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IN THE SUPREME COURT OF THE STATE OF DELAWARE

GGH-RE INVESTMENT PARTNERS LIMITED and CEZARY JARZABEK, Defendants-Below/Appellants/ Cross-Appellees, v. GOLUB CEE INVESTORS LLC, Plaintiff-Below/Appellee/Cross-Appellant.	)	No. 36, 2023 CASE BELOW: Chancery Court of Delaware C.A. No.: 2021-0810-KSJM

APPELLANTS' REPLY BRIEF AND CROSS-APPELLEES' ANSWERING BRIEF

CONAWAY-LEGAL LLC

Bernard G. Conaway (ID No. 2856)
1007 N. Orange Street, Suite 400
Wilmington, DE 19801
(302) 428-9350
bgc@conaway-legal.com

Attorneys for Defendants-Below/Appellants/ Cross-Appellees GGH-RE Investment Partners Limited and Cezary Jarzabek

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First, the Appellee's suggestion and reliance upon *International Rail Partners LLC v. American Rail Partners, LLC*[1] is misplaced as that case turned on upon "any and all" claims language that is missing from the OA in this matter.

Second, the Chancery Court's reliance upon *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I*[2] was appropriate and consistent with settled Delaware law.

II. **Equitable Fee Shifting.** Denied. The Chancery Court correctly concluded that fee shifting was not supported under equitable principles as the defense in this case as the product of zealous advocacy. That advocacy was made difficult by an inability to conduct discovery and subject to deleterious adverse inference.

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[1] 2020 WL 6882105 (Del. Ch. Nov. 24, 2020).

[2] 2020 WL 7861336 (Del. Ch. Dec. 31, 2020).

ARGUMENT

A. The Appellee Failed to Address the Material, Evidentiary Gaps Underlying the Chancery Court's September 14, 2022, Bench Decision.

The Appellant argues that the trial court's factual findings support the court's conclusion that the Appellants' breached various obligations. Acknowledging a "thin" evidentiary record,[3] the trial court concluded that the Appellants "more likely than not" breached obligations imposed by Exhibit A of Second Amendments to the Operating. As noted in the *Appellants' Opening Brief*, Mr. Glazier's[4] testimony was the foundation for the trial court's conclusion that the Appellants breached those obligations.[5]

The *Appellee's Answering Brief on Appeal and Cross Appellant's Opening Brief on Cross-Appeal* (hereafter "AB") identifies two evidentiary pools that, aside from Mr. Glazier's testimony, it asserts substantiate the trial court's factual findings. Ironically, the Appellee first suggests that the Court ignore the Mr.

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[3] *Post-Trial Ruling* at p. 24 noting that *"*because Golub has alleged many breaches of the LLC agreement, each allegation relies on a somewhat thin record, often consisting only of the limited trial and deposition testimony and Golub's adverse inferences and Polish public records." Appearing as **Exhibit A**.

[4] The Appellant acknowledges that Mr. Glazier's name was incorrectly spelled in its Opening Brief. No disrespect was intended by the spelling error and the Appellant apologizes to both this Court and Mr. Glazier for the error.

[5] *Appellants' Opening Brief* at 22, and 34-39 (hereafter "AOB").

Glazier's testimony – their only trial witness.[6] To this end, the Appellee argues that Glazier's testimony is unnecessary because "[Mr.] Jarzabek's own admissions and government records support most of the breaches and is sufficient to establish that it is more likely than not that Defendants breached the LLC Agreement and Second Amendment."[7] Appellee continues by stating: "Furthermore, Defendants have identified no actual inconsistencies in Mr. Glazier's testimony."[8] On both claims, the Appellant is wrong.

First, the trial court's factual findings cannot be the product of a "logical and orderly deductive process" when (a) supported on a "more likely than not" analytical framework that is anchored by a one-word answer – yes;[9] *and* that answer is directly contradicted by the Appellee's own documentary evidence.

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[6] *Appellee's Answering Brief on Appeal and Cross Appellant's Opening Brief on Cross-Appeal* at 45 (hereafter "AB").

[7] *Id*.

[8] *Id*. at 46.

[9] *See* Mr. Glazier's only trial testimony that the allegation set out in the Complaint were true:

> *Q*. And were the allegations in this complaint true, to the best of your knowledge?
>
> *A*. Yes, they were.

TT at 24/12-22.

Started differently – all of the Second Complaint's allegations cannot, as Mr. Glazier testified, be correct if the Polish NCR documents clearly show otherwise. Mr. Glazier was incorrect, at best.

This irreconcilable inconsistency[10] sets the full breadth of the trial court's error into full view. Specifically, the trial court's reliance upon a "more likely than not" framework under these two conditions is fundamentally flawed. This is true because a "more likely than not" framework logically requires a balancing of the totality of the evidence. Notwithstanding this Court's natural reluctance to defer to the trial court's factual findings, that deference must yield when those findings are "disconnected from the record evidence."[11] That is precisely what happened here. The trial court's decision to find that the Appellants breached Exhibit A based Mr. Glazier's thread-bar, otherwise anemic testimony does not comport with the documentary evidence. Hence, balancing the evidence to reach a "more likely than not" conclusion fails here because the trial court did not, nor

[10] The Appellee argues that Mr. Glazier's testimonial errors are not material, and therefore, this Court can, as the trial court did, ignore them. Mr. Glazier's testimony served as the foundation for many of the Appellants' breaches of Exhibit A. As such, those errors are hardly immaterial.

[11] *CDX Holdings, Inc. v. Fox*, 141 A.3d 1037, 1043-45 (Del. 2016) (Valihura, J., dissenting)

could it, account for obvious evidentiary inconsistencies.[12]

Second, the AOB identified direct conflicts between Mr. Glazier's testimony and the documentary evidence. Specifically, the AOB, at pages 18 through 28, details numerous instances where Mr. Glazier's one word "yes" answers are inconsistent with documentary evidence.

B. The Failure to Appoint Cypriot Directors as a Breach

The trial court concluded that the Appellants breached obligations arising under Exhibit A of the 2-OA because they failed to nominate individuals to serve as Appellee's board designees for the Cypriot companies.[13] In their response, the Appellee, like the trial court, assert that the Appellants had the duty to affect such appointments. Both the trial court and Appellee, however, inexplicably fault the Appellants for failing to nominate the Appellee's board members. This is a nonsensical conclusion because, as Mr. Glazier testified at trial, the Appellee never once identified a nominee for any Cypriot company.[14] Hence, absent a nomination the Appellant could not appoint the Appellee's board member. Despite this, the trial court concluded that the Appellants that were in breach.

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[12] The trial court's error is more pronounced here because the evidentiary discrepancies are not based upon a credibility assessment of the evidence. *Bank of N.Y. Mellon Trust Co., N.A. v. Liberty Media Corp*., 29 A.3d 225, 236 (Del. 2011).

[13] *DT* at 42/6 to 48/5.

[14] *TT* at 93/11-21.

The AO goes a step further. Although acknowledging that Exhibit A does not "specify exactly how to implement the change [of the Cypriot board members]" the Appellee inverts its own obligation to nominate into the Appellants' failure to ask the Appellee for a nomination.

> If Defendants were unable to carry out the appointment of a Golub nominee because they did not know who they were supposed to appoint, Defendants could have inquired with Golub, or raised this defense at any point after receiving the Second Removal Notice or the filing of the Complaint. Mr. Glazier testified that a person suggested by Savva would likely have been the nominee. (AO-0442-0443 (140:22-141:3).)

AO at 48.

The Appellee's argument, however, misstates Mr. Glazier's trial testimony. At trial Mr. Glazer testified that the Cypriot company agent, C. Savva & Associates Ltd, would identify a nominee.

> Q. So my question was for you to answer and identify a single person that Golub nominated to serve as a management board member of any Cypriot company.
>
> A. We did not nominate a specific person.
>
> Q. Okay. So how would Mr. Jarzabek have that person appointed if they were never identified?
>
> A. Now I'll explain. So as I indicated in my earlier testimony, Savva would identify Cypriot nationals to serve as board members for each of the shareholders. We wanted him, Mr. Jarzabek, to resign from the Cypriot board, and he could appoint a Cypriot national to represent him and we

> would do the same.[15] So we would each have Cypriot nationals who would represent us respectively on the management board. Savva would identify those people when we were ready to proceed to organize or reorganize the management board in that fashion.[16]

In short, the Appellee's position that it could or would not nominate a board member is at odds with the position set out in their AO. That inconsistency could be deemed as inconsequential except the documentary evidence reveals that Mr. Glazer always expected to identify the Appellee's nominees.

This expectation is reflected during the editing of Exhibit A as part of the settlement of the First Action. During that process the Appellee's requested that the Cypriot entities be added to Exhibit A. Mr. Jarzabek responded by agreeing to add those entities and further suggesting the "means by which we would introduce the changes in Cyprus, e.g. Savva."[17] In response, the Appellee's stated:

> [Mr. Jarzabek],
>
> Your comments address the means by which we would introduce the

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[15] Mr. Jarzabek was faulted by the trial court for refusing to work with Savva to make the Cyprus board changes. This failure, in the trial court's view, constituted a breach of an Exhibit A obligation. The trial court failed to appreciate that the Appellee's demand that Mr. Jarzabek resign from the Cypriot board was not an obligation set out in Exhibit A. As a further observation, the Appellant's Cyprus expert offered uncontradicted testimony that the Appellee was responsible for the breakdown of the Savva engagement. AO: 270; *see also TT* at 220/8 to 223/17.

[16] *TT* at 91/19 to 92/12

[17] *AO*: 730.

> changes in Cyprus, e.g. Savva. While we did discuss that, we do not want to create a fixed road map to make the changes. *Let's just name the entities to which a Golub board member will be appointed. I do not want to lock myself or anyone for Golub as the board members in this Exhibit. We just need to say Golub shall have an appointed board member*. Savva is a service provider. If we choose to change him out, that's what we'll do and figure out the way to do so as part of the process.
>
> Michael Glazier[18]

As reflected in this statement, Mr. Glazier specifically refused "to create a fixed road map to make the changes" to the Cyprus board members, i.e., giving rise to the "lack of specificity" acknowledged in the AO. Mr. Glazier's statement is also important because it reflects an implicit understanding that the Appellee *would* name the Cyprus board members but that they did "not want to lock myself or anyone for Golub as the board members in this Exhibit."[19] Mr. Glazier's understanding of Appellee's role identifying in board nominees is confirmed in Savva's draft of the companies to be included in Exhibit A. Specifically, in a March 29, 2021, letter summaries the Cypriot entities to be included:

> [C. Savva & Associates Ltd] will execute instructions sent to us jointly by all the beneficial owners of Citosa Investments Ltd, Lounacho Ltd, Bakharval Investment Ltd and Golub Gethouse Holdings Limited to change the composition of the board of directors of the said companies in accordance with the instructions of the beneficial owners.

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[18] *Id*. (italicization added).

[19] *AO*: 728.

AO: 742.

The bottom line here, once again, is that Mr. Glazier's testimony fails to comport with document evidence offered by the Appellee. Despite this, the trial court concluded – without logic or reason – that the Appellants breached Exhibit A obligation.

C. Foreign Law Controlled the Foreign Company Director's Legal Obligations.

Both the trial court[20] and the Appellee[21] fault the Appellants for failing to explain why compliance with Exhibit A was possible on some occasions but not on others. The criticism is misplaced as is the conclusion that foreign law has created an impossibility to perform obligations arising under the OA, 2-OA or Exhibit A. It is misplaced because the obvious distinction between compliance with Exhibit A or Polish law is defined by fiduciary duties. Indeed, at no place in the post-trial briefing or Appellants' opening brief in this Court was foreign law described as creating an impossibility of performance.

Rather the Appellants' point was that Polish, Cypriot and Delaware law rely upon different fiduciary duty vectors. Specifically, at pages 29 through 32, those

[20] *DT* at 65/9.

[21] AO at 35.

vectors compel a Delaware director and a Polish or Cypriot director to respond differently under otherwise identical circumstances. At trial one particular instance highlighted the conflicting legal obligations.

Mr. Jarzabek issued bonds to raise capital to finish construction of the Mennica Tower project. His testimony made clear, that absent additional capital, the Nominal Defendant's indirect ownership interest in the Mennica Tower would be lost. He testified as follows:

> Q. Tell us about the retail bonds that were issued.
>
> A. You refer to the retail bonds for the Mennica project?
>
> Q. Yes.
>
> A. They were issued in order to continue the construction of a building in 2018. At that point of time, there was no financing available to continue the construction. We didn't have any equity to continue the construction. It ended, finished – the equity finished in 2017.
>
> Q. And when you say you had no equity, does that mean that neither of the partners were willing to contribute equity?
>
> A. Neither of the partners were willing to contribute. Golub didn't want to contribute equity. Radziwills didn't want to contribute equity. And the only option to continue the construction, which I decided to pursue, was to issue the retail bonds.
>
> Q. What would have happened had you not secured additional equity?
>
> A. The project would be just -- we would have to give up the project. Our JV partner would flip it over and our equity would

be wiped out.

Q. Was anyone in your circle of investors or partners or members aware of the action to borrow -- to secure retail funding through retail bonds?

A. Of course. Everybody knew. I mean, we are talking about the building which is one of the biggest buildings in downtown Warsaw. So the way this finance is is [stet] common knowledge. It was available. Golub knew. Radziwills knew. Mennica knew how I was contributing equity to continue the construction. Everybody knew.

TT at 278/13 to 279/24. Under Delaware law, Mr. Jarzabek, as a manager, would have been obligated to act consistently with the shareholder's declared interest. Hence, if, as in this instance, the shareholders determined that they did not want to invest further capital, then Mr. Jarzabek would have been duty bound to honor that decision. Conversely, Polish and Cypriot managers owe their fiduciary duties to the company, not their respective members or shareholders.[22]

Confronted with the complete loss of equity in the Mennica Tower Project, Mr. Jarzabeck determined that the company's best interest was served by securing additional financing. Nonetheless, the decision ran counter to the OA and 2OA obligations. Consequently, Mr. Jarzabek faced a conundrum. Either comply with the OA and 2OA as compelled by Delaware law and risk criminal and civil

[22] OA 284 (describing Polish law and stating: "The main duty of the management board of the limited liability company is to act for the benefit of the company and not its shareholders.")

liability under Polish law for doing so; or, raise additional capital to preserve the Polish company's investment and risk civil liability under Delaware law for acting inconsistently with the OA and 2OA.

D. The Trial Court's Determination That The Appellants Breached The OA And 2-OA By Negotiating Potential Sales Of Property Is Unsupported.

The trial court concluded and the Appellee argues that Mr. Jarzabek's negotiation of potential property sales constituted a breach.[23] Nothing in the OA or 2-OA prohibits Mr. Jarzabek, in his capacity as the OMM, from undertaking sale negotiations. Mr. Glazier conceded at trial that Mr. Jarzabek had the sole authority to act on behalf of the Polish or Cypriot entities.[24] Nonetheless, the trial court concluded, without any basis in the governing documents, that such action constituted a breach.

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[23] *Id.* at 56/22 through 60/15 (trial court's discussion/conclusions); *AO* at p. 33-35 (Appellee's discussion/conclusions). Both addressing attempts to sell property.

[24] *TT* at 82/18 through 83/15.

I. THE CHANERY COURT CORRECTLY CONCLUDED THAT THE APPELLEE WAS NOT ENTITLED TO AN AWARD OF ATTORNEY FEES

A. Question Presented

Did the Chancery Court commit an error of law when it determined that the Appellee was not entitled to an award of attorney's fees based upon (a) an indemnification provision in the Operating Agreement, or (b) under principles of equity. No. As noted by the Appellee, this argument was not preserved below. SUPREME COURT RULE 8 otherwise prohibits a party from raising on appeal an argument not raised before the trial court. That RULE, however, admits for an exception based upon an interest of justice consideration. These facts warrant such consideration.

B. Standard of Review

This Court reviews *de novo* the Court of Chancery's interpretation of written agreements.[25]

C. Merits of the Argument

ARTICLE 11.5 addresses indemnification pursuant to the Operating Agreement. That ARTICLE is reprinted in its entirety below:

> 11.5 Indemnification by the Members.
>
> Each Member hereby agrees to indemnify the Company and each of its other Members and hold them each harmless from and against all

[25] *Schock v. Nash*, 732 A.2d 217, 224 (Del. 1999).

> liability, loss, cost, damage and expense (including attorneys' fees and costs incurred in the investigation, defense and settlement of the matter) which the Company or any of such other Members shall ever sustain, suffer or incur which relate or arise out of or in connection with a breach by the indemnifying Member of any representation, warranty or covenant made by the indemnifying Member in this Agreement or in any agreement or instrument delivered pursuant hereto. If the Company is made a party to any litigation or otherwise incurs any loss or expense as a result of or in connection with any Member's personal obligations or liabilities unrelated to Company business, such Member shall indemnify and reimburse the Company for all such loss and expense incurred, including reasonable attorneys' fees.

The Appellee asserts that the outcome here should be controlled by *International Rail Partners LLC v. American Rail Partners, LLC,*[26] and not, as the trial court did, by *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I.*[27] *International Rail* is unhelpful. In *Int'l Rail Partners LLC* the court observed that the LLC act's broad language enabling indemnification supported its conclusion, in that case, that first-party indemnification was permissible. The "any and all" statutory language cited in the *Int'l Rail Partners LLC* indemnity language is not present here. This omission suggests, at the least, that the OA was intended to cover a narrower range of indemnifiable claims. Second, as the *Great Hill* court observed - the public policy underlying the goals of statutory advancement and

[26] 2020 WL 6882105 (Del. Ch. Nov. 24, 2020), *cert. denied,* (Del. Ch. 2020), *and appeal refused,* 245 A.3d 517 (Del. 2021).

[27] 2020 WL 7861336 (Del. Ch. Dec. 31, 2020*).*

indemnification were better served by allowing indemnification on the "corporate instrument" in that case.[28]

Appellee argues that the language of ARTICLE "11.5 can only make sense if read to include first party disputes."[29] The argument fails on its face. First, contrary to settled Delaware law, ARTICLE 11.5 does not specifically reference indemnification for claims against members by other members.[30] As such, a legion of Delaware cases concluded that this wording omission precludes the Appellee's indemnity claim under the circumstances of this matter.[31] Second, unlike *Int'l Rail Partners,* ARTICLE 11.5 does not track the broad indemnification language set out in 6 DEL. C. §18-108.[32] Moreover, the Appellee's interpretation of ARTICLE 11.5 merely identifies who is obligated to pay indemnity but not what indemnity is to paid for.

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[28] *Great Hill*, 2020 WL 7861336, at *5.

[29] *AO* at 62.

[30] *TranSched Sys. Ltd. v. Versyss Transit Solutions, LLC*, 2012 Del. Super. LEXIS 170, 2012 WL 1415466 (Del. Super. Mar. 29, 2012), at *2.

[31] *Int'l Rail Partners LLC v. Am. Rail Partners, LLC*, 2020 Del. Ch. LEXIS 345 (Del. Ch. Nov. 24, 2020), at *11(cases cited therein).

[32] In *Int'l Rail Partners LLC* the court observed that the LLC act's broad language enabling indemnification supported its conclusion, in that case, that first-party indemnification was permissible. That "any and all" language cited in *Int'l Rail Partners LLC* is not present here.

Finally, the Appellee seeks an award of fees under the "principles of equity."[33] This request is anchored upon the assertion that the Appellee had a "clearly defined and established right" but was forced by the Appellant to needlessly litigate.[34] There are two problems with argument. First, the Appellee acknowledges the trial court's determination that the Appellants' arguments were the result of zealous advocacy.[35] Zealous advocacy is counsel's immutable obligation to their client. Consequentially, such advocacy cannot form the basis of and award of fees under the "principles of equity." Second, shifting legal fees after imposing a serious evidentiary sanction results in a double penalty. Absent an ability to conduct discovery and subject to deleterious adverse inference, the Appellants capacity efficiently engage in litigation is undoubtedly compromised.

[*Remainder of Page Left Intentionally Blank*]

[33] *AO* at 63.

[34] *Id*.

[35] *Id*. at 64.

III. CONCLUSION

WHEREFORE, the Appellants, GGH-RE Investment Partners Limited and Cezary Jarząbek, respectfully request that this Court reverse the judgment of the Chancery Court as to breaches against them, and confirm the Chancery Court's decision denying the Appellee's an award of legal fees, and to award such other relief as warranted by the facts, law, and equity.

CONAWAY-LEGAL LLC

Date: June 2, 2023

/s/ *Bernard G.* Conaway
Bernard G. Conaway (DE #2856)
1007 North Orange Street, Suite 400
Wilmington, DE 19801
Tel: (302) 428-9350
Fax: (844) 364-0137
Email: *bgc@conaway-legal.com*

Counsel to the Defendants Czarek Jarzabek, and GGH-RE Investment Partners Limited.