filings compelled the conclusion that a reasonable investor would have understood "maximum applicable rate" to mean recourse rate; there was no colorable alternative reflected anywhere. *See* A683-84/488:8-490:13 (McMahon).

b. The supposed "counterfactual assumptions" were reasonable predictive judgments called for by the unambiguous terms of the LPA

Likewise erroneous was the trial court's accusation that Baker relied on

"counterfactual assumptions … designed to generate the conclusion that [it] wanted to reach." Op. 117. Each of the "assumptions" the trial court purported to identify and then impugned—on finality and ADIT, rate case risk, and indicative rates—was a predictive judgment that the contract's "reasonably likely" and "in the future" language *required* counsel to make. A3117/LPA § 15.1(b). And each was reasonable—as Skadden confirmed for the Sole Member. There was no indication of "contrivance." The trial court concluded otherwise only by ignoring the contractual text.

i. Finality & ADIT

Baker reasonably predicted that FERC's announced policy change would become permanent and be accompanied by ADIT amortization. A3698; A616/217:16-218-21 (Wagner). The trial court's criticism that the firm indulged "counterfactual assumptions" about "finality" and the "known" character of ADIT treatment, Op. 84, 118, 131, reads "reasonably likely" out of the contract and mischaracterizes the record.

As to the Revised Policy, Baker properly assumed it would hold. Among other things, the Revised Policy was applied to a real-world case the day it issued, and was ultimately implemented through final regulations. *See* p. 14, *supra*; A5189-390.

As to FERC's elimination of ADIT for MLPs shortly after the call right's exercise, that was neither anticipated nor reasonably foreseeable when Baker issued its opinion. No one involved thought FERC would eliminate ADIT. A836-37/1095:18-1098:5 (Kelly); A5569-70/210:14-216:4 (Sullivan Dep.); A647-48/344:20-345:5 (Alpert). Everyone believed, Op. 69, 133, based on FERC's comments, actions, and precedent that the agency would require Reverse South Georgia or, worse, accelerated amortization. P. 16-17, *supra*. Plaintiffs' FERC expert acknowledged this assumption was not unreasonable. A786/894:2-5 (Court).

Finding otherwise, the court cited Boardwalk's contemporaneous regulatory filing decrying the lack of FERC guidance on ADIT treatment following announcement of the Revised Policy. Op. 133; *see also* Op. 79-81. But none of these statements reflected anticipation that FERC might *eliminate* ADIT—they highlighted uncertainty about which *amortization* method FERC would adopt. A691/519:1-23 (McMahon). Without knowing which amortization method applied, Boardwalk could not accurately assess likely rate impact. Yet Baker could still conclude that even with non-accelerated amortization the projected

adverse effect on recourse rates was "material" for purposes of the call right. *See* A836/1093:23-1094:22 (Kelly).[1]

No evidence supports the suggestion, Op. 122, that Loews rushed to exercise the call right before the July 19 FERC meeting and potential decision on ADIT. Wagner advised Loews that FERC would not rule on ADIT at the July meeting. A4360; A620/233:5-234:15 (Wagner). Plaintiffs' expert acknowledged "[t]here was no indication in late June or early July 2018 that FERC was going to take up the ADIT NOI at the July 19th meeting." A786/894:6-9 (Court). The June exercise decision date was a negotiated compromise with the original plaintiffs, who sued to cause an early exercise—Loews wanted to defer until September, as the uncontested evidence makes clear. *See* A4343-44; A5438-39.

ii. Rate case risk

The trial court criticized Baker's supposed "unstated counterfactual assumption" that rates would change without a rate case. Op. 123. The court's analysis assumes the "material adverse effect" on rates must materialize within the near term, and that Baker was required to assess the likelihood of a rate case emerging in that timeframe. Op. 124-26. Neither assumption finds any support in

[1] The court misconstrued Wagner's handwritten notes and marginalia to suggest that Baker had "[n]o idea" how FERC would treat ADIT. Op. at 132. That ignores Wagner's testimony, in which he explained this note was referring to how quickly FERC would amortize ADIT, not whether it might eliminate ADIT. A617-18/224:6-227:21 (Wagner).

Section 15.1(b), which refers to "the future" generally and makes no nod to short-term probability. *See* A4346 (Bandera representative: "On its face" call right triggered even if "change in law won't affect rates until 1,000 years from now"); A584/89:19-91:18 (Rosenwasser); A622/244:2-6, A630/273:11-24 (Wagner). The trial court simply read a new element into the contract.

And with no commercial justification. Boardwalk's pipelines are "long-lived assets" that stay "in the ground for 70 [to] 100 years"—far "in the future." A5556/147:2-12 (Alpert Dep.). The critical inquiry was, "what would be [Boardwalk's] maximum applicable rates if they filed that rate case in the future if they had a tax allowance, and what would it be if they didn't have a tax allowance?" A584/91:8-12 (Rosenwasser). Baker did not assume recourse rates would change without a rate case—it predicted, reasonably, that a rate case would arise at some point "in the future."

iii. Indicative rates

The final bad-faith "counterfactual assumption" the trial court attributed to Baker was "that indicative rates were the same as recourse rates." Op. 130; *see id.* at 126. Baker made no such assumption. Rather, to estimate the "reasonably likely" effect on Boardwalk's subsidiaries' 167 individual recourse rates, Baker relied on Boardwalk's use of indicative rates as a *tool* to measure the likely change in aggregate recourse rates for each of Boardwalk's three pipelines. A710/594:3-

595:9 (Johnson).

That was reasonable. Plaintiffs' expert neither offered an alternative estimation method nor identified any way in which an alternative methodology would have yielded a different result. A804-05/968:24-970:16 (Webb). The contract did not require analyzing the effect on all 167 rates; it referred to "maximum applicable rate" in the singular. Recourse rates are designed to recover the cost of service, A5764-68, and indicative rates appropriately aggregate cost-of-service effects. A714/609:4-610:14 (Johnson), A839/1106:5-1107:21 (Kelly); A620-21/236:5-237:16 (Wagner). The court did not find otherwise; it just mischaracterized what Boardwalk had done and criticized that mischaracterization.

c. Baker did not engage in "single-issue ratemaking"

Also integral to the trial court's finding that Loews pressured Baker into a "contrivance" was its determination that the rate model Boardwalk prepared and Baker relied upon constituted "single-issue ratemaking," Op. 138—that is, improperly adjusting a single cost-of-service input (the income tax allowance) in the recourse rate calculation, without updating any others. A797/940:3-8 (Webb). That finding is clearly erroneous.

Even plaintiffs' expert agreed that FERC "carve[d] out an exception to its general policy against single-issue ratemaking with respect to *the income tax*

allowance changes." A811/996:3-10 (Webb) (emphasis added). So this was not a valid basis for criticism.

In any event, Boardwalk's model did not reflect single-issue ratemaking. The model updated *all* cost-of-service elements and ran two scenarios: one with an income tax allowance and one without. A3746-48; A715/614:13-24 (Johnson); A797/940:9-13 (Webb). The court faulted the model for "chang[ing] only the income tax allowance variable while holding all else constant." Op. 138. That is not at all analytically improper; it is the only way to test a single variable, which is what Baker had to do.

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

Applying the unambiguous language of the contract and the outputs from the rate model, Baker concluded that a "material adverse effect" on recourse rates was reasonably likely as a result of the Revised Policy. That was no "stretch[]," Op. 142, and the trial court's contrary finding rests on a legal error in construing the contract.

The purpose of the call right was to permit a go-private transaction in precisely these circumstances, where FERC eliminated the tax allowance for MLPs. Indeed, the Revised Policy created a bigger discrepancy in treatment between MLPs and corporations than did *Lakehead*—whose resurrection Section 15.1(b) was intended to guard against. The rate model showed a projected

reduction in recourse rates of more than 10% for each of Boardwalk's pipelines if it stayed an MLP. Baker, with advice from RLF, made the reasonable legal judgment that this effect—in perpetuity—was indeed "material." P. 18, *supra*. The firm consulted but did not rely exclusively on Delaware MAE clause caselaw—which, with its focus on business effects rather than the impact of tax status on recourse rates, offered limited guidance. *See* A5525-38; A4752-53; A762/800:3-21 (Raju). Contrary to the trial court's assertion that Baker "did not explain how it reached that conclusion," Op. 145, the firm carefully spelled out its reasoning over 16 pages. A4845-60.

The court could not identify any actual error in Baker's judgment, but *sua sponte* insinuated that Baker lacked competence to assess "materiality" because its practice is not Delaware-based. Op. 66, 114. The suggestion that non-Delaware lawyers are unqualified to opine on Delaware law is unprecedented and inconsistent with the national scope of Delaware's corporate jurisprudence. It also makes no sense in the context of this case. Baker had the benefit of analysis from an excellent Delaware firm—RLF—in addition to its own Delaware law experts. The trial court's suggestion that RLF and Skadden disagreed with Baker's MAE analysis (Op. 145) is untrue. In advice both firms stood by at trial, RLF said the effect at issue was material, and Skadden determined that Baker's MAE opinion

was reasonable. *See* A4823-24; A4752-53; A764/806:19-22 (Raju), A5551-52/233:7-237:16 (Grossman Dep.).

At any rate, the question posed by the language of the contract was *not* about a material adverse change to a business. Section 15.1(b) is not a merger agreement MAE clause. It called for an estimation of future impact on recourse rates resulting from Boardwalk's status as an MLP (as opposed to a corporation). Hence, the LPA called for the reasoned application of legal judgment, which is what Baker delivered.

In all of these ways, the trial court measured Baker's opinion not against the plain language of the LPA or a fair review of the record, but against its view of what Section 15.1(b) ought to have said and on insupportable inferences from the evidence. These errors alone warrant reversal.

3. The trial court applied the wrong legal standard in its review of Baker's analysis

The court committed independent legal error, likewise compelling reversal, by reading the words "Opinion of Counsel" out of Section 15.1(b).

An opinion-of-counsel clause is a buffer, permitting a client to take actions protected by counsel's judgment. Courts therefore do not review legal opinions *de novo*—that would "render the [opinion]-of- counsel provision of the agreement superfluous." *NHB Advisors*, 2013 WL 3790745, at *3. Review is intentionally

deferential. A court may not "substitute [its own] judgment … for that of [counsel]." *Williams*, 2016 WL 3576682, at *11.

The trial court here did just that. It accorded no deference to Baker (or any of the several firms who agreed with its analysis), and treated every point of deliberation among the lawyers as incremental evidence of bad faith. The court all but ignored Baker's 50-page legal memorandum explaining the opinion and Skadden's 23-page deck explaining why the opinion was reasonable, preferring instead to cherry-pick from the trove of deliberative communications the few preliminary observations that might be said to support the court's own view. Op. 58-60, 142, 165-67. A junior associate's preliminary MAE memo thus became, in the court's eyes, Skadden's considered—skeptical—view, even though the Skadden partners involved all testified they disagreed with it. *See* A3773-76; Op. 60, 142. One might as well call a court's opinion a "contrivance" simply because it diverges from a law clerk's initial bench memo.

The court's determinative reliance on attorneys' tentative initial musings—which were thrown open to its review by a privilege waiver, and many of which Loews never even saw—is inconsistent with *Williams*. Under the rule of the trial court, the more lawyers vet their analysis—the harder they work to get it right—the less likely the court will respect counsel's judgment. The rule defeats the

contractual deference to judgment as to nuanced legal questions, leaving only the easiest of judgments protected. That makes no sense.

The court's castigation of Loews for soliciting the input of a variety of counsel similarly upends the law, which previously recognized that having attorneys take a "fresh look" at the predicates for an opinion is evidence of good faith rather than bad. *See Williams*, 2016 WL 3576682, at *7, *14. At Loews's urging, Baker and the other firms engaged in extensive testing of initial determinations to ensure the resulting opinion was sound. The trial court took this laudable diligence and turned it against everyone involved. That was legal error.

Had it applied the proper standard, the court would have been compelled to reject plaintiffs' claim. In the legal memo the court ignored, Baker carefully considered all operative language in Section 15.1(b)—"maximum applicable rate," "reasonably likely," and "material adverse effect." A4841-60; p. 31-42, *supra*. It made thoughtful, fully explained judgments, relying on key assumptions plaintiffs' own expert conceded were reasonable. A786/894:1-5. A788/903:6-12 (Court). In another lengthy analysis the court ignored, Skadden agreed that Baker's opinion was reasonable. A4749-54. RLF and other counsel whose views were sought on certain matters also agreed with Baker. A764/806:23-807:9, A766/817:18-21 (Raju); A5551-52/233:7-237:16 (Grossman Dep.); A5871-72/240:14-241:23 (Layne Dep.). There was no basis to displace Baker's judgment or find breach.

The court thus disregarded governing law by reviewing Baker's opinion *de novo* rather than granting it any deference. That is legal error and an independent ground for reversal.

4. The trial court erred in concluding that Loews corrupted the opinion and its acceptance

With scant record citation, and no proof, the trial court concluded that Alpert "manipulate[d] his outside counsel so that counsel would deliver the answers that he wanted to receive." Op. 148. That was a misapplication of *Williams* and a gross distortion of the evidence. These errors supply a third independent basis to overturn the court's decision to reject the opinion of counsel.

They are errors of serious consequence. The court's holding rests on a finding that a superb law firm—Baker—breached its professional responsibilities by rendering an opinion that did not reflect its actual judgment, and that another superb law firm—Skadden—engaged in a "whitewash." The court writes that Alpert and Loews tried to "manipulate[]" the law firms. Op. 148. But Alpert's and Loews's motivations and actions are irrelevant absent proof that they produced a contrived opinion. Under *Williams*, the question is whether *counsel* applied their expertise in good faith. *See Williams*, 2016 WL 3576682, at *15. So the court's

holding on the opinion of counsel can stand only upon proof that Baker and Skadden did not act in good faith.

The evidence cannot sustain that holding. As to Baker, the *only* evidence the court cited to suggest it was "manipulated" was (i) testimony from Rosenwasser acknowledging that Loews applied "maximum pressure" in seeking a "thumbs up"—*or a* "*thumbs down*"—in time for quarter-end disclosures on whether it was more likely than not the opinion would be rendered; (ii) Alpert's solicitation of comments to the opinion from Davis Polk, which Rosenwasser testified had no impact on the opinion; and (iii) Alpert's admonition that Wagner's lengthy explanation of how FERC's Revised Policy was "effective now" had "too much nuance"—which Wagner took merely as a caution against "overus[ing] jargon" in speaking with "biz ppl [sic]." Op. 42-43, 148 n.26; A607/182:22-193:15, A610/193:6-14 (Rosenwasser); A3698; A3704; A5573/195:23-196:12 (Wagner Dep.). The court cited nothing suggesting Alpert skewed (or even tried to skew) Baker's analysis or conclusions. Nor could it. No document remotely suggests that Baker was manipulated or its judgment influenced. Every lawyer involved who testified said he did not feel pressure and believed his advice to be sound. P. 29-30, *supra*.

There is likewise zero evidence that Alpert skewed the substance of Skadden's advice. Here again, that is dispositive under *Williams*. And here again,

there is no evidence Alpert tried to skew Skadden's substantive advice. The court suggested that Skadden "relented" in advising the Sole Member on acceptability only after Alpert threatened firing the firm. *See* Op. 78, 148-49. But Skadden's views on the opinion's acceptability were never in question. The dispute concerned "tweak[ing]" the language in Baker's opinion to avoid implying that Skadden itself was offering the MAE opinion, rather than Baker. A590/114:21-115:6 (Rosenwasser); A652-53/364:17-366:24 (Alpert); A5544/170:19-171:24 (Grossman Dep.). Notwithstanding Alpert's frustration at Skadden, Grossman testified that the whole episode was a matter of "wordsmithing" not "substance." A5544-45/171:7-24, 177:10-16 (Grossman Dep.). The lawyers ultimately reached consensus. A4265; A4266; A4267-69; A4270.

The court cited not a single document showing Loews exerting pressure on the outcome of Baker's opinion or Skadden's advice, nor a single internal communication from any of the counsel involved expressing a feeling of such pressure. Were this Court to probe the trial court's examples of "pressuring," it would find nothing more than a handful of emails capturing pedestrian and fleeting questions from lawyers concerning process-related issues.

The court's rejection of Baker's opinion thus rests on an unsupported holding that impugns the integrity and good faith of virtually every attorney involved: close-to-retired expert in his field Rosenwasser and his partners at Baker;

several Skadden attorneys; RLF; Ramey Layne from Vinson & Elkins; in-house counsel Alpert and McMahon; and even the attorneys for the original plaintiffs. *See, e.g.*, Op. 95-96, 147-50, 166-67, 171; A229-33 at 80:19-84:10. The point merits emphasis: The trial court's determination to reject Baker's opinion cannot stand because it relies on a finding of lawyer bad faith that lacks all support in the evidence.

And this point merits emphasis too: In a published Delaware judicial decision, the world has been told that Baker acted in bad faith; Skadden engineered a "whitewash"; RLF facilitated a conspiracy. These are harsh, reputation-damaging conclusions. They should be made cautiously, based only on real evidence, and not just because a court may disagree with a lawyer's reasoned professional judgment.[2] *Cf. Williams*, 2016 WL 3576682, at *12 (recognizing that law firm of "national and international repute" has interests "larger than [a] particular representation"). And these conclusions surely had no place here—where the law required substantial deference to counsel and where the record showed not a grand conspiracy but diligence by all involved.

[2] In an article discussing this case and two of his other recent decisions, the trial judge provided the point of view that lawyers, particularly at "big firms," are too ready to cast aside professional "constraints" and to assume the role of an "enabler." A5873-75/Sujeet Indap, *Delaware Judge Sends Warning to Zealous Lawyers*, FINANCIAL TIMES (Dec. 13, 2021), https://www.ft.com/content/d5a7e86a-a654-4ef0-970c-89788c756a7b.

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

A. Question Presented

Did the Court of Chancery err in holding that the Sole Member of the General Partner could not determine acceptability? This question was raised below (A1053-57) and considered by the Court of Chancery (Op. 151-67).

B. Scope of Review

Questions of law and contract interpretation are reviewed *de novo* and factual findings for clear error. *See* p. 27, *supra*.

C. Merits of Argument

With Baker having rendered its opinion of counsel, the task fell to the General Partner to decide whether the opinion was "acceptable." A3030/LPA § 1.1. Following advice from Skadden, RLF, Baker Botts, Davis Polk, and Vinson & Elkins (which separately advised the GPGP board), the General Partner, acting through its Sole Member, decided it was. A5081-93. The trial court said this process was defective because the LPA required the GPGP board rather than the Sole Member board to accept the opinion. The court acknowledged that defendants' position had more "textual support[]," but thought its own—which was

predicated on a "surplusage" argument raised *sua sponte*—"meshe[d]" better with the contract's "overall structure." Op. 151-52.

The court's ruling runs contrary to the unambiguous language of the LPA and misapplies governing interpretive principles.

1. The Sole Member had the power to determine acceptability under the plain language of the operative agreements

Section 15.1(b), along with the LPA's definition of "Opinion of Counsel," vested the acceptability determination with the General Partner. The General Partner, with advice from multiple law firms, decided the acceptability determination was the Sole Member's to make.

The assignment of decisionmaking to the Sole Member gave full effect to the LPA and was fully supported by the General Partner's own organizational documents. The LLC agreement for GPGP (the general partner of the General Partner) defined "Opinion of Counsel" as "a written opinion of counsel … acceptable to the Sole Member." A1309 § 1.1. Section 5.6 of the LLC agreement granted the Sole Member exclusive authority over the business and affairs of GPGP not related to management or control, and specifically vested in the Sole Member the "*exclusive authority* to cause the Company to exercise the rights of the Company and those of the MLP General Partner … provided in … Section 15.1." A1315-18 § 5.6 (emphasis added). Against this clear language, no words in any

relevant document suggested that the acceptability determination should be confided to the GPGP board—let alone to the exclusion of the Sole Member.

2. Canons of construction underscore that the Sole Member is the right decisionmaker

The trial court acknowledged all this, but found the contracts "ambiguous" and applied *contra proferentem* to adopt the interpretation it deemed most favorable to the limited partners. That was multilayered error.

First, there was no ambiguity in the LPA. Where one interpretation of a contract enjoys greater "textual support," Op. 2, 152, the contract is not ambiguous. *Rhone-Poulenc*, 616 A.2d at 1196. The textual signals here all pointed to an interpretation authorizing the Sole Member to accept the opinion. Op. 2, 151-52. The LPA expressly committed certain decisions to the GPGP board, *see, e.g.*, A3061/LPA § 5.11(f), but not the decision to accept an opinion of counsel under Section 15.1(b). *See Comerica Bank* v. *Glob. Payments Direct, Inc.*, 2014 WL 3779025, at *11-12 (Del. Ch. Aug. 1, 2014) (absence of requirement in one contractual provision, when present in another, reflects purpose to omit).

The *only* textual basis the court offered for its finding of ambiguity was its *sua sponte* ruling that the acceptability determination would be "surplusage" if it could be made by the same decisionmaker vested with the power to exercise the call right. Op. 158. It was unfair for the trial court to resolve a key contested issue on the basis of an argument neither party raised. *See Oxbow Carbon & Mins.*

Holdings, Inc. v. *Crestview-Oxbow Acquisition, LLC*, 202 A.3d 482, 501-02 (Del. 2019). And there is good reason plaintiffs never exposed this argument to scrutiny: The canon prohibiting surplusage operates only when an interpretation renders a provision without all meaning. *See Osborn ex rel. Osborn* v. *Kemp*, 991 A.2d 1153, 1159 (Del. 2010). That is not this case. The General Partner could very well deem an opinion acceptable, creating a call option, but nevertheless determine not to exercise the option. These are distinct issues which are committed to the Sole Member's purview without redundancy. Illustrating this, the Sole Member received both legal and business advice, because it needed to decide not only whether it could exercise, but whether exercise was commercially advisable.[3]

Second, nothing about the contractual "structure" bespeaks an intent to erect a "protection" for the limited partners. The boards of GPGP and of the Sole Member had identical fiduciary duties. For representative-capacity decisions under the LPA, the decisionmaker acting for the General Partner—whichever it was—had to make the determination in "good faith," contractually defined as "in the best interests of the Partnership." A3091/LPA § 7.9(b). For individual-capacity decisions (which this unquestionably was), the decisionmaker could act in

[3] By contrast, the court's own interpretation created "surplusage" by rendering the express meaning assigned to the term "Opinion of Counsel" in the LLC agreement a mere "stray definition." Op. 156.

its self-interest without any fiduciary obligations to the Partnership. A3091-91/LPA § 7.9(c).[4]

And the court's suggestion that GPGP's "independent directors" afforded "protection" was unfounded. While four of the GPGP board's eight directors were independent at the time, that was happenstance: the LLC agreement, to which the limited partners were not parties, required only three independent directors and permitted the Sole Member to expand the GPGP board with further non-independent directors at its discretion. A1303-27 §§ 3.1, 5.1, 5.3.

Third, to the extent the reasoning below suggests acceptability is a representative-capacity decision, Op. 158-59, it is untenable. No one disputes that the General Partner was entitled to exercise the call right in its individual capacity, *i.e.*, consistent with the self-interest of its members. That contractually sanctioned self-interest—and the whole idea of buying out the limited partners at a set formula—would be nullified if the General Partner could only accept an opinion serving "the best interests of the Partnership." The "protection" the contract

[4] Section 7.9(c) says: "By way of illustration and not of limitation, whenever the phrase, 'at the option of the General Partner,' or some variation of that phrase, is used in this Agreement, it indicates that the General Partner is acting in its individual capacity" and that such decisions are not subject to good faith or fiduciary principles. A3091-92/LPA § 7.9(c). Section 15.1(b) makes clear that the call right can be exercised "at [the General Partner's] option." A3117.

afforded against "arbitrar[y]" exercise of the call right, Op. 159, was in the opinion of counsel and its attendant good-faith standard.

The contract supports nothing further. *See Oxbow*, 202 A.3d at 501 (cautioning against identifying contractual "gap[s]" and filling them with terms unsupported by a contract's plain meaning). This Court routinely rejects plaintiffs' efforts to seize greater fiduciary protections than those that limited partnership or LLC contracts provide. *The Haynes Fam. Tr.* v. *Kinder Morgan G.P., Inc.*, 135 A.3d 76, 76 (Del. 2016); *see Norton*, 67 A.3d at 368; *Encore Energy*, 72 A.3d at 109. The trial court should have done the same here.

Finally, the court compounded the foregoing errors by misapplying *contra proferentem*. Because the limited partners were not party to the LLC agreement, *contra proferentem* cannot apply to that contract and nothing "protective" can be gleaned from it. *But see* Op. 162-63, 167. As for the LPA, no investor could "reasonabl[y] expect[]" the "protection" the court grafted onto it. *Commerzbank*, 65 A.3d at 551-52. The prospectus and subsequent disclosures explained bluntly that the call right would be exercised by the General Partner consistent with its self-interest, expressly warning that such exercise could force unitholders to sell their units "at an undesirable time or price." *See* A1365, A1425, A1452; A2618-19, A2691. Against this backdrop, it would have been unreasonable for an

investor to expect any "protection" embedded *sub silentio* within the acceptability determination.

III. THE TRIAL COURT ERRED IN ITS CONSTRUCTION AND APPLICATION OF THE LPA'S EXCULPATION PROVISIONS

A. Question Presented

Did the trial court err in ruling that Sections 7.8(a) and 7.10(b) of the LPA did not exculpate the General Partner for breach of the call right provision? This question was raised below (A1057-63) and considered by the Court of Chancery (Op. 168-75).

B. Scope of Review

Questions of law and contract interpretation are reviewed *de novo* and factual findings for clear error. P. 27, *supra*.

C. Merits of Argument

The LPA provides that the General Partner shall not "be liable for monetary damages … unless there has been" a final judgment that it "acted in bad faith or engaged in fraud [or] willful misconduct." A3090/LPA § 7.8(a). This showing, on which plaintiffs bore the burden, *see Brinckerhoff*, 159 A.3d at 260, set a very high bar—even higher than the bar Delaware has established in 8 *Del. C.* § 102(b)(7). And under the LPA the General Partner is "conclusively presumed" to have acted in good faith when it relies on the advice of counsel "as to matters that the General Partner reasonably believes to be within [counsel's] professional or expert competence." A3092/LPA § 7.10(b).

The trial court found these provisions inapplicable because Baker, Alpert, McMahon, Johnson, and Siegel purportedly engaged in "willful misconduct" by contriving the opinion of counsel they then relied on. Op. 170-72. That analysis rewrites the contract, has no record support, and creates dangerous exculpation precedent.

1. In identifying the acceptability decisionmaker and deciding to accept the opinion, the General Partner relied in good faith on Skadden's advice

The General Partner, acting through the Sole Member, relied on Skadden's considered advice that (1) the acceptability determination was the Sole Member's to make; and (2) Baker's opinion was acceptable. *See* A4732-54. Aware that Skadden had been reviewing Baker's work at every step, and armed with Skadden's reasoned advice that Baker's opinion was acceptable, A4741-54, the Sole Member accepted the opinion and exercised the call right based on that advice. A5081-90. There was no evidence—and no finding by the court below—that Skadden's advice was rendered in bad faith, or that the Sole Member board had any reason to doubt that advice was within Skadden's "professional or expert competence." A3092/LPA § 7.10(b). Although the court made an (unsupported) finding of willful misconduct against Siegel, it made no findings of—and there was no evidence to show—bad faith or willful misconduct by any other Sole Member director. Under the LPA, the General Partner should have been "conclusively

presumed" to have acted in good faith, thus precluding any finding of "bad faith" or "willful misconduct." *Id.*; A3090/LPA § 7.8(a).

To escape this conclusion, the court imputed without evidence the alleged "scienter" of other General Partner agents to the Sole Member board, even though these others did not make the decisions at issue. That was legal error. The only "scienter" that matters is that of the decisionmaker. *See Dieckman* v. *Regency GP LP*, 2021 WL 537325, at *36-38 (Del. Ch. Feb. 15, 2021) ("[W]hether the General Partner acted in bad faith or engaged in fraud or willful misconduct turns on the state of mind of the directors on the Board who voted to approve or otherwise authorized a challenged action."), *aff'd*, 264 A.3d 641 (Del. 2021) (TABLE); *Norton*, 67 A.3d at 367 (concluding general partner acted in good-faith reliance on fairness opinion when *board* relied on fairness opinion).

Recognizing (though not adhering to) this principle, the court suggested that the Sole Member board's decision was tainted by the "manufacture[d]" Baker opinion, which Skadden "whitewash[ed]." Op. 174. That was clearly erroneous. Wholly apart from the infirmities in the court's analysis concerning Baker, there was no evidence suggesting Skadden "whitewash[ed]" anything, and the court cited none. The General Partner needed only to rely on one counsel's advice to receive the benefit of the conclusive presumption. There was every reason to rely on Skadden: Skadden's team was led by a former FERC Commissioner and a

seasoned Delaware litigator. The team shadowed every part of Baker's process, including participating on diligence calls and reviewing Baker's analyses. The trial court disapprovingly characterized Skadden's advice as "an opinion about an opinion." Op. 174. But that is exactly what the Sole Member board required in making the acceptability determination—legal advice as to the acceptability of a distinct legal opinion. There exists no logical or textual justification to disqualify Skadden's advice under the LPA—Section 7.10(b) is satisfied by reliance on any "advice" of counsel, whatever its form. It should have applied here.

2. The record does not support a finding of scienter as to any Loews or Boardwalk employee

In any event, there was no evidentiary basis for the trial court's finding of "willful misconduct" by Loews and Boardwalk employees—a finding that, if affirmed, would have disturbing implications for the exculpation doctrine more broadly.

The court's analysis on this point is confined to one sweeping paragraph where it indicted Alpert, McMahon, Johnson, and Siegel in undifferentiated fashion for "orchestrat[ing] the sham Opinion, support[ing] the sham Opinion with the inadequate Rate Model Analysis, and divert[ing] the acceptability determination … from the GPGP Board to [the Sole Member]." Op. 171. The court evidently believed its findings concerning Baker's "contrivance," discussed in Section I *supra*, likewise showed individual willful misconduct by the four

client employees. But they do not. Because the trial court's findings here have no evidentiary basis, they warrant no deference.

As for Alpert, the court predicated its finding of his supposed bad-faith pressure principally on emails in which he expressed frustration with Skadden and other documentary evidence it claimed showed "manipulation." As discussed above, *supra* Section I.C.4, the evidence the court cited furnishes no proof of any corruption of—or any intent to corrupt—any attorney's substantive analysis.

As for Johnson and McMahon, the finding of "willful misconduct" seems to be based on the court's criticism of their rate model—which was predicated on assumptions plaintiffs' own expert conceded were reasonable and a methodology that FERC had itself used and approved. Even if the rate model contained flaws, there is no evidence (or even finding) that McMahon or Johnson believed their inputs to Baker's analysis were improper. Delaware law has never negated the protection of exculpation absent such evidence, even in the Section 102(b)(7) context—let alone under the higher contractual standard that obtains here. Nor was it proper to impute McMahon or Johnson's conduct to Loews, which, according to the unanimous testimony, had no input into the model. P. 15, *supra*.

As to Siegel, the trial court made essentially no reference to his involvement in Baker's opinion, and none to suggest bad faith. In fact, the trial court declined to examine Siegel's "individual state[] of mind" or his conduct. Op. 170-71.

Nor was there a basis to conclude that Alpert or Siegel or anyone else at Loews acted in bad faith with respect to the acceptability determination. Five law firms independently concluded that the acceptability determination fell to the Sole Member. *See* p. 18-20, *supra*. Disregarding this consensus, the court focused on an early internal email from Skadden attorney Jennifer Voss—which no one at Loews even saw before this litigation—suggesting that the GPGP board may be the correct party to accept the opinion. A3750-53; *see* Op. 58, 164. When Skadden thereafter provided its preliminary advice to Loews, it merely observed that an enterprising plaintiff *could* make such an argument, not that the argument was correct. A3777-80. And Skadden's final presentation to the Sole Member board, reflecting the considered view of Voss, Grossman, Naeve, and the entire engagement team, advised that the Sole Member was the correct entity to accept the opinion. A4734. RLF agreed. A764-65/807:24-813:16 (Raju).

Similarly, and contrary to the court's insinuation, nothing in Loews's dealings with the GPGP board supports a finding of bad faith or willful misconduct. It made sense for Boardwalk (*not* Loews) to ask Vinson & Elkins's Layne, GPGP's regular counsel, rather than Skadden, to advise the GPGP board on the acceptability issue. *Cf.* Op. 96. And although Alpert initially thought it prudent, based on Skadden's advice, to have both GPGP and the Sole Member make the acceptability determination, he and others decided, based on RLF's

advice, to go with the Sole Member alone after the GPGP independent directors asked why they should be involved. Siegel's testimony on this point was unrebutted. A746-47/737:5-739:9 (Siegel). The court construed a stray note from Layne (who received information third-hand) describing a "hostile reaction" as proof that the independent directors "did not want to be treated as a speedbump on Loews' path to the take-private." Op. 164 (citing A4257). But this and all other record evidence merely showed that the independent directors didn't want to be involved—not that they disapproved of exercising the call. Plaintiffs have no contrary evidence because they did not so much as depose any of the independent directors, let alone call them at trial.

3. The court committed error in imputing Baker's purported scienter to the General Partner

Finally, it was legal error for the court to fill the scienter gap by imputing Baker's alleged misconduct to the General Partner. Op. 172. Even had Baker acted in bad faith, no case permits the imputation of outside counsel's scienter to a client. *Vance* v. *Irwin*, 619 A.2d 1163, 1165 (Del. 1993), which the court invoked *sua sponte*, deals with notice, not scienter. Moreover, the LPA specifically provides that "the General Partner shall not be responsible for any misconduct or negligence on the part of any … agent appointed by the General Partner in good faith." A3090/LPA § 7.8(b). The court made no finding that Baker's *appointment* was in bad faith.

Bad faith and willful misconduct are grave charges, for which the decision below finds no support. The court erred in finding that the General Partner's conduct precluded application of Sections 7.8(a) and 7.10(b).

IV. THE TRIAL COURT ERRED IN ASSESSING DAMAGES

A. Question Presented

Did the trial court err and abuse its discretion in awarding damages based on a unit valuation of $17.60? This question was raised below (A1075-82), and considered by the Court of Chancery (Op. 175-91).

B. Scope of Review

This Court reviews a trial court's damages determination for abuse of discretion, *see RBC Cap. Mkts., LLC* v. *Jervis*, 129 A.3d 816, 866 (Del. 2015), but reviews any embedded legal questions *de novo*, *see* P. 27, *supra*.

C. Merits of Argument

This Court has repeatedly instructed trial courts to defer to market evidence in assessing damages because "the price produced by an efficient market is generally a more reliable assessment of fair value than the view of a single analyst." *Dell, Inc.* v. *Magnetar Glob. Event Driven Master Fund Ltd*, 177 A.3d 1, 24 (Del. 2017). Both parties' experts *agreed* that Boardwalk's units traded in an efficient market. A829/1067:6-9 (Atkins); A849/1147:16-1148:12 (Hubbard). Yet the trial court disregarded the market evidence and awarded plaintiffs damages based on a per unit valuation of $17.60—an expert-generated price that cannot be reconciled with any real-world market evidence. The damages award undermines without justification this Court's repeated guidance and constitutes legal error.

1. The trial court erred by ignoring market evidence

"Market prices are typically viewed superior to other valuation techniques because, unlike, e.g., a single person's discounted cash flow model, the market price should distill the collective judgment of the many based on all the publicly available information about a given company and the value of its shares." *DFC Glob. Corp.* v. *Muirfield Value Partners, L.P.*, 172 A.3d 346, 369-70 (Del. 2017). This Court has delivered this instruction repeatedly: whenever possible, courts should credit market-tested valuations over the opinion of "an expert witness who caters her valuation to the litigation imperatives of a well-heeled client." *Dell*, 177 A.3d at 24. As the Court of Chancery recognized recently, the "Delaware Supreme Court's decisions … teach that a trial court should be skeptical of valuation conclusions reached using a judgment-laden methodology when that method diverges from market indicators." *In re Appraisal of Regal Ent. Grp.*, 2021 WL 1916364, at *20 (Del. Ch. May 13, 2021).

Here, however, the trial court ignored that teaching, in the face of conclusive market evidence. The parties agreed that Boardwalk's shares traded in an efficient market. A849/1147:16-1148:12 (Hubbard); A829/1067:6-9 (Atkins). This conclusion was inescapable: Boardwalk's market capitalization was over $3 billion; millions of its units traded on a weekly basis; it was covered by 11 market analysts; and its units reacted promptly to material information. A5602-04.

Neither party disputed any of this. Nor did any investor or market analyst question the efficiency of the Boardwalk trading market. Only the trial court.

This was an abuse of discretion. The distortions that can arise from litigation-driven valuation were on full display here. Plaintiffs' expert:

- *Entirely* ignored the market evidence;
- Relied entirely on a Distribution Discount Model that is particularly sensitive to its assumptions, *see* A5628;
- Relied on projected cash distributions a decade out—that were not even Boardwalk's;
- Ignored contemporaneous projections of Boardwalk management that showed far lower distributions; and
- Posited an implausibly low level of investment in the business, including maintenance CapEx—violating basic principles of corporate finance. A851-53/1155:9-1157:24, 1159:1-1161:21 (Hubbard); *see also* A5733-35, A5743-44.

The result is a $700 million damages award based on a valuation far greater than anyone investing real money contemplated—a valuation over 60% higher than Boardwalk's market price, and higher than every aspirational price target set by any analyst covering the stock. A5738.[5] Unrealistic expert valuations of this

[5] The trial court justified its award on the view that Loews expected to achieve $1.557 billion in value creation—what the court deemed "expropriation"—"from exercising the Call Right." Op. 3, 190. But contemporaneous documents make clear that the $1.557 billion did *not* reflect the benefit Loews expected to receive from exercising the call; rather, it reflected the estimated future increase in value of Boardwalk *as a whole* between 2018 and 2022, not discounted to the present. A4705. As Loews owned 51% of Boardwalk's units, the gain attributable to units

kind are precisely why courts recognize that cash flow analysis is "necessarily a second-best method to derive value," *Union Ill. 1995 Inv. Ltd. P'ship* v. *Union Fin. Grp., Ltd.*, 847 A.2d 340, 359 (Del. Ch. 2004), useful "when there isn't an observable market price," *DFC*, 172 A.3d at 370.

Here, there was an observable market price—Boardwalk's trading price. But the trial court disregarded it. That decision defies the lesson of *DFC*, *Dell*, and the many cases following them, yielding an otherworldly valuation that is contrary to precedent and commercial common sense. And it is contrary to the LPA itself, which uses market-tested trading prices as the benchmark for valuing LP units. *See* A3117/LPA § 15.1(b) (basing call right exercise price on public trading prices of units).

The trial court should have credited the unaffected market price as a reliable measure of fair value and—because the exercise price of $12.06 represented a 12% premium over the unaffected market price of Boardwalk's units—awarded no damages. *See* A5083; A5611; *Regency*, 2021 WL 537325, at *27, *48 (finding no damages warranted after rejecting a "plainly unsound" DDM in favor of the unaffected unit price where a controlled MLP "traded in an efficient market and '[its] unit prices accurately reflected each company's value'").

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subject to the call right was less than half that amount, and was expected to yield a mediocre 9.9% IRR. A749/747:7-24 (Siegel); A4713.

The trial court offered two justifications for its refusal to follow the law on market evidence. Neither withstands scrutiny.

a. That Boardwalk had a controlling general partner does not justify the court's decision to ignore market evidence

The court's first justification was that the market for Boardwalk's shares was "less likely" to be efficient because Boardwalk had a controlling unitholder. Op. 178. This was so, the court said without further analysis, because "'participants … perceive the possibility that the controller will act in its own interests and discount the minority shares accordingly.'" *Id.* In four lines, relying on no applicable authority, the trial court applied the novel rule that markets in controlled-company shares are inefficient—a rule sponsored by neither party's expert, unsupported in the economic literature, and that, if affirmed, will have far-reaching consequences throughout Delaware law.

The ruling should not be affirmed. Even were the court correct that a controlling stockholder made an efficient market less likely, that does not mean Boardwalk's trading market was inefficient. Controlled MLP units often trade in efficient markets, as our law confirms. *See Regency*, 2021 WL 537325, at *27 (finding that the controlled MLPs "Regency and ETP both traded in an efficient market"). Here, no one even challenged the market's efficiency. If either party had, the court's obligation would be to determine whether the challenge was valid.

The trial court undertook no such analysis. It cited no evidence that Loews ever has or planned to extract private benefits of control through Boardwalk. It identified no evidence that any market participant "perceived" that Loews might try to take advantage of its control. It likewise found no evidence that any of the investors who bought and held Boardwalk units ever discounted the units' value because the entity had a controller, or had any question as to the efficiency of the market. There is no evidence on any of these points.

And even if there were, that still would be no basis for ignoring entirely market evidence. As this Court noted in *Dell*, a "market that is not perfectly efficient may still value securities more accurately than appraisers who are forced to work with limited information and whose judgments by nature reflect their own views and biases." *Dell*, 177 A.3d at 24, n.113 (quoting Cornell, Corporate Valuation 46 (1993)). The trial court provided no explanation for its determination to accord market evidence no weight at all. Op. 177-79. Neither law nor economic theory supports that determination and it constitutes reversible error.

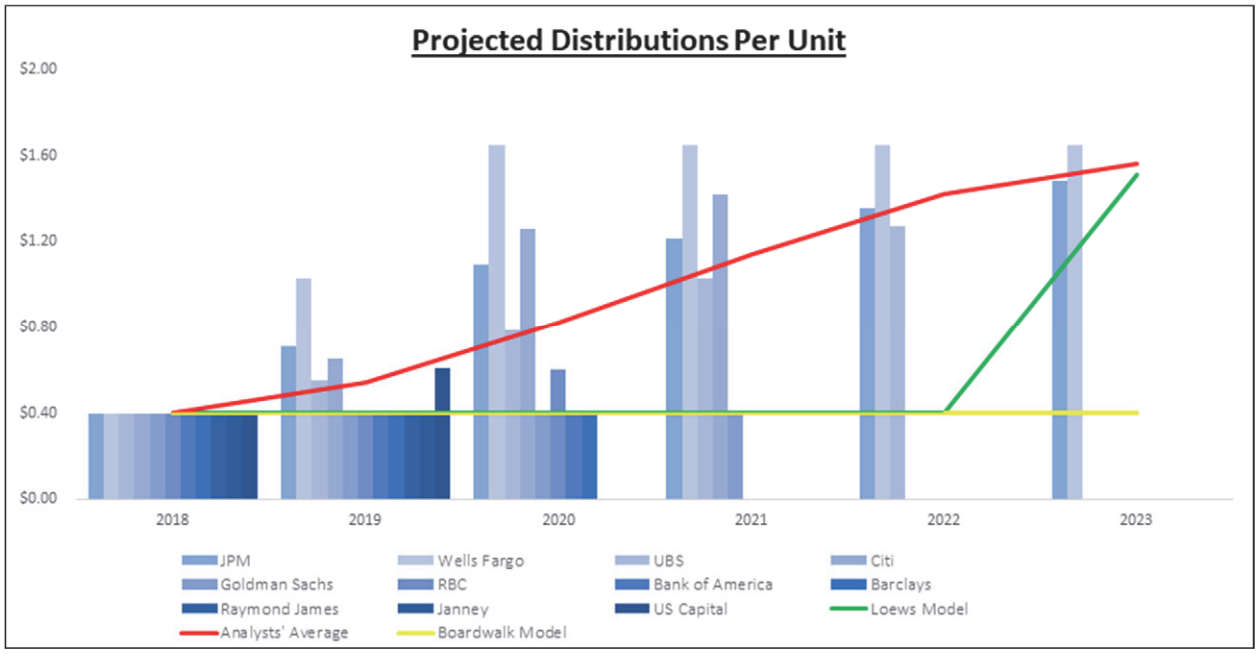
b. No "material, nonpublic information" justified the court's decision to ignore market evidence

The court's only other justification for ignoring Boardwalk's market price was that Loews had "material, nonpublic information" undisclosed to the market—namely, internal projections that "distributions would quadruple in 2023." Op. 179. These projections, said the court, "could not have been baked into the public

trading price," which must therefore have been unreliable. *Id.* This finding is clear error, on multiple grounds:

First, uncontroverted evidence showed that market prices reflected a projected increase in distributions. Analysts foresaw Boardwalk increasing distributions even before the Loews model predicted. UBS projected that distributions would increase from $0.40 per unit in 2018 to $0.790 per unit in 2020, $1.030 per unit in 2021, and $1.270 per unit in 2022—over three times higher than the distributions Loews projected for 2022. A3415. Similarly, Citi projected an increase in distributions from $0.40 per unit in 2018 to $1.26 per unit in 2020 and $1.42 per unit in 2021. A3429. All the evidence indicates that the market anticipated *higher* distributions than did Loews's internal projections:[6]

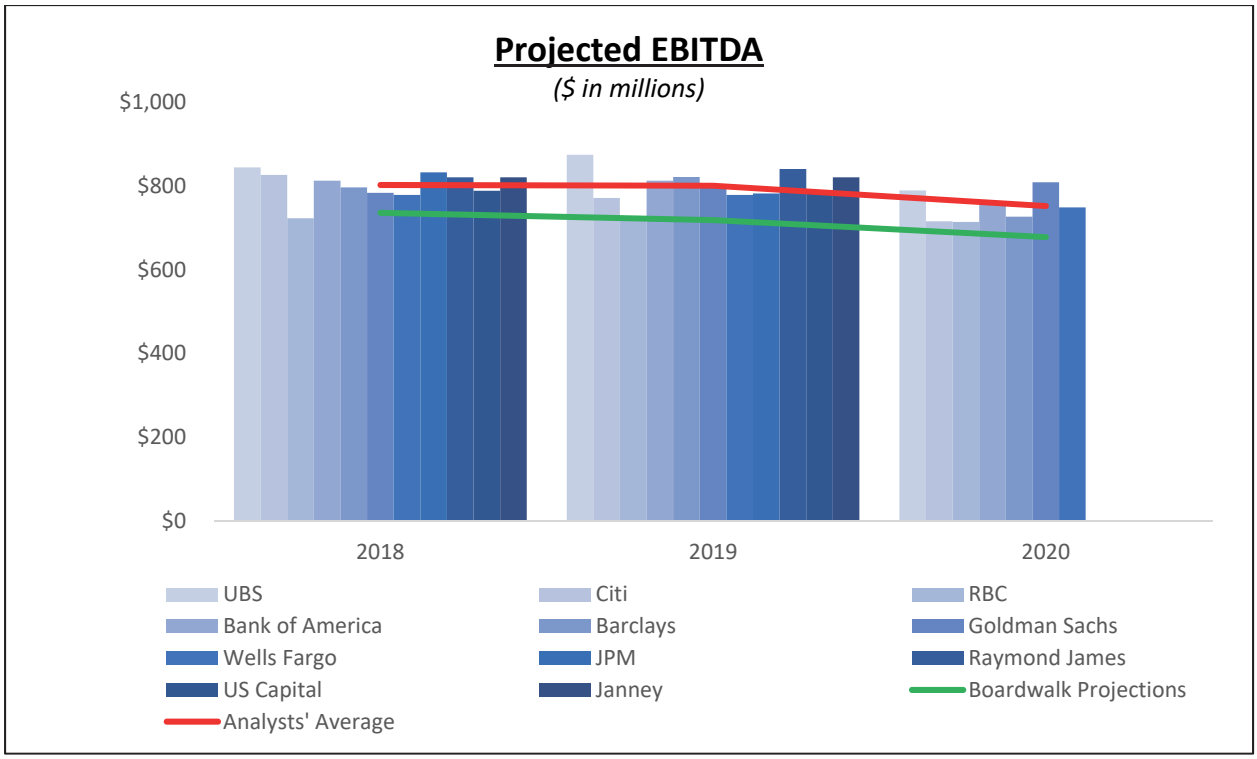
[6] *See* A3408; A3415; A3429; A3424; A3442; A3584-85; A3767; A4324; A4333; A4726; A5130.



There is zero evidence to show that the market's valuation would have been higher had the internal projections been known to the public.

Second, equally uncontroverted evidence showed that the market underestimated the re-contracting risk facing Boardwalk in 2018-2020. Market analysts projected higher EBITDA for those years than what Boardwalk was projecting internally. A5610; A738-39/705:1-706:2 (Siegel).[7]

[7] *See* A3408; A3415; A3424; A3429; A3446; A3584-85; A4324; A4333; A4726; A5130.



The court just ignored this evidence, which foreclosed its negative "valuation gap" thesis. Op. 179.

Third, the court ignored *Boardwalk*'s own 10-year management projections, which assumed distributions would remain flat at $0.40 per unit for the entire projection period. A3756, A3770. These projections aligned with unrebutted testimony that, as of June 2018, there was no plan to increase distributions in 2023. A740-41/713:23-714:20 (Siegel). Boardwalk, of course, was closer to the drivers of future performance than was Loews, yet the court disregarded Boardwalk's own projections entirely, without explanation.

Fourth, the court offered no explanation why the market would credit as material projected distributions up to ten years down the road. Delaware courts

have repeatedly recognized that outer-year projections are inherently speculative and less reliable than shorter-term forecasts. *See In re ISN Software Corp. Appraisal Litig.*, 2016 WL 4275388, at *5 (Del. Ch. Aug. 11, 2016) (rejecting 10-year projections in favor of 5-year projections because "projections out more than a few years owe more to hope than reason"), *aff'd*, 173 A.3d 1047 (Del. 2017) (TABLE); *Kihm v. Mott*, 2021 WL 3883875, at *15 (Del. Ch. Aug. 31, 2021) (finding that the "second half of [] ten-year projections … are inherently more speculative."). That concern applies with particular force here, where the out-year extrapolations in Loews's internal model reflected a "back-of-the-envelope," "gross set of assumptions" that were used to "sanity check" the terminal multiple for the five-year model, and were neither relied upon by Loews's management nor even presented to Loews's board. A740/710:17-711:11, A742/718:1-719:2, A748-49/745:22-746:22 (Siegel); A4712-16.

Finally, lacking any evidence that private information had depressed Boardwalk's market price, the trial court quoted *Dell* for the proposition that "'valuation gaps' can occur when 'information fail[s] to flow freely or … management purposefully temper[s] investors' expectations for the [c]ompany so that it [can] eventually take over the [c]ompany at a fire-sale price." Op. 179. But the court cited no evidence, and there is none, that Loews or Boardwalk sought to temper the market's expectations about Boardwalk's performance or prospects. As

in *Dell*, the court lacked any valid basis to find that a "valuation gap" existed between Boardwalk's market and fundamental values. *See Dell*, 177 A.3d at 24-27.

2. The trial court's damages award erroneously relied on appraisal-law principles

Finally, the court's decision to reject market evidence rests on a legal category error: The court improperly transplanted a remedial principle idiosyncratic to the Delaware appraisal statute into the law of contracts.

In the appraisal context, a petitioner is entitled to the *pro rata* value of her shares. Even if appraised shares in a controlled company trade at a minority discount, the petitioner receives an undiscounted award. *Cavalier Oil Corp.* v. *Harnett*, 564 A.2d 1137, 1146 (Del. 1989). This controversial principle has never been extended beyond the law of appraisal and the courts have specifically declined "to import into the limited partnership context all the artificial complexities of our corporate appraisal jurisprudence." *Gelfman* v. *Weeden Invs., L.P.*, 859 A.2d 89, 125 (Del. Ch. 2004).

Accordingly, plaintiffs here are entitled to nothing more than the value of their pre-exercise position—as minority unitholders *in a controlled MLP*. Op. 178. If, as the court posited, the units carried a minority discount, they were *bought* and *traded* at that discount as well. Any damages award should reflect that discount.

The trial court, however, infused the contract damages analysis with a rule borrowed from appraisal law, concluding that plaintiffs—who all bought shares at a price reflecting any potential minority discount—were entitled to a *pro forma* share of Boardwalk's value *without consideration of any minority discount*. This result, while familiar in the appraisal context, is unprecedented in the remedial law of contracts. It is also inequitable: The remedy bestowed an undiscounted payout on plaintiffs who (by the court's hypothesis) purchased discounted units—yielding a $700 million windfall, at Loews's expense. That was clear error.

CONCLUSION

The judgment should be reversed.

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