EFiled: Jun 12 2023 04:33PM EDT
Filing ID 70183543
Case Number 36,2023

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.	:	C.A. No. 36, 2023 APPEAL FROM THE COURT OF CHANCERY OF THE STATE OF DELAWARE C.A. No. 2021-0810-KSJM

CROSS-APPELLANT'S REPLY BRIEF ON CROSS-APPEAL

Ronald N. Brown, III (I.D. No. 4831)
Kelly L. Freund (I.D. No. 6280)
DLA PIPER LLP (US)
1201 North Market Street, Suite 2100
Wilmington, DE 19801
(302) 468-5700
(302) 394-2341 (Fax)
ronald.brown@us.dlapiper.com
kelly.freund@us.dlapiper.com

Attorneys for Plaintiff-Below/ Appellee/Cross-Appellant Golub CEE Investors LLC

DATED: June 12, 2023

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

INTRODUCTION

This is Cross-Appellant's Reply Brief On Cross-Appeal. The Cross-Appeal concerns one issue: whether the Court of Chancery erred in denying Golub's claim for attorneys' fees and costs. The Court of Chancery found that Defendants had committed at least twenty breaches of the LLC Agreement.[1] That LLC Agreement includes a clause entitling a member to reimbursement for costs that "relate or arise out of or in connection with a breach by the indemnifying Member." This provision can only be read to apply to this sort of situation. In addition to this contractual basis for fees and costs, Golub is also entitled to fees and costs on an equitable basis.

During the proceedings below, Golub consistently asserted that it was entitled to attorneys' fees and costs pursuant to the LLC Agreement. Defendants did not, in any way, respond to Golub's claim for contractual fee-shifting. Accordingly, Golub preserved its claim to attorneys' fees and costs and Defendants have waived any argument to the contrary.

Defendants never argued below that Golub was not entitled to its fees and costs under the LLC Agreement based on the line of cases that includes *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I*, 2020 WL 7861336 (Del. Ch. Dec. 31, 2020) and *TranSched Sys. Ltd. v. Versyss Transit Solutions, LLC*, 2012 WL

[1] Capitalized terms not otherwise defined shall have the same meaning as in Appellee's Answering Brief On Appeal And Cross-Appellant's Opening Brief On Cross-Appeal (the "Answering Brief", cited as "AB").

1415466 (Del. Super. Ct. Mar. 29, 2012). It was the Court of Chancery that, *sua sponte*, raise this precedent in its bench ruling. Thus, of course, Golub never addressed why these cases, which concerned bilateral contracts, do not control. Indeed, *International Rail Partners LLC v. American Rail Partners, LLC*, 2020 WL 6882105 (Del. Ch. Nov. 24, 2020), which also concerned the operating agreement of a limited liability company, controls.

Finally, the Court of Chancery erred when it declined to shift fees on an equitable basis on the theory that the discovery sanctions had already addressed Defendants' misconduct and the foreign law defenses had been fairly raised, even if they were ultimately unsuccessful, because the Court overlooked the fact that Defendants consistently delayed and obstructed this litigation in order to prolong Cezary Jarząbek's control over the Company and its subsidiaries. While this action was pending before the Court of Chancery, Defendants continued to act with impunity and violated the LLC Agreement, Second Amendment, and Status Quo Order in Poland by selling or attempting to sell the Company's Projects without Golub's consent and litigating on behalf of the Company.[2] Defendants have not addressed this issue.

---

[2] In fact, after the close of trial but before the issuance of the September 14, 2023 Bench Ruling, Golub initiated an action in Cyprus seeking an ex parte injunction preventing the Company from removing Mr. Jarząbek's from the management board of the Cypriot entities, which is also a violation of the Status Quo Order and LLC Agreement. (BR0024, BR0026-27, BR0033, BR0037-38.)

ARGUMENT

I. GOLUB PRESERVED ITS CONTRACTUAL AND EQUITABLE ARGUMENTS WITH RESPECT TO FEES AND DEFENDANTS WAIVED ANY ARGUMENTS IN OPPOSITION THERETO

Defendants argue that the question of whether Golub is "entitled to an award of attorney's fees based upon (a) an indemnification provision in the Operating Agreement, or (b) under principles of equity" "was not preserved below." (RB at 12.) This is plainly incorrect.

A. Golub Preserved Its Contractual Arguments Regarding Fees In The Proceedings Below

Golub did preserve the argument that the indemnification provision entitled Golub to fees. Golub sought "attorneys' fees and expenses pursuant to the Court's inherent power and pursuant to the LLC Agreement" in its Complaint. (BR0020.) In Golub's Revised Pretrial Brief, Golub cited Section 11.5 of the LLC Agreement and *EDIX Media Group, Inc. v. Mahani*, 2007 WL 417208 (Del. Ch. Jan. 25, 2007). (B1420-1421.) In Golub's Reply Pretrial Brief, Golub noted that it had "explained that Golub is entitled to fees and expenses under Section 11.5 of the Agreement" and that "Defendants did not respond to this." (B1956.) In Golub's Post-Trial brief, Golub stated that it was entitled to fees "[u]nder Section 11.5 of the LLC Agreement." (B2383.)

In its Revised Pretrial Brief, and Post-Trial Brief, Golub argued that it was entitled to fees because "Defendants have caused undue delay and expenses." (B1420, B2383.) In the Revised Pretrial Brief, Golub cited to Mr. Glazier's testimony that the expenses incurred in the Section Action were "significant." (B1421.)

In its Revised Pretrial Brief, Golub explained that "it has become apparent that Jarząbek's strategy is to make agreements that he does not follow through on in order to create delay, which gives him more time to sell assets of the Company without Golub's consent." (B1421.) In the Revised Pretrial Brief and Post-Trial Brief, Golub outlined how Defendants had continued to act unilaterally after the Second Action was initiated and given expedited treatment, including directing litigation in Poland on behalf of the Company and selling and attempting to sell the Company's Projects without Golub's consent. (B1392-94, B2348-49.)

In its Reply Pretrial Brief, Golub also explained that it was entitled to fees because Defendants had "consistently avoided the joint control scheme through delay and obstruction" and had "missed the first two deadlines to respond to the Complaint," prevented the finalization of a case schedule or trial date by failing to communicate with their counsel, and "trial was delayed three times so that Defendants could retain counsel and present foreign law issues." (B1957.) Golub also explained that it had "been forced to bring motions to cause Defendants to

comply with their responsibilities as litigants, including the entry of a case schedule … and participating in discovery" and that "Plaintiff also had to prepare multiple submissions to ensure compliance with the Status Quo Order" and it had to submit a "Revised Pretrial Brief and [the Reply Pretrial Brief] to address belatedly raised defenses." (B1957.) Finally, Golub noted that Golub had been forced to "incur the cost of foreign law experts, yet Defendants ultimately do not substantially rely on their Cypriot expert report." (B1957.) In Golub's Post-Trial Brief, Golub explained that it had been required to move to enforce the Status Quo Order to prevent the sale of two Projects, as well as the extension of a loan, and the initiation of bankruptcy proceedings on behalf of a subsidiary. (B2349-B2352.)

B. Defendants Waived Any Argument That Section 11.5 Did Not Include First-Party Claims

Despite the fact that Golub repeatedly asserted that it was entitled to fees during the pendency of the litigation before the Court of Chancery, at no time did Defendants address those arguments. Defendants never argued during the proceedings below that Section 11.5 did not cover first-party claims. In fact, in Golub's Post-Trial Brief, not only did Golub state that it was entitled to fees "[u]nder Section 11.5 of the LLC Agreement," but Golub also pointed out that "Defendants did not contest this in their Pretrial Brief and have waived any argument to the contrary." (B2383.) As stated in Golub's Answering Brief, any arguments that Defendants raise on appeal on this point have been waived. (AB at 60.)

C. Golub Is Entitled To Present Arguments In Support Of Its Interpretation Of Section 11.5 In The Interests Of Justice

As explained in Section I(A) above, Golub preserved its claim to attorneys' fees and costs below. But to the extent that this Court finds that Golub did not preserve any specific argument in support of its interpretation of Section 11.5 below, Golub should be permitted to submit its full arguments in favor thereof before this Court. Defendants never raised any argument or defense in response to Golub's assertion of a contractual right to indemnification at any point in the proceedings below. Accordingly, Golub did not believe that there was any disagreement between the parties that Section 11.5 applied to first-party claims. Nor did Golub have any opportunity to distinguish this indemnification provision from the one in *Great Hill* in its pre- or post-trial briefing as *Great Hill* was cited for the first time on September 14, 2022, by the Court of Chancery in the bench ruling. (DT-069.)

Accordingly, to the extent that Golub's arguments on this issue were not fairly presented to the trial court, it serves the "interests of justice" for this Court to consider Golub's arguments based on that line of cases. *Reddy v. MBKS Co., Ltd*., 945 A.2d 1080, 1085-86 (Del. Mar. 3, 2008) (finding that this Court should consider an issue that the parties had not addressed in the proceedings below because the Vice Chancellor had *sua sponte* raised and ruled on the issue).

II. THE INDEMNIFICATION PROVISION COVERS FIRST-PARTY CLAIMS

Defendants' arguments for why Section 11.5 does not cover first-party claims consist of the following: (1) the language of Section 11.5 include "all" but not "any and all", (2) *International Rail* does not control and the *TranSched* line of cases should apply instead of *International Rail*, and (3) Golub's has not explained what the indemnity provision in Section 11.5 covers. All three arguments fail.

A. The Word "All" In Section 11.5 Includes Any And All Losses

Defendants argue that the "'any and all' statutory language in the indemnity provision at issue in Int'l Rail Partners LLC is not present" and so "the OA was intended to cover a narrower range of indemnifiable claims." (RB at 13.) While Section 11.5 says "all" instead of "any and all." the omission of the (redundant) "any" does not alter the plain meaning of Section 11.5.

Furthermore, it is doubtful that legislature intended to make the word "any" a requirement when indemnifying a member when it enacted 6 *Del. C.* § 18-108 ("Section 18-108"). Indeed, the language of Section 18-108 suggests that it is necessary to make any exceptions (such as an exception excluding first-party claims) to an indemnification expressly clear when drafting such provisions:

> *Subject to such standard and restrictions, if any, as are set forth in its limited liability company agreement*, a limited liability company may, and shall have the power to, indemnify and hold harmless any member … from and against any and all claims and demands whatsoever.

6 *Del. C.* § 18-108. Defendants argue that it should be the other way around, and that first-party claims must be expressly noted in an indemnification provision in a limited liability company agreement. But this is contrary to the language of the statute and the holding of *International Rail*.

B. Public Policy Favors Fee-Shifting In The Context Of An LLC's Operating Agreement

Defendants also argue that "the public policy underlying the goals of statutory advancement an indemnification were better served by allowing indemnification on the 'corporate instrument' in [*International Rail*]." (RB at 13-14, citing *Great Hill*, 2020 WL 7861336, at *5.) But there are similar policy concerns present as in *International Rail* which weigh in favor of covering first-party claims. A member or manager of a limited liability company who successfully brings an action to enforce the limited liability company's operating agreement and establishes that a manager has breached the operating agreement should not be left to pay the cost—here Golub has been saddled with a de facto penalty for removing a GGH-RE, a rogue manager, which it was entitled to do under the operating agreement.

Defendants argue that "contrary to settled Delaware law, ARTICLE 11.5 does not specifically reference indemnification for claims against members by other members" and that "a legion of Delaware cases concluded that this wording omission precludes the Appellee's indemnity claim under the circumstances of this matter" *citing International Rail*, 2020 WL 6882105, at *11 and "the cases cited herein." (RB at 14, 14 n.29.) However, the cases cited in *International Rail* as examples where the courts found a presumption against fee-shifting all dealt with "bilateral commercial contract[s]." 2020 WL 6882105, at *4-5; *TranSched Sys. Ltd.*, 2012 WL 1415466 (concerning an asset purchase agreement); *Deere & Co. v. Exelon Generation Acquisitions, LLC*, 2016 WL 6879525 (Del. Super. Ct. Nov. 22, 2016) (concerning purchase agreement for a business and a related contract to purchase electricity); *SARN Energy LLC v. Tatra Defence Vehicle A.S.*, 2019 WL 6525256 (Del. Super. Ct. Oct. 31, 2019) (concerning a contract to facilitate the sale armored fighting vehicles to foreign countries); *Winshall v. Viacom Int'l Inc.*, 2019 WL 5787989 (Del. Super. Ct. Nov. 6, 2019) (concerning a merger agreement); *In re Bracket Hldg. Corp. Litig.*, 2020 WL 764148 (Del. Super. Ct. Feb. 7, 2020) (concerning a stock purchase agreement and insurance policy); *Senior Hous. Capital, LLC v. SHP Senior Hous. Fund, LLC*, 2013 WL 1955012 (Del. Ch. May 13, 2013) (concerning a management agreement); and *Nasdi Hldgs., LLC v. N. Am.*

Leasing, Inc., 2020 WL 1865747, at *5-6 (Del. Ch. Apr. 13, 2020) (ORDER) (concerning a commercial contract).

What's more, the Court of Chancery explicitly distinguished the *TranSched* line of cases from those concerning the governing documents of a corporation or limited liability company. *Int'l Rail*, 2020 WL 6882105, at *6-8 ("I conclude that the first-party/third-party claim distinction applied in the *TranSched* line of cases is inapplicable here.") This Court should adopt the same reasoning here.

C. The Language Of Section 11.5 Covers Losses Incurred As A Result Of A Member's Breach Of The LLC Agreement

Finally, Defendants claim that "Appellee's interpretation of ARTICLE 11.5 merely identifies who is obligated to pay indemnity but not what indemnity is to paid [sic] for." (RB at 14.) The language of Section 11.5 is clear that it covers "all liability, loss, cost, damage and expense … which relate or arise out of or in connection with a breach by the indemnifying Member." Golub's loss is its attorneys' fees and costs incurred in bringing this action, which resulted from GGH-RE's many breaches of the LLC Agreement. As explained in Golub's answering brief, Section 11.5 only makes sense if it covers first-party claims, as the representations and covenants in the LLC Agreement are for the benefit of the Company's members. (AB at 62-63.)

III. GOLUB IS ENTITLED TO FEES BASED ON EQUITABLE PRINCIPLES BECAUSE DEFENDANTS' PATTERN OF DELAY AND OBSTRUCTION EXTEND BEYOND DISCOVERY MISCONDUCT

Defendants' only response to Golub's arguments regarding equitable fee shifting is that "the Appellants' arguments were the result of zealous advocacy" and fee shifting would amount to a "double penalty." (RB at 15.)

"Zealous advocacy" does not explain Defendants' repeated failure to meet deadlines, communicate with opposing counsel, and retain counsel which resulted in multiple delays and postponements as outlined in Golub's answering brief. (AB at 64-65.)[3] "Zealous advocacy" also does not explain why Defendants waited until the eve of the third trial date to raise the foreign law defenses, which led to yet another delay. (AB at 65.) Golub was prejudiced by this delay as Defendants were able to continue to act unilaterally to sell off the Company's Projects, in violation of the LLC Agreement, the Second Amendment, and the Status Quo Order, and Golub was forced to bring motions to enforce the Status Quo Order. (AB 65-66.) The Court of Chancery's imposed adverse inferences to address Defendant's discovery misconduct, not those other harms to Golub. (AO-0553, AO-0555; B0871-884.) Accordingly, fee shifting would not amount to a "double penalty." *In EDIX Media*, 2007 WL 417208, at *1-2 (awarding fees based on a contractual fee-shifting provision and noting that the fees were reasonable in light of the fact that plaintiff

[3] This was in spite of the fact that the action was expedited. (B0438-B0439.)

had had to prepare for trial twice, due to Defendant's request to postpone the trial, stating that "Defendant will not be heard to complain that the time spent preparing for litigation was excessive when he may be blamed for so much of the cost and delay.")

Finally, as set forth in the Answering Brief, the record reflects that Defendants' numerous breaches were motivated by a personal need for liquidity arising from the sale of Retail Bonds. (AB at 66; AO-0627 (162:6-9); B2015, B2020-2021.) The Court of Chancery found that Defendants had breached the LLC Agreement at least twenty times. (DT-060.) As a fiduciary, these violations of the LLC Agreement for personal ends are particularly egregious and constitute an independent basis to impose fees. In the proceedings below, Defendants did not refute the evidence that Mr. Jarząbek was motivated by personal gain. Defendants have also not rebutted Golub's argument on this basis in its Answering Brief (AB at 66) in its briefing on appeal.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Plaintiff's Answering Brief, this Court should remand to the court below for an award of fees and expenses that Plaintiff incurred in this action.

DATED: June 12, 2023

DLA PIPER LLP (US)

/s/ Ronald N. Brown, III

Ronald N. Brown, III (I.D. No. 4831)
Kelly L. Freund (I.D. No. 6280)
1201 North Market Street, Suite 2100
Wilmington, DE 19801
(302) 468-5700
(302) 394-2341 (Fax)
ronald.brown@us.dlapiper.com
kelly.freund@us.dlapiper.com

Attorneys for Plaintiff-Below/
Appellee/Cross-Appellant
Golub CEE Investors LLC