IN THE SUPREME COURT OF THE STATE OF DELAWARE

FAIZ KHAN and RALPH FINGER, on behalf of themselves and all others similarly situated, Plaintiffs below, Appellants v. WARBURG PINCUS, LLC, WARBURG PINCUS PRIVATE EQUITY XII, L.P., WARBURG PINCUS PRIVATE EQUITY XII-B, L.P., WARBURG PINCUS PRIVATE EQUITY XII-D, L.P., WARBURG PINCUS PRIVATE EQUITY XII-E, L.P., WP XII PARTNERS L.P., WARBURG PINCUS XII PARTNERS, L.P., WP CITYMD TOPCO LLC, WALGREENS BOOTS ALLIANCE, INC., and VILLAGE PRACTICE MANAGEMENT COMPANY LLC, Defendants below, Appellees	No. 236, 2025 Court Below: Court of Chancery of the State of Delaware, C.A. No. 2024-0523-LWW **Redacted Version filed on July 30, 2025**

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NATURE OF PROCEEDINGS

This appeal involves claims that private equity firm Warburg[1] coerced the plaintiffs,[2] physician-members of urgent-care limited liability company CityMD-Summit Health,[3] into waiving contract rights in order to secure differential, advantageous treatment for Warburg's affiliates in connection with the Company's merger with VillageMD.[4] The contract provided Plaintiffs and other owners of Company Class B units with tag-along rights if the Class A holders, all WP Investors, proposed to sell their units. Those tag-along rights guaranteed Class B members, like Plaintiffs, the right to the same kind and amount per-unit as Class A members in a merger or other exit event. In the Merger here, however, the WP Investors extracted all-cash consideration while the non-Warburg unitholders, including Plaintiffs and Class B members, received a mix of cash and equity.

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[1] Warburg is Appellee/Defendant-below Warburg Pincus LLC. Its investor-affiliates, Appellees/Defendants-below Warburg Pincus Private Equity XII, L.P., Warburg Pincus Private Equity XII-B, L.P., Warburg Pincus Private Equity XII-D, L.P., Warburg Pincus Private Equity XII-E, L.P., WP XII Partners L.P., Warburg Pincus XII Partners, L.P., are the "WP Investors."

[2] Appellants/Plaintiffs-below are Drs. Faiz Khan and Ralph Finger (together, "Plaintiffs").

[3] Appellee/Defendant-below is WP CityMD Topco LLC ("CityMD-Summit Health" or the "Company"). The Company and the WP Investors are the "Contracting Defendants."

[4] VillageMD is Appellee/Defendant-below Village Practice Management Company LLC, majority-owned by Appellee/Defendant-below Walgreens Boots Alliance Inc. ("Walgreens").

Defendants effected this result by requiring Class B members, including Plaintiffs, as a part of the unitholder vote on the Merger, to also consent to waive their tag-along rights and waive potential claims. Defendants coerced those waivers under threats that gave Plaintiffs and Class B unitholders no reasonable alternative. Specifically, the Contracting Defendants told Class B members that their failure to both, as a class, waive their contractual tag-along rights and, individually by signing a "Letter of Transmittal," waive all Merger-related claims against Defendants would mean no exit event *and* effective forfeiture of their individual investments. In information sessions Warburg held to purportedly "educate" Class B members like Plaintiffs about the deal, Warburg never mentioned the tag-along right or explained the implications of waiving it. Instead, Warburg lied to unitholders, implying that they would either receive no cash consideration or no deal would occur at all unless they promptly signed the "Letter of Transmittal."

The operative[5] LLC Agreement's objective was to make money through an exit event, and the manifest purpose of the tag-along right was to ensure that Warburg's Class A affiliate-investors did not get different terms from the Class B investors in an exit. Plaintiffs and other Class B unitholders had no other means to obtain any return on their otherwise illiquid investments. When the exit event arose,

[5] Fourth Amended and Restated Limited Liability Company Operating Agreement of WP CityMD Topco LLC. A0450 (the "LLC Agreement").

Warburg and its Class A affiliates ensured it was conditioned on waiving the tag-along right that materially induced Class B members' assent to the LLC Agreement in the first place. Conditioning the Merger on the tag-along right waiver upset both the reasonable expectations of Class B members like Plaintiffs and the contract's risk allocation in an exit scenario. The Contracting Defendants' efforts to obtain that waiver, including by forcing a waiver of claims, plainly and successfully frustrated Plaintiffs' and Class B members' right under the LLC Agreement to enjoy the benefits of the tag-along right precisely when it mattered, in an exit event.

Plaintiffs allege, in Count I of their Complaint, that the arbitrary structural requirement to waive tag-along rights and all potential claims breached the implied covenant of good faith and fair dealing by coercing the waivers from Plaintiffs and other Class B unitholders in the Merger. In Counts II and III, Plaintiffs claim that non-parties to the contract – Warburg, VillageMD, and Walgreens – tortiously interfered with the Class B tag-along right by requiring its waiver in Merger negotiations conducted without Class B representation and otherwise forcing that waiver from Class B members like Plaintiffs. In Count IV, Plaintiffs claim Warburg was unjustly enriched through its affiliates' receipt of all-cash consideration without the Class B members' participation on identical terms, as the tag-along right required.

The Court of Chancery erred by dismissing Plaintiffs' claims. The Court of Chancery dismissed Plaintiffs' implied covenant claim on the erroneous basis that coercion is conceptually unavailable in contract law when fiduciary duties are waived and the contract provides for amendments. The trial court held that the implied covenant does not prohibit contracting parties from coercing better terms from existing counterparties. That is wrong. Contracting parties must cooperate in the performance of the contract's terms to fulfill its intended purposes. The Contracting Defendants' conduct violated the implied covenant, the protections of which are particularly important here because the LLC Agreement waives Warburg's fiduciary duties.

The trial court also erred by concluding that the implied covenant did not apply in the absence of fiduciary duties, because the LLC Agreement contained an express provision subjecting the contract "to the effects of . . . *any implied covenant of good faith and fair dealing*."[6] Plaintiffs and other Class B members were therefore entitled to the implied covenant's protections through an express contractual term. And the implied covenant does not require drafters to include obvious, provocative conditions,[7] like "the Contracting Defendants shall not coerce contractual waivers and amendments from Class B members."

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[6] A0222-25 § 12.01(a) (emphasis added).

[7] *Dieckman v. Regency GP LP*, 155 A.3d 358, 368 (Del. 2017).

Reversal is merited. A coerced contract amendment is voidable under contract principles. Coercion is not a concept exclusively applicable to claims for breach of fiduciary duty, as the trial court maintains. The implied covenant acts to prohibit precisely what happened here – using coercion against a counterparty to extract better economic terms through a contract amendment.

Dismissal of Plaintiffs' implied covenant claim is out-of-step with Delaware cases, including *Dieckman*, standard rules of contractual interpretation, the Restatement (Second) of Contracts as applied in Delaware on issues of coercion, and implied covenant decisions from other jurisdictions. Dismissing Plaintiffs' tortious interference and unjust enrichment claims was also erroneous, given the viable contractual claim and the absence of duplication. Plaintiffs' allegations amply support those claims too.

Thus, this Court should reverse the Complaint's dismissal and remand the case to the Court of Chancery for further proceedings.

SUMMARY OF ARGUMENT

1. Plaintiffs state a valid implied covenant claim. The trial court erroneously concluded that coerced amendments and waivers from LLC members cannot violate the implied covenant of good faith and fair dealing where the LLC agreement waives a counterparty's fiduciary duties and the agreement provides amendment procedures. This legal finding excessively narrows the implied covenant's role in protecting contracting parties' reasonable expectations and enforcing good faith contractual conduct. Coercion inducing consent, either based on factors other than merit or as a result of improper threats of economic duress, violates the implied covenant. The court below failed to meaningfully analyze when coercion vitiates consent to an amendment pursuant to contract principles. Coercion, as well-established contract law shows, violates the implied covenant and renders resulting contract amendments voidable. The facts here show such coercion, requiring reversal. Count I does not rest one bit on fiduciary principles.

2. The trial court likewise erroneously dismissed the tortious interference claims in Counts II and III for lack of a viable implied covenant claim. Because Plaintiffs have stated an implied covenant claim, Counts II and III should be reinstated. Plaintiffs plead the necessary elements regardless. Walgreens, VillageMD, and Warburg engineered coercive contractual waivers and misallocated Merger proceeds away from Plaintiffs and the Class B unitholders. Non-parties to a

contract act without justification by engineering a coerced outcome under that contract, and they may not benefit from gains obtained through that coerced outcome.

3. The trial court also erroneously dismissed Count IV against Warburg for unjust enrichment. The Complaint pleads sufficient facts that Warburg acted without justification, and its funds were primary beneficiaries of the Defendants' scheme to coerce Plaintiffs' and other Class B investors' waiver of their contractual tag-along rights.

STATEMENT OF FACTS

I. BACKGROUND OF INVESTMENTS

CityMD, founded in 2010 by Plaintiff Dr. Kahn and other partners, is a leading urgent care provider with over 130 locations across New York, New Jersey, and Washington state.[8] CityMD offers high-quality urgent care without prior appointments, serving as an alternative to hospital emergency rooms.[9] Before Warburg affiliates acquired a majority interest in 2017, CityMD was primarily owned by its physicians.[10]

Warburg manages private equity funds through its controlled affiliates, often serving as the general partner of limited partnerships in which Warburg's clients hold limited partnership interests.[11] As Warburg's marketing materials disclose, Warburg requires "discretionary authority for us to manage the investment and other day-to-day activities of the Funds."[12] The WP Investors acted only through Warburg, imputing Warburg's conduct to the WP Investors.

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[8] A0031-32(¶¶18-19). The Verified Class Action Complaint, dated May 16, 2024, is the "Complaint."

[9] *Id.*

[10] A0032(¶20).

[11] A0028-29(¶9).

[12] *Id.*

In 2017, Warburg acquired a 70% stake in CityMD.[13] As part of the investment, CityMD's other equity holders, *i.e.*, its physician-members, received tag-along rights should Warburg seek to sell its equity, permitting the physician-members to participate alongside Warburg, on identical terms, in such sales.[14]

II. BACKGROUND OF THE SUMMIT TRANSACTION

In June 2019, CityMD announced its merger with Summit Medical Group ("Summit"), an independent, physician-governed multispecialty medical group founded in 1919 (the "Summit Transaction").[15] Summit brought together physicians from various specialties to drive synergies.[16]

Shortly before the announcement, Warburg presented CityMD's equity holders with a pitch deck describing the terms of the deal and the protections they would enjoy going forward (the "Summit Pitch Deck").[17] In connection with the Summit Transaction, Summit was valued at [redacted] and CityMD at [redacted].[18] The Company would be formed as the combined entity.[19]

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[13] A0032-33(¶¶21-22).

[14] A0032-33(¶22).

[15] A0033(¶23).

[16] *Id.*

[17] A0033(¶24).

[18] A0034(¶25).

[19] *Id.*

The Summit Pitch Deck, among other things, described the strong protections the Company's LLC Agreement would provide to CityMD's non-Warburg equity holders, including a tag-along right. Specifically, the Summit Pitch Deck said:

[redacted][20]

These, together with other representations in the Summit Pitch Deck, were material inducements to Plaintiffs' and other Class B members' decisions to agree to the Summit Transaction. The Summit Transaction closed in August 2019.[21]

III. THE LLC AGREEMENT

On closing the Summit Transaction, the Company adopted the LLC Agreement,[22] governing the relationships among the Company's various classes of

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[20] A1251.

[21] A0036(¶34).

[22] A0036(¶35). The Third Amended and Restated Limited Liability Company Operating Agreement of WP CityMD Topco LLC became effective on the Summit Transaction's closing. It was subsequently amended in, as relevant here, non-material ways in 2021, resulting in the operative Fourth Amended and Restated Limited Liability Company Operating Agreement of WP CityMD Topco LLC. A0450.

equity holders.[23] CityMD's non-Warburg investors rolled over [redacted], and Summit investors rolled over their [redacted].[24] Warburg's affiliates rolled over [redacted].[25] Non-Warburg CityMD and Summit investors received Class B units; Warburg's affiliates received Class A units, which held the most senior position in the Distribution Waterfall.[26]

Class B members could not transfer their units before an initial public offering without the Company Board's approval and, because Warburg controlled the Board, effectively without Warburg's approval.[27] Exit events were the clearest path to liquidity for Plaintiffs and other Class B unitholders. The LLC Agreement contained significant protections for Class B members—as previously outlined in the Summit Pitch Deck—to ensure all unitholders would have the opportunity to participate in and benefit from an exit event on a complete *pro rata* basis.[28]

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[23] *Id.*

[24] A0034(¶26).

[25] A0034(¶27).

[26] A0034(¶28).

[27] A0034(¶29).

[28] A0036(¶36).

Specifically, Section 4.01 of the LLC Agreement provided that the proceeds of any transfer pursuant to an "Extraordinary Transaction"[29] would be distributed according to the waterfall set forth in Section 4.01(b) (the "Distribution Waterfall"). The Distribution Waterfall provided for distributions to the holders of Class A units, Class B units, and eligible incentive "I" units in accordance with their respective "*pro rata* portion."[30] Section 4.01 did not provide for a different allocation of cash and equity to different classes of units.[31]

The LLC Agreement also gave the Company's non-Warburg unitholders (including Class B unitholders and Class I unitholders) an express "tag-along right" entitling each unitholder to participate on equal terms in certain WP Investor sales of Company units.[32] Section 7.03(a) of the LLC Agreement provided that, in the event Warburg proposed to transfer a number of the WP Investors' Company units that, together with all prior transfers by the WP Investors, would exceed [redacted] of the highest aggregate number of Company units ever owned by the WP Investors (a "Tag-Along Transfer," like in the Summit Pitch Deck), the Class B unitholders,

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[29] The LLC Agreement defines an "Extraordinary Transaction" as [redacted] A0037(¶37); A0151.

[30] A0037-38(¶37); A0184-88.

[31] A0037-38(¶37); A0184-88.

[32] A0038(¶38).

among others, would have the right to include in the proposed Tag-Along Transfer a percentage of Class B units equal to the percentage of the units held by the WP Investors that Warburg had proposed to transfer in the Tag-Along Transfer.[33] Class B Members could choose to participate in the Tag-Along Transfer by delivering a notice to Warburg.[34]

Section 7.03(b) further provided that "[redacted]" pursuant to the Distribution Waterfall.[35]

Thus, the tag-along right ensured that if Warburg sold or transferred WP Investor Class A units at a favorable price or for other favorable consideration, other unitholders would have the same opportunity.[36] The LLC Agreement thus allocated this exit-event risk to the WP Investors, insulating Class B unitholders from it. This

[33] A0038-39(¶39).

[34] A0039(¶40); A0203-04 § 7.03(b); A0235-36 § 14.02.

[35] A0039-40(¶41) (alteration in original).

[36] A0040(¶42).

protection was crucial for minority unitholders and was a material inducement for the Class B unitholders' (including Plaintiffs') assent to the LLC Agreement.[37]

Section 14.04 of the LLC Agreement restricted amendments. Section 14.04(c) prohibited amendments [redacted].[38] Section 14.04(d) mandated that any amendment that [redacted][39] This ensured that holders of a majority of Class B units had to consent to any changes that might negatively impact their rights against the Class A WP Investors.

The LLC Agreement also contained other, generally applicable terms, including:

- Section 3.11: [redacted];[40]

[37] *Id.*

[38] A0041-42(¶44).

[39] *Id.*

[40] A0182-83 § 3.11.

- Section 10.01(a): "[redacted]".[41]
- Section 14.05: [redacted];[42]
- Section 14.19: [redacted].[43]

The LLC Agreement also eliminated any fiduciary duties owed by any "WP Persons" or entity affiliated with Warburg.[44] And, the LLC Agreement is "subject to the effects of . . . general equitable principles (whether considered in a proceeding in equity or at law) and any implied covenant of good faith and fair dealing."[45]

IV. VILLAGEMD ACQUIRES CITYMD-SUMMIT HEALTH

By late 2021, at least one of the WP Investors was nearing the end of its scheduled life and needed to return capital to investors.[46] Warburg sought to exit its funds' existing Company investment and began exploring a sale.[47] Warburg eventually turned to VillageMD, a national primary care provider majority-owed by Walgreens, resulting in the Company's merger with VillageMD (the "Merger").

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[41] A0217-18 § 10.01(a).

[42] A0238-39 § 14.05.

[43] A0241 § 14.19.

[44] A0218 § 10.01(b).

[45] A0222-25 § 12.01(a).

[46] A0029(¶10).

[47] A0042(¶45).

On November 19, 2021, [redacted]. In January 2022, [redacted].[49]

By August 8, 2022, the Company [redacted][50] [redacted].[51]

The final LOI signed on September 2, 2022, provided for a mix of [redacted].[52] [redacted][53]

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[48] A0042(¶46).

[49] A0043(¶47).

[50] A0043(¶49).

[51] *Id.*

[52] A0044(¶51).

[53] A0044(¶50).

Warburg, the Company, VillageMD, and Walgreens began exchanging drafts of transaction documents on September 21, 2022, and they concluded negotiations of the Merger agreement on or around October 25, 2022. They finalized ancillary agreements, including: (a) a support agreement where Walgreens committed to vote its VillageMD units in favor of the Merger; (b) a purchase agreement where Walgreens committed to acquire an additional [redacted] worth of units in the combined *pro forma* entity; (c) a debt commitment letter under which Walgreens provided VillageMD a [redacted] term loan and a [redacted] revolving credit facility to fund the Merger; and (d) an amended and restated LLC Agreement for the combined company that gave Walgreens the right to control a majority of the post-closing Board.[54] The parties signed the Merger agreement on November 7, 2022.[55]

V. DEFENDANTS ENGINEER A COERCED WAIVER OF NON-WARBURG INVESTORS' TAG-ALONG RIGHT

The Merger, valuing the Company at [redacted], allowed Warburg to receive [redacted] and [redacted].[56] In contrast, the Class B unitholders, among those referred to in the Information Statement as the "Partial Rollover Holders," were required to rollover at least [redacted] of their holdings

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[54] A0044-45(¶52 & n.4).

[55] A0045(¶53).

[56] A0045(¶¶54-55).

into VillageMD equity, and received only [redacted] in cash.[57] If the consideration had been split *pro rata*, pursuant to the tag-along right, non-Warburg investors, including Plaintiffs and Class B unitholders, would have received over [redacted] more in cash than they ultimately did.[58]

But, knowing that the Merger would trigger the non-Warburg unitholders' tag-along rights, Warburg, the Class A unitholders, and the Company coerced the Partial Rollover Holders, including Plaintiffs and other Class B members, into consenting to amend the LLC Agreement to waive the tag-along right for the Merger. Defendants conditioned the Merger on the tag-along waiver. Defendants also required the Partial Rollover Holders to each sign and return a "Letter of Transmittal,"[59] as a necessary precondition to receiving any merger consideration. The Transmittal Letter, among other things, purportedly waived all rights to sue the Defendants on any claim arising from the Merger. The Transmittal Letter and the Information Statement presented these waivers as mandatory conditions-precedent for receipt of the Merger consideration.[60] Unitholders were offered and given

[57] A0046(¶¶56-58).

[58] A0028, A0046(¶¶5, 58).

[59] A1141-72 (the "Transmittal Letter").

[60] A0047, A0049 (¶¶61, 67-68); A1141-72 (Transmittal Letter) and A1032-140 (Information Statement). The Merger agreement does not require unitholders to sign the Letter of Transmittal or the release of any claims as a condition for receiving their Merger consideration.

nothing in return for complying with these demands, other than Merger consideration the Merger agreement already guaranteed them on closing.

The Information Statement, dated November 14, 2022, [redacted].[61] The Information Statement [redacted].[62] The Information Statement also made explicit that [redacted].[63] Plaintiffs and other Class B unitholders, as a class, had little time or ability to organize resistance.[64] Individually, they had no reasonable alternative but assent to Warburg's demands.

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[61] A0049(¶67).

[62] A1043. The Information Statement discloses no information concerning, among other things, how, when, or in what manner the tag-along right arose in Merger negotiations. *See* A0042-45, A0050 (¶¶45-53, 70). The Information Statement never mentions the tag-along right when discussing the Merger's background. *See* A1049-50.

[63] A1047.

[64] *Id.*

In the weeks before the Merger's closing, Warburg conducted information sessions under the guise of educating the Class B unitholders, most of them physicians and nearly all of them, including Plaintiffs, with little M&A sophistication or experience in complex corporate transactions.[65] Warburg never mentioned the tag-along waiver in these sessions.[66] Rather, Warburg threatened that there would be no Merger without the physicians' consent. And, Warburg's representatives falsely implied that unless the Partial Rollover Holders promptly signed and returned the Transmittal Letter by the December 4 election deadline, either no deal at all would occur or their entire investment would be rolled over and they would receive no cash consideration.[67]

VI. THE MERGER CLOSES

Consequently, the Merger, which closed on January 3, 2023, saw the WP Investors take all-cash for their existing investment and get a new (not rolled-over) [redacted] equity investment in the new Company. Plaintiffs and other Class B unitholders had to accept a cash-equity mix of at least 40% equity, as Merger

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[65] A0049-50(¶69).

[66] A0050(¶70).

[67] A0050(¶70).

consideration.[68] This outcome significantly harmed the Class B investors and was a result the tag-along right was designed to prevent.

VII. THE COMPANY'S EQUITY VALUE PLUMMETS

VillageMD's equity value plummeted post-closing.[69] In March 2024, Walgreens disclosed a $12.4 billion goodwill impairment on VillageMD, underscoring that the equity consideration forced on Class B members like Plaintiffs was significantly less advantageous than the all-cash Warburg's affiliates received.[70] Absent the tag-along waiver, Warburg's affiliates would have suffered the same fate as Plaintiffs and other Class B unitholders.

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[68] A0045-46, A0051-52(¶¶54-58, 71-72).

[69] A0051(¶73).

[70] *Id.*

VIII. RELEVANT PROCEDURAL HISTORY

Plaintiffs filed their Verified Class Action Complaint (the "Complaint") on May 16, 2024, raising claims for breach of the implied covenant of good faith and fair dealing (Count I) against the Contracting Defendants, for tortious interference against Warburg, VillageMD, and Walgreens (Counts II and III), and for unjust enrichment against Warburg (Count IV).

Defendants moved to dismiss the Complaint and, following argument, the court below issued a memorandum opinion on April 30, 2025, concluding that the Complaint should be dismissed, principally for failing to state an implied covenant claim in Count I. The court found Counts II and III without a predicate contractual breach, meriting their dismissal, and concluded that Count IV, for unjust enrichment, was duplicative of other claims, also meriting dismissal. The next day, May 1, 2025, the trial court entered an order implementing its opinion and dismissing the Complaint with prejudice.

Plaintiffs filed a timely Notice of Appeal on May 29, 2025.

ARGUMENT

I. DISMISSING PLAINTIFFS' IMPLIED COVENANT CLAIM WAS ERRONEOUS

A. Question Presented

Whether the trial court erred in finding that Plaintiffs did not plead facts creating a reasonably conceivable claim under the implied covenant of good faith and fair dealing, where Plaintiffs alleged facts showing that the Contracting Defendants coerced Plaintiffs and other Class B members into waiving contractual tag-along rights and waiving potential claims, thereby securing differential consideration and better terms for the Contracting Defendants in connection with the Merger. The question was raised below[71] and considered by the trial court.[72]

B. Standard and Scope of Review

This Court reviews *de novo* the dismissal below of Plaintiffs' complaint under Court of Chancery Rule 12(b)(6).[73] Pleading standards are "minimal" and the Court "must draw all reasonable inferences in favor of the non-moving party."[74] Dismissal

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[71] A1206-29; Ex. C at 35-70.

[72] Ex. A at 18-22.

[73] *City of Sarasota Firefighters' Pension Fund v. Inovalon Hldgs., Inc.*, 319 A.3d 271, 288 (Del. 2024).

[74] *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 897 (Del. 2002).

is inappropriate "unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances" susceptible of proof.[75]

C. Merits of the Argument

Plaintiffs' claims in Count I arise from the Contracting Defendants' breaches of the implied covenant of good faith and fair dealing inherent in the LLC Agreement. An implied covenant claim is, fundamentally, a claim for breach of contract.[76] To state a claim under the implied covenant, Plaintiffs must show "a specific implied contractual obligation, a breach of that obligation by [the Contracting Defendants], and resulting damage to [Plaintiffs]."[77]

The trial court erroneously held that "coercion" applies only in the fiduciary duty context and does not implicate the implied covenant for contract amendments where the contract provides processes for amendment that were formally satisfied.[78] The court effectively held that coercion cannot vitiate consent to a contractual

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[75] *Voigt v. Metcalf,* 2020 WL 614999, at *8 (Del. Ch. Feb. 10, 2020) (citation omitted); *In re Dell Techs. Inc. Class V S'holders Litig.*, 2020 WL 3096748, at *13 (Del. Ch. June 11, 2020).

[76] *Whitestone REIT Operating P'ship, L.P. v. Pillarstone Cap. REIT*, 2024 WL 274228, at *7 (Del. Ch. Jan. 25, 2024).

[77] *See id.*, 2024 WL 274228 at * 7 (post-trial decision).

[78] Ex. A at 19-22.

amendment where the contract waives fiduciary duties and the contract provides amendment procedures.[79] That is not Delaware law.

The trial court erroneously dismissed Plaintiffs' implied covenant claim. Extracting better economic terms from an existing contractual counterparty through coercion and threats of economic duress is a textbook violation of the implied covenant of good faith and fair dealing.[80] Coercion has long been understood as vitiating assent to contractual amendments.[81] Plaintiffs and their fellow Class B members had no reasonable option but to assent to the Contracting Defendants' waiver demands.

1. Plaintiffs' Implied Covenant Claim Sounds in Contract, Not Fiduciary Duty

The implied covenant exists in all contracts and survives contractual fiduciary duty waivers to ensure parties do not exploit contractual mechanisms in bad faith.[82] The implied covenant forbids opportunistic conduct designed to undermine a counterparty's contract rights. It "applies when the party asserting the implied

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[79] Ex. A at 18-19.

[80] *See, e.g.*, John E. Murray, Jr., *Murray on Contracts* §§ 94, 97(C) (5th Ed. 2011).

[81] *See, e.g.*, *Bakerman v. Sidney Frank Importing Co.*, 2006 WL 3927242, at *13-17 (Del. Ch. Oct. 16, 2006) (collecting authorities).

[82] *See Gerber v. Enter. Prods. Hldgs., LLC*, 67 A.3d 400 (Del. 2013); *Dieckman*, 155 A.3d 358; *City of Sarasota Firefighters' Pension Fund v. Inovalon Hldgs. Inc.*, 2025 WL 1642064, at *7 (Del. Ch. June 10, 2025).

covenant proves that the other party has acted arbitrarily or unreasonably, thereby frustrating the fruits of the bargain that the asserting party reasonably expected."[83]

The implied covenant serves as more than a mere gap-filler.[84] "The implied covenant is best understood as a way of implying terms in the agreement, whether employed to analyze unanticipated developments ***or*** to fill gaps in the contract's provisions."[85] It serves to imply terms "necessary to vindicate the apparent intentions and reasonable expectations of the parties."[86] "As such, parties to an agreement can hold one another accountable for violating implied contract terms that are so obvious that the drafter would not have needed to include the conditions as express terms in the agreement."[87] The contracting parties' reasonable expectations determine the

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[83] *Dieckman*, 155 A.3d at 367.

[84] See *id.*

[85] *Whitestone REIT*, 2024 WL 274228, at *6 (internal quotations omitted) (emphasis added).

[86] *Dieckman*, 155 A.2d at 367; *see also Mkt. St. Assocs. L.P. v. Frey*, 941 F.2d 588, 596 (7th Cir. 1991) (Posner, J.) (the implied covenant embodies "the overriding purpose of contract law, which is to give the parties what they would have stipulated for expressly if at the time of making the contract they had had complete knowledge of the future and the costs of negotiating and adding provisions to the contract had been zero.").

[87] *Whitestone REIT*, 2024 WL 274228, at *6 (citation modified).

implied covenant's nature and scope in a particular contract.[88] "The reasonable expectations of the contracting parties are assessed at the time of contracting."[89]

Here, the Class B members would not have demanded an obvious term, like "the Contracting Defendants shall not coerce contractual amendments and waivers from Class B members." Such a demand assumes that Warburg would likely connive at some vulnerable moment to extract better economic terms from Class B members, absent express prohibition. "[D]rafters, whether drafting on their own, or sitting across a table in a competitive negotiation, do not include obvious and provocative conditions in an agreement[.]"[90] Contracting parties are entitled to trust that their counterparties will cooperate and perform as-promised, without needing additional inducements or specific proscriptions against undermining the other party's receipt of their contract fruits.[91]

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[88] *See Fortis Advisors LLC v. Johnson & Johnson*, 2024 WL 4048060, at *38 (Del. Ch. Sept. 4, 2024); *Whitestone REIT,* 2024 WL 274228, at *6; 6 Timothy Murray *et al.*, *Corbin on Contracts* §26.8 (Spring 2025).

[89] *Fortis Advisors*, 2024 WL 4048060, at *38.

[90] *Dieckman*, 155 A.3d at 368.

[91] *See Mkt St. Assocs.*, 941 F.2d at 593-97; *id.* at 596 ("But whether we say that a contract shall be deemed to contain such implied conditions as are necessary to make sense of the contract, or that a contract obligates the parties to cooperate in its performance in 'good faith' to the extent necessary to carry out the purposes of the contract, comes to much the same thing.").

Plaintiffs' implied covenant claim "is based on the words of the contract and not the disclaimed fiduciary duties."[92] The trial court erroneously concluded that the implied covenant has no role here because the LLC Agreement had an express amendment provision the parties formally satisfied. As in *Dieckman*, "[t]he Court of Chancery erred by focusing too narrowly on whether the express [amendment] provision displaced the implied covenant."[93] It should have focused on the language of the amendment provision and what the words used reasonably meant.[94] Section 14.04 speaks of seeking unitholder "consent."[95] The LLC Agreement has no provision rendering analysis of unitholder consent beyond the reach of contract principles.

The Contracting Defendants sought unitholder consent for a long-awaited exit event, conditioned on waiving the very tag-along right that was supposed to protect Plaintiffs and Class B unitholders in an exit event. The Information Statement assured each Class B unitholder that they would receive no merger consideration whatsoever unless they waived all claims against the Defendants. "Not surprisingly, the express terms of the [LLC] Agreement did not address, one way or another,

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[92] *Dieckman*, 155 A.3d at 368.

[93] *Id.* at 367.

[94] *See id.*

[95] A0237-38 § 14.04.

whether" the Contracting Defendants could coerce Plaintiffs and other Class B members into consenting, as a class, to waive the tag-along right and, individually in the Transmittal Letter, to surrender all claims as mandatory conditions precedent to receiving any fruits from an exit event.[96]

The implied covenant prohibits one party from "frustrating the [other party's] fruits of the bargain" by "act[ing] arbitrarily or unreasonably."[97] The demand for the tag-along waiver and the Information Statement's and Transmittal Letter's assurances that Merger consideration would be individually withheld absent each unitholder's waiver of potential claims was arbitrary conduct to enable full liquidity for the Class A WP Investors at the expense of Class B members like Plaintiffs. That conduct frustrated Class B members' tag-along right, including their right to sue to enforce it. Additionally, the Merger agreement provided that, upon closing, all units automatically converted into the right to receive Merger consideration, without action by anyone.[98] Yet, the Transmittal Letter and Information Statement imposed more conditions to an individual's receipt of merger consideration, including waiving all claims and absolving Defendants of wrongdoing. Those conditions were arbitrary, lacking supporting consideration, and not required by the Merger

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[96] *See Dieckman*, 155 A.3d at 367.

[97] *E.g.*, *id.*

[98] A0622-23 § 2.9(b)(ii).

agreement or by any contract involving Plaintiffs and the Class B members.[99] And, Warburg, promoting the Merger in the information sessions for the WP Investors, never mentioned the tag-along waiver or its implications to Class B members, instead indicating that the Merger would not happen unless they promptly signed the Transmittal Letter.

The trial court erroneously interpreted Plaintiffs' arguments as confirmation that Plaintiffs are really claiming a fiduciary-duty breach in implied-covenant clothing.[100] Not so. The trial court noted Plaintiffs' citation to *Delphi*, but although *Delphi* was decided on fiduciary duty grounds, the court expressly left undecided the question of whether the coercive charter amendment also breached the implied covenant.[101] Nothing in *Delphi* suggests that coercion in breach of the implied covenant is only actionable where fiduciary duties apply. Indeed, this Court in *Dieckman* found facts constituting coercion to violate the implied covenant where fiduciary duties are absent.[102]

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[99] The LLC Agreement, before amendment, required only majority, not unanimous, approval of Class B unitholders to waive the tag-along right; nothing in it, or the Merger agreement, required waiving claims.

[100] *See* Ex. A at 19-22.

[101] *In re Delphi Fin. Grp. S'holder Litig.*, 2012 WL 729232, at *17 (Del. Ch. Mar. 6, 2012).

[102] *See Dieckman*, 155 A.3d at 361. Although not couched in *Dieckman* as "coercion," Delaware courts have determined that material disclosure issues caused by interested insiders are potentially coercive on outside investors. *See, e.g.*,

Likewise, Plaintiffs cited certain LLC Agreement provisions in an effort to ascertain the implied covenant's nature and scope, as the analysis demands.[103] Those provisions make clear that certain Company officers owed fiduciary duties, suggesting that the LLC Agreement manifested reasonable unitholder expectations that those Company officers would not, as Company agents, coerce or mislead investors in a vote the contract requires.[104] The LLC Agreement is also expressly [redacted]

Gradient OC Master, 930 A.2d at 128; *Eisenberg v. Chi. Milwaukee Corp.*, 537 A.2d 1051, 1056 (Del. Ch. 1987); *see In re Columbia Pipeline Grp., Inc. Merger Litig.*, 299 A.3d 393, 493 (Del. Ch. 2023) ("If the stockholders did not rely on the disclosures, or if the disclosures did not play any role in inducing the stockholder to approve the transaction, then the vote would not reflect an independent decision about the merits of the transaction"), *rev'd on other grounds*, 2025 WL 1693491 (Del. June 17, 2025). Subversion of a safe-harbor process in *Dieckman*, by deceiving investors, obscures from investors the merits of a safe-harbor vote and, thus, induces a decision based on factors other than merit. *See Bakerman*, 2006 WL 3927242, at *13 (inequitable coercion occurs when one party causes another to "vote in favor of a proposed transaction for some reason other than the merits of that transaction.").

[103] 6 Timothy Murray et al., *Corbin on Contracts* §26.8 (Spring 2025).

[104] *See* Ex. 3 at 48-49. The Information Statement contained no information concerning the background of the tag-along waiver, and yet Defendants purportedly obtained contractual absolution for that waiver through the Class B unitholders' assent to the Transmittal Letter. *See Dieckman*, 155 A.3d at 361 ("The implied covenant is well-suited to imply contractual terms that are so obvious—like a requirement that the general partner not engage in misleading or deceptive conduct to obtain safe harbor approvals—that the drafter would not have needed to include the conditions as express terms in the agreement.")

[redacted][105]

These arguments, rather than signaling an inherent fiduciary duty angle in Plaintiffs' claims, instead confirm Plaintiffs' analytical faithfulness to contract principles in Count I and their claim that coercion, violating the implied covenant, rendered voidable their consent to the tag-along waiver and Transmittal Letter pursuant to those principles.

By concluding that Count I sounds in fiduciary duty and not in contract, the opinion below effectively elevates the contract's limited fiduciary duty waiver above the implied covenant and the provision explicitly subjecting the LLC Agreement to it. It is nonsensical to conclude, like the trial court, that the implied covenant has no role simply because another contractual provision provides a limited waiver of fiduciary duties. Elevating one contract term over another violates the maxim that a contract must be construed to give effect to all provisions such that none is "meaningless or illusory."[106] The trial court's misreading rendered the LLC

[105] A0541-42 § 12.01(a).

[106] *Manti Hldgs., LLC v. Authentix Acq. Co., Inc.*, 261 A.3d 1199, 1208 (Del. 2021).

Agreement's inherently present implied covenant wholly empty. That erroneous contractual interpretation merits reversal.[107]

Count I is based on contract principles. As in *Dieckman*, the implied covenant maintains a role here with respect to amendments notwithstanding fiduciary duty waivers, even though the contract provides amendment procedures. At least on the pleadings, it is reasonably conceivable that the Contracting Defendants coerced Plaintiffs and the Class B members to consent to the tag-along waiver and Transmittal Letter through arbitrary and coercive behavior violating the implied covenant. The LLC Agreement's express terms neither condone coerced amendments nor displace the implied covenant's role concerning amendments. Dismissing Count I on this basis was error.

Two strains of coercion exist in Delaware law,[108] and Plaintiffs' allegations satisfy both.

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[107] *E.g.*, *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228 (Del. 1997) (reversing summary judgment where lower court's contract interpretation failed to give effect to all provisions).

[108] *Bakerman*, 2006 WL 3927242, at *13-15.

2. The Contracting Defendants Coerced Plaintiffs by Inducing the Waivers on Factors Other Than Merit

A unitholder is coerced when "wrongfully induced to make a decision for reasons unrelated to merit."[109] This variety of coercion arose in cases like *Delphi*[110] and *Gradient OC Master*,[111] where fiduciary duties were at play, and in *Dieckman*, a contract case involving no fiduciary duties.[112]

The trial court ruled that this version of coercion—which can vitiate stockholder consent in the fiduciary duty context—does not vitiate contractual consent. This runs afoul of this Court's analysis in *Dieckman*. There, this Court rejected the trial court's reasoning that "the implied covenant had no work to do" on disclosure obligations because of express contract terms concerning disclosure.[113] As noted, the *Dieckman* Court rejected that reasoning because the trial court "focus[ed] too narrowly on whether the express disclosure provision displaced the

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[109] *Gradient OC Master*, 930 A.2d at 117; *see also Bakerman*, 2006 WL 3927242, at *13 ("if some other party causes stockholders to vote in favor of a proposed transaction for some reason other than the merits of that transaction, then the vote has been inequitably coerced.").

[110] *Delphi*, 2012 WL 729232, at *15 (a choice "between approving the Merger at the cost of [the Charter amendment] or voting against the Merger and forgoing an otherwise attractive deal (that could nevertheless be more attractive sans [the Charter amendment])" was coercive).

[111] *Gradient OC Master*, 930 A.2d at 117.

[112] *See Dieckman*, 115 A.3d at 361; *see, supra,* n. 102.

[113] *Dieckman*, 115 A.3d at 367.

implied covenant."[114] That same reasoning applies equally here. Just because the LLC Agreement waives fiduciary duties and provides procedures for amending the contract does not mean the contract, explicitly subject to the implied covenant, permits coercive amendments.

The implied covenant prohibits arbitrary and unreasonable conduct directed at a counterparty to frustrate their receipt of bargained-for benefits.[115] Inducing a counterparty's waiver of contract rights and a waiver of rights to sue on the contract for reasons other than the merits of those waivers is unreasonable conduct that "frustrat[es] the fruits of" the contract rights.[116] The presence or absence of fiduciary duties does not factor in. The implied covenant plainly applies to contracts where there are no fiduciary duties owed between the contracting parties. If anything, the implied covenant is even more important where fiduciary duties have been waived and cannot possibly duplicate fiduciary duty claims.[117]

Here, the WP Investors, acting through Warburg, refused to perform under the tag-along right exactly when the contract was poised to bear fruit for everyone and exactly when the tag-along right mattered. The Contracting Defendants upset the

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[114] *Id.* at 367.

[115] *Id.*

[116] *E.g.*, *id.*

[117] *See Inovalon*, 2025 WL 1642064, at *7.

exit-event risk-allocation the tag-along right embodied by conditioning the Merger on the tag-along waiver, forcing Plaintiffs and other Class B members to decide on the waiver, not on its merits, but because otherwise there would be no exit event. The Contracting Defendants forced Plaintiffs and Class B members to waive the tag-along right so as to induce the Contracting Defendants' support for the deal the Contracting Defendants themselves had negotiated.

The Contracting Defendants assured Plaintiffs and Class B unitholders that no Merger consideration would flow to each of them unless and until each of them signed the Transmittal Letter waiving all potential claims. In the information sessions, Warburg, acting as the WP Investors' agents, falsely threatened that no cash would be paid to those Class B members who failed to deliver the Transmittal Letter by December 4. For Plaintiffs and other Class B members, each waiver decision reduced to whether they wanted to receive some Merger consideration or no Merger consideration.

Thus, the trial court erred by rejecting Plaintiffs' assertion of this form of coercion as violating the implied covenant.

3. The Contracting Defendants Coerced Plaintiffs by Imposing Economic Duress to Induce the Waivers

Plaintiffs' allegations also support a second form of coercion. A contract amendment can be rendered voidable through one party's wrongful act, like imposing economic duress, that overcomes the other party's will and leaves them without reasonable alternatives.[118] This form of coercion maps well onto implied covenant precepts, as employing duress to force surrender of a counterparty's contract rights and leave them without a reasonable alternative plainly frustrates the counterparty's receipt of the fruits of the bargain.[119]

Plaintiffs referenced *Bakerman* for this form of coercion below, yet Defendants never addressed this form of coercion in their briefing or at oral argument.[120] The trial court summarily dismissed Plaintiffs' assertion of this form of coercion in footnote 101 of its opinion, declaring *Bakerman* factually distinct and "inapposite."[121] This was error. Hardly inapposite, *Bakerman* provides an analytical guide for this variety of coercion.

In *Bakerman*, Chancellor Chandler found that threats of economic duress potentially vitiated consent to a contract amendment, sufficient to survive a motion to dismiss.[122] To reach that conclusion, he relied on and applied Sections 175 and

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[118] *Bakerman*, 2006 WL 3927242, at *15-18.

[119] *See*, *e.g.*, *Dieckman*, 155 A.3d at 361.

[120] *See* Ex. C at 62, 79-90.

[121] Ex. A at 20 & n. 101.

[122] See *Bakerman*, 2006 WL 3927242, at *15-18 & nn. 72-73. The Restatement (Second) of Contracts is referred to in text as the "Second Restatement."

176 of the Restatement (Second) of Contracts, which, respectively, relate to "when duress by threat makes a contract voidable" and "when a threat is improper."[123]

Section 175(1) states, "If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim."[124] Section 176(1)(d) provides that "improper threats" include where "the threat is a breach of the duty of good faith and fair dealing under a contract with the recipient."[125]

Illustration 9 of Section 176 elucidates the point:

> A contracts to excavate a cellar for B at a stated price. A begins the excavation and then threatens not to finish it unless B makes a separate contract to excavate the cellar of another building. B, having no reasonable alternative, is induced by A's threat to make the contract. A's threat is a breach of his duty of good faith and fair dealing, and the proposed contract is voidable by B.[126]

Plaintiffs plead threats the Second Restatement and *Bakerman* deem improper, vitiating consent. The Contracting Defendants demanded from Plaintiffs an economic benefit to which they were otherwise unentitled and employed coercion to get it. The LLC Agreement manifests the parties' intent to ensure that the Class B

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[123] Restatement (Second) of Contracts, §§175, 176.

[124] Restatement (Second) of Contracts, §175.

[125] Restatement (Second) of Contracts, §176.

[126] *Id.*, Illustration 9.

unitholders were treated the same as the Class A members in a transaction like the Merger. Yet, when the Merger's prospect arose, the Contracting Defendants required Plaintiffs and the Class B members to give the Class A unitholders the tag-along waiver. The Contracting Defendants further required full absolution for doing so, through a waiver of potential claims in the Transmittal Letter, before paying any Merger consideration. Warburg, acting as the WP Investors' agent, lied in the information sessions that no cash would be paid to Class B members who did not sign the Transmittal Letter by the December 4 rollover election deadline, representations in the Information Statement notwithstanding.

Plaintiffs and the Class B members had no reasonable alternative but consent. The underlying objective of the LLC Agreement was for all unitholders to make money in an exit event, and another exit event was not assured. Absent payment through an exit event, Plaintiffs' and the Class B unitholders' investments were essentially illiquid without Warburg's consent. Thus, to get any return on their investments, Class B unitholders had to assent to everything the Contracting Defendants demanded. The Contracting Defendants assured they would withhold all Merger consideration from unitholders who did not individually consent and grant Defendants absolution by waiving claims in the Transmittal Letter, unless and until the unitholders did.[127] Not assenting would have triggered effective forfeitures for individual Class B members.

Both law and equity abhor forfeitures.[128] Thus, effective forfeiture cannot be deemed a reasonable option for Plaintiffs and other Class B members. They spent years awaiting an exit event and liquidity of their long-held, substantial individual investments. No one could predict if, or when, another exit event might arise if the Merger did not occur.

Warburg controlled exit events. It could handle any timing uncertainty far better than physician-Class B owners. The tag-along right was, for Class B members like Plaintiffs, a valuable safety against Warburg's exit-event discretion and a highly material inducement to signing the LLC Agreement. But, the exit event and consequent liquidity remained the LLC Agreement's ultimate objective. The Contracting Defendants leveraged that objective to extract the tag-along waiver and Transmittal Letter from Plaintiffs and other Class B members.

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[127] A1047.

[128] *Thompson St. Cap. P'rs IV, L.P. v. Sonova United States Hearing Instruments, LLC*, 2025 WL 1213667, at *1 (Del. Apr. 28, 2025) ("our common law abhors a forfeiture."); *Jefferson Chem. Co. v. Mobay Chem. Co.*, 267 A.2d 635, 637 (Del. Ch. 1970) ("Equity ... abhors a forfeiture.").

In *Bakerman*, the improper threats Chancellor Chandler found to impose duress were to terminate at-will employment and file a baseless lawsuit.[129] Here. the trial court rejected Plaintiffs' argument concerning this sort of coercion because, distinguishing *Bakerman*, Plaintiffs did not "allege any such duress." That was error. Sections 175 and 176 of the Second Restatement illustrate that threats of economic duress other than those specifically alleged or present in *Bakerman* can vitiate consent to a contract amendment.

Other cases are in accord. In a Seventh Circuit Court of Appeals decision concerning the implied covenant, Judge Easterbrook described the epitome, a movie star who holds up production, refusing to complete filming without increased pay.[130] A classic case involves workers, knowing the absence of substitutes, demanding increased wages before they complete performance.[131] More recent variations on that fact-pattern have the same outcome: assent to an amendment vitiated through coercion, resulting in a voidable contract amendment.[132]

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[129] *Bakerman,* 2006 WL 3927242, at *15-18; *see* Restatement (Second) of Contracts, §176(1)(d) (bad faith threats of civil process are improper).

[130] *See Indus. Representatives v. C.P. Clare Corp.*, 74 F.3d 128, 130 (7th Cir. 1996) (Easterbrook, J.). In *Market Street Associates*, 941 F.2d at 596, the same court, through Judge Posner, found an implied covenant claim where one party allegedly "tried to trick" a counterparty out of vested contract rights. *See* Ex. C at 51-52.

[131] *Alaska Packers Ass'n v. Domenico*, 117 F. 99 (9th Cir. 1902). *See* Ex. C at 62.

[132] *Totem Marine Tug & Barge, Inc. v. Alyeska Pipeline Serv. Co.*, 584 P.2d 15 (Alaska 1978) (summary judgment reversed when economic duress potentially made

Plaintiffs' allegations sufficiently show coercion vitiating assent to the tag-along waiver and the Transmittal Letter, through threats of economic duress constituting an implied covenant breach.[133] Coercion vitiated consent in *Bakerman*; so too here. The trial court's narrow distinction in footnote 101, based on *Bakerman's* precise holding on its facts, erroneously foregoes the additional analysis that Sections 175 and 176 require, and which Chancellor Chandler conducted when deciding *Bakerman*.

The trial court, thus, erroneously rejected Plaintiffs' assertion of this form of coercion.

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Plaintiffs state an implied covenant claim. They have successfully pleaded that the Contracting Defendants coerced their consent to the tag-along waiver and the Transmittal Letter through arbitrary and unreasonable conduct designed to undermine the tag-along right, vitiating that consent and rendering those agreements

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release voidable); *Atlas Express Ltd. v. Kafco (Imps. and Distribs. Ltd.)*, 1 All ER 641, 646 (Queens Bench Division, Commercial Court (England) 1989) (threats of non-performance absent better economic terms, leaving counterparty without reasonable alternatives, constituted economic duress vitiating apparent consent to new terms). In all these cases, to the extent there was a contractual gap, it was an obvious, proscriptive term no one would have thought to make explicit. *See Dieckman*, 155 A.3d at 368.

[133] *See also Murray on Contracts* §97(C) ("The 'Good Faith' Requirement").

voidable, pursuant to established contract principles. Fiduciary concepts have no bearing on this analysis. The trial court erroneously concluded otherwise.

II. DISMISSAL OF PLAINTIFFS' TORTIOUS INTERFERENCE CLAIMS WAS ERROR

A. Question Presented

Whether the trial court erred in dismissing Counts II and III for want of an underlying contractual breach, where Plaintiffs establish a contractual breach and relief for Plaintiffs is otherwise reasonably conceivable under the facts alleged. The question was raised below[134] and considered by the trial court.[135]

B. Standard and Scope of Review

This Court reviews *de novo* the dismissal below of Plaintiffs' complaint under Court of Chancery Rule 12(b)(6).[136] Pleading standards are "minimal" and the Court "must draw all reasonable inferences in favor of the non-moving party."[137] Dismissal is inappropriate "unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances" susceptible of proof.[138]

C. Merits of the Argument

Counts II and III, alleging tortious interference by Warburg, VillageMD, and Walgreens, were erroneously dismissed solely because the court below found no

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[134] A1229-34.

[135] Ex. A at 25-27.

[136] *Inovalon*, 319 A.3d at 288.

[137] *Savor*, 812 A.2d at 897.

[138] *Voigt,* 2020 WL 614999, at *8 (citation omitted); *Dell*, 2020 WL 3096748, at *13.

contractual breach. To plead viable claims for tortious interference, "a plaintiff must plead '(1) a contract, (2) about which defendant knew, *and* (3) an intentional act that is a significant factor in causing the breach of such contract, (4) without justification, (5) which causes injury.'"[139]

Counts II and III state viable claims. Plaintiffs allege Warburg knew of the LLC Agreement and negotiated the LOI and Merger agreement with Walgreens to avoid and coercively eliminate the tag-along right, causing Plaintiffs and other Class B unitholders significant harm while providing total liquidity to the Class A unitholders. Likewise, Plaintiffs allege facts showing that Walgreens and VillageMD knew of the LLC Agreement and negotiated the LOI and Merger agreement with Warburg to avoid and coercively eliminate the tag-along right, causing Plaintiffs and the Class B unitholders the same significant harm and limiting the amount of cash Walgreens and VillageMD needed to pay. Thus, for Walgreens, VillageMD, and Warburg, the Complaint clearly alleges facts establishing four of the five elements of tortious interference.

Analysis of the tort's remaining "without justification" element is fact-intensive, inappropriate for a motion to dismiss,[140] and the trial court never

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[139] *New Enter. Assocs. 14, L.P. v. Rich*, 292 A.3d 112, 140 (Del. Ch. 2023) (quoting *Bhole, Inc. v. Shore Invs., Inc.*, 67 A.3d 444, 453 (Del. 2013)).

[140] *New Enter.*, 292 A.3d at 142-43. Additionally, with Warburg, Delaware recognizes a limited affiliate privilege protecting as-justified a parent corporation

conducted it here. In any event, Plaintiffs plead facts showing that Warburg, VillageMD, and Walgreens all acted "without justification" to obtain the tag-along waiver.

Warburg acted without justification. Warburg was not "pursu[ing] lawful action in the good faith pursuit of [the Company's] profit making activities."[141] Warburg pursued its own interests at the expense of Class B unitholders and the Company's contractual obligations. It engineered all-cash Merger consideration for its WP Investors through the elimination of the tag-along right in negotiations around the LOI. Warburg caused the Class A WP Investors to gobble up the bulk of the available cash Merger consideration, at the expense of the Class B unitholders, their tag-along right, and the Company's obligations under the LLC Agreement.[142] Warburg followed up signing the Merger agreement with live information sessions that (a) misinformed Class B unitholders that they would receive no cash and a 100%

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that "pursues lawful action in the good faith pursuit of [its subsidiary's] profit making activities." *Id.* at 143 (alteration in original). Still, "Delaware's respect for corporate separateness means that Delaware maintains a role for tortious interference even when one entity controls another." *Id.* The limited affiliate privilege requires additional case-specific factual analysis. *Id.*

[141] *See id.*

[142] *Id.* (on pleadings, substantial company stockholders and board members tortiously interfered with other unitholders' rights under governing agreement by participating in the breach of that agreement and "gobbl[ing] up" 82% of a favorably priced second offering).

rollover unless they met the December 4 rollover election deadline and signed the Transmittal Letter, (b) misinformed Class B unitholders that there would be no merger unless all of them consented, and (c) never mentioned the tag-along waiver. In stark contrast with the tag-along right's prominence in Warburg's Summit Pitch Deck, the tag-along waiver is barely mentioned in any of the materials Plaintiffs and other Class B unitholders received about the Merger.

Walgreens and VillageMD also acted without justification. Walgreens sought to acquire control of the Company through VillageMD and proposed to pay all-cash Merger consideration to the WP Investors to get Warburg's assent. The original LOI proposal was to pay only the Class A members [redacted]% cash, in violation of the LLC Agreement. Walgreens and VillageMD would not have to contribute more cash toward the Merger consideration if Class A members got [redacted]% cash and Class B members did not. Walgreens and VillageMD may have wanted to avoid spending more than $[redacted] cash toward Merger consideration, but there is no indication they could not. Walgreens negotiated and signed agreements ancillary to the Merger providing benefits, including voting support and financing, needed to give VillageMD the ability to close the Merger. Negotiating the LOI with Warburg to eliminate the tag-along right in the Merger allowed Walgreens and VillageMD to get favorable deal terms the LLC Agreement prohibited. There is no justification for

Walgreens/VillageMD's efforts to extinguish the tag-along right just so Walgreens could get deal terms it preferred and induce Warburg to agree.

The LLC Agreement did not license external parties to manipulate exit-event distributions in favor of themselves, notwithstanding the tag-along right. Warburg, Walgreens, and VillageMD negotiated deal terms that required the tag-along waiver and the waiver of potential claims, forcing valuable concessions for themselves and their affiliates from Class B unitholders like Plaintiffs.

Plaintiffs have shown a contractual breach and Plaintiffs otherwise plead facts supporting their tortious interference claims. Thus, the Court should reverse the trial court's dismissal of Counts II and III.

III. DISMISSAL OF PLAINTIFFS UNJUST ENRICHMENT CLAIMS WAS ERROR

A. Question Presented

Whether the trial court erroneously dismissed Count IV as duplicative of other claims, where Plaintiffs allege facts showing that Warburg acted without justification and relief for Plaintiffs is otherwise reasonably conceivable under the facts alleged. The question was raised below[143] and considered by the trial court.[144]

B. Standard and Scope of Review

This Court reviews *de novo* the dismissal below of Plaintiffs' complaint under Court of Chancery Rule 12(b)(6).[145] Pleading standards are "minimal" and the Court "must draw all reasonable inferences in favor of the non-moving party."[146] Dismissal is inappropriate "unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances" susceptible of proof.[147]

C. Merits of the Argument

Count IV, for unjust enrichment against Warburg, should not have been dismissed as duplicative, particularly given the trial court's dismissal of Count I. The

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[143] A1234-35.

[144] Ex. A at 27.

[145] *Inovalon*, 319 A.3d at 288.

[146] *Savor*, 812 A.2d at 897.

[147] *Voigt,* 2020 WL 614999, at *8 (citation omitted); *Dell*, 2020 WL 3096748, at *13.

elements of a claim for unjust enrichment are: "(1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by law."[148] Enrichment refers to any "retention of a benefit to the loss of another."[149] This claim does not depend on any breach of the LLC Agreement.

Warburg did not sign the LLC Agreement except on the WP Investors' behalf, and thus, equitable claims against Warburg are viable.[150] "Plaintiffs may be able to show that the profits [Warburg is] alleged to have obtained are without justification."[151] Warburg earns fees when it returns capital to its fund investors. As just discussed, Warburg's conduct in extracting the tag-along waiver from Plaintiffs and other Class B members lacked justification. Plaintiffs have pleaded facts supporting all elements of their unjust enrichment claim. Accordingly, the trial court erred by dismissing Count IV.

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[148] *Garfield v. Allen,* 277 A.3d 296, 341 (Del. Ch. 2022).

[149] *Jackson Nat'l Life Ins. Co. v. Kennedy,* 741 A.2d 377, 393 (Del. Ch. 1999).

[150] *See Vichi v. Koninklijke Philips Elecs. N.V.*, 62 A.3d 26, 59 (Del. Ch. 2012).

[151] *Fannin v. UMTH Land Dev., L.P.*, 2020 WL 4384230, at *27 (Del. Ch. Aug. 28, 2020).

CONCLUSION

For the foregoing reasons, this Court should fully reverse the Court of Chancery's opinion and order dismissing the Complaint and remand the case for further proceedings.

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CERTIFICATE OF SERVICE

I, Michael C. Wagner, hereby certify that, on July 30, 2025, I caused a true and correct copy of the foregoing to be served on the following via File & ServeXpress:

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