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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

**PLAINTIFF BELOW-APPELLANT**
**NATHAN BRICK'S CORRECTED REPLY BRIEF**

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## TABLE OF CONTENTS

ATTACHMENTS:

Certificate of Compliance
Certificate of Service

## TABLE OF AUTHORITIES

**Cases** **Page(s)**



**Statutes**



**Rules**

## INTRODUCTION

This Appeal arises out of proceedings pending before the United States Customs Border Protection Agency ("Customs" or CBP") initiated by Appellees, TRS Holdco, LLC ("HoldCo") and The Retrofit Source, LLC ("Opco") through their filing of a Prior Disclosure ("PD") with CBP under 19 U.S.C. Section 1592 and the Regulation at 19 C.F.R. 162.74.[1] A PD is an admission of violations of U.S. Customs laws for failing to pay proper tariffs. Appellees have represented that the PD blames Appellant ("Brick") for all violations of the Customs law disclosed in the PD.

Filing a PD results in Customs determining one of three options: whether "persons" were negligent, grossly negligent or guilty of fraud[2]. CBP determines which "persons" it will impose fines based on their culpability. It is now well settled that the term "person" in 19 U.S.C. 1592 for purposes of assessment of fines encompasses any person found culpable for those violations[3]. Imposition of these personal liabilities by CBP are subject to appeals to the Court of International Trade and then to the federal courts. It is CBP and those courts that are charged with

[1] Pursuant to 19 C.F.R. § 162.74, a Prior Disclosure must disclose "all… false material statements omissions or acts including an explanation of how and when they occurred."

[2] 19 U.S.C. § 1592(a).

[3] *U.S. v. Trek Leather,* 767 F.3d 1288 (Fed Cir. 2014).

examining the conduct of all persons and determining who is liable. The sole body of law that governs these determinations of individual/personal liability is the Customs Statutes and Regulations under the Clearfield Trust Doctrine[4].

In addition, CBP forewarns filers:

> 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][5]

As "persons" under the statue, the criminal sanctions to which Holdco Board members and Opco Officers are subject, encompass the criminal misconduct prohibited and those who aided and abetted in that conduct[6]. Even though a state court may find Board members or officers blameless under state law, under the federal statutory scheme they may be convicted of a crime.

Appellees represent that the PD made Brick the target for all of the aforementioned civil and criminal sanctions. In order to pursue an investigation and prepare his defenses before CBP and the civil and criminal proceedings that may follow, Brick has retained criminal defense counsel and customs law counsel.

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

[5] U. S. Customs and Border Protection (Aug. 2017), *What Every Member of the Trade Show Should Know: Prior Disclosure* (Frequently Asked Questions, pp. 13-14).

[6] 19 USC Section 1591(a)(1)(A) and (B).

On March 27, 2020, Brick demanded Appellees grant him advancement/indemnification under the terms of the Holdco/Opco Agreements. Appellees repeatedly rejected these demands because they decided Brick had engaged in Excluded Misconduct and entered a Joint Resolution limited to that reason.[7]

Brick has contended that because he had Good Faith Reliance ("GFR") (defined in Section 11.1 and Section 11.2 of the Holdco Agreement), under Section 11.1(b) it is "conclusively presumed" that his alleged role in the underpayment of tariffs does "…not constitute Excluded Misconduct"[8]. Because Brick is "conclusively presumed" not to have engaged in Excluded Misconduct, then he is not only entitled to indemnification but need not post any security for repayment because GFR guarantees indemnification.

While Appellees concede and the Court of Chancery agrees that Board members' indemnification is mandatory, they argue that Section 11.3(g) grants them "unfettered discretion" to deny indemnification to Brick in his capacity as an officer and the Court of Chancery agreed.[9]

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[7] Joint Resolution (A315-316).

[8] *Id.*

[9] A31.

Brick contends, the lower court erred by not "reading the Agreement as a whole". The court never addressed Brick's Section 11.1(b) GFR evidence and argument.

Thus, the above Customs law issues for this *de novo* appeal are joined. Is it not for Customs under federal law to decide which "persons" are liable under federal customs laws for fines/penalties or are CBP and the federal courts bound by the Court of Chancery's holding that Brick only acted in his capacity as an officer and not as a Board member? Is a federal court in a criminal proceeding precluded from deciding that Brick as a Board member or officer is guilty of criminal conduct or for aiding and abetting criminal conduct because the Court of Chancery held that Brick's alleged misconduct was done solely in his capacity as an officer?

Under the Clearfield Trust Doctrine Brick's civil and criminal liabilities as a Board member or officer are necessarily matters of federal of law that only Customs and the federal courts may decide under the legal standards set by federal law, not state law. Those determinations of which persons are culpable goes to the merits of the PD proceedings based on those federal statutory law. Brick submits that it was and is "reasonable for him to believe" that since the PD blames him for all the Customs laws violated, that Customs "may pursue" him as a Board member or as an officer in civil or criminal proceedings.

There is a second claim for relief submitted for *de novo* review wherein Brick requested advancement. Appellees have threatened to sue Brick for $400,000.00 paid to him as bonuses because the bonuses are alleged to be based on "incorrect earnings data". These bonuses were paid to Brick by reason of the fact that he was employed as an officer of Opco. The Joint Resolution does not address the $400,000.00 claim. The court below does not treat it as a separate claim for advancement and incorrectly confuses and/or intertwines it with Brick's first claim.[10]

[10] A34.

## ARGUMENT

## I. THE COURT OF CHANCERY ERRED BY NOT GRANTING BRICK INDEMNIFICATION AS A BOARD MEMBER.

### A. Section 29 U.S.C. Section 1591 Makes Board Members Personally Liable for Violations of the U. S. Customs Laws.

*Trek Leather, supra* held that civil and criminal liability reaches "all persons" under 29 U.S.C. 1592 *(e.g.)* for improper payment tariffs.[11] Customs or on appeal to the Court of International Trade will determine whether any persons, (Board members or officers of Holdco and Opco) are found to have been negligent, grossly negligent or have engaged in fraud and assess penalties accordingly.[12] *Sterling Footware* explains, the Customs laws' definitions of negligence and gross negligence and the civil penalties it may impose on any person as follows:

> A Defendant is negligent when they "fail[] to exercise the degree of reasonable care and competence expected from a person in the same circumstance either: (a) in ascertaining the facts or in drawing inferences therefrom, in ascertaining the offender's obligations under the statute; or (b) in communicating information in a manner so that it may be understood by the recipient" 19 C.F.R. Pt. 171, App. B(C)(1). (emphasis added). When a negligent § 1592(a) violation impacts the assessment of duties, the civil penalty may not exceed "the lesser of [] the domestic value of the merchandise, or [] four times the lawful duties, taxes, and fees of which the United States is or may be deprived." 19 USC § 1592(c)(3)(A).

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[11] *See U.S. v. Sterling Footware, Inc.,* 279 F. Supp. 3d 1113, 1128, 1130-2017 (Ct. Int'l Trade 2017) citing and applying *Trek Leather, supra*.

[12] The mere filing of a Prior Disclosure by Statute and Regulation mandates Customs categorize the misconduct admitted by either negligent, grossly negligent or fraudulent. 19 USC § 1592(c).

* * *

> To establish gross negligence, Plaintiff must prove "an act or acts (of commission or omission). [by Defendants] done with actual knowledge of or wanton disregard for relevant facts and with indifference to or disregard for the offender's obligations under the statute." 19 C.F.R. Pt. 171, App. B(C)(2); *see also, United States v. Ford Motor Co*., 463 F.3d 1286, 1292 (Fed. Cir. 2006) ("An importer is guilty of gross negligence if it behaved willfully, wantonly, or with reckless disregard in its failure to ascertain both the relevant facts and the statutory obligation, or acted with an utter lack of care.") (emphasis added). When a grossly negligent § 1592(a) violation impacts the assessment of duties, the civil penalty may not exceed "the lesser of [] the domestic value of the merchandise, or [] four times the lawful duties, taxes, and fees of which the United States is or may be deprived." (19 USC § 1592(c)(2)(A). [Emphasis Added][13]

Opco admits it had no customs compliance policies at all in May 2020. (A323). Kossoff, admitted he "knew" that undervaluing of Chinese imports was occurring and was a party himself to emails on the subject (A325). Although Kossoff was the 100% owner of The Retrofit Source, LLC, then became a 25% owner and President of Opco and a Board member of Holdco he states he was not primarily responsible for those valuation decisions Brick, a Board member and officer, was. (A325).

It is plausible that Kossoff, Brick and other Board members in their capacities as Board members of Holdco may be determined by Customs to have not "…exercised the degree of reasonable care and competence expected…" in "…ascertaining [Opco's] obligations under the (Customs) statute" or that they acted with "wanton disregard" or with "indifference", resulting in a finding of negligence

[13] 29 U.S.C. § 1592(C)(1) details the penalties for fraud.

or gross negligence, for not having a customs compliance policy resulting in fines. It is plausible that Customs may determine that the June 15 email, where three Board members, (Zimmerman, Buschmann and Brick) ratified Kossoff's continuation of his Customs Policy of not paying proper tariffs, by "skirting" the law through reclassifying goods imported amounts to negligence, gross negligence, or fraud.

All of the foregoing go to the merits of whether Brick as a Board member or officer will be fined by Customs under federal law. With all due respect to the Court of Chancery, these are not matters that were considered or could be decided in this or any state court proceeding. Assuming *arguendo* the Court of Chancery's holding that Brick's conduct was only in his capacity as an officer is correct under Delaware LLC law, it nevertheless fails to address any of the questions presented under Customs laws that CBP will decide that subject Brick as an officer or Board member to fines.

Brick submits that this Court's *de novo* review should conclude that under U.S. Customs laws, it is for Customs, the Court of International Trade and federal courts, under the Clearfield Trust Doctrine to decide whether Brick, as a Board member or officer is subject to fines for negligence, gross negligence or fraud and that under federal criminal law, it is for the federal court to determine whether Brick as a Board member or officer violated federal criminal laws. As such, this Court should conclude that Brick is entitled to indemnification as a Board member "by

reason of the fact" that there is indisputably a "nexus and casual connection" between the PD proceedings and the civil penalties Customs must consider assessing against all "persons" Customs deem culpable.[14]

### B. The Prior Disclosure Proceedings Triggered Brick's Right To Indemnification.

#### 1. It is Reasonable To Believe the Prior Disclosure Will Result in Fines.

The mere pendency of the PD proceedings gives rise to a claim thereby triggering indemnification.

Brick's position that the pendency of the PD proceedings triggers his right to indemnification is validated in *Meyers v. Quiz-DIA, LLC*, No. 9878-VCL, 2017 Del. Ch. Lexis 96 (Del. Ch. June 6, 2017). In *Meyers, supra* Vice Chancellor Laster considered a claim for indemnification, where two officers, (Smythe and McDonald) were involved in obtaining $875 million of financing from private equity funds in 2012. (*Id.* at p.4). McDonald and Smythe resigned from Quiznos in July 2012. In 2013, the funds met with McDonald and Smythe and though the funds did not threaten to sue them or assert any claims, as V. C. Laster found: "Suspecting that the funds were contemplating litigation, McDonald and Smythe retained Jones Day to investigate claims that the funds might pursue". (*Id.* at p. 5) (Emphasis added). In 2014, Quiznos and its affiliates filed bankruptcy and referenced pursuing litigation

[14] *Homestore v. Tafeen,* 888 A2d 204, 214 (Del. 2005).

against McDonald, Smythe and others (*Id.* ). On July 1, 2014 Jones Day demanded indemnification and then, on July 10, 2014 Jones Day filed a lawsuit. On July 22, 2014 the Funds filed suit against McDonald and Smythe ending in a dismissal by a federal district court in September, 2015.

The indemnification claim in *Meyers* solely revolves around pre-litigation investigative expenses incurred in 2013, prior to the threat of litigation in bankruptcy in 2014 or the filing of the 2014 suit in Colorado.[15] The Funds argued pre-litigation investigative costs were not recoverable because McDonald and Smythe were not engaged in "defense" of the Colorado lawsuit until it was filed in 2014. In granting indemnification for the fees and costs incurred within the Jones Day's investigation, Vice Chancellor Laster held "It was reasonable for McDonald and Smythe to believe the funds were threatening a lawsuit and it was necessary to investigate the claims that the Funds might bring as part of their defense." *(Id*.at *17) [Emphasis Added].

Brick submits that, as in *Meyers, supra* it is "reasonable to believe" that the actual, not threatened PD proceedings make it "necessary to investigate the claims" Customs "might bring as part of [his] defense." Unlike McDonald and Smythe's concerns over the litigation the funds "might bring" the PD has been brought and the

[15] Unlike *Meyers, supra* where McDonald and Smythe had to await the final disposition of the Colorado case for their claim for indemnification to be "ripe", Brick's claim is ripe because indemnification for Board members is mandatory and is guaranteed to Brick as an officer because he had GFR.

issues of what fines and penalties will be assessed is now in process before Customs[16]. These are real risks to Brick as a Board member and officer, rendering Appellees assertions that there is no "claim" without basis.

### 2. Section 4.1 Makes Board Members Responsible for Compliance with Customs Laws.

Section 4.1 of the Agreement describes the contractual duties and responsibilities of Board members. The Court of Chancery's holding that Brick's alleged misconduct was only in his capacity as an officer not as a Board member was arrived at without any reference to Section 4.1. The courts holding is bottomed solely on commonly held understandings of the traditional roles, duties and responsibilities ascribed to officers and Board members. Because of the language Holdco put in its Agreement, those notions are inapplicable.

As pointed out to the court below, the Agreement contractually alters the traditional notions of roles, duties, authority and most important, the ultimate responsibilities of Board members (A138-139). Section 4.1 mandates that Board members as manager of Opco have "exclusive authority" to "exercise all of the powers of [Opco]". Those powers include the exclusive authority:

[16] This "reasonable belief" is underscored because Appellees have not produced the PD. What violations have Appellees confessed besides the alleged double invoicing scheme that subject him to fines/penalties as a Board member? What must Brick investigate to prepare his defenses to those still undisclosed admissions by Appellees?

1. "To conduct, direct and exercise full control over all activities of the Company" (emphasis added);

2. All management powers over the business and affairs of the Company shall be vested in the Board, and;

3. Bind or take any action" on behalf of Opco covered by the Agreement.[17]

In the Background Statement to Opco's Operating Agreement it states: Holdco owns 100 per cent (100%) of Opco "and has complete control of the affairs of the Company [Opco]".[18] [Emphasis added].

Based on Section 4.1, Brick argued below that Customs would look upon Holdco and Opco as a single employer with the Board members of Holdco in "complete control". (A186-187). As a matter of contract interpretation, giving "each term and provision effect" leads to the conclusion that Section 4.1 specifically intends Board members of Holdco to have every vestige of authority necessary to make all decisions and manage every detail of the business affairs of Opco as if they were the officers. In light of those Board member Section 4.1 powers and responsibilities, the degree of "reasonable care" and "competence" imposed by Customs law require Holdco/Board members to "ascertain" Opco's obligations

[17] Holdco Agreement A262.

[18] Opco's Operating Agreement-Exh. A to Amended Unsworn Declaration of Rick Cravey. (A187).

under Customs law. Customs must determine if some or all Board members acted with a "wanton disregard", "indifference to" or "disregard" for Opco's obligations under the statute and assess penalties accordingly. Customs must look to the "persons" who are responsible for complying with the Customs law and from there determine their culpability to assess fines. Customs is not likely to exalt the form of what officers and Board members are traditionally expected to do, and instead look at the substance of their Section 4.1 powers and responsibilities. That statutory analysis by Customs are the merits of what federal law directs Customs must decide. In error the Court of Chancery decided the merits of precisely what federal statutory law assigns Customs to decide. Appellee's arguments concerning limiting Brick's conduct to that of an officer therefore fail (Answering Brief pgs. 19-22).

## II. THE COURT OF CHANCERY ERRED BY NOT APPLYING SECTIONS 11.1 AND 11.2 OF THE HOLDCO AGREEMENT.

### A. The Court of Chancery Erred in Not Ascribing Any Meaning to Good Faith Reliance or the Contractual Standards that Govern its Exercise.

Brick has argued that Sections 11.1 and 11.2 define what constitutes GFR by a Covered Person ("CP") when making a decision to act or omit to act[19]. When GFR is shown under Section 11.1(b) it is conclusively presumed that the act or omission does not "constitute Excluded Misconduct". Appellees in their Answering Brief and the court below fail to interpret and apply GFR.

Delaware law interprets LLC contracts in accordance with their terms.[20] In doing so, Delaware courts read contracts "as a whole" so as not to "render any part of the contract mere surplusage" or "render a provision or term meaningless or illusory".[21] Brick respectfully requests in this *de novo* review this Court interpret of what import and meaning Section 11.1(b)'s irrebuttable presumption has upon the case at bar.

### B. Section 11.1 and 11.2 Mean That Where a Covered Person Shows Good Faith Reliance They are Entitled to Indemnification.

Sections 11.1 and 11.2 contain specific clauses intended to "exculpate" CP's from suffering losses "by reason of any action taken or omitted taken by such

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[19] A155-165, A209-210.

[20] The Court of Chancery did not address GFR or sections 11.1 or 11.2.

[21] *In Re Osborn*; supra at 1159.

Covered Person that in anyway relates to the Company or its business affairs".[22] Section 11.1(b) carves out, with bright line specificity, that when the act or omission otherwise constitutes Excluded Misconduct, the Covered Person is nevertheless specifically "fully protected" if they had GFR based on any "information, opinions, reports or statements" from any Representative, another officer or employee or any expert or professional engaged by the Company.[23] Indemnification is guaranteed when GFR exists. Appellees arguments purposely avoids confronting the meaning of the language in Sections 11.1 and 11.2 and thus, the Answering Brief is non-responsive to this issue. (AB at pps. 23-25).

Appellees Answering Brief does not address Section 11.2(b) at all where it states, when a CP makes a decision, they may utilize "only such interests and factors " they "desire", to such an extent that they are permitted to make decision in exclusively their <u>own self-interest</u> with "no duty or obligation to give any consideration to any interest of or factors affecting the Company or any other person"[24]. To assure CP are "fully protected" this contract specifically exempts their decision from "…any other or different standard imposed by this Agreement or any

[22] A288.

[23] *Id.*

[24] Section 11.2(b) (A289).

applicable law"[25]. Section 11.2(a) eliminates any fiduciary duties owed and waives any claims of breach of those duties by others "imposed or implied" by applicable law[26].

As a matter of contract interpretation, Brick contends that these specific clauses evidence an intent by unambiguous language to displace all "applicable law", and "replace such other duties and obligations" with this Operating Agreement's unique and specific terms. Brick requests that in this Court's *de novo* review it hold that the clear and ambiguous language of section 11.1(b) means that here GFR indemnification is guaranteed.

### C. Where There is Any Inconsistency Between a Specific and General Term of a Contract, the Specific Provision Controls.

The court below held that Section 11.3(g) gave Holdco/Opco "unfettered discretion" to the Board to deny indemnification to an officer. Section 11.3(g) is a general clause. The court did not consider that Sections 11.1 and 11.2 go to extraordinary lengths to describe in minute and very <u>specific</u> detail the definition of GFR, the mechanism and principles of its application and that, when met, establish the irrebuttable presumption that the CP's conduct "shall conclusively be presumed not to constitute" Excluded Misconduct.

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[25] *Id.*

[26] (A288).

Brick submits that the extensive specificity of the GFR guarantee clause controls over the general references to Board discretion[27]. To permit the general incantation of discretion to prevail over a series of highly specific clauses, renders the GFR guarantee entirely "illusory" and "meaningless" under Delaware law[28]. Such an interpretation means that a CP is not "fully protected" and when they make a decision using the GFR standards they actually have no protection at all. Section 11.2(b) specifically promises that those express standards "shall not be subject to any other or different standard imposed by this Agreement or applicable law"[29]. (Emphasis added). If a CP cannot/shall not be subject to applicable law or "any other or different standard imposed by this Agreement", Brick submits that Section 11.3(g) is merely a "other or different standard" that cannot negate the specific right to the indemnification guaranteed by GFR.

The *Osborn* Court then adds to the tools of contract interpretation by holding that if a contract is ambiguous "…we will apply the doctrine of *contra proferentum* against the drafting party and interpret the contract in favor of the non-drafting

[27] *DCV Holdings v. ConAgra, Inc.* 889 A.2d 954, 961 (Del. 2005) holding that "[s]pecific language in a contract controls over general language".

[28] *Estate of Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010).

[29] Section 11.2(b) (A289).

party".[30] (*Osborn* at 1160). Appellees avoid addressing this doctrine, for it leads to the interpretation that GFR guarantees indemnification.

Brick requests this Court hold that as a matter of contract interpretation, showing GFR establishes an irrebuttable presumption that guarantees indemnification.

### D. Appellee's Attempt to Revoke Brick's Right to Indemnification is Solely Based Upon its Assertion that Brick Engaged in Excluded Misconduct not Because They Exercised Discretion.

The only basis Appellees stated for denying Brick indemnification is because they found Brick engaged in Excluded Misconduct. Now, Appellees ask this Court to infer that their Joint Resolution discretion must have been an exercise of Section 11.3(g)[31]. Brick submitted it was incumbent upon the Board, at their April 16th Joint Board meeting, where they had multiple legal counsel in attendance, to have specifically referenced Section 11.3(g) or used the word "discretion".[32] With the advice of counsel, they only articulated one reason for denying indemnification - because of Brick's alleged "Excluded Misconduct".

The Court of Chancery erred in holding that Holdco/Opco Boards exercised discretion in denying Brick indemnification. It is requested this Court hold that

[30] Brick Opening Brief p.32.

[31] Appellees Answering Brief at 31-32.

[32] Brick Opening Brief pp. 43-46.

Appellees Joint Resolution does not evidence an exercise of discretion but only that they "…found [find] that Mr. Brick's conduct with respect to the underpayment of tariffs constituted "Excluded Misconduct". Further, it is requested that this Court conclude that, because Brick had GFR, in accordance with Section 11.1(b) it is "conclusively presumed" that Brick's conduct does not constitute Excluded Misconduct and therefore, Brick is entitled to indemnification.

### E. The Evidence Demonstrates Brick had Good Faith Reliance and Therefore is Entitled to Indemnification as an Officer.

The only other question presented is in the application of GFR to the facts in the case at bar in Brick's capacity as an officer[33]. In his Affidavit, Brick's uncontroverted testimony is that the Customs Policy of The Retrofit Source and later Holdco/Opco were "set, approved and implemented" by Kossoff. In reliance on Kossoff's direction Brick implemented those policies. (A331, 334 and 336).

Though confronted by these assertions by Brick, Kossoff sidesteps and never denies that he had a policy to "skirt" Customs law, via double invoicing, reclassification or other devises. Kossoff admits he knew about the double invoicing being carried on and that the exchanged emails that discussed double invoicing with Chinese suppliers. (A325). Even though Kossoff was sole owner and president of Opco, 25 percent (25%) owner of Holdco and a Board member he … "was not the

[33] The Court of Chancery held that indemnification for Board members is mandatory.

TRS employee preliminarily responsible" (*Id.*). However, the June 15th email where Kossoff admits to the continuation of his Custom's Policy roundly impeaches his credibility on the existence of his singular Custom's Policy to "skirt" the law, through whatever means. Brick had no motive to skirt the law. He was merely a salaried employee with no ownership interest. Kossoff and Kian owned everything and profited from skirting the law by paying lower tariffs. The June 15th email not only confirms Kossoff's Customs Policy but shows that the Kian Reps, Zimmerman and Buschmann had adopted and ratified those Policies. Of course, Brick had GFR on Kossoff's Customs Policies and on June 15, 2019 a Board majority adopted/ratified these Policies with Brick.

Brick's Affidavit also sets forth his extensive interactions with CPA's engaged by Kian for three (3) audits. Brick's uncontroverted testimony is that in all three audits he provided the auditors financial records, including the records showing goods imported from China, along with the invoices from the Chinese manufacturers and those invoices showing a lower valuation upon which tariffs were paid. (A329, 331-334, 336-337).[34]

[34] Appellees claim that their CPA's engagement letters state that they were not engaged to "ferret out fraud". This was never communicated to Brick. Since the CPA's hired by Kian reviewed those Customs/tariff records and made no findings of non-compliance, Brick, in accordance with Sections 11.1 and 11.2, in his own self-interest, bound by no law, fiduciary duty or other obligation to Holdco/Opco concluded that his adherence to Kossoff's/Holdco's Custom Policy was validated.

It is submitted that under the "express standard" set forth in Section 11.2 which excludes reference to any "applicable law", fiduciary obligation, or the interests of Holdco/Opco or any person, Brick had GFR in: (a) following the Customs Policy to "skirt the law" as implemented by Kossoff and adopted, approved by Buchmann and Zimmerman and; (b) relying on three audits where financial records of tariffs paid were disclosed and no auditor raised any questions as to the validity of Holdco/Opco's Customs practices or those of The Retrofit Source, thereby entitling him to indemnification.

It is requested that this Court conclude Brick had GFR and accordingly, he is entitled to indemnification as an officer, and as mandatorily required under Section 11.3(g), as a Board Member.

## III. APPELLEES ARE EQUITABLY ESTOPPED FROM RELYING ON THEIR JOINT RESOLUTION TO DENY BRICK INDEMNIFICATION.

Brick has contended that Appellees took the position on April 2, 2020, in response to Brick's March 27, 2020 demand that their sole reason for denying the demand was Brick's Excluded Misconduct. Appellees passed their Joint Resolution on April 16, 2020, after this suit was filed on April 4, 2020. Brick contends that Appellees are estopped from invoking Section 11.3(g) "discretion" after this lawsuit was filed.

In *Branin v Stein Roe Investment Counsel* 2014 WL 2961084 (Del. Ch. June 30, 2014) the company amended their bylaws after the lawsuit was filed. Here, after the lawsuit was filed, Appellee's amended their position by attempting to add Section 11.3(g) discretions as a reason for denying indemnification. Like ***Branin***, a company cannot amend their operating agreement, after suit has filed, so too here, Appellees cannot amend their reason for rejection of Brick's demand for indemnification after the lawsuit was filed.

## IV. APPELLEE'S ARGUMENTS AND THE COURT OF CHANCERY'S DECISION ARE NOT SUPPORTED BY ADMISSIBLE OR RELIABLE EVIDENCE.

In its *de novo* review the Court reviews the admissible evidence in the record. Appellees Briefs and Unsworn Declaration make many factual assertions but present no documents to substantiate any of their critical assertions. Will this Court simply believe what Appellees claim their PD states? There are no documents to show a double invoicing scheme or that there were underpayments of tariff's amounting to $2 million dollars. Appellees simply expect the Court to believe whatever they claim the PD admits. Those claims are not "admissible evidence" under Rule 56(e) or the best evidence rule. A review of the Court of Chancery decision reveals that it too relies exclusively on representations by Appellees and their witness as to what documents state or contain. Without the benefit of those critical documents, the Court of Chancery had an insufficient record to sustain its holding.

In addition, the factual basis for Appellees multiple claims about Brick's conduct are flawed as follows:

(1) Brick "lied" "misled" and "deceived" the Holdco Board when asked about the effect increased tariffs would have on Opco's Customs tax liabilities. (Answering Brief pps. 4, 11, 20-21) Brick's email states – "Everything that we import was tariffed the first go around, a year ago, or when ever (sic) that was. It has <u>had</u> no effect on margins <u>to this point</u>." Brick's response was not a lie, but the

truth. Opco's imports having already been tariffed meant the Trump tariffs had no effect – "to this point".

(2) Brick did not "conceal" the alleged double invoicing scheme. Kossoff admitted he knew about it and exchanged emails with Chinese suppliers about it. (Appellees Answer Brief p. 2).

(3) Because Kossoff admits he knew about double invoicing, it is simply inaccurate to claim "…the Board learned of the arrangement only after an internal investigation that led to Brick's admission of wrongdoing." (Appellees AB p. 2 and 4);

(4) Brick's comments to Jimenez about the "Chinese suppliers practice of undervaluing goods to reduce the amount of duty paid" or that he was surprised "it took Kian to so long to figure it out" are not admissions of wrongdoing by Brick. (B074-075). Holdco/Opco's Kossoff's Customs Policy, endorsed by Zimmerman and Buschmann in the June 15, 2019 email, to "skirt" customs law to avoid paying proper tariffs was "systemic" (A58).

## V. BRICK IS NOT OBLIGATED TO POST SECURITY OR OTHER UNDERTAKING BECAUSE HE IS ENTITLED TO INDEMNIFICATION.

Brick has contended that no undertaking is required because his GFR makes indemnification guaranteed.[35] Assuming *arguendo* an undertaking is required, the right to indemnification merely triggers the obligation to advance funds so that a company need not advance funds until the undertaking is delivered. *Wong v. USES Holding Corp*, 2016 WL1436594, at *2 (Del. Ch. April 5, 2016). Thus, the right to advancement is not extinguished for failure to post an undertaking.

[35] A159-165.

## VI. BRICK IS ENTITLED TO ADVANCEMENT ON APPELLEE'S THREAT TO SUE HIM ON THE $400,000. CLAIM.

Contrary to Appellees claims, they did threaten to sue Brick for the $400,000. He was paid as a bonus "by reason of fact" that he was an officer/employee of Opco (Appellees AB at pps. 46-48). The threat is in writing and is not a mere "cloud on the horizon" (Appellees AB at p. 48). Unlike the plaintiff in *Donahue v. Corning* 949 A.2d 574 (Del. Ch. 2008), Brick's demand for advancement is purely defensive and should be granted. [36]

[36] Appellees have no argument that the $400,000 claim is addressed in the Joint Resolution. That Resolution is limited to Exclude Misconduct causing "the underpayment of tariff" not the issuance of $400,000 in payroll bonus checks.

## CONCLUSION

In view of the foregoing, it is respectfully requested the Court enter an order granting Brick's Motion for Summary Judgment granting him the following:

1. Indemnification as an Officer and Board Member for all costs, expenses and legal fees incurred and to be incurred in his investigation, preparation of defenses, and defense of all civil or criminal investigations, administrative and legal proceedings arising out of the PD proceedings;

2. Advancement of all costs, expenses and legal fees arising out of Brick's investigation, preparation of defenses or litigation of Appellees $400,000 Claim;

3. Award fees on fees incurred by Brick in this litigation; and

4. Such other relief the Court deems just and equitable.

Respectfully submitted,

OFFIT KURMAN, P.A. & LEWIS

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4832-2793-5189, v. 1