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Case Number 311,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

NATHAN BRICK	)	No. 311,2020
	)	
Plaintiff Below-Appellant,	)	
	)	Court Below: Court of Chancery of the
v.	)	State of Delaware
	)	C.A. No.: 2020-0254-KSJM
THE RETROFIT SOURCES, LLC, TRS HOLDCO, LLC and TRS MANAGEMENT, LLC.,	)	
	)	
Defendants Below-Appellees	)	

PLAINTIFF BELOW-APPELLANT
NATHAN BRICK'S CORRECTED OPENING BRIEF

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Dated: November 4, 2020 (Corrected November 19, 2020)

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NATURE OF PROCEEDINGS

Plaintiff-below Appellant, Nathan Brick, ("Brick"), filed this action on April 4, 2020 before the Delaware Court of Chancery seeking advancement and indemnification as the Chief Operating Officer of The Retrofit Source, LLC ("Opco") and as a named Board member of TRS Holdco, LLC ("Holdco") under the terms of the Second Amended Restated Limited Liability Company Agreement of TRS Holdco, LLC, dated March 29, 2019 ("Holdco LLC Agreement") (A239 – A308) and the LLC agreement of The Retrofit Source, LLC, dated March 23, 2018 ("Opco, LLC Agreement") (A226 – A237).

On May 14, 2020, Brick filed a Motion for Summary Judgment and on June 22, 2020 Appellees filed a Cross-Motion for Summary Judgment. On August 18, 2020, the court awarded Summary Judgment for Appellees. (Exh. A at pp. 1-18; A19 – A36). Brick submits this Appeal to request this Court reverse the Order of the Court of Chancery and grant Brick summary judgment.

Brick's first claim on appeal concerns a claim made by Opco that Brick received certain payments in 2019 totaling more than $400,000.00 (the "Earnings Payments") based on incorrect earnings (the "$400,000.00 Claim"). Brick's second claim on appeal concerns Opco's and Holdco's filing of an initial disclosure letter followed by a Prior Disclosure with the United States Customs Border Protection Agency ("Customs") pursuant to 19 *U.S.C.* §1592 and the Customs Regulations at

19 C.F.R. §162.74 *et seq.* wherein they admitted violating the U.S. Customs laws ("Prior Disclosure"). In doing so, Holdco/Opco blamed those violations on Brick.

Brick asserted that he was entitled to advancement/indemnification in both claims "by reason of the fact" that they arise out of his conduct as an Officer of Opco and/or as a Board Member of Holdco. In the $400,000.00 Claim, Brick asserts he was paid bonuses because of his performance as an Officer of Opco. In the Customs proceedings, Brick must defend his conduct as an Officer and as a Board member against civil and criminal liabilities. As to whether Brick will be held personally liable as an Officer or Board member for the conduct Holdco/Opco confessed in the Prior Disclosure proceedings or held to account directly and/or for aiding and abetting under criminal statutes as an Officer or Board member is a matter that Customs and/or a federal court will need to decide. 19 U.S.C. §1592 makes clear that the criminal aspect of U.S. Customs laws reaches both members of Holdco's Board and Officers of Opco stating:

> [no] person, by fraud, gross negligence, or negligence (A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of – (i) any document or electronically transmitted data or information....or act which is material and false or (ii) any omission which is material. [Emphasis Added][1]

[1] 19 U.S.C. §1592 (a)(1)(A)(i) and (ii).

Holdco/Opco has already confessed to violations of the law in their Prior Disclosure, what remains for Customs is to determine which of Holdco's Board and/or its Officers it will impose fines and penalties upon. Customs decides whether to refer the matter for criminal prosecution of Holdco Board members and/or Officers as "person(s)" under the statute.[2]

Under Delaware case law there is "a nexus and causal connection" between Officer and Board Member conduct and the Customs proceedings and potential criminal proceedings.[3] The conduct of all Board members and Officers will be investigated by Customs "by reason of the fact" that they hold those positions and therefore are "persons" under the statute and enforcement is within the exclusive jurisdiction of Customs and the federal courts.

The court erred in prematurely deciding Brick's conduct only implicates him as an Officer for purposes of advancement and indemnification under state law. (A18). Brick is a named Board member and attended a board meeting in this capacity where the Customs issues at the core of the Prior Disclosure were discussed. (Exh. A at ¶¶1, 7; A19 and A23).

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[2] U.S. Customs and Border Protection (Aug. 2017), *What Every Member of the Trade Should Know: Prior Disclosure* ("If you submit a prior disclosure containing information which gives Customs reason to believe that a criminal violation has occurred, Customs and ICE/HIS are legally obligated to refer that information to the appropriate U.S. Attorneys office.") [Emphasis added] (Frequently Asked Questions, pp. 13-14).

[3] *Homestore, Inc. v. Tafeen* 888 A.2d 204, 214 (Del. 2005).

Moreover, Brick was a party, as a Board member and officer to a June 15, 2018 email exchange where a majority of the Board ratified the Custom's Policy to skirt U.S. Customs laws to avoid paying proper tariffs. (A310 – A312). The determination as to whether the email exchange and the December Board meeting "implicate" Brick as a Board member and/or as an officer is for Customs and the federal courts to decide. After Customs or the federal courts render a decision and decide the merits of that question further action by the Court of Chancery will be appropriate – until then, action by the Court of Chancery is premature.

In addition, the Court of Chancery based its decision on inadmissible evidence and without appropriate supporting documentary evidence, contrary to Ct. Ch. R. 56(e), and D.R.E 1002 ("Best Evidence Rule"). Appellees did not offer their Prior Disclosure into evidence and only characterized the Prior Disclosure's contents. Since the court had no evidence of the contents of the Prior Disclosure, *a fortiori*, holding the alleged misconduct only implicates Brick as an Officer and not as a Board member in the Customs proceeding cannot be sustained because the Order is based on hearsay, contrary to Rule 56(e).

In the Opening Brief, Reply Brief and at oral argument Brick argued that he is entitled to not only advancement but, indemnification because he had "Good Faith Reliance" (A139 – A169 and A182 – A210), as that term is uniquely defined in the LLC agreement at Section 11.1(b) where it states:

> ....any action taken or omitted to be taken by the Covered Person based on such reliance [good faith reliance] shall conclusively be presumed not to constitute Excluded Misconduct by such Covered Person. [Emphasis Added] (A288).

Based on the evidence in the record, Brick proved he had Good Faith Reliance such that Section 11.1(b)'s irrebuttable presumption against any claim that he engaged in Excluded Misconduct is answered. Armed with Good Faith Reliance, the Holdco Agreement guarantees indemnification.

Brick also argued that since Good Faith Reliance guarantees indemnification, there is no need for a Board member or Officer to post any undertaking to secure repayment. In error, the court also failed to rule on this issue.

The court also failed to apply Sections 11.1 and 11.2 of the Holdco LLC Agreement and abide by the requirement that a court must "read a contract as a whole" and "give each term and condition effect".[4] These operative provisions unambiguously spell out the intent of Holdco/Opco to "fully protect" and "exculpate" Board members and Officers from all liabilities arising from any claim where Good Faith Reliance exists. Instead, the court below only focused on the mechanical provisions of the Holdco LLC Agreement at Section 11.3 and not the manner in which Sections 11.1 and 11.2 are to be applied to allow Section 11.3 to have operative effect. The court incorrectly concluded that the Holdco/Opco Boards

[4] *Kuhn Contr., Inc. v. Diamond State Port Corp.* 990 A.2d 393, 396-397 (Del. 2010).

could exercise discretion to deny indemnification under Section 11.3(g) ignoring Section 11.1(b) and Brick's Good Faith Reliance.

Brick also argued in his Reply Brief that Appellees are equitably estopped from asserting they had the right to exercise their discretion to deny him advancement/indemnification under Section 11.3(g) of the Second Amended Holdco LLC Agreement. (A198 – A201). Appellees failed to offer the Joint Resolution denying Brick indemnification, until June 22, 2020, after Brick had filed his lawsuit and Opening Brief. Moreover, the Joint Resolution does not reference Section 11.3(g) or contain the word "discretion". Instead the Joint Resolution only references Brick's alleged Excluded Misconduct. The court never addressed Brick's equitable estoppel arguments.

SUMMARY OF ARGUMENT

1. Contract: The court erred by not considering the contract "as a whole" by failing to consider the application of Sections 11.1 and 11.2. The intent of the parties announced in Section 11.1(a) is to exculpate and indemnify Board members and Officers from "....any loss, costs, expense, liability, damage or claim" by reason of any action they take, and to provide "full protection", "....to the maximum extent permitted by law...". (A288). To assure that protection, Section 11.1(b), permits an Officer/Board member to rely on any document or statement or opinion of any Officer or other Representative to justify their conduct so that, by contract, it ".....shall conclusively be presumed [the conduct] not to constitute Excluded Misconduct by such Covered Person...." *Id.*

The court erred by not giving "effect" to the standards for interpretation of Covered Persons conduct explained in Section 11.2(a) and (b). It states no Covered Person has any fiduciary obligations toward Holdco/Opco and that those LLC's and their Members waive imposing any fiduciary duties. *Id.* Section 11.2(a) provides that whenever a Covered Person makes a decision he "...shall be entitled to consider only such interests and factors as such Covered Person desires, including its own interests, and shall have no duty or obligation to give any consideration to any interests of or factors effecting the Company or any other Person." Whenever a Covered Person makes a decision, their "good faith" is to be judged "...under such

express standard and shall be not subject to any other or different standard imposed by this Agreement or any other applicable law." *Id.*

2. Evidence/Contract: The court erred in not ruling on Brick's evidence of Good Faith Reliance defined in Sections 11.1 and 11.2. Brick's evidence of Good Faith Reliance consisted of Opco's President Matthew Kossoff's ("Kosoff") directives to "skirt" Customs laws in order to evade paying proper tariffs and the Board's June 15, 2018 ratification of that Policy. In addition, Brick presented evidence of three audits by CPA's hired by Holdco which included Brick providing financial records of imports and tariff's paid. Those auditors did not communicate any concerns of compliance with Customs Laws. Because of Brick's Good Faith Reliance he is entitled to indemnification for his defense in the Customs proceedings.

3. Contract: The court erred in upholding Holdco/Opco's exercise of discretion under Section 11.3(g) to deny Brick indemnification because of his alleged Excluded Misconduct. Because Brick had Good Faith Reliance, Section 11.1(b) of the Agreement imposes an irreputable presumption that "conclusively" presumes that Brick did not engage in Excluded Misconduct. Thus, as a matter of contract the very basis for the Joint Resolution that Brick engaged in Excluded Misconduct cannot stand.

4. Contract/Ratification: The court erred in failing to rule on Brick's argument that adherence to the Customs Policy was ratified by Matthew Kossoff, and a majority of Board members on June 15, 2018. At Oral Argument, after reading a June 15, 2018 e-mail exchange ("The E-mail Exchange") into the record, Brick argued that the Customs Policies of Holdco/Opco to violate customs laws were "systemic". (A310 – A311). This ratification of the Customs Policies by a Board majority renders Holdco/Opco's Joint Resolution without force or effect. The Board cannot deny Brick his contractual right to indemnification for the very conduct they ordered him to engage.

Finally, Brick argued and the court failed to rule upon the argument that Holdco/Opco retaining of Kossoff as President and as Board member constitutes ratification of the Custom's Policies.

5. Contract: The court erred by failing to rule on Brick's argument that, because Good Faith Reliance guarantees indemnification, he need not post any undertaking/security to repay monies advanced.

6. Equitable Estoppel: The court erred in not ruling on Brick's equitable estoppel argument to wit: Holdco/Opco are equitably estopped from exercising discretion under Section 11.3(g) to deny Brick indemnification. Once Brick made his demand March 27, 2020, it was incumbent of Holdco/Opco's Board to exercise discretion under Section 11.3(g), immediately. Instead, the Board met on April 2,

2020, and rejected Brick's demand based on his alleged Excluded Misconduct. Brick argued that he became vested in his right to advancement/indemnification on April 4, 2020 when he filed his Verified Complaint. Holdco/Opco met again on April 16, 2020 and passed a Joint Resolution (A314 – A316). Although alluded to in their April 17, 2020 Second Additional Defense in their Answer, Holdco/Opco waited until their June 22, 2020 brief to produce the Joint Resolution in opposition to Brick's Motion for Summary Judgment and to support their own Cross-Motion. Brick argued that Holdco/Opco are equitable estopped from their belated alleged exercise of discretion. Appellees introduced their Joint Resolution after they put Brick to the expense of filing a lawsuit and the expense of proceeding with a Motion for Summary Judgment.[5]

7. Evidence: The court erred because its Order is based on inadmissible evidence. Appellee's assert that their Prior Disclosure states that Brick was solely responsible for Holdco/Opco's Custom Laws violations. Yet, this extraordinarily important document is not in evidence. Nevertheless, the court relied on Holdco/Opco's characterizations of the Prior Disclosure's content, contrary to what

[5] Since the Joint Resolution does not mention Section 11.3(g) or the word "discretion" not only does that negate Appellee's argument, but it makes the court Order plain error for that Order is based on Appellee's right to exercise discretion under Section 11.3(g), when that provision is not identified in the Joint Resolution.

is required by The Best Evidence Rule and Ct. Ch. R. 56(e). The Court simply reported:

> The law firm also conducted an audit of Opco's customs policies and summarized its findings in a report to the U.S. Customs and Border Protection ("CBP") on May 4, 2020. (Exh. A at ¶6; A22).

The "report" that the court is referring to is the statutorily required Prior Disclosure that commences the Customs proceedings. Without the Prior Disclosure there is no admissible evidence in the record to substantiate any of the assertions by Holdco/Opco as to its content. Holdco/Opco claim the Prior Disclosure holds Brick responsible for a double invoicing scheme – a commercial invoice at one price level and an invoice to Customs at a lower price so a lower/improper tariff can be paid. Without a single commercial invoice or custom's invoice or the Prior Disclosure in evidence Appellees claims are hearsay.

In the absence of any admissible evidence under Rule 56(e) or The Best Evidence Rule to validate any of Holdco/Opco's assertions that Brick masterminded and violated U.S. Customs laws, the court erred in reaching its conclusion that:

> Defendants submitted detailed evidence that Brick's action giving rise to his demand for advancement implicate solely his capacity as Chief Operating Officer. (Exh. A at ¶29, A34).

The court does not identify any of the "detailed evidence" upon which it relies. This record, without any documentary evidence and only hearsay statements about the

Prior Disclosure cannot support the Court of Chancery's Order. Brick submits that this Court's, *de novo* review need only take judicial notice of the ongoing Customs proceedings, wherein by statute confessions of wrong doing are made in the Prior Disclosure, implicating all "persons" involved – especially Board members and Officers – with civil and criminal liability.

8. Evidence: The Court of Chancery failed to rule on Brick's claim for advancement on the $400,000.00 Claim by Holdco/Opco against him.

STATEMENT OF FACTS

A. Brick's History and Involvement with the Retrofit Source, LLC and Holdco/Opco

Opco imports and sells high-end head lamps and other lighting products for automobiles. Matthew Kossoff was the founder and always the sole owner of The Retrofit Source, LLC. ("Retrofit"). Brick was a high school friend of Kossoff. In August of 2007, Kossoff entered into an arrangement with Brick to perform various tasks for Kossoff's business. In January of 2011 Kossoff hired Brick as an employee. In late 2013, Kossoff made Brick Retrofit's COO.

On or before November of 2017, Kossoff decided to find a buyer for Retrofit and was introduced to Kian Capital ("Kian"). Kian engaged in due diligence activities, including an audit of Retrofit's financial records and reporting and documents showing the tariffs Retrofit paid.

As owner of Retrofit and later as an Owner and President of Holdco/Opco, Kossoff implemented and was responsible for the policies related to the U.S. Customs laws ("Customs Policies"). Brick followed those Policies both before and after Retrofit was acquired by Holdco/Opco. Holdco/Opco adopted, maintained and followed those same Customs Policies to "skirt" and evade the proper payment of proper tariffs.

While Kossoff and the Kian Board Representatives ("Kian Reps") seek to portray non-compliance with Customs Laws as entirely Brick's doing, the sworn

testimony and documentary evidence does not support that position. First in his capacity as sole owner of Retrofit and as President/Board member and as 25% owner of Holdco/Opco, Kossoff admitted in his unsworn declaration that:

> At some point I did become aware and knew that TRS was discussing with its Chinese suppliers declaring the value of certain imported goods (for Customs purposes) at less than the commercial value of those goods. And I was involved in a number of e-mail exchanges with Chinese suppliers in which the subject of undervaluation was discussed. But I was not the TRS employee primarily responsible for these valuation decisions and did not adopt a general practice, policy or procedure that the company engage in such acts." (emphasis added). (A325)

Despite Kossoff's attempt to distance himself from responsibility, his unsworn declaration is an admission of his knowledge of these Customs Policies. At all times Kossoff was President of Retrofit and Opco and a Board member of Holdco and with those positions comes responsibilities, including complying with U.S. Customs laws.

On June 15, 2018, within three months after the March 2018 acquisition of Retrofit by Holdco/Opco, the majority of Holdco/Opco Board ratified and implemented the continuation of Kossoff's Customs Policy. In order to pay less duty and increase their profits, the Holdco/Opco Board began its process of determining what evasive activity they would have to engage in order to escape the impact of new tariffs. At oral argument, Brick asserted that these Customs Policies

were systemic and as proof, read into the record The E-mail Exchange that documents the Custom's Policy. (A53 – A55).

In The E-mail Exchange (A310-A311), Board member Zimmerman inquires whether the Trump Tariffs will impact the tariff to be paid on a particular diode. In response, Kossoff reiterates the Customs Policy, stating they will simply reclassify the diode in order to "skirt" customs laws and the proper payment of tariffs. Kossoff adds that Brick knows how to reclassify imports and requests his input. In Brick's responses to Kossoff, he copies three Board members – Zimmerman, Buschmann and Kossoff, none of whom object to this evasion of Customs law and thereby ratifying it.

Utilizing The E-mail Exchange, Customs may impose fines and penalties or refer the matter for criminal prosecution to the U.S. Attorney holding these Board members accountable for the skirting schemes.

B. Ownership and Control of Opco and Management by Holdco and its Board Members

The ownership of Holdco and its wholly owned subsidiary Opco are seventy-five percent (75%) owned by Kian Capital ("Kian") and twenty-five percent (25%) by Kossoff. Brick had no ownership in either Holdco or Opco and stood nothing to gain by Kossoff/Holdco's Custom Policies to "skirt" those laws. All of those ill begotten profits were for the benefit of Kossoff and Kian-not Brick.

Moreover, these Board members actually exercised the same control over the day to day activities of Opco as one finds in the hands of Officers. Section 4.1 of the Holdco, LLC agreement states:

> .....(i) (the) Board shall conduct, direct, and exercise full control over all activities of the Company [Opco] (ii) all management powers over the business and affairs of the company shall be vested in the Board and (iii) the Board shall have the power to bind or to take any action on behalf of the Company, or to exercise in its sole discretion any rights and powers (including the rights and powers to take certain actions, give or withhold certain consents or approvals, or make certain determinations, opinions, judgments or other decisions) granted to the Company under this Agreement, or any other agreement, instrument or other document....or by virtue of its holding the equity interest of any Subsidiary thereof. The Board shall constitute the "manager" of the Company within the meaning of the Act. (A262).

To make this absolute and unequivocal dominance of Holdco over every aspect of every activity of Opco, the Opco agreement states:

> Holdings [Holdco] is now the sole member of the Company, [Opco] and the parties hereto acknowledge that Holdings owns 100 percent of the membership interests in the Company and has complete control of the affairs of the Company. [Emphasis added] (A226).

Section 4.3(b) names the six members of the Board. Cravey, Buschmann and Zimmerman (all partners in Kian) are the three Kian Reps. Kossoff and Brick are named as Board members Section 4.3(b)(iii) and (v) (A264). Section 4.5(b) (i) states "....the Chairman of the Board, who shall be the Kian Representatives designated by Kian as such, shall be entitled to three votes on all matters for all purposes". (A265). Subsection (ii) provides... "the Kian Representatives present at any

meeting of the Board shall have five votes between them regardless of how many are actually present at the meeting....". *Id.* With five out of the eight votes, Kian controlled Holdco/Opco. The Agreement gave Kian "complete control".

Practically speaking, Section 4.1 makes Brick a non-owner figure head on the Board that acted at the direction of the owners - the three Kian Reps and Kossoff.

C. Appellees File a Prior Disclosure Admitting They Violated U.S. Customs Laws

The definition of a Prior Disclosure in 19 CFR §162.74(a)(1) is - "a prior disclosure is made if the person concerned discloses the circumstances of a violation (as defined in paragraph (b) of this section of 19 U.S.C §1592 or 19 U.S.C. §1593a..." (Emphasis added.) The Regulations define the phrase, "discloses the circumstances of a violation", as:

> The term "discloses the circumstances of a violation" means the act of providing to Customs a statement orally or in writing that: (1) Identifies the class or kind of merchandise involved in the violation; (2) Identifies the importation or drawback claim included in the disclosure ... (3) Specifies the material false statements, omissions or acts including an explanation as to how and when they occurred; and (4) Sets forth to the best of the disclosing party's knowledge, the true and accurate information or data that should have been provided... (Emphasis Added.)[6]

The Regulation mandates that the disclosing party must specify "the material false statements" and all of the "omissions or acts" and "how and when they occurred". To

[6] 19 CFR §162.74(a)(3).

meet that requirement, the Prior Disclosure must include The E-mail Exchange because it describes "how and when" the Board directive to violate the law "occurred". This admitted misconduct subjects those "persons", in The E-mail Exchange, *i.e.*, Board members, to civil or criminal liabilities arise under 19 U.S.C. §1592 and related federal criminal laws.

D. The Agreement's Advancement and Indemnification Obligations

1. The Operative Clauses that Define Exculpatory Conduct

The operative provisions of the indemnification language in the Holdco LLC Agreement are set forth in Article XI. (A288 – A292). Those provisions reveal that the Holdco LLC Agreement erects a shield from any personal liability for conduct by any Board Member or Officer such that under no circumstances could the Kian Reps or Brick lose their entitlement to indemnification.

In Brick's Opening Brief and Reply Brief he argued that he had Good Faith Reliance within the meaning of Section 11.1(b) of the Holdco LLC Agreement and that his decisions on the actions he took as a Board member and COO are protected based on the behavioral and contract interpretation standards of Section 11.2.

On the other hand, the court solely focused on Section 11.3 and particularly Section 11.3(g) and never considered Sections 11.1 or 11.2 or Brick's arguments.

Section 11.1(a) states: Exculpation of Covered Persons;

> (a) To the maximum extent permitted by law, no Covered Person shall be liable to the Company or any other Covered Person for any loss, cost,

> expense, liability, damage or claim incurred by any such Person by reason of any action taken or omitted to be taken by such Covered Person that in any way relates to the Company, or its business and affairs, so long as such action or omission by such Covered Person does not constitute Excluded Misconduct. (Emphasis Added.) (A288).

This Section intends to exculpate and indemnify any Covered Person unless they have engaged in Excluded Misconduct.

Section 11.1(b) states that Covered Persons are "fully protected" from any liability when they have Good Faith Reliance stating:

> Good Faith Reliance. A Covered Person shall be fully protected in relying in good faith upon the records of the Company and upon such information, opinions, reports or statements....of the following Persons or groups, and any action taken or omitted to be taken by the Covered Person based on such reliance shall conclusively be presumed not to constitute Excluded Misconduct by such Covered Person: (Emphasis Added.) (A288).

In clear and unambiguous language, Section 11.1(b) shields a Covered Person from liability whenever he relies in good faith on any business record or any form of "... information opinions, reports or statements..." from any Representative, officer, employees, attorney, independent accountant or other expert or professional. Reliance on any of foregoing persons or documents contractually creates an irrebuttable presumption that such conduct "shall conclusively be presumed not to constitute Excluded Misconduct by such Covered Person ...". *Id.*

Bolstering this broadest of protections from liability, this exculpation is cemented by the elimination of any fiduciary duty that may exist at law. Section 11.2(a) states:

> This Agreement is not intended to, and does not, create or impose any fiduciary duty on any Covered Person. Furthermore, each of the Members and the Company hereby waives any and all fiduciary duties that, absent such waiver, may be imposed or implied by applicable law, and in doing so, acknowledges and agrees that the duties and obligation of each Covered Person to each other and to the Company are only as expressly set forth in this Agreement. The provisions of this Agreement, to the extent that they restrict the duties and liabilities of a Covered Person otherwise existing at law or in equity, are agreed by the Members to replace such other duties and liabilities of such Covered Person. [Emphasis Added] (A289).

No matter how Appellees characterize Brick's conduct, by contract, he had no duty to disclose his conduct and Holdco/Opco had waived any claim of breach of fiduciary duty.

Section 11.2(b) defines the wholly self-interested basis upon which Covered Persons may make decisions.

> (a) Interpretation of Certain Terms. Whenever in this Agreement a Covered Person is permitted or required to make a decision (including a decision that is in such Covered Person's "discretion" or under a grant of similar authority or latitude), the Covered Person shall be entitled to consider only such interest and factors as such Covered Person desires, including its own interests, and shall have no duty or obligation to give any consideration to any interest of or factors affecting the Company or any other Person. Whenever in this Agreement a Covered Person is permitted or required to make a decision in such Covered Person's "good faith," the Covered Person shall act under such express standard and shall not be

> subject to any other or different standard imposed by this Agreement or any other applicable law. (Emphasis Added.) (A289).

As a Covered Person, Brick need only consider "such interests and factors as such Covered Person desires including its own interest …". In conducting himself as he "desires" Brick had "no duty or obligation to give any consideration to any interest of or factors affecting the company or any other Person." *Id.* This extraordinary contractually formulated protection is held above all else, such that their conduct "…shall not be subject to any other or different standard imposed by this Agreement or any other applicable law". *Id.* Without the fetters of fiduciary duty, armed with Good Faith Reliance on the Customs Policies ratified by the Board, Brick was contractually free to exercise his discretion to follow those Customs Policies as he "desired", knowing that "any other standard" in the Holdco LLC Agreement or the law were inapplicable.

2. The Mechanical Clauses

The court merely referenced the mechanical provisions of the Holdco LLC Agreement that contain nothing of the intent of parties and are intended only to be applied after conduct is evaluated under Sections 11.1 and 11.2 above.

3. The Joint Resolution

On June 22, 2020, Appellees revealed their April 16, 2020 Joint Resolution wherein they denied Brick indemnification because they assert he engaged in Excluded Misconduct stating:

> BE IT RESOLVED FURTHER, that the Board finds that Mr. Brick's conduct with respect to the underpayment of tariffs constituted "Excluded Misconduct" as defined in the Holdco LLC Agreement and Management LLC Agreement, and as such, Mr. Brick is not entitled to advancement or indemnification thereunder. (A315 – A316).

The Joint Resolution raises several questions about Appellees position and conduct. The Board met on April 2nd to reject Brick's March 27 demand for advancement/indemnification, making no reference to Section 11.3(g). If Appellees wish to rely on their Section 11.3(g) discretion, why does the Joint Resolution not reference Section 11.3(g) or discretion? Can the exercise of this Board's discretion under Section 11.3(g) to deny indemnification be exercised at any time – even after proper demand, after litigation has commenced and after a Motion for Summary Judgment has been filed? It is against this backdrop that Brick claimed in equity, he was vested in his right to indemnification on April 4, 2020 and Holdco/Opco are estopped from acting under Section 11.3(g).

E. The Kian Reps Accuse Brick of Misconduct Arising under Their Own Customs Policies

On December 18, 2019 at a Holdco Board meeting, Cravey accused Brick of "deliberately misleading" the Board by failing to make disclosure of the Customs Policies. (Exh. A at ¶7; A23). Kossoff, Buschmann and Zimmerman were present. Incredulously, Cravey accuses Brick of misleading the Board concerning the very Customs Policies that all of the other Kian Reps and Kossoff had directed Brick to follow. In response to Cravey's accusation, all that Brick responded to him was –

"sorry". (A220 – A221). Obviously, Brick cannot feel sorry toward Zimmerman, Buschmann or Kossoff as they were aware of the Customs Policies.[7]

The December 18, 2019 board meeting was where Brick is confronted by Cravey, a fellow Board member about Brick "allegedly" misleading his fellow Board members. (Exh. A at ¶7, A23). Cravey was complaining about Brick's conduct as a Board member. *Id.* Yet, the court held it was Brick's conduct as an Officer that is solely implicated. (Exh. A at pp. 16-17; A34 – A35). It is respectfully submitted that the December 18th Board meeting conclusively proves Brick was acting in his capacity as a Board member.

F. The Kian Reps/Holdco Board Forced Brick to Resign, Brick Demands Advancement

Shortly after the Board meeting, Brick received a Separation Agreement from Holdco/Opco (A339 – A345). The Separation Agreement makes reference to a $400,000.00 payment to Brick based on "incorrect earnings data". (A339) Paragraph 4 of the Separation Agreement states, "....In exchange for Employees execution of this Release.....the Company hereby agrees not to pursue repayment of

[7] Appellees also rely on e-mails attached to Cravey's amended unsworn declaration where it is claimed that Brick engaged in a discussion of undervaluation of imports with Chinese vendors. Appellees further claimed that Brick masterminded a double invoicing scheme wherein the invoice presented to Customs showing the value of the goods imported was less than what was on the commercial invoice actually paid by Opco. Appellees failed to offer into evidence even a single set of customs invoices and commercial invoices.

the Earnings Payment" [Emphasis Added] (A340). The $400,000.00 Claim and threat to "pursue repayment" are clear. Brick asserted that Opco did not make any earnings payments to him at all. Rather, all of those so-called Earnings Payments were owed to Kossoff. (A335). Brick asserts that Kossoff declined to accept some portion of those earnings payments and requested that Opco pay that portion as bonuses to certain employees of Opco, including Brick. Thus, Brick received bonuses voluntarily issued by Opco, just like any other paycheck. *Id.* While there are multiple demands for advancement in the record, the Verified Complaint and the Motion for Summary Judgment by Brick all requesting advancement for Brick to investigate and defend against claims by Holdco/Opco to pursue repayment of the $400,000.00, the court erroneously failed to rule.

ARGUMENT

I. THE COURT OF CHANCERY ERRED BY FAILING TO HOLD THAT EVIDENCE OF GOOD FAITH RELIANCE ENTITLED COVERED PERSONS TO INDEMNIFICATION

A. Question presented

Did the court err by not applying the terms of Sections 11.1(a) and (b) of the Holdco Agreement and hold that evidence of Good Faith Reliance entitles Covered Persons to indemnification.

Brick argued and preserved his argument in his Opening (A155 – A165) and Reply Brief (A209 – A210).

B. Scope of Review

This Court reviews questions of law and interprets contracts *de novo*. *Estate of Osborn v. Kemp* 991A.2d 1153, 1158 (Del. 2010).

C. Merits of Argument

Brick, a Covered Person, is entitled to indemnification because when Good Faith Reliance is demonstrated all conduct in question is "conclusively presumed not to constitute Excluded Misconduct" pursuant to Section 11.1(b) of the Agreement. The court erred by ignoring the irrebuttable presumption imposed by Section 11.1(b) and mechanically applied Section 11.3(g).

When interpreting a contract, the court "will give priority to the parties' intentions as reflected in the four-corners of the agreement," construing the

agreement as a whole and giving effect to all its provisions.[8] The *Osborn* Court directed: "We will read a contract as a whole and we will give each provision and term effect, so as not to render any part of the contract mere surplusage. We will not read a contract to render a provision or term meaningless or illusory."[9] Guided by those principles of contract interpretation, the court should have applied the terms of Sections 11.1 and 11.2 to Brick's conduct to determine if Brick had Good Faith Reliance.

[8] *GMG Capital Invs., Ltd. Liab. Co. v. Athenian Venture P'rs I, Ltd. P'ship,* 36 A.3d 776, 779 (Del. 2012); *Kuhn Constr., supra.*

[9] *Osborn*, 991 A.2d at 1159 (internal quotations and citations omitted).

II. COURT OF CHANCERY ERRED BY NOT FINDING THAT BRICK HAD GOOD FAITH RELIANCE AND IS ENTITLED TO INDEMNIFICATION AS AN OFFICER AND BOARD MEMBER

A Question Presented

Did the court err by not finding that Brick had Good Faith Reliance and is entitled to indemnification as an Officer and Board member?

Brick argued and preserved his argument in his Opening (A155 – A165) and Reply Brief (A209 – A210).

B. Scope of Review

This Court reviews questions of law and interprets contracts *de novo*. *Osborn, supra* at p. 1158 (Del. 2010).

C. Merits of Argument

A *de novo* review of the evidence establishes Brick had Good Faith Reliance in his decision to follow the Customs Policy, making it "conclusively presumed" that he did not engage in Excluded Misconduct, guaranteeing indemnification. The evidence in the record is:

1. At Retrofit and thereafter at Holdco/Opco, Brick adhered to the Customs Policies Kossoff had established to "skirt" paying proper tariffs (Brick Aff. ¶¶22-23 (A333), Opinion ¶7 (A23), and Cravey Decl. ¶19, (A220 – A221);

2. The E-mail Exchange, shows that a majority of Holdco/Opco's Board members ratified Kossoff's scheme to "skirt" customs laws (A310 – A312);

3. Brick was involved in three audits of Retrofit/Holdco/Opco in which he supplied financial records, including records of the importation of goods and payment of tariffs. At no time did those Holdco/Opco's CPA's advise Brick orally or in writing that they had any questions or concerns over the Customs Policies or compliance by Holdco/Opco. (A329 – A330 and A332 – A333).

Under Section 11.1(b) Brick relied in good faith on "statements" by Kossoff and the three Kian Reps., to "skirt" Customs Laws. Brick also relied upon "information, opinions, reports or statements" by CPA's hired by Holdco/Opco by Kian to audit the finances of Holdco/Opco.

In making the decision to follow the Customs Policies as a Board member and Officer, under Section 11.2(a) Brick had no fiduciary duty toward Holdco/Opco or any person and none could be imposed. Under Section 11.2(b), Brick could consider any "interests" or "factors" he "desired" in making his decision, including his own self-interest without "any duty or obligation" to consider Holdco/Opco or any other persons interests. Finally, Section 11.2(b) provides every Covered Person's latitude in making a good faith decision by intoning that the Covered Person's acts are to be judged only under the Section 11.2(b) standard and under "no different standard imposed by this Agreement or any other applicable law." Brick had such Good Faith Reliance because Brick could rely in good faith on the Customs Policies directed by Kossoff, ratified by Zimmerman and Buschmann and audited by Holdco/Opco's

CPA's. Therefore, Brick is entitled to the protection of Section 11.1(b)'s irrebuttable presumption that his conduct does not constitute Excluded Misconduct. As a matter of contract Brick is guaranteed indemnification.

The court also erred in deciding Brick's conduct only implicates him as an Officer for purposes of advancement and indemnification under state law. Brick is a named Board member and attended a board meeting as such where the Customs issue at the core of the Prior Disclosure were discussed. (Exh. A at pp. 1, 5; A19, A23).

Moreover, Brick was a party, as a Board member and officer to a June 15, 2018 email exchange where a majority of the Board ratified the Custom's Policy to skirt Customs laws to avoid paying proper tariffs. (A310 – A312). The determination as to whether the email exchange and the December Board meeting "implicate" Brick as a Board member and/or as an officer is for Customs and the federal courts to decide. After Customs or the federal courts render a decision and decide the merits of that question further action by the Court of Chancery will be appropriate – until then, action by the Court of Chancery is premature.

III. THE COURT OF CHANCERY ERRED IN HOLDING THE HOLDCO BOARD HAD EXERCISED ITS DISCRETION UNDER SECTION 11.3(G) TO DENY BRICK INDEMNIFICATION AS AN OFFICER, CONTRARY TO SECTION 11.1(B)'S IRREBUTTABLE PRESUMPTION AND THE CLEARFIELD TRUST DOCTRINE

A. Question presented

Did the court err in holding that the Holdco Board had exercised its discretion under Section 11.3(g) to deny Brick indemnification as an Officer contrary to Section 11.1(b)'s irrebuttable presumption and the Clearfield Trust Doctrine?

Brick argued and preserved his argument in his Opening (A118, A150 – A152, A165 – A166) and Reply Brief (A186 – A200).

B. Scope of Review

This Court reviews questions of law and interprets contracts *de novo*. *Osborn, supra* at p. 1158 (Del. 2010).

C. Merits of Argument

The court held "… indemnification for officers is discretionary and indemnification for Holdco Board members is mandatory." (Exh. A at ¶20; A31). In error, the court held that the Holdco Board properly exercised its "power" to deny Brick advancement in his capacity as COO of Opco. (Exh. A at ¶26; A33). In reaching that conclusion, the court erroneously determined that all of Brick's conduct was solely in his capacity as an Officer and therefore, the Holdco/Opco

Boards had the "power" to exercise their discretion under Section 11.3(g) to deny indemnification.[10]

First, as set forth above Brick acted in his capacity as a Board member and he had Good Faith Reliance and therefore under Section 11.1(b) it "shall conclusively be presumed" that Brick's conduct did not constitute Excluded Misconduct. The reason for denying Brick's indemnification is set forth in the Joint Resolution and states:

> BE IT RESOLVED FURTHER, that the Board finds that Mr. Brick's conduct with respect to the underpayment of tariffs constituted "Excluded Misconduct" as defined in the Holdco LLC Agreement and Management LLC Agreement, and as such, Mr. Brick is not entitled to advancement or indemnification thereunder;

In light of the irrebuttable presumption imposed by Section 11.1(b), the Board's sole reason for denying indemnification – that the "underpayment of tariffs constituted Excluded Misconduct" is simply unsupportable and invalid. In fact, because Brick had Good Faith Reliance, Section 11.1(b) guarantees indemnification, leaving the Holdco/Opco Boards no discretion under Section 11.3(g) and the Court's Order in error.

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[10] Based on the Clearfield Trust Doctrine, the court's findings as to Brick acting solely as an Officer is erroneous because such determination falls within the purview of Customs and the federal courts. Order at pps.16-17 (Exh. A at pp. 16-17; A34 – A35).

The Court of Chancery also usurped the exclusive jurisdiction of Customs and the federal courts to determine whether Brick acted in his capacity as a Board member.[11] Since the advent of the Clearfield Trust Doctrine, the determination of whether state or federal laws apply to the application of a federal law lies exclusively with federal agencies and courts.[12] In citing *Clearfield*, *supra*, the United States Supreme Court succinctly reiterated this fundamental principle holding:[13]

> This Court has consistently held that federal law governs questions involving the rights of the United States arising under nationwide federal programs. *Id* .

Undoubtedly, federal programs that "by their nature are and must be uniform in character throughout the Nation" necessitate formulation of controlling federal rules. *United States v. Yazell*, 382 U.S. 341, 354 (1966); *see Clearfield Trust Co. v. United States, supra*, at 367; *United States v. Standard Oil Co., supra*, at 311; *Illinois v. Milwaukee*, 406 U.S. 91, 108 n.10 (1972).

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[11] In *U.S. v. Trek Leather* 767 F3d 1288 (Fed Cir 2014) the Federal Circuit *en blanc* held individual can be held personally liable for violations of U. S. Customs laws and accordingly, Customs has the authority to hold the Board members and officers personally liable for fines and penalties arising out of the conducted Appellees admitted in their Prior Disclosure.

[12] *Clearfield Trust Co. v. U.S.,* 318 U.S. 363 (1943).

[13] *U.S. v. Kimbell Foods,* 440 U.S. 715 (1979).

The Customs proceedings and civil or criminal proceeding's determination of who is deemed to be a "person" under U.S. Customs Laws is part of the "rights of the United States arising under a nationwide federal program…". The U.S. Customs laws, by "their nature", necessitate the exclusive attention of Customs and the federal courts.[14]

The court, erroneously decided Brick's conduct was not as a Board member and only as an Officer. The Prior Disclosure Holdco/Opco filing admits liability and what remains under the Clearfield Trust Doctrine is for Customs, not the Court of Chancery, to determine which "persons" and in what capacity they will be held responsible. The Kian Reps, Kossoff and Brick as Board members may all be held responsible in such capacity by Customs.

Brick submits that even without the evidence he submitted on the Good Faith Reliance issue, the filing of the Prior Disclosure opened the door to the application of this "nationwide federal program". Under the Clearfield Trust Doctrine, who is a "person" "necessitate [the continuing] formulation of controlling Federal rules" by Customs and the federal courts. Under the Clearfield Trust Doctrine, the court's holding that Brick's conduct only implicates him as an Officer and not as a Board member constitutes reversable error.

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[14] The Third Circuit adheres to the *Clearfield Trust Doctrine. See, U.S. v. Pisani*, 646 F.2d 83, 86 (3d Cir. 1981).

In view of the foregoing, Brick requests that this Court grant his Motion for Summary Judgment and order Holdco/Opco to indemnify him as a Board member and as an Officer in the Customs and federal court proceedings.

IV. THE COURT OF CHANCERY ERRED IN UPHOLDING HOLDCO/ OPCO'S EXERCISE OF DISCRETION UNDER SECTION 11.3(G)

A. Question presented

Did the court err by deciding that the Holdco/Opco Board's properly exercised their discretion to deny Brick indemnification as an Officer under Section 11.3(g)?

Brick argued and preserved his argument in his Opening (A155 – A165) and Reply Brief (A209 – A210).

B. Scope of Review

This Court reviews questions of law and interprets contracts *de novo*. *Osborn, supra* at p. 1158 (Del. 2010).

C. Merits of Argument

The question presented only goes to the discretionary denial to indemnification in Brick's capacity as an Officer, for indemnity of Board members is mandatory. (Exh. A at pp. 13-18; A31 – A36).

Focusing on the Boards' rationale for denying Brick indemnification, the sole reason put forth in the Joint Resolution is because "his conduct with respect to the underpayment of tariffs constituted Excluded Misconduct…". (A315). This guaranty of indemnification leaves the Board without any discretion to exercise under Section 11.3(g) because it is "conclusively presumed" that Brick did not engage in Excluded Misconduct due to his Good Faith Reliance. Otherwise, the

intent of parties to "fully protect" Covered Persons who have Good Faith Reliance is not merely thwarted but, rendered illusory. This Court in *Osborn* reaffirmed certain basic principles of contract interpretation:

> Delaware adheres to the 'objective' theory of contracts, i.e, a contract's construction should be that which would be understood by an objective, reasonable thirty party. We will read a contract as a whole and we will give each provision and term effect, so as not to render any part of the contract mere surplusage. We will not read a contract to render a provision or term "meaningless or illusory.

And further:

> When the contract is clear and unambiguous, we will give effect to the plain-meaning of the contract's terms and provisions....An unreasonable interpretation produces an absurd result or one that no reasonable person would have accepted when entering the contract.[15]

Reading the Holdco Agreement "as a whole" and giving "effect" to the irrebuttable presumption imposed by the establishment of Good Faith Reliance results in the extinguishment of Excluded Misconduct and a contractual guarantee of indemnification. Otherwise, the extensive and exhaustive language of Section 11.1 and 11.2 become mere "surplusage" and "illusory", a result the *Osborn* court would not countenance.[16]

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[15] *Osborn*, *supra* at 1159.
[16] *Id.*

Should Appellees argue that there is ambiguity in whether Sections 11.1 and 11.2 Good Faith Reliance protection prevails over Section 11.3(g)'s exercise of discretion, the *Osborn* court answers:

> If a contract is ambiguous, we will apply the doctrine of *contra proferentem* against the drafting party and interpret the contract in favor of the non-drafting party. The parties' steadfast disagreement over interpretation will not, alone, render the contract ambiguous. The determination of ambiguity lies within the sole province of the court.[17]

To aid in the application of the doctrine[18] of *contra proferentem*, this Court inserted a guiding principle –

> An unreasonable interpretation produces an absurd result or one that no reasonable person would have accepted when entering into the contract.[19]

If Section 11.3(g) discretion can make the protection of Good Faith Reliance "illusory" and its language mere "surplusage" then, that is quintessential example of an "absurd result" that surely "no reasonable person would have accepted when entering into the contract."

Guided by these principles of contract interpretation, Brick submits that the exercise of Section 11.3(g) discretion must be construed against Appellees and that the guarantee of the indemnification promised Section 11.1(b) be upheld. Accordingly, for purposes of this *de novo* review of a contract, it is requested that

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[17] *Id.* at 1160.
[18] *Id.*
[19] *Id.*

this Court reverse the Court of Chancery's upholding of Appellees discretion under Section 11.3(g) as an abuse of discretion and grant Brick's Summary Judgment.[20]

[20] *Id.* where the Court held – "review the grant of specific performance for abuse of discretion" and thus for interpretation of all contractual terms.

V. THE COURT OF CHANCERY ERRED IN NOT CONCLUDING THAT BRICK IS ENTITLED TO INDEMNIFICATION BECAUSE HE HAD GOOD FAITH RELIANCE IN LIGHT OF THE EVIDENCE THAT THE CUSTOMS POLICIES BRICK FOLLOWED WERE RATIFIED BY THE HOLDCO/OPCO'S BOARD

A. Question presented

Did the court err by failing to rule on Brick's argument that he is entitled to indemnification in light of facts that: 1) The E-mail Exchange establishes that a majority of Holdco/Opco's Board ratified the Customs' Policy to "skirt" the law to underpay proper tariffs and; 2) by continuing to employ Kossoff as an Officer and Board member.

Brick argued and preserved his argument in his Reply Brief (A202 – A204).

B. Scope of Review

This Court reviews questions of law and interprets contracts *de novo*. *Osborn, supra* at p. 1158 (Del. 2010).

C. Merits of Argument

At Oral Argument, counsel for Brick read The E-mail Exchange into the record. (A53 – A54). Brick submits that The E-mail Exchange proves the following:

1. Kossoff, reiterated the Customs Policy of Holdco/Opco to "skirt" the law to evade and directed Brick to "reclassify" a diode to lower the tariff;

2. Brick responded to Kossoff's directive to reclassify the diode and sent his response to Board members, Kossoff, Zimmerman and Buschmann;

3. At the Oral Argument, Brick argued that this E-mail Exchange demonstrates that Kossoff's and now Holdco/Opco's Customs Policy were "systemic";

4. This systemic Customs Policy, was ratified by the Board in The E-mail Exchange giving Brick the basis for Good Faith Reliance;

5. Retaining Kossoff after the filing of the Prior Disclosure, constitutes ratification of the Customs Policy.

Applying the law of ratification to the foregoing, Delaware courts provide the following analytical framework:

> Ratification of an unauthorized act may be found from conduct which can be rationally explained only if there we an election to treat a supposedly unauthorized at as in fact authorized. *Id.* Ratification requires [k]nowledge, actual or imputed, of all material facts and may be implied from conduct, as well as expressed by words. [21]

In discussing ratification's sister doctrine of acquiescence, the court explained:

> [w]hen a man with full knowledge, or at least with sufficient notice or means of knowledge of his rights, and of all the material circumstances of the case, freely and advisedly does anything which amounts to the recognition of a transaction, or acts in a manner inconsistent with its repudiation, ...there is acquiescence, and the transaction, although originally impeachable, become unimpeachable in equity. *Papaioanu v. Comm'rs of Rehoboth*, 186 A.2d 745, 749-50 (Del. Ch. 1962) (internal quotation marks omitted). [22]

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[21] *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, No. 5843-VCL, 2012 Del. Ch. LEXIS 109, at *46-47 (Ch. May 16, 2012).
[22] *Id.*

Applying the foregoing case law to (1) through (5) above, The E-mail Exchange "authorized" Brick to follow the Customs Policy to "skirt" the law. A Board majority with "full knowledge" embraced this "systemic" Customs Policy. Finally, retaining Kossoff, the author of the Customs Policy as an Officer and Board member, also constitutes ratification.

In view of the foregoing, the court erred in not ruling on Brick's ratification argument as a basis for concluding Brick had Good Faith Reliance. Based on Holdco/Opco's ratification of the Customs Policy it is requested Brick be granted Summary Judgment.

VI. BRICK IS NOT REQUIRED TO POST SECURITY OR OTHER UNDERTAKING BECAUSE HE IS ENTITLED TO BE INDEMNIFIED

A. Question presented

Whether Brick is required to post an undertaking or other security to secure repayment of monies Appellee's must advance.

Brick argued and preserved his argument in his Opening (A153 – A165) and Reply Brief (A209 – A210).

B. Scope of Review

This Court reviews questions of law and interprets contracts *de novo*. *Osborn, supra* at p. 1158 (Del. 2010).

C. Merits of Argument

The court never reached the question of whether Brick need post security for the monies Appellees would advance because it held in error, Brick was not entitled to indemnification as an Officer or Board member. Here, indemnification is guaranteed by Section 11.1 and 11.2. For this reason, there is no need to post an undertaking to repay and the outcome on the merits of the Prior Disclosure proceedings have no bearing. "Fully protected" by Good Faith Reliance, Brick is guaranteed indemnification with no obligation to repay.

Guaranteed indemnification, without the necessity to post an undertaking is precisely what the owners of Holdco/Opco intended. The Holdco/Opco Agreement

covers six individuals – the six Board members, two whom are also Officers. Four of the six Board members own 100% of Holdco/Opco – the three Kian Reps 75% and Kossoff 25%. Guaranteed indemnification by the LLC to one who owns the LLC is a privilege of ownership. The Kian Reps and Kossoff have astutely taken advantage of what Delaware offers in enforcing LLC Agreements and Brick, as an Officer and Board member with Good Faith Reliance is entitled to the same benefit.

VII. APPELLEE'S ARE EQUITABLY ESTOPPED FROM EXERCISING DISCRETION TO DENY BRICK'S INDEMNIFICATION UNDER SECTION 11.3(G)

A. Question presented

Did the court err in not holding that Appellees are equitably estopped from exercising discretion under Section 11.3(g) because Brick was "vested" after he filed this lawsuit.

Brick argued and preserved his argument in his Reply Brief (A194 – A200).

B. Scope of Review

This Court reviews questions of law and interprets contracts *de novo*. *Osborn, supra* at p. 1158 (Del. 2010).

C. Merits of Argument

Brick made his demand on March 27, 2020. Appellees rejected Brick's demand because they claimed he engaged in Excluded Misconduct and made that the sole basis for their April 2, 2020 rejection. The record is clear, Appellees did not invoke Section 11.3(g) – only their attorneys did in their Answering Brief. At the joint Board meeting April 16, 2020, it is important to make note that the Joint Resolution makes no reference to the Board exercising their discretion under Section 11.3(g). Instead the Joint Resolution merely recites that Brick engaged in "Excluded Misconduct" and "as such" he is denied advancement/indemnification. Appellees

Joint Resolution rested solely on Brick's alleged Excluded Misconduct - not Section 11.3(g) discretion.

Still, without notice that Appellees attorneys would attempt to invoke Section 11.3(g) discretion, Brick filed his Motion for Summary Judgment on May 14, 2020 and not until June 22, 2020 when Appellees filed their Answering Brief and Cross Motion did Appellee's attorneys first invoke Section 11.3(g) discretion months after Brick incurred substantial legal fees.

In error, the court misunderstood Brick's citation to *Branin v. Stein Roe Investment Counsel, LLC* as support for the argument that Brick became "vested" in his right to indemnification once he filed this lawsuit on April 2, 2020.[23] In *Branin*, after a lawsuit was filed, the LLC amended their LLC agreement so that *Branin* would not be entitled to indemnification. Here, after receiving Brick's March 27th demand, Appellees rejected his demand because of his alleged Excluded Misonduct, not because they had exercised discretion under 11.3(g). After Brick files a lawsuit and goes to the expense of his Motion, then on June 22, 2020 Appellees "morph" the undisclosed April 16, 2020 Joint Resolution into a Section 11.3(g) exercise of discretion. Brick submits that just like *Branin*, Appellee's alleged April 16th Section 11.3(g) exercise of discretion had to be exercised before Brick filed this lawsuit. Like *Branin*, once Brick made his demand, it was incumbent that Appellee's invoke

[23] 2014 WL 2961084 (Del. Ch. June 30, 2014).

Section 11.3(g) so that Brick not be put to the great expense of a lawsuit. Appellee's failed to do so.

Moreover, a review of the Joint Resolution creates an insurmountable hurdle for Appellee's. The Joint Resolution does not cite to or invoke Section 11.3(g). The Joint Resolution does not even contain the word "discretion".

Brick submits the record before this Court for *de novo* review presents no evidence of Appellee's exercise of discretion under Section 11.3(g) and thus, the Court of Chancery committed reversable error in concluding Appellee's exercised that discretion to deny Brick indemnification. Brick argued below his right to indemnification "vested" like *Branin*, when he filed this lawsuit, regardless. Waiting until June 22, 2020 to first make their Section 11.3(g) argument is simply too late.

VIII. THE COURT OF CHANCERY ERRED IN GRANTING APPELLEES CROSS MOTION BY RELYING ON INADMISSIBLE EVIDENCE

A. Question presented

Did the court err by basing its Order on inadmissible evidence contrary to the Best Evidence Rule and Rule 56(e).

Brick argued and preserved his argument in his Reply Brief (A182).

B. Scope of Review

This Court reviews questions of law *de novo*. *Osborn, supra* at p. 1158.

C. Merits of Argument

Ct. Ch. R. 56(e), incorporating the requirements of the Best Evidence Rule, requires that "documents" being referenced be authenticated and submitted. Appellees submitted no documentary evidence to support their Cross-Motion. Overturning the court's Order and granting Brick's Motion need only be based on the fact that Brick's right to indemnification is proper because Appellees have represented to the court they filed a Prior Disclosure, through which Brick as Board member or Officer is a "person" with civil or criminal liabilities. Without the Prior Disclosure in evidence, court's granting of Summary Judgment should be reversed due to absence of "admissible evidence" to prove:

1. The claim of a double invoicing or reclassification scheme due to the absence of even a single actual commercial invoice or customs invoice or a

document actually showing reclassification of imported goods to prove Brick engaged in any wrongdoing;

2. Without evidence of the alleged double invoicing or reclassification Appellees have no evidence that Brick engaged in Excluded Misconduct;

3. No evidence to support their alibis about lack of knowledge of Kossoff's Customs Policy or alleged limitations in CPA's engagement letters, financial or other written reports from their CPA's, attorneys, consultants or CFO's or the alleged content of, or its 5-year "robust" audit;

5. No evidence of $2,000,000 in tariffs due alleged to be admitted in their Prior Disclosure and thus no evidence of underpayment at all; and

In absence of the Prior Disclosure or any other documents, Appellees had no "material facts" before the court on which it could rule and therefore, the court erred in granting Appellees Cross-Motion. Since the court did not rule on this issue either, it is requested that this Court's *de novo* review it do so and reverse the Order and enter Summary Judgment for Brick.

IX. THE COURT OF CHANCERY ERRED IN FAILING TO ADDRESS OR RULE UPON THE $400,000.00 CLAIM TO WHICH BRICK IS ENTITLED TO ADVANCEMENT

A. Question presented

Did the court err in not granting Brick's advancement the $400,000.00 Claim against Brick?

Brick argued and preserved his argument in his Opening (A116 – A118 and A126 – A128).

B. Scope of Review

This Court reviews questions of law *de novo*. *Osborn, supra* at p. 1158 (Del. 2010).

C. Merits or Argument

The court failed to rule on the 400,000.00 Claim. Brick is entitled to advancement on this claim. Brick received bonus checks like any other paycheck, which Appellee's assert amount to in excess of $400,000.00 based on "incorrect earnings data". The nexus of this claim, a threat to "pursue repayment" of the $400,000.00 is "by reason of the fact" that Brick was an Officer he received these bonuses.

Moreover, the Joint Resolution does not address the $400,000.00. Nowhere in the record is there any evidence, admissible or otherwise as to what Appellee's basis is for asserting "incorrect earning data". Yet, Brick has been threatened that

Appellees will "pursue repayment". The court below never ruled and Appellees made no argument. Brick requests this Court grant his Motion on this $400,000.00 claim.

CONCLUSION

WHEREFORE, Brick respectfully requests this Court reverse the decision of the Court of Chancery and grant Brick Summary Judgment ordering he be indemnified for all liabilities, costs, legal fees and expenses arising from the Customs proceedings and be awarded advancement on the $400,000.00 Claim.

OFFIT KURMAN, P.A.

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4819-6744-1618, v. 1