IN THE SUPREME COURT OF THE STATE OF DELAWARE

GREGORY A. HOLIFIELD and GH BLUE HOLDINGS, LLC,	
Defendants Below, Appellants/Cross-Appellees,	Case 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.	

APPELLANTS' OPENING BRIEF

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NATURE OF PROCEEDINGS

In this appeal, Appellants seek reversal of a judgment entered by the Court of Chancery that it viewed as inequitable. In doing so, Appellants respectfully ask this Court to clarify and distinguish, or overrule, certain holdings in *CompoSecure, L.L.C. v. CardUX, LLC* ("*CompoSecure II*"), 206 A.3d 807 (Del. 2018) and *Absalom Absalom Tr. v. Saint Gervais LLC* ("*Absalom*"), 2019 WL 2655787 (Del. Ch. June 27, 2019) that bound the trial court to enter an unfair judgment contrary to the facts of the case proven at trial.

Plaintiff-below XRI Investment Holdings LLC acquiesced to Defendant-below Gregory Holifield transferring his Class B member units in XRI to an entity he wholly owns and controls, GH Blue Holdings, LLC (the "Blue Transfer"). XRI knowingly participated in the Blue Transfer. XRI acknowledged and accepted the benefits of the Blue Transfer. XRI assisted in conceiving the idea for the transaction, assisted in structuring it, and assisted in getting it to closing in June 2018. In August 2018, XRI's CEO, Matthew Gabriel, took credit for all of this assistance. Holifield reasonably and faithfully believed that the Blue Transfer was valid and had been approved by XRI.

Eight months later, in mid-2019, XRI determined that the Blue Transfer violated XRI's LLC Agreement because it lacked written consent of the board. XRI did not tell Holifield this. And XRI did not take steps to challenge the Blue Transfer.

To the contrary, XRI's board made the affirmative, "calculated legal and business decision" that it "didn't need to."

Two and half years later, XRI's board decided that it *did* need to.

XRI eventually commenced a declaratory judgment action in the Delaware Court of Chancery—three years after the Blue Transfer. XRI sought to prove that the Blue Transfer violated XRI's LLC Agreement and was therefore void *ab initio*. Holifield sought to defend the claim by proving that XRI participated in and knowingly acquiesced to the Blue Transfer, which would bar XRI's entitlement to relief. In response to Holifield's defense, XRI sought to bar the Court of Chancery's application of any equitable principles relying upon *CompoSecure II* and *Absalom*.

After careful consideration, the Court of Chancery issued a lengthy opinion in which it determined, *inter alia,* (i) the Blue Transfer breached the LLC Agreement which specified as a consequence that the transfer "shall be void"; (ii) Holifield properly raised, and the trial court properly considered, equitable defenses to XRI's claims under Delaware law; (iii) Holifield proved that XRI participated in and acquiesced to the Blue Transfer; and (iv) Holifield at all times believed—reasonably and good faith—that the Blue Transfer was valid and had been approved by XRI.

Notwithstanding these findings of fact, the Court of Chancery determined that *CompoSecure II* and its progeny required entry of judgment declaring the Blue Transfer void *ab initio* because the LLC Agreement used "the word 'void'" to describe the consequences of the violation XRI proved. The Court of Chancery also determined that *CompoSecure II* and its progeny precluded entry of judgment recognizing that XRI's acquiescence barred the relief sought.

The Court of Chancery ruled in XRI's favor, "contrary to the equities of the case." The Court of Chancery also held that if the doctrine of acquiescence applied, it would bar XRI's claim to any relief and judgment would enter declaring that the Blue Transfer resulted in an assignee-only interest held by Blue.

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Two issues are presented in this appeal.

First, whether parties to LLC agreements can stretch the bounds of contractual freedom to avoid equity jurisprudence altogether by simply using the word void to specify incurable voidness. That is, does Delaware law *via CompoSecure II* and the cases applying it endorse, without restriction, the ability of parties to specify a consequence of contractual noncompliance that is absolutely invulnerable to equity's reach?

Second, if *CompoSecure II* does endorse the parties' ability to contract out of equity, should not Delaware require a more specific language formulation than just "the word 'void'" in order that contractually specified incurable voidness be created predictably and applied consistently?

SUMMARY OF ARGUMENT

1. The principle of incurable voidness recognized in *CompoSecure II* ought be reserved for illegitimate acts that violate limits imposed by the state, *qua* sovereign. The *full* reach of equity should have been available to the Court of Chancery to address the parties' post-contracting behavior in this case—expressions, communications, deeds, inactions, and tacit modifications—no matter the words of violation-consequence the parties elected to use in the LLC Agreement, and no matter the analytical vehicle of fact-specific inquiry the Court of Chancery used to determine the effect of such behavior.

2. The trial court erred by applying the provision *sub judice*—"shall be void"—in the same way as the "voidness language" contained in *CompoSecure II* ("void and of no force or effect whatsoever"), *Absalom* ("null and void"), and *Southpaw* ("null and void *ab initio*"). In order that a rule of contractually specified incurable voidness be consistently and predictably applied, a more specific and emphatic contract language formulation should be required to invoke such a rule (*e.g.*, "null and void *ab initio*")—particularly if the parties intend to contractually eliminate equity's *full* reach.

STATEMENT OF FACTS

A. The Parties

Plaintiff-below/Appellee XRI Investment Holdings LLC ("XRI" or the "Company") is a full-cycle water recycling and midstream infrastructure company servicing the energy exploration and production industry. Op. 9.[1] Matthew Gabriel is a former corporate lawyer who specialized in private equity transactions and co-founded XRI with Holifield. Op. 2, 10. Gabriel is a Class B member, CEO, and board member of XRI. Op. 2, 10–11. XRI's sole Class A member is a fund affiliated with Morgan Stanley. Op. 11. Three Morgan Stanley designees serve on XRI's five-member board: Logan Burt, Mark Bye, and John Moon. Op. 11.

Defendant-below/Appellant Gregory Holifield is a co-founder of XRI (with Gabriel) and a Class B member/board member. Op. 1, 11. Holifield is a combat veteran who served as an Infantry Officer, an Explosive Ordnance Disposal Specialist, and a Uniformed Army Scientist during his twenty-two years of duty in the Unites States Army. Op. 9.

Defendant-below/Appellant GH Blue Holdings, LLC ("Blue") is a single-member LLC formed by Holifield. Op. 1.

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[1] Citations to "Op. __" refer to the Court of Chancery's post-trial Opinion, dated September 19, 2022. A copy of the Opinion is attached hereto as Exhibit A.

B. The Genesis of XRI and the XRI Loan

In 2013, Holifield and Gabriel co-founded XRI's predecessor, XRI Blue. Op. 9. In 2016, they sold a controlling interest in XRI Blue to a fund affiliated with Morgan Stanley. Op. 10. The resulting entity, XRI, is a Delaware entity governed by an operating agreement (the "LLC Agreement"). Op. 10; A0045–139.[2]

As part of the consideration for the sale, Holifield and Gabriel received Class B membership units in XRI and arranged multi-million dollar loans from XRI. Op. 11. At all relevant times, Holifield's capital account at XRI had a positive balance of $20 million. Op. 14–15, 39–40. *See* A0156. Holifield's loan was to be received by Entia, LLC ("Entia"), an entity co-owned by Gabriel and Holifield, but controlled by Holifield. Op. 10–11. The loan was documented by a secured promissory note that contemplated a single balloon payment, in the amount of $10,611,356.88, with accrued interest, due on August 8, 2020 (the "XRI Loan"). Op. 11; A0140–149. Under this structure, XRI could levy on Holifield's Class B units if the loan was not repaid. Op. 11.

XRI filed a UCC-1 financing statement with the State of Florida in 2016, identifying Holifield as the debtor at his home address, identifying XRI as the secured party, and identifying Holifield's Class B units as the collateral for the XRI Loan. Op. 11; A0150–155; A0498 (Gabriel Dep. 84:20–23).

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[2] Citations to "A___" refer to the Appendix to Appellants' Opening Brief.

C. The Blue Transfer and the Assurance Loan

In May 2018, Holifield sought to raise money for Entia through a \$3.5 million loan from Assurance Mezzanine Fund (the "Assurance Loan") to support nascent businesses that he and Gabriel were developing through Entia. Op. 12, 14, 16, 28.

Throughout May and into early June 2018, Holifield approached XRI through Gabriel and Burt to discuss the proposed structure of the Assurance Loan as well as the transfer and encumbrance restrictions that the LLC Agreement placed upon Holifield's Class B units. Op. 2, 12–31. *See* A0160–161. "Gabriel's guidance was important because Gabriel had a stronger relationship with Morgan Stanley, and dealmaking fell within his skill set." Op. 13. *See* A0551 (Holifield Dep. 94:1–22).

On May 8, 2018, Gabriel met with Assurance's manager, Seth Ellis, about Holifield's efforts to obtain capital for Entia. Op. 14–15. To support those efforts, Gabriel created a spreadsheet that showed Holifield's Class B units "had substantial value in excess of the amount due on the XRI Loan and would support an additional loan like the one that Ellis discussed with Gabriel." Op. 15; A0156. *See* A0653 (Gabriel 119:9–11). Gabriel was "in the loop about the Assurance Loan" from the beginning and "understood what was going on." Op. 31. Gabriel "helped Holifield raise capital" for Entia. Op. 12 n.6. *See* A0382; *see also* A0674 (Holifield 203:18–204:9).

Gabriel conferred internally at XRI with Burt and other Morgan Stanley board designees, as well as XRI's lawyers, about the contemplated Assurance Loan. Op. 26, 77. *See* A0162–163. Gabriel first previewed with Morgan Stanley the concept and the idea of the Assurance Loan to Entia, then suggested that Holifield speak directly with Burt. Op. 16. *See* A0673 (Holifield 197:23–198:18). Burt also discussed Holifield's initial proposals involving the Assurance Loan internally with other Morgan Stanley representatives. Op. 17; A0157. *See* A0636 (Burt 49:16–23). Burt told Holifield that his initial proposal (*i.e.*, a direct second-position pledge of the Class B units to Assurance) was unlikely to receive approval by XRI's board. Op. 17. At the same time, Burt reassured Holifield that XRI's board did not want to interfere with efforts to raise capital for Entia. *Id.* He told Holifield that as long as the loan arrangement stayed "on [Holifield's] side of the ledger, then Morgan Stanley didn't care." Op. 17; A0673 (Holifield 197:4–22); A0630 (Burt 26:22–27:10); A0158–159.

After the call with Burt, Holifield and Gabriel "brainstormed" how to structure a transaction accordingly. Op. 18. Holifield worked with his lawyers to develop a transaction structure that, per Burt, was entirely on Holifield's side of the ledger and thus did not require any further involvement by Morgan Stanley's board designees. Op. 18; A0158–159. The structure included Holifield creating a newly formed LLC—Blue—for which Assurance became a general creditor. Op. 20–21.

Holifield's Class B units would be transferred to Blue, and Assurance would become Blue's only general creditor. Op. 20–21. Assurance "would not receive any security interest" in Holifield's Class B units, but instead received a right to the net proceeds of any sale of the Class B units (*i.e.,* after satisfying the XRI loan), and only after Holifield personally received and deposited (if) any net proceeds. Op. 20–21; A0158. The idea for the structure of the Assurance Loan and the proposed Class B unit transfer to Blue came out of Holifield's exchanges with Gabriel and Burt. Op. 18, 23, 29. *See* A0673 (Holifield 198:2–18). The transaction was ultimately structured so that "XRI would be unaffected." Op. 21. The "structure did not prejudice XRI in any way, because it did not affect the XRI Loan or XRI's interest in the Disputed Units. As the only creditor with a pledge of the units, XRI was the only party that could levy on the Disputed Units themselves." Op. 56.

XRI, through Gabriel, knew all of the material facts about Holifield's intent to transfer his Class B units to Blue, and knew the material terms of the Assurance Loan. Op. 2, 76–77. Gabriel and Holifield discussed "in real time" during May and June 2018 the Assurance Loan and its structure involving the proposed Class B unit transfer to Blue. Op. 31 n.14. *See* A0671–672 (Holifield 190:4–196:1). Gabriel understood the proposed transaction and assisted Holifield to structure it. Op. 2, 31, 77. Gabriel knew that the Assurance Loan documents were being carefully drafted *not* to give Assurance any security interest in or direct claim against the Class B units. Op. 29, 31, 77. And Gabriel knew that there was no real uncertainty about the Assurance Loan closing in conjunction with the Class B unit transfer. Op. 2, 31, 77.

"Holifield and his counsel believed—reasonably and in good faith—that they had created a mechanism that did not affect XRI's side of the ledger." Op. 25. Holifield and his counsel also believed—reasonably and in good faith—that Morgan Stanley's board designees did not want XRI to be involved in Holifield's capital-raising efforts for Entia, unless its approval was contractually required. Op. 12–13, 17–18, 25, 30–32. Importantly, Burt's ledger-based instruction, and Gabriel's subsequent assistance to Holifield to structure such a transaction, supported those reasonable beliefs. Op. 30, 70. Because of XRI's words and deeds, "Holifield and his counsel believed—reasonably and in good faith—that they had created a mechanism that did not affect XRI's rights and did not require XRI's approval." Op. 30.

On June 5, 2018, XRI, through Gabriel, signed off on Holifield's transfer of his Class B units in XRI to Blue (the "Blue Transfer"). Op. 26, 77; A0164–165. *See* A0166–179. In connection therewith, XRI executed an amended pledge agreement, and approved a revised UCC-1 financing statement identifying Blue as the debtor and Blue as the holder of the Class B units as collateral for the XRI Loan. A0359–378; A0244–246. *See also* Op. 28.

On June 6, 2018, the documents for the Blue Transfer and Assurance Loan were fully executed, and the transaction closed. Op. 57–58; A0180–358. Gabriel knew that the Assurance Loan had closed. Op. 2, 77. *See* A0379–381. In an August 2018 email, Gabriel emphasized the credit he deserved for his assistance to Holifield and Entia in connection with structuring and closing the Assurance Loan and the Blue Transfer. Op. 2, 31–32; A0382.

In April 2019, XRI's lawyers requested, received, and reviewed the transaction documents executed in connection with the Blue Transfer and Assurance Loan. Op. 34, 73; A0384–385; A0386–388. For three weeks, XRI's lawyers pored over the transaction documents. Op. 34, 73, 77–78. XRI's lawyers formed "a strong opinion" that the Blue Transfer constituted "a violation" of the LLC Agreement, but XRI did not take any action. Op. 34, 73; A0659–660 (Gabriel 144:21–145:5). Instead, on May 6, 2019, XRI's lawyers told Holifield that XRI "continues to review the situation…," to determine whether the Blue Transfer violated the LLC Agreement. Op. 34, 73; A0389–390.

"In reality," however, XRI "decided that the matter was not worth pursuing." Op. 34. *See* Op. 73. Burt confirmed that XRI's board "had made a business judgment that it wasn't worth the hassle and legal expense to clarify a position that the company didn't need to clarify." Op. 34, 73, 77–78; A0637 (Burt 54:17–20). XRI's decision made "complete sense" because neither the Blue Transfer nor the

Assurance Loan "impaired XRI's position in . . . any way" and XRI "benefited from the Blue Transfer." Op. 73–75; A0746–751.

D. The XRI Loan Default

As the XRI Loan's August 8, 2020 maturity date approached, Holifield and Burt began to discuss restructuring and repayment scenarios. Op. 35. Burt took the position that XRI could simply *take* the Class B units in lieu of timely and full repayment of the XRI Loan on August 8, 2020. Op. 35; A0675 (Holifield 208:2–17). Holifield disagreed that XRI could do so without recognizing the "fair market price" of the Class B units in accordance with the Uniform Commercial Code (the "UCC"). Op. 35–36; A0675 (Holifield 208:2–17). The discussions broke down at that point. *Id.*

On August 12, 2020, XRI sent Holifield a formal default notice by email and letter threatening to foreclose on the Class B units held by Blue as collateral for the XRI Loan. Op. 36; A0391–393. Holifield responded immediately to the email. Op. 36. Holifield wrote that XRI would be required to take commercially reasonable steps under the UCC in connection with any foreclosure. Op. 37; A0394–395. He also noted that XRI's recent financial performance made it clear that the Class B units' value far exceeded the amount due ($10.6 million plus interest) on the XRI Loan. A0394–395.

XRI neither responded to nor otherwise addressed Holifield's invocation of the UCC. Op. 37. This was because XRI viewed engaging in a commercially reasonable disposition of the Class B units "as not a reasonable or viable option to pursue," and "horrifically damaging to XRI." Op. 37; A0661 (Gabriel 152:4–21).

E. XRI's October Surprise

At some unidentified point in October 2020, XRI's board revisited its eighteen-month-earlier "business judgment"—*i.e.*, that it "didn't need to" challenge the Blue Transfer as a violation of the LLC Agreement. Op. 3–35, 37; A0593–623 (¶ 54); A0412–436 (¶¶ 21, 29). XRI's board determined that: (i) the Blue Transfer violated the LLC Agreement and should not be recognized; and (ii) XRI would undertake a strict foreclosure to obtain the Class B units to satisfy the XRI Loan. Op. 37; A0593–623 (¶ 54).

Although Holifield was a member of XRI's board at the time, XRI did not notice a board meeting. Op. 37. XRI's board did not tell Holifield that it now viewed the Blue Transfer as invalid or that foreclosure efforts would commence. Op. 37. And XRI ensured that Holifield would not find out—by the board's affirmative decision "not [to] memorialize, in any minutes or other writing, the XRI board's determination about the [Blue Transfer]." Op. 37–38; A0661 (Gabriel 150:18–23).

On October 16, 2020, XRI commenced strict foreclosure efforts. Op. 38; A0593–623 (¶ 55); A0396–399. XRI's lawyers directed a letter proposal (to which

Holifield had a strict twenty-day period to respond under the UCC) for FedEx-only delivery to a defunct address for Holifield and Blue *that XRI knew was defunct*. Op. 4, 36, 38; A0676 (Holifield 209:16–210:17). *See* Op. 36 n.17.

XRI did not transmit a copy of the letter to Holifield by email as was typical. Op. 38. XRI did not deliver a copy of the letter to the debtor's address listed on the Florida UCC-1—*i.e.*, Holifield's home address, well-known to Gabriel in particular through their Entia co-ownership. Op. 38; (Gabriel Dep. 84:20–23). XRI also did not attempt to transmit or deliver a copy of the letter by any of the other channels through which XRI's principals, lawyers, and board members regularly communicated with Holifield and his lawyers. Op. 11, 38.

Holifield never received the October 16, 2020 FedEx-only letter proposal. Op. 38; A0687 (Holifield 255:14–21). XRI's lawyers received only a FedEx confirmation denoting a "C19" electronic signature—reflecting delivery without signature due to Covid-19. Op. 38; A0400–401.

On November 30, 2020, XRI informed Holifield that his failure to "timely object or respond" to the October 16 FedEx-only letter proposal resulted in a strict foreclosure under the UCC because XRI had "accepted" all of his Class B units to satisfy the XRI Loan. Op. 39; A0400–404. Of course, this time, XRI directed its correspondence (i) to Holifield's home address, (ii) to Holifield's email address, *and* (iii) to Holifield's lawyers. Op. 39. On the same day—by the same multiple means of delivery and transmittal—XRI sent a letter purporting to remove Holifield from XRI's Board. Op. 39. *See* A0409–411.

Holifield promptly objected to XRI's attempted strict foreclosure. Op. 5, 39; A0405–406. XRI responded on December 18, 2020, again by letter and email, asserting for "the first time . . . definitively [] the position that the Blue Transfer was void, as opposed to merely suggesting the possibility." Op. 39; A0407–408.

XRI maintains that its strict foreclosure efforts resulted in (i) the forfeiture of all of Holifield's Class B units to satisfy the XRI Loan, (ii) the elimination of his Class B membership interest, and (iii) the zeroing out of his $20 million capital account. Op. 40. If successful, Morgan Stanley and Gabriel would stand to capture (proportionately *via* their own Class A and B ownership interests in XRI, respectively) the excess value of Holifield's Class B units after crediting the approximately $12.3 million due on the XRI Loan—*plus* the "zeroing out" of Holifield's $20 million positive balance capital account. Op. 39–42.

Gabriel explained at trial that XRI's financial information provided to both Holifield and a third party supported a realistic valuation of Holifield's Class B units in the $40–$50 million range. Op. 14–15, 41. *See* A0676 (Holifield 211:1–20). Thus, the excess value captured by Morgan Stanley and Gabriel in a successful strict foreclosure could exceed $35 million—and would be entirely at Holifield's expense. Op. 4–6, 41–42.

XRI and Holifield both acknowledge that the legal effectiveness of XRI's strict foreclosure efforts, along with issues relating to the value of the Class B units, will be implicated in follow-on UCC litigation in New York. Op. 4 n.1, 4–6, 41–42.

F. The Proceedings Below

Trial took place on June 15, 2022. *See* A0624–698. The parties introduced 292 exhibits and lodged six deposition transcripts. Op. 8. Three fact witnesses testified live. *Id.*

XRI proved that the Blue Transfer violated Section 8.01(a) of the LLC Agreement. Op. 1, 50, 64–65. Holifield proved that XRI acquiesced to the Blue Transfer. Op. 1–2, 43, 66, 68, 78.

i. XRI Proved That the Blue Transfer Violated the LLC Agreement.

Section 8.01 of the LLC Agreement established a general prohibition on members transferring their member interests (the "No Transfer Provision"). Op. 1, 42; A0104–105 (§ 8.01). Holifield contended that the Blue Transfer fell within an exception to that general prohibition (the "Permitted Transferee Exception"). Op. 1, 42; A0104–105 (§ 8.01). XRI proved that the Blue Transfer must be considered as part of the Assurance Loan under the step-transaction doctrine, meaning that the Assurance Loan provided consideration for the Blue Transfer. Op. 1, 50. Thus, Holifield could not show that the Blue Transfer fit within the Permitted Transferee Exception. Op. 1, 44, 50, 65.

XRI therefore proved its claim that the Blue Transfer violated the No Transfer Provision. Op. 42, 64–65. The LLC Agreement addresses the consequences of a noncompliant transfer at Section 8.03:

> **Transfers In Violation of Agreement.** 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) (bold in original; emphasis added).

The trial court found that XRI was entitled to a declaration that the Blue Transfer was "void" under Section 8.03. Op. 65–66.

ii. Holifield Proved that XRI Consciously Acquiesced to the Blue Transfer.

The trial court also found that Holifield had satisfied all of the requirements to prove the defense of acquiescence. Op. 1–2, 43, 66, 68, 78. Holifield proved that XRI's full knowledge and approval of the Blue Transfer in June 2018, followed by a twenty-eight month period of inactive silence, followed by a *volte-face* challenge to the Blue Transfer three years after it took place, clearly established XRI's acquiescence. Op. 6, 34–35, 68, 74–75, 77–78. Holifield proved that XRI took a series of actions—all while XRI knew everything material that it wanted and needed to know about the Blue Transfer—which caused Holifield to reasonably believe that XRI did not object to the Blue Transfer. Op. 2, 78. XRI recognized and accepted the benefit *to XRI* created by the Blue Transfer. Op. 73–74. And XRI determined as part of a calculated legal and business strategy not to challenge the Blue Transfer. Op. 74–75, 78. *See* A0637 (Burt 54:8–20). According to the trial court:

> During those periods, Holifield reasonably believed that the Blue Transfer was acceptable to XRI. Gabriel's deep involvement in the process supported that good faith belief. So did Burt's instruction to keep any capital raise on his side of the ledger. So did Gabriel's execution of the Blue Pledge. So did XRI's failure to take any action after receiving full information about the Assurance Loan.

Op. 75.

iii. CompoSecure II and its Progeny Render the Blue Transfer Incurably Void and Render XRI's Acquiescence to the Blue Transfer Invulnerable to Redress.

Holifield properly raised the defense of acquiescence, and thereafter proved all of its elements, making it necessary for the trial court to address XRI's argument that *CompoSecure II* and its progeny rendered the Blue Transfer incurably void under Section 8.03 and invulnerable to equitable defenses. Op. 7–8, 43, 66, 78, 103. The trial court ruled that the defense of acquiescence could not be considered and the Blue Transfer was incurably void under *CompoSecure II's* precedent. Op. 7–8, 44–45, 64–65, 103, 109.

The trial court noted that such result was "disquieting" because it was "contrary to the equities of the case." Op. 7–8. The trial court further observed that:

> If the defense of acquiescence were available, then the court would find that XRI acquiesced in the Blue Transfer and could not challenge its validity. The court then would declare that the Blue Transfer caused

> Blue to become the owner of an assignee interest in the Disputed Units, and the court would grant judgment in favor of Holifield and Blue.

Op. 8; *see also Id.* 44, 110, 154.

iv. The Final Order and Judgment.

By Final Order and Judgment entered on October 3, 2022, the trial court confirmed Holifield's breach of Section 8.01(a) and the invalidity of the Blue Transfer. Final Order ¶¶ 1–3.[3] The trial court confirmed that the acquiescence defense was barred by *CompoSecure II*. *Id.* ¶ 6; Op. 109. The trial court rejected entry of a proposed partial final judgment under Court of Chancery Rule 54(b) that would preserve certain issues for further litigation, ruling that ". . . the factual findings in the Opinion *regarding XRI's knowing participation in the Blue Transfer*, . . ." would preclude any additional or alternative relief under Section 8.01(a) of the LLC Agreement. Final Order ¶¶8(a)–(b) (emphasis added).

[3] A copy of the Final Order and Judgment is attached hereto as Exhibit B.

ARGUMENT

I. *COMPOSECURE II*'s RELEVANT HOLDING SHOULD BE OVERRULED AND JUDGMENT ENTERED IN FAVOR OF DEFENDANTS.

A. Question Presented

Can parties to a limited liability company agreement specify an outcome of contractual noncompliance that is strictly incurable and immune to the Court of Chancery's equitable review?

This issue was raised below (A0789–793) and considered by the Court of Chancery (Op. 102–109, 111).

B. Scope of Review

The Court reviews questions of law and contract interpretation *de novo*. *Genger v. TR Invs., LLC*, 26 A.3d 180, 190 (Del. 2011). Findings of historical fact after a trial are subject to the deferential "clearly erroneous" standard of review. *Poliak v. Keyser*, 65 A.3d 617 (Del. 2013) (Table). That deferential standard applies to the trial court's finding of acquiescence *sub judice*, which constitutes "not only [] historical facts that are based upon credibility determinations but also [] findings of historical fact that are based on physical or documentary evidence or inferences from other facts." *Id.*

C. Merits of Argument

The rule of contractually specified incurable voidness recognized in *CompoSecure II* and *Absalom* should be clarified and distinguished or overruled because using the word—"void"—cannot fully immunize a contracting party against the effects of their own post-contract behavior and cannot entirely eliminate equity's reach.

The consequence of incurable voidness should be reserved for acts that violate sovereign-imposed limitations upon actions that parties can legitimately take. A contract or a conduct that is void *ab initio* contravenes such limitations. A contract or a conduct that does not contravene the 'metes and bounds' of the sovereign-created legal environment is therefore voidable, not void *ab initio*.

Delaware grants maximum freedom to parties ordering their affairs, but those parties cannot—by mere use of the word "void" in an LLC agreement—stretch the bounds of our State's policy to maximize contractual freedoms to avoid altogether our State's venerable equity jurisprudence.[4] This is because:

> The acoustically sensitive walls of equity's cathedral are tuned to benign sounds law cannot hear, and witnesses regularly speak to chancellors of circumstances deemed irrelevant in common law courts. She imputes intention to fulfill express or implied obligations; whereas the same obligations may not be enforceable elsewhere for sometimes primitive legal reasons. Her chancellors seek to provide and insure fair

[4] *See infra* footnote 11.

> dealing when the forms of law are sometimes supine and lifeless. Though equity customarily follows the law, it is not so "slavishly nor always."

Hack v. Concrete Wall Co., 85 N.W.2d 109, 113–14 (Mich. 1957) (citing *Graf v. Hope Bldg. Corp.*, 171 N.E. 884, 887 (N.Y. 1930) (Cardozo, C. J., dissenting)).

Delaware recognizes this same nuanced, ever evolving, role of equity:

> [T]he Chancellor always has had, and always must have, a certain power and freedom of action, not possessed by the courts of law, of adapting the doctrines which he administers. He can extend those doctrines to new relations, and shape his remedies to new circumstances, if the relations and circumstances come within the principles of equity, where a court of law in analogous cases would be powerless to give any relief.

In re Carlisle Etcetera LLC, 114 A.3d 592, 602–03 (Del. Ch. 2015) (quoting *Schoon v. Smith*, 953 A.2d 196, 204–205 (Del. 2008)).

Equity fills gaps where the law inadequately fits. *Schoon v. Smith*, 953 A.2d at 204 (citing Donald J. Wolfe, Jr. & Michael A. Pittenger, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 2–2[a], at 2–2 (2006)). "Indeed, its *raison d'être* is that actions at law sometimes produce an unjust result that equity will not abide." *Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2004 WL 2050527, at *4 (Del. Super. Ct. Sept. 15, 2004) (Abelman, J.).

XRI freely participated in, and knowingly acquiesced to, precisely the contractually noncompliant act for which it sought relief in the Court of Chancery. Here, one of equity's least elegant forms ought prevail—*i.e.*, the court will sometimes simply "leave the parties where they find them." *Geronta Funding v. Brighthouse Life Ins. Co.*, 284 A.3d 47, 60 (Del. 2022). That result fits here.

i. The Procedural Posture of CompoSecure II and IV, and Absalom

The manner in which the issue of contractually specified voidness arose in *CompoSecure II* resulted in this Court not having the benefit of meaningful prior authority from Delaware and beyond addressing the issue. *See* Op. 106–109, 115–120. *CompoSecure II* involved the language "void and of no force or effect whatsoever" contained in an LLC agreement, and addressed only the defense of ratification to the extent the provision using 'void' language was applicable upon remand. *CompoSecure II*, 206 A.3d at 816–17. The trial court found "the 'void' provision" inapplicable on remand, and therefore did not address the issue of voidness or the applicability of defenses thereto. *Id.* at 818–819; *see Composecure, L.L.C. v. Cardux, LLC* ("*CompoSecure IV*"), 213 A.3d 1204 (Del. 2019). The trial court's remand opinion was affirmed. *CompoSecure IV*, 213 A.3d at 1205. Thus, neither the Delaware Supreme Court nor the Delaware Court of Chancery had the opportunity to issue a reasoned written opinion on the historically confusing concept of contractual voidness, or the nuanced issues pertaining to contractually specified incurable voidness in the alternative entity context. *See* Op. 108.

Approximately six months after *CompoSecure II*, and a month before *CompoSecure IV*, the Court of Chancery issued its decision in *Absalom*. *Absalom* involved an LLC agreement's transfer/assignment provision using the language "null and void" to describe the consequences of a violation. *Absalom*, 2019 WL 2655787, at *4. The Court of Chancery was called upon to address the assertion of multiple equitable defenses in addition to ratification and held that *CompoSecure II*'s "logic extends to other equitable defenses as well." *Id.* *Absalom* ruled that "[u]nder *CompoSecure* [*II*], Absalom cannot rely on equitable defenses to validate its status as a member," because "using the word 'void' in an LLC Agreement" renders a noncompliant assignment "invulnerable to equitable defenses" and "immune to equitable defenses." *Id.*

Absalom's expansion of *CompoSecure II's* holding to render "invulnerable" and "immune" *all* equitable defenses by mere use of "the word void," in an LLC agreement is a too-harsh—too-sharp—doctrinal shift. That is not to say that the *Absalom* Court was unfaithful in its reading of *CompoSecure II*; rather, it is to say: the general rule of *Absalom* involving the historically imperfectly used word "void" deserves a more nuanced analysis because it creates extraordinary tension between the limits of contractual freedom and the broad reach of equity.

The importance of predictability and stability in our law compels attention to historical arcs and doctrinal angles—because "the law does not always develop in a 'straight line'." *See* The Honorable Karen L. Valihura, *The Seventeenth Annual Albert A. DeStefano Lecture on Corporate, Securities, & Financial Law at the*

Fordham Corporate Law Center: The Role of Appellate Decision-Making in the Development of Delaware Corporate Law—A View From Both Sides of the Bench, 23 FORDHAM J. CORP. & FIN. L. 1, 12 (2017).

ii. Delaware Law Before CompoSecure II

Delaware courts historically treated the word 'void' as used in a contract—including the specific term "void *ab initio*"—as meaning something more akin to voidable, and historically recognized the applicability of legal and equitable defenses thereto. *See* Op. 115–120 (discussing *Eureka VIII LLC v. Niagara Falls Holdings. LLC*, 899 A.2d 95 (Del. Ch. 2006), *Genger v. TR Investors, LLC*, 26 A.3d 180 (Del. 2011), and *Paul v. Chromalytics Corp.*, 343 A.2d 622 (Del. Super. Ct. 1975)).

Indeed, at the time of *CompoSecure II*, a long-historical split in authorities existed as to whether use of the word 'void' in describing a noncompliant act meant 'void *ab initio*' or 'voidable.' *See* Op. 120–121 n.57; *Keite v. Clopton*, 124 Eng. Rep. 799, 799 (1657) ("[A]n act or thing may be said [to be] void in several degrees."), Op. 144–146 n.98–99 (collecting authorities showing courts imprecise use of the words 'void,' 'voidable,' 'invalid' and 'unenforceable' and citing *e.g.*, *Void*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("the word [void] is often used and construed as bearing the more liberal meaning of 'voidable.")).

The United States Court of Appeals for the Sixth Circuit tried to address a split amongst the circuits relating to violations of the automatic stay provision of Section 362 of the U.S. Bankruptcy Code by separately defining 'void' and 'voidable':

> In our opinion, the only path that will lead us to the correct answer in the void/voidable debate must begin by defining "void" and "voidable." As should be evident, these words are not synonyms, however, they are often used interchangeably and imprecisely. There is great looseness and no little confusion in the books in the use of the words void and voidable, growing, perhaps, in some degree, out of the imperfection of the language, since there are several kinds of defects which are included under the expressions void and voidable, while there are but two terms to express them all.
>
> "Void" is defined as "an instrument or transaction [that] is nugatory and ineffectual so that nothing can cure it," and as "that of no legal force or effect and so incapable of confirmation or ratification." "Voidable" is defined as "not void in itself," and as "capable of being adjudged void, invalid, and of no force." We think that "invalid" is a more appropriate adjective to use when defining an action taken against a debtor during the duration of the automatic stay. Like the word "void," "invalid" describes something that is without legal force or effect. However, something that is invalid is not incurable, in contrast to a void action which is incapable of being ratified....
>
> In summary, we hold that actions taken in violation of the stay are invalid and voidable and shall be voided *absent limited equitable circumstances*.

Easley v. Pettibone Michigan Corp., 990 F.2d 905, 909 (6th Cir. 1993) (citations omitted) (emphasis added).

Many modern courts have undertaken a "functionalist approach" that views "void, voidable, and unenforceable" as incapable of being independently defined because they are simply different facets of the same, undivided concept. *See* Jesse A. Schaefer, *Beyond A Definition: Understanding the Nature of Void and Voidable Contracts*, 33 CAMPBELL L. REV. 193, 208 (2010); *see also* Op. 145–146 n.98 (citing Abraham J. Levin, *The Varying Meaning and Legal Effect of the Word "Void,"* 32 MICH. L. REV. 1088, 1094 (1933) [hereinafter Levin, *Void*] ("Efforts to distinguish between 'void' and phrases having a like meaning are not helpful since the approach is through definition rather than by an effort to seek out the principles governing the operation of the words.")).

Delaware has recognized this nuanced, functional approach. In *Solomon v. Armstrong*, then-Chancellor Chandler observed that the distinction between void and voidable acts was "textured," and therefore, "sometimes confusing." 747 A.2d 1098, 1114 (Del. Ch. 1999), *aff'd*, 746 A.2d 277 (Del. 2000). *Solomon* observed that "the list of void acts, while not exclusive, is nonetheless very restricted," describing acts that a corporation has no implicit or explicit authority to undertake, and acts that are fundamentally contrary to public policy. *Id.*; *see* Op. 121–122 n.58 (contracts deemed void *ab initio* under common law were "those opposed to positive law, those which are contrary to morality and those which offend public policy."); *PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Trust*, 28 A.3d 1059, 1067 (Del. 2011).

"On the list of voidable acts," *Solomon* observed, were those "performed in the corporation's interest but beyond management's explicit authority..." as well as other acts that may implicate fiduciary relations. *Solomon*, 747 A.2d at 1114.

Importantly, like other pre-*CompoSecure II* Delaware cases, (*i.e., Eureka, Genger*, and *Paul*), *Solomon* embraced the notion that the Court of Chancery's equitable powers were not foreclosed or eliminated even as to acts deemed "void *ab initio*." *Id.* (holding that while "[n]o amount of shareholder ratification validates acts repugnant to public policy . . ., and which are therefore void *ab initio,...those acts may still be subject to this Court's equitable powers* (*e.g.,* rescission).") (emphasis added).

In Delaware, prior to *CompoSecure II*, neither use of "the word 'void'" in a contract, nor an act deemed void *ab initio*, foreordained the elimination of equitable powers.

iii. The Limits of Privately Ordering Incurable Voidness in LLCs

Claims seeking declarations or damages by contracting parties relating to violations of an LLC agreement are ordinarily susceptible to, and routinely subjected to, the application of legal and equitable defenses. *See generally* Op. 79–103. This is because LLC agreements are primarily creatures of contract that are construed and interpreted under Delaware law like other contracts. *See* Op. 135 n.84.

Delaware courts frequently observe and explain how an LLC's 'primarily' contractual nature does not equate to a primacy of ultimate authority, nor an 'exclusively' contractual nature. Op. 141–143. Similarly, our courts often observe that 6 *Del. C.* § 18-1101(b)'s policy of giving "maximum effect" to both (i) freedom of contractual ordering, and (ii) enforceability of the same, *does not* equate to 'absolute' effect, freedom, or enforceability. *Id.*

Thus, even though the LLC Act expressly authorizes an LLC agreement to specify a remedy that will apply in the event of breach,[5] and the law emphasizes the enforceability of such specified remedies, Delaware courts remains generally resistant to rote enforcement of contractually inalterable provisions, *i.e.*, 'locked-in' legal or equitable remedies. *See* Op. 136–139 n.85–87. For example, parties cannot contractually dictate a right to an injunction, a mandamus, or for specific performance that bypasses the trial court's inherent authority of discretion. Op. 139–140 n.88–92. Parties cannot contractually dictate or confer jurisdiction of the Court of Chancery, or even contractually lock in a contractual choice of law. Op. 136–138 n.86.

Parties also cannot strictly mandate a remedy of rescission or reformation of an LLC Agreement's provision, nor strictly insulate an LLC Agreement from

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[5] Notably, the LLC Act does not expressly authorize an LLC agreement to specify a legal or equitable defense that is inapplicable in the event of a breach.

rescission or reformation by eliminating a court's inherent judgment in awarding such relief. *See* Op. 139–140 n.92 (citing *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 174 (Del. 2002) ("Rescission . . . is awarded as a matter of judgment.")). Finally, and importantly here, under current Delaware law contracting parties cannot strictly 'lock-in' complete integration of an LLC agreement, *e.g.*, *via* a no-oral-modification provision, and cannot strictly 'lock-out' a waiver of an LLC agreement's provision.[6] Op. 137 n.85–86.

The principle that parties to an LLC agreement cannot establish a strict regime dictating a specific outcome, award, decree, or remedy for contractual noncompliance makes considerable sense because under Delaware law, "... parties have a right to renounce or amend [an] agreement in any way they see fit and by any mode of expression they see fit." *Pepsi-Cola Bottling Co. of Asbury Park v. Pepsico, Inc.*, 297 A.2d 28, 33 (Del. 1972). In *Pepsi-Cola,* this Court recognized that even absent consideration by the trial court of the "formal requirements" of an asserted contract defense, the trial court properly focused upon its inherent role to resolve "the factual issue of what the conduct of the parties was and what the effect of this conduct amounted to." *Id.* at 33–34; *see* Op. 115–120; *see also In re PNC Delaware v. Berg*, 1997 WL 720705, at *4 (Del. Super. Ct. Oct. 22, 1997) ("[H]owever one

[6] The holding of *CompoSecure II* would seem to leave room for parties to bypass this well-developed area of LLC jurisprudence altogether by simply using the word "void" in anti-waiver provisions and integration clauses.

characterizes the behavior . . ., whether it be in terms of waiver, acquiescence, estoppel, abandonment, or novation, the evidence is overwhelming that [it] forewent its claim on the contract rights . . . .")

In *In re Coinmint, LLC*, Vice Chancellor Zurn acknowledged *Absalom's* extension of *CompoSecure II's* logic to other equitable defenses. 261 A.3d 867, 897–900 (Del. Ch. 2021). The court found that the LLC agreement provisions at issue did not contain the necessary "voiding language" to impact the asserted defenses. *Id.* But *Coinmint* nevertheless highlighted the trial court's inherent role to consider and address "post-contract behavior" like "promises, communications, or modifications to [an] express agreement," "no matter the analytical vehicle; whether couched in terms of waiver, acquiescence, *or other fact-specific inquiry*, . . ." *Id.* (emphasis added); *See also id.* at 908 n.267 (citing *Carlisle*, 114 A.3d at 605–06) (LLCs are not "purely contractual," because Delaware *qua* sovereign "retains an interest" that includes the ability of the sovereign's courts "to oversee and, if necessary, dissolve the entity.")).

Chancellor McCormick discussed these principles recently in *Totta v. CCSB Fin. Corp.*, observing that because LLCs plainly accept benefits—by their creation and administration—provided by Delaware, *qua* sovereign, "the sovereign retains an interest in that entity," and "[t]hus, Delaware courts…retain some measure of inherent residual authority so that entities created under the authority of Delaware law could not wholly exempt themselves from Delaware oversight." 2022 WL 1751741, at *17 (Del. Ch. May 31, 2022), *judgment entered*, (Del. Ch. 2022), *cert. denied*, 2022 WL 4087800 (Del. Ch. Sept. 7, 2022), *and appeal dismissed*, 2022 WL 4124751 (Del. Sept. 12, 2022) (quoting *In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940, 960 n.8 (Del. Ch. 2010)). And such Delaware oversight expressly includes, "the rules of law and equity." *See* Op. 143 n.96 (citing 6 *Del. C.* § 18-1104 and its RUPA analog, and discussing that principles of law and equity, including the law of agency and estoppel, are "supplementary" to the governance of Delaware LLCs and LPs).

The throughline of *Pepsi-Cola, Paul, Coinmint,* and *Totta* is the recognition that Delaware courts retain an inherent measure of authority and oversight in Delaware contract relations—one that is supplemented by principles of law and equity—and one that endures even at the maximized outer bounds of contractual freedom. This is so *precisely because* contracting parties may conduct themselves—*post*-contract—"in any way they see fit and by any mode of expression they see fit." *Pepsi*, 297 A.2d at 33.

These authorities strongly suggest that contracting parties cannot use the word "void" to create an escape-hatch that wholly exempts post-contract behavior (*i.e.*, however 'they saw fit') from judicial considerations of fairness by strictly eliminating all equitable defenses.[7] The principle of contractually specified incurable voidness recognized in *CompoSecure II* and *Absalom* should be reconsidered and overruled because it allowed XRI to do just that—and compelled the trial court to rule in way that *it viewed* to be demonstrably unfair.

iv. Equity Ought Prevail – "Always"[8]

XRI freely assented—by words and deeds—to the Blue Transfer. XRI, through Gabriel, assisted in conceiving the Blue Transfer, and assisted in closing the Blue Transfer. XRI participated in the Blue Transfer by executing and approving supporting documents, and XRI benefited from the Blue Transfer. All the while, XRI calculated a legal and business strategy to lie in wait for an opportunistically prolonged period of more than two years—knowing that Holifield faithfully and

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[7] *See* Op. 148-149 (citing *DuPont v. DuPont*, 85 A.2d 724, 727 (Del. 1951)). The trial court's *dicta*—though addressing an issue the parties did not raise directly below—aptly observed:

> There is an odd disconnect between a constitutional system in which even the General Assembly faces limitations on its ability to limit equity's reach, but parties can foreclose this court's ability to consider equitable defenses by using the word "void" in an agreement.

[8] *In re Carlisle Etcetera LLC*, 114 A.3d at 602–03 ("[T]he Chancellor *always has had*, and *always must have*, a certain power and freedom of action, not possessed by the courts of law, of adapting the doctrines which he administers.") (emphasis added).

objectively relied upon XRI's words-and-deeds assent and participation in order to undertake the Blue Transfer.

This conduct above was the *real*—'as-they-saw-fit'—post-contract relationship involving XRI and Holifield *viz*. the Blue Transfer: XRI's acquiescence *proven by facts* after a full and fair trial in the Court of Chancery. Despite that "[e]quity always attempts to . . . ascertain, uphold, and enforce rights and duties which spring from the *real* relations of parties," *CompoSecure II* results in XRI's acquiescence being immune to redress. *Carlisle*, 114 A.3d at 607 (citations omitted) (emphasis in original). *CompoSecure II* should be reconsidered and its holding overruled, thereby recognizing equity cannot be avoided in every context.

Long-recognized considerations implicated by a finding of acquiescence ought prevail. A party "who participates in or acquiesces in an action has no standing in a court of equity to complain against it, even though the act be against the permission of the law." *Trounstine v. Remington Rand, Inc.*, 194 A. 95, 99 (Del. Ch. 1937); *see also Mead v. Collins Realty Co.*, 75 A.2d 705, 707 (Del. Super. Ct. 1950) (". . . the thought of one party to a contract with full knowledge of the facts deliberately excusing some minor breach in performance and thereafter bringing an action for damages is repugnant.").[9]

[9] *See also* Op. 112, 121, 130 (proffering that a consequence of contractually specified incurable voidness is to enable a party responsible for a defective act to take advantage of their own nonfeasance, misfeasance, or even malfeasance.)

In *Morente v. Morente,* then-Vice Chancellor Strine acknowledged the "time honored principle that equity will not hear a complainant stultify himself by complaining against acts in which he participated," and observed that estoppel-by-acquiescence "hinges on the fact that a plaintiff should not be permitted to participate knowingly in acts and then come into court to deny them later when it is to the plaintiff's personal advantage." 2000 WL 264329, at *2 n.9 (Del. Ch. Feb. 29, 2000) (cleaned up).

XRI so stultified itself here. XRI belatedly, and unfairly opportunistically, sought to invalidate a transaction to which it assented, in which it participated, and by which it benefited. And XRI sought to deafen a court of equity to the unfair *sounds and effects* of its own words and conduct. The trial court did not need to employ acoustic enhancements to hear or recognize the inequities present in this case—it was audible and obvious after a merits trial. The principle of contractually specified incurable voidness recognized in *CompoSecure II* and *Absalom* should be overruled because contracting parties should not be rewarded for acting inequitably, thus erasing fairness from the fabric of our law.

v. Voidness and Ratification—versus—Voidness and Acquiescence.

It matters that Delaware jurisprudence distinguishes acquiescence from ratification, albeit in a factually nuanced way. "Acquiescence 'properly speaks of assent by words or conduct *during the progress of a transaction*, while ratification suggests an *assent after the fact*.'" *Nevins v. Bryan*, 885 A.2d 233, 254 (Del. Ch. 2005), *aff'd*, 884 A.2d 512 (Del. 2005) (quoting *Frank v. Wilson & Co.*, 32 A.2d 277, 283 (Del. 1943) (emphasis added)).

Our compatriots in New York, richly endowed in corporate/equity jurisprudence themselves, also recognize subtle distinctions involving the doctrines of ratification and acquiescence. New York courts recognize that "[a]cquiescence as a defense has, speaking generally, a dual nature." *Bernard v. Citibank, N.A.*, 151 N.Y.S.3d 87, 92 (N.Y. App. Div. 2021) (quoting *Pollitz v. Wabash R.R. Co.*, 100 N.E. 721,725 (N.Y. 1912)). "It may, upon the one hand, rest upon the principle of ratification, and may be denominated implied ratification, or it may, upon the other hand, rest upon the principle of estoppel, and may be denominated equitable estoppel." *Id.*

Whether a party can invoke the defense of acquiescence to a "void" act in New York depends upon which form the acquiescence defense takes. New York courts apply the doctrines *via* a dual-track approach.[10]

When an acquiescence-styled defense rests on the principle of ratification, New York courts, consistent with *CompoSecure II*, indicate that such defense cannot overcome a breach of a non-assignment provision that expressly declares a violation

[10] *See* Peter J. Sluka, *Magic Words Still Matter, and Equitable Defenses Can't Save a "Void" Transfer*, https://www.nybusinessdivorce.com, (September 19, 2022).

"shall be void." *Horowitz v. Nat'l Gas & Elec., LLC*, 2021 WL 4478622, at *10 (S.D.N.Y. Sept. 30, 2021), *appeal withdrawn*, 2022 WL 16580105 (2d Cir. July 6, 2022) (holding that a "non-consensual assignment" violated the 'void' provision resulting in an "incurable *legal* nullity" to which the defenses asserted were "unavailable as *a matter of law*.") (emphasis added).

But when an acquiescence-styled defense rests on the *equitable* estoppel side of the tracks, New York courts, consistent with *Trounstine* and *Carlisle*, indicate that "[w]hen a party with full knowledge . . . freely does what amounts to a recognition or adoption of a contract or transaction as existing, or acts in a manner inconsistent with its repudiation, and so as to affect or interfere with the relations and situation of the parties, [that party] acquiesces in and assents to it and is *equitably* estopped from impeaching it, *although it was originally void or voidable*." *Bernard*, 151 N.Y.S.3d at 93 (emphasis added) (citing *Rothschild v. Title Guarantee & Tr. Co.*, 97 N.E. 879, 881 (N.Y. 1912) ("Equitable estoppel will be applied, 'in accordance with established general principles, in order that the transactions and dealings may result justly and fairly with the parties concerned with them.")); *Carmona v. Gene Kazlow, P.C.*, 2017 WL 3316091, at *8 (E.D.N.Y. Aug. 2, 2017); *In re Levy*, 893 N.Y.S.2d 142, 144 (N.Y. App. Div. 2010).

Thus, New York's approach to voidness and the permissible invocation of acquiescence-styled legal and equitable defenses is consistent with the "textured" approach to voidness Chancellor Chandler articulated in *Solomon*. Like equity itself, Delaware's approach to contractually specified voidness should focus upon the *real* relations and circumstances of contracting parties rather than a strict, general rule born from an elusively defined word. *See* Levin, *Void*, at 1101 ("*Circumstances* govern the application of language, and application involves judicial process and principles of substantive law and not the use of a dictionary.") (emphasis added)).

Those oft-nuanced contract relations and circumstances in one instance may simply compel the ready consequence of incurable voidness, but in another instance, may alert equity's delicate ear to a viable defense that impels a fair result.

II. *COMPOSECURE II* AND *ABSALOM* SHOULD BE CLARIFIED, DISTINGUISHED, OR OVERRULED, AND THE JUDGMENT BELOW REVERSED AND ENTERED IN FAVOR OF DEFENDANTS.

A. Question Presented

Did the trial court err by construing and applying *CompoSecure II* too broadly—as applied by the Court of Chancery in *Absalom*—because here the LLC Agreement's "shall be void" provision rendered the Blue Transfer merely voidable rather than incurable?

The issue was raised below (A0790–0793) and considered by the Court of Chancery (Op. 44–47, 120 n.57, 128–138).

B. Scope of Review

The Court reviews the trial court's construction of an operating agreement *de novo*. *Gerber v. Enter. Prods. Holdings, LLC*, 67 A.3d 400, 416–17 (Del. 2013).

C. Merits of Argument

Absalom's ruling indicates that "using the word 'void'" in a contract is adequate under *CompoSecure II* to render contractual noncompliance "invulnerable" and "immune" to all equitable defenses. In this respect, *Absalom* goes too far.

As Judge Cardozo wrote nearly a century ago in *Wood v. Lucy, Lady Duff-Gordon*, "[t]he law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today." 118 N.E. 214, 214 (N.Y. 1917). Delaware's broader view and modern approach to talismanic words is aptly articulated as follows:

> As the Court does not grant relief because the "magic" words are used, the Court conversely does not deny relief for failure to use the "magic" words, provided, of course, that the requisite showing is otherwise accomplished.

Dobler v. Montgomery Cellular Hldg. Co., 2001 WL 1334182, at *7 n.28 (Del. Ch. Oct. 19, 2001) (Noble, V.C.).

As argued above, incurable voidness should be reserved for void *ab initio* acts: those that violate sovereign-dictated limitations or fundamental public policy. Using *the word* "void" in a contract to describe a contract violation should not be a hair-trigger that automatically springs to eliminate fairness considerations of parties' post-contract conduct.

Yet, if *CompoSecure II* and *Absalom* reflect the cardinal direction in which our law is now set to steer, then arriving at incurable voidness *via* language in an LLC agreement must require more than just *a* word—and more than just *the* word "void."[11] Lack of clear, consistent, historical *and* contemporary, legal application

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[11] Delaware's long path to clarity in connection with parties' ability to expand, eliminate, or restrict the default fiduciary duties by language in an LLC agreement should be taken into account. That is to say: "'[a]lthough fiduciary duties may be disclaimed, agreements' *drafters must do so clearly*, and *should not be incentivized to obfuscate or surprise* investors by ambiguously stripping away the protections investors would ordinarily receive.' Indeed, it is now settled in this court that the removal of default fiduciary duties through an LLC agreement *must be accomplished with clear and unambiguous language*." *77 Charters, Inc. v. Jonathan D. Gould*, 2020 WL 2520272, at *9 (Del. Ch. May 18, 2020) (quoting *Ross Hldg. & Mgmt. Co. v. Advance Realty Gp., LLC*, 2014 WL 4374261, at *15 (Del. Ch. Sept. 4, 2014);

of the word 'void' and its linguistic cousins—alongside a "great looseness" of its usage by practitioners-in-transactions, legislators-in-statutes, academics-in-articles (and dictionaries), and jurists-in-adjudications—beckons such a requirement. *See Easley*, 990 F.2d at 909; *see also* Op. 145–146, n.98.

If Delaware is to stem this unpredictable ebb and flow of linguistic inconsistency, to promote uniformity of application by its courts, and to ensure predictability of going-forward efforts by its practitioners, this Court should announce a contractual language formulation (*i.e.*, something more than mere use of *the word* "void") that clearly and emphatically specifies a violation-consequence of incurability and indicates the inapplicability of equitable defenses.

The language formulation "null and void *ab initio*" would do just that. Though *arguably* redundant, the "null" *and* "void" combination makes it emphatic—and the addition of "*ab initio*" makes it explicit. And such a proposed formulation is faithfully born of the contract language previously recognized to specify incurable voidness in *CompoSecure II* ("void and of no further effect

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citing *CelestialRX Invs., LLC v. Krivulka*, 2017 WL 416990, at *16 (Del. Ch. Jan. 31, 2017) and *Feeley v. NHAOCG, LLC*, 62 A.3d 649, 664 (Del. Ch. 2012)) (emphasis added); *Largo Legacy Grp., LLC v. Charles*, 2021 WL 2692426, at *13 (Del. Ch. June 30, 2021). If parties to an LLC agreement, *via* a rule of contractually specified incurable voidness, can elect to 'contract out of equity' they must do so by explicit, express, clear, and unambiguous language.

whatsoever"), flanked by the earlier *Southpaw* ("null and void *ab initio*"), and the later *Absalom* ("null and void").[12]

Because such a doctrinal clarification is warranted and should prevail as the result of this appeal, the result of this appeal should also include reversal of the trial court's judgment and entry of judgment in favor of Defendants.

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[12] *Southpaw Credit Opportunity Master Fund, L.P. v. Roma Rest. Holdings, Inc.*, 2018 WL 658734, at *2 (Del. Ch. Feb. 1, 2018).

CONCLUSION

It is a rare case that would ask the Supreme Court of Delaware to overrule one of its own recent holdings. Yet, it is an equally rare case that the Delaware Court of Chancery would be bound to enter a post-trial judgment *it viewed* to be demonstrably "contrary to the equities of the case."

In order to assure clarity, consistency, and predictability in our law, the Supreme Court of Delaware should clarify and distinguish or overrule the holdings of *CompoSecure II* and *Absalom*—to which the trial court believed it was bound in this case—and clarify that consequences of incurable voidness in Delaware are reserved for acts that violate sovereign-imposed limitations.

The Court of Chancery's decision should be reversed and judgment entered in favor of Defendants to bar XRI's challenge to the Blue Transfer and to recognize an assignee-only interest transfer to Blue.

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