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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| COMPOSECURE, L.L.C.,<br><br>Plaintiff/<br>Counterclaim Defendant-<br>Below/Appellant,<br><br>v.<br><br>CARDUX, LLC f/k/a AFFLUENT CARD, LLC,<br><br>Defendant/<br>Counterclaim Plaintiff-<br>Below, Appellee. | No. 177, 2018<br><br>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 REPLY BRIEF

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## PRELIMINARY STATEMENT

In arguing for affirmance, CardUX[1] would have this Court ignore the trial court's critical, *binding determinations* relevant to the issues raised on appeal. The undisputed facts found by the trial court establish that (a) the Sales Agreement was a conflicted transaction under CompoSecure's governing LLC Agreement; (b) the Sales Agreement was not validly approved; (c) Kleinschmidt and his affiliate CardUX were charged with knowledge that the Sales Agreement was not validly approved; and (d) CardUX played no role in bringing about the Amazon sale. Although these factual determinations are no longer subject to challenge, CardUX nevertheless attempts to portray itself as an independent, innocent third party that entered into a one-sided agreement not subject to specific approval requirements, and totally unaware that those specific approvals never occurred.

CardUX's arguments fail to address head-on the important legal issues presented in this appeal. CardUX's contention that CompoSecure failed to raise its "void" argument below is demonstrably wrong, and CardUX offers no substantive response to CompoSecure's argument that the express language of Section 4.1(p) of the LLC Agreement should be enforced. CardUX also fails to respond to CompoSecure's argument that Delaware law requires strict compliance with

[1] Defined terms in CompoSecure's Opening Brief shall have the same meanings herein.

conflicted transaction approval provisions. With regard to ratification, CardUX erroneously contends that a party charged with knowledge that a transaction was not validly approved may nevertheless obtain ratification through acquiescence by an agent that was not authorized to approve the transaction in the first place.

CardUX's answering brief establishes that no basis exists under Delaware law for enforcement of the unapproved Sales Agreement. The trial court's decision enforcing the Sales Agreement must be reversed.

## ARGUMENT

### I. UNDER SECTION 4.1(p) OF THE LLC AGREEMENT, FAILURE TO OBTAIN PRIOR APPROVAL OF THE SALES AGREEMENT RENDERED THE SALES AGREEMENT "VOID." THIS COURT SHOULD ENFORCE THE PLAIN LANGUAGE OF THE LLC AGREEMENT.

The plain language of Section 4.1(p) of the LLC Agreement provides that a covered transaction shall be "void and of no force or effect whatsoever" absent prior approval of the CompoSecure Board, the Investors, and the Class A Majority. The requisite approvals were never obtained, rendering the Sales Agreement void. Under well-established Delaware law, a void contract cannot be ratified.

Remarkably, CardUX ignores the relevant language of the LLC Agreement and CompoSecure's argument that the language renders the Sales Agreement void, and *does not even mention* the authorities relied upon by CompoSecure. Instead, CardUX offers only a baseless waiver argument, and a factually unsupportable claim that the Sales Agreement -- under which, if valid, CardUX would be entitled to commissions worth more than $1.1 million during the contract's first year alone -- does not trigger the requirements of Section 4.1(p). These arguments do not withstand scrutiny.

#### A. CompoSecure's Argument That The Sales Agreement Is Void Was Properly Raised Below.

Unable to offer a substantive response to CompoSecure's "void" argument under Section 4.1(p) of the LLC Agreement, CardUX attempts to manufacture a

waiver argument, falsely claiming that CompoSecure failed to present this argument to the trial court. In fact, CompoSecure has pressed its "void" argument from the outset of the litigation,[2] and it was fully presented below. For example, in its Opening Pretrial Brief, CompoSecure's first argument was captioned as follows: "The Court Should Declare The SRA Void Because It Never Received The Approvals Required By The LLC Agreement." (A335) CompoSecure there argued (with reference to supporting case precedent) that "[l]imited liability companies are creatures of contract, and the parties have broad discretion to use an LLC Agreement to define the character of the company and the rights and obligations of its members." (A336) Thus, CompoSecure argued, "when interpreting an LLC Agreement, 'the Court must, as with any contract, begin the analysis with an examination of the plain language.'" (*Id.*) Specifically quoting that language, CompoSecure went on to argue that Section 4.1(p) mandates "*prior* approval," and specifies that "the consequence of a failure to obtain that approval [is] the contract 'shall be void and of no force or effect whatsoever.'" (A338-39)

CompoSecure repeated its "void" argument in its post-trial briefing:

[2] *See* Plaintiff CompoSecure, L.L.C.'S Verified Second Amended Complaint and Answer and Affirmative Defenses to Defendant's Counterclaims, ¶ 1 ("This is an action for a declaratory judgment that a contract entered into between two Delaware limited liability companies is void and unenforceable because it did not receive the approvals required under Plaintiff's LLC Agreement.") (AR1); *see also* ¶¶ 40-61 (AR9-12)

> Whether viewed as a conflicted transaction or a Restricted Activity, the LLC Agreement required that the SRA receive formal approval from the Board, Investors, and Class A Majority. Section 4.1(p) goes further, requiring '*prior* approval' for Restricted Activities, and specifying the consequence of failure to obtain that approval: the contract 'shall be void and of no force or effect whatsoever.' … Consequently, under the plain language of the LLC Agreement and Delaware law, the SRA is void.[3]

(A862-63). Indeed, CardUX's own briefing below confirmed that it understood that CompoSecure was arguing the Sales Agreement was void and therefore could not be ratified.[4]

The "void" argument thus was clearly and fairly presented to the trial court -- which issued an Opinion containing a detailed discussion of its views concerning the distinction between void and voidable acts with respect to ratification[5] -- and the authorities relied upon by CardUX in support of its waiver argument are inapposite.[6]

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[3] As can be seen from this passage, CompoSecure argued that the Sales Agreement was "void" under both Section 4.1(p) and Section 5.4. Thus, the Court's holding that CompoSecure's arguments "were 'cumulative'" says nothing about what arguments were presented to the Court of Chancery. *See* AB at 26-27 n.7.

[4] *See* A907 ("D. If the SRA Was Void, CardUX Still Recovers Under The Unjust Enrichment Doctrine.").

[5] *See* Opinion at 65-67; *see also* Opinion at 32 n.162 (noting that "CompoSecure argues that the Sales Agreement also qualified as a 'Restricted Activity' under Section 4.1(p)").

[6] In *Shawe v. Elting*, this Court refused to entertain on appeal an argument that the Court of Chancery's exercise of power under the DGCL violated the United States Constitution where that argument had not been presented to the Court of Chancery. 157 A.3d 152, 169 (Del. 2017). In *Clark v. Clark*, the appellant made only a

### B. The LLC Agreement Renders The Sales Agreement Void And Therefore Non-Ratifiable.

CardUX fails to address the merits of CompoSecure's "void" argument, relying instead on its "waiver" argument and its contention that, as CompoSecure "had 'capacity and power to enter into'" the Sales Agreement, the Sales Agreement "'is voidable, not void.'" *Id*. While that contention may accurately state the default common law rule, as CompoSecure's Opening Brief demonstrated, under Delaware law the parties to an LLC Agreement have the power to modify the common law, and they in fact did so here.[7] The mere existence of some common law principle does not preclude enforcement of the plain language of an LLC agreement altering the common law.[8] Concisely stated, "[t]he LLC Agreement changed the rules." Opinion at 62. CardUX failed to dispute this principle.

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"fleeting reference" to the legal argument it advanced on appeal by failing to present its argument in a procedural posture that would allow the Family Court to rule on the argument. 47 A.3d 513, 517-18 (Del. 2012). The only other case CardUX cites, *Rocktenn CP, LLC v. BE&K Eng'g Co., LLC*, 103 A.3d 512 (Del. 2014), says only that "The appellants raise a novel issue for the first time on appeal."

[7] *See* 6 *Del. C.* § 18-1101(b), (i); 6 *Del. C.* § 18-107. *See also* OB at 22, note 7.

[8] *See* OB at 22-23 and notes 8-9, referencing, *inter alia*, 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 & 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

Because parties may modify the common law rules via an LLC agreement, the parties to the CompoSecure LLC Agreement held the power to modify the traditional doctrine that renders an unauthorized but otherwise lawful corporate act merely voidable if the parties fail to follow some necessary procedural steps. The CompoSecure LLC Agreement evinces the exercise of that power in Section 4.1(p). As a result, the failure to obtain the requisite prior approvals renders the Sales Agreement not merely voidable, but "void."

CardUX also fails to distinguish -- or even mention -- the recent decision of the Court of Chancery in *Southpaw Credit Opportunity Master Fund, L.P. v. Roma Restaurant Holdings, Inc.*, 2018 WL 658734 (Del. Ch. Feb. 1, 2018), which held that "[t]he contractually mandated penalty for failure to comply with [an LLC Agreement prior approval requirement] is that the [unapproved] issuance is void *ab initio*." *Id.* at *7. Similarly unaddressed by CardUX is CompoSecure's reference to a specific discussion in the Court of Chancery's *Oxbow* decision in which Vice Chancellor Laster approved the *Southpaw* result. *In re Oxbow Carbon LLC Unitholder Litig.*, 2018 WL 818760, at *48 n.473 (Del. Ch. Feb. 12, 2018). By ignoring these authorities, and failing to respond to CompoSecure's arguments,

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instrument to waive any of the statutory or common law default principles of law and to shape their own relationships.") (footnote omitted).

CardUX has conceded the point. *See, e.g., Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived").

### C. Section 4.1(p) Applies To The Sales Agreement.

Having failed to present any substantive opposition to CompoSecure's "void" argument, CardUX argues instead that the provisions of Section 4.1(p) do not apply to the Sales Agreement. Section 4.1(p) identifies certain "Restricted Activities" that CompoSecure may undertake only if they are included in CompoSecure's annual budget or receive the requisite prior approvals of the Board, the Investors, and the Class A Majority. Included among the "Restricted Activities" is "enter[ing] into … any contract … 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) Without any trial record support, CardUX argues that "[t]he SRA is exempted as an 'ordinary course' activity, given Compo's established practice of paying an effective 15% commission on sales..." (AB at 27), and that, in any event, CompoSecure anticipated expenses of less than $500,000 annually. The trial record forecloses these arguments.

The trial court held that the Sales Agreement was not contemplated under CompoSecure's budget (Opinion at 62), and the record establishes that the Sales Agreement was well outside of CompoSecure's ordinary course of business. The trial court correctly held that the Sales Agreement was a conflicted transaction,

which by definition is outside of the ordinary course. Further, the Company had never before hired an exclusive independent sales organization. Indeed, the Sales Agreement was without precedent in CompoSecure's history. Although CardUX argues that the commission provided for under the Sales Agreement "was comparable" to a wholesale discount provided to certain reselling personalization businesses, CardUX fails to note that those businesses are not mere sales agents, but are themselves already engaged in the industry as personalization bureaus with extensive, existing customer relationships and thus possessing the ability to resell CompoSecure's products together with their personalization services. The record establishes that those personalization businesses in fact add value to the product, personalizing the cards with the card member's name, account information, expiration date and security number, information they then also encode on the magnetic strip and chip module. (A425)

Moreover, the Judgment itself establishes that, if the Sales Agreement were enforceable, CardUX would be entitled to commissions of more than $1.1 million during the first year of the agreement alone -- a figure greatly exceeding $500,000. The 2017 figure would be nearly $13.3 million. Section 4.1(p)(ix)'s clear intent was to require enhanced approval of extraordinary unbudgeted transactions. The Sales Agreement undoubtedly qualifies as such a transaction.

### D. CardUX's Remaining Arguments Also Fail.

CardUX also makes two arguments that are not specific to Section 4.1(p): first, that Section 4.1(j) renders the Sales Agreement binding on CompoSecure, "even if unauthorized" (AB 30); and second, that CompoSecure's argument "would turn contracts into options." (AB 31) Both arguments fail. The trial court correctly rejected the first, and the second fails because this case implicates no such policy concern, as the Sales Agreement was also signed in breach of Section 5.4, governing conflicted transactions.

The trial court properly held the plain language of Section 4.1(j) undercuts CardUX's argument that it was entitled to rely on Logan's apparent authority in signing the Sales Agreement. Opinion at 61. Section 4.1(j) permits anyone "other than a Member" to "rely on the authority of the Board … in taking any action in the name of the Company without inquiry into the provisions of this Agreement or compliance herewith, regardless of whether that action actually is taken in accordance with the provisions of this Agreement." (A138) When he negotiated the Sales Agreement with CompoSecure on behalf of his to-be-formed entity, Kleinschmidt was a Member, and thus could not rely on Logan's apparent authority. The same authority representation appeared unchanged in every draft of the Sales Agreement, and Kleinschmidt knew the Board never took the actions needed to render it enforceable. Kleinschmidt carried that knowledge with him to CardUX

upon its formation, rendering CardUX equally incapable of relying on apparent authority. In fact, the trial court found that "CardUX knew about the limitations on Logan's authority." Opinion at 63.

The trial court correctly held that "Kleinschmidt acted as an agent of his principal, CardUX. Kleinschmidt's knowledge of the limitations on Logan's authority is therefore imputed to CardUX." Opinion at 64 (citing, *inter alia*, *Teachers' Ret. Sys. of La. v. Aidinoff*, 900 A.2d 654, 671 n.23 (Del. Ch. 2006) ("[I]t is the general rule that knowledge of an officer or director of a corporation will be imputed to the corporation.")). Kleinschmidt, and thus CardUX, was charged with knowledge of the LLC Agreement, and "is deemed to have known about the Related Party Provision [Section 5.4] and its implications for Logan's ability to enter into the Sales Agreement." Opinion at 63.

Moreover, Section 4.1(j)'s general third-party reliance language does not eliminate or alter Section 5.4's more specific provisions addressing the requirements for conflicted transactions. Section 4.1(j) addresses the general ability of *independent* third parties to rely on the apparent authority of CompoSecure's agents and its Board without inquiring into their actual authority. Section 5.4, in contrast, addresses the much more limited subset of situations involving parties attempting to engage in a conflicted transaction with the Company. CardUX's relationship with CompoSecure was governed by the latter provision, not the former. As the trial court

held, the enhanced approval requirements of Section 5.4 apply not only to Kleinschmidt, as a Member and director, but also to CardUX, as an "Affiliate" of, and "Related Party" to, Kleinschmidt. "'[T]he settled rules of contract interpretation' counsel the Court to prefer Section [5.4], a specific provision, over the more general Section [4.1(j)]." *Morris v. Spectra Energy Partners (De) GP, LP*, 2017 WL 2774559, at *11 (Del. Ch. June 27, 2017) (quoting *Brinkerhoff v. Enbridge Energy Co., Inc.*, 159 A.2d 242, 254 (Del. 2017)) (holding that the rebuttable presumption found in the more specific conflict-of-interest safe harbor provision of the limited partnership agreement applied to a conflicted transaction instead of the conclusive presumption contained in a more general provision).

The cases CardUX cites are distinguishable, and reinforce the conclusion that, under the circumstances present here, CardUX could not rely on the Sales Agreement's authority representation. For example, in *Cobalt Operating, LLC v. James Crystal Enterprises, LLC*, a buyer accused the seller of making false financial representations in an asset purchase agreement. 2007 WL 2142926, at *27 (Del. Ch. July 20, 2007), *aff'd*, 945 A.2d 594 (Del. 2008) (TABLE). The Court of Chancery rejected the seller's argument that facts available in due diligence should have aroused the buyer's suspicions sufficient to render reliance on the financial representations unreasonable. *Id.* at *28. The court held that the buyer was not required to investigate and independently verify the accuracy of the representations

on which it sought to rely; indeed, the truth was known only to the seller, and "the fraud was intentionally hidden from Cobalt when its due diligence team went looking." *Id.* Here, unlike in *Cobalt*, no investigation into the authority representation's accuracy was needed, as CardUX knew it was invalid.[9]

CardUX's other argument, that a ruling in CompoSecure's favor "would turn contracts into options" (AB 31), fails for the independent reason that CardUX was far from an innocent third party. Kleinschmidt was a member and a signatory to the LLC Agreement. He was also on the Board, and was properly charged with knowledge that the Sales Agreement was not validly approved.[10] There is nothing inequitable or unfair about enforcing the LLC Agreement in accordance with its terms or holding conflicted parties to the consequences of their own knowledge. Innocent third parties and insiders contracting with companies whose governing documents do not contain specific approval requirements like CompoSecure's (or that comply with such requirements if they exist) have nothing to fear from a ruling in CompoSecure's favor. Accordingly, the purported policy considerations expressed by CardUX need not concern the Court in this case.

[9] Moreover, *Cobalt* did not involve a conflicted transaction with a company director.

[10] More generally, CardUX's discussion of the *ultra vires* doctrine says nothing about what the Court should do when parties to an LLC Agreement use their freedom of contract to expressly render transactions void absent procedural pre-compliance.

## II. FAILURE TO COMPLY WITH THE CONFLICTED TRANSACTION APPROVAL REQUIREMENTS UNDER SECTION 5.4 CANNOT BE EXCUSED THROUGH RATIFICATION. EVEN IF RATIFICATION WERE AVAILABLE, UNDER DELAWARE LAW RATIFICATION WOULD HAVE REQUIRED APPROVALS IN ACCORDANCE WITH SECTION 5.4.

CardUX does not and cannot argue that the Sales Agreement, a conflicted transaction governed by the specific safe harbor approval requirements of Section 5.4 of the LLC Agreement, was validly entered into in compliance with those provisions. CardUX concedes, as it must, that not one of the required parties -- the Board, the Investors, or the Class A Majority, much less all -- approved the Sales Agreement, and further concedes that it was properly charged with knowledge of the lack of those approvals. Instead, its attempt to avoid the impact of Section 5.4 rests on its argument that the unapproved Sales Agreement was nevertheless ratified by "CompoSecure's" conduct. Under Delaware law, a fiduciary's knowing failure to comply with the requirements of a conflicted transaction will invalidate the transaction, leaving it void. Even if ratification were available, it is well settled that the doctrine requires the approval of the constituencies that held the power to authorize the action in the first instance -- in this case, the Board, the Investors, and the Class A Majority.[11] The undisputed and unchallenged facts establish that those approvals never occurred.

[11] *See* n.16, *infra*.

### A. Failure To Strictly Comply With The Approval Requirements of Section 5.4 Renders The Sales Agreement Void.

CardUX was properly charged with knowledge that the approval requirements set forth in Section 5.4 were not satisfied. Delaware law requires strict compliance with conflicted transaction approval provisions.[12] Indeed, as this Court noted in *Dieckman v. Regency GP LP*, 155 A.3d 358, 361 (Del. 2017), "unitholders are entitled to have [contractually negotiated] terms enforced according to the reasonable expectations of the parties to the agreement." Thus, a conflicted transaction entered into in knowing violation of specific approval requirements must be treated as void.

CardUX's attempt to distinguish *Dieckman* -- by noting that that case "had nothing to do with whether a transaction was void or voidable" -- reads this Court's opinion too narrowly. CompoSecure submits *Dieckman* espouses a broader concept, namely, that conflicted transaction provisions like Section 5.4 operate for the benefit of unitholders, *not* the conflicted party. The Court held that such approval requirements are intended to "ensure[ ] that, before a safe harbor is reached" by the conflicted party, "unaffiliated unitholders have a vote, or the conflicted transaction is reviewed and recommended by an independent Conflicts Committee." *Id.* This Court's holding that a conflicted party may "not act to undermine the protections

[12] *See* 6 *Del. C.* § 18-107.

afforded the unitholders in the safe harbor process," *id.* at 368, mandates a finding in this case that failure to meet the specific approval requirements of Section 5.4 renders the Sales Agreement void. Otherwise, the safe harbor provision would be meaningless.

### B. Even If The Doctrine of Ratification Were Available, It Would Be Inapplicable Under The Facts Of This Case.

In determining that the unapproved Sales Agreement was nevertheless valid, the trial court purported to rely on principles of implied ratification under New Jersey law. CardUX offers no response to CompoSecure's argument that, under the internal affairs doctrine, Delaware law must control the meaning and effect of the provisions of the LLC Agreement, including consideration of principles of implied ratification.[13] Indeed, CardUX concedes that New Jersey and Delaware law regarding ratification are consistent. Either way, the trial court misapplied the ratification doctrine here.

[13] The Court of Chancery's decision in *Weil v. Morgan Stanley DW Inc.*, 877 A.2d 1024, 1032-33 (Del. Ch. 2005) (cited by CardUX, AB at 37), in which the court applied a California choice of law provision to contract claims, does not support application of New Jersey law here because the claims among the parties do not arise *solely* out of the relationship created by the Sales Agreement. As demonstrated in CompoSecure's Opening Brief (OB at 27-28), Delaware law governs the meaning and effect of the provisions of the LLC Agreement.

In urging affirmance, CardUX relies on implied ratification cases that uniformly concern truly independent, third-party contractual relationships.[14] Those decisions have no relevance here, where the Sales Agreement at issue was governed by the specific approval requirements of a conflicted transaction provision and CardUX was charged with knowledge that those requirements were not satisfied.

CardUX's response says nothing about acquiescence by each of the separate constituencies whose approval was required under Section 5.4. Rather, CardUX argues simply that "Compo ratified and acquiesced to" the Sales Agreement (AB at 39) -- treating "CompoSecure" as a separate entity capable of independently approving the Sales Agreement under the conflicted transaction provision. Thus, CardUX urges the Court to conclude that, notwithstanding the existence of specific conflicted transaction approval requirements, the conflicted party charged with knowledge that the specific approvals were not obtained nevertheless obtained ratification of the transaction through the acquiescence of a party (CompoSecure,

[14] *See* AB at 35, citing *Klaassen v. Allegro Dev. Corp.*, 106 A.3d 1035, 1047 (Del. 2014) (relying on various conduct to find implied consent, including an executed written consent providing formal acknowledgement of the exact conduct the ratifying party sought to avoid); *Am. Photocopy Equip. Co. v. Ampto, Inc.*, 198 A.2d 469, 474 (N.J. Super. Ct. App. Div. 1964) (involving a third-party patent license agreement); *Dannley v. Murray*, 1980 Del. Ch. LEXIS 639, at *12-13 (Del. Ch. July 3, 1980) (involving unauthorized endorsements of checks); *Thermo Contracting Corp. v. Bank of New Jersey*, 354 A.2d 291, 296 (N.J. 1976) (involving unauthorized endorsements of checks by a subcontractor); *Ajamian v. Schlanger*, 89 A.2d 702, 704 (N.J. App. Div. 1952) (involving a real estate transaction).

the entity) through agents that CardUX knew lacked authority to approve (or ratify) the transaction. Delaware law does not countenance such a result so inconsistent with the express terms of the LLC Agreement.

For this additional reason, CardUX's reliance on this Court's decision in *Genger v. TR Investors, LLC,* 26 A.3d 180, 195 (Del. 2011), to suggest that ratification "precludes a party 'who [has] accepted the benefits of a transaction from thereafter attacking it,'" is misplaced. The Board, the Investors, and the Class A Majority (*i.e.*, the parties whose prior approval of the Sales Agreement was required) never "accepted the benefits of [the] transaction." Even assuming Logan, who signed the Sales Agreement without authority, could be deemed to have accepted the transaction, an invalid act on the part of an officer who lacks authority to bind the company is not imputable to the company. Moreover, it is undisputed that the Sales Agreement was never presented to the Board for its approval,[15] nor did the Board take any action that might reasonably be deemed to constitute acquiescence.

Indeed, the decisions in *Espinoza v. Zuckerberg*, 124 A.3d 47 (Del. Ch. 2015) and *Lewis v. Vogelstein*, 699 A.2d 327 (Del. Ch. 1997), make clear that formal ratification is required where approval of constituencies beyond the entity itself are

[15] *See Klaassen*, 106 A.3d at 1047 (acquiescence requires "full knowledge of [a claimant's] rights and the material facts)."

required to authorize an act at the outset.[16] Thus, under Delaware law, the Sales Agreement is not capable of ratification in the absence of informed, formal approval by each of the Board, the Investors, and the Class A Majority -- the parties whose approvals are required under Section 5.4.[17]

Finally, unclean hands precludes ratification here. CardUX's response that the elimination of fiduciary duties under the LLC Agreement forecloses an entire fairness challenge misses the point. Section 5.4 requires that any conflicted

[16] *See also Hannigan v. Italo Petroleum Corp.*, 47 A.2d 169, 172 (Del. 1945) (act must be "duly and properly ratified by that authority which would have been completely empowered to legally authorize the act in the first instance …."). As noted on CompoSecure's Opening Brief, *Zuckerberg* and *Vogelstein* are consistent with the Restatement (Second) of Agency §93(2) (1995), the Restatement (Third) of Agency §4.01, cmmt. e (2006), 2A WILLIAM MEADE FLETCHER, FLETCHER'S CYCLOPEDIA OF THE LAW OF CORPORATIONS § 768 (2017) and 19 C.J.S. *Corporations* § 696. CardUX's brief makes no reference to these authorities cited by CompoSecure.

[17] CardUX does not respond to CompoSecure's argument that, under Delaware law, the Court may not "assume" what a board "would have" done had it met. It is undisputed that the CompoSecure Board never approved the Sales Agreement, nor was it ever presented for Board review. In fact, only an incorrect summary was provided -- and then only after the Sales Agreement was signed. Thus, CardUX presents no evidence that the Board, the Investors, and the Class A Majority were informed of all material facts. Nor has CardUX provided any support for the trial court's improper supposition that the CompoSecure Board would have approved the Sales Agreement notwithstanding newly-appointed, independent director Philippe Tartavull's uncontroverted testimony that, based on his experience in the credit card industry, the proposed 15 percent commission was too high, and he would have objected to the Sales Agreement had it been presented for approval. (*See* A756, A759).

transaction be "at arm's length." As this Court held in *Gatz Props., LLC v. Auriga Capital Corp.*, 59 A.3d 1206 (Del. 2012), the use of the phrase "arm's length" in a conflicted transaction approval provision constitutes "an explicit *contractual* assumption… 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 equitable standard of conduct and judicial review." *Id*. at 1213 (emphasis added). So construed, the "arm's length" bargaining requirement in Section 5.4 precludes the windfall awarded to Kleinschmidt and his affiliate here because they did not stand at arm's length from CompoSecure, but were its "Affiliate" and a "Related Party." In simpler terms, CardUX was a company owned by a CompoSecure board member and owner. Delaware law precludes insiders from extracting such a windfall.[18]

[18] Citing *Bird v. Lida Inc*., 681 A.2d 399, 406 (Del. Ch. 1996), CardUX argues that fiduciaries are entitled to enforce their contracts. (AB at 44) *Bird* establishes that fiduciaries are not entitled to enforce *unfair* contracts. *See Bird*, 681 A.2d at 406-407 (finding that plaintiff failed to state a claim where plaintiff failed to allege that the contracts were "unfair when entered"). Thus, a conflicted transaction that is not fair to the company is not enforceable. The *dicta* in *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010), relied upon by CardUX and the trial court, to the effect that the law will enforce bad contracts, has no application in this conflicted transaction context, where express terms of the LLC Agreement require an arms' length transaction and prior authorization by specific approvals by the Board, the Investors and the Class A Majority.

## III. CARDUX'S *QUANTUM MERUIT* CLAIM FAILS.

CardUX also urges affirmance "on the alternative basis of quantum meruit." (AB at 45) Relying on principles of unjust enrichment (*id*.), CardUX argues that it needed to prove that CompoSecure "received a benefit" and the "retention of that benefit would be unjust." (*Id*.)

CardUX's unjust enrichment claim lacks merit because the trial court found it failed to prove any relationship between the "enrichment" (CompoSecure's receipt of Amazon orders) and the "impoverishment" (CardUX's claimed sales efforts). "To prove this element of unjust enrichment, a plaintiff must show that there is 'some *direct* relationship … between a defendant's enrichment and a plaintiff's impoverishment.'" *Vichi v. Koninklijke Philips Elec. N.V.*, 62 A.3d 26, 59-60 (Del. Ch. 2012) (quoting *Anguilla RE, LLC v. Lubert-Adler Real Estate Fund IV*, 2012 WL 5351229, at *6 (Del. Super. Ct. Oct. 16, 2012)) (emphasis in original). The trial court found that CardUX played no part in generating the Amazon sale for which it seeks commission, a determination now no longer subject to challenge.

Even if CardUX had proven it conferred a benefit on CompoSecure, it would be entitled to no damages. "Recovery under a quasi-contract action is the value of the services provided, not the value of the benefit received." *Hynansky v. 1492 Hosp. Grp., Inc.*, 2007 WL 2319191, at *1 (Del. Super. Ct. Aug. 15, 2007). CardUX presented no evidence at trial regarding the value of its services. Put simply,

CardUX's non-involvement in the sale forecloses any form of quasi-contractual relief in equity.

Finally, CardUX's request for fee shifting once again ignores the trial court's *express determinations in CompoSecure's favor* that the Sales Agreement was a conflicted transaction under CompoSecure's governing LLC Agreement; the Sales Agreement was not validly approved; Kleinschmidt and his affiliate CardUX were charged with knowledge that the Sales Agreement was not validly approved; and CardUX played no role in bringing about the Amazon sale. The CompoSecure Board never deliberated or voted on the Sales Agreement, a failing chargeable to Kleinschmidt, the conflicted party who took no steps to ensure formal approval of the Sales Agreement as required by Section 5.4. Kleinschmidt had an obligation to affirmatively protect the interests of the Company and its unitholders. Rather, 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.

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, the contention of a faithless fiduciary and his affiliate that the Court should shift legal fees rings hollow.

## CONCLUSION

The Sales Agreement -- which was not validly approved in accordance with Sections 4.1(p) and 5.4 of the LLC Agreement -- is void and unenforceable. As a "conflicted transaction" governed by specific approval requirements that were never fulfilled, the Sales Agreement was void and could not be ratified. Failure to obtain prior approval of the Sales Agreement rendered the transaction "void" under the LLC Agreement's "Restricted Activity" provisions, precluding ratification as a matter of law. Even if ratification were available, Kleinschmidt's knowledge of the lack of approvals was properly imputed to CardUX, precluding application of the doctrine.

The Judgment must be reversed.

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