EFiled: Dec 21 2020 03:24PM EST
Filing ID 66202038
Case Number 311,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

NATHAN BRICK, Plaintiff Below-Appellant, v. THE RETROFIT SOURCE, LLC, TRS HOLDCO, LLC and TRS MANAGEMENT, LLC, Defendants Below-Appellees.	)	No. 311, 2020 On Appeal From The Court of Chancery of the State of Delaware, C.A. No.: 2020-0254-KSJM **PUBLIC VERSION FILED DECEMBER 21, 2020**

APPELLEES' AMENDED ANSWERING BRIEF

MORRIS JAMES LLP

P. Clarkson Collins, Jr. (#739)
K. Tyler O'Connell (#4514)
Kirsten A. Zeberkiewicz (#4573)
Damon B. Ferrara (#6658)
500 Delaware Avenue, Suite 1500
Wilmington, Delaware 19801
(302) 888-6800

Attorneys for Defendants Below, Appellees The Retrofit Sources, LLC, TRS Holdco, LLC and TRS Management, LLC

OF COUNSEL:

ROBINSON, BRADSHAW, & HINSON, P.A.

Stephen M. Cox
202 East Main Street,
Suite 201
Rock Hill, South Carolina 29730
(803) 325-2910

Dated: December 7, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

NATURE OF PROCEEDINGS

Appellant Nathan Brick ("Brick") – the former Chief Operating Officer ("COO") of The Retrofit Source, LLC ("Opco") and a former member of the board of managers ("Board") of Opco's parent company, TRS Holdco, LLC ("Holdco" and, together with Opco, the "Companies") – has filed this appeal seeking advancement of his legal expenses pursuant to Holdco's Second Amended and Restated Limited Liability Company Agreement (the "Holdco Agreement"). While perhaps not obvious from the tangled skein of arguments that Brick has made in his Opening Brief, resolution of this appeal requires only the straightforward application of the plain language of the Holdco Agreement to an undisputed factual record.

Section 11.3 of Holdco Agreement expressly preserves the Board's discretion to deny advancement and indemnification to any person other than a Holdco Board member acting in his "capacity as such." *See* A291 § 11.3(g). The Court of Chancery rightly found that Holdco's Board had exercised that discretion to deny advancement to Brick. Consequently, the Court of Chancery concluded, Brick was entitled to relief only if the actions for which he sought advancement had been undertaken in his capacity as a Holdco Board member.

Brick's conduct that gives rise to his advancement claim arose in connection with a "double invoicing" arrangement by which Opco submitted documents to U.S. Customs and Border Protection ("CBP") that undervalued Opco's imported goods

and resulted in at least $2 million of underpaid Customs duties. Holdco and Opco submitted detailed, undisputed evidentiary materials to the Court of Chancery showing that: (i) Brick oversaw the double-invoicing arrangement as part of his day-to-day employment responsibilities at Opco; (ii) Brick communicated with Chinese suppliers to carry out the arrangement and remitted inaccurate documents to CBP; (iii) Brick concealed the arrangement and lied to the Board about the effect of increased tariffs on Opco's Customs tax liabilities; and (iv) the Board learned of the arrangement only after an internal investigation that led to Brick's admission of wrongdoing.

After assessing this undisputed evidence, the Court of Chancery properly found that there "is no issue of disputed material fact that the proceedings for which Brick claims advancement are solely by reason of the fact the he was a COO of Opco."[1] Indeed, Brick conceded in his own Affidavit that he had engaged in the conduct at issue as an Opco *employee,* not as a Holdco Board member.[2] Thus, the Court properly denied Brick's request for advancement.

---

[1] Order ¶ 32. (The Order referenced herein is contained within the Corrected Appendix to Appellant's Opening Brief at pages A1-A18 and will be cited as "Order ¶ __".)

[2] Order ¶ 29.

On appeal, Brick takes a scattershot approach intended to generate as many claims of error as possible in the hope that he might prevail on one. The result is a jumbled, redundant stew of *eight* alleged errors in thinly argued sections of two to three pages each, almost all of which are bereft of legal authority.[3] Brick's arguments, however, are hobbled by at least these fundamental flaws:

- Though he does not deny that Section 11.3(g) of the Holdco Agreement gives the Board discretion to deny him indemnification (and thus advancement) for any conduct undertaken as an Opco employee or officer, he mistakenly contends that Section 11.2 of the Holdco Agreement (which does not mention indemnification or advancement at all) neutralizes this discretion.
- Rather than point to any record evidence showing that he was acting in a capacity as a Holdco Board member pursuant to a Delaware operating

[3] In light of the remarkable absence of genuine legal argument supporting the errors that Brick alleges in his Opening Brief, the Companies preemptively note that this Court will not consider a reply brief that attempts to assert additional arguments. Del. Supr. Ct. R. 14(c)(i) ("appellant shall not reserve material for reply brief which should have been included in a full and fair opening brief"); *see also Collins v. State*, 148 A.3d 687 (TABLE), 2016 WL 5369484, at *1 n.1 (Del. 2016) (refusing to consider appellant's reply brief because it "raised claims that were neither raised in the [court-below] in the first instance nor in the appellant's opening brief.")

agreement, he cites inapplicable federal law in an attempt to wrest the issue away from Delaware courts altogether.

- He falsely claims that the Board is equitably estopped from invoking its discretion to deny him advancement, even though the Board's express power to do just that is obvious from even a cursory reading of the Holdco Agreement.

Any one of these errors justifies the rejection of Brick's appeal. Yet this Court may also affirm the Court of Chancery on an alternate ground that the Court did not need to reach: regardless of the capacity in which he was acting, Brick committed "Excluded Misconduct" (as defined in the Holdco Agreement) and is thus not entitled to indemnification or advancement. *See infra* at 34-41. Brick's attempts to avoid that conclusion rest upon a host of errors, specifically (i) a gross misreading of the Holdco Agreement that eviscerates the Agreement's prohibition against illegal and wrongful misconduct; and (ii) a fundamental misapprehension of Delaware's "Best Evidence Rule."

Moreover, even if Brick were entitled to advancement, this Court should reject it based on another ground that the Companies presented to the Court of Chancery but upon which that Court did not need to rule: Brick has not tendered an undertaking "satisfactory" to the Board. While there is no dispute that the Board

rightfully requested such an undertaking as a condition precedent to advancement, Brick asks this Court to vitiate that condition on the spurious ground that the Holdco Agreement "guarantees" him advancement. *See infra* at 42-44. On this point, as on all the rest, Brick is wrong.

Finally, there is no actual "claim" pending or threatened against Brick. Accordingly, this Court may also affirm on the alternate and independent basis, recognized in Court of Chancery precedent, that a mere "cloud on the horizon" does not trigger advancement rights. *See infra* at 45-47.

For all of these reasons, the Companies respectfully request that this Court affirm the Court of Chancery's Order.

SUMMARY OF ARGUMENT

1. Denied. While Brick claims the Court-below erred in not reading the Holdco Agreement "as a whole" in light of Sections 11.1 and 11.2 (which respectively address exculpation and Board members' duties), he does not deny that the plain language of the Holdco Agreement's *actual advancement and indemnification provisions* in Section 11.3 make those benefits discretionary except for Board members acting in their "capacity as such." In light of this unfettered discretion, as well as the Court of Chancery's conclusion that Brick's conduct at issue was not undertaken as a Holdco Board member, Brick's crabbed view of the duties owed by a "Covered Person" to Holdco is simply irrelevant.

2. Denied. This argument is infected by the same error as the previous one: because the Holdco Board had discretion under Section 11.3 of the Holdco Agreement to deny advancement to Brick for conduct undertaken as an Opco employee, the "good faith reliance" provisions of Section 11.1 and Section 11.2 of the Holdco Agreement are neither relevant nor controlling.

3. Denied. Brick wrongly suggests that the Holdco Board could deny advancement to Brick under Section 11.3(g) of the Holdco Agreement *only* if he engaged in "Excluded Misconduct." As noted above, however, the Holdco Board had unfettered discretion to deny advancement to Brick in his capacity as an Opco

employee, and it did so. In any event, even though the Court of Chancery did not reach the issue, there is undisputed evidence that Brick engaged in "Excluded Misconduct" by knowingly overseeing a secretive, illegal double-invoicing arrangement intended to deny Customs duties to the U.S. Government.

4. Denied. Brick's argument that an email read into the record by his lawyer at oral argument constitutes evidence of implied ratification by the Holdco Board comes too late; Brick waived that argument by not making it in his briefs to the Court of Chancery. In any event, the email upon which Brick relies does not create any genuine issue of material fact that the Holdco Board ratified Brick's actions. Moreover, Holdco was powerless to ratify Brick's illegal misconduct. *See infra* at 28-29.

5. Denied. As noted above, Brick was not "guaranteed" indemnification, and the Holdco Agreement gave Holdco's Board the clear and express right to demand an undertaking as a condition of advancement. *See infra* at 42-44.

6. Denied. Contrary to Brick's contention, the doctrine of equitable estoppel does not neutralize the Board's Joint Resolution denying him advancement. That doctrine is to be applied only to prevent manifest injustice, and the party seeking it must show that he lacked knowledge of the truth in the facts in question. Here, nothing in the Board's Joint Resolution should have come as a surprise to

Brick, given the Companies' clear rejection of his pre-suit advancement demand and the plain language of the Holdco Agreement.

7. Denied. The Companies submitted three extensive Declarations to the Court of Chancery describing Brick's misconduct. The Court also noted that Brick's own Affidavit confirmed that he had undertaken the conduct-at-issue as an Opco employee, not a Holdco Board member. There was thus ample, undisputed evidence in the record that Brick was not acting as a Holdco Board member and, therefore, the Holdco Board could deny him advancement in its discretion.

8. Denied. Brick *admits* that an alleged claim by Holdco/Opco—for a $400,000 bonus he received—occurred in his capacity as an employee or officer. Accordingly, the Holdco Board had discretion to deny him advancement for that claim. *See infra* at 19-21. In any event, because Holdco/Opco have never pursued or even threatened a claim against Brick for this bonus, it does not give rise to an advancement right. *See infra* at 46.

STATEMENT OF FACTS

A. The Founding of Opco; Brick is Hired

Opco, founded in 2005 by Matt Kossoff ("Kossoff"), is one of the world's largest suppliers of high-end automotive lighting upgrades. In the company's early years, it acquired its lighting components from a network of U.S. salvage yards. A318-A319 ¶ 4. Eventually, however, Opco began buying parts on a "purchase order" basis from China. *Id.* ¶¶ 4, 5. At that time, all Customs paperwork and procedures were handled by the companies in China that shipped goods to Opco. A319 ¶ 7, A323-A324 ¶ 16.

In or about 2009, Opco employed Brick to perform various administrative and logistical tasks, and he eventually assumed responsibility for all day-to-day logistical operations. A320 ¶¶ 8, 9. In mid-2011, Opco relocated to Atlanta, where Brick was responsible for running the supply chain and order fulfillment functions. A320-A324 ¶ 10.

B. Opco Becomes an "Importer of Record"; Brick Becomes COO

In or about 2012, Opco became an "importer of record" for the first time. A321-A322 ¶ 12. As an importer of record, it hired Customs brokers and freight forwarders, submitted invoices and other paperwork to CBP. documenting import transactions (including the type of goods and their value), and calculated and paid Customs duties. *Id.* The amount of the duties paid was supposed to be based upon

the "transaction value" (*i.e.*, the amount Opco paid the supplier). *Id.* Understating the declared value results in underpaying lawfully owed duties. *Id.*

Before Opco became an importer of record, the company did not have any "Customs Policies" because all of that work was handled by the commercial shippers abroad. A323-A324 ¶ 16. When the company became an importer of record in 2012, Brick was the employee in charge of managing the company's supply chain and overseeing the ordering and Customs clearance processes with Opco's foreign vendors. A321-A322 ¶¶ 12-13.

In 2013, Brick became the COO of Opco. In this role, Brick had to identify and engage Customs brokers; submit paperwork to customs brokers as required by CBP; and ensure that all Customs duties were paid. A322-A324 ¶¶ 14, 15, 17; B71 ¶ 3. As noted by the Court of Chancery, Brick "does not dispute the nature of his role" in dealing with Customs issues at Opco. Order ¶ 4.

C. Kian Purchases a Controlling Stake in Opco

In March 2018, Kian purchased a majority ownership stake and controlling interest in Holdco, which acquired all of Opco. A214-A215 ¶¶ 3, 4; A225-A237. Opco was re-domiciled as a Delaware limited liability company. A214 ¶ 3. Its affairs are governed by a Limited Liability Company Agreement dated as of March 23, 2018 (the "Opco Agreement"). *See* A225-A237. Holdco is managed by

the Board and acts as Opco's Manager. *See* A235-A308. Holdco's affairs are governed by the Holdco Agreement. *Id.*

D. Brick's Improper Customs Reporting Is Exposed

Soon after Kian acquired its interest in Holdco, the U.S. Government increased the "Section 301" dutiable rate on Chinese imports. A218 ¶ 13. Kian asked Brick, as Opco's COO, how Opco was handling the impact of this increase. A218-A219. ¶ 14. Brick responded falsely that the impact would be "very minimal if at all."[4] In May 2019, after more inquiries, Brick misled Kian again, saying that the new duties had "had no material effect on margins to this point." *Id*.

In 2019, at Kian's direction, Opco hired a new Vice-President of Finance, Victor Jimenez ("Jimenez"), to assist with the completion of Opco's 2018 financial audit and a review of Opco's financial reporting and operations. A219 ¶ 15. By Fall 2019, Kian had become aware of the potential magnitude of the Section 301 duties because of the effect those duties had had on another Kian portfolio company. *Id.* ¶ 16. In October 2019, Kian directed Jimenez to focus on how Section 301 duties were being managed and paid at Opco. *Id.* When Jimenez did so, he found that the Chinese goods that Opco ordered, received and paid for were systematically

[4] *Id.* ¶ 14; *see also* A309-A312.

undervalued on the Customs Invoices, so that Customs duties were systematically underpaid. A216-A217 ¶ 9.

Shortly after this discovery, Jimenez called Brick into his office to ask him why the Customs Invoices submitted to freight forwarders under his oversight had systematically undervalued Chinese imports. B74 ¶ 10. Brick replied that, for years, Chinese suppliers had been undervaluing goods for Opco on Customs invoices to reduce the duties owed. *Id.* ¶ 10. When Jimenez expressed surprise at this obviously illegal conduct, Brick was nonchalant, claiming that everybody did it. B74-B75 ¶ 11. Brick later told Jimenez that he was "surprised that it took Kian so long to figure it out." *Id.*[5]

E. Kian Takes Action

As soon as Kian learned of the double-invoicing arrangement overseen by Brick, it caused Opco to hire a nationally regarded law firm with experience in international trade matters to address the problem. A220 ¶ 18. That firm hired a Customs compliance expert to assist it. *Id.* Soon thereafter, Kian and Opco authorized the law firm to make a voluntary disclosure to CBP notifying the agency

[5] In the course of its investigation into the underpayment of Customs duties overseen by Brick, Opco reviewed some of Brick's email communications with foreign vendors that discussed undervaluing imports. A224 ¶ 27. Samples of those communications are collected as Exhibit J to Mr. Cravey's Amended Declaration. B207-B242.

that Opco suspected that it had underpaid Customs duties and was undertaking a thorough investigation to determine the amount of any potential underpayment. *Id.*

On May 4, 2020, Opco submitted a self-disclosure report to CBP consistent with applicable regulations. A221 ¶ 20. Opco followed up with a second report, filed on May 12, 2020, which calculated the underpayments and provided copies of the new Customs compliance measures put in place at Opco. *Id.*

At a December 18, 2019 Holdco Board meeting, not long after Brick's conduct was discovered, Cravey, a Kian Co-Founder and Partner, sharply criticized Brick for his involvement in the systematic underpayment of duties for Chinese imports. Brick did not claim that he thought his actions were legal, or that he was just following a "Customs Policy" established before he arrived. A220-A221 ¶ 19. His only response was to mutter "Sorry." *Id.*

In January 2020, the Board offered Brick a proposed separation agreement (the "Separation Agreement") by which the Companies agreed not to pursue repayment of a bonus paid to Brick based on false earnings information attributable to Brick's misconduct. A222 ¶ 22. Brick refused to sign the Separation Agreement. A335 ¶ 31. On January 28, 2020, after being told that Opco was going to fire him for cause, Brick resigned from all of his positions. A222 ¶ 22.

F. Brick Seeks Advancement for Possible "Claims"

Though Opco has never waived any of its rights against Brick, it has never formally asserted claims against him or filed a proceeding against him. *Id.* Nor, to Opco's knowledge, has CBP or any other government agency asserted a claim against Brick. *Id.* Nevertheless, on March 27, 2020, Brick demanded advancement under the Holdco Agreement for "his legal fees and expenses in connection with investigating, preparing to defend or defending any claim, lawsuit or other proceeding." A222-A223 ¶ 23; B79-B98. On April 2, 2020, the Companies responded through counsel that they did not believe Brick was entitled to advancement or indemnification, and that the Companies were reserving all rights and defenses with respect to any such claims. A222-A223 ¶ 23; B99-B101. Four days later, Brick filed his Verified Complaint in the Court of Chancery.

On April 16, 2020, the Defendants held a formal Board meeting to consider further Brick's demands for advancement. A223 ¶ 24. At that meeting, the Board received legal advice and adopted a resolution formally denying Brick's demand (the "Joint Resolution"). *Id.*; A313-A316.

On April 17, 2020, Brick submitted a second advancement demand. A223-A224 ¶ 25; B102-B117. The Companies rejected the demand on April 21, 2020. A223-A224 ¶ 25; B118-B183. The Companies also informed Brick of the Joint

Resolution and represented that, should the Companies ever advance legal costs, he would be required to submit a fully secured undertaking. *Id*.

Notably, even though Brick has never been the subject of a formal claim or proceeding, he is demanding advancement and reimbursement of almost $130,000 in fees for services provided by at least ten different lawyers working at four different law firms. B79-B101; B102-B117; B184-B206.

G. The Court of Chancery Denies Advancement; Brick Appeals

On May 14, 2020, Brick moved for summary judgment, and on June 22, the Companies cross-moved. On August 18, 2020, following briefing and argument, the Court-below issued the Order granting Defendants' motion and denying Brick's.

In its Order, the Court reviewed the governing Agreements and determined that, pursuant to Section 11.3(g) of the Holdco Agreement, "the Holdco Board retains the 'sole discretion' to 'limit or deny' indemnification to Covered Persons who are not members of the Holdco Board." Order ¶ 19. The Court next considered whether "the proceedings for which Brick seeks advancement involve actions he took in a covered capacity – *i.e.*, as a Holdco Board Member." Order ¶ 27. The Court reasoned that the Companies "submitted detailed evidence that Brick's actions giving rise to his demand for advancement implicate solely his capacity as [COO]," that Brick had conceded "in his own affidavit that the conduct at issue occurred in

his capacity as an employee," and that Brick had not "meaningfully argue[d] based on the factual record that his actions bear the relevant nexus to his position as a Holdco Board member." *Id.* ¶¶ 29-30. Therefore, the Court found that "Brick's claims for advancement [were] solely by reason of the fact that he [was] an officer of Opco" and that the Board "invoked its right to use its sole discretion to deny Brick advancement in that capacity." *Id.* ¶ 33.

On September 16, 2020, Brick filed a Notice of Appeal. Brick filed his Opening Brief on November 4, 2020, and a Corrected Opening Brief on November 18, 2020.[6]

[6] Brick's Opening Brief will be cited herein as "OB at ____".

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY APPLIED THE GOVERNING PROVISIONS OF THE HOLDCO AGREEMENT TO UPHOLD THE BOARD'S EXERCISE OF ITS DISCRETION TO DENY ADVANCEMENT TO BRICK.

A. Question Presented

Did the Court of Chancery correctly hold that, aside from a narrow exception for Holdco Board members acting in their capacity as such, Section 11.3(g) gives the Holdco Board unfettered discretion to deny advancement and indemnification?

B. Standard and Scope of Review

This Court's review of a trial court's grant of a motion for summary judgment is *de novo*. *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.* 871 A.2d 428, 443 (Del. 2005).

C. Merits of Argument

The Court-below correctly ruled that Section 11.3 of the Holdco Agreement preserves the Board's plenary discretion to deny indemnification and advancement to Covered Persons other than for claims against Board members acting in such capacity. The Court also was correct to rule that Brick's actions in furtherance of his double-invoicing scheme occurred as Opco's COO, rather than as a Holdco Board member. Brick's argument that *other* provisions of the Holdco Agreement

guaranteed him advancement *in spite of* the plain and unambiguous language of Section 11.3 is unavailing.

1. It Is Undisputed That the Advancement and Indemnification Rights Are Permissive, Not Mandatory, For Employees and Officers under the Holdco Agreement

Section 11.3(b) of the Holdco Agreement states that Holdco will advance legal or other expenses to a "Covered Person in connection with investigating, preparing to defend or defending any claim, lawsuit or other proceeding relating to any Indemnified Losses *for which such Covered Person is entitled to be indemnified* pursuant to this Section 11.3."[7] A289 (emphasis added). Section 11.3(g) of the Holdco Agreement provides:

> (g) Board Right to Limit Indemnification. In the case of any Covered Person other than a Representative, it being understood that indemnification of a Representative with respect to claims in its capacity as such shall be mandatory to the extent permitted under this Agreement, *the Board shall have the right, acting in its sole discretion, to limit or deny the indemnification provided for hereunder with respect to any other Covered Person, in whole or in part.*

---

[7] Similarly, Section 5.8(b) of the Opco Agreement provides advancement, in certain circumstances, to any "Person *to whom indemnification may be owed hereunder*" for a proceeding "*for which indemnification may be sought* under this Section 5.8." A231 (emphasis added). The Court-below noted that "[t]he relevant provisions of the Opco LLC Agreement are substantially the same as the advancement provisions of the Holdco LLC Agreement" and "[f]or simplicity," the Court focused on "the Holdco LLC Agreement only." Order at 9 n.51. Brick does not mention the Opco Agreement in the legal argument of his Opening Brief on appeal, and thus he is not relying on the Opco Agreement for relief here.

A291 (emphasis added). "Representatives" are defined in § 1.7 of the Holdco Agreement as Board members.

Under the plain language of these provisions, a Covered Person's right to advancement is dependent on her right to indemnification. Furthermore, the Board has the unfettered discretion to deny indemnification (and thus, advancement) to any Covered Person other than a Holdco Board member acting as such.

Brick does not contend otherwise. As the Court of Chancery noted, "Brick does not dispute . . . that a discretionary decision to deny him indemnification rights as an officer operates to terminate his advancement rights as an officer."[8] Order ¶ 23. Indeed, Brick did not even *cite* Section 11.3(g) of the Holdco Agreement in his 93 pages of briefing before the Court of Chancery.

2. There Was No Genuine Dispute of Material Fact: Brick Carried Out the "Double-Invoicing" Scheme as An Opco Employee, Not as a Holdco Board Member

Because there was no dispute before the Court of Chancery that the Holdco Board had exercised its discretion to deny Brick advancement as an Opco employee

[8] Section 5.8(e) of the Opco Agreement similarly confirms the Board's complete discretion to deny indemnification to persons at Opco, stating "[i]n the case of any person otherwise entitled to be indemnified hereunder (other than the Manager [*i.e.*, the Holdco Board]), *the Manager shall have the right acting in its sole discretion, to limit or deny the indemnification provided for hereunder with respect to any other person, in whole or in part."* A232 (emphasis added).

and officer, the sole question remaining for that Court was whether the conduct for which Brick sought advancement had been undertaken as a Holdco Board member. To answer this question, the Court reviewed the Companies' "three affidavits that describe Brick's responsibilities as COO of Opco,"[9] which included communications with Chinese suppliers about double-invoicing.[10] On the basis of this undisputed record, the Court of Chancery ultimately concluded that "Brick does not meaningfully argue based on the factual record that his actions bear the relevant nexus to his positon as a Holdco Board member."[11] Indeed, the Court observed, "Brick further concedes in his own affidavit that the conduct at issue occurred in his capacity as an *employee,* not as a member of the Holdco Board."[12]

In particular, the Court of Chancery noted Brick's failure to offer any evidence of the Board's involvement in his double-invoicing misconduct. *See, e.g.*, Order ¶ 30 ("There is no evidence that Brick included other Holdco Board members on emails with suppliers or sought their authority to act."). Indeed, the undisputed evidence before the Court of Chancery was that Brick had *deceived* the Board,

---

[9] Order ¶ 29 & n.71 (citing A216-A217 ¶¶ 9, 14, 17; A322-A324 ¶¶ 14, 15, 17; B71 ¶ 3.).

[10] *See, e.g.,* B207-B242 (select emails between Brick and Opco's Chinese suppliers).

[11] Order ¶ 30.

[12] Order ¶ 29 (emphasis in original).

stating that the increase in Section 301 Customs duties on Chinese goods had "no effect" or "no impact" on the Companies.[13] These misrepresentations worked; Brick's double-invoicing misconduct was not discovered by the Board until an internal investigation in October 2019, after which Brick was confronted and confessed.[14] In fact, the *only* evidence in the record of any Board-level consideration of the conduct at-issue was at a December 2019 Board meeting, when Brick was admonished by another Board member and apologized.[15]

Brick had the opportunity below to take issue with the Companies' evidence, but he did not. Indeed, he declined to state whether "double-invoicing" had occurred, whether he had played any role in a double-invoicing arrangement at Opco, or whether CBP had been underpaid. The Court-below took notice, ruling that "Brick ha[d] failed to dispute material facts by affidavit or proof of similar weight."[16] Absent such a dispute, the Court properly granted summary judgment.[17]

---

[13] *See, e.g.,* A309-A312 (Brick emails no impact), A218-A219 ¶ 14 (describing Brick emails and statements at board meetings); B71 ¶ 2 (Brick "had repeatedly said to Kian and to me at TRS Board meetings that the Section 301 duties were having 'no effect' and 'no impact'…").

[14] *E.g.*, B74-B75 ¶¶ 10-13 (discussing a confrontation with Brick and Brick's admissions of wrongdoing).

[15] *E.g.* A220-A221 ¶ 19; A325 ¶ 20.

[16] Order ¶ 32.

[17] *Id.* ¶ 32.

3. Brick's Argument that Section 11.1(b) of the Holdco Agreement Guarantees Him Advancement and Neutralizes the Controlling Provisions of Section 11.3 Is Meritless.

As noted above, the Court of Chancery rightly construed the plain language of Section 11.3 of the Holdco Agreement to mean that: (i) a "Covered Person's" right to advancement is dependent on a right to indemnification and (ii) the Holdco Board has unfettered discretion to deny advancement to anyone other than a Covered Person acting in a capacity as a Holdco member. From these premises, the Court of Chancery correctly ruled that the Holdco Board had properly exercised its discretion to deny advancement and indemnification to Brick.

Brick did not dispute this construction of Section 11.3's provisions below, and he does not dispute them here. Instead, Brick strives mightily to neuter Section 11.3, even though it is that Section of the Holdco Agreement that expressly governs the rights of advancement and indemnification. In a section of his Opening Brief labeled "The Agreement's Advancement and Indemnification Obligations," Brick declines even to quote Section 11.3, instead indirectly referring to that Section's provisions as "The Mechanical Clauses" and claiming that they "contain nothing of the intent of the parties." OB 21. Warming to this theme, he later claims that the Court of Chancery "mechanically applied Section 11.3(g)." OB 25.

It is a remarkable forensic strategy to contend that a section of an operating agreement expressly entitled "Indemnification" and describing a party's eligibility for advancement really bears no relevance to those topics. But Brick goes further, making that strategy the centerpiece of his Opening Brief. In a rambling quartet of repetitive arguments, he claims that Section 11.1(b) of the Holdco Agreement—a Section that does not even mention advancement or indemnification—completely neutralizes the Board's discretion under Section 11.3(g). This bold but groundless claim culminates on page 31 of Brick's Opening Brief, where he contends that "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."

This argument is meritless. Section 11.1(b), entitled "Good Faith Reliance," says only that a Covered Person "shall be fully protected in relying *in good faith* upon the records of [Holdco]" and information from those associated with Holdco. A228 (emphasis added). The Section goes on to explain that actions taken on the basis of "such [good faith] reliance shall conclusively be presumed not to constitute Excluded Misconduct." *Id*.

Section 11.1(b) does not mention or refer to the advancement or indemnification provisions of Section 11.3 *at all*. It certainly does not vitiate the Board's comprehensive and unfettered discretion to deny indemnification and

advancement under Section 11.3(g). Indeed, Section 11.1(b) stands for nothing more remarkable than the proposition that a Covered Person who truly relies on other sources of information "in good faith" shall be immunized from a finding that she committed "Excluded Misconduct."

Brick, however, invokes Section 11.1(b) to do much more. He contends that—by *implication*—it completely does away with the Board's *express* discretion to deny advancement and indemnification to anyone other than a Holdco Board member acting in that capacity. Not surprisingly, Brick cites no legal authority for this sweeping contention. To the contrary, he ignores this Court's admonition, cited elsewhere in his Opening Brief, that "[w]e will read a contract as a whole and we will give each provision and term effect, so as not to render any part of a contract mere surplusage. We will not read a contract to render a provision or term meaningless or illusory." *In re Osborn,* 991 A.2d 1153, 1159 (Del. 2010) (internal quotations and citations omitted). Moreover, "[s]pecific language in a contract controls over general language…" and when there is a perceived conflict between specific and general language, "the specific provision ordinarily qualifies the meaning of the general one." *DCV Holdings v. ConAgra, Inc*., 889 A.2d 954, 961 (Del. 2005). Section 11.3(g) is a "specific" provision addressing entitlement to indemnification and advancement that qualifies the applicability and meaning of

Section 11.1(b). Thus, Brick's attempt to neutralize Section 11.3(g) with Section 11.1(b) cannot be reconciled with well-settled principles of contract interpretation, and that attempt should be rejected.

4. There is No Genuine Issue of Material Fact that Brick Was Not Acting in His Capacity as a Board Member.

As explained above, the Court of Chancery—after reviewing a comprehensive and undisputed factual record—properly found that Brick's involvement in the double-invoicing arrangement at issue was undertaken as an Opco officer and employee, not as a Holdco Board member. On the rare occasions that Brick interacted with the Board about the double-invoicing issue, he was either *deceiving* the Board about the impact of Customs duties on Opco's business or *apologizing* to the Board for his involvement (as Opco's COO) in the double-invoicing arrangement.

The Holdco Agreement imports the corporate "by reason of the fact" standard of Section 145 of the Delaware General Corporation Law. Order ¶ 28. As the Court of Chancery noted, "[i]n the corporate context, this standard is satisfied when 'there is a nexus or causal connection between any of the underlying proceedings . . . and one's official corporate capacity.'" *Id.*, citing *Homestore v. Tafeen*, 888 A.2d 204, 214 (Del. 2005). Brick failed to offer any evidence below disputing his substantial and knowing involvement in Opco's double-invoicing arrangement, his

misrepresentations to the Board about the impact of Section 301 Customs duties, or his apology to the Board for his misconduct as Opco's COO. Thus, as the Court of Chancery correctly ruled, there is no evidence that there was a "nexus or causal connection" between the actions Brick took in furtherance of the double-invoicing scheme and his role as a Holdco Board member. *Id.* ¶ 29. Accordingly, he was not entitled to indemnification or advancement.

Constrained by his failure to offer any evidence below of a "causal connection" between his status as a Holdco Board member and his involvement in the double-invoicing arrangement, Brick attempts to change the subject. Pointing to a single June 15, 2018 email exchange between himself and two Board members about the reclassification of certain imported goods, (A309-A312, the "June 15 Email"), Brick suggests that the communication "implicate[s him] as a Board member" and raises a question as to his advancement rights. OB at 29.

As a threshold matter, Brick did not mention the June 15 Email in his Affidavit to the Court of Chancery, nor did he cite it or make any arguments concerning it in his briefs to that Court. Brick's lawyer briefly read from the email at a hearing before the Court of Chancery,[18] but Brick did not properly preserve any issue arising from the Email or assert any issue concerning it in his Opening Brief to this Court.

[18] A53-A54.

Accordingly, he waived any such issue.[19] Allowing him to make arguments concerning that email now, after the Companies were deprived of any meaningful opportunity to challenge those arguments in the Court-below, would be prejudicial.[20]

Not only does Brick improperly attempt to create on appeal a new issue that he was acting as a Holdco Board member, he tries to wrest consideration of that issue away from Delaware courts entirely. Citing *Clearfield Trust Co. v. United States,* 318 U.S. 363 (1943) and its progeny, he claims the Court-below "usurped the exclusive jurisdiction of Customs and federal courts to determine whether Brick acted in his capacity as a Board member". OB 31-33.

Brick fundamentally misapprehends *Clearfield Trust.* That case and its progeny stand for the unremarkable proposition that "federal law governs questions

---

[19] *See, e.g., Flamer v. State*, 953 A.2d 130 (2008) ("the appealing party's opening brief [must] fully state the grounds for appeal, as well as the arguments and supporting authorities on each issue or claim of reversible error" or such arguments will be deemed waived) (emphasis omitted); *Roca v. E.I. du Pont de Nemours and Co*., 842 A.2d 1238, 1242 (Del. 2004) ("Casual mention of an issue in a brief is cursory treatment insufficient to preserve the issue for appeal and *a fortiori* no specific mention of a legal issue is insufficient.") (internal quotations and citations omitted).

[20] In any event, though the June 15 Email is an exchange among Brick and two other Board members (Caldwell Zimmerman and Matt Kossoff), nothing in the email indicates that Brick is being consulted in his capacity as a Holdco Board member instead of his capacity as Opco's COO in charge of customs compliance. The email is thus unavailing to Brick in his effort to secure advancement.

involving the *rights of the United States* arising under nationwide federal programs." *United States v. Kimbell Foods, Inc.,* 440 U.S. 715, 726 (1979), citing *Clearfield,* 318 U.S. at 366-67 (emphasis added). This case, however, does not involve "the [public] rights of the United States arising under [a] nationwide federal program," but a *private* advancement dispute between Brick and Holdco governed by the operating agreement of a Delaware LLC. It is thus Delaware contract law, not federal law, that governs this dispute. *Clearfield Trust* is inapposite.

In Brick's view, it seems, federal law supplants Delaware law whenever a party seeks advancement for claims arising under a federal program or statute. As the Vice Chancellor observed below, "[t]hat's just not Delaware law…. The idea that I wouldn't have the ability to determine whether the conduct at issue gives rise to indemnification or advancement rights is just wrong."[21] The Court of Chancery rightly exercised its authority to determine that Brick was not acting as a Holdco Board member, and it rightly denied Brick advancement.

---

[21] A100; *see also, e.g., Charney v. Am. Apparel, Inc*., 2015 WL 5313769, (Del. Ch. Dec. 11, 2015) (declining advancement because the Court found that the claims at issue did not involve plaintiff's "use or abuse of corporate power as a fiduciary").

5. The Board Did Not "Impliedly Ratify" Brick's Double-Invoicing Scheme

Doubling down on his reliance on the June 15 Email, Brick also contends that the Email is evidence that the Holdco Board ratified Brick's misconduct. OB 39-41. As noted above, Brick has waived any arguments based on the Email. But even he had not, his argument is meritless. First and foremost, Delaware law holds that illegal acts (such as knowingly underpaying Customs duties) are "void" or "ultra vires" and *cannot* be ratified.[22] Thus, the Board was powerless to ratify Brick's double-invoicing misconduct even if it had known about it (which, the record indisputably indicates, it did not).

Moreover, "[u]nder Delaware law, '[r]atification is an equitable defense that precludes a party who has accepted the benefits of a transaction from thereafter attacking it.'"[23] Here, the Companies have *not* accepted any "benefits" of Brick's misconduct. To the contrary, they hired counsel and experts to investigate the

---

[22] *See, e.g.*, *CompoSecure, L.L.C. v. CardUX LLC*, 206 A.3d 807, 816 (Del. 2018) (reasoning "void acts are *ultra vires* and generally cannot be ratified"); *Nevins v. Bryan*, 885 A.2d 233, 245 (Del. Ch. 2005), *aff'd*, 884 A.2d 512 (Del. 2005) ("Void acts are not ratifiable because the corporation cannot, in any case, lawfully accomplish them. Void acts are illegal acts or acts beyond the authority of the corporation." (internal quotations and citations omitted).

[23] *Braga Investment & Advisory LLC v. Yenni Income Opportunities Fund I, L.P.*, 2020 WL 3042236, at *11 (Del. Ch. Jun. 8, 2020) (quoting *Genger v. TR Inv'rs, LLC*, 26 A.3d 180, 195 (Del. 2011) (alteration in original)).

problem, have self-reported underpayments to Customs, and are prepared to pay what is owed. *See, e.g.,* A220-A222 ¶¶ 18, 20, 21.

Finally, the June 15 Email does not create a genuine issue of material fact that Holdco ratified Brick's double-invoicing misconduct. Notably, that Email does not mention or refer to double-invoicing at all. Instead, Holdco Board member Caldwell Zimmerman asks about the impact on Opco of the new tariff regulations; then-CEO Kossoff says "we could reclassify the HTS codes most likely in an effort to skirt it"; and Brick says "[w]e have been using some different HTS codes for recent exposures that have limited exposure to the new tariffs." A310. There is nothing in the Email to suggest that "using different HTS codes" was even illegal, much less that Mr. Zimmerman or Scott Buschmann (the other Holdco Board member copied on the email) appreciated that import. Indeed, there is no indication in the Email that Zimmerman or Caldwell even read (let alone "ratified") Brick's reply at all.

II. THE COURT OF CHANCERY CORRECTLY RULED THAT, BY THE BOARD'S ADOPTION OF THE JOINT RESOLUTION, THE COMPANIES PROPERLY EXERCISED THE COMPANIES' DISCRETION TO DENY BRICK ADVANCEMENT.

A. Question Presented

Did the Court-below err in rejecting Brick's argument that the Board was equitably estopped from relying on the Joint Resolution to deny him advancement?

B. Standard and Scope of Review

As stated above.

C. Merits of the Argument

Through counsel, Brick first demanded advancement from the Companies by letter dated March 27, 2020. A222-A223¶ 23, B79-B101. The Companies denied that demand by letter from their own counsel dated April 2, 2020. *Id.* ¶ 23, B99-B101. Four days later, Brick filed his Verified Complaint in the Court of Chancery. Twelve days after that, on April 16, the Board held a formal Board meeting, received legal advice, and adopted a "Joint Resolution" formally denying Brick's demand. A223 ¶ 24; A313-A316.[24]

---

[24] Brick suggests for the first time on appeal that the Joint Resolution is deficient because it "does not cite to or invoke Section 11.3(g) [and] merely recites that Brick engaged in 'Excluded Misconduct.'" OB at 44-46. To the extent that Brick is attempting to make a legal argument out of this observation, he waived that argument by not making it or briefing it below. More to the point, however, Brick is wrong. Far from "merely recit[ing] that Brick engaged in Excluded Misconduct," the Joint Resolution contains *five separate resolutions* denying Brick advancement, the first

Brick contends that the Board is equitably estopped from relying on the Joint Resolution to deny him advancement. He claims that "it was incumbent that Appellee's [sic] invoke Section 11.3(g) so that Brick not be put to the great expense of a lawsuit." OB at 44-45. Though the legal basis for this contention is not clear in his Opening Brief, presumably he will make the same argument that he made before the Court of Chancery: that the Companies intended to "trap" him by disclosing the Joint Resolution at the last minute and surprising him with their position that the Holdco Board had the discretion to deny him advancement as an officer and employee. *See* A197-A201.

This argument fails here for the same reasons it failed below. The doctrine of equitable estoppel "is applied cautiously and only to prevent manifest injustice." *Pilot Point Owners Ass'n v. Bonk*, 2008 WL 401127, at *2 (Del. Ch. Feb. 13, 2008). It requires Brick to demonstrate "by clear and convincing evidence that: (1) [he] lacked knowledge or the means of obtaining knowledge of the truth of the facts in question; (2) [he] reasonably relied upon the conduct of the party against whom the

---

and third of which do not mention Excluded Misconduct at all but generally invoke the Board's "contractual right[s]" under the Holdco and Opco Agreements. No legal authority required the Board to expressly refer to Section 11.3(g) in the Joint Resolution, and Brick does not cite any.

estoppel is claimed []; and (3) [he] suffered a prejudicial change of position as a result of his reliance upon that conduct. *Id.*

Brick cannot satisfy any of these elements, for the Joint Resolution could not have surprised him. The Companies' pre-suit rejection of his advancement demand, which expressly "reserve[d] all rights, claims, defenses and objections," made it clear the Companies were denying him advancement. Section 5.3 of the Opco Agreement and 11.3 of the Holdco Agreement—which Brick and his lawyers had to have read before he filed his Verified Complaint—made it clear that the Companies had the unfettered discretion to deny Brick advancement as an officer and employee. In short, far from being surprised or prejudiced by the Joint Resolution, Brick should have *expected* it based on the Companies' pre-suit communication and his own review of the documents governing his advancement rights.

The only legal authority that Brick relies on for his equitable estoppel argument is *Branin v. Stein Roe Investment Counsel, LLC*, 2014 WL 2961084 (Del. Ch. June 30, 2014). As the Court of Chancery explained when distinguishing that case, however, *Branin* stands for the proposition that a company may not amend its Operating Agreement *after* the plaintiff has been sued on a covered claim to take away a mandatory advancement right that was triggered by that claim. No such amendment occurred here. *See, e.g.*, A214-A215 ¶ 4 (indicating the Board never

amended the advancement or indemnification provisions at-issue). Instead, the Board merely exercised the unfettered discretion that it had under the Holdco Agreement *before* Brick ever made his advancement demand.

For all of these reasons, Brick's attempt to invoke the doctrine of equitable estoppel to nullify the Joint Resolution must fail.

III. IN THE ALTERNATIVE, THE COURT MAY AFFIRM ON THE UNREBUTTED EVIDENCE: BRICK'S ILLEGAL DOUBLE-INVOICING SCHEME WAS "EXCLUDED MISCONDUCT"

A. Question Presented

May this Court affirm the Court of Chancery on the separate and independent ground that Brick is guilty of "Excluded Misconduct," making him ineligible for advancement *even if* his misconduct had been undertaken in his capacity as a Holdco Board member?

B. Standard and Scope of Review

As stated above.

C. Merits of Argument

Because the Court of Chancery concluded that the conduct for which Brick sought advancement was undertaken solely as an Opco officer and employee, it did reach the question whether Brick was entitled to advancement in his capacity as a Holdco Board member. There is ample, undisputed evidence in the record, however, to show that Brick committed "Excluded Misconduct," as defined in the Holdco Agreement. Accordingly, he is ineligible for advancement even as a Board member.

1. Brick Engaged in Excluded Misconduct

The Holdco Agreement makes clear that all indemnification and advancement rights, *including the rights of Board members acting in their capacities as such*, are conditioned upon the Covered Person's not having engaged in Excluded

Misconduct. *See* A289 § 11.3(a). The Holdco Agreement defines Excluded Misconduct as, among other things, "fraud, willful misconduct, or a knowing violation of law." *Id.* § 1.7 at A245. As discussed *supra*, there is ample evidence in the record that Brick knowingly participated in a years-long "double-invoicing" arrangement intended to underpay Customs duties, resulting in at least a $2 million liability over a five-year period alone. Brick offered no evidence below to raise any genuine issue of material fact concerning: (i) the existence of the double-invoicing arrangement, (ii) his substantial participation in it, and (iii) the resultant loss to CBP and corresponding exposure to the Companies. Accordingly, this Court may affirm on the alternate ground that Brick committed "Excluded Misconduct" and is not entitled to advancement in any capacity.

2. Brick's Attempt To Claim the Benefit of "Good Faith Reliance" Violates Delaware's Canons of Contract Interpretation and Is Bereft of Factual Support.

Although he does not dispute the actual facts demonstrating his behavior, Brick contends that he could not have engaged in "Excluded Misconduct" because he relied "in good faith" on purported "Customs Policies" and/or "audits" of Opco, thereby entitling him to the protection of the "Good Faith Reliance" provision of Section 11.1(b) of the Holdco Agreement.[25] OB 27-29. Section 11.2(b) of the

[25] Cases considering the analogous Section 141(e) of the Delaware General

Holdco Agreement, however, provides that "[w]henever 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[.]" A288. Put more bluntly, to claim the benefit of "good faith reliance" under Section 11.1(b), a "Covered Person" must actually act "in good faith." No plausible interpretation of Section 11.1(b) would allow a party to invoke "good faith reliance" while simultaneously engaging in the sort of "willful misconduct" or "knowing violation of law" that constitutes Excluded Misconduct. Such a construction would violate Delaware's fundamental canon of contract interpretation that "requires all contract provisions to be harmonized and given effect when possible." *Martin Marietta Materials, Inc. v. Vulcan Materials Co.,* 68 A.3d 1208, 1225 (Del. 2012).

Heedless of the law's command that all contract provisions be read together and "harmonized," Brick isolates and focuses on a portion of Section 11.2(b) of the

---

Corporation Law hold that, in order for a "good faith" reliance defense to apply, the actor claiming the defense reasonably rely on matters within another's expertise, and do so in "good faith." *See, e.g., Brehm v. Eisner*, 746 A.2d 244, 262 (Del. 2000); *Mills Acquisition Co. v. Macmillan, Inc*., 559 A.2d 1261, 1284 (Del. 1988); compare also *Allen v. Encore Energy Partners, L.P*., 72 A.3d 93, 104 (Del. 2013) ("an act is in good faith if the actor subjectively believes that it is in the best interests of the [entity]") (emphasis omitted), and *In re Massey Energy Co. S'holder Litig*., 2011 WL 2176479, at *20 (Del. Ch. May 30, 2011) (reasoning "a fiduciary of a Delaware corporation cannot be loyal to a Delaware corporation by knowingly causing it to seek profit by violating the law.").

Holdco Agreement that allows a Covered Person making a decision to "consider only such factors as such Covered Person desires." OB 28-29. In Brick's view, this phrase takes precedence over all other standards of conduct prescribed by the Holdco Agreement, including (i) the provision in the *very next sentence* of Section 11.2(b) that a party required to act in good faith actually do so and (ii) the Agreement's prohibition against Excluded Misconduct. Indeed, as Brick insisted to the Court of Chancery:

> Th[e Holdco] Agreement prohibits inquiry into the rationality, morality or even legality of [a Covered Person's] reliance on even tidbits of information. Such reliance will be deemed to be in good faith and the law of irrebutable presumption is immediately activated to protect [him] from ever being accused of engaging in [Excluded Misconduct]. Brick enjoys that same protection.[26]

In Brick's view, a Covered Person who has engaged in a knowing violation of law, committed willful conduct, or accomplished some other egregious act can still guarantee himself advancement by just claiming reliance (whether in good faith or not) on a "tidbit of information." This sweepingly nihilistic view of a Covered Person's duties under the Holdco Agreement would eviscerate the good faith obligation of Section 11.2(b) and the Agreement's injunction against Excluded Misconduct. It cannot be upheld.

---

[26] A163.

Finally, even if Brick's anarchic construction of "good faith reliance" could be sustained, he has failed to create a genuine issue of material fact on this issue because he cannot point to any information upon which he relied to further a double-invoicing arrangement. While he refers to nebulous and unspecific "Customs Policies," he does not dispute that, before Opco first became an "importer of record" responsible for providing documentation and tax payments to CBP, these policies were *his* responsibility.[27] Moreover, any "double-invoicing arrangement developed *after* Opco became an importer of record was under his supervision alone. A321-A324. In other words, there is nothing in the record to indicate that Brick relied on anyone but himself to fashion and to further a double-invoicing "Customs Policy."

Brick also claims to have relied upon the fact that he was not disciplined after three "audits," contending that such "audits" resulted in no "questions or concerns about the Customs Policies[.]" OB 28. But Brick does not point to any evidence to suggest that the audits disclosed a double-invoicing arrangement upon which he later relied. Nor does he dispute the Companies' evidence that the alleged "auditors" expressly disclaimed any obligation to ferret out fraud. A217 ¶ 11. In short, Brick has not described any feature of the "audits" upon which he relied to continue his

[27] A320-A322 ¶¶ 10-14.

knowing oversight and administration of a double-invoicing arrangement intended to underpay the U.S. Government.

3. The Unrefuted Evidence Provided by Defendants Below is Admissible and Supports a Finding That Brick Engaged in Excluded Misconduct

Rather than submit evidence in the Court-below that would have created a genuine issue of material fact, Brick attempted to avoid summary judgment by making spurious challenges to the admissibility and sufficiency of the Companies' evidence. Adopting the same strategy here, Brick contends in conclusory fashion that the Court-below erred by "basing its Order on inadmissible evidence" and, without that, the Defendants "have no evidence that Brick engaged in Excluded Misconduct." OB 47-48. In particular, Brick claims, without the Companies' self-disclosure to CBP or the "actual commercial invoice[s]" in the record, there was no "admissible evidence" to prove the existence of the double-invoicing scheme or Brick's Excluded Misconduct. OB 46-48.

Brick cites no authority for these propositions, which are without merit.[28] The Companies' Motion below was properly supported by three detailed Declarations, made under penalty of perjury, from witnesses who relied on their personal

[28] Indeed, Brick's two-page "evidentiary" argument should be deemed waived for failure to cite legal authority. *Flamer*, 953 A.2d at 134.

knowledge to describe Brick's misrepresentations to the Board, the Board's lack of any involvement in the double-invoicing arrangement, the internal investigation into Brick's oversight and administration of the arrangement, and Brick's admissions. The Companies also submitted emails showing Brick's communications with Chinese suppliers to advance the arrangement. B207-B242. Brick chose not to dispute any of this evidence.

Brick's reliance on Delaware's "Best Evidence Rule" (Rule of Evidence 1002) is unavailing. That Rule provides that a specific document should be entered into evidence "to prove its content[.]" It applies "only when the happening or transaction is sought to be proved *by a writing* …, not when it is sought to be proved by other evidence. Thus, for example, "[a]n event may be proved by nondocumentary evidence, even though a written record of it was made."[29] Contrary to Brick's view, Rule 1002 *does not* require the proponent to use documents, even in circumstances where documents might be the "best evidence" of what occurred.[30]

---

[29] F.R.E. 1002 (Adv. Comm. Notes); Wright & Miller, 31 FED. PRACTICE & PROC. § 7184 (reasoning that Rule 1002 does not apply to "other evidence that is probative of the same facts") (Apr. 2020 Update).

[30] *Id.* (discussing that the Rule permits "the admission of evidence that is clearly not the 'best evidence' available. Thus, a witness with personal knowledge of testimony at some prior proceeding may describe the contents of that prior testimony even though there is a transcript that is more accurate.…").

In short, the Best Evidence Rule did *not* require the Companies to burden the Court-below with additional documents, particularly when Brick chose not to dispute the evidence against him and in light of his own admissions of wrongdoing.

IV. IN THE ALTERNATIVE, THE COURT MAY AFFIRM FOR BRICK'S FAILURE TO PROVIDE THE SECURED UNDERTAKING THAT IS A CONDITION PRECEDENT TO ADVANCEMENT

A. Question Presented

Was Brick obligated to provide a secured undertaking as requested by the Board, and is his failure to do so an additional ground to affirm?

B. Standard and Scope of Review

As stated above.

C. Merits of Argument

Section 11.3(b) of the Holdco Agreement conditions any advancement rights on the "receipt by the Company of *an undertaking satisfactory to the Board* by or on behalf of such Covered Person…." A290-A291 (emphasis added).[31] An undertaking is a condition precedent to advancement and must be tendered before a right to advancement ripens.[32] Where a would-be indemnitee has not provided a required undertaking, the indemnitor is not liable for advancement until the indemnitee provides one.[33]

---

[31] Section 5.3(c) of the Opco Agreement does as well.

[32] *See, e.g., Blankenship v. Alpha Appalachia Holdings, Inc.*, 2015 WL 3408255, at *16 (Del. Ch. May 28, 2015), judgment entered 2015 WL 3582352 (Del. Ch. June 5, 2015) (so reasoning).

[33] *See*, *e.g.*, *Wong v. USES Holding Corp*., 2016 WL 1436594, at *2 (Del. Ch. Apr. 5, 2016) (reasoning the company had "no obligation to advance funds, and

The Agreements include the requirement that any undertaking to repay be "satisfactory" to the Board.[34] Absent language constraining a Board's discretion, a Board's demand for a secured undertaking will be upheld so long as "rational directors" may think it appropriate to protect the company.[35] This is a matter for the Board's business judgment.[36]

Here, the Board considered Brick's advancement request and made it clear to Brick that, if the Companies were required to provide advancement (and they were not), Brick would have to tender a secured undertaking. B118-B183. Brick has never offered to satisfy this condition precedent. Instead, in a two-page argument citing no authority, Brick now contends that "[g]uaranteed indemnification, without the necessity to post an undertaking is precisely what the owners of Holdco/Opco intended." OB 41. Notably, Brick does not cite the language of the undertaking

---

could properly withhold advancement, until such time as the Plaintiffs delivered their mandated undertakings").

[34] These words must be interpreted to have meaning. *See, e.g., NAMA Holdings, LLC v. World Mkt. Ctr. Venture, LLC*, 948 A.2d 411, 419 (Del. Ch. 2007), *aff'd*, 945 A.2d 594 (Del. 2008).

[35] *Thompson v. Williams Cos.*, 2007 WL 3326007, at *5 (Del. Ch. July 31, 2007).

[36] *See, e.g., Carlson v. Hallinan,* 925 A.2d 506, 541 (Del. Ch. 2006), opinion clarified, 2006 WL 1510759 at *541 (Del. Ch. May 22, 2006) (discussing that a board may consider a secured, unsecured, or simply an oral undertaking, and holding "[a]ll that is required is that the board secure such an undertaking in some form. If a board of directors is satisfied, in an exercise of its business judgment, that an oral undertaking is sufficient then this Court will not interfere with that decision.").

requirement in the Holdco Agreement, does not dispute that it preserves the Board's discretion to require security, and does not challenge the Board's exercise of that discretion. Brick cannot elevate his own personal preferences over the clear and unequivocal language of the Holdco Agreement that permits the Board to demand an undertaking as a condition to advancement.

Accordingly, this Court may affirm on the alternate basis of Brick's failing to provide a secured undertaking.

V. IN THE ALTERNATIVE, THE COURT MAY AFFIRM ON THE BASIS THAT THERE IS NO PENDING OR THREATENED CLAIM AGAINST BRICK THAT TRIGGERS HIS RIGHT TO ADVANCEMENT

A. Question Presented

May this Court deny Brick advancement on the separate and independent ground that there is no pending or threatened claim against him at this time?[37]

B. Standard and Scope of Review

As stated above.

C. Merits of Argument

A party's right to advancement does not "ripen into an enforceable right until triggered by a covered claim." *Marino v. Patriot Rail Co*., 131 A.3d 325, 345 (Del. Ch. 2016). Here, the Holdco Agreement permits advancement for "investigating, preparing to defend or defending any claim, lawsuit or other proceeding relating to" a claim for which a person is entitled to be indemnified under Section 11.3.[38] Yet

---

[37] This argument was thoroughly briefed by the Companies in the Court-below. B57-B60; B275-B276.

[38] The Holdco Agreement permits indemnification for "losses, claims, damages, judgments, fines or liabilities, including reasonable fees or other expenses incurred in investigating or defending against such losses, claims, damages, judgments, fines or liabilities[.]" A289 § 11.3(a). The advancement provision refers to "investigating, preparing to defend or defending any claim, lawsuit or other proceeding relating to any Indemnified Losses for which such Covered Person is entitled to be indemnified under this Section 11.3." *Id.* § 11.3(b).

Brick does not contend that anyone has commenced a proceeding against him. The record evidence indicates only that (i) the Companies self-reported the roughly $2 million underpayment in Customs duties to CBP and offered to pay it; and (ii) the parties did not sign a *draft* Separation Agreement by which the Companies would have agreed *not* to pursue repayment of a $400,000 bonus paid to Brick. There is no evidence in the record that the Companies ever threatened Brick with such a repayment claim.

In analyzing whether litigation is sufficiently imminent to trigger an advancement right, the Court of Chancery has cautioned against "taking an overly broad reading of threatened [p]roceedings" and advised that advancement should not be triggered by "any cloud on the horizon." *Donohue v. Corning*, 949 A.2d 574, 581 (Del. Ch. 2008). In *Donohue*, although the company had not filed a legal action against the plaintiff, Donahue argued that he was "disposing of that threatened action by bringing … suit" and that these threats triggered his advancement rights. *Id*. The Court disagreed, finding that "because the defendants did not threaten or initiate a proceeding against Donohue, he is not entitled to advancement." *Id*. at 575.

As in *Donohue*, neither Opco nor CBP has threatened, let alone initiated, any litigation. A222 ¶ 22. Brick's belief that Opco or Customs may have a potential

claim against him constitutes nothing more than a "cloud on the horizon." He has no advancement claim at this juncture. *Donohue*, 949 A.2d at 575.

CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that this Court affirm the Order of the Court of Chancery.

MORRIS JAMES LLP

/s/ P. Clarkson Collins, Jr.
P. Clarkson Collins, Jr. (#739)
K Tyler O'Connell (#4514)
Kirsten A. Zeberkiewicz (#4573)
Damon B. Ferrara (#6658)
500 Delaware Avenue, Suite 1500
Wilmington, Delaware 19801
(302) 888-6800

Attorneys for Defendants Below, Appellees The Retrofit Source, LLC, TRS Holdco, LLC, TRS Management, LLC

OF COUNSEL:

ROBINSON, BRADSHAW, & HINSON, P.A.

Stephen M. Cox
202 East Main Street,
Suite 201
Rock Hill, South Carolina 29730
(803) 325-2910

Dated: December 7, 2020