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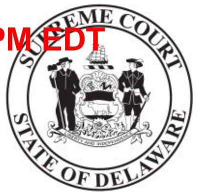

IN THE SUPREME COURT OF THE STATE OF DELAWARE

COMPOSECURE, L.L.C,	:	
	:	
Plaintiff/Counterclaim	:	
Defendant-Below/Appellant,	:	No. 177, 2018
	:	
v.	:	On appeal from the Court of Chancery
	:	of the State of Delaware in C.A. No.
CARDUX, LLC f/k/a AFFLUENT	:	12524-VCL
CARD, LLC,	:	
	:	
Defendant/Counterclaim	:	
Plaintiff-Below/Appellee.	:	

CORRECTED ANSWERING BRIEF OF APPELLEE CARDUX, LLC F/K/A AFFLUENT CARD, LLC

Dated: June 19, 2018

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NATURE OF PROCEEDINGS

In a November 2015 sales representative agreement ("SRA"), CompoSecure LLC ("Compo" or "Company") agreed to pay CardUX LLC ("CardUX") 15% of "all" sales to "Approved Prospects." When Compo received a large Approved Prospect order several months later, it refused to pay.

On June 29, 2016, Compo petitioned the Chancery Court to declare the SRA unauthorized and invalid, despite express representations it was "authorized[,] … valid and binding …" SRA §11.1(A209). On July 26, CardUX answered and counterclaimed, seeking, *inter alia*, the earned commission and a declaration it was entitled to commissions on "all" sales within the SRA's scope. On August 22, Compo denied liability on the counterclaim and filed a First Amended Complaint, adding fraudulent inducement and asserting CardUX breached the SRA by marketing to parties other than "Approved Prospects."

A four-day trial was held May 22-25, 2017. In its February 1, 2018 memorandum opinion ("Op."), the Court found the SRA was improperly authorized, but was ratified and enforceable. On March 29, the Court entered final judgment awarding CardUX $14.39 million for commissions through the end of 2017, plus attorneys' fees, expenses and interest. The Trial Court also found Compo breached the SRA by obstructing CardUX's performance, awarding nominal damages of $1.

On April 5, 2018, Compo appealed and, on May 4, filed Appellant's Opening Brief ("Brf."). This is Appellee CardUX's Answering Brief.

SUMMARY OF THE ARGUMENT

1. Denied. The Trial Court correctly held that if the SRA was not properly authorized, it was voidable, not void, and subject to ratification. Compo acknowledges "the traditional corporate law rule that an action is voidable if some procedure exists by which [it] could be accomplished, but was not followed." Brf. 21. Without dispute, the SRA could have been authorized by "some procedure." Compo claims Section 4.1(p) of its limited liability company agreement ("LLC Agreement" or "LLCA") overrides the traditional void/voidable analysis, and transactions requiring approval under its provisions are void if improperly authorized. That argument was not made to the Trial Court and cannot be raised now. Moreover, Section 4.1(p) does not apply to the SRA.

2. Denied. Compo argues ratification is inapplicable because CardUX was an affiliate of a fiduciary and "[r]atification should not be available to cure a fiduciary's knowing failure to comply with a related party provision." Brf. 5. Compo's argument contravenes Delaware law. Compo also contends that in finding ratification occurred, the Trial Court erroneously applied New Jersey law, not Delaware law. Compo does not deny that ratification was properly found under New Jersey law, and there is no substantive difference with the Delaware law standard. Under the law of either jurisdiction, the Trial Court correctly held Compo ratified the SRA by, *inter alia*, treating it as binding, representing it was

authorized and valid, encouraging and accepting the benefits of CardUX's performance.

3. The LLC Agreement contains a safe harbor allowing parties contracting with Compo to rely on an officer's authority. The Trial Court erroneously held the provision did not apply.

4. Even if the SRA was unenforceable, CardUX is entitled to *quantum meruit* recovery, with agreed-on commissions as fair compensation.

STATEMENT OF FACTS

Compo fabricates metal and other "specialty" credit cards, with a "virtual monopoly" in metal card manufacturing. Op. 1, 5. It was established in 2000 by John Herslow, whose daughter Michele Logan was Chief Executive Officer from 2012 until 2017. *Id.* 4-5. Until May 2015, Logan had no Board oversight. *Id.* 61-62. She consulted with a "senior leadership team," including Herslow, but had sole contracting authority. A426-27.

Describing the industry in which Compo operated, the Trial Court found as follows:

> [A]n issuing bank affiliate[es] with a [co-brand or affinity] partner to issue a credit card that bears the marks of both the issuing bank and the partner. The card typically grants the holder benefits associated with the partner such as reward points or a discount on the partner's products. A classic example is an airline credit card that rewards the holder with frequent flyer miles. By affiliating with a partner, an issuing bank can use the partner's market appeal to sign up customers. In return, the issuer pays the partner a fee.

Op. 7. Generally, issuers purchase cards from the manufacturer. *Id.* 1-2; A602. Some sales occur through personalization partners – firms that emboss cards with consumer-specific information (*e.g.*, names and account numbers). A425, A433.

During 2012-17, Compo grew from 40 employees to 400 "production employees" in three facilities. A424-25. In 2015, revenues topped $76 million, yielding gross profits above $45 million. B211. While plastic cards sold for $0.50

or less, Compo's metal cards, mainly used in prestige programs, sold at prices up to $700 each, with huge margins. Op. 5.

A. Compo Pursues Outside Investment.

In 2013, Compo sought equity investment, pausing the process in hopes of higher values in 2014. Op. 6-9. In May 2015, LLR Partners bought 60% of the equity for $100 million. *Id.* 9. LLR partner Mitchell Hollin led LLR's Compo team. *Id.* 7.

LLR's investment closed May 11, 2015. Op. 14. Compo migrated from a New Jersey LLC to a Delaware LLC, and equity holders signed the LLC Agreement. *Id.* The LLC Agreement establishes two types of units. Logan owned a majority of Class A Units, with additional units held by trusts for her children and by a former employee. *Id.* LLR received most of Class B, with additional units owned by co-investors. *Id.*

The LLC Agreement, governed by Delaware law (LLCA§12.13, (A170-71)), had several relevant provisions. Section 5.4 (the "Related Party Provision") permitted Members, directors "and their respective Affiliates, or any other Related Party" to transact with Compo "if such transaction is at arm's length and approved by the Board, [LLR] and [Logan]." A143. Special approvals also were required under §4.1(p)(ix)(A) (the "Restricted Activities Provision") to:

> enter into, terminate or amend any contract, agreement, arrangement or understanding requiring the Company or any of its Subsidiaries to

> make expenditures in excess of $500,000 during any fiscal year, other than in the ordinary course of business consistent with past practice…

unless the transaction was reflected in an annual budget or business plan "previously approved by" LLR and Logan. *Id.* (A139-40).

To protect parties doing business with Compo, the LLC Agreement contains a safe harbor:

> Any Person dealing with the Company, other than a Member, may rely on the authority of the Board (or any Officer authorized by 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. Every agreement, instrument or document executed by the Board (or any Officer authorized by the Board) in the name of the Company with respect to any business or property of the Company shall be conclusive evidence in favor of any Person relying thereon or claiming thereunder that (i) at the time of the execution or delivery thereof, this Agreement was in full force and effect, (ii) such agreement, instrument or document was duly executed according to this Agreement and is binding upon the Company and (iii) the Board or such Officer was duly authorized and empowered to execute and deliver such agreement, instrument or document for and on behalf of the Company.

LLCA§4.1(j)(A138) ("Safe Harbor"). "Person" is a natural person or entity. A125.

B. LLR Enlists Kleinschmidt.

During pre-deal due diligence, LLR asked Kleinschmidt to evaluate Compo. Op. 7. Kleinschmidt is a former credit-card executive with extensive co-brand

relationship experience. Op.7-8. Hollin "had a high regard" for Kleinschmidt. A389. At Hollin's invitation, Kleinschmidt invested $500,000 in B Units.

After the conversion to a Delaware LLC, the Compo Board had five members. Empowered to designate two directors, Logan selected herself and Herslow. LLR named Hollin, Kleinschmidt and Jason Reger. Op. 10, 15.

C. CardUX.

In due diligence, Kleinschmidt found 75% of sales were to JPMorgan Chase, mostly its proprietary Sapphire Card. Op. 8. Chase could unilaterally "stop buying metal cards" or reduce purchases. *Id*. Chase eschewed long-term commitments and "used its buying power to demand discounts." *Id*. 8-9. Kleinschmidt also found Compo's small sales staff dealt primarily "with personalization partners or low-level managers at issuing banks." *Id.* 9. Many co-brand partners "[weren't] familiar with" metal cards, and never considered asking for them, and Compo "had no strategy for educating co-brand partners about metal cards and using the partners' influence to spur demand." *Id.*; A668-69.

Hollin asked Kleinschmidt to become CEO. Kleinschmidt declined and recommended Paul Frantz, a former credit card marketing executive experienced in working with co-brand partners. Frantz also declined. Op. 10-11.

Kleinschmidt, Frantz and a third former credit card executive, Holly Flanagan, proposed to Compo an independent sales organization ("ISO") to

market to issuers and affinity partners. Op. 12-13. Besides general marketing, the ISO would target their extensive industry contacts, attempting to convince co-brand partners "to ask for/demand a metal card." *Id.* 11-12; A669; 603; A428. When the co-brand relationship came up for renewal, the partner would "have a lot of leverage … [to] force their issuer to agree to buy metal." Op. 10-11.; A668; A416. Given Compo's virtual metal card manufacturing monopoly, orders likely would go to Compo. A669.

ISO negotiations accelerated after LLR invested. A429. Logan was Compo's principal negotiator, but Hollin stepped in when her mother became gravely ill. Op. 15, 21. Logan remained informed and involved. A454.

At the new Board's first meeting on July 1, Logan discussed the ISO proposal and Kleinschmidt gave a strategy overview. Op. 20; B26-28. There was "a lot of enthusiasm for getting the deal done." *Id.*

D. The SRA.

On June 24, 2015, Logan circulated a memo summarizing the material ISO agreement terms to the Board (excluding Kleinschmidt), senior management and Compo's Counsel. As the Trial Court found: "None of the Board members objected… Herslow told Logan to 'let it fly' [and] Hollin had one comment relating to expense reimbursements." Op. 20; B15-16; B19; A502.

On November 4, 2015, Compo's lawyers sent Logan and Hollin the final SRA. Op. 29. Logan forwarded it to Herslow and the other senior leadership members. *Id*. 29, 72; B90.

On November 9, the SRA was executed, effective November 6. A192. Shortly before, Kleinschmidt and his associates formed an ISO entity – Affluent Card, LLC – later changing the name to CardUX.[1] Logan signed for Compo and Kleinschmidt for CardUX. A217.

The SRA, which had a two-year term, included a list of "Approved Prospects" and required Compo to pay "a commission on all sales of Products to Approved Prospects … of fifteen percent (15%) of the Net Sales Price." SRA §6.1 (A201-02). Making it clear a sale is commissionable even if ordered or paid for by someone other than an Approved Prospect, the provision continues:

> Notwithstanding anything to the contrary in this Agreement, for all purposes under this Agreement, a sale of Products shall be deemed to be a sale of Products to an Approved Prospect if (without duplication of sales): … (c) any other Person (including an Issuer Prospect, a Personalization Partner or an Excluded Customer) purchases Products directly or indirectly from CompoSecure on behalf of, for the benefit of, pursuant to a contract with, or bearing the trademarks or other identifiable marks of, an Approved Prospect.

Id. Commissions were due "only at such times and only to the extent that [Compo] actually receives payment," and would be paid in the quarter following receipt. *Id.*

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[1] "UX" means "user experience."

§6.2(b)-(c)(A202). Commissions accrued on Approved Prospect purchases during the two-year term and two years thereafter, extending 15 years for Approved Prospects purchasing during the first four years. *Id.* §6.2(e)(A202). The contract was subject to New Jersey law. *Id.* §16.16 (A215).

The commission was comparable to the 15% discount Compo gave personalization partners on sales they generated. A433. "CompoSecure viewed the discount as the functional equivalent of a 15% commission…." Op. 6.

Recognizing the fee provision "creates the potential for CardUX to earn a commission when its efforts have not played a role in" an Approved Prospect sale, the Trial Court observed "it also creates the potential for CompoSecure to receive sales without paying commissions if CardUX's efforts result in sales for parties other than Approved Prospects." Op. 93. The SRA addressed the Chase concentration risk by incentivizing CardUX to pursue Approved Prospects unaffiliated with Chase and because CardUX's marketing strategy would encourage co-brand partners to force issuers to enter into multi-year metal card purchase obligations. *Id.* 90-91.

Compo never denied in court that the SRA was negotiated at arm's length.[2] The parties negotiated extensively, aided by counsel. Op. 51. There was

[2] As discussed below, Logan told CardUX LLR forced her to sign against her will, but admitted at trial the assertion was "false." *See, infra*, pp. 18-19.

significant give-and-take, and CardUX made numerous concessions. Further, Compo repeatedly removed Approved Prospects from the list when Compo made or received a contact. Op. 28 (citing A86).

E. Logan's Authority.

The Trial Court held Logan did not have actual authority to sign the SRA. Op. 60, 63-64. She represented otherwise, warranting in the SRA:

> (b) [Compo] has the full right, power and authority to enter into this Agreement … and to perform its obligations under this Agreement;
>
> (c) the execution of this Agreement has been duly authorized by all necessary company action; and
>
> (d) this Agreement constitutes the legal, valid and binding obligation of such Party, enforceable against such Party in accordance with its terms . . .

§11.1 (A209). Kleinschmidt viewed the representation as "a necessary component of any contract." A708. He believed the representation. A709.

Compo's counsel "prepared the initial draft of the Sales Agreement, which included the Authority Representations." Op. 51, 74. Logan, signing in her CEO capacity, Op. 31 (citing *PreTrial Order* ¶49), admitted the representation was "not ambiguous," believed it was accurate and thought she had "authority to sign." A435, A452, A453, A502. Compo Directors Hollin and Herslow also believed Logan had authority. Op. 35; B229. The Trial Court held CardUX reasonably relied on the representation, observing "[i]f anyone should have ensured that

CompoSecure took the necessary action to make the Authority Representations accurate, it was Logan, Hollin, and CompoSecure's counsel." Op. 74.

Although the Board did not formally vote to authorize the SRA, it was approved by the directors. The Board was kept informed of the negotiations. B221-222; B223-225. Herslow was briefed and copied on much of the negotiators' correspondence. *E.g.*, B3, B5, A113, B83. Reger received updates. *E.g.*, B1. Hollin and Logan wanted to sign. B154; B156; B227. No Board member expressed reservations about or objections to the SRA or Logan's authority. Op. 72.[3]

F. Budgeting the SRA.

As noted, the LLC Agreement's Restricted Activities Provision applies to unbudgeted and required expenses greater than $500,000 a year. The SRA was not budgeted in 2015, having been adopted near the year end. SRA expenses were in the 2016 budget, which went to the Board in December 2015. Op. 35, 62, 70; A457-58; B158.

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[3] Philippe Tartavull joined the Board at its December 2015 meeting. The Trial Court found, given the unanimous support for the SRA, it is unlikely Tartavull would have opposed it had he voted. Op. 73. While Compo disagrees, Brf. 15, the finding was not "clearly erroneous." Even if Tartavull had opposed, there still was a majority in favor, excluding Kleinschmidt. Op. 73-74. Compo also complains a Board meeting slide inaccurately reflected SRA terms, neglecting to note the slide was prepared by its officers and approved by Logan. Brf. 14; Op. 73; A397-98; A436, A455; B209. The supposed inaccuracy was a statement the SRA was terminable, without detailing the circumstances permitting termination. Op. 73.

The SRA in no way required expenses of $500,000 a year. The only required expenses were up to $20,000 annually for out-of-pocket costs, and $10,000 per month during the first fifteen months as an advance against future commissions. SRA § 4.2(a)(A200); § 6.2(a)(A202).

The SRA was not expected to cost more than $500,000 in any year. It could not have done so in the weeks remaining in 2015. Compo did not expect "any significant business" in the first year. Op. 70; A457. The Trial Court found "it was Logan's expectation that CardUX would have to educate the market and work its contacts before any meaningful sales would come along." Op. 97. Logan anticipated a few "prototype orders" that are "generally $5,000 or less." A457. Even if there had been 2015 sales, no commission would be paid until the first quarter of 2016.

Compo would have to receive more than $3.33 million in cash from commissionable sales in any given year for fees to top $500,000. Logan expected ***total sales*** would hit $5 million ***over four years*** – an average annual commission less than $190,000. A458-59.

G. CardUX Goes to Work.

After signing the SRA, CardUX began spreading the word about metal cards to industry contacts. Op. 35. The record contains "[v]oluminous evidence" of CardUX's "extensive marketing and sales efforts." *Id.* 36-37. CardUX regularly

updated Compo on its efforts, and Compo supplied sample cards for CardUX's marketing. *Id.* 35, 37 n.181.

Twice, Compo sought to amend the agreement it now claims is void. On November 13, 2015, Logan learned Discover (an Approved Prospect) had budgeted for metal cards. Op. 35. She wrote to Hollin that, in addition to CardUX's commission, Compo would owe 15% to a personalization partner. *Id.* With Hollin's agreement, and without telling CardUX of the potential Discover order, Logan asked Kleinschmidt to drop Discover as an Approved Prospect and add Barclays. *Id.* 36. CardUX declined. *Id.* In December 2015, Logan asked to add American Airlines as an Approved Prospect at half commission because Compo already had contact with the airline. *Id.* CardUX agreed, and an amendment was signed. *Id.*

Much evidence focused on Amazon, an Approved Prospect. CardUX met several times with key Amazon managers and a consultant who previously helped Amazon with issuers. Op. 37-38. Unbeknownst to Compo or CardUX, Amazon had already issued an RFP requiring metal cards, and the Trial Court found CardUX's substantial efforts did not generate the business. *Id*. 38, 41.

H. "Yikes. Kevin and Paul would get 15%."

In early December 2015, Bank of America advised Compo of a potential order of "several million" cards. Op. 38-39. Several days later, Logan "received a

similar inquiry from Chase." *Id.* When she asked her Chase contact to name the co-brand partner, she was told in confidence it was Amazon. *Id.*

Logan and Hollin realized from the start the Amazon order generated a commission for CardUX:

> Immediately upon hearing about the Amazon order, Logan wrote the following to Hollin: "Yikes. Kevin and Paul would get 15%." At trial, Logan and Hollin confirmed that the Amazon order met the requirements for a commission under the Sales Agreement. On December 14, 2015, Logan sent an email to Hollin bemoaning the fact that CompoSecure "didn't insist on a lower commission" for Chase orders "since the whole point is to lower the concentration." Hollin told Logan that CompoSecure should "live with the deal as agreed."

Op. 39-40 (record citations omitted); B192; B193. Logan claimed she knew at the time CardUX was not entitled to a fee and "attempted to re-interpret her contemporaneous emails." *Id.* 39 n.195. The Trial Court found "[h]er testimony was strained, seemed overly rehearsed, and was not credible." *Id.*

Although Chase identified Amazon in confidence, Logan "enlisted CardUX's help in steering the business to Bank of America," which did not receive volume discounts. *Id*. 40. Kleinschmidt merely agreed to "work to ensure that Amazon 'requires metal cards from whatever issuer receives the new contract.'" *Id.*

On January 22, 2016, Chase advised Logan it "would be placing a massive order for Amazon." *Id*. 41. Logan emailed Hollin: "Oh boy Mitchell … I know

that we are trying to decrease the customer concentration, but it's hard to say no to 70% margin business." *Id.*; B189, A495.

Logan called Kleinschmidt, telling him, "You hit the lottery." Op. 42; A710. She said the "up-front [] commission would be $9 million," and asked Kleinschmidt to consider taking a lower commission. Op. 42.[4] Kleinschmidt refused. *Id* 44.

I. Compo Refuses to Pay.

On January 30, 2016, Herslow wrote to Logan, suggesting Compo "pay 5 percent and let them sue." Op. 43; B202; B198. At a February 5 meeting Logan told the CardUX partners Compo "was not going to pay the [Amazon] commission." Op. 43; B205.

Compo offered pretext after pretext for refusing to pay. The pattern continued through trial and it offers more new arguments in its opening appeal brief.

- In a January 30 email to Logan, Herslow claimed there was "a very good case with minority shareholder rights since LLR with 60% forced us to sign

[4] Logan testified she told Kleinschmidt there was no commission due. *Id.* The Trial Court "reject[ed] her account and credit[ed] Kleinschmidt's. In contemporaneous emails, Logan recognized that CardUX was entitled to a commission…She admitted at trial that the Amazon sale met the requirements of the Sales Agreement…This was not the only instance when Logan's testimony did not hang together. Kleinschmidt's account, by contrast, was credible." Op. 42 n.213 (citations omitted).

an agreement which we never would have signed" (B197), and on February 5, Logan claimed the SRA "was forced on her by LLR." Op. 44; B205. Herslow, Logan, and Hollin labeled the claim "false." Op. 44; A446-47; A764; A417. Herslow said he was just "coming up with reasons to either invalidate the Agreement" or avoid paying. Op. 43; B230-31.

- Also on February 5, Logan claimed no commission was due because CardUX did not procure Amazon's order. Op. 43-44 (citing B205). The Trial Court rejected the argument, holding the SRA explicitly entitled CardUX to a commission on "any" Approved Prospect sales, regardless of whether CardUX generated the order. The Trial Court also found CardUX repeatedly made this requirement clear during the SRA drafting, and Compo recognized that. *Id*. 21-28.[5]
- Logan declined to pay full commission on any Chase-affiliated co-brand partners' orders. Op. 43-44. At trial, Logan admitted she always understood CardUX would "focus on the co-brand partners and wanted a commission on orders for approved prospects even if the issuer was … not on the approved prospect list." *Id.* 17. The Trial Court held the parties explicitly negotiated,

[5] On January 22, 2016, Logan wrote Hollin bemoaning having agreed CardUX would earn a fee on "all" Approved Prospect Orders: "If you recall, we wanted to include a paragraph in their contract about 'meaningful involvement' but they flat out refused." B195.

and unambiguously agreed, commissions would be paid on cards bearing the name or trademark of an Approved Prospect, regardless of who placed or paid for the order. *Id.* 78-79, 81.[6]

- In a May 26, 2016 letter to CardUX, Compo's newly-retained litigation counsel "asserted for the first time that the [SRA] had never received the approvals required by the LLC Agreement." *Id.* 48.
- Also in the May 26 letter, counsel accused CardUX of breaching the SRA by engaging in "numerous prohibited contacts" with parties other than Approved Prospects, and of having ignored Compo directions. *Id.* The contentions were dropped during trial. *Id.*
- In its August 22, 2016 First Amended Complaint, Compo claimed it was fraudulently induced to sign the SRA because Kleinschmidt falsely promised in a September 14, 2015 email that CardUX would never seek commissions for orders it did not generate. Op. 26-27; B38-9. The Trial Court held the reading of the email urged by Logan and Hollin was "not reasonable" and found their testimony "not credible." Op. 27.

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[6] In contemporaneous emails, Logan recognized CardUX would be marketing to co-brand partners affiliated with Chase and other issuers with which Compo already had a relationship. Op. 17 n.81; A113 (noting "business awkwardness issues of their guys end-running our current customers to go to affinity partners"); B194 ("too bad that we didn't insist on a lower commission" for Chase orders).

J. Compo Obstructs CardUX's Performance.

After CardUX declined to discount the Amazon commission, Compo "obstruct[ed] CardUX's ability to earn more commissions" by banning CardUX from pursuing Chase-affiliated Approved Prospects. Op. 44-47. On May 10, 2016, Logan instructed CardUX to "pause all activities and communications" while Compo "evaluat[ed]" the relationship. *Id.* 47.

Although the obstruction of Chase opportunities continued, the "pause" was brief. Counsel's May 26 letter stated Compo "expected CardUX to continue working" while Compo sought a "judicial determination" regarding the SRA's validity. Op. 49 (quoting B213-16); *see also* B217-19 (advising Compo filed suit but would "continue to manage [the] relationship . . . in a 'business as usual manner"). CardUX continued working on Compo's behalf through trial, and "developed additional business" for Compo. Op. 49.

K. The Ruling.

The Trial Court rejected each Compo argument for why the SRA did not clearly provide for a commission on the Amazon sale. Op. 77-85. The Court similarly rejected Compo's attempts to use extrinsic evidence to read in terms that were not agreed on or incorporated in the SRA. Op. 86-97.

While holding that formal approvals required by the Related Party Provision were not given, the Trial Court found Compo ratified the SRA by treating it as

valid and by accepting its benefits. Op. 65-75. The Trial Court did not determine whether the Restricted Activities Provision applied, finding the issue "cumulative" because "the analysis of the approval requirements under the Related Party Provision applies equally to the comparable requirements under" the Restricted Activites Provision. Op. 32 n. 162; SRA § 4.1(p)(A139).

The ratification holding was premised on extensive factual findings, not challenged here, including:

- "[A]t the time of signing, all of the significant actors believed that the Sales Agreement was valid and binding. Hollin and Logan, who led the negotiations for CompoSecure, believed they were working on a valid agreement and wanted to enter into it." Op. 72.

- In SRA §11, Compo represented it had "full right, power and authority to enter into this Agreement" and "to perform its obligations under this Agreement." A209.

- Kleinschmidt reasonably relied on Compo's authorization representation: "Given how the parties were aligned at the time, I do not think it is reasonable to expect CardUX to have assumed the burden of ensuring that CompoSecure supplied the proper internal approvals. Kleinschmidt and Frantz had been negotiating at arm's length with Logan and Hollin. CompoSecure's outside counsel prepared the initial draft of the Sales Agreement, which included the Authority Representations. If anyone should have ensured that CompoSecure took the necessary action to make the Authority Representations accurate, it was Logan, Hollin, and CompoSecure's counsel." Op. 74.

- Although the Board did not formally vote on the SRA, "there is no contemporaneous evidence indicating that any director thought the Sales Agreement was invalid or opposed entering into it." *Id.* 73.

- Even accepting Tartavull's testimony that he would have opposed the SRA had he known all of its terms, "a Board majority comprising the three directors other than Kleinschmidt still supported it." *Id.* 73.

- Compo manifested ratification "through its interactions with CardUX and by accepting the benefits of CardUX's extensive efforts to perform under the Sales Agreement." *Id.* 69.

- Compo "included amounts in its budget for 2016 to reflect expenses contemplated by" the SRA. *Id.* 70.

- "CompoSecure also recognized the existence of the Sales Agreement by approaching CardUX about changes to the Approved Prospect list as if the Sales Agreement was binding." *Id.* 69.

- During the six months after the SRA was signed, "CardUX engaged in sales efforts with at least forty-eight prospects. Voluminous evidence in the record demonstrates the extensive marketing and sales efforts that CardUX pursued during this period." Op. 36-37. CardUX regularly reported to Compo on its efforts. *Id.* 37.

- "CompoSecure specifically accepted the existence of the contract and treated it as valid and binding for purposes of events relating to Amazon…When the Amazon Sale materialized through Chase, Logan viewed the order as triggering a commission and sought to negotiate a compromise with CardUX." *Id.* 70; *see also id.* 42. Moreover, "CompoSecure enlisted CardUX's help in steering the [Amazon] business to Bank of America. Because Chase received volume discounts, the order would generate more revenue for CompoSecure if it came from Bank of America." *Id*. 40.

- Even after Compo sent its May 26, 2016 letter asserting, for the first time, Logan was not authorized to sign the SRA, "CompoSecure continued to treat the Sales Agreement as valid and accepted the benefits of CardUX's continuing marketing efforts." Op. 71. In fact, "[b]y the time of trial, CompoSecure had received the benefits of nearly two additional years of marketing efforts, and those efforts generated additional business for CompoSecure." *Id*. at 72 (citation omitted).

- In its May 26 letter, Compo's counsel stated Compo "expected CardUX to continue working" pending a "judicial determination as to the validity of" the SRA. *Id.* 49.
- Compo did not raise any challenge to the SRA's validity until more than six months after it was signed (four months after it learned there would be an Amazon order). Op. 48.
- With Compo's knowledge and at its insistence, CardUX continued performing through trial. *Id.* 49; A601-02.

On March 29, 2018, the Trial Court entered final judgment declaring the SRA is binding, rejecting Compo's arguments on its meaning and awarding contract damages of $14,387,427.24, fees and expenses of $1,997,555.66 and interest.

ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THE SRA WAS VOIDABLE, NOT VOID.

A. Question Presented.

Did the Trial Court correctly find Compo's failure to follow formal approval requirements in its LLC Agreement rendered the SRA voidable, not void? Op. 67, 72; A903, 906-7.

B. Scope of Review.

This Court "will not disturb [factual] findings unless they are clearly erroneous and not supported by the record." *Genger v. TR Investors, LLC*, 26 A.3d 180, 190 (Del. 2011). The application of legal principles is reviewed *de novo. Id.*

C. Merits of the Argument.

The Trial Court found Logan was not authorized to execute the SRA because Compo failed to obtain formal approvals required under the Related Party Provision. Op. 32, n.162; 64. The Court held the SRA was "voidable" but was ratified because Compo treated it as valid and accepted its benefits. *Id.* 67, 72.

Compo does not dispute that a voidable contract is subject to ratification. Instead, it argues the SRA was void and could not be ratified. Discussing the Related Party Provision, Compo contends that "[i]f a fiduciary fails to follow the procedures laid out in a conflicted transaction safe harbor approval provision [*i.e.* the Related Party Provision], the transaction should be treated as void." Brf. 25.

It also argues the Restricted Activities Provision explicitly modifies generally applicable legal principles permitting ratification of a voidable act:

> [t]he lack of approval of the [SRA] should have ended the inquiry. Section 4.1(p) of CompoSecure's LLC Agreement [the Restricted Activities Provision] provides that the failure to obtain 'prior approval' of certain "Restricted Activities" – including the Sales Agreement – renders such activities 'void and of no force or effect whatsoever."

Brf. 2. Thus, it argues the SRA was void as a matter of contract construction.

Both arguments fail.

1. If Improperly Authorized, the SRA Is Voidable, Not Void.

Compo admits that "under the traditional corporate law rule [] an action is voidable if some procedure exists by which the action could be accomplished, but was not followed." Brf. 21; *In re Oxbow Carbon LLC Unitholder Litig*., 2018 Del. Ch. LEXIS 47, at *120 (Del. Ch. Feb. 12, 2018) ("assuming … the parties failed to follow the requisite procedures, the issuance of units … would be voidable, not void."). The Trial Court correctly described the "traditional corporate rule" differentiating void from voidable acts:

> Void acts are … acts that the entity lacks the power or capacity to effectuate. Voidable acts are within the power or capacity of an entity, but were not properly authorized or effectuated by the representatives of the entity. Voidable acts can be validated by equitable defenses, such as ratification and acquiescence.

Op. 65 (citations omitted). Compo had "capacity and power to enter into" the SRA. *Id.* (citing 6 *DEL. C.* §§ 18-106(5),18-107 and LLCA§2.6(A129)).

Consequently, the SRA "is voidable, not void" and "[t]he lack of authority that otherwise renders the Sales Agreement unenforceable is therefore subject to being cured by equitable defenses such as ratification." *Id.* 67.

2. Compo's Contract Argument Cannot Be Raised for the First Time Here.

Compo did not argue to the Trial Court, as a matter of contract, the Restricted Activities Provision modifies the traditional void/voidable distinction, rendering the SRA incapable of ratification. It cannot make that argument now.

This Court considers only arguments "fairly presented to the trial court." Supr. Ct. R. 8; *Shawe v. Elting,* 157 A.3d 152, 169 (Del. 2017) (refusing to address new legal argument where "[t]he record is largely undeveloped, the trial judge did not have the opportunity to make a thoughtful ruling, and [appellant's] briefs only cursorily address the issue."); *Rocktenn CP, LLC v. BE&K Eng'g Co.,* LLC, 103 A.3d 512 (Table) (Del. Oct. 16, 2014) ("The appellants raise a novel [legal] issue for the first time on appeal"). Fleeting references are insufficient to preserve a claim. *Shawe,* 157 A.3d at 168; *Clark v. Clark*, 47 A.3d 513, 518 (Del. 2012) (because party raised issue but "cite[d] no statutory or common law authority as part of a legal argument," "th[e] legal question was not fairly presented below" and could not be raised on appeal).[7]

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[7] Compo's new argument applies the contract-based argument only to the Restricted Activities Provision. Brf. 21-23. The Trial Court's analysis of Compo's

At the post-trial hearing, Compo relied solely on the Related Party Provision to argue ratification was inappropriate, arguing:

> With regard to the equitable principles of [] ratification and waiver, et cetera, I submit those principles can have no application in the face of a safe harbor provision. Again, it bears noting that Section 5.4 was included in the LLC agreement to protect CompoSecure, and not the conflicted party that's seeking to enter into an agreement with the company.

B404. Nowhere in the briefing or argument did Compo contend the Restricted Activities Provision alters the common law to render the SRA incapable of ratification.

In any event, the Restricted Activities Provision does not apply to the SRA. The provision relates to unbudgeted transactions "**requiring the Company or any of its Subsidiaries to make expenditures in excess of $500,000 during any fiscal year,** other than in the ordinary course of business consistent with past practice…" A139-140 (emphasis added). The SRA is exempted as an "ordinary course" activity, given Compo's established practice of paying an effective 15% commission on sales generated by personalization partners. *See, e.g., Ivize of Milwaukee, Ltd. Liab. Co. v. Compex Litig. Support, Ltd. Liab. Co*., 2009 Del. Ch.

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arguments confirms such a differentiated contract analysis was not made. It found Compo's arguments about the two provisions were "cumulative," and "the analysis of the approval requirements" of one "applies equally" to the other. Op. 32 n.162.

LEXIS 55, at *27 (Del. Ch. Apr. 27, 2009) (defining ordinary course of business as "[t]he normal routine in managing a trade of business").

At execution, Compo expected expenses far less than $500,000 annually. A458-459. Logan believed commissions would average less than $190,000 annually, with nothing in 2015 other than the $10,000 a month commission advance (for two months) and an expense reimbursement capped at $20,000 a year. Even if Compo accepted orders in 2015 generating commissions of $500,000, nothing would be payable until 2016 because commissions accrued only after Compo received payment and were payable in the quarter after receipt. For 2016, the SRA was budgeted.[8]

The Trial Court's findings confirm commissions were not "required" expenditures under any circumstances:

> … CardUX receives compensation only if [Compo] determines that a sale is beneficial. The [SRA] gives [Compo] sole discretion over whether to accept any sale to an Approved Prospect …

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[8] It is irrelevant that the judgment exceeds $500,000. *See* Brf. 18. The argument would turn contracts into options. If the Restricted Activities Provision is triggered by actual expenditures, Compo need only fail to include a multi-year contract in a future year budget if it wanted to evade its obligations. Compo omits mention of the fact that in 2015, the only year in which the SRA was unbudgeted, total payments were $10,000.

Op. 93. As a result, Compo's "exercise of discretion may result in no Commission owed, or a reduction or delay in the payment of Commission …" *Id.* n.383; SRA §5.2(A201).

3. Fiduciary-Beneficiary Transactions Are Not Void *Per Se.*

The contention that the voidable/void dichotomy does not apply because Kleinschmidt was a fiduciary fails because, as Compo acknowledged in its Chancery Court briefing, "the [Compo] governance documents eliminate fiduciary duties." A925; *accord* Op. 101; LLCA§5.1(A142). Moreover, as the Trial Court found, "[i]f anyone should have ensured that CompoSecure took the necessary action to make the Authority Representations accurate, it was Logan, Hollin, and CompoSecure's counsel." Op. 74.

Compo offers no authority supporting its novel claim that traditional concepts such as voidable/void and ratification are not available to fiduciaries. While it cites out-of-context snippets from *Dieckman v. Regency GP LP*, 155 A.3d 358 (Del. 2017) (Brf. 26-27), *Dieckman* had nothing to do with whether a transaction was void or voidable or whether it was ratified. *Dieckman* stands for the unremarkable proposition that LLC agreements overriding fiduciary duties do not shield misstatements used to procure approval for conflicted transactions. *Id.* at 367-68.

The legally wanting fiduciary argument also is premised on a factual mischaracterization – a repeated insinuation Kleinschmidt acted dishonorably because he knew the SRA required prior approvals. *E.g.* Brf. 25. The Trial Court credited Kleinschmidt's testimony that he had not read the LLC Agreement before signing, but charged him with constructive knowledge – hardly a morally culpable circumstance. Op. 63-64. Of course, if Kleinschmidt knew the SRA was unauthorized, so did Logan, Hollin and Herslow.

4. The Safe Harbor Validates the SRA.

The LLC Agreement itself explicitly renders the SRA binding – even if unauthorized. Pursuant to the Safe Harbor, "[a]ny Person dealing with the Company, ***other than a Member***, may rely on the authority of the Board (or any Officer authorized by the Board) in taking any action in the name of the Company without inquiry into the provisions of this Agreement or compliance herewith." (LLCA§4.1(j)(A138) (emphasis added)). CardUX is not a Member.

By comparison, the Related Party Provision extends to ***affiliates*** of Members and Directors. The omission of affiliates here "manifests an intent not to include Affiliates." *See EBG Holdings LLC v. Vredezicht's Gravenhage 109 B.V.,* 2008 Del. Ch. LEXIS 127, at *36 (Del. Ch. Sept. 2, 2008) ("by expressly including Affiliates" in indemnification provision "while referring only to parties in the

jurisdiction provision, [LLC Agreement] manifested an intent *not* to include Affiliates" in that provision).

The Trial Court erroneously concluded the Safe Harbor was inapplicable because Logan lacked explicit Board-vested authority to sign the SRA and, therefore, was not an "Officer authorized by the Board." Op. 61.[9] If the Board authorized the officer to take the challenged action, the provision would be unnecessary. It is basic that a "contract should not be interpreted to render one of its terms meaningless." *Porreca v. City of Millville*, 16 A.3d 1057, 1070 (N.J. Super. Ct. App. Div. 2011). The only plausible reading of the phrase is that the Board must have vested the Officer with her official status.

5. Compo Would Turn Contracts Into Options.

Compo's basic premise is: operating under a fully-executed contract, Party A cannot rely on Party B's representation the agreement is authorized and binding, even if Party B demands and accepts Party A's performance. That rule would incentivize parties to do exactly what Compo is doing here – sign a contract and then decide with hindsight whether to ratify or disclaim it.

Courts consistently reject such gamesmanship. For example, in *In re Reliable Mfg. Corp.*, 703 F.2d 996, 1003 (7th Cir. 1983), a guarantor "attempt[ed]

[9] The Trial Court's rationale was not argued by Compo, but raised *sua sponte* in the Opinion. CardUX, therefore, did not have the opportunity to make the points argued here.

to escape its liability" by claiming the guarantee was "void" because "it was not given for a proper corporate purpose." Applying Delaware law, the Seventh Circuit rejected the attempt to escape liability "by arguing that a contract it executed was beyond its power." *Id.*

One reason for abolishing the *ultra vires* doctrine in the corporate context through the 1967 enactment of 8 *Del. C.* § 124 "was to prevent both corporations and those contracting with them from avoiding contracts that could be classified as 'outside the scope of the…[corporation's] powers." *SEPTA v. Volgenau*, 2012 Del. Ch. LEXIS 206, at *6-7 (Del. Ch. Aug. 31, 2012). "Predictability and confidence in the efficacy of an agreement were the commercially reasonable objectives" for jettisoning the doctrine. *Id.* at *7. The General Assembly recognized the doctrine "was a double-edged sword, available under certain circumstances to both corporations and those contracting with corporations to escape from their contractual liabilities." *Id.* at *7 n. 8 (quoting David A. Drexler, et al., *Delaware Corporation Law and Practice* § 11.05 (2011)). Application of the *ultra vires* doctrine had led to "much confusion and patently inequitable results." Drexler, at § 11.05. Similarly, the legislative history of § 205 confirms it was enacted to avoid "draconian effects." *Genelux Corp. v. Roeder*, 126 A.3d 644, 667-68 (Del. Ch. 2015) (citing H.B. 127, 147th Gen. Assem. § 4 (2013)). "An important goal [of H.B. 127] was to facilitate correction of mistakes made in the context of a

corporate act without disproportionately disruptive consequences." *In re Numoda Corp.*, 2015 Del. Ch. LEXIS 30, at *28 (Del. Ch. Jan. 30, 2015).

Compo's strained efforts "to escape from [its] contractual liabilities" based on ***its*** failure to abide the LLC Agreement would lead to "patently inequitable results," greatly undermining the "[p]redictability and confidence in the efficacy of an agreement." *SEPTA*, 2012 Del. Ch. LEXIS 206, at *7. Compo's arguments find no support in law or the plain language of the Restricted Activities Provision.

II. THE TRIAL COURT CORRECTLY FOUND COMPO RATIFIED THE SRA.

A. Question Presented:

Did the Trial Court correctly find Compo's treatment of the SRA as valid, acceptance of CardUX's performance and acceptance of the benefits of that performance effected a ratification? Op. 69-75.

B. Scope of Review

In reviewing factual findings concerning the defenses of implied ratification and acquiescence, this Court "will not disturb those findings unless they are clearly erroneous and not supported by the record." *Genger,* 26 A.3d at 190. The application of legal principles is reviewed *de novo. Id.*

C. Merits of Argument

The Trial Court held the SRA was binding and enforceable because Compo "accepted the existence of the contract and treated it as valid and binding." Op. 69-73. That holding is correct as a matter of law.

1. Compo Ratified the SRA.

Compo does not deny that voidable contracts are enforced if ratified. The Trial Court's finding that "[o]n the facts of this case, CompoSecure's conduct ratified the Sales Agreement" (Op. 72) was overwhelmingly supported by the record.

A party "is deemed to have acquiesced in a complained-of act where he[] has full knowledge of his rights and the material facts and (1) remains inactive for a considerable time…" *Klaassen v. Allegro Dev. Corp.*, 106 A.3d 1035, 1047 (Del. 2014).[10] The same is true under New Jersey law. *See Am. Photocopy Equip. Co. v. Ampto, Inc.*, 198 A.2d 469, 474 (N.J. Super. Ct. App. Div. 1964) (corporation's "failure to disaffirm the unauthorized act of its agent within a reasonable time, will under certain circumstances amount to the acquiescence from which ratification will be implied"). Even if Compo had disaffirmed the SRA when it first claimed it was unauthorized (despite its continuing acceptance of contract benefits), its acquiescence lasted as long or longer than periods found by Delaware and New Jersey Courts to constitute ratification. *E.g. Dannley v. Murray*, 1980 Del. Ch. LEXIS 639, at *12-13 (Del. Ch. July 3, 1980) (3 months); *Thermo Contracting Corp. v. Bank of New Jersey*, 354 A.2d 291, 296 (N.J. 1976) (6 months); *Ajamian v. Schlanger*, 89 A.2d 702, 704 (N.J. App. Div. 1952) (6 months).

Implied ratification and acquiescence apply where a party "acts in a manner inconsistent with the subsequent repudiation, which leads the other party to believe the act has been approved." *Klaassen*, 106 A.3d at 1047. As the Trial Court found:

[10] Any argument that Compo did not realize the SRA required formal approval clashes with its repeated assertion that CardUX had actual knowledge of the LLC Agreement provisions because Kleinschmidt signed it.

Compo "treated the Sales Agreement as valid and accepted its existence," leading CardUX to believe it was authorized and binding. Op. 75.

Compo's Authority Representation in the SRA is itself sufficient to validate the agreement. Contracting parties may rely on the truth of representations. *Cobalt Operating, LLC v. James Crystal Enterprises, LLC,* 2007 Del. Ch. LEXIS 108, at *89-92 (Del. Ch. July 20, 2007), *aff'd*, 945 A.2d 594 (Del. 2008). Similarly, "[u]nder New Jersey law, a party's reliance is generally reasonable even if it accepts the other party's representations as true without further inquiry." *Tonglu Rising Sun Shoes Co. v. Nat. Nine (USA) Co.*, 2016 U.S.Dist. LEXIS 175701, at *11 (D.N.J. Dec. 20, 2016). While Compo may contend the representation was itself unauthorized, having been aware the representation was made and that CardUX would rely on it, Compo cannot now disavow it. *Hannigan v. Italo Petroleum Corp*., 47 A.2d 169, 172 (Del. 1945); *Johnson v. Hosp. Serv. Plan*, 135 A.2d 483, 487 (N.J. Super. Ct. 1957).

Compo offers three arguments for why the SRA was not ratified. *First*, it contends the Trial Court applied New Jersey law, instead of Delaware law. Brf. 27-30. *Second*, it contends the SRA could only be ratified if formally approved in accordance with the requirements of both the Related Party and Restricted Activities Provisions. *Id.* 30-36. *Third*, it accuses Kleinschmidt of "unclean hands." *Id.* 36.

2. Under New Jersey and Delaware Law, Ratification Occurred.

The Trial Court held Delaware law governed Logan's authority to execute the SRA, but implied ratification and acquiescence "raise[] substantive questions of contract law." Op. 56. The holding was based, in part, on the SRA's sweeping New Jersey choice of law clause. A215. Applying New Jersey law, the Trial Court held Compo ratified the SRA and is bound. Op. 75.

Compo argues Delaware law applies because "the application of the laws of two different states to different pieces of one action" is improper. Brf. 27. It does not deny that, if New Jersey law applies, the Trial Court correctly applied it. Nor does it argue the Delaware law is different.

Although Compo argues this Court previously rejected the application of the laws of two states to one action, Brf. 27, none of its authorities make such a pronouncement and none involved multiple contracts with different choice of law provisions. *See Bell Helicopter Textron, Inc. v. Arteaga*, 113 A.3d 1045, 1052 n.28 (Del. 2015) (limiting analysis of tort liability and damages to one state's law; no "extraordinary circumstances … justify unraveling the connections between the duties owe[d] and the remedies afforded"); *Weil v. Morgan Stanley DW Inc.*, 877 A.2d 1024, 1032-33 (Del. Ch. 2005) (choice of law provision applied to contract claims "and other claims that arise *solely* out of the relationship created by [the] contract")(emphasis added).

There is no such rule. Delaware courts have not hesitated to apply the law of multiple jurisdictions where circumstances warrant. *See Xu Hong Bin v. Heckmann Corp.*, 2009 Del. Ch. LEXIS 188, at *16 n.9 (Ch. Oct. 26, 2009) ("fiduciary duties … governed by Delaware law while general contract duties are governed by New York law"); *Standard Gen. L.P. v. Charney*, 2017 Del. Ch. LEXIS 854, at *24 (Del. Ch. Dec. 19, 2017) ("apply[ing] Delaware law to all claims and affirmative defenses concerning or incident to [the Agreements] containing Delaware choice of law provisions and … New York law to all claims and affirmative defenses concerning or incident to [the Agreements] containing New York choice of law provisions.").

Further, no relevant differences exist between Delaware and New Jersey law. Analyzing Delaware ratification law in *Dannley*, for example, the Chancery Court quoted extensively and with approval from the New Jersey Supreme Court's decision in *Thermo*. *Dannley,* 1980 Del. Ch. LEXIS 639, at *9-13. Compo is certainly aware of *Dannley*, having relied on it in post-trial briefing. A925.

This Court quoted *Dannley* with approval in analyzing implied ratification and acquiescence in *Genger*, 26 A.3d at 195 n. 61, 62; 196 n. 67. Consistent with New Jersey law, *Genger* teaches ratification "may be either express or implied through a party's conduct" and "precludes a party 'who [has] accept[ed] the benefits of a transaction from thereafter attacking it.'" *Id*. at 195. "Ratification of

an unauthorized act may be found from conduct ‘which can rationally be explained *only* if there were an election to treat a supposedly unauthorized act as in fact authorized’” or “where a party ‘receives and retains the benefit of [that transaction] without objection, [] thereby ratify[ing] the unauthorized act and estop[ping] itself from repudiating it.’” *Id.* (corrections and emphasis in original). *Genger* also stated that “[i]mplied ratification occurs ‘[w]here the conduct of a complainant, subsequent to the transaction objected to, is such as reasonably to warrant the conclusion that he has accepted or adopted it, [and] his ratification is implied through his acquiescence.’” *Id. Accord Klaassen,* 106 A.3d at 1047; *Hannigan.*, 47 A.2d at 172-73.

Regardless of whether Delaware or New Jersey law applies, the legal standards for implied ratification and acquiescence are the same. Under either state’s law, the Trial Court’s determination that Compo ratified and acquiesced to the SRA, and that the SRA is valid and binding, stands.

3. No Formal Vote Is Required for Ratification.

Compo argues that although it believed the SRA was valid and binding, although it represented to CardUX it was authorized, and although it accepted the benefits and demanded continued performance, "ratification in this context requires formal action." Brf. 35. The argument is simply a rehash of its contention that the SRA is void, not voidable because the traditional rule doesn't apply to fiduciaries.

Compo misconstrues the form of ratification argued by CardUX and found applicable by the Trial Court:

> CardUX does not invoke entity-based principles of ratification, which would involve one or more decision makers at CompoSecure formally making the decisions necessary to authorize the Sales Agreement…Rather, CardUX invokes the agency-based doctrine of implied ratification, or ratification by acquiescence ...

Op. 67. As shown above, ratification by acquiescence does not require a formal act in the form that would have conferred proper authority in the first place. "Implied ratification occurs '[w]here the conduct of a complainant, subsequent to the transaction objected to, is such as reasonably to warrant the conclusion that he has accepted or adopted it, [and] his ratification is implied through his acquiescence.'" *Genger*, 26 A.3d at 195.

Here again, Compo cites no authority for its professed understanding of Delaware law. Its reliance on *Espinoza v. Zuckerberg*, is misplaced. Brf. 35. In

Espinoza, a controlling stockholder argued he could "ratify the decision of an interested board of directors without complying with the formalities of the provisions of the DGCL for taking stockholder action." 124 A.3d 47, 58 (Del. Ch. 2015). That ratification was of a significantly different nature than here – not an affirmation to approve a transaction, but one "shift[ing] the judicial standard of review from one of entire fairness to business judgment." *Id.* Chancellor Bouchard quoted with approval *Lewis v. Vogelstein*, 699 A.2d 327 (Del. Ch. 1997), in which former Chancellor Allen:

> explained how "[r]atification is a concept deriving from the law of agency," but went on to elaborate that "[a]pplication of these general ratification principles to shareholder ratification is complicated by three other factors," namely (1) the lack of a single individual acting as principal – a factor not present here, (2) a purpose to demonstrate compliance with fiduciary duties rather than to validate unauthorized conduct, and (3) the existence of the DGCL as a statutory overlay. The Chancellor commented that these "differences between shareholder ratification of director action and classic ratification by a single principal … lead to a difference in the effect of a valid ratification in the shareholder context.

Id. at 58-59. *Espinoza* recognized *Lewis* as "demonstrat[ing] the need to be sensitive to the peculiarities of the corporate context when applying general principles of ratification." *Id.* at 59. Thus, "stockholder ratification of an interested transaction, so as to shift the standard of review from entire fairness to the business judgment presumption, cannot be achieved without complying with the statutory formalities in the DGCL for taking stockholder action." *Id.* at 66.

4. Compo's Unclean Hands Argument Is Legally and Factually Specious.

Again attempting to engraft a fiduciary standard onto an LLC Agreement disavowing fiduciary duties, Compo argues its own failure to authorize the SRA formally requires CardUX to prove entire fairness. Brf. 36-37. The Trial Court rejected that argument, finding the negotiations were at arms-length between sophisticated parties represented by counsel:

> It is true that Kleinschmidt bargained in his own interest when he negotiated the Sales Agreement, but this does not mean he has unclean hands. Kleinschmidt openly negotiated opposite Logan and Hollin. They and the rest of CompoSecure's leadership team knew about Kleinschmidt's interests and his roles as a manager and member of CompoSecure… CompoSecure has not identified any misrepresentations that Kleinschmidt made…This is not a case where unclean hands should be used to implement a form of quasi-reformation. The parties bargained for terms. Those terms should be enforced.

Op. 104. And, as already noted, the LLC Agreement disavows fiduciary obligations.

Compo misrepresents the one decision on which it relies – *Gatz Props., LLC v. Auriga Capital Corp.*, 59 A.3d 1206 (Del. 2012) (Brf. 36). According to Compo, in applying an LLC agreement's related party provision, the *Gatz* Court construed the phrase "at arm's length" as "an explicit contractual assumption … of an obligation subjecting the manager and other members to obtain a fair price,"

which was "the contractual equivalent of the entire fairness standard of conduct and judicial review." Brf. 36 (quoting *Gatz*, 59 A.3d at 1213).

Gatz says no such thing. The conclusion that the agreement provided for the "contractual equivalent" of entire fairness was not based on the phrase "arm's length," but on specific "operative language" which was "'on terms and conditions which are less favorable to the Company than the terms and conditions of similar agreements which could then be entered into with arms-length third parties, without the consent of a majority of the non-affiliated members.'" 59 A.3d at 1213, n.18.

The Related Party Provision here contains no substantive fairness standard; a transaction need only be "at arms' length and approved by the Board, the Investors and the Class A Majority." LLCA§5.4(A143). It is undisputed that the SRA was negotiated at arm's length. In addition, while Compo's LLC Agreement eliminates fiduciary duties, in *Gatz* "the existence of fiduciary duties under the LLC Agreement" was contested. 59 A.3d at 1218.

Even if fairness were an issue, the Trial Court correctly held the commission is fair. Compo argues CardUX earned a supposed windfall on an order it did not generate. Brf. 37. The Trial Court recognized, however, CardUX could just as easily confer a windfall on Compo by generating sales on which it earned no commission.

Of course, it is irrelevant whether a contract is a bad or good deal. "Parties have a right to enter into good and bad contracts, the law enforces both." *Nemec v. Shrader,* 991 A.2d 1120, 1126 (Del. 2010); *see also CPG Tinton Falls Urban Renewal, LLC v. Twp. Of Neptune,* 2007 N.J.Super. LEXIS 285, at *13 (N.J. Super. Ct. App. Div. Oct. 23, 2007)(court will not "make a better contract for parties than they themselves have seen fit to enter into"). While Compo argues otherwise, Brf. 37, fiduciaries are entitled to enforce their contracts. *Bird v. Lida, Inc*., 681 A.2d 399, 406 (Del. Ch. 1996) (officer or director "is under no equitable duty to forego a contracted for return at a future time should changes in market conditions make his contract especially advantageous").

III. THE SRA'S TERMS SHOULD BE ENFORCED ON THE ALTERNATIVE BASIS OF *QUANTUM MERUIT*.

A. Question Presented.

If the SRA is found to be unenforceable, is CardUX entitled to a 15% commission under the doctrine of *quantum meruit*?

B. Scope of Review.

This Court has "power to decide issues not reached below," the exercise of which "is controlled by balancing considerations of judicial propriety, orderly procedure, the desirability of terminating litigation, and the position of the lower court as the primary trier of issues of fact." *Weinberg v. Baltimore Brick Co.,* 112 A.2d 517, 518 (Del. 1955).

C. Merits of the Argument.

CardUX argued to the Trial Court that, if the SRA was unenforceable, it would be entitled to the same 15% commission under the doctrine of *quantum meruit*. A907-08; *see also* CardUX PreTrial Opening Brf. 34-36. Having found the SRA was enforceable, the Chancery Court did not reach that issue. It is an alternative basis for affirmance, even though not raised through cross-appeal. *See, e.g., In re Santa Fe Pac. Corp. Shareholder Litig*., 669 A.2d 59, 67 (Del. 1995).

Under New Jersey law, unjust enrichment requires proof the "defendant received a benefit" and "retention of that benefit without payment would be unjust." *VRG Corp. v. GKN Realty Corp*., 641 A.2d 519, 526 (N.J. 1994). The

claimant must have "expected remuneration … at the time it performed or conferred a benefit on defendant," and the failure to pay must have "enriched defendant." *Canon Financial Services, Inc. v. Bray*, 2015 U.S. Dist. LEXIS 23060, at *15 (D.N.J. Feb. 26, 2015). Delaware law establishes similar requirements. *Nemec,* 991 A.2d at 1130.

CardUX's principals elected to forego other business activities to assist Compo. They used their extensive industry relationships to market metal cards to specific users, and generally educate the market. The Trial Court found Compo "accept[ed] the benefits of CardUX's extensive efforts to perform under the Sales Agreement." Op. 69, 71-72.

CardUX relied on Compo's express agreement to pay 15% of Approved Prospect revenues. Compo reaped the benefits of CardUX's performance, and its refusal to pay is unconscionable. *Pike Creek Prof'l Ctr. v. E. Elec. & Heating, Inc.*, 540 A.2d 1088 (Table)(Del. 1988)(affirming *quantum meruit* damages where plaintiff unjustly enriched by uncompensated construction services); *Lawrence v. Dibiase*, 2001 Del. Super. LEXIS 368, at *22-26 (Del. Super. Ct. Feb. 27, 2001)(imposing quasi-contract remedy where plaintiff performed design services for and at request of defendants).

The remedy for unjust enrichment is "reasonable" compensation. Where, as here, the parties agreed on fee terms, those terms are presumptively reasonable.

Jacobson v. Dryson Acceptance Corp., 2002 Del. Ch. LEXIS 130, at *45-46 (Del. Ch. Nov. 1, 2002) (bargained-for agreement was appropriate damage measure for unjust enrichment because "substance of the bargain these parties actually struck" was clear). The reasonableness is further demonstrated by the SRA's reciprocal risks and Compo's practice of paying an effective 15% commission on sales from personalization partners. Op. 6, 92-93.

The Trial Court also declined to decide whether fee shifting was appropriate under the American Rule, given Compo's failure to dispute that prevailing parties were entitled to fees and costs under the SRA. Op. 109-11. Given the Trial Court's multiple findings of testimony that was untrue and arguments that were unfounded, fee shifting is appropriate even if *quantum meruit* damages are awarded. *See, e.g., Johnston v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542, 547 (Del. 1998) (shifting fees for knowingly asserting false claims); *Auriga Capital Corp. v. Gatz Properties*, 40 A.3d 839, 880-81 (Del. Ch. 2012) ("splatter[ing] the record with a series of legally and factually implausible assertions" constitutes "subjective bad faith"); *Nagy v. Bistricer*, 770 A.2d 43, 65 (Del. Ch. 2000).

CONCLUSION

For the reasons stated, CardUX respectfully requests an Order affirming the Trial Court's decision that the SRA is valid and enforceable, as outlined above.

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