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Case Number 236,2025

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 September 17, 2025**

APPELLANTS' OMNIBUS REPLY BRIEF ON APPEAL

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INTRODUCTION

This appeal rests on a simple proposition. Inherent in every contract is the implied covenant of good faith and fair dealing. It is a breach of the implied covenant of good faith and fair dealing where a contracting party bargains away a contract right, then coerces its counterparty to waive that contract right in order to avoid a far worse outcome.

The implied covenant of good faith and fair dealing prohibits arbitrary and unreasonable conduct frustrating a counterparty's enjoyment of bargained-for contractual fruits, which Defendants[1] do not debate. Nor do they dispute that the Merger transformed Plaintiffs' investments into the right to receive Merger consideration or nothing at all. This appeal concerns Defendants' imposition of arbitrary and unreasonable conditions on unitholders' receipt of Merger consideration, including consent to the Waivers.[2] Defendants admit they induced the

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[1] Defendants use several terms defined differently than Plaintiffs' terms. Plaintiffs incorporate terms defined in Plaintiffs' Opening Brief. "Contracting Defendants" includes the WP Investors and the Company. Because all Defendants rely in arguments against Count I, this brief sometimes refers to "Defendants" when discussing Count I, without intent to obscure distinctions among the Defendants. The "Amendment" refers to the First Amendment to the LLC Agreement containing the tag-along waiver, A0257. Warburg's and the WP Investors' Answering Brief is the "WPAB." The Company's and VillageMD's Answering Brief is the "CAB," and Walgreens' Answering Brief is the "WalAB."

[2] The Transmittal Letter's waivers and releases and the Amendment's tag-along waiver, together.

Waivers on factors unrelated to the Waivers' merit, but never credit Plaintiffs' allegations that Defendants' conduct frustrated enjoyment of the contract rights the Waivers purportedly extinguished.

The implied covenant requires parties to refrain from trying to regain bargained-away contract assets. Defendants admit they bargained away the tag-along right to Class B members in the LLC Agreement, then required its waiver in the Merger or else Class B members would receive—and have—nothing. Their conduct violates the implied covenant from any perspective.

Defendants' Answering Briefs fail to refute Plaintiffs' claims. Plaintiffs' cases show the implied covenant prohibits using coercion to extract better economics from existing counterparties. *Dieckman* prescribes analyses to determine whether express contract terms displace the implied covenant, but the Defendants cite *Dieckman* just once, for its facts. Defendants conduct no analysis before concluding the contract's amendment provision displaced the implied covenant on unitholder "consent."

Defendants' authority also confirms that Warburg, Walgreens, and VillageMD tortiously interfered with the LLC Agreement's tag-along right by executing plans for the Company's future that required changing the LLC Agreement's negotiated risk allocation for exit events. Walgreens wanted its controlled VillageMD subsidiary to buy the Company, with Walgreens paying only so-much cash while maintaining post-closing majority control. Warburg wanted the

WP Investors' fully liquid exit. Their plan required undermining the tag-along right, and all acted to achieve the WP Investors' full liquidity. Their own authority shows that undermining the LLC Agreement to achieve Warburg's, VillageMD's, and Walgreens' plans for the Company's future lacked justification.

Finally, Plaintiffs' unjust enrichment claim validly seeks restitution from Warburg beyond the differential cash Merger consideration it obtained for its investment-fund products, not replicating relief sought through other claims. It is reasonably conceivable that Warburg, at least through fees earned when returning fund capital to its customers after the Merger's consummation, was unjustly enriched through its plan to provide customers with full liquidity in the Merger by undermining the tag-along right.

This Court should reverse.

ARGUMENT

I. THE TRIAL COURT ERRONEOUSLY DISMISSED PLAINTIFFS' IMPLIED COVENANT CLAIM

A. Plaintiffs' Coercion Allegations Support Their Implied Covenant Claims Under Delaware Law

Defendants argue that Class B Unitholders were "not coerced," while conceding that Class B unitholders were forced to decide between receiving "some Merger consideration" or "no Merger consideration."[3] They argue there was no coercion simply because Class B Unitholders were given a "choice,"[4] ignoring that the nature and context of the Transmittal Letter presented no real choice at all. They also argue Plaintiffs' coercion theory is "wholly unsupported by Delaware precedent,"[5] but fail to meaningfully address or distinguish Delaware authorities, including *Dieckman*, confirming that consent obtained through coercion gives rise to implied covenant claims.[6]

1. Plaintiffs Adequately Allege Coercion

Defendants handle Plaintiffs' coercion allegations by essentially ignoring them. Mischaracterizing Plaintiffs' coercion claims as a "fallback,"[7] Defendants'

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[3] WPAB 27.

[4] WPAB 2, 26-27, 31.

[5] WPAB 26.

[6] POB 34-35.

[7] WPAB 25.

arguments require improper pleading-stage inferences that they did not "attempt to strong-arm or deceive an unwilling participant into" waiving vested contract rights.[8] But, that is the upshot of Plaintiffs' allegations. "'[C]onsent' to a bully is no consent at all."[9]

Defendants counterfactually rely on a *status quo*, they posit, certainly awaiting Class B unitholders who opposed the Amendment. However, Defendants strong-armed Class B unitholders into accepting a bad deal requiring the tag-along waiver to avoid far worse consequences. The Merger's closing automatically cancelled existing equity and converted it into the right to receive Merger consideration.[10] Thereafter, Class B unitholders' investments existed *only as that right to receive Merger consideration*.[11] Reducing Plaintiffs' investments into the right to receive Merger consideration on closing eliminated options to retain existing equity and embrace a *status quo*.

Defendants' requirement that unitholders must sign the Transmittal Letter to get Merger consideration the Merger agreement guaranteed unitholders on closing

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[8] *See* WPAB 32.

[9] Timothy Murray, et al., *Corbin on Contracts* §26.5 (Spring 2025) ("*Corbin*").

[10] A0622; POB 29.

[11] A0622 (Class B members' existing equity "[redacted]" and they "[redacted]").

became Class B unitholders' only reasonable option and functioned as a coercive threat. All unitholders would obviously want some Merger consideration because the right to Merger consideration is the only investment they had on closing. Most Class B unitholders, like Plaintiffs, wanted as much cash as possible for their long-held and otherwise illiquid investments.[12]

Signing the Transmittal Letter was the only way Class B unitholders could avoid a fate *worse* than disparate consideration contrary to the tag-along right. Unitholders needed to sign the Transmittal Letter to avoid the effective forfeiture an otherwise unfulfillable right to Merger consideration represents. And, if unitholders, regardless of their personal views, wanted to maximize any available cash Merger consideration (albeit less than the tag-along right required), they had to agree to the Amendment's tag-along waiver, make a timely rollover election, and sign the Transmittal Letter to receive available Merger consideration. Together, the Waivers "create[ed] a prisoner's dilemma – distorting choice and creating incentives for [Class B unitholders to accept a bad deal] in order to avoid a worse fate."[13]

Defendants downplay the Transmittal Letter's significance and virtually ignore its role in coercing the tag-along waiver, including by purporting to release

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[12] POB 11.

[13] *In re Pure Res., Inc., S'holders Litig.*, 808 A.2d 421, 442 (Del. Ch. 2002), *appeal refused*, 812 A.2d 224 (Del. 2002).

all potential claims to sue on the contract or Merger. The alleged structural coercion comprises both the tag-along waiver *and* the Transmittal Letter's waiver of liability.[14] The Information Statement explicitly required unitholders to return the Transmittal Letter and consent to waive all potential claims before Merger consideration would flow.[15]

Defendants misread Plaintiffs' Opening Brief as making only "passing references" to the Transmittal Letter's waiver and release of claims,[16] then fail to address Plaintiffs' unacknowledged arguments for why the Transmittal Letter's mandatory waiver of all claims was coerced.[17] They offer nothing rebutting Plaintiffs' arguments that the Transmittal Letter wrenched the tag-along waiver from

[14] Defendants argue Class B Unitholders could have, as a unitary amalgam, rejected the Merger through organized efforts. Class B Unitholders had neither the time nor the ability over a Thanksgiving holiday to rally against the Defendants' plan, like Defendants presume. *See* A0028, A0032, A0049-50. Warburg's purportedly educational information sessions, held during the November 15 to December 4 review period, also misled unitholders, deepening that inability. A0049-50. Only by distorting Plaintiffs' arguments can the WP Investors maintain Class B unitholders, *en masse*, were free to reject the Amendment and embrace the *status quo*. Individual unitholder incentives distorted unitholder choices.

[15] WPAB 15.

[16] WPAB 31 (citing POB 35, 39, 42).

[17] POB 2, 3, 19, 23, 28, 29, 30 n.99, 33, 36, 40.

Class B unitholders by conditioning individual receipt of Merger consideration, from the LLC Agreement's end-stage exit event, on its return.[18]

Defendants' argument that transmittal letters can serve legitimate, procedural purposes is beside the point.[19] Defendants fail to explain any need to "return"[20] uncertificated equity[21] cancelled on the Merger's closing if that was the Transmittal Letter's true purpose.[22] Defendants concede, by not contesting, that conditions the Transmittal Letter imposed (except perhaps informational requirements for transmitting Merger consideration) were arbitrary and not otherwise required.[23] Its manifest purpose was to extract the Waivers: on closing, unitholders' entire investments became a right to Merger consideration that would remain unfulfilled until they signed the Transmittal Letter. The well-pled facts at this stage establish that the Transmittal Letter and its broad waivers and releases of substantive claims,

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[18] POB 28-43.

[19] WPAB 28. The referenced model agreement is not law.

[20] WPAB 28 (citing a need to for unitholders "to effectuate a return of their units" and "transmit his or her equity").

[21] A0493 §3.06 (membership units "[redacted]"). Defendants never explain how returning [redacted] equity is practicable.

[22] Defendants claim no procedural need for the Transmittal Letter's requirement that individual unitholders waive and release all potential claims.

[23] POB 29-30. Defendants also abandon their contention below the Transmittal Letter's waivers and releases of claims, lacking supporting consideration, were nevertheless contractually binding on Plaintiffs. *See* Ex. A at 27.

imposed without consideration and masquerading as a procedural necessity, served Defendants' illegitimate, non-transactional goals.

Defendants also argue there was no coercion because the Information Statement contained wholly accurate factual information, seeking to cast Count I as a defeated fiduciary disclosure claim that Plaintiffs waived.[24] While disclosure issues do not constitute the only, or primary, basis for Plaintiffs' implied covenant claims, material disclosure deficiencies contributed to the coercion Class B unitholders like Plaintiffs experienced.[25]

Defendants actually acknowledge the Information Statement misrepresented the Amendment was needed only to "clarify" distribution rights,[26] not materially change them in the WP Investors' favor. The Background of the Merger section never mentions the tag-along right, despite that its waiver is among the Merger's primary features.[27] Plaintiffs allege Warburg, soliciting unitholder approval at information sessions as the WP Investors' agents, provided false information about the tag-along right, the approval thresholds, the rollover election, and the Transmittal

[24] WPAB 26-29, 32 n.11.

[25] POB 30-31 n.102; *see infra* at 12-13 (discussing *Dieckman*).

[26] WPAB 13-14.

[27] POB 31 n.104; A0283-84; A1203-04.

Letter.[28] Defendants' other accurate representations do not rectify material disclosure deficiencies that helped induce unitholder votes on the Waivers, not based on merit, but on whether the unitholders wanted any Merger consideration.[29]

The arbitrary and unreasonable conditions Defendants imposed on Plaintiffs' right to receive consideration from the LLC Agreement's exit event, including consent to the Waivers, frustrated Plaintiffs' enjoyment of the vested tag-along right Defendants negotiated away to Class B unitholders in the LLC Agreement, violating the implied covenant.

2. Delaware Law Supports Plaintiffs' Coercion Theory

In their Opening Brief, Plaintiffs explained the two forms of coercion at issue and the Delaware authorities supporting them: when a party is "wrongfully induced to make a decision for reasons unrelated to merit,"[30] and when one party's wrongful act imposes economic duress that leaves the other party without reasonable

[28] POB 2, 39, 47. The Complaint alleges this. A0049-50.

[29] POB 34-36, 31 & nn.102, 104; WPAB 27.

[30] *Gradient OC Master, Ltd. v. NBC Universal, Inc.*, 930 A.2d 104, 117 (Del. Ch. 2007), *appeal refused*, *Gradient P'rs, L.P. v. NBC Universal, Inc.*, 930 A.2d 298 (Del. 2007); *see also Bakerman v. Sidney Frank Importing Co.*, 2006 WL 3927242, at *13 (Del. Ch. Oct. 16, 2006).

alternatives.[31] Plaintiffs also explained how these forms of coercion give rise to implied covenant claims under Delaware law.[32]

Defendants offer only insubstantial factual distinctions against these authorities, none persuasive. Defendants quote *Gradient OC Master* only for the proposition that accurately disclosing transactional realities is not, in itself, actionably coercive.[33] They claim the amendment provision necessarily displaced the implied covenant, not addressing that provision's requirement for "consent."[34]

After not referencing *Bakerman* below, Defendants now adopt the trial court's narrow factual distinction of Chancellor Chandler's detailed decision.[35] They say *Bakerman* involved threats factually different from those here,[36] but not that the threats here were not "improper" or otherwise coercive under Chancellor Chandler's reasoning. Defendants decline to engage with Sections 175 and 176 of the Second Restatement or analyze the form of coercion leaving unitholders without a

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

[32] POB 25-43.

[33] WPAB 29.

[34] WPAB 30.

[35] WPAB 32.

[36] WPAB 32.

reasonable alternative.[37] They say the uncertain *status quo* was Plaintiffs' alternative.

Defendants also go to lengths to distinguish *Delphi*,[38] though the plaintiffs there argued the coercive charter amendment violated the charter's implied covenant, constituting the basis of the fiduciary duty claim the court decided.[39] Their related assertion Class B members received the same putative amount in Merger consideration as the WP Investors obfuscates that the tag-along right required consideration of the same kind *and* amount per unit, not just the same reported value.[40] They argue the implied covenant, even when explicitly referenced like here, can be read-empty unlike all other contract terms.[41]

Defendants do not respond to Plaintiffs' observation that *Dieckman* involved an implied covenant breach inflicted through inducing safe-harbor approvals on factors other than merit.[42] Defendants sole citation to *Dieckman* acknowledges that

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[37] WPAB 36-37.

[38] WPAB 33-35.

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

[40] WPAB 34. Like here, the charter in *Delphi* required "equal treatment of Class A and Class B shares in the distribution of merger consideration." *Delphi*, 2012 WL 729232, at *12.

[41] WPAB 34 n.12 (distinguishing cases because they did not involve implied covenant claims).

[42] POB 30-31 & n.101, 34.

"a general partner breached the implied covenant where he affirmatively made false and misleading statements in a proxy statement."[43] Like this Court held in *Dieckman*, by choosing to make disclosures soliciting unitholder consent to the Waivers and the Merger, the Contracting Defendants assumed a *contractual* "obligation not to mislead unitholders."[44] It is reasonably conceivable the Contracting Defendants' failure of that obligation, as in *Dieckman*, violated the implied covenant here.

They fail in attempts to distinguish Plaintiffs' citations to non-Delaware cases. Defendants do not acknowledge Judge Easterbrook's exemplar of their conduct, noting only the defendant there did not resemble it.[45] But Defendants do. Refusing to complete performance unless handed additional economics they originally failed to negotiate gives rise to an implied covenant claim.[46] They dismiss Plaintiffs' other authorities as illustrating "the absence of any allegations here remotely constituting improper coercion."[47] They do not explain how the victims of Judge Easterbrook's exemplar do not also resemble a fisherman left without workers unless paid higher

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[43] WPAB 33.

[44] *Dieckman*, 155 A.2d at 368.

[45] WPAB 35.

[46] *Indus. Representatives v. C.P. Clare Corp*., 74 F.3d 128, 130 (7th Cir. 1996) (Easterbrook, J.).

[47] WPAB 35.

wages than they negotiated,[48] an importer left without options but pay higher prices,[49] or the other contractual counterparties left without reasonable options, vitiating their consent to contract amendments, rendering them voidable, in each case.[50]

Finally, Defendants' argument that Plaintiffs conceded voidability by asserting that neither "the Merger [n]or Amendment was void or unenforceable"[51] lacks merit. The transcript shows Plaintiffs conceded only that "the LLC Agreement" itself is not "void" or "unenforceable."[52] Regardless, there is a big difference between "void" and "voidable" Defendants ignore.[53]

Plaintiffs have consistently argued the Waivers are *voidable* because the Contracting Defendants extracted consent through coercion violating the implied

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[48] *Alaska Packers' Ass'n v. Domenico*, 117 F. 99 (9th Cir. 1902).

[49] *Atlas Express Ltd. v. Kafco (Imps. and Distribs. Ltd.)*, 1 All ER 641, 646 (Queens Bench Division, Commercial Court (England) 1989).

[50] POB 41-42.

[51] See WPAB 36-37. The WP Investors also mischaracterize Plaintiffs as speechless when asked below to elaborate on coercion. WPAB 26. Plaintiffs elaborated. Ex. C at 57-70.

[52] Ex. C at 66-67. Plaintiffs did not waive their voidability argument by any delay in bringing the timely Complaint. *See* WPAB 34-35. A0558 §14.09 ("[redacted]").

[53] *See*, *e.g., Holifield v. XRI Inv. Hldgs. LLC*, 304 A.3d 896, 930-31 (Del. 2023).

covenant.[54] The Transmittal Letter, the Amendment, and the Merger agreement all contain severability provisions.[55] Deeming the Waivers voidable does not, accordingly, render the instruments or transactions void or wholly unenforceable.

B. Defendants' Reliance on Express Terms to Displace the Implied Covenant Ignores *Dieckman*

Defendants contend the contract's express terms displaced the implied covenant for unitholder "consent" because the tag-along right could be amended and some fiduciary duties were waived.[56] Though *Dieckman* prescribes analyses to avoid unreasoned conclusions that explicit contract terms displace the implied covenant,[57] Defendants cite *Dieckman* for its facts but otherwise never refer to it.[58] Defendants' bare conclusion that the amendment provision displaced the implied covenant fails to conduct any of the analyses *Dieckman* prescribed.

In *Dieckman*, this Court required analyzing the express term's language and what it reasonably means,[59] but Defendants never assess what the amendment provision's unitholder "consent" requirement reasonably means or how "consent"

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[54] POB 32, 37-39, 42.

[55] A1148, A0486, A0724.

[56] WPAB 22-25.

[57] *Dieckman v. Regency GP LP*, 155 A.3d 358, 367-68 (Del. 2017).

[58] WPAB 33.

[59] *Dieckman*, 155 A.3d at 367; POB 28, 32.

might be vitiated. Parties are supposed to ascertain if the contract addresses the pertinent issue "one way or the other,"[60] but Defendants cite nothing in the LLC Agreement addressing whether coercion may induce unitholder consent. *Dieckman* determined the implied covenant does not require parties to expressly articulate obvious and provocative terms, proscribing specific misconduct,[61] like "the Contracting Defendants shall not coerce contractual amendments and waivers from Class B members."[62] Nevertheless, like the trial court, Defendants contend Class B unitholders could have negotiated terms like that to prevent what happened here.

Not conducting *Dieckman*'s analyses, the Contracting Defendants repeat the trial court's erroneous reasoning that the express amendment provision plus the partial fiduciary duty waiver necessarily displaced the implied covenant on unitholder "consent."[63] The general availability of amendment procedures does not signal that every amendment, if formally approved, necessarily demonstrates unitholder "consent." Nothing in the contract says fiduciary principles alone govern "consent." Nothing in the contract says an amendment's formal passage conclusively establishes unitholder "consent."

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[60] *Dieckman*, 155 A.3d at 368; POB 28-29.

[61] *Dieckman*, 155 A.3d at 368; POB 27.

[62] POB 27; *see* WPAB at 22.

[63] WPAB 23.

Like the erroneous decision below, the WP Investors focus "too narrowly on whether the express [amendment] provision displaced the implied covenant."[64]

C. Plaintiffs State an Implied Covenant Claim against the Company

The Company adopts the WP Investors' implied covenant arguments and makes three separate, unavailing contentions.[65]

First, the Company argues Plaintiffs have identified only Warburg's conduct, but no Company act undermining the tag-along rights. Yet, Company agents negotiated and signed the LOI and the Merger agreement,[66] both of which required waiving the extant tag-along right. Company agents prepared, signed, and disseminated the misleading and otherwise coercive Information Statement.[67] Company agents determined to impose the Transmittal Letter's arbitrary terms on Class B unitholders like Plaintiffs, including the broad waivers and releases.[68] Company agents, alongside VillageMD's CEO, solicited the Waivers.[69]

The Company asserts Plaintiffs plead no facts about their agents, but all companies necessarily act through human agents and the Complaint incorporates

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[64] *Dieckman*, 155 A.3d at 367; POB 28, 34-35.

[65] CAB 17-21.

[66] A0283-84, A0736.

[67] A0266-69.

[68] A0974, A1047, A1076.

[69] A0269.

documents showing conduct by Company officers.[70] For the bulk of the facts alleged, the Complaint explicitly relies on and thus incorporates, among others, the Information Statement, the LLC Agreement, the Transmittal Letter, and the Amendment. The Complaint's source documents are integral to Plaintiffs' claims.

The Company cannot disclaim its agents' conduct. Delaware holds a company liable for its officers' acts and knowledge, even when an officer acts fraudulently or causes injury through illegal conduct.[71] Certain "WP Persons" might be Company officers owing unitholders no fiduciary duties under the LLC Agreement, but *all* Company officers are still Company agents who bind the Company. Warburg effectively controlled the Company and had exit-event discretion,[72] but that does not erase the Company's independent existence or its culpability for breaching the implied covenant through agents' conduct.

Second, the Company contends it had no incentive to hurt Class B unitholders and was indifferent to Merger consideration allocation.[73] That perspective, though,

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[70] *E.g.*, *Fortis Advisors LLC v. Allergan W.C. Hldg. Inc.*, 2019 WL 5588876, at *3 (Del. Ch. Oct. 30, 2019) (documents integral to the complaint are within the motion to dismiss record); *In re Gardner Denver, Inc. S'holders Litig.*, 2014 WL 715705, at *3 (Del. Ch. Feb. 21, 2014) ("a document is integral to the claim if it is the 'source for the ... facts as pled in the complaint.'").

[71] *Stewart v. Wilm. Tr. SP Servs., Inc.*, 112 A.3d 271, 303 (Del. Ch. 2015), *aff'd*, 126 A.3d 1115 (Del. 2015); *see* A1222-23.

[72] POB 11, 40; CAB 18-19.

[73] CAB 4, 21.

requires impermissible factual inferences favoring the Company. Because Warburg controlled the Company, the Company had every incentive to do as Warburg directed and no ability to do otherwise.

Third, the Company, arguing Plaintiffs have not shown the Company's "bad faith,"[74] erroneously conflates ill-willed "bad-faith" with the conceptually distinct absence of contractual "good faith."[75] The argument misconstrues a contract's inherent "good faith" duty.

The judicial and academic debate around contractual good faith is not whether a plaintiff must show "bad faith" to plead an implied covenant claim.[76] The debate is whether contractual good faith "goes beyond trying to regain bargained-away assets of the contract, and either imposes a standard of business ethics or at least restricts a party's freedom of action beyond the literal terms of the contract."[77]

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[74] CAB 19-21.

[75] *eCOMMERCE Indus., Inc. v. MWA Intel., Inc*., 2013 WL 5621678, at *33 (Del. Ch. Oct. 4, 2013).

[76] Consistent with this Court's precedent, the concept of "bad-faith" breaches of contract "is at best moribund, outside the insurance law area." *Corbin*, §26.10. *See*, *e.g., Tackett v. State Farm Fire and Cas. Ins. Co.*, 653 A.2d 254, 264-66 (Del. 1985) (discussing bad-faith denial-of-coverage claims).

[77] *Corbin*, §26.8 (section entitled "Good Faith and Bad Faith").

There is no debate whatsoever that a party breaches the contractual good-faith obligation when "trying to regain what [that] party bargained away."[78] Plaintiffs' claim of the Contracting Defendants' lack of good faith relies on no normative assessments.[79] The Contracting Defendants bargained away the tag-along right in the LLC Agreement, then later required the tag-along waiver as an inducement to complete performance. Across common law jurisdictions, that conduct violates the contractual duty of good faith and, thus, the implied covenant of good faith and fair dealing.[80]

In *eCOMMERCE*, which the Company cites, the Court explained that contractual "'[g]ood faith' does not envision loyalty to the contractual counterparty, but rather faithfulness to the scope, purpose, and terms of the parties' contract."[81] The good-faith duty requires faithfulness to the agreement-in-fact.[82] Thus, the

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[78] *Id. Cf., Aspen Advisors LLC v. United Artists Theatre Co.*, 843 A.2d 697, 707 (Del Ch. 2004), *aff'd*, 861 A.2d 1251 (Del. 2004) (parties cannot obtain, through the implied covenant, contractual terms they failed to bargain for originally).

[79] *See Mkt. St. Assocs. v. Frey*, 941 F.2d 400, 595 (7th Cir. 1991) ("It would be quixotic as well as presumptuous for judges to undertake through contract law to raise the ethical standards of the nation's business people.").

[80] *See* POB at 41-42.

[81] *eCOMMERCE*, 2013 WL 5621678, at *33 (internal quotations omitted) (quoting *Gerber v Enter. Prods. Hldgs., LLC*, 67 A.3d 400, 418–19 (Del. 2013)).

[82] *See Market Street Associates*, 941 F.2d at 595 (the implied covenant's purpose "is to give the parties what they would have stipulated for expressly if at the time of

Contracting Defendants' "[un]faithfulness to the scope, purpose, and terms of the" LLC Agreement shows their absence of contractual "good faith."[83]

An implied covenant breach does not require showing a defendant's uncontextualized "bad faith." Parties violate the implied covenant when acting "arbitrarily or unreasonably, thereby frustrating the fruits of the bargain that the asserting party reasonably expected."[84] Stated differently, "bad faith" in the context of the implied covenant actually means "without contractual good faith."[85]

The Superior Court's decision in *New Wood Residential LLC v. Baldwin*, which the Company relies on, demonstrates the point.[86] There, the court defined "bad faith" merely as conduct "driven by an improper purpose."[87] Evidence of a non-party's potential bad faith in that sense had been shown after discovery, but none was shown from the contractual counterparty against whom the implied covenant

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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.").

[83] *See eCOMMERCE*, 2013 WL 5621678 at *36-*37.

[84] *Id.* at *33 (quoting *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010)).

[85] *See Corbin*, §26.8 (discussing "the long line of bad faith breach of contract cases from Montana" holding an implied covenant breach occurs "[w]here one party acts arbitrarily, capriciously or unreasonably, that conduct exceeds the justifiable expectations of the second party.") (citing *Nicholson v. United Pac. Ins. Co.*, 710 P.2d 1342 (Mont. 1985)).

[86] 2023 WL 4883924 (Del. Super. July 31, 2023), *aff'd* 315 A.2d 445 (Del. 2024).

[87] *Id.* at *8.

was asserted, meriting summary judgment.[88] And the court's ruling that specific contractual terms precluded judicial review of the contractual "good faith" determination is a poor analogue for the facts here.[89] Unlike in *New Wood*, nothing in the contract here eliminates judicial review of unitholder "consent" to the Waivers.

Regardless, Plaintiffs plead Defendants' improper threats and improper motive to eliminate the tag-along right for the Merger, to get the WP Investors full liquidity otherwise unavailable to them in this exit event under the LLC Agreement's negotiated risk allocation.

The Company also cites *eCOMMERCE*, but that case does not help its argument. There, the court used "bad faith" when discussing contractual good faith, but its implied covenant determination hinged upon "identifying the fruits of the bargain [the plaintiff] reasonably expected at the time it negotiated the [contract]."[90] In its discussion of "bad faith," the court concluded, "this evidence demonstrates that [defendants] participated in [a third party's] plan for the future of the [business the contract governed] and, in doing so, deliberately undermined the scope, purpose, and

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[88] *Id.* at *8.

[89] *Id.* at *3-*6, *11.

[90] *eCOMMERCE*, at *34.

terms of the [contract]."[91] "Thus," Vice Chancellor Parsons held, the defendants were liable "for breaching the implied covenant of good faith and fair dealing."[92] The defendants' intent to undermine the contract, evident through their conduct, supported what the court called contractual "bad faith."[93]

The same result is warranted here. The Contracting Defendants, including the Company, participated in Warburg's and Walgreen's plans for the Company's future and, in doing so, deliberately undermined the tag-along right. Under the reasoning in *eCOMMERCE*, that states an implied covenant claim.[94]

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[91] *Id.* at *37.

[92] *Id.*

[93] *See id.* at *36-*37; *see also Corbin*, §26.8 ("Good Faith and Bad Faith").

[94] As discussed below, the court also found third parties liable for tortious interference. *eCOMMERCE*, 2013 WL 5621678, at *37-*39.

II. THE TRIAL COURT ERRONEOUSLY DISMISSED PLAINTIFFS' TORTIOUS INTERFERENCE CLAIMS

Warburg, Walgreens, and VillageMD's arguments against their tortious interference liability ignore the thrust of Plaintiffs' allegations: these Defendants devised and executed a plan for the Company's future requiring changing the LLC Agreement's negotiated risk allocation for exit events, inducing the Contracting Defendants' contractual breach. These Defendants all maintain both no breach occurred and, otherwise, none of them acted "without justification." While some complain Plaintiffs raise new arguments,[95] all were lodged below.[96]

Warburg, Walgreens, and VillageMD knew about the LLC Agreement which, as shown, was breached. They negotiated the LOI and Merger agreement to avoid and eliminate the tag-along right. This limited the cash Walgreens needed to pay for VillageMD's purchase,[97] allowed Walgreens to "maintain" post-closing control,[98] and enabled the WP Investors' full-liquidity exit, all at Class B members' expense. None of this happened accidentally. Their conduct toward executing their plan for the Company's future lacked justification and demonstrates intent.

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[95] WalAB 14-15; CAB 29.

[96] A1229-33.

[97] Walgreens funded VillageMD's acquisition through ancillary agreements. POB 17.

[98] A0277-78; *see* A0321, A0334.

eCOMMERCE efficiently disposes of these Defendants' arguments, including arguments their actions lacked intent or had justification.[99] Vice Chancellor Parsons held third parties who conceived and executed a future plan for a business governed by a contract one of their controlled entities signed, requiring undermining a counterparty's vested contract rights, tortiously interfered with that contract and acted without justification.[100] The third parties connived a plan for that business's future they knew would "damage" the plaintiff,[101] requiring undermining the plaintiff's vested rights, including against non-competition.[102] The plan for the business's future did not necessarily benefit affiliate contracting defendants, "particularly when considered in light of the potential for liability from their breach of contract," showing the third parties acted without justification.[103] The court found another third party with a tertiary role not liable for tortious interference because it had not "acted with any intent" to cause the contractual breach.[104]

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[99] VillageMD's Answering Brief cites *eCOMMERCE*, but only unpersuasively (for the Company) against Count I. CAB 20. Neither Warburg nor Walgreens acknowledges their co-defendants' authority, and VillageMD ignores its applicability on Counts II and III.

[100] *eCOMMERCE*, 2013 WL 5621678, at *37-*39.

[101] *Id.* at *39.

[102] *Id.* at *38.

[103] *Id*.

[104] *Id.* at *39.

Here, Warburg, Walgreens, and VillageMD all deliberately conceived and executed a plan for the Company's future that minimized Walgreens'/VillageMD's purchase-cash outlay while maintaining Walgreens' post-Merger control, enabled the WP Investors' exit with full liquidity, and required changing the Class B unitholders' vested tag-along right. The LOI Walgreens/VillageMD originally proposed, the final LOI, and the Merger agreement they negotiated with the Company and Warburg's WP Persons all required the tag-along waiver. Through the Information Statement, VillageMD and Company agents together solicited the Waivers with false representations and required the arbitrary Transmittal Letter.[105] Warburg conducted misleading information sessions. None had a tertiary role. Objections Plaintiffs failed to "adequately plead" certain of the tort's elements[106] ignore that plaintiffs need not plead legal theories.[107]

The affiliate privilege saves no one. The Company was effectively Warburg's subsidiary, and the Merger and related transactions were unrelated to the Company's profitmaking activities.[108] VillageMD was not an LLC Agreement party, so

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[105] A0266-69.

[106] *See*, *e.g.*, WalAB at 9-10.

[107] *In re McDonalds Corp. S'holder Deriv. Litig.*, 289 A.3d 343, 375-76 (Del. Ch. 2023).

[108] *See eCOMMERCE*, 2013 WL 5621678, at *38.

Walgreens gets no affiliate privilege.[109] Related notions that VillageMD acted independently of Walgreens' control[110] require unreasonable factual inferences favoring Walgreens.[111]

Warburg is wrong the affiliate privilege exonerates it for the WP Investors' contractual breaches.[112] The WP Investors are investment-vehicle products Warburg sold to customers, not Warburg subsidiaries. Warburg exercises day-to-day control for management purposes,[113] but Warburg does not own its funds. It earns fees through managing the investment products it sells.[114] Relationships between products and purveyors are not among the "recognized relationships" meriting the limited privilege.[115]

That Warburg's customers would eventually demand liquidity from the products Warburg sold them was foreseeable when the LLC Agreement was adopted, but the WP Investors negotiated away the tag-along right to Class B

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[109] *See eCOMMERCE*, 2013 WL 5621678, at *37.

[110] WalAB 2, 11-16, 28-29.

[111] Ex. C at 44.

[112] WPAB 41.

[113] A0028-29.

[114] *See* A0028-29.

[115] *See eCOMMERCE*, 2013 WL 5621678, at *37 (only parent-subsidiary relationships qualify).

unitholders. Foreseeable but unhedged customer desire for liquidity did not license Warburg to pursue that end through whatever means. Through its plan for the Company's future requiring the Waivers for the LLC Agreement's exit event, Warburg tortiously interfered with the LLC Agreement.

III. THE TRIAL COURT ERRONEOUSLY DISMISSED THE UNJUST ENRICHMENT CLAIM

Warburg's argument against Count IV, like the trial court's decision, relies on the mistaken proposition that Plaintiffs seek as unjust enrichment the excess cash Merger consideration Warburg obtained for WP Investors. Plaintiffs seek that excess cash Merger consideration through Counts I and II. Count IV does not replicate those claims.

Rather, Count IV seeks restitution through disgorgement of fees Warburg earned by returning customers' investment capital after the Merger closed. Warburg earns fees for managing products it sells, including fees when investment products generate liquid returns for customers. Warburg's motive for seeking its products' full-liquidity exit in the Merger was to obtain liquid returns for Warburg's customers. Fees Warburg earned by doing so result from Warburg's wrongful, unjustified conduct committed to achieve that end. Justice demands disgorgement of fees Warburg earned by returning fully liquid customer investment returns wrung from Class B unitholders in the Merger. "Plaintiffs may be able to show that the profits [Warburg is] alleged to have obtained are without justification."[116]

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

CONCLUSION

This Court should fully reverse the trial court's dismissal of Plaintiffs' Complaint and remand for further proceedings.

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CERTIFICATE OF SERVICE

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