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Case Number 407,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GREGORY A. HOLIFIELD and GH BLUE HOLDINGS, LLC,	)	
Defendants Below, Appellants/Cross-Appellees,	)	No. 407,2022
v.	)	Court Below: Court of Chancery of the State of Delaware
XRI INVESTMENT HOLDINGS LLC,	)	C.A. No. 2021-0619-JTL
Plaintiff Below, Appellee/Cross-Appellant.	)	

CORRECTED APPELLEE'S ANSWERING BRIEF ON APPEAL AND CROSS-APPELLANT'S OPENING BRIEF ON CROSS-APPEAL

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NATURE OF PROCEEDINGS

XRI Investment Holdings LLC, like many other limited liability companies, issued its equity to a narrow group of members and imposed through its company agreement clear limits on the ability of its members to transfer or encumber that equity. Delaware LLCs are commonly structured this way because free transfer and encumbrance of ownership can threaten a company's business plan and competitive position. Here, to protect their interests, all of XRI's members agreed, through plain, unambiguous language in the LLC agreement, that any improper transfer of XRI's shares would be "void." Under this Court's decision in *CompoSecure, L.L.C. v. CardUx, LLC*, 206 A.3d 807 (Del. 2018), that means such transfers will be treated by the law as if never made.

Appellant Gregory Holifield, the defendant below, breached XRI's Limited Liability Company Agreement when he transferred his XRI equity to a special-purpose vehicle he created to provide collateral for a $3.5 million personal loan he received from a third party, Assurance Mezzanine Fund III, LLC. The fact that Holifield's transfer breached XRI's LLC agreement is not in dispute. Likewise, it is not disputed that, under *CompoSecure* and the Court of Chancery's subsequent decision in *Absalom Absalom Trust v. Saint Gervais LLC*, 2019 WL 2655787 (Del. Ch. June 27, 2019), the transfer of Holifield's shares was void—which means that as a matter of law, it never happened. Nor is it disputed that, under *CompoSecure*

and *Absalom*, no equitable defense, including acquiescence, is available here. Application of such a defense would contravene the plain terms of the LLC agreement by making the void transfer effective.

The trial court believes that this Court should overrule *CompoSecure*. Holifield agrees. Both urge this Court to change the law to disrupt the settled understanding of LLC members that breaches of core provisions in their founding agreements can have defined consequences. They urge this result so that Holifield, a serial breacher of his agreements, may escape the bargained-for consequences of his breach.

No principle of sound policy or *stare decisis* warrants abandoning *CompoSecure*. The decision articulates a straightforward, easily administered rule that advances the contractarian, pick-your-partner principles that govern the relationship between an LLC and its members. The General Assembly responded to *CompoSecure* with a narrow modification that leaves its core holding intact. *CompoSecure* thus reflects the considered policy of this Court, effectively endorsed by the General Assembly, to give effect to the express intentions and commitments of LLC members.

The trial court believes it has proposed a "different" and "better approach" than the one the legislature enacted in response to *CompoSecure*, and urges this Court to adopt it. But neither the trial court nor Holifield even tries to identify the

"urgent reasons" and "clear manifestation of error" required to overrule precedent. *Seinfeld v. Verizon Commc'ns, Inc.*, 909 A.2d 117, 124 (Del. 2006).

There is no sound legal reason to abandon *CompoSecure*, and the undisputed facts fully support its application here. Holifield's use of his XRI equity in connection with the Assurance loan caused XRI significant harm. After Holifield defaulted on the Assurance loan, Assurance sued XRI in state court in Texas, asserting an interest in the XRI equity Holifield improperly transferred and seeking to force a commercial sale of that equity. The undisputed evidence shows such a sale would have posed an existential threat to XRI: The bidders would likely have included its competitors. This is exactly the type of risk XRI's LLC agreement was designed to prevent, and XRI ultimately expended significant sums to defend against and resolve the Texas action. Holifield's assertion that XRI *benefited* from his breach cannot be reconciled with the Texas litigation, which Holifield has chosen simply to ignore in his opening brief.

Holifield defaulted not only on the $3.5 million Assurance loan but also on a $10.6 million loan from XRI, which was secured by the same XRI equity Holifield improperly transferred. Under the terms of the XRI loan agreement, XRI had a right to strictly foreclose on Holifield's equity. After several attempts to negotiate a resolution, XRI did so in November 2020. The parties dispute the value of Holifield's equity at that time: Holifield believes it was worth more than the $10.6

million (plus interest) he owed XRI, while XRI believes the opposite. Critically, that dispute is legally and equitably irrelevant. The trial court stated repeatedly that the issues of valuation and the propriety of the strict foreclosure are outside the scope of this case. Those issues remain to be resolved in another forum, if and when Holifield elects to assert claims against XRI based on the strict foreclosure. Tellingly, he has not done so to date. In this case, issues related to valuation and foreclosure serve only as a distraction.

XRI cross appeals two aspects of the trial court's judgment. The trial court ruled against XRI on its claim for breach of contract damages, in which XRI sought to recover both (1) amounts it expended in litigating against Assurance, and (2) legal expenses advanced to Holifield as a former LLC member. The trial court concluded that XRI failed to preserve this claim, but the record demonstrates the opposite. XRI claimed in the operative complaint that it was entitled to damages for breach of contract. XRI then stated multiple times in post-trial briefing and argument that it was continuing to pursue both elements of damages, neither of which had been fully liquidated at the time of trial. At that point, the Assurance litigation was ongoing and Holifield was continuing to incur legal expenses in this case.

The trial court also held that its finding of acquiescence foreclosed XRI's claim for the Assurance-related damages. That is legal error. The trial court recognized that under *CompoSecure* and *Absalom*, acquiescence does not foreclose

a claim for declaratory relief arising from breach of contract. The same logic applies to damages.

As to recoupment of legal expenses, the trial court again held that acquiescence is a bar. Under the LLC Agreement, however, XRI is entitled to recoupment if Holifield engaged in disabling conduct, which is defined as a willful or grossly negligent breach of contract. The trial court made no finding under that standard, but the evidence—including the trial court's findings on other issues—leads to the conclusion that Holifield's breaches were grossly negligent or willful. This Court should remand and instruct the trial court to make the required finding and award damages for breach of contract.

SUMMARY OF ARGUMENT

A. Answer to Holifield's Summary of Argument

1. **Denied**. This Court held in *CompoSecure* that parties to an LLC agreement may agree contractually that transactions which breach specified provisions of the agreement are void and may not be ratified. That holding gives full and appropriate effect to the contractarian principles that underlie the governance of alternative entities like LLCs. The General Assembly has tacitly approved *CompoSecure*'s core holding and application to cases like this one. Holifield has not even attempted to show the "urgent reasons" and "clear manifestation of error" necessary to justify overruling controlling law under principles of *stare decisis*.

2. **Denied**. The parties understood that the term "void" in the LLC agreement means that a breaching transaction has no effect, and that the parties to the transaction remain in the positions they occupied before the transaction occurred. Holifield submitted no evidence that the term "void" was ambiguous. Holifield has consequently provided no basis for this Court to require parties to an LLC agreement to use the specific set of "magic words" he proposes—"null and void *ab initio*"—to give effect to parties' clearly stated intent.

B. Summary of XRI's Argument on Cross-Appeal

1. The trial court erred in dismissing XRI's claim for breach of contract damages related to the Assurance litigation. XRI properly preserved this claim, and

the trial court's ruling that XRI's acquiescence bars recovery is erroneous and contravenes *CompoSecure*.

2. The trial court erred in dismissing XRI's claim for recoupment of legal expenses advanced to Holifield. XRI properly preserved this claim too, and the trial court never considered, under the terms of XRI's LLC Agreement, whether Holifield acted willfully or with gross negligence in breaching that contract. At a minimum, this Court should remand with instructions that the trial court make the proper finding in light of the record and this Court's ruling.

STATEMENT OF FACTS

A. The Company Agreement Constrains XRI Members From Transferring Or Encumbering XRI Units

Holifield and Gabriel founded XRI's predecessor in 2013. Op. 10.[1] In 2016, they made a deal with Morgan Stanley to recapitalize and restructure the company. *Id.* Together with Morgan Stanley, they created and executed the Amended and Restated Limited Liability Company Agreement (Company Agreement). Op. 10; A0045–139. The Company Agreement is XRI's founding document pursuant to Delaware's Limited Liability Company Act. *Id.* In the Company Agreement, the parties adopted binding rules that control the structure and governance of the entity, the ownership of its equity, the limited circumstances in which new owners may be admitted, and the consequences of particular contractual breaches. Op. 11, 47, 64. Enforcing those consequences was essential for the protection of XRI and its shareholders. A0627 (15:23–16:14); A0667 (173:12–13). Pursuant to the Company Agreement, XRI was governed by a five-member board: Gabriel, Holifield and three Morgan Stanley employees. Op. 11. Holifield became the holder of 18,346 Class B Units.

[1] Throughout this brief, "Holifield" refers either to Holifield individually or, where context indicates, collectively to both Holifield and GH Blue. The two appellants have taken identical positions throughout this litigation and filed a single appellate brief.

As is typical in LLC agreements, the Company Agreement restricted members' ability both to transfer and to encumber their ownership interests. The restrictions, described further below, were important to Morgan Stanley and to XRI. Logan Burt, one of XRI's board members, explained that the relevant provision "restricts the ability of members to freely transfer their units," and that "the point of this provision is so that the company and its members … know who its partners are and have a role in deciding who those partners are." A0627 (15:23–16:14). The prohibition against encumbrances was equally important: It was not in XRI's "interests to have those units further borrowed against and have the prospect of additional parties around the units or with claims on the collateral." A0630 (26:11–13). Allowing free transfer or encumbrance of ownership interests could be disastrous for XRI. If the XRI Units were readily available to outsiders, "[t]he primary parties interested in that would likely be competitors." A0667 (173:12–13).

To protect XRI from such existential threats—ownership of its equity by its business rivals—the parties to the Company Agreement not only restricted transfers and prohibited encumbrances but also agreed that impermissible transactions would be void:

> Any transfer or attempted Transfer in violation of this Article VIII shall be void, and none of the Company or any of its respective Subsidiaries shall record such purported Transfer on its books or treat any purported Transferee as the owner of such Units.

A0106 (§ 8.03). This provision was intended to "serve[] as a deterrent both for transferors and transferees not to attempt transfers that are impermissible or without a board consent." A0633 (40:7–10).

B. XRI's $10.6 Million Loan To Holifield

Contemporaneous with its recapitalization, XRI extended to Holifield, through his company Entia Holdings LLC, a $10.6 million loan (the XRI Loan). Op. 11; A0140–49. Entia had no assets. A0640 (67:9–21). It was created to serve as a brand for interests Gabriel and Holifield owned in what they called "portfolio companies." *Id.* Gabriel held a minority interest in Entia but Holifield controlled it entirely. Op. 10. Holifield committed to repay the XRI Loan four years later, on August 8, 2020, in a single payment covering both principal and interest. Op. 11. The XRI Loan was secured by Holifield's 18,346 XRI Units through a unit pledge agreement. *Id.* Holifield also executed a personal guaranty for the XRI Loan. *Id.*

Holifield did not use the $10.6 million XRI Loan to benefit Entia or the portfolio companies but instead immediately transferred the funds to his personal Goldman Sachs account. A0640 (68:2–8).

C. Holifield Breaches The Company Agreement's Transfer Restrictions

1. Events Leading to the Assurance Loan

By early 2018, Holifield and several of the Entia portfolio companies faced serious financial difficulties. A0641 (69:21–70:10). Seeking a cash infusion,

Holifield approached both Morgan Stanley and Gabriel individually about buying out his XRI Units, but both ultimately declined. *Id*. (70:11–71:14). Gabriel believed that neither Entia nor the portfolio companies was financially able to take on more debt. *Id*. (71:15–72:11).

Gabriel's concerns about Entia's and Holifield's financial position have been amply borne out. By the time of trial, former employees, vendors and lenders had filed at least 19 lawsuits against Holifield and various entities within the Entia portfolio for unpaid wages, invoices and loans. B0820. At least one ended with a default judgment against Holifield. A0688 (259:18–21).

In addition to pursuing a buyout of his Units from Morgan Stanley and Gabriel, Holifield entered into discussions with Assurance in early 2018. Assurance had previously loaned money to XRI and had achieved above-market returns on its investment during the 2016 recapitalization. Op. 12. In considering a loan to Holifield in 2018, Assurance sought a security interest in Holifield's XRI Units. B0667 (73:1–6); B0668 (77:15–78:6).

For his part, Holifield told XRI director Logan Burt on May 21, 2018 that he intended to obtain a loan from Assurance (the Assurance Loan). A0677 (216:19–217:1). As security for the Assurance Loan, Holifield proposed that he give Assurance a second lien position in the XRI Units he had previously pledged as collateral for the $10.6 million XRI Loan. Op. 16.

After raising the matter with the other Morgan Stanley board designees, Burt told Holifield that the board was unlikely to consent to a second position pledge to Assurance. Op. 17. According to Holifield, Burt told him that XRI was nevertheless sympathetic to his need to raise capital, and that if Holifield could keep arrangements on his "side of the ledger," XRI would not object. *Id.* Burt testified that his intent during this conversation was that "if Entia need to raise capital, then Entia or Mr. Holifield should be doing that themselves without involving the XRI Units." A0491 (53:3–5). Unfortunately, as described below, Holifield did not keep the XRI Units out of his personal affairs.

2. The Company Agreement's Restrictions on Transferring and Encumbering XRI Equity

Holifield had to approach XRI's board about using his XRI Units as collateral for the Assurance Loan because the Company Agreement imposes strict limitations on the transfer and encumbrance of the Units. Specifically, the Company Agreement prohibits the transfer of XRI equity save (1) "to a Permitted Transferee," (2) "with the written Consent of the Board," or (3) in other circumstances not at issue here. A0104 (§ 8.01(a)) (the Transfer Restriction). As noted, the Company Agreement clearly states that a transfer of XRI shares in violation of the restriction is ineffective: "Any transfer or attempted Transfer in violation of this Article III *shall be void*." A0106 (§ 8.03) (emphasis added); *supra* at 9 (quoting provision in full). Holifield offered no evidence suggesting that this provision is ambiguous, or that he believed

it meant anything other than what it says: any purported transfer of XRI shares that violates the Transfer Restriction has no legally cognizable effect.

The Company Agreement also prohibits encumbrances:

> Notwithstanding the foregoing or any other provision of this Agreement, no Member shall pledge, borrow against, collateralize, otherwise encumber or allow any Liens to exist on any of the Units or Company Interests except (x) with the written consent of the Board or (y) in connection with a pledge of Units to the Company as collateral to secure such Member's obligations under a promissory note or guarantee of indebtedness to the Company approved by the Board.

Id. § 8.01(a) (the Encumbrance Prohibition). Transactions that violate the Encumbrance Prohibition, like transactions that violate the Transfer Restriction, are void. *Id.* § 8.03.

3. In Order to Facilitate the Assurance Loan, Holifield Violates the Transfer Restriction and Encumbrance Prohibition

After XRI rejected his original proposal, Holifield set about structuring the deal to give Assurance a similar interest in his XRI Units without directly making it a second lienholder. Holifield and his legal team created a new entity, called GH Blue Holdings (Blue), and transferred Holifield's Units to it (the Blue Transfer). *See* A0158. Entia's general counsel testified that the purpose of the transfer was "[t]o facilitate the Assurance Mezz loan." A0680 (226:21–227:2). Specifically, as Holifield's outside counsel explained, Holifield would transfer his XRI Units to a "new limited purpose SPV" (that is, Blue), Assurance would loan $3.5 million to Entia, and Blue "would assign its right to the proceeds of the XRI equity to Entia."

A0158. As security for the loan, Assurance would be entitled to payment following the sale of Holifield's Units. *Id.*

In structuring the Assurance Loan transaction this way, Holifield and his counsel sought to take advantage of the Company Agreement's definition of "Permitted Transferee." The Transfer Restriction contains an exception for family trusts, estate planning and the like, for which XRI board approval is not required. It provides:

> [W]ith respect to any Class B Member or Management Member, any Person meeting all of the following requirements: (a) such Person is … (iii) any trust, family partnership or limited liability company, the sole beneficiaries, partners or members of which are such Member … (b) the applicable Transfer to such Person is *made without consideration* and (c) such Member … [has] at all times (including after the subject Transfer) the exclusive right to exercise and perform all rights and duties under this Agreement[.]

A0059 (§ 1.01) (emphasis added) (definition of "Permitted Transferee"); A0104 (§ 8.01) (exception to Transfer Restriction for Permitted Transferees).

Holifield claimed that the Blue Transfer fell within the Permitted Transferee exception because its purpose was estate planning. Op. 23–24. In reality, however, he made the transfer to provide Assurance with security by leveraging his XRI Units. *Id.*; A0680 (226:21–227:2) (per Entia's general counsel, the purpose of the transfer was "[t]o facilitate the Assurance Mezz loan").

Holifield told XRI about the existence of the Assurance Loan but withheld many significant details of the transaction. Holifield and Assurance effected the interlinked series of transactions through nine documents, all dated June 6, 2018.

(1) Note Purchase Agreement—the contract establishing the terms of the lending arrangement between Entia and Assurance. A0247–316.

(2) Assurance-Entia Note—the note reflecting Assurance's $3.5 million loan to Entia. A0322–26.

(3) Entia Security Agreement—the agreement securing the Assurance-Entia Note with all of Entia's assets as collateral. A0349–58.

(4) Assurance-Holifield Guaranty—a guaranty by Holifield in favor of Assurance for the Assurance-Entia Note. A0338–48.

(5) Assurance-Blue Guaranty—a guaranty by Blue in favor of Assurance for the Assurance-Entia Note. A0327–37.

(6) Assurance Side Letter—a letter from Assurance to Blue imposing restrictions on Blue's use of the XRI Units. A0317–21.

(7) Contribution, Assignment and Assumption Agreement—an agreement purportedly transferring XRI Units from Holifield to Blue. A0180–214.

(8) XRI Guaranty–Blue—a guaranty agreement by Blue in connection with the $10.6 million XRI Loan, which Holifield had previously guaranteed personally. A0234–43.

(9) Blue Pledge Agreement—an agreement in which Blue pledged the XRI Units as security for the $10.6 million XRI Loan. A0215–33.

It is undisputed that Holifield provided copies of only the last three documents to XRI in June 2018. A0685 (246:8–247:15).

Even those three documents were stripped of critical details. As required by the Company Agreement, Holifield provided XRI with Blue's operating agreement.

But he and his counsel carefully scrubbed that document to eliminate reference to the Assurance Loan to avoid "inviting trouble with Morgan Stanley." Op. 25. As Holifield's counsel wrote, "we'd rather not have any mention of the loan or repayment in the docs that Morgan Stanley approves," because "the goal from Day 1" had been to "keep them out of our loan arrangements …." *Id.* The draft operating agreement Holifield ultimately provided to XRI accordingly contained no reference to Assurance, the Assurance Loan or any interest of Assurance in the XRI Units or the proceeds of their sale. B0758. The Blue Pledge Agreement, which was the only document XRI executed, similarly contained no reference to the Assurance Loan, or to the fact that proceeds from the sale of the Units were security for that loan. B0782; A0631 (30:23–31:14).

At trial, Holifield conceded that the first six documents (concerning the Assurance Loan) and the latter three documents (concerning the Blue Transfer) were interrelated, and that the purpose of the transfer was to facilitate the loan. That is, Holifield admitted that both Blue and the Blue Transfer were "used as part of the loan itself." A0682–83 (232:17–233:6). Despite the relationship between the two parts of the transaction, Holifield told Burt that he was making the transfer for purposes of "estate planning," and that he consequently had the right to do so without board approval. Op. 23–24. He took the same position in litigation. B0071. The record, including Holifield's own testimony, wholly undercuts that assertion.

Holifield did not transfer his Units to Blue for "estate planning" purposes independent of the Assurance Loan. Holifield never undertook any estate planning at all. A0674 (202:9–12); Op. 23.[2]

In connection with the documents he shared with XRI, Holifield represented, as noted, that Blue was a Permitted Transferee. A0160–61; A0630 (29:12–22). In light of that representation, Gabriel stated in a June 5, 2018 letter that "[w]ith the understanding that the transfer that you are proposing is indeed a Permitted Transfer, then the consent of XRl's board is not required." A0176. But contrary to Holifield's assertion in his opening brief (OB), this did not amount to "signing off" on the arrangement. OB 10. Gabriel explicitly qualified XRI's response: "XRI expressly reserves all of its rights under the XRI LLC Agreement, including if the proposed Permitted Transferee is not a Permitted Transferee or ceases to be a Permitted Transferee." A0176.

4. Events in 2019 Further Demonstrate The Extent Of Assurance's Interest In Holifield's XRI Units

The record leaves no doubt that Assurance understood that it had an enforceable interest in Holifield's XRI Units, and that Holifield agreed. Assurance made two additional loans to Entia in 2019. A0688 (257:24–258:4). In connection

[2] Holifield maintained his "estate-planning" fiction throughout trial, until finally conceding the true purpose of the transfer in his appellate brief. *Compare* A0680 (228:13–16) *with* OB 8.

with the first of the two, Ellis reported to Assurance's investment committee that this loan, together with the original $3.5 million Assurance Loan, would be "secured by stock … in a private Company (XRI Investment Holdings LLC)." B0459. To obtain the two loans, Holifield improperly provided Assurance with XRI documents, including a board package and financial statements and projections. B0471–512; A0683 (239:16–240:17). All of these documents were marked "Highly Confidential," and all were subject to the following mandate in the Company Agreement:

> Each Member and former Member shall keep confidential and not reveal … any and all confidential documents, trade secrets and other confidential information concerning, relating to or in connection with the Company or any of its Subsidiaries …. The provisions of this Section 4.10 shall survive a Member's ceasing to be a Member.

A0092 (§ 4.10).

In March 2019, after obtaining three loans from Assurance, Holifield again needed cash and attempted to interest both XRI and Gabriel in buying out his XRI Units. In discussing a potential deal with Gabriel, Holifield suggested that Gabriel might obtain a loan from Assurance to finance the buyout and pledge his own XRI Units as collateral. Op. 33. That proposal led Gabriel to question the propriety of Holifield's arrangements for the June 2018 Assurance Loan. Gabriel relayed his concern to XRI's board. *Id.*

In response, XRI's counsel sent a letter to Holifield on April 12, 2019, seeking documents and more information about the Blue Transfer. Op. 33–34. On April 18, 2019, Holifield's counsel provided XRI with copies of the six Assurance Loan documents previously withheld. Op. 34. Although it is undisputed that XRI had never seen those documents before, Holifield's counsel told XRI in an accompanying letter that XRI had been kept "fully informed through every step of the Transfer." A0386–87. Holifield's counsel also told XRI—falsely—that Holifield transferred his Units to Blue "without consideration" and "in full compliance with the Company Agreement." *Id.* Holifield and his legal team made no effort to explain how that representation could be reconciled with the fact that Holifield made the Blue Transfer in exchange for the Assurance Loan. Earlier drafts of the April 18, 2019 communication show that Holifield's legal team struggled with whether to disclose the Assurance Loan documents to XRI, expressing "mixed feelings" about the matter. B0583; B0539 (n.1).

On May 6, 2019, after reviewing the Assurance Loan-related documents for the first time, XRI was able to take a position on the validity of the arrangement. XRI reminded Holifield that it had never agreed to the Blue Transfer, and that by means of Gabriel's June 5, 2018 email, it had explicitly declined to opine on whether Blue was a Permitted Transferee. A0389. XRI further reminded Holifield that it had reserved all rights on the Permitted Transferee issue in June 2018, and it renewed

its reservation of rights in the May 6, 2019 letter with respect to the validity of the Blue Transfer. *Id.* XRI also made clear that it would "continue[] to review the situation to determine *the extent* to which Mr. Holifield has breached his ongoing obligations." *Id.* (emphasis added).

Although XRI had formed "a strong opinion" that the Blue Transfer violated the Company Agreement, XRI did not believe it worthwhile in May 2019 to commence an action against Holifield. Op. 34, 73. As XRI director Burt testified, the consequence of breaches of the Transfer Restriction was governed by the Company Agreement *without* resort to litigation: Transactions that breached the restriction were void. A0633 (39:16–20). Because the Company Agreement was self-executing in this respect, XRI determined in May 2019 that it did not need to pursue litigation at that time. "[T]he way the company agreement worked is that if a member attempted to transfer units that were not transferable or attempted an impermissible transfer, those transfers are simply voided without further action." *Id.* XRI's legal position was secure under the plain language of the Company Agreement.

D. Holifield's Multiple Defaults and Their Consequences

1. Default on the XRI Loan and Subsequent Strict Foreclosure

The $10.6 million XRI Loan came due on August 8, 2020. At this time—roughly six months into the COVID-19 pandemic—the global energy market was

suffering. A0666 (171:11–172:5). XRI and Holifield attempted to negotiate a cure both before and during the months after August 8, 2020, but discussions repeatedly broke down. Op. 35–36.

Holifield defaulted on the loan. Op. 36. He never made a single payment. Following his default, Holifield demanded XRI's cooperation in "a reasonable marketing and sale process." Op. 37. Gabriel testified that such a process would have been "horrifically damaging to XRI," *id.*, as the likely buyers would have included XRI's competitors. *Supra* at 9.

In October 2020, after multiple failed negotiation attempts, XRI concluded that Holifield had no plan to repay the loan and strictly foreclosed on the XRI Units. A0513 (142:5–23); Op. 37. Holifield characterizes XRI's actions as a "calculated … legal and business strategy to lie in wait for an opportunistically prolonged period of more than two years." OB 33. That contention defies chronology. Between the Blue Transfer in 2018 and the strict foreclosure in 2020, Holifield defaulted on more than ten million dollars of debt. XRI obviously did not know he would do so in 2018 or 2019. A0634 (44:3–13). Holifield's contention also depends on the premise that in November 2020, despite the economic impact of the pandemic, his XRI Units exceeded the value of the $10.6 million plus substantial interest on which he had defaulted. As the trial court repeatedly held, that issue is outside the scope of these proceedings. *Infra* at 24–25.

2. Default on the Assurance Loan and the Resulting Texas Action

Seven months after the strict foreclosure, on June 18, 2021, Assurance sued XRI in Texas state court, seeking to invalidate the foreclosure and obtain access to the Units. *Assurance Mezzanine Fund III, L.P. v. XRI Inv. Holdings LLC*, No. 2021-36737 (269th Dist. Ct. Harris County, Texas) (the Texas Action); B0629. Assurance filed the Texas Action after Holifield defaulted on the Assurance Loan, just as he had defaulted on the XRI Loan. Seeking to recoup its losses, Assurance asserted a "claim to an interest in the XRI [Units] and/or the proceeds thereof." B0639 (¶ 43). Assurance also claimed that XRI had failed to comply with its purported obligation to provide *Assurance* with notice of the strict foreclosure—an obligation owed only to creditors with a security interest in the foreclosed-on collateral. *Id.* (¶ 43(c)); Tex. Bus. & Com. Code §9-621(a); *see also* A0695 (Ellis 285:2–6) ("if they're going to take some foreclosure action, they need to notify us because we had a claim to proceeds"). When XRI moved to dismiss the Texas Action based on the invalidity of the Blue Transfer, Assurance continued to assert that it had an interest in Holifield's XRI Units. Holifield took the same position in a later unsuccessful attempt to intervene in the Texas Action. B0807.

Assurance also sought in the Texas Action to force a commercial sale of Holifield's XRI Units. B0640 (¶ 45). Any such sale, as the undisputed evidence shows, could be disastrous for XRI: The likely bidders would be XRI's competitors.

Supra at 9; Op. 37. Assurance successfully opposed XRI's bid for dismissal on standing grounds based on its view that it had a legally cognizable interest in Holifield's XRI Units. Assurance consistently maintained "that it ha[d] certain rights and claims to the XRI Class B Units by virtue of various documents it ha[d] signed with Entia, Holifield, and GH Blue." B0721.

XRI incurred significant legal expenses in defending itself in the Texas Action and ultimately paid further significant amounts to settle it. From the beginning of the current litigation, XRI has sought to recover these losses in the form of contract damages caused by Holifield's breach of the Company Agreement. B0005 (¶ 13), B0026 (¶ 113) & B0029 (Prayer for Relief (iii)). XRI reiterated its claim for breach of contract damages at multiple points in post-trial briefing and argument. B0149; B0206; B0222; B0276.

Holifield ignores the Texas litigation in his brief. But it was plainly intertwined with this litigation. Indeed, they are so closely connected that Holifield sought to intervene in the Texas Action. When that failed, he argued strenuously, less than a year ago, that this litigation should be stayed in favor of the Texas Action.

E. The Limited Nature of This Litigation

XRI brought this action in response to the Texas Action. Assurance claimed there that XRI's November 2020 foreclosure was improper because (among other things) Holifield's Units were held by Blue as a result of the Blue Transfer, and XRI

had therefore foreclosed on the wrong party—Holifield—rather than Blue. B0630 (¶ 4). The question of who as between Holifield and Blue held the Units in November 2020, however, depends on whether the 2018 Blue Transfer was valid, and that in turn is governed by the Company Agreement. XRI initiated this action in Delaware because the Company Agreement has an exclusive forum selection clause mandating that all disputes arising therefrom be adjudicated in Delaware. A0119 (§ 11.08).

The trial court denied Holifield's motion to stay this litigation pending resolution of the Texas Action. The court explained that under the forum selection clause, "the answer is that we litigate the 2018 issues here"—that is, issues about the validity of the Blue Transfer. B0038. By the same token, the trial court ruled that it would *not* adjudicate any of "the issues involving the 2020 foreclosure," which were then pending in the Texas Action. B0039. "It seems to me that I can limit my analysis to whether Holifield breached the transfer provisions in the LLC agreement, including any defenses that he might raise regarding that 2018 transfer." *Id.*

After trial, when questions about the scope of this litigation again arose, the court reiterated that it would not "indulge an effort to … litigate the strict foreclosure in this action." B0134. The court made this point emphatically:

> But I'm not going to decide how much the shares were worth. I'm not going to do it. And I'm not going to decide whether the strict foreclosure procedures were followed. There will be some things that

> I decide that will have some implications for that issue, but I am not going to go beyond that.

B0135–36. The trial court returned to this point in its post-trial memorandum:

> The parties' real dispute is over the validity of the strict foreclosure, but that transaction is not directly at issue in this litigation. Through this case, XRI is litigating the predicate issue of whether the Blue Transfer validly transferred the Disputed Units to Blue. XRI seeks a ruling that the Blue Transfer was void. If so, then Holifield remained the owner of the Disputed Units, and XRI sent its proposal for a strict foreclosure to the correct party. A victory for XRI in this litigation thus will help XRI prevail in any future litigation over the validity of the strict foreclosure. *The question answered in this litigation will not be dispositive in that future litigation, because there will be additional disputes of fact and law for that litigation to address. At best, therefore, this case is a prelude to another lawsuit*.

Op. 5–6 (emphasis added). That "other lawsuit" by Holifield has yet to be commenced.

F. The Trial Court's Rulings

1. Ruling on Breach

The trial court found that Holifield breached the Transfer Restriction. Op. 50. The court rejected Holifield's contention that Blue was a "Permitted Transferee." *Id.* The Permitted Transferee exception does not apply to transfers made for consideration, and Holifield transferred his Units to Blue in exchange for Blue's agreement to guarantee the $3.5 million Assurance Loan and to pledge the Units as security for the loan. Op. 51. That is significant consideration in itself.

The court also found that the series of agreements related to the Blue Transfer and the Assurance Loan must be viewed as constituent parts of a single interlinked

transaction under Delaware's "step transaction" doctrine. Op. 52–53. And because only one multifaceted transaction is at issue, Holifield transferred his Units to Blue *in consideration for the $3.5 million Assurance Loan*. Op. 61. Without the transfer, Holifield could not have provided Assurance with the "relative priority" it required. Op. 64.

Having concluded that Holifield transferred his Units to Blue for consideration, the trial court did not reach XRI's claim that Holifield had also breached the Encumbrance Prohibition. Nor did the court address XRI's claim that Holifield had breached the Transfer Restriction in multiple other ways—by impermissibly relinquishing the "exclusive right to exercise and perform all rights and duties under [the Company] Agreement," and by transferring "Company Interests" (in addition to XRI Units). Op. 61–63.

2. Ruling on Acquiescence

Having found breach, the trial court proceeded to assess Holifield's acquiescence defense. The court recognized that the defense is not available under *CompoSecure* and the language of the Company Agreement, but expressed its view that *if* the law allowed acquiescence as a defense here, Holifield would prevail. Op. 8. The trial court then urged this Court to overrule *CompoSecure*.

The trial court's view regarding XRI's "acquiescence" had three principal bases: (1) its belief that the Blue Transfer conferred a "benefit" on XRI by

"structurally subordinating Holifield's general creditors" (Op. 2, 73–75); (2) its conclusion that Holifield reasonably believed that he had complied with his obligation by keeping the Assurance Loan on his "side of the ledger" (Op. 25); and (3) its impression that XRI had strategically delayed filing this lawsuit rather than suing in 2019, when Holifield first provided it with the full set of documents connecting the Blue Transfer and the Assurance Loan (Op. 75, 78). The trial court's entire discussion of acquiescence is *dicta*. As the court acknowledged, the defense is not available to defeat a binding voidness provision in an LLC agreement.

The trial court's view of XRI's conduct is what raises the question whether to overrule *CompoSecure*. But that view depends on excluding critical undisputed facts. First, the trial court's statement that the Blue Transfer conferred a benefit on XRI as Holifield's creditor conflicts with the court's own recognition that because XRI—and XRI alone—had a perfected security interest in Holifield's Units, XRI's status was *already* superior to that of all other creditors. Op. 21, 23. In light of that finding, the Blue Transfer conferred no benefit at all. The concept of a benefit to XRI also excludes (and contradicts) the trial court's own finding that the Blue Transfer and the Assurance Loan must legally be considered a single integrated transaction. Op. 53–60. It is undisputed that the transaction as a whole *harmed* XRI. The transaction gave Assurance a basis for asserting the right to force a sale and to interfere with XRI's strict foreclosure, both of which it sought to do in the Texas

Action. Even if that lawsuit should have had no impact on XRI's favorable position *as a creditor* competing with Assurance to recover on defaulted loans, it undeniably harmed XRI (and its members) *as an LLC*. Holifield's breaching transaction threatened the pick-your-partner principle embedded in the Transfer Restriction, Encumbrance Prohibition and voidness provision of the Company Agreement. Because of Holifield's breach, XRI became embroiled in precisely the kind of litigation the Company Agreement was designed to prevent.

Second, the trial court placed extraordinary weight on Burt's reference, as relayed by Holifield, to Holifield's "side of the ledger." The court referred to this metaphorical "ledger" 19 times. But in using the term "ledger," Burt did not say or suggest that XRI would agree to a transaction that put any of its interests at risk. Nor did Burt express approval of the interconnected Assurance Loan/Blue Transfer transaction, or of an arrangement in which Holifield (purportedly) pledged only the proceeds of a sale of the Units rather than the Units themselves. At the time of Burt's comment, Holifield and his legal team had not yet contemplated structuring their deal in that way. Holifield himself testified that he understood the "ledger" comment to mean that XRI was open to his arrangements with Assurance only if he "kept all of the risk associated with that on [his] side." A0673 (197:4–22); Op. 17. Burt's "ledger" comment is consistent with the terms of the Company Agreement: It does not show that by invoking a metaphorical "ledger," XRI intended to relinquish the

contractual limitations prohibiting the transfer and encumbrance of its equity. Nor does any evidence support the premise that XRI condoned Holifield's deliberate withholding of evidence that he had circumvented those limitations. To the contrary, all of the evidence shows that XRI affirmatively reserved all of its contractual rights throughout its interactions with Holifield, and in particular reserved its rights in the event that Holifield's representation that Blue was a Permitted Transferee proved false. *Supra* at 16–17.

Third, while the trial court stated that XRI delayed bringing this suit for strategic reasons, it did not explain why XRI should have felt compelled to sue sooner. The voidness provision operated without judicial intervention, *supra* at 20, and XRI expressly reserved its rights both on June 5, 2018 and again when it was first informed of the full details of the Blue Transfer in 2019. The court denigrated these reservations as "stock language," Op. 77–78, but commercial parties commonly reserve rights through "stock language" precisely because it has a well-established meaning. Most significantly, Holifield had not yet defaulted on the XRI or Assurance loans in April 2019. Those defaults and their consequences triggered the Texas Action, and it was only after Assurance filed that action that the risks created by Holifield's breaches of the Company Agreement materialized. Once the Texas Action presented the threat of a disastrous commercial sale of XRI equity, the consequences of Holifield's breach outweighed the burden of litigation—and XRI

filed suit. XRI did not act wrongly in waiting until that point to litigate Holifield's breach.[3]

3. Final Judgment

After the trial court issued its ruling, the parties jointly requested entry of partial final judgment under Rule 54(b). B0339. In that request, the parties expressly noted that certain matters remain to be decided, among them XRI's claims for breach of contract damages related to the Texas Action and for the recoupment of legal expenses XRI advanced to Holifield under indemnification provisions in the Company Agreement. The court rejected the parties' joint request, stating that XRI had briefed the outstanding matters as an "oh by the way" and hence had failed to preserve them. B0346. The court further held that as to both claims, XRI's "knowing participation in the Blue Transfer" precluded relief. *Id.*

[3] To arrive at a view of the equities that favors Holifield, the trial court not only overlooked the undisputed harm to XRI but also stated repeatedly that XRI's two trial witnesses were not credible. Op. 12 n.6, 16 n.9, 31 n.14, 34, 36 nn. 16-17. This Court need not reject any of the trial court's credibility findings to rule in favor of XRI on any issue. But the findings notably depend on crediting Holifield, a party who is both a serial defaulter on loans and who intentionally withheld from XRI critical documents that revealed the breach of the Transfer Restriction the trial court itself found, as well as additional breaches of the Encumbrance Prohibition. *Infra* at 57-58. Holifield also provided false or inconsistent testimony on such matters as estate planning, *supra* at 17, and XRI's position on whether Blue was a Permitted Transferee. *Compare* A0685 (245:12-14) *with* A0684 (244:20-23).

ARGUMENT

I. *COMPOSECURE* WAS CORRECTLY DECIDED AND THIS COURT SHOULD NOT ABANDON *STARE DECISIS* TO ADOPT THE TRIAL COURT'S FLAWED "DIFFERENT APPROACH"

A. Question Presented

Should the Court overrule *CompoSecure*?

XRI disagrees with Holifield's statement that he raised the issue below, but notes that by its nature, the issue could not have been raised below.

B. Scope of Review

This Court resolved the legal issue presented in *CompoSecure* on *de novo* review. 206 A.3d at 816. The same standard of review applies here.

C. Merits of Argument

1. The Holdings and Rationale of *CompoSecure* and *Absalom*

CompoSecure's analysis and holding are straightforward. The operative LLC agreement in the case defined certain company expenditures as "Restricted Activities" requiring board and investor approval, and it provided that "any action taken in contravention of [those requirements] shall be void and of no force or effect whatsoever." 206 A.3d at 814. CompoSecure entered into a sales agreement with a company called CardUx that proved highly unfavorable. Seeking to extricate itself from the deal, CompoSecure argued that the sales agreement was a "Restricted Activity" and therefore void because the company had failed to obtain the required approvals.

This Court agreed that if the sales agreement was a Restricted Activity, it was void and incapable of ratification. *Id.* at 816–17. The Court explained that under the common law, void acts—which are outside an entity's power—are distinct from voidable acts—which are within an entity's power but not properly authorized. *Id.* The common law rule is that voidable acts are subject to equitable defenses such as ratification. *Id.* But parties to an LLC agreement may vary that rule by providing that transactions undertaken in breach of specified terms in the LLC agreement are void. *Id.* The parties to CompoSecure's LLC agreement had done just that: "[G]iven the plain language of the Restricted Activities position—'void and of no force or effect whatsoever'—its application would trump the common law rule and render the Sales Agreement void and incapable of being ratified." The Court reached this result "reluctantly, as the trial court made a persuasive case that the equities do not favor CompoSecure." *Id.* at 811.[4]

The Court of Chancery applied *CompoSecure* in *Absalom*. *Absalom* is similar to this case. The transaction at issue was a transfer of equity that breached transfer restrictions in an LLC agreement. 2019 WL 2655787, at *1. The LLC agreement provided that transfers that violated the restriction were void. *Id.* The party who

[4] This Court remanded *CompoSecure* so that the trial court could determine as a factual matter whether the sales agreement was a Restricted Activity. The trial court held that it was not, and this Court affirmed that ruling. *CompoSecure, L.L.C. v. CardUx, LLC*, 213 A.3d 1204 (Del. 2019).

breached the transfer restriction—one of the LLC's members—argued that equitable defenses, including acquiescence, trumped the contractual voidness provision. *Id.* at *3.

The Court of Chancery rejected that argument, holding that "[t]he reasoning in *CompoSecure* … mandates that the contractual language—'void'—trumps the common law, rendering the assignment ineffective and invulnerable to equitable defenses." *Id.* at *4. The court explained that *CompoSecure* applies (1) to equitable defenses other than ratification, including acquiescence, and (2) to breaches of LLC agreements committed by members (as opposed to the LLC itself, which was the breaching party in *CompoSecure*). *Id.* The court rejected the breaching member's argument that "equity must intervene" to save her from the effect of the transfer restriction. The language of the LLC agreement was unambiguous, as was "the *CompoSecure* ruling that the contractual imposition of voidness trumps the common law." *Id.* at *6.

Because the contractual provision breached in *Absalom* was a transfer restriction, the case touched on a policy critical in this litigation—the "no strangers" or "pick-your-partner" principle central to the governance of LLCs. *Id.* at *5. Delaware courts have recognized the importance to LLCs and other closely-held entities of restricting ownership to the original members or those approved by them. When a member breaches a transfer restriction, "[t]he end result of th[e] breach …

[is] a stranger occupying a position of control," which is the "very result" parties adopt transfer restrictions to avoid. *Eureka VIII LLC v. Niagara Falls Holdings LLC*, 899 A.2d 95, 112 (Del. Ch. 2006). Delaware law also recognizes the importance of transfer and encumbrance restrictions in ensuring that the *creditors* of an LLC member do not become owners: Creditors' interests almost never align with those of an LLC's founders. *Id.* at 113–14. Indeed, the centrality of the pick-your-partner principle in LLC agreement transfer restrictions is so obvious that the breaching member in *Absalom* argued that as long as the transferee is *not* a stranger, a court may disregard a transfer restriction (a proposition the court rejected). 2019 WL 2655787, at *5. In this case, by contrast, the trial court never addressed the pick-your-partner function of the Transfer Restriction, despite XRI's undisputed testimony on this point. *Supra* at 9. The trial court addressed only XRI's status as Holifield's *creditor*, and ignored XRI's status as a closely-held entity with a vital interest in controlling its ownership.

In addition to the pick-your-partner principle, the strong contractarian policies embedded in Delaware law generally, and in Delaware LLC law in particular, provide the foundation for the holdings in both *Absalom* and *CompoSecure*. "[T]here is a … strong American tradition of freedom of contract, and that tradition is especially strong in our State." *TRI Investors, LLC v. Genger*, 2010 WL 2901704, at *21 n.143 (Del. Ch. July 23, 2010), *aff'd in relevant part*, 26 A.3d 180 (Del. 2011).

"Delaware law with regard to limited liability companies is contractarian; individuals may create an organization that reflects their perception of the appropriate relationships among the parties, most conducive to their interests, as represented by their mutual agreement." *In re Coinmint*, LLC, 261 A.3d 867, 889–90 n.138 (Del. Ch. 2021) (quotation marks and citation omitted). The LLC statute is equally explicit: "It is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements." 6 *Del. C.* § 18-110(b).

Notwithstanding this legal background, Holifield suggests, drawing on the trial court's survey, that *CompoSecure* and *Absalom* parted ways with precedent. OB 25 (citing *Eureka*, this Court's *Genger* decision and *Paul v. Chromalytics Corp.*, 343 A.2d 622 (Del. Super. Ct. 1975)). But in none of those decisions did the court elevate equitable defenses over a contractual voidness provision.

In *Eureka*, the court made only passing reference to a voidness provision. 899 A.2d at 100. The court then questioned whether a contract right may be waived orally in the face of a provision requiring that modifications be made in writing, but ultimately "elide[d]" that issue. *Id.* at 108–09.

Paul is a 48-year-old Superior Court decision that has nothing to do with LLC agreements. The contract at issue there was an asset purchase agreement containing both an anti-assignment clause and a provision making violative assignments void.

The court *enforced* the provisions against the plaintiff, who was the assignee of a promissory note. 343 A.2d at 625–26. The court rejected the plaintiff's contention that the defendant had waived the anti-assignment provision, and held that because plaintiff received the note in a contractually void transaction, he lacked standing to sue the counterparty to the note. *Id.* While the plaintiff was permitted to pursue a claim against the assignor, that would be comparable to permitting Blue to pursue a claim against Holifield, and has no bearing on Holifield's rights as to XRI.

Finally, in *Genger*, as in this case, the defendant breached a transfer restriction in an agreement that specified voidness as a remedy for improper transfers. 2010 WL 2901704, at *4. The trial court here read *Genger* to treat the noncompliant transfer as having been ratified in part. Op. 117–18 (citing 2010 WL 2901704, at *17–18). That was error. In *Genger,* the Court of Chancery rejected in its entirety the defendant's argument that the plaintiffs had ratified the transfer, and this Court affirmed. *Id.* at *15–18; 26 A.3d at 194–96. Neither court reached (or needed to reach) the question whether equitable defenses can trump an LLC's contractual voidness provision. Only *CompoSecure* and *Absalom* squarely presented the issue, and both this Court and the Court of Chancery ruled that the contractual voidness provisions controlled.

CompoSecure and *Absalom* are not alone. The Fourth Circuit's unpublished decision in *In re Kang*, 664 F. App'x 336 (4th Cir. 2016), arose from a situation

similar to that in *CompoSecure*: An LLC took an action in violation of the LLC agreement, which provided that violative transactions were void. The counterparty to the transaction—who was not a party to the LLC agreement—argued that she should be permitted to assert equitable defenses. The Fourth Circuit rejected the argument and affirmed dismissal of her claim. "Operating agreements define the authority of LLCs, and companies that engage in transactions with an LLC appropriately look to those agreements during the due-diligence process to determine such authority." *Id.* at 341. Notably, Holifield cites no decision that parts ways with *CompoSecure*, nor any decision that suggests its holding has created confusion in the law or otherwise has proven difficult to apply.

2. The Legislative Response to *CompoSecure* and *Absalom*

CompoSecure and *Absalom* triggered a legislative response. As the trial court recognized, the General Assembly explicitly adopted Section 18-106(e) of the LLC Act in 2021 to address the two decisions. Op. 132–34 n.83 (citing legislative history). The new statutory provision addresses the factual scenario presented in *CompoSecure*: an LLC's act is void because required approvals were not obtained. Under the new provision, an LLC may now ratify such acts or waive the approval requirements via its "members, managers or other persons whose approval would be required under the limited liability company agreement." 6 *Del. C.* § 18-106(e). The statute is limited to the LLC's own breaching acts: It does not apply when, as here

and in *Absalom*, the breach is committed by one of the LLC's members. *Id.* The remedy provided by the statute is available only to those in control of the LLC, and it does not extend to conduct such as acquiescence. Nor does the statute provide the Court of Chancery with authority to validate void acts.

The legislature could have gone further. It could have enacted an LLC Act provision analogous to 8 *Del. C.* Section 205, which gives the Court of Chancery broad discretion to validate defective *corporate* acts. *See, e.g.*, C. Stephen Bigler & John Mark Zeberkiewicz, *Restoring Equity: Delaware's Legislative Cure for Defects in Stock Issuances and Other Corporate Acts*, 69 Bus. Law. 393, 417 (2014). The trial court would have preferred that outcome. Op. 134 n.83. But the General Assembly chose *not* to enact in the LLC context a provision parallel to the one it adopted for corporations, consistent with its stated policy of providing LLCs with maximum contractual freedom.

The trial court considers the General Assembly's response inadequate; according to the court, it amounted only to "a half-loaf." *Id.* The trial court thought it could do "better." *Id.* In lieu of a "law review article or speech," the trial court advocated a "different approach"—contrary to the text and governing framework of the LLC Act—under which only those acts of an LLC that go beyond powers granted by the "sovereign" can be contractually void. *Id.*; Op. 110, 114 n.56.

This Court should not adopt that approach. The "sovereign," acting through the General Assembly, has already addressed the specific issue of contractual voidness. By letting *CompoSecure* stand in relevant respect, the legislature has given parties to an LLC agreement the power to determine which of the LLC's or its members' breaching acts are void. Other legislation similarly provides that LLC agreements may subject a member who "fails . . . to comply with the terms and conditions of the limited liability company agreement" to "specified consequences." 6 *Del. C.* § 18-306. The trial court's "better approach" would deprive LLCs and their members of precisely the power the "sovereign" has granted them. It is not the courts' role to second-guess the General Assembly.[5]

3. Principles of *Stare Decisis* Weigh Heavily Against Overruling *CompoSecure*

"Mere disagreement with the reasoning and outcome of a prior case, even *strong* disagreement, cannot be adequate justification for departing from precedent or *stare decisis* would have no meaning." *Brookfield Asset Mgmt., Inc. v. Rosson*, 261 A.3d 1251, 1280 (Del. 2021) (emphasis in original). "When re-examining a

[5] Holifield not only ignores the relevant statute, he urges the Court to adopt an approach that conflicts with it. Holifield contends that New York courts have held that a voidness provision can be trumped by acquiescence in the form of conduct, but not by ratification; he further argues that because this is a "textured" approach, this Court should adopt it. OB 35-38. But he cannot explain why this Court should adopt a rule under which acquiescence but not ratification trumps a voidness provision when the General Assembly has dictated exactly the opposite.

question of law in a prior case, the essential danger is that parties have acted in reliance on the answer that this Court previously gave." *Id.* at 1278. Considerations of reliance are "at their acme [in] cases involving property and contract rights," since "parties are especially likely to rely on such precedents when ordering their affairs." *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 457 (2015). "Under the doctrine of *stare decisis*, settled law is overruled only 'for urgent reasons and upon clear manifestation of error.'" *Seinfeld*, 909 A.2d at 124. Neither Holifield nor the trial court address—or could meet—this standard.

This Court's recent decision in *Brookfield*, which overruled *Gentile v. Rossette*, 906 A.2d 91 (Del. 2006), is instructive. It demonstrates that the Court departs from precedent only on a showing of compelling need. *Gentile* held that certain stockholder dilution claims are direct rather than derivative. Both the trial court and this Court recognized in *Brookfield* that *Gentile* conflicted with an earlier decision, *Tooley v. Donaldson, Lufkin & Jennette, Inc.*, 845 A.2d 1031 (Del. 2004). *Tooley* supported the view that the claims at issue in *Brookfield* were derivative, while *Gentile* supported the conclusion that the claims were direct. 261 A.3d at 1260–61, 1267. This Court recognized that in the 15 years since it had issued *Gentile*, other courts had struggled in applying it. *Id.* at 1274. Overruling *Gentile* would eliminate the conflict with *Tooley* and return coherence to the law. *Id.* at 1276. And because the conflict between *Tooley* and *Gentile* had long been apparent,

reliance interests were diminished: "[P]arties could rightly anticipate that *Gentile*'s continued viability was in doubt." *Id.* at 1280. The rule the Court adopted in *Brookfield* resolved prior confusion in the area with a straightforward, workable test.

None of those factors is in play here. No decision of this Court conflicts with *CompoSecure*. *CompoSecure* is four years old. It articulates a straightforward rule. The General Assembly has responded to it by providing a narrow way out of contractual voidness provisions for one party (the LLC) through one remedy (ratification). The General Assembly has otherwise allowed the decision to stand—it expressed none of the trial court's objections to *CompoSecure*—thereby signaling its accord with the contractarian policies *CompoSecure* protects. Even legislative silence can signal accord with judicial application of a statute. *Brookfield*, 261 at 1278 n.144. This case presents a far stronger expression of accord. The General Assembly has made a considered decision *not* to change the law in relevant respect. Nobody could rightly anticipate that *CompoSecure*'s holding was in doubt. The trial court's belief that *CompoSecure* fails to properly balance freedom of contract with equitable concerns is exactly the type of "mere disagreement" insufficient to justify abandoning recent precedent.

4. <u>This Case Is A Poor Vehicle for Reconsidering *CompoSecure*</u>

Even without regard to *stare decisis*, this case provides no occasion to reconsider *CompoSecure*. The trial court recognized that the "real dispute" between

the parties is "the validity of the strict foreclosure," rather than whether the Blue Transfer is void. Op. 5; *supra* at 25. Deciding the issue of voidness resolves only the question of who, as between Holifield and Blue, owned the Units at the time of the strict foreclosure. According to the trial court, "[a]t best, therefore, this case is a prelude to another lawsuit." Op. 6. More precisely, this case is a precursor to another *potential* lawsuit, since Holifield has not to date sued XRI. There is no "equity" to be championed in *this* case.[6]

But even if final resolution were achievable in this proceeding, any equitable concerns are far weaker here than they were in *CompoSecure* itself. The LLC in *CompoSecure*, as this Court recognized, sought to escape what it had come to "lament" as a "bad contract." 206 A.3d at 811, 815. This Court further recognized that CompoSecure was trying to benefit from its own breach, while CardUx, a largely innocent counterparty, would undeniably be harmed by the breach. 206 A.3d at 815. The Court nevertheless "reluctantly" concluded that enforcing the voidness provision as written was the correct result.

Here, by contrast, Holifield, a member of XRI, breached the Company Agreement. XRI, the LLC, is the victim of the breach, not the perpetrator. The trial

[6] While Holifield discusses the propriety of the strict foreclosure and the value of the Units at length, OB 13-16, neither issue was before the trial court or this Court. *Supra* at 24–25. XRI accordingly does not address the issues here, save to note that it will, at an appropriate time, vigorously dispute Holifield's account.

court's concern with allowing "contracting parties to take advantage of their own nonfeasance, misfeasance or malfeasance," Op. 121, has no place here. Meanwhile, Holifield created Blue—the counterparty to the breaching transaction—solely to enable his breach. The trial court's additional concern for innocent third parties—such as bona fide purchasers for value, who may be victimized when a transaction they have entered into is void, Op. 128—is thus also out of place here. Although the trial court equated Holifield's position with that of CardUx, Op. 134 n.83, the two are situated entirely differently in equity. CardUX was harmed by the LLC's breach of its own agreement, to which CardUX was not a party. Here, the LLC was harmed by Holifield's breach of an agreement to which he *was* a party. XRI has sought to mitigate the harm it suffered by holding Holifield to the terms of the Company Agreement. That does not offend equity.

For structural reasons, the equities in this case are thus in no way opposed to contract enforcement. Beyond that, Holifield's portrayal of the equities is badly incomplete. Holifield, like the trial court, presents XRI as the beneficiary of his breach of the Transfer Restriction only by ignoring XRI's crucial interest in preventing strangers from gaining rights related to its equity. That interest lies at the heart of the Transfer Restriction and Encumbrance Prohibition, which were undisputedly designed to protect against the kind of existential crisis XRI would face if its equity were subject to a commercial sale against its wishes. *Supra* at 9.

Delaware law recognizes the threat an LLC faces when its equity falls into the hands of creditors, *supra* at 34, and Holifield's pattern of default—which he also disregards—shows how real that peril was here. Holifield breached his obligations to XRI by entangling his Units in the Assurance Loan, and this led directly to the Texas Action. Holifield simply pretends the Texas Action never existed, and likewise gives no weight to the core pick-your-partner principles his breaches threatened. That is consistent with Holifield's underlying conduct, in which he similarly abandoned those principles in favor of his personal financial desires. This case implicates none of the equitable concerns the trial court believed are triggered by *CompoSecure*.

5. Equity Is Not a Tool for Avoiding Contractual Commitments

Capitalizing on the trial court's phrasing, Holifield complains that *CompoSecure* permits parties to "contract out of equity." OB 3, 7. Holifield uses the phrase pejoratively but does not explain why enforcing contracts according to their terms is bad law or policy. Nor does he explain why a policy of contract enforcement is less important than judicial notions of equity. One could just as easily characterize Holifield's position as using equity to escape contractual obligations, which Delaware does not condone. *E.g.*, *Absalom*, 2019 WL 2655787, at *6 (party cannot "invoke equitable principles to override the plain language" of a contract); *MHS Cap. LLC v. Goggin*, 2018 WL 2149718, at *13–14 (Del. Ch. May 10, 2018)

(party "cannot use equity to circumvent the results of its bargain"); *Wildfire Prods., L.P. v. Team Lemieux LLC*, 2022 WL 2342335, at *11 & n.60 (Del. Ch. June 29, 2022) (similar; collecting authorities).

The authorities Holifield cites in no way suggest that this Court erred in *CompoSecure*, or that the Court of Chancery erred in *Absalom*, in balancing the relationship between contract enforcement and equity as they did. Holifield cites *Solomon* for the proposition that the distinction between void and voidable acts is "textured" and therefore "sometimes confusing." OB 27 (citing *Solomon v. Armstrong*, 747 A.2d 1098, 1114 (Del. Ch. 1999), *aff'd*, 746 A.2d 277 (Del. 2000)). But *Solomon*, which concerned neither an LLC nor a contractual voidness provision, is not on point. The decision contains a brief discussion of issues that have historically arisen when courts need to determine whether actions taken by a corporation are *inherently* void because they are outside a corporation's authority or contrary to public policy. *Solomon*,747 A.2d at 1114-15. Those issues have, indeed, generated confusion, including confusion over terminology. *Infra* at 51. But they are not in play here. The question of voidness in this case is governed by contract rather than by the inherent nature of Holifield's breach. In any event, the *Solomon* court did not suggest that equity should be used to *validate* a contractually void act. To the contrary: The court stated that equitable powers can be used to *invalidate* an

inherently void act, notwithstanding a ratification defense. *Solomon*,747 A.2d at 1115.

Holifield also relies heavily on this Court's 50-year old decision in *Pepsi-Cola Bottling Co. of Asbury Park v. Pepsico, Inc.*, 297 A.2d 28 (Del. 1972). The Court held there that the parties to a bottling and distributorship agreement had waived a contractual integration clause by making and accepting oral modifications over the course of decades. *Pepsi-Cola*, like *Solomon*, did not involve an LLC, a transfer restriction or a contractual voidness provision, and therefore did not implicate the strong contractarian principles that animate the law governing alternative entities, *supra* at 35, nor the pick-your-partner principles necessary for those entities' survival.

The Court of Chancery's decision in *Totta v. CCSB Financial Corp.* is even further afield. 2022 WL 1751741 (Del. Ch. May 31, 2022). The case involved neither an LLC nor a contractual voidness provision, and the court explicitly contrasted fiduciary-oriented principles in the corporate context—which were at issue—with the contractarian principles embodied in the General Assembly's approach to alternative entities. *Id.* at *14–21. Indeed, *Totta* rejected the corporate defendant's principal argument on the ground that it "would treat a corporate charter like the constitutive agreement that governs an alternative entity." *Id.* at *14. This case, of course, falls on the opposite side of that division. *Totta* also noted in passing

that "even alternative entities retain mandatory features and contain domains where equity continues to apply," *id.* at *17, but in no way suggested that *CompoSecure*, *Absalom* or the legislature drew the line between contractual freedom and equity in the wrong place.

Holifield cites one decision from the LLC context, but it supports XRI's position. The Court of Chancery noted in *Coinmint* that "Delaware's LLC law is … explicitly contractarian," and that courts construe LLC agreements "by effectuat[ing] the parties' intent based on the parties' words and the plain meanings of those words." 261 A.3d at 890 (internal quotation marks and footnotes omitted; brackets in original). The court then stated, following *CompoSecure,* that "[d]rafters of operating agreements are … free to use their flexibility in contracting to agree that failure to follow certain procedures means an otherwise voidable action is void." *Id.* at 891. XRI did exactly that.

From these decisions—*Pepsico*, *Totta* and *Coinmint,* together with *Paul* (discussed *supra* at 35–36)—Holifield concludes that "Delaware courts retain an inherent measure of authority and oversight in Delaware contract relations." OB 32. That general proposition, while true, does not assist Holifield. In *CompoSecure*, this Court used its "oversight in Delaware contract relations" to determine that the parties to LLC agreements are free to vary the common law by specifying that certain breaching acts are void rather than voidable. Nothing in Holifield's brief shows that

the Court erred in *CompoSecure*, much less that the Court should now replace that decision, which has subsequently been buttressed in relevant part by the legislature, with a "different approach."

II. THE TRIAL COURT CORRECTLY INTERPRETED THE MEANING OF THE TERM "VOID" IN THE COMPANY AGREEMENT; REQUIRING ADDITIONAL FORMULAIC LANGUAGE IS NOT JUSTIFIED BY THE RECORD AND WOULD SERVE NO PURPOSE

A. Question Presented

Is the term "shall be void" in the Company Agreement sufficient to render the Blue Transfer void, or were the contracting parties required to use the phrase "null and void *ab initio*"?

XRI disagrees with Holifield's statement that he raised this issue below. The portion of the record Holifield cites (A0790–93) contains no discussion of the issue.

B. Scope of Review

XRI agrees with Holifield regarding scope of review.

C. Merits of Argument

Holifield contends that the trial court erred in holding, as a matter of contract interpretation, that the voidness provision makes breaching transactions legally ineffective. The operative language in the provision is "shall be void," and Holifield notes that in other cases in which contractual voidness provisions were enforced, the wording was slightly different. In *Absalom*, the relevant phrase was "null and void"; in *CompoSecure*, the phrase was "void and of no further effect"; in a third case, it was "null and void *ab initio*." *Southpaw Credit Opportunity Master Fund, L.P. v. Roma Rest. Holdings, Inc.*, 2018 WL 658734, at *2 (Del. Ch. Feb. 1, 2018); OB 41–

42. Holifield then argues that the language in the Company Agreement was insufficient to effect voidness.

Holifield's argument is entirely unmoored from this litigation. There is no dispute that an LLC agreement, like any other contract, is interpreted according to its terms. *Godden v. Franco*, 2018 WL 3998431, at *8 (Del. Ch. Aug. 21, 2018); Op. 45. "When interpreting a contract, the role of the court is to effectuate the parties' intent." *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006). There is likewise no dispute that in keeping with the plain meaning of the word "void," the parties to the Company Agreement intended that breaching transactions would have no effect, and that no judicial intervention is required to achieve that result. *Supra* at 9–10, 20. XRI's testimony on the issue was never rebutted. Even on appeal, Holifield does not argue that the voidness provision is ambiguous, or that he believed it meant anything other than that the parties to a breaching transaction occupy their original, pre-transaction positions. Much as Holifield now belittles "the word 'void,'" *id.* 3, 21, 30, 32, 40–41, the record shows no dispute between the parties about what the word or the concept behind it meant.[7]

[7] Holifield cites decisions addressing fiduciary duties in LLCs and holding that parties may contract out of default fiduciary duties only through clear and unambiguous language. OB 40 n.11. Setting aside the fact that the dispute here involves a contractual voidness provision—not contractual limitations on fiduciary duties—there is no evidence and no finding in this case that the voidness provision was ambiguous.

Holifield nevertheless invites the Court to impose a "judicial contract formulation" that enshrines a phrase of his choosing: "null and void *ab initio*." OB 41. That self-serving invitation has nothing to recommend it. Holifield's proposal would defeat the parties' undisputed intent in this case—and would do so, ironically, by imposing an obligation to use exactly the kind of "magic words" Holifield purports to eschew.

Holifield seeks to attach his view to the confusion over the void/voidable distinction in cases outside the context of contractual voidness provisions. Holifield cites a Sixth Circuit decision addressing the validity of transactions that violate an automatic bankruptcy stay and noting that the terms "void" and "voidable" had been used imprecisely in that context. OB 26 (quoting *Easley v. Pettibone Michigan Corp.*, 990 F.2d 905 (6th Cir. 1993)). This Court, similarly, has noted that the terms "void" and "voidable" have at times been used imprecisely in determining the validity of an action in which a corporate board employs deception. *Klaassen v. Allegro Dev. Corp.*, 106 A.3d 1035, 1046–47 (Del. 2014). But the confusion over terminology discussed in these decisions is not at issue here. The void/voidable distinction is set out in the plain terms of the Company Agreement. Holifield does not argue that the contractual language is ambiguous, and his bid for a rule requiring formulaic language beyond "the word 'void'"—made for the first time on appeal—is a transparent attempt to escape from his contractual commitments.

III. THE TRIAL COURT ERRED BY DISMISSING XRI'S CLAIM FOR BREACH OF CONTRACT DAMAGES RELATED TO THE TEXAS ACTION

A. Question Presented

Did the trial court err by holding (1) that XRI failed to preserve its claim for breach of contract damages related to the Texas Action, and (2) that the claim is foreclosed by XRI's "knowing participation in the transaction at issue"?

XRI raised this issue below. B0002 (¶ 3); B0026 (¶ 113); B0029 (Prayer for Relief (iii)); B0149; B0206; B0222; B0276.

B. Scope of Review

This Court reviews *de novo* the question of whether a party has preserved an issue. *See CompoSecure*, 206 A.3d at 810, 817–18 (court independently "examin[es] the record below" to determine whether issue was preserved). Whether breach of contract damages are recoverable is a legal question in the context of this case, and hence is also reviewed *de novo*.

C. Merits of Argument

The trial court erred in holding that XRI failed to preserve its claim for breach of contract damages. XRI plainly set out that claim in its Amended Complaint. B0005 (¶ 13), B0026 (¶ 113); B0029 (Prayer for Relief (iii)). In post-trial briefing, XRI reiterated the claim and specified the damages it sought:

> Because of Defendants' breaches, XRI was forced into litigation with Assurance. XRI expended significant amounts defending itself in the Texas Action and additional significant amounts resolving that matter.

> XRI is entitled to damages equal to the costs of defending and resolving the Texas Action.

B0206; *see also* B0149. XRI again pressed its claim during post-trial oral argument, asking the court to "conclude that plaintiff has demonstrated an entitlement to damages resulting from defendants' breach equal to the fees and expenses incurred in … the Assurance litigation and settlement." B0276; *see also* B0222.

The trial court characterized this issue as an "oh by the way." B0346 (¶ 8(b)). But a party that raises an issue "weakly" or "not forcefully" has adequately preserved it. *CompoSecure*, 206 A.3d at 810, 817. XRI plainly stated that it was seeking breach of contract damages in the operative complaint. It reiterated its claim at the conclusion of the proceedings below and articulated the theory underlying the claim. And XRI cannot be faulted for not presenting evidence of the amount of damages. Because the Texas Action was still ongoing during trial in this case, damages were not yet liquidated. XRI properly preserved the issue of damages so that it could present evidence of amount after liquidation.

Significantly, Holifield has never argued waiver. He stipulated to a request that the trial court enter a partial final judgment only on XRI's claim for declaratory relief, while "expressly preserv[ing]" XRI's damages claim pending appeal. B0341 (¶ 6). The trial court's conclusion that XRI waived its claim for damages is contrary to the record and to the positions of both parties.

The trial court's second conclusion—that XRI's acquiescence in Holifield's breach bars damages—cannot be squared with *CompoSecure*. The trial court recognized that the contractual voidness provision in the Company Agreement trumps equitable defenses under *CompoSecure*, and that XRI was therefore entitled to declaratory relief as a matter of law. Op. 66–67, 152. The court did not explain why *CompoSecure* does not equally entitle XRI to breach of contract damages as a remedy for Holifield's violation, and XRI is not aware of any doctrine that would distinguish between the two forms of relief in this setting.

IV. THE TRIAL COURT ERRED BY DISMISSING XRI'S CLAIM FOR RECOUPMENT OF LEGAL EXPENSES

A. Question Presented

Did the trial court err by holding that XRI failed to preserve its claim to recoup legal expenses advanced to Holifield, and that XRI's "knowing participation in the Blue Transfer" precluded relief?

XRI raised this issue below. B0002 (¶ 3); B0026 (¶ 113); B0029 (Prayer for Relief (iii)); B0205–06; B0276.

B. Scope of Review

Whether a party has preserved an issue is determined *de novo*. *Supra* at 52. This Court reviews factual findings for clear error, but will reverse and remand if the trial court failed to make a required factual finding. *Eagle Force Holdings, LLC v. Campbell*, 187 A.3d 1209, 1213, 1229–39 (Del. 2018).

C. Merits of Argument

XRI's claim for recoupment of legal expenses is one component of its claim for breach of contract damages. XRI explained this in post-trial briefing:

> In the current litigation, XRI has also been required to advance payment to Holifield for his legal expenses. The Company Agreement provides that XRI may recover the amounts advanced if Holifield engaged in "Disabling Conduct." JX001 at § 5.04(a). "Disabling Conduct" is established by a "final and non-appealable judgment entered by a court of competent jurisdiction determining that [a member's] act or omission constituted gross negligence or willful breach" of the Company Agreement. *Id.* at § 4.07(a). Given the multiple breaches discussed above, together with the record of concealment, XRI is entitled to a determination that Holifield acted willfully or with gross

> negligence. XRI is therefore entitled to recover the sums advanced to Holifield.

B0206. In its Final Order and Judgment, in which it rejected the parties' proposed partial final judgment, the trial court denigrated this claim as another "oh by the way," noting that XRI's argument occupied only "one paragraph of a sixty-page post-trial brief." B0346 (¶ 8(a)). But preserving an issue does not require a given number of paragraphs or pages. And here, a paragraph was sufficient. The amount of damages to which XRI is entitled has yet to be determined. Damages continue to accumulate as Holifield incurs legal expenses in this proceeding and XRI indemnifies him. XRI clearly and adequately signaled its continuing pursuit of this claim in its post-trial brief and reinforced the message at oral argument. B0205–06; B0276. Even Holifield did not dispute that XRI appropriately preserved the recoupment issue: He stipulated to a proposed *partial* final judgment expressly preserving the issue pending appeal. B0339.

As to the merits, XRI is entitled to recoup the amounts it paid to Holifield on a judicial finding of "gross negligence or willful breach" of the Company Agreement. A0090 (§ 4.07(a)); A0093–94 (§ 5.04(a)). The trial court did not address this contractual standard. But it did find that Holifield represented to XRI that he was making the Blue Transfer "for estate planning purposes," and that Blue was consequently a Permitted Transferee—while knowing full well that he "never created any formal estate plan," and that the true "impetus" for the transfer was "to

facilitate the Assurance Loan." Op. 22–23. Deception designed to evade an express contractual standard constitutes a willful breach. And for multiple reasons, the trial court's dicta concerning acquiescence cannot be substituted for the required contractual finding.

First, the court concluded only that Holifield believed "reasonably and in good faith" that XRI condoned his breach of the *Transfer Restriction*. Op. 2, 4, 75. The trial court never determined whether Holifield breached the Encumbrance Prohibition, nor whether such a breach was reasonable or in good faith. The court stated that it did not need to reach the Encumbrance Prohibition in light of its finding that Holifield breached the Transfer Restriction. But a willful or grossly negligent breach of the Encumbrance Prohibition would entitle XRI to recoup fees.

The evidence strongly supports a finding that Holifield both breached this provision and did so with gross negligence at minimum. The Encumbrance Prohibition is clear and broad. Members may not "pledge, borrow against, collateralize, otherwise encumber or allow any Liens to exist on any of the Units or Company Interests." *Supra* at 13. The term "Lien" is also defined broadly: It includes, among other things, all "adverse claims or restrictions, of any kind or character whatsoever." A0059 (§ 1.01). Holifield encumbered his Units when, among other things, Blue agreed in a side letter with Assurance not to dispose of the

Units save in circumstances in which Assurance's interests would be fully satisfied. A0318 (¶ 1 (d-e)).

Holifield argued strenuously below that Assurance obtained an interest only in the proceeds of the sale of the Units, not in the Units themselves. Even if that were not contradicted by Assurance's testimony in this case and filings in the Texas Action, *supra* at 22–23, an interest in the proceeds comes within the broad terms of the Encumbrance Prohibition. And significantly, the Encumbrance Prohibition, unlike the Transfer Restriction, contains no Permitted Transferee exception, nor any other arguably pertinent exception that Holifield could reasonably have believed applied. XRI should not be foreclosed from recoupment without a ruling on the Encumbrance Prohibition.

Second, even with respect to the Transfer Restriction, the fact that Holifield might reasonably have believed that XRI condoned his breach does not resolve the issue. It is undisputed that Holifield told XRI that Blue was a Permitted Transferee. *Supra* at 14–17. That was false, as the trial court's findings demonstrate. On multiple levels, Holifield made the Blue Transfer for consideration. *Supra* at 26. It is also undisputed that Holifield engaged in a transparent fiction when he claimed that he had created Blue for the purpose of estate planning. In reality, he engaged in no estate planning at all. *Supra* at 17.

Holifield also withheld documents demonstrating the extent to which his Units were implicated in the Assurance Loan. His legal team eliminated references to the Assurance Loan from documents they were required to provide to XRI and did so to avoid "trouble" with Morgan Stanley. *Supra* at 16. They took the position that Blue was a Permitted Transferee, but the transaction documents leave no doubt that the transfer was consideration for the loan—and again, the trial court's own findings confirm this. That cannot be undone by Holifield's understanding of what he had been told by Gabriel and Burt, particularly as that understanding depends so heavily on Burt's unadorned "ledger" reference—which Holifield himself understood as an instruction to make sure XRI did not face risk. *Supra* at 28. At a minimum, Holifield and his legal team were grossly negligent in structuring the Assurance Loan around their purported belief that one-on-one spoken conversations superseded the plain terms of the no-consideration clause in the Company Agreement, and in constructing a transaction that saddled XRI with risks they knew it was unwilling to bear—all while hiding that risk from XRI. XRI's purported acquiescence, again, does not change either the fact of the breach or the untruthful statement Holifield made about it.

Finally, it is undisputed that Holifield breached provisions of the Company Agreement beyond the Transfer Restriction and Encumbrance Prohibition. Assurance, having become interested in XRI's financial performance, asked

Holifield to provide it with confidential information, including XRI's consolidated financial statements, a sensitive investment document, weekly management reports with customer lists, and XRI's annual budget. B0349; B0363; B0368; B0420. Holifield provided all of these materials. B0471; B0473–536; A0683 (239:16–240:17).

In doing so, Holifield breached, again and again, his obligation of confidentiality under the Company Agreement. *Supra* at 18. Holifield testified that he elevated the duty he assumed in connection with the Assurance Loan—to divulge XRI's confidential information—over his obligation under the Company Agreement, which was *not* to disclose that information. A0683 (239:16–21).

All of these facts are necessary to determine whether Holifield's breaches of the Company Agreement were willful or grossly negligent. A finding on a separate issue (here, the trial court's dicta regarding acquiescence) cannot be swapped in as an "implicit" finding on the issue in question (here, gross negligence/willful breach) where the two issues are not the same. *Eagle Force*, 187 A.3d at 1213 (rejecting the proposition that the trial court's finding that a contract was insufficiently definite was an implicit finding that the parties did not intend to be bound by it). The trial court neglected to make the required finding under the contractual gross negligence/willful breach standard.

CONCLUSION

The Court should affirm the trial court's holding that Holifield breached the Transfer Restriction, that the Blue Transfer was void, and that Holifield continued to hold the Units at issue after the purported transfer. The Court should remand with instructions that the trial court determine (1) the amount of breach of contract damages to which XRI is entitled for its expenditures in the Texas Action, and (2) whether XRI is entitled to recoup legal expenses advanced to Holifield under the Disabling Conduct clause of the Company Agreement.

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