EFiled: May 04 2018 03:40PM EDT
Filing ID 61961494
Case Number 177,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

COMPOSECURE, L.L.C., Plaintiff/ Counterclaim Defendant- Below/Appellant, v. CARDUX, LLC f/k/a AFFLUENT CARD, LLC, Defendant/ Counterclaim Plaintiff- Below, Appellee.	No. 177, 2018 Appeal from the Memorandum Opinion Dated February 1, 2018, As Corrected on February 12, 2018, and Order and Final Judgment Dated March 29, 2018, of the Court of Chancery of the State of Delaware in C.A. No. 12524-VCL

APPELLANT'S OPENING BRIEF

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Dated: May 4, 2018

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PRELIMINARY STATEMENT

The Court of Chancery awarded a windfall of more than $14 million to appellee CardUX, LLC ("CardUX") -- an entity created by a conflicted manager of appellant CompoSecure, L.L.C. ("CompoSecure" or the "Company") -- under a Sales Representative Agreement (the "Sales Agreement" or the "SRA") signed in violation of "Restricted Activity" and conflicted party "safe harbor" provisions in CompoSecure's Delaware limited liability company agreement. The trial court so ruled notwithstanding its findings that (i) the Sales Agreement was a conflicted transaction subject to specific advance approval requirements under the LLC Agreement; (ii) the Sales Agreement was not validly approved; (iii) the conflicted manager and his affiliate CardUX knew the Sales Agreement was not validly approved; and (iv) the trial court's commission award resulted primarily from sales as to which the conflicted director and CardUX played no role.

In enforcing the Sales Agreement, the trial court ignored controlling Delaware law in construing the required approval provisions of the Company's LLC Agreement. Instead, the trial court chose and misapplied principles of "implied ratification" under New Jersey law, concluding that the conflicted transaction that was never approved (as required) by CompoSecure's Board, its Investors and its Class A Majority, had been ratified by the Company's conduct.

The lack of approval of the Sales Agreement should have ended the inquiry. Section 4.1(p) of CompoSecure's LLC Agreement provides that the failure to obtain "prior approval" of certain "Restricted Activities" -- including the Sales Agreement -- renders such activities "void and of no force or effect whatsoever." Unlike voidable acts, void acts are not subject to ratification, and thus ratification should not have been available as a matter of Delaware law.

Similarly, Section 5.4 of the LLC Agreement, governing related party transactions, authorizes a transaction such as the Sales Agreement "only if such transaction is at arm's length and approved by the Board, the Investors and the Class A Majority." Delaware law, as exemplified by this Court's decision in *Dieckman v. Regency GP LP*, 155 A.3d 358 (Del. 2017), requires compliance with conflicted transaction provisions. Under Delaware law, a conflicted transaction that has not been approved in accordance with those precise terms cannot be ratified.

The trial court's findings that the Sales Agreement was never validly approved and that CardUX *knew* of the absence of such approval are not challenged on appeal. Those findings are thus binding, and preclude the windfall awarded by the trial court. CompoSecure submits the trial court's decision should be reversed and remanded, with instructions that the judgment entered by the trial court be vacated and judgment be entered in favor of CompoSecure.

NATURE OF PROCEEDINGS

CompoSecure filed an action in the Court of Chancery seeking a declaration that the Sales Agreement between CompoSecure and CardUX was invalid. CardUX counterclaimed, asserting, *inter alia*, that CompoSecure breached its obligation to pay commissions under the Sales Agreement. The trial court issued a Post-Trial Memorandum Opinion (the "Opinion," attached as Exhibit A), in which it determined that the Sales Agreement had not been approved in accordance with CompoSecure's LLC Agreement. Applying principles of implied ratification under New Jersey law, the trial court nevertheless held that the Sales Agreement was valid and enforceable, and obligated CompoSecure to pay commissions to CardUX, including potentially tens of millions of dollars in commissions from sales that CardUX's efforts played no role in bringing about.

At the trial court's direction, the parties agreed on a stipulated judgment, entered as a final judgment on March 29, 2018 (the "Judgment") (Exhibit B hereto), under which CompoSecure is obligated to pay CardUX $1,118,387.51 for commissions generated during 2016 and $13,269,039.73 for commissions generated during 2017. In addition, the trial court awarded $1 in nominal damages on CardUX's claim that CompoSecure failed to use reasonable efforts to support its activities, reimbursement of nearly $2 million in legal fees and expenses, and pre- and post-judgment interest. The Judgment further obligates CompoSecure to pay

future commissions for a period of 15 years.

On April 5, 2018, CompoSecure filed its Notice of Appeal. Although CompoSecure disagrees with many of the trial court's factual findings regarding the interpretation of the Sales Agreement, this appeal challenges only the trial court's holding that the Sales Agreement was a valid and binding contract.

SUMMARY OF ARGUMENT

1. Having correctly determined that the required parties never validly approved the Sales Agreement and that CardUX was charged with this knowledge, the trial court erred by not enforcing the plain language of Section 4.1(p) of the CompoSecure LLC Agreement. That provision states that the failure to obtain prior approval of certain enumerated "Restricted Activities" -- including the Sales Agreement -- renders such activities "void and of no force or effect whatsoever." Delaware law allows the parties to an LLC Agreement to organize their affairs as they see fit, and enforces such LLC provisions as written unless otherwise contrary to law. The trial court erred in failing to determine that the Sales Agreement was void under Section 4.1(p), and thus not subject to ratification.

2. The trial court also erred in holding that the Sales Agreement was valid in the face of Section 5.4 of CompoSecure's LLC Agreement, which governs related party transactions. Ratification should not be available to cure a fiduciary's knowing failure to comply with a related party provision. Even assuming ratification were available, its application should have been determined by reference to Delaware law under the internal affairs doctrine. Under Delaware law, ratification would have required informed, formal approval in accordance with the provisions of the LLC Agreement, which the trial court held never occurred.

STATEMENT OF FACTS

A. CompoSecure is a Delaware LLC that Manufactures Metal Credit Cards

CompoSecure is one of the only companies in the world that manufactures and sells metal and composite credit cards ("metal cards"). Opinion at 1. CompoSecure began as a family business in 2000, founded by Michele Logan, her father, John Herslow, and another individual. *Id*. at 4. CompoSecure frequently sells its metal cards through co-brand relationships, in which an issuing bank affiliates with a partner (such as a retailer or airline). *Id*. at 7.

From its founding and until consummating the transaction with LLR described below, Logan and Herslow ran the Company as a family business. A421-22. They had no outside directors, and operated without board oversight. *Id*. By 2013, CompoSecure had developed from a startup to the acknowledged leader in a growing market segment it was largely responsible for creating through its product innovations. Opinion at 5.

Because metal cards are more expensive than plastic cards, metal cards have largely been reserved for programs targeted at affluent customers, for example the JP Morgan Chase ("Chase") Sapphire Card program. *Id*. at 5-6. Experience has shown that these affluent customers prefer metal cards, and customers who use metal cards spend more and are more loyal to the card programs in which metal cards are used. *Id*. at 6. As a result of the highly successful Sapphire program, Chase

increased its metal card purchases, which had the effect of increasing Chase's proportion of CompoSecure's overall business. *Id*. at 6.

B. CompoSecure Begins Talks With LLR; LLR Brings in Kevin Kleinschmidt To Help Alleviate the Chase Concentration Problem

In 2013, CompoSecure initiated a sale process to reduce the founders' risk. *Id*. at 6; A427. Private equity firm LLR Partners ("LLR") was one potential bidder. Opinion at 6-7. LLR partner Mitchell Hollin led the negotiations with CompoSecure. Early in the process, Hollin enlisted Kevin Kleinschmidt, who had extensive experience in the credit card industry, to assist in evaluating the investment. *Id*. at 7. Kleinschmidt immediately flagged CompoSecure's customer concentration with Chase as problematic, because Chase accounted for roughly 75% of CompoSecure's revenue. *Id*. at 8. In introducing Kleinschmidt to CompoSecure, Hollin sent an email to Herslow (copying Kleinschmidt) describing Kleinschmidt's role: "Kevin Kleinschmidt in particular will assist our efforts to broaden our reach on the marketing front to overcome the [Chase] concentration." A58. Kleinschmidt never disclaimed this role. A722.

In late October 2013, with CompoSecure experiencing rapid sales growth, it put the sale process on hold. A54.

C. LLR Invests $100 Million; Kleinschmidt Becomes a Member of CompoSecure, Joins its Board, and Signs the LLC Agreement

In late 2014, CompoSecure reinitiated the sale process with LLR. Additional due diligence and negotiations ensued, with Kleinschmidt's continued participation on behalf of LLR. LLR ultimately invested approximately $100 million in CompoSecure in return for 60% of its equity. Opinion at 9. At LLR's invitation, Kleinschmidt personally invested $500,000, receiving Class B Units in return, and Kleinschmidt agreed to serve as a member of the Board of Managers of CompoSecure (the "Board") upon closing of the transaction. *Id*. at 10. The transaction closed on May 11, 2015, and Kleinschmidt joined the Board. *Id*. at 14.

In connection with the transaction, CompoSecure converted from a New Jersey LLC into a Delaware LLC, and the parties entered into the CompoSecure, L.L.C. Amended and Restated Limited Liability Company Agreement, dated as of May 11, 2015 (the "LLC Agreement"). *Id*.; A114. As a member of CompoSecure and a member of its Board, Kleinschmidt signed and acknowledged actual notice of all the provisions of the LLC Agreement. *Id*.; A177.

The LLC Agreement reflected that 44,000 Class A Units were issued. Approximately 60 percent of the Class A Units were issued to Logan, with the balance issued to trusts for Logan family members and other individuals. A180. 64,918.04 Class B Units were issued, with approximately 97 percent issued to two

LLR partnerships and the balance issued to four individuals, including Kleinschmidt. A180.

D. The CompoSecure LLC Agreement Imposes Strict Prior Approval Requirements For Certain "Restricted Activities" and Related Party Transactions

Two provisions of the LLC Agreement are at issue in this appeal. Section 4.1(p) governs the approval of certain enumerated Restricted Activities, providing in relevant part:

> *Except as set forth in [the] annual budget or annual business plan previously approved by the Investors and the Class A Majority*, neither the Company nor any of its Subsidiaries shall undertake, nor shall agree to undertake, any of the following actions without the prior approval of the Board and Investors (and during the Earnout Period, the Class A Majority), and *any action taken in contravention of the foregoing shall be void and of no force or effect whatsoever*:
>
> … (ix)(A) enter into, terminate or amend any contract, agreement, arrangement or understanding requiring the Company or any of its Subsidiaries to make expenditures in excess of $500,000 during any fiscal year, other than in the ordinary course of business consistent with past practice ….

A139, A140 (emphasis added).[1] Under Section 4.1(p), a transaction that meets the criteria in Section 4.1(p)(ix) is a "Restricted Activity." A140. Section 5.4, which

[1] LLC Agreement § 1.1 ("'Investor' or 'Investors' means, collectively, any investment fund managed by [LLR] that holds any Units and each transferee of Investor's Units; provided that, unless otherwise agreed by the persons comprising Investor, LLR shall be permitted to act unilaterally for and on behalf of Investor for all purposes under this Agreement." A124. LLC Agreement § 1.1 ("'Class A Majority' means Members collectively holding at least fifty-one percent (51%) of all Class A Units held by Members.") A120.

the trial court referred to as the "Related Party Provision," governs conflict of interest transactions:

> Notwithstanding that it may constitute a conflict of interest, *each of the Members, the members of the Board and their respective Affiliates, or any other Related Party, may engage in any transaction or other arrangement* (including the purchase, sale, lease or exchange of any property or the rendering of any service or the establishment of any salary, other compensation or other terms of employment), whether formal or informal, *with the Company* (and/or any of its Subsidiaries), *and the Company may engage in any such transaction, only if such transaction is at arm's length and approved by the Board, the Investors and the Class A Majority.*

A143 (emphasis added).

E. After Joining the Board, Kleinschmidt Negotiates the Self-Interested Sales Agreement, With Logan Mostly Absent For Personal Reasons

While assisting LLR with the transaction, Kleinschmidt and an associate, Paul Frantz, began discussing ways in which they might secure a piece of CompoSecure's success for themselves. The two "brainstormed," and determined to propose that they take on a sales role at the Company. A608. In March 2015, Kleinschmidt proposed in an email to Hollin that he create "an independent sales organization 'that sources new business for [CompoSecure] primarily (or solely) on a pay for performance basis.'" Opinion at 12 (quoting A110). At an April 9, 2015 meeting, Kleinschmidt and Frantz pitched the idea to CompoSecure, but the Company tabled further discussion pending completion of the LLR transaction.

Negotiation of the Sales Agreement resumed in late May 2015. By July 1, 2015, the date of CompoSecure's first Board meeting after the LLR transaction, the parties had negotiated only a term sheet. Opinion at 19-20. It was not until weeks later, on July 22, 2015, that they first exchanged a draft of the Sales Agreement. *Id*. at 21. As the trial court noted, by that time then-CEO Logan had assumed a less prominent role in negotiations: "Shortly after the Board meeting, Logan's mother was diagnosed with terminal cancer. From that point on, although Logan remained involved, Hollin led the negotiations for CompoSecure." *Id*. Thereafter, a series of drafts were exchanged. Although a Board meeting had been planned for October 9, 2015, the meeting was canceled due to the critical condition of Logan's mother. A189; A734.

F. Kleinschmidt Signs the Sales Agreement Knowing That It Lacked Proper Approvals

The Sales Agreement was signed on November 9, 2015, effective as of November 6. Opinion at 29. The document was signed by Logan, purportedly on behalf of CompoSecure. Opinion at 31; A217; A435. Kleinschmidt signed the Sales Agreement on behalf of CardUX, an entity he formed on November 4, 2015 to carry out the sales responsibilities required by the Sales Agreement.[2] A191; A217; A730.

[2] The Sales Agreement reflects the name "Affluent Card, LLC," which became CardUX by name change. Opinion at 12 n.50.

The trial court held that both Kleinschmidt and CardUX knew of the specific approval requirements in the LLC Agreement. As a party to the LLC Agreement, the trial court held that Kleinschmidt was "deemed to have known about the Related Party Provision and its implications for Logan's ability to enter into the Sales Agreement." Opinion at 63. "The Related Party Provision applied to the Sales Agreement, because CardUX qualified as an Affiliate of Kleinschmidt, who was a member of the Board. Consequently, CompoSecure could enter into the Sales Agreement only with the approval of the Board, the Investors, and the Class A Majority." *Id.* at 59-60. As the trial court found, the Board, the Investors and the Class A Majority never approved the Sales Agreement. *Id.* at 33. As a result, Logan had no authority to sign the Sales Agreement on behalf of CompoSecure. *Id.* at 60.

Kleinschmidt not only knew of the failure to obtain proper approval of the transaction, he also knew that Logan had been distracted by her mother's terminal illness and death during the final phase of negotiations. A740. Although, under Section 5.4, he was charged with ensuring that any proposed transaction be "at arm's length," Kleinschmidt took no steps to ensure that the other Board members saw the Sales Agreement, let alone consider or vote to approve it. Kleinschmidt knew that the Board never deliberated over or voted on the Sales Agreement, before or after it was signed. A735.

The Sales Agreement provides for the payment of commissions on orders from customers identified on an approved list. Under the Sales Agreement, if an "Approved Prospect" places an order within the two-year term of the Sales Agreement or the two years following that term, CompoSecure is obligated to pay commissions to CardUX on orders from that customer for 15 years from the first order. A202. As interpreted by the trial court, CardUX is entitled to commission payments even where it played no role in bringing about the sale.

G. Chase Places an Order for Amazon-Branded Cards Without Influence from CardUX, Leading to This Litigation

In early December 2015, Chase reached out to CompoSecure, inquiring about CompoSecure's ability to handle a potential order of "several million" metal cards. Opinion at 39. Logan spoke to a contact at Chase and learned that this request was for a potential co-brand program with Amazon.com, Inc. ("Amazon"), for which Amazon insisted on metal cards. *Id*. It turned out that Amazon had "demanded metal cards in October 2015, before CardUX started pursuing Amazon," *id*. at 41, and indeed before the Sales Agreement was signed, before CardUX ever contacted Amazon, and before CardUX even existed. Amazon finalized the terms of its agreement with Chase on January 19, 2016, requiring the use of metal cards. *Id*. Days later Chase informed CompoSecure that it would be placing an order for Amazon-branded cards. *Id*. The trial court found: "The evidence at trial established

that CardUX's efforts did not contribute to Amazon's request for metal cards." *Id.* at 41.

H. CompoSecure's Board Next Meets in December 2015 and Does Not Approve the Sales Agreement

In December 2015 the Board met for the first time since July. By that time, the Sales Agreement had already been signed by Logan. At the December meeting, Board members were not provided a copy of the Sales Agreement, nor did the Board approve it. Opinion at 33. Although charged under Section 5.4 of the LLC Agreement with ensuring the Sales Agreement was at "arm's length," Kleinschmidt neither spoke concerning the Sales Agreement nor offered to recuse himself from any such discussion at the Board meeting. The Board was provided only a single-page summary of its terms which, as the trial court found, was incorrect. Opinion at 73.

New director Phillippe Tartavull joined the Board at the December meeting. Opinion at 47. Tartavull testified unequivocally that he would have opposed the Sales Agreement if it had been presented for approval. *Id*. at 73. Tartavull explained that, based on the summary document, he believed the commission percentage of 15% was too high, as 5% was the customary rate. A756, A759. He believed, however, that the Sales Agreement was still being negotiated, and that -- per the inaccurate summary page -- it would be subject to a right to terminate on 30 days'

notice. A756-57. That testimony was uncontradicted, and he was not cross-examined by CardUX. A759.

Although this was the only testimony about what Tartavull would have done,[3] the trial court found, without any evidentiary support, that Tartavull would not have voiced any objections if the Board had voted on the Sales Agreement at that time. Opinion at 73 ("I doubt that Tartavull actually would have opposed it had he known more at the time."). This finding was phrased as a hypothetical, because the Board never actually deliberated over or voted on the Sales Agreement. The trial court found that, although no vote occurred at that meeting, a Board majority "supported it" and that "the disinterested members of the Board would have given the necessary approval." *Id.* at 73-74. In fact, although the LLC Agreement required the Board to act by vote or written consent,[4] the Board neither voted in favor of the Sales Agreement nor approved it by written consent. *Id.* at 33. The Investors and Class A Majority also did not approve the Sales Agreement, as required by the LLC Agreement. *Id.*

[3] A759 ("[I]f the SRA had been presented for approval by the CompoSecure board, based on your experience and your understanding of the provisions of the agreement, would you have voted to approve it? A: No. I would have made the same remark that I just made today.").

[4] LLC Agreement § 4.1(k) at A138.

I. CompoSecure Disputes the Sales Agreement's Validity

In the months following notification of the Chase/Amazon contract, CardUX insisted that it receive a full commission for that sale even though it significantly exacerbated the Chase concentration problem and CardUX had done nothing to influence it. On May 26, 2016, CompoSecure informed CardUX that the Sales Agreement was invalid, a contention CardUX disputed, leading to this litigation. The Sales Agreement required, however, that the parties continue to perform during any dispute. SRA § 6.3(b) at A203-04.

The trial court held that, although the Sales Agreement had not been approved in accordance with the LLC Agreement, it was validated under principles of "implied ratification" under New Jersey law. The court then entered the Judgment, awarding CardUX $1,118,387.51 for commissions on sales during 2016 and $13,269,039.73 for commissions on sales during 2017; $1 in nominal damages for CompoSecure's failure to use reasonable efforts to support CardUX's activities; reimbursement of legal fees and expenses of nearly $2 million; and pre- and post-judgment interest. Under the Judgment, CompoSecure's obligation to pay commissions will continue for 15 years.

ARGUMENT

I. THE SALES AGREEMENT IS "VOID" UNDER SECTION 4.1(p) OF THE LLC AGREEMENT AND CANNOT BE RATIFIED

A. Question Presented: Whether, under Delaware law, an LLC agreement provision mandating that an action will be deemed "void" if a specified approval procedure is not followed must be enforced as written? A335-36; A366; A862-63; A924-25.

B. Scope of Review: This Court applies *de novo* review to arguments regarding the legal import of terms in LLC agreements. *Gatz Props., LLC v. Auriga Capital Corp.*, 59 A.3d 1206, 1212 (Del. 2012).

C. Merits:

The trial court erred by holding that New Jersey law concerning "implied ratification" trumped the LLC Agreement, erroneously validating a contract that the LLC Agreement dictates shall be "void and of no force or effect whatsoever." LLC Agreement § 4.1(p) at A139. Delaware law holds that a void act may not be ratified. Under the plain meaning of Section 4.1(p) of the LLC Agreement, failure to obtain prior approval of the Sales Agreement rendered it "void and of no force or effect whatsoever." *Id*. The parties enshrined that language and concept in the LLC Agreement and are bound by it. This Court should reverse the judgment below, which is in conflict with the principles of freedom of contract underlying Delaware's LLC Act.

Section 4.1(p) of the LLC Agreement requires the Board to enact an annual budget and business plan for approval by the Investors and the Class A Majority and sets out a class of "Restricted Activities," providing that:

> [e]xcept as set forth in such annual budget or annual business plan previously approved by the Investors and the Class A Majority, neither the Company nor any of its Subsidiaries shall undertake, nor shall they agree to undertake … without the prior approval of the Board and Investors (and during the Earnout Period, the Class A Majority), *and any action taken in contravention of the foregoing shall be void and of no force or effect whatsoever*.

LLC Agreement § 4.1(p) at A139 (emphasis added). Section 4.1(p)(ix)(A) imposes these procedural requirements on any effort to "enter into, terminate or amend any contract, agreement, arrangement or understanding requiring the Company … to make expenditures in excess of $500,000 during any fiscal year, other than in the ordinary course of business consistent with past practice." A140.

The Sales Agreement required CompoSecure to spend more than $500,000 in a given fiscal year, and was not included in CompoSecure's previously approved annual budget. A437. *See* Judgment (awarding CardUX "compensatory damages for past-due commissions … comprised of … [*inter alia*,] $1,118,387.51 for sales during 2016 … and … $13,269,039.73 for sales during 2017"). The Sales Agreement was manifestly not "in the ordinary course of [CompoSecure's] business consistent with past practice": (a) Kleinschmidt proposed the idea because

CompoSecure was not doing anything similar;[5] and (b) the Sales Agreement was a related-party transaction and thus, by definition, not in the ordinary course of business. Although the Sales Agreement triggered the Section 4.1(p) prior approval process, the Board, the Investors and the Class A Majority did not give prior approval. Opinion at 33. Accordingly, the Sales Agreement is "void" by the express terms of Section 4.1(p) of the LLC Agreement. The trial court only summarized Section 4.1(p) in a footnote, and made no reference to the phrase "void and of no force or effect whatsoever" in its Opinion. *Id*. at 32 n.162.

Under Delaware law, a "void" act cannot be ratified. *Harbor Finance Partners v. Huizenga*, 751 A.2d 879, 896 (Del. Ch. 1999). "[T]he most important distinction between void and voidable acts is that void acts, as a general matter, are not ratifiable." C. Stephen Bigler & Seth Barrett Tillman, *Void or Voidable?—Curing Defects in Stock Issuances Under Delaware Law*, 63 BUS. LAW. 1109, 1116 (2008); *accord Michelson v. Duncan*, 407 A.2d 211 (Del. 1979); *Waggoner v. Laster*, 581 A.2d 1127, 1137 (Del. 1990). By stating that actions taken in contravention of its approval requirements "shall be void and of no force or effect whatsoever," the plain language of Section 4.1(p) of the LLC Agreement precludes ratification to cure the absence of the required prior approvals. The trial court

[5] Opinion at 9, 12.

effectively blue-penciled this plain language out of the LLC Agreement.

In another recent case, the Court of Chancery enforced similar language, precluding an after-the-fact effort to secure approval that was required to be obtained beforehand. *Southpaw Credit Opportunity Master Fund, L.P., v. Roma Restaurant Holdings, Inc.*, 2018 WL 658734, at *5 (Del. Ch. Feb. 1, 2018). In *Southpaw*, a stockholders' agreement stated that "[a]ny issuance of Shares or any Common Stock Equivalents by the Company [is] null and void *ab initio*" unless the recipient had "agreed in writing" to be bound by the Stockholders Agreement. *Id*. at *2. The parties failed to execute joinders before the challenged stock issuance, but after the issuance the stockholders consented to be bound by the stockholders' agreement. *Id*. at *6-7. Despite this later consent, the court held that the stock issuance was void: "The contractually mandated penalty for failure to comply with [this provision of the stockholders' agreement] is that the issuance is void *ab initio*." *Id*. at *7. *See also In re Oxbow Carbon LLC Unitholder Litig.*, 2018 WL 818760, at *48 n.473 (Del. Ch. Feb. 12, 2018) (suggesting *Southpaw* was correctly decided because the LLC Agreement at issue in *Southpaw* used the term "void").

The same result should have followed here, particularly given that, in this case, *no* efforts were ever taken -- not even after the fact -- to have the Board, the Investors and the Class A Majority formally approve the Sales Agreement.

Here, the trial court erred by holding, in a footnote, that ratification could (and did) cure the initial failure to comply with Section 4.1(p): "[T]he analysis of the approval requirements under the Related Party Provision applies equally to the comparable requirements under Section 4.1(p)." Opinion at 32 n.162. This holding contradicts the plain language of CompoSecure's LLC Agreement, because the parties agreed that failure to obtain required prior approvals would render the transaction void and therefore incapable of ratification.[6]

CardUX's only argument below on this point was that the failure to follow procedural requirements would render a challenged action merely voidable, not void. *See* A903. That argument proceeds under the traditional corporate law rule that an action is voidable if some procedure exists by which the action could be accomplished, but was not followed. This argument should be rejected here, as the parties to the LLC Agreement contracted for a bright-line rule that the failure to follow the mandated procedure would render the action "void and of no force or effect whatsoever." The trial court erred by not enforcing this provision, even though Kleinschmidt and CardUX both knew of it.

[6] The trial court did not in so many words hold that a failure to comply with Section 4.1(p)(ix) would render the Sales Agreement voidable rather than void. But by treating Section 4.1(p)(ix) as duplicative of Section 5.4 and then holding that the failure to comply with Section 5.4 did not matter because the SRA was later ratified, the trial court necessarily also held that the failure to comply with Section 4.1(p)(ix) was cured by an implied ratification under New Jersey law.

The trial court's holding that the Sales Agreement was ratified is contrary to established Delaware law holding that parties to a Delaware LLC agreement have the power to organize their affairs and that LLC Agreement provisions will be enforced as written. Indeed, "[i]t is the policy of [the LLC Act] to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements." 6 *Del. C.* § 18-1101(b).[7] Based on this principle, this Court has held that parties to an LLC Agreement may contractually adopt rules that vary from default rules in the LLC Act. *See Elf Atochem*, 727 A.2d at 295 (holding that, based on § 18-1101(b), "the parties may contract to avoid the applicability of Sections 18-110(a), 18-111, and 18-1001.").[8]

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[7] *See Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 292 (Del. 1999) ("[T]he following observation relating to limited partnerships applies as well to limited liability companies: 'The Act's basic approach is to permit partners to have the broadest possible discretion in drafting their partnership agreements and to furnish answers only in situations where the partners have not expressly made provisions in their partnership agreement. Truly, the partnership agreement is the cornerstone of a Delaware limited partnership, and effectively constitutes the entire agreement among the partners with respect to the admission of partners to, and the creation, operation and termination of, the limited partnership. Once partners exercise their contractual freedom in their partnership agreement, the partners have a great deal of certainty that their partnership agreement will be enforced in accordance with its terms.' In general, the commentators observe that only where the agreement is inconsistent with mandatory statutory provisions will the members' agreement be invalidated.") (quoting Martin I. Lubaroff & Paul Altman, DELAWARE LIMITED PARTNERSHIPS § 1.2 (1999)).

[8] *See* LEO E. STRINE, JR. AND J. TRAVIS LASTER, *The Siren Song of Unlimited Contractual Freedom*, *in* RESEARCH HANDBOOK ON PARTNERSHIPS, LLCS AND ALTERNATIVE FORMS OF BUSINESS ORGANIZATIONS, at 1 (Robert W. Hillman &

The trial court should have enforced the LLC Agreement's "void and of no force or effect" provision as written – particularly given that Kleinschmidt signed the LLC Agreement and the trial court held that "CardUX knew about the limitations on Logan's authority [as provided in the LLC Agreement]."). Opinion at 63.[9] That result is not only fair, it is consistent with Delaware law and public policy to enforce a limited liability company agreement in accordance with its terms. 6 *Del. C.* § 18-1101(b) and (i).

Kleinschmidt and CardUX should be held to the LLC Agreement's terms. This Court should enforce the parties' bargain in the LLC Agreement, and hold that the Sales Agreement is void and not subject to ratification.

Mark J. Lowenstein ed. 2015) ("[T]he statutes that authorize alternative entities declare as public policy the goal of granting the broadest contractual freedom possible, and permit the parties to the governing instrument to waive any of the statutory or common law default principles of law and to shape their own relationships.") (footnote omitted). *See also Olson v. Halvorsen*, 986 A.2d 1150, 1162 (Del. 2009) (discussing § 18-1101(b) and holding: "The General Assembly offered the limited liability company as an alternative to the corporate form for entrepreneurs and investors."); 6 *Del. C.* § 18-107 (stating that members or managers can transact business with an LLC "[e]xcept as provided in a limited liability company agreement").

[9] The trial court emphasized that Delaware enforces contracts as written: "When parties have ordered their affairs voluntarily through a binding contract, Delaware law is strongly inclined to respect their agreement, and will only interfere upon a strong showing that dishonoring the contract is required to vindicate a public policy interest even stronger than freedom of contract." Opinion at 101 (quoting *Libeau v. Fox*, 880 A.2d 1049, 1056 (Del. Ch. 2005) (Strine, V.C.), *aff'd in part, rev'd in part*, 892 A.2d 1068 (Del. 2006)).

II. THE SALES AGREEMENT IS INVALID UNDER SECTION 5.4, THE LLC AGREEMENT'S RELATED PARTY PROVISION

A. Question Presented: Whether a member and manager of a Delaware LLC may form a valid contract with the LLC on behalf of his affiliate without complying with the approval requirements of an interested party transaction provision (A862-63; A924-25), and whether the trial court properly bifurcated the choice of law analysis so that non-compliance with a provision in a Delaware LLC agreement governing conflicted transactions could be excused by reference to the common law of another jurisdiction? A923.

B. Scope of Review: The Court reviews choice of law decisions de novo. *Tumlinson v. Advanced Micro Devices, Inc.*, 106 A.3d 983, 986 (Del. 2013). The Court applies de novo review to legal conclusions about the meaning of contracts (including LLC agreements), *Gatz*, 59 A.3d at 1212, as well as burden of proof on, and the legal requirements of, ratification. *Yiannatsis v. Stephanis by Sterianou*, 653 A.2d 275, 279 (Del. 1995). This Court may reject factual findings by a trial court if "clearly erroneous." *Gatz*, 59 A.3d at 1212.

C. Merits:

The trial court erred by holding that the doctrine of implied ratification under New Jersey law validated the Sales Agreement notwithstanding the failure to comply with the requirements of the Related Party Provision, either before or after the Sales Agreement was signed. First, as the Related Party Provision functions as a

replacement for Delaware's common law of fiduciary duty, a fiduciary who knows of a related party safe harbor provision and of the failure to obtain requisite approvals thereunder should not be permitted, through "implied ratification," to obtain a windfall benefit – in this case, commissions through 2017 of more than $14 million. Second, even if the Sales Agreement were properly subject to ratification, the trial court erred by holding that implied ratification under New Jersey law would apply to determine (without further reference to the LLC Agreement) whether CompoSecure ratified the contract which was not approved in accordance with the specific requirements of the LLC Agreement. As a matter of law, the facts as found by the trial court do not support ratification.

1. A Fiduciary's Knowing Failure To Comply With A Related Party Provision Should Invalidate A Covered Transaction

The trial court erred by deeming the Sales Agreement valid even in the absence of compliance with the Related Party Provision's approval requirements. The trial court reached this erroneous result despite charging both Kleinschmidt and CardUX with knowledge of the Related Party Provision and holding that the required approvals had not been obtained.

If a fiduciary fails to follow the procedures laid out in a conflicted transaction safe harbor approval provision, the transaction should be treated as void. A member or manager of an LLC who agrees to such a provision must comply with it to have

the same rights as a person who is not a member or manager. 6 *Del. C.* § 18-107.[10] If implied ratification principles could be applied to validate noncompliance with conflicted transaction safe harbor provisions, investors in Delaware alternative entities would lose crucial statutory and contractual protections. Put simply, a fiduciary who engages in a conflicted transaction should not be spared the consequences of his failure to comply with a safe harbor provision.

This principle follows from the Court's recent ruling in *Dieckman v. Regency GP LP*, 155 A.3d 358 (Del. 2017). In *Dieckman*, this Court reversed the Court of Chancery's dismissal of a claim for breach of a limited partnership agreement and a claim for breach of the implied covenant of good faith and fair dealing. *Id.* at 369. The Court reached that result in large part because when traditional fiduciary duties are replaced with contractually negotiated provisions governing conflicted transactions, "unitholders are entitled to have those terms enforced according to the reasonable expectations of the parties to the agreement." *Id.* at 361. The Court noted that a "conflicts resolution provision also operates for the unitholders' benefit. It ensures that, before a safe harbor is reached by the general partner, unaffiliated unitholders have a vote, or the conflicted transaction is reviewed and recommended

[10] Section 18-107 provides in relevant part: "Except as provided in a limited liability company agreement, a member or manager may … transact other business with[] a limited liability company and, subject to other applicable law, has the same rights and obligations with respect to any such matter as a person who is not a member or manager."

by an independent Conflicts Committee." *Id*. The *Dieckman* Court thus held the implied covenant of good faith in conflicted transactions imposes a requirement that the conflicted party "not act to undermine the protections afforded the unitholders in the safe harbor process." *Id*. at 368. That rationale mandates compliance with a conflicted transaction provision.

2. Delaware Law Governs the Meaning of the LLC Agreement

The trial court erred by bifurcating its choice of law analysis, resulting in the application of New Jersey law (as specified in the Sales Agreement), rather than Delaware law (as specified in the LLC Agreement), to determine the validity of the Sales Agreement with a Related Party. The court applied Delaware law to determine only whether Logan had actual authority when she signed the Sales Agreement. It then decided that New Jersey law would govern all other issues affecting the validity of the Sales Agreement. The trial court cited no authority supporting its decision to bifurcate the choice of law analysis in this fashion.[11] This Court has previously rejected the application of the laws of two different states to different pieces of one action.[12] The trial court erred in applying New Jersey law to this issue.

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[11] Specifically, the paragraph running from page 55-56 of the Opinion contains no authority supporting the proposition that, "Once that question [of actual authority, based on Delaware law and the LLC Agreement] has been answered, the choice of law provision requires that New Jersey law govern all questions of contractual authority."

[12] *Bell Helicopter Textron, Inc. v. Arteaga*, 113 A.3d 1045, 1052 n.28 (Del. 2015) ("[W]e note that it generally makes no logical sense to apply different laws to these

The internal affairs doctrine requires that Delaware law be applied to determine the meaning and consequence of provisions of a Delaware LLC Agreement. The trial court acknowledged that the provisions in the LLC Agreement govern CompoSecure's internal affairs. Opinion at 14.[13] The choice of law analysis is therefore well established: Delaware law governs the meaning and effect of the provisions in CompoSecure's LLC Agreement.[14]

Delaware law governs internal affairs issues of domestic entities, especially those issues that (like the Related Party Provision) concern conflicted transactions

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elements in the same case. To do so risks subjecting litigants to a law of the case that is not the law of any jurisdiction, but is instead an eclectic blend of various sovereigns' laws crafted by a judge into a bespoke tort law fitted for a particular case." … '[A]pplying the law outside the context of the other laws in the jurisdiction may contravene legislative intent.'") (quoting *Simon v. U.S.*, 805 N.E.2d 798, 802-03 (Ind. 2004)). *Cf. Weil v. Morgan Stanley DW Inc.*, 877 A.2d 1024, 1032-33 (Del. Ch. 2005) ("That text should not be interpreted in a crabbed way that creates a commercially senseless bifurcation between pure contract claims and other claims that arise solely because of the nature of the relations between the parties created by the contract.").

[13] *See also In re Oxbow Carbon LLC Unitholder Litigation*, 2018 WL 818760, at *4 ("The LLC Agreement governs its internal affairs."); *Sanders v. Ohmite Holdings, LLC*, 17 A.3d 1186, 1192 (Del. Ch. 2011) ("Ohmite's internal affairs are governed by the Amended and Restated Limited Liability Company Agreement of Ohmite Holdings, LLC…").

[14] *See Kronenberg v. Katz*, 872 A.2d 568, 589 (Del. Ch. 2004) (noting that Delaware law would most likely apply in part because the relationship involved "contractual rights of the parties to the LLC Agreement"); *Facchina v. Malley*, 2006 WL 2328228, at *3 (Del. Ch. Aug. 1, 2006) ("Delaware law … governs the internal affairs of a Delaware limited liability company, regardless of its place of operations.").

and implicate bargained-for voting rights regarding those transactions.[15] The internal affairs doctrine serves as an "implicit guarantee that directors and officers of a corporation will know what law will be applied to their actions and a corporation's stockholders will know the standards of accountability to which they may hold such individuals." *QVT Fund LP v. Eurohypo Cap. Funding LLC I*, 2011 WL 2672092, at *7 (Del. Ch. July 8, 2011). As the Related Party Provision replaces the common law of fiduciary duty with specific contractual provisions, *see supra* at 24-25, Delaware has a strong interest in determining the consequences of the failure to comply with those provisions.[16]

The parties well understood that Delaware law would govern the effect of the provisions in the LLC Agreement. The LLC Agreement contains a Delaware choice of law clause. LLC Agreement § 12.13 at A170-71. The trial court never mentioned

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[15] *See VantagePoint Venture P's 1996 v. Examen, Inc.*, 871 A.2d 1108, 1115-16 (Del. 2005) ("As the United States Supreme Court held in *CTS*, '[n]o principle of corporation law and practice is more firmly established than a *State's authority* to regulate domestic corporations, including the authority to *define the voting rights of shareholders*.'"); *See Rosenmiller v. Bordes*, 607 A.2d 465, 469 (Del. Ch. 1991) (finding that under the internal affairs doctrine Delaware law -- and not New Jersey law -- controlled the issue of whether a stockholders' voting agreement was valid).

[16] Even under the Restatement (Second) of Choice of Law (the "Restatement"), Delaware law should govern the meaning and effect of the provisions of CompoSecure's LLC Agreement. Delaware has a "fundamental policy" and a "materially greater interest" than New Jersey under Section 187(2)(b) of the Restatement in determining the import of the provisions in CompoSecure's LLC Agreement.

this provision in its choice of law analysis, nor did it mention 6 *Del. C.* § 18-1101(i), requiring construction of the LLC Agreement "under the laws of the State of Delaware in accordance with its terms."

No basis exists for applying New Jersey law here. Kleinschmidt, a CompoSecure manager, formed CardUX to carry out a conflicted transaction with CompoSecure. The trial court correctly found that CardUX was an "Affiliate" under CompoSecure's LLC Agreement charged with knowledge of that document's terms. Delaware law should determine the effect of Kleinschmidt's knowing failure to comply with the LLC Agreement's Related Party Provision. A contrary ruling would subject interpretation of Delaware LLC agreements to the vagaries of the common law of any other state in which a Delaware limited liability company transacts business.

This Court should hold that Delaware law governs the meaning and effect of the LLC Agreement, and that the LLC Agreement's safe harbor protections cannot be defeated by reference to principles of implied ratification under New Jersey law.

3. As a Matter of Law, the Sales Agreement was Not Ratified

Even if acts that are deemed "void" by an LLC Agreement may later be ratified -- which is not the case under Delaware law -- the trial court erred by holding that the Sales Agreement was ratified regardless of which state's law applied. As a threshold matter, informal ratification can have no applicability in this case given

the presence of a conflicted manager who knew that required prior approvals were never obtained.

"Ratification is an equitable defense[,]"[17] and CardUX had the burden to establish it. Opinion at 57 n.280. Ratification is derived from the law of agency, but is complicated by other factors in the corporate context.[18] Accordingly, ratification requires the approval of the principals that held the power to authorize the action if the proposed action were properly submitted for prior approval,[19] acting with the same formality that would have been required to approve the transaction at

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[17] *Genger v. TR Investors, LLC*, 26 A.3d 180, 195 (Del. 2011).

[18] *See Lewis v. Vogelstein*, 699 A.2d 327, 334 (Del. Ch. 1997); *Espinoza v. Zuckerberg*, 124 A.3d 47, 50 (Del. Ch. 2015).

[19] *See Hannigan v. Italo Petroleum Corp.*, 47 A.2d 169, 172 (Del. 1945) (ratification occurs if "after knowledge of the facts, [it is] duly and properly ratified by that authority which would have been completely empowered to legally authorize the act in the first instance …."); *Lewis*, 699 A.2d at 335 ("in the case of shareholder ratification there is of course no single individual acting as principal …."). *See also Stammelman v. Interstate Co.*, 170 A. 595, 597 (N.J. 1934) (rejecting lease as invalid because it would have required "the formal act and authority of its board of directors, and the proofs do not show any such action either before or after the execution of the lease," and explaining that the general rule is "that whenever the law requires a particular mode of authorization there can be no valid ratification except in the same manner."); 2A WILLIAM MEADE FLETCHER, FLETCHER'S CYCLOPEDIA OF THE LAW OF CORPORATIONS § 768 (2017) ("[W]hen the adoption of any particular form or mode is necessary to confer the authority in the first instance, there can be no valid ratification except in the same manner. Thus, if a corporation can only authorize a particular act or contract by a power under seal, or by a formal vote, ratification of such an act or contract must be under seal or by a formal vote, as the case may be."); 19 C.J.S. *Corporations* § 696 ("Where a particular mode of authorization is required by charter or statute, a ratification must be made in the same manner, as by a resolution of the board of directors or by a vote of the stockholders.").

the outset.[20] Ratification may only be accomplished if the principals actually know the material facts when approving the transaction.[21] None of these requirements was satisfied.

The trial court erred by holding that "CompoSecure's conduct ratified the Sales Agreement." Opinion at 72. It was not CompoSecure as an entity which could have approved the Sales Agreement, but rather the Board, the Investors and the Class A Majority. LLC Agreement § 5.4 at A143. The Board did not approve, vote for, consent to, or take any formal action regarding the Sales Agreement. The LLC Agreement specified how the Board could act: by written consent or a vote. LLC Agreement § 4.1(k) at A138. The Board did neither, before or after the Agreement was signed. Nor did the Investors or the Class A Majority approve, vote for, consent to or take any other formal action regarding the Sales Agreement.

The trial court attempted to paper over this issue by erroneously finding that the Board "would have" approved the Sales Agreement had it considered the contract. Opinion at 73-74. Under Delaware law, assumptions about what a board

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[20] *See* n.27, *infra*; *see also Espinoza v. Zuckerberg*, 124 A.3d 47, 50 (Del. Ch. 2015).

[21] "Effective ratification depends upon knowledge of material facts." *Liberis v. Europa Cruises Corp.*, 1996 WL 73567, at *8 (Del. Ch. Feb. 8, 1996), *aff'd*, 762 A.2d 926 (Del. 1997) (TABLE); *Persi v. Woska*, 2017 WL 958498, at *6 (N.J. Super. Ct. App. Div. Mar. 10, 2017) ("Ratification requires the principal to have the capacity to act when the agent acted. It also 'requires the principal's intent to ratify plus full knowledge of all the material facts.'").

"would have" done had it met are legally insufficient.[22] For more than a century, Delaware law has insisted on the fundamental importance of a board's deliberative process.[23] Delaware law so greatly values the board's deliberative process that the exclusion of a single director -- whose participation almost certainly would not change the board's decision -- risks invalidating board action.[24]

The trial court compounded its error by rejecting uncontroverted testimony that a Board member would have opposed the Sales Agreement had it been presented for approval. Tartavull, who joined the Board during the December meeting, testified unequivocally that he would have opposed the Sales Agreement. A759. As

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[22] J. Travis Laster & John Mark Zeberkiewicz, *The Rights and Duties of Blockholder Directors*, 70 BUS. LAW. 33, 35 (2014) ("Delaware corporate law embraces a 'board-centric' model of governance. This model expects that all directors will participate in a collective and deliberative decision-making process… .").

[23] *OptimisCorp v. Waite*, 137 A.3d 970 (TABLE), 2016 WL 2585871, at *3, n.8 (Del. Apr. 25, 2016) ("[I]t has long been the policy of our law to value the collaboration that comes when the entire board deliberates on corporate action and when all directors are fairly accorded material information."); *Lipman v. Kehoe Stenograph Co*., 95 A. 895, 897, 899 (Del. Ch. 1915) ("Each member of a corporate body has the right to consultation with the others and has the right to be heard upon all questions considered…[T]here is a deeper reason [directors are not permitted to act by proxy] … a director cannot authorize anyone to act for him, because his associates are entitled to his judgment, experience and business ability, just as his associates cannot deprive him of his rights and powers as director.").

[24] *See Kalisman v. Friedman*, 2013 WL 1668205, at *7 (Del. Ch. Apr. 17, 2013) (transactions taken at board meetings where defendants failed to provide adequate notice of meetings to one board member and more generally "froze [one board member] out of the deliberative process" might be invalidated even where all of the other seven directors voted in favor of the transactions).

he testified, he was not even provided the Sales Agreement for review. A756. Rather, a single slide in a board presentation referenced the Sales Agreement, and incorrectly suggested that (a) no contract had yet been signed and (b) if one were signed, CompoSecure would have the power to terminate it at any time on 30 days' notice. A756. That testimony was uncontroverted, and indeed Tartavull was not cross-examined.

There is no record support for the trial court's decision to disagree with Tartavull's testimony about what he would have done in a situation that never occurred.[25] More broadly, the trial court's supposition that CompoSecure's Board would have approved the Sales Agreement notwithstanding Tartavull's objection[26] is no substitute for Board deliberation and a corresponding vote. Moreover, even assuming the Board would have voted to approve the Sales Agreement, there was no formal approval by the Investors and the Class A Majority, as also required by the LLC Agreement.

[25] *See Allen v. Encore Energy, L.P.*, 72 A.3d 93, 106 (Del. 2013) ("Despite their expertise, the members of the Court of Chancery cannot peer into the hearts and souls of directors ….") (internal quotations omitted).

[26] "Even accepting his testimony, a Board majority comprising the three directors other than Kleinschmidt still supported [the Sales Agreement]." Opinion at 73.

The trial court's implied ratification holding was also in error because ratification in this context requires formal action.[27] In *Espinoza v. Zuckerberg*, 124 A.3d 47 (Del. Ch. 2015), the Chancellor held that Facebook founder and majority stockholder Mark Zuckerberg did not effectuate stockholder ratification of Facebook director compensation merely because he "expressed his will to approve the transaction" through a deposition and an affidavit. *Id*. at 50, 58. This informal approach to ratification was "ill-suited to the context of corporate law ratification, where formal structures govern the collective decision-making of stockholders who coexist as principals." *Id*. at 50. "These formalities serve to protect the corporation and all of its stockholders by ensuring precision, both in defining what action has been taken and establishing that the requisite number of stockholders approved such action, and by promoting transparency, particularly for non-assenting stockholders." *Id*. The Chancellor therefore held: "[S]tockholders of a Delaware corporation -- even a single controlling stockholder -- cannot ratify an interested board's decisions without adhering to the corporate formalities specified in the Delaware General Corporation Law for taking stockholder action." *Id*. at 50.

[27] "Where formalities are requisite for the authorization of an act, its affirmance must be by the same formalities in order to constitute a ratification." RESTATEMENT (SECOND) OF AGENCY § 93(2) (1958). "If formalities are required for the authorization of an act, the same formalities are required for ratification." RESTATEMENT (THIRD) OF AGENCY § 4.01, cmmt. e (2006).

That same rationale should apply here: a conflicted transaction is not capable of ratification absent, at the very least, informed, formal approval by the parties whose approvals are required under the LLC Agreement.[28]

Finally, unclean hands precludes ratification here. Section 5.4 requires that any Related Party transaction must be conducted "at arm's length." This Court has construed this phrase "as an explicit contractual assumption by the contracting parties of an obligation subjecting the manager and other members to obtain a fair price for the LLC in transactions between the LLC and affiliated persons. Viewed functionally, the quoted language is the contractual equivalent of the entire fairness standard of conduct and judicial review." *Gatz Props., LLC v. Auriga Capital Corp.*, 59 A.3d 1206, 1213 (Del. 2012).

[28] The trial court relied solely on two inapposite, half-century old cases from New Jersey dealing with contracts signed by corporate agents who had arguably exceeded their authority. Opinion at 68 n.314 ("*See, e.g.*, *Johnson v. Hospital Serv. Plan of N.J.*, 135 A.2d 483, 486-87 (N.J. 1957) (applying doctrine of implied ratification to contract with municipal corporation and collecting earlier cases); *Am. Photocopy Equip. Co. v. Ampto, Inc.*, 198 A.2d 469, 473 (N.J. Super. Ct. App. Div. 1964) (applying doctrine of implied ratification to license agreement initially signed by corporate officer without proper authority)."). Neither case involved a conflicted transaction safe harbor provision that the contractual counterparty knew about but ignored. They also conflict with *Stammelman v. Interstate Co.*, 170 A. 595, 597 (N.J. 1934), requiring formal action consistent with Restatement (Second) of Agency § 93 (1958) and Restatement (Third) of Agency § 4.01 (2006). This Court need not resolve which New Jersey case controls, because Delaware law applies to the internal affairs of CompoSecure.

The Sales Agreement fails the entire fairness test as a matter of law. The process was demonstrably unfair because the Board was not adequately informed about the Sales Agreement and never deliberated or voted on it, before or after it was signed -- a failing appropriately chargeable to Kleinschmidt, who took no steps to ensure formal approval of the Sales Agreement as required by the Related Party Provision of the LLC Agreement. Kleinschmidt, as a CompoSecure Board member, should not be permitted to benefit from a conflicted transaction while knowing that the transaction was never presented for the requisite approval.

The substance of the Sales Agreement also was demonstrably unfair, at least as interpreted by the trial court, because it resulted in a huge windfall for CardUX. The trial court erred by holding that this outcome was fair because the parties had bargained over the terms of the Sales Agreement. Although enforcement of a one-sided agreement might be appropriate in a case involving bargaining by unrelated parties, entire fairness requires that the Sales Agreement be *substantively* fair *to CompoSecure*. The trial court found that CardUX played no role in the sale of Amazon-branded cards to Chase, and did nothing to earn this commission aside from placing Amazon's name on a list of Approved Prospects in the Sales Agreement. Yet through Kleinschmidt's knowing failure to comply with the LLC Agreement's

Related Party approval requirements, CardUX stands to reap tens of millions of dollars in commissions from that sale over 15 years.

Kleinschmidt had an obligation to affirmatively protect the interests of the Company and its unitholders.[29] Instead, he negotiated the Sales Agreement in his self-interest and took no steps to secure the approvals required by the LLC Agreement for his conflicted transaction. The unclean hands doctrine should not countenance a windfall award to a faithless fiduciary and his affiliate in the face of a *knowing failure* to obtain the specific prior approvals required under a conflicted transaction provision contained in a Delaware LLC agreement.

[29] In the corporate context, *see Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939) (corporate fiduciary has an obligation to affirmatively protect the interests of the corporation committed to his charge); *Mills Acq'n Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1280 (Del. 1989).

CONCLUSION

The trial court's legally erroneous ruling sends a harmful message. The ruling undermines Delaware law establishing that members of Delaware limited liability companies are free to govern their affairs as they see fit. The decision eviscerates the rule that conflicted party safe harbor provisions are to be strictly enforced in acccordance with the parties' reasonable expectations. It ignores the longstanding Delaware internal affairs doctrine, requiring application of Delaware law in the interpretation and enforcement of Delaware governing instruments, and instead misapplies "implied ratification" principles under New Jersey law to cure a knowing failure to comply with a related party provision. CompoSecure therefore submits the decision of the trial court should be reversed and remanded, with instructions that the Judgment be vacated and judgment be entered in CompoSecure's favor.

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Dated: May 4, 2018
5768447