EFiled: Mar 03 2023 04:09PM EST
Filing ID 69270154
Case Number 407,2022

THE SUPREME COURT OF THE STATE OF DELAWARE

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

[CORRECTED] APPELLANTS' REPLY BRIEF AND CROSS-APPELLEES' ANSWERING BRIEF

BERGER HARRIS LLP

Michael W. McDermott (I.D. No. 4434)
Richard I. G. Jones, Jr. (I.D. No 3301)
David B. Anthony (I.D. No. 5452)
Zachary J. Schnapp (I.D. No. 6914)
Harry W. Shenton, IV (I.D. No. 6919)
1105 N. Market Street, 11th Floor
Wilmington, Delaware 19801
Telephone: (302) 655-1140
Fax: (302) 655-1131
mmcdermott@bergerharris.com
rjones@bergerharris.com
danthony@bergerharris.com
zschnapp@bergerharris.com
hshenton@bergerharris.com

Counsel for Defendants Below-Appellants/Cross-Appellees Gregory A. Holifield and GH Blue Holdings, LLC

Dated: March 3, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

This appeal concerns *CompoSecure*'s holding—as extended by the Court of Chancery in *Absalom.* Appellants seek consideration of whether a court of equity may be strictly barred from discerning and applying acquiescence as an equitable defense to a breach of contract if contracting parties use the word "void" to describe the consequence of such breach. Whether *Absalom* properly extended *CompoSecure*'s holding to acquiescence—and all other equitable defenses—is a consideration this Court has not yet had the occasion to undertake.

This case, respectfully, is the occasion.

In 2018, XRI knowingly participated in structuring a transaction that was a breach of its own LLC Agreement. It knew that 'in real time.' More than three years later, XRI commenced this action by sworn allegations claiming the transaction was done in "secret" and its details were entirely "unbeknownst" to XRI. B0016 (¶¶ 53–54). Separately in a Texas Action, XRI claimed the transaction was "secretive and convoluted," and designed "to defraud XRI." C0001, C0015, C00027.

A trial in the Delaware Court of Chancery laid bare XRI's 'secret transaction' claims. By and through extensive documentary and testimonial evidence, and fully supported inferences drawn therefrom, Holifield proved XRI's full material knowledge of, participation in, assistance with, and acquiescence to the 'secret transaction'—all "in real time." Op. 31 n.14. XRI knew about the structure and

implications of the transaction, knew that its ability to 'pick-its-partner' was never in jeopardy, and knew that its primary and exclusive interests were entirely 'unaffected' by the transaction—the Blue Transfer and Assurance Loan. XRI knew that Holifield relied upon XRI's knowledge and assistance to complete the transaction. And XRI knew that Holifield acted in good faith and of reasonable belief that the transaction was both acceptable to XRI and valid under the LLC Agreement.

XRI does not appeal any of the trial court's findings of fact. Not a one.

XRI instead conjures a counterfactual narrative animated by Holifield *qua* bogeymen: a liar, fraudster, serial breacher, hider of documents, and reckless perpetuator of existential threats to XRI's capital structure. And through nearly two-dozen references to the "Texas Action," XRI props up a straw doomsday scenario involving "undisputed" damages, "undeniabl[e]" existential harms, and "real [] peril" (AB 3, 22–24, 27–30, 30 n. 3, 43–44, 53, 58)[1]—all the while, XRI acknowledges that issues raised by the Texas Action are "legally and equitably irrelevant" to this appeal and "serve only as a distraction." AB 4.

~

[1] Citations to "AB __" refer to *Corrected Appellee's Answering Brief on Appeal and Cross-Appellant's Opening Brief on Cross Appeal*, dated February 6, 2023.

In Delaware there is—and always must be—an irreducible measure of inherent equitable discretion exercisable by the Court of Chancery 'to do right and justice' according to the 'real relations' of participants in Delaware business entities, even in max-flex LLC contract relations. Because parties may amend or modify their contracts by any mode of post-contract conduct or expression they see fit, equity's intercession may be called upon to discern the effect of such post-contract conduct. Fundamental expectations of participants in a Delaware LLC include that *both* maximum contractual flexibility and enforceability, *and* fairness and forthrightness—equity—will abide.

Stare decisis does not preclude consideration of the important doctrinal questions raised in this appeal. There is no settled precedent or doctrine that recognizes contracting parties' ability to strictly eliminate acquiescence as a defense or otherwise contractually prohibit the Court of Chancery's exercise of equitable discretion. The Delaware General Assembly's partial response to *CompoSecure* similarly does not preclude this Court's consideration of *Absalom* and its doctrinal implications for Delaware's equity jurisprudence.

Holifield seeks reversal of the order entered below and entry of an order that leaves the parties precisely where the Court of Chancery found them after a full and fair merits adjudication—with Blue as an assignee-only interest holder of Holifield's XRI units through the Blue Transfer to which XRI acquiesced.

~

XRI's cross appeal seeks only a second nibble at damages awards that it did not prove below—damages the trial court determined were precluded in any event by the extensive factual record. The cross appeal secures a second appellate brief for XRI, but merits not a second chance for damages relief *via* remand on any issue.

SUMMARY OF ARGUMENT ON CROSS-APPEAL

1. **Denied.** XRI did not proffer evidence or prove damages associated with its breach of contract claims. The trial court made detailed factual findings about XRI's acquiescence to, assistance with, and participation in the breaching transaction for which it sought damages. These findings fully support the trial court's determination that an award of contract damages is precluded. XRI presents no argument or record evidence on appeal that can disturb the trial court's damages determination as clearly erroneous or an abuse of discretion.

2. **Denied.** XRI did not proffer evidence or prove damages associated with its breach of contract claims. XRI's counterfactual narrative that Holifield engaged willfully or with gross negligence in 'multiple breaches' through a 'record of concealment' is disproven by the trial court's actual findings. The trial court found that Holifield acted at all times reasonably and in good faith.

COUNTER STATEMENT OF FACTS ON APPEAL AND STATEMENT OF FACTS ON CROSS-APPEAL

A. Gabriel's Help, Burt's Directive, and XRI's Knowing Participation.

Holifield and Gabriel co-founded Entia as a services company to provide management and personnel services for a portfolio of operating businesses they were developing. Op. 10. At its peak, Entia had about 256 employees. Op. 10. Holifield and Gabriel both personally owned the interests in Entia's portfolio businesses, including XRI's successful predecessor, XRI Blue. Op. 9–10. When Morgan Stanley purchased a controlling interest in XRI Blue and formed XRI, Gabriel became XRI's CEO. Gabriel and Holifield nevertheless continued to develop opportunities through their Entia portfolio businesses in an effort monetize them. Op. 31–32.

In early 2018, Gabriel and Holifield communicated frequently about Entia and its capital needs. Op. 2, 12. Gabriel was also communicating internally at XRI with Logan Burt and Morgan Stanley about Entia and its capital needs. Op. 13, 16. Burt and Morgan Stanley initially rejected a proposed Entia financing structure involving an Assurance Loan. Op. 17. But Burt promptly "reassured" Holifield that XRI and Morgan Stanley were not attempting to interfere with efforts to raise capital for Entia. Op. 17.

Burt's reassurance to Holifield came through a "directive" not to impair XRI's interests in the Class B units and to keep the financing for Entia entirely on

Holifield's "side of the ledger." Op. 3, 17–18 n.10. This directive made sense because Gabriel and Holifield created Entia and were vested in its next success, *and* they were key stakeholders in XRI—so, Morgan Stanley had an interest in accommodating them. Op. 17–18. Holifield "reasonably understood" the meaning of Burt's directive: "One necessary implication of Burt's comment was that Morgan Stanley would not object if Holifield borrowed the amounts personally, without giving Assurance any security interest specific to the Disputed Units...." Op. 18, 70. Holifield and Gabriel thereafter "brainstormed ways to structure a loan so that the arrangement would be acceptable to Morgan Stanley...." Op. 16–17. Gabriel "discuss[ed] the loan and its structure with Holifield in real time...." Op. 31 n.14. He "helped Holifield develop the structure" of the transaction, "interacted" directly with Assurance to support the transaction, "knew" the Assurance Loan and Blue Transfer closed contemporaneously in June 2018, and "took credit" for his assistance and help with the Assurance Loan in August 2018. Op. 2; *see also* Op. 13–18, 20, 23, 26–28, 31–32.

At bottom, the trial court found that "Gabriel worked with Holifield" to raise capital for Entia through the Assurance Loan and Blue Transfer, and the end result was a loan structure that "did not prejudice XRI in any way, because it did not affect the XRI Loan or XRI's interest in the Disputed Units." Op. 2, 12, 56. The trial court determined that "[t]hrough Gabriel, XRI knew all of the material facts about the Blue

Transfer and the related financing in June 2018, *when the Blue Transfer took place*." Op. 2 (emphasis added).

XRI tries to disclaim its 'real time' knowledge, insisting that Holifield "withheld many significant details of the transaction." AB 15. The trial court disagreed:

> In this litigation, XRI has claimed that Holifield and his counsel *hid documents* from XRI because they knew that the Assurance Loan and Blue Transfer were structured in a way that violated the LLC Agreement. *That is not how I view the evidence*. Op. 30 (emphasis added).
>
> Throughout this litigation, XRI has contended that this email demonstrates an intent by Holifield and his counsel to *defraud XRI* by *withholding information* about the structure of the Assurance Loan. *That is not how I view the evidence*. Op. 25 (emphasis added).
>
> XRI now contends that acquiescence cannot apply because *Holifield misled XRI* about the purpose of the Blue Transfer and *failed to reveal* that it would facilitate the loan to Entia. *The evidence disproves those assertions*. Op. 3 (emphasis added).

B. XRI's Bogeyman: Unproven Lies, Unpled Breaches, and Unsupported "Serial" Bad Acts.

The trial court made a series of specific factual findings about Holifield's good faith beliefs and intentions, as well as the reasonableness of his words and deeds, in connection with the Blue Transfer and Assurance Loan. The trial court repeatedly cited Holifield's and Assurance's credible testimony concerning XRI's knowledge of and participation in the transaction. Op. 12 n.6, 15, 36 n.16. By contrast, the trial

court "stated repeatedly that XRI's two trial witnesses were not credible." AB 30 n.3; *see* Op. 12 n.6, 14 n.7, 15 n.8, 16 n.9, 31 n.14, 34, 36 n.16, 36 n.17.

XRI's effort on appeal to finger Holifield as a 'bad guy' is similarly not credible. XRI calls him a "serial breacher" who "intentionally withheld critical documents" and "provided false or inconsistent testimony" "throughout trial" about the structure of the Blue Transfer and Assurance Loan. AB 2, 17 n.2, 19, 30 n.3, 58.

XRI calls Holifield's creation of Blue as an SPV for estate-planning and creditor-protection benefits a "fiction throughout trial" that should have been viewed more dimly, *i.e.*, as a "record of concealment," and "[d]eception designed to evade an express contractual standard constitut[ing] a willful breach." AB 16–17, 17 n.2 (quoting B0206), 30 n.3, 55, 57–58. But the trial court viewed Holifield's efforts to implement estate-planning and creditor-protection benefits differently. Those efforts "were real," but "were secondary," because "[t]he specific impetus for placing the Disputed Units in an SPV was to facilitate the Assurance Loan." Op. 22–23, 59.

These claimed falsehoods, fictions, and "other breaches"[2] are belied by the post-trial findings. The trial court found no evidence of bad faith, willfulness,

---

[2] *See, e.g.*, AB at 60 ("Holifield breached, again and again, his obligation of confidentiality under the Company Agreement."). XRI confirmed at trial that it had not pled such a claim. During post-trial argument, the trial court recalled this and confirmed: "Yeah. That's why I'm not thinking of it as a claim." A0776 (78:8–13).

negligence, or any bad act by Holifield. It repeatedly found the opposite—*i.e.*, Holifield's good faith and reasonableness:

> [Holifield] demonstrated that XRI took a series of actions which caused [him] to believe—reasonably and in good faith—that XRI did not object to the Blue Transfer, notwithstanding that it was part of a financing transaction. And he demonstrated that XRI took those actions knowing everything that it wanted and needed to know about the Blue Transfer and the associated financing. Op. 2.
>
> Holifield and his lawyers believed—reasonably and in good faith—that they had complied with that [Burt] directive. They believed—again reasonably and in good faith—that XRI and its controller knew everything that they wanted and needed to know. Holifield and his lawyers believed—also reasonably and in good faith—that XRI and its controller did not want or need to be involved in anything else. Op. 3.
>
> I find that 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.
>
> Here too, I believe that 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.
>
> *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 (emphasis added); *see also* Op. 17, 68, 70, 72, 74.

C. The Trial Court Found that the Blue Transfer and Assurance Loan Did Not Harm XRI's Rights—and Instead Benefited XRI.

"The Assurance Loan Documents were carefully drafted *not* to give Assurance any security interest in or direct claim against the Disputed Units." Op. 29 (emphasis in original). The 'pick-your-partner' principle was never threatened here, because "XRI would continue to enjoy its exclusive status as the only secured creditor. . . ." Op. 21. The trial court found that:

> XRI's position would be unaffected. Op. 21.
>
> XRI would be the only creditor that actually could levy on the Disputed Units (as opposed to obtaining a charging order against them). Op. 21.
>
> Notably, this structure did not prejudice XRI in any way, because it did not affect the XRI Loan or XRI's interest in the Disputed Units. Op. 56.
>
> Assurance would not [] have any special rights to foreclose on and take possession of the Disputed Units. Op. 19.
>
> Assurance would have rights on par with Holifield's other general creditors, such as the banks that issued him credit cards. Op. 19.
>
> Assurance did receive a security interest in Entia's assets, but that interest did not encompass the Disputed Units (which were owned by Blue). At best, therefore, Assurance received a security interest in the contractual right to the net proceeds from any sale of the Disputed Units that the Side Letter created. Op. 62 n. 24.

XRI nevertheless maintains on appeal—repeatedly and without any citation to the record—that there is "undisputed" and "undeniabl[e]" evidence that the "transaction as a whole *harmed* XRI" AB 27 (emphasis in original), 28, 30. XRI

presented no such evidence in connection with trial. And the trial court, accordingly, discerned no such evidence. *See* Final Order ¶ 8 (a)–(c). Again, the trial court found directly to contrary: "XRI conceded" that the structure of the Blue Transfer and Assurance Loan "benefited XRI." Op. 74. The Blue Transfer structurally subordinated Holifield's general creditors from XRI's interest in the Class B units. Op. 2, 73–75. And "XRI was happy to accept the benefits of the Blue Transfer," which was "another factor supporting acquiescence." Op. 75.

D. The Texas Action – A Never-Existent "Existential Threat."

XRI criticizes Holifield's opening brief because it "simply pretends the Texas Action never existed." AB 44; *see also* AB 23. But the reason Holifield does little to address the Texas-based dispute is aptly set forth in XRI's own brief: "that dispute is legally and equitably irrelevant." AB 4. XRI correctly further observes that the Texas Action "serve[s] only as a distraction." AB 4.

And XRI has made it a distraction from the beginning. Assurance filed the Texas Action after XRI strictly foreclosed the Class B units. Op. 39–41. In response, XRI identified Holifield as a "necessary party" to the Texas Action and claimed that he conspired with Assurance "to defraud XRI." C0001, C0015, C00027. Holifield sought to intervene as a necessary party, to join issue on the merits, and to set the record straight before the Texas court. AB 22–23. XRI opposed Holifield's intervention and insisted that its 'secret breach' claims were

only susceptible to adjudication by the Delaware Court of Chancery. *Id.*; *see* Op. 40–41.

The trial court observed that in the Texas Action, Assurance sought to "challenge the strict foreclosure," alleging that XRI failed to give proper notice in an effort to frustrate Holifield's other creditors. Op. 40. It was not until the Texas Action threatened to expose XRI's unfair attempt to "capture all the value" of Holifield's Class B units through its strict foreclosure, that XRI finally decided that it should spring a challenge to the Blue Transfer and call it a 'secret transaction.' Op. 75. As the trial court found:

> . . . XRI benefited from the Blue Transfer because by transferring the Disputed Units to Blue, Holifield structurally subordinated his personal creditors. XRI suffered no relative detriment. It remained the only creditor with a security interest in the Disputed Units in the form of the Blue Pledge. *It only became advantageous for XRI* to challenge the Blue Transfer once the allegations in the Texas Action revealed problems with XRI's attempt to use a strict foreclosure to capture all of the value of the Disputed Units. *Before that point, XRI was happy* to accept the benefits of the Blue Transfer.

Op. 75 (emphasis added).

The trial court also observed that the manner in which XRI prosecuted this litigation and the Texas Action "provides some corroboration for Holifield's testimony that the value of the units far exceeds the amount due on the XRI Loan." Op. 41–42. "To the extent XRI can defend the strict foreclosure, then Morgan

Stanley and Gabriel capture proportionate shares of any excess value through their ownership interests in XRI. Their gain, of course, comes at Holifield's expense." Op. 42.

REPLY ARGUMENT ON APPEAL

I. THIS COURT SHOULD CONSIDER WHETHER *ABSALOM'S* EXTENSION OF *COMPOSECURE* GOES TOO FAR.

A. Introduction.

The harsh rule of contractually specified incurable voidness created by *Absalom*'s sweeping extension of *CompoSecure* should be overruled. Mere use of the word "void" should not completely immunize a contracting party against the inequitable effects of its own post-contract words and deeds. Delaware's capacious grant of contractual freedom and flexibility should not extend so far as to allow the elimination of equitable considerations of parties' post-contract conduct.

In *Absalom*, the Court of Chancery held that "under *CompoSecure*, 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 act "invulnerable to equitable defenses" and "immune to equitable defenses." *Absalom Absalom Tr. v. Saint Gervais LLC*, 2019 WL 2655787, at *3–4 (Del. Ch. June 27, 2019).

That holding undermines Delaware's revered system of equity—"to do right and justice." *Schoon v. Smith*, 953 A.2d 196, 205 (Del. 2008) (quoting 1 POMEROY'S EQUITY JURISPRUDENCE § 60, at 80 (5th ed. 1941) [hereafter, "1 POMEROY"]). It deafens the acoustic sensitivity of the Chancellor's ear when needed to redress inequity. It shelves the rich tapestry of equitable considerations otherwise always available for use by the Court of Chancery. And it upsets the fundamental

expectations and settled understandings of participants in Delaware-formed business entities.

XRI argues that *nothing* in Holifield's submission explains why Delaware's policy of maximum contract freedom and enforcement should not prevail over notions of equity. AB 44 ("Nor does [Holifield] explain why a policy of contract enforcement is less important than judicial notions of equity."). But XRI's framing of the issue is improvident. *Both* contract enforcement *and* notions of equity are equally "important." They exist in equipoise—their relationship is symbiotic.

In this respect, Holifield and XRI ultimately join issue as to the doctrinal implications of *Absalom*. XRI maintains that *Absalom* is an otherwise unremarkable extension of *CompoSecure* that confirms contractual flexibility in LLCs to immunize post-contract conduct from all equitable considerations by use of the word void. Holifield maintains that *Absalom* is a doctrinal over-shift that impels reconsideration precisely because of *this* case—the substantial deference afforded the trial court's unchallenged fact findings here—and the trial court's recognition that equity ought to intercede here.

Holifield's position in this appeal should prevail. It is axiomatic that Delaware LLCs are *primarily* creatures of contract. And specified consequences and remedies set forth in such contracts are given *primary* consideration and effect by Delaware courts. These are undeniably among the settled expectations and

understandings of sophisticated Delaware alternative entity participants. But *primacy* of contract freedom does not equate to *purity* or *exclusivity* of contract freedom. Because equity abides.

Equity does not seek deployment to assault contract freedom, nor does equity seek to contest contract freedom's vanguard role in Delaware alternative business entities. There is no brewing battle. Equity is not contract freedom's adversary. Equity is contract freedom's diligent, ever-present, rearguard. This appeal highlights that important practical role.

> [T]he practical role of equity in LLCs will be more subtle than overt. Because even if the Delaware courts seldom assert their equitable jurisdiction, the very existence of an unwaivable judicial power "to do right and justice" may chasten parties against brazen overreach in the drafting of LLC agreements or exploitation in performance thereunder. Put differently, freedom of contract will subsist, but it will be exercised always in the shadow of the courts' equitable power.

Mohsen Manesh, *Equity in LLC Law?*, 44 FLA. ST. U.L. REV. 93, 128–29 (2016) (cleaned up) [hereafter "Manesh, *Equity*"].

The practical role of equity in LLCs will also be more infrequent than not. A plaintiff will rarely arrive at the steps of the Delaware Court of Chancery (as XRI did here) demanding affirmative relief and damages for a contract breach in which it knowingly participated and benefited, and through which it knowingly induced the alleged breaching party's faithful and reasonable reliance. This case is one such rarity.

B. ***Delaware's System Of Equity Abides Itself To "Do Right And Justice."***

The Court of Chancery has always had "broad latitude to exercise its equitable powers to craft a remedy." *In re Oxbow Carbon LLC Unitholder Litig.*, 2018 WL 3655257, at *2 (Del. Ch. Aug. 1, 2018), *vacated sub nom., Oxbow Carbon & Minerals Holdings, Inc. v. Crestview-Oxbow Acquisition, LLC,* 202 A.3d 482 (Del. 2019). It's equitable powers are "complete," "as the facts of a particular case may dictate." *Id.* As Vice-Chancellor Glasscock described it:

> Put more poetically, the protean power of equity allows a court to fashion appropriate relief, and a court will in shaping appropriate relief, not be limited by the relief requested by the plaintiff. Consequently, once a right to relief in Chancery has been determined to exist ... [the court can] shape and adjust the precise relief to be granted so as to enforce particular rights and liabilities legitimately connected with the subject matter of the action. For a proven breach of contract, the Court of Chancery has the discretion to award any form of legal and/or equitable relief and is not limited to awarding contract damages for breach of the agreement. *The power to grant factually tailored remedies designed to provide complete redress represents the fundamental purpose of an equity court and closely comports with the historical foundations of Chancery jurisdiction.*

Id. at *2–3 (cleaned up) (emphasis added).

This Court has long endorsed the Court of Chancery's "capacious remedial discretion" to address inequity. *McGovern v. Gen. Holding, Inc.*, 2006 WL 1468850, at *24 (Del. Ch. May 18, 2006) (citing *inter alia, Weinberger v. UOP, Inc.,* 457 A.2d 701, 715 (Del.1983)).

Equity is "in every sense of the word a system," and through that system, "always must stand, that the final object of equity is to do right and justice." *Schoon,* 953 A.2d at 205 (quoting 1 POMEROY § 60, at 80). In administering this system 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.

Id. at 204–05 (quoting 1 POMEROY § 60, at 77–78).

These foundational principles answer the question XRI raises in its answering brief. Delaware's system of equity *is no more nor less important* than Delaware's policy of maximum contract freedom and enforcement. As one commentator has explained:

> There is no reason today to believe that judge-made business associations law, coupled with and supplementing contract law, is inferior to law resulting from contracts alone. In any event, Delaware's judges must settle this issue by weighing the various considerations on a case-by-case basis. This too, for hundreds of years, has been the province of equity judges.

Lyman Johnson, *Delaware's Non-Waivable Duties*, 91 B.U.L. REV. 701, 724 (2011). Thus, equity's shadow is ever-present, case-by-case. But it's not an ominous shadow. When—*if*—necessary, equity considers word-by-word, deed-by-deed,

expressions, impressions, inferences, and imputations resulting from "the *real* relations" of contracting parties. *In re Carlisle Etcetera LLC*, 114 A.3d 592, 607 (Del. Ch. 2015) (emphasis in original). And when—*if*—deployed, equity is carefully measured and tailored. It is a bespoke "corrective salve" for circumstances where the strict application of law would otherwise be unjust or inequitable. Manesh, *Equity*, at 118.

Here, the trial court identified that strictly applying *Absalom* required entry of a Final Order that was contrary to the equities of the case. The trial court discerned that but-for *Absalom*, it would have exercised its discretion to fashion an equitable remedy. This is the passive backstop to contract freedom—equity.

C. ***Delaware's Equity Backstop Is Inherent.***

The foundational principles described above anchor the inherent equitable discretion that the Court of Chancery retains in business entities formed under Delaware's sovereign authority—such that those entities can never wholly exempt themselves from Delaware oversight. *See In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940, 960 n.8 (Del. Ch. 2010). This serves to explain why maximum contract flexibility, freedom, and enforcement can never include complete immunity from Delaware' system of equity—and why *Absalom's* holding goes too far. The LLC Act does not mandate enforcement of specific contractual remedies, nor does it contain language overriding the Court of Chancery's ability to exercise equitable

discretion. "To the contrary, the LLC Act elsewhere recognizes that *equity backstops the LLC structure* by providing generally that 'the rules of law and equity' shall govern in 'any case not provided for in this chapter.'" *Carlisle*, 114 A.3d at 601–02 (quoting 6 *Del. C.* § 18-1104) (emphasis added).

In *Carlisle*, the Court of Chancery described the inherent nature of the interest Delaware retains in an LLC: "[W]hen a sovereign makes available an entity with attributes that contracting parties cannot grant themselves by agreement, the entity is not *purely* contractual. Because the entity has taken advantage of benefits that the sovereign has provided, the sovereign retains an interest in that entity." *Id.* at 605; *see also Terramar Retail Ctrs., LLC v. Marion #2-Seaport Tr. U/A/D/June 21, 2002*, 2017 WL 3575712, at *7 (Del. Ch. Aug. 18, 2017) (holding that "a claim to enforce the entity's constitutive document necessarily implicates the special interest that a sovereign has in adjudicating cases involving the internal affairs of entities created under its laws.").

XRI undertakes no discussion of *Carlisle* or other cases observing that Delaware LLCs are not purely contractual and that Delaware retains an inherent interest in them. XRI also declines to acknowledge the relevant holdings in *Pepsico* and *Coinmint*. Those cases illustrate how contracting parties' freedom to renounce or amend their agreements "in any way they see fit and by any mode of expression they see fit" is exercised under "blanket principles" involving the Court of

Chancery's inherent role [and Delaware's inherent interest] to resolve factual issues concerning the *effect*, if any, of parties' post-contract conduct. *Pepsi-Cola Bottling Co. of Asbury Park v. Pepsico, Inc.*, 297 A.2d 28, 33 (Del. 1972); *In re Coinmint, LLC*, 261 A.3d 867, 900 (Del. Ch. 2021).

In *Coinmint*, the Court of Chancery underscored that even in the face of plain, broad, prohibitory language in a contract (there, a non-waiver clause), "the law is clear that courts are not precluded from holding [a party] responsible for their post-contracting behavior." 261 A.3d at 899. The court went on to hold that even "iron-clad" waiver and estoppel provisions do not "have the unfettered power *in all circumstances* to supersede the doctrines of waiver and estoppel." *Id.* (emphasis added). Vice-Chancellor Zurn cited *Pepsico* to illustrate this:

> [In *Pepsico*] the Court analyzed conduct-based modifications and waivers against the backdrop of contractual clauses prohibiting modification. The Court concluded that those clauses did not prohibit modification or waiver of the agreement's written terms:
>
> > [A] written agreement does not necessarily govern all conduct between contracting parties until it is renounced in so many words. The reason for this is that the parties have a right to renounce or amend the agreement in any way they see fit and by any mode of expression they see fit. They may, by their conduct, substitute a new oral contract without a formal abrogation of the written agreement. We think the existence of [a joint integration and no-oral modification clause] does not prohibit the modification or making of a new agreement by conduct of the parties, despite a prohibition [ ] against any change except by written bilateral agreement.

> The Court stressed that these *blanket principles* applied no matter the analytical vehicle; whether couched in terms of waiver, acquiescence, or other fact-specific inquiry[.]

Id. at 900 (quoting *Pepsico*, 297 A.2d at 33) (emphasis added).

Coinmint recognizes that important policy considerations underlying the enforcement of plain, broad, and strict contract provisions do not supplant the trial court's inherent ability to consider fact-specific, post-contract, "any way they see fit" conduct and the effects of the same. *Id.* at 896–97 ("[W]hen applied to *post-contract behavior*, these principles do not prohibit the Court's consideration of subsequent promises, communications, or modifications to the express agreement.") (emphasis added).

XRI gives short shrift to the Court of Chancery's recent decision in *Totta,* calling it "even further afield." AB 46. But *Totta* confirms that because LLCs and other alternative entities are "not *purely* contractual," they "retain mandatory features" and "contain domains where equity continues to apply." *Totta v. CCSB Fin. Corp.*, 2022 WL 1751741, at *17, 17 n.193 (Del. Ch. May 31, 2022), *judgment entered*, (Del. Ch. 2022), *cert. denied*, 2022 WL 4087800 (Del. Ch. Sept. 7, 2022), *and appeal dismissed*, 284 A.3d 713 (Del. 2022) (emphasis added). The Chancellor explained:

> For example, LLCs, which are frequently described in this court and elsewhere as creatures of contract, are not devoid of mandatory components that inhere in every entity whose existence is dependent on

> an act of the sovereign. . Indeed, there are core attributes of the LLC that only the sovereign can authorize, such as its separate legal existence, potentially perpetual life, and limited liability for its members. This court has explained that when a sovereign makes available an entity with attributes that contracting parties cannot grant themselves by agreement, the entity is not purely contractual. Because the entity has taken advantage of benefits that the sovereign has provided, the sovereign retains an interest in that entity. Thus, 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.

Id. at *17 n.193 (cleaned up).

Carlisle, Coinmint, and *Totta* indicate that Delaware courts need not unquestioningly defer to express language in LLC agreements *in every circumstance*—particularly where post-contract conduct proves to be manifestly opportunistic, exploitative, or otherwise inequitable. *That* "domain [is] where equity continues to apply." *See Totta,* 2022 WL 1751741, at *17.

Carlisle, *Coinmint*, and *Totta* thus provide a rationale for overruling *Absalom* and clarifying that mere use of the word void cannot completely immunize LLC members' post-contract conduct, nor wholly exempt the LLC itself, from equity's deft reach.

Delaware's competitive advantage plainly derives from this 'equity backstop.' It is monitored by an expert judiciary deploying its inherent measure of remedial discretion when—*if*—needed to ensure the integrity of our law and to assure fairness

in actions by corporations, alternative entities, and their participants.[3] Importantly, this prized franchise also embodies the fundamental expectations and settled understandings of participants in Delaware-formed business entities.

---

[3] *See* Myron T. Steele, *Judicial Scrutiny of Fiduciary Duties in Delaware Limited Partnerships and Limited Liability Companies*, 32 DEL. J. CORP. L. 1, 6–7 (2007) (quoting Leo E. Strine, *If Corporate Action Is Lawful, Presumably There Are Circumstances in Which It's Equitable to Take That Action: The Important Corollary to the Rule of Schnell v. Chris-Craft 4*, Regents Lecture, UCLA School of Law (Mar. 31, 2005)):

> . . .the continued importance of the common law of corporations is not the result of happenstance, but reflects a policy choice made by the Delaware General Assembly. That choice deliberately deploys Delaware's judiciary to guarantee the integrity of our corporate law through the articulation of common law principles of equitable behavior for corporate fiduciaries. Delaware's primary court for applying these principles is its court of equity-the Delaware Court of Chancery.

D. ***XRI's Acquiescence In This Case Shows Why Absalom Goes Too Far.***

This case confirms the need to recognize that an irreducible measure of inherent equitable discretion exists even at the maxed-out boundaries of contract freedom and flexibility. XRI joins issue by claiming "[t]here is no 'equity' to be championed in *this* case." AB 42 (emphasis in original). XRI tries to decouple itself from knowing participation in the Blue Transfer and Assurance Loan by calling it "Holifield's breach" and maintaining that "[t]he trial court's entire discussion of acquiescence is *dicta*." AB 23, 28–30, 42, 45, 54; *see* AB 27. But the trial court's determination that XRI acquiesced to the Blue Transfer and Assurance Loan is not mere "discussion." It is a series of now-unchallenged, specific, post-trial findings that are afforded substantial deference on appeal.

Those findings demonstrate how and why *Absalom*'s holding goes too far. XRI (i) knowingly participated in a 'real time' breach of a void-specifying provision in its own LLC Agreement, (ii) knowingly enjoyed the benefit of the breach, (iii) knowingly remained silent for years, and (iv) knowingly induced Holifield's reasonable reliance on XRI's knowledge, silence, and inaction. Under *Absalom*, XRI is nevertheless entitled to enjoy *both* incurability at law as the result of the breach *and* immunity from equity's ability to fashion a fair remedy for that breach. *Absalom* permits LLCs to contractually mandate such immunity, even in matters brought before the Delaware Court of Chancery.

That is contrary to equity itself—and it upends Delaware's system of equity.

XRI also argues that there is simply "no place here" for concerns about XRI having "take[n] advantage of its own nonfeasance, misfeasance or malfeasance." AB 42–43 (quoting Op. 121). XRI declares itself the "victim" of the breach in this case—not the "perpetrator." AB 42. XRI maintains it suffered an "existential crisis" because a stranger could have gained rights related to its equity through the Blue Transfer and Assurance Loan, and "how real [that] peril was here," is amply demonstrated by the Texas Action. AB 43–44.

The trial court disagreed with XRI on each of these points. The post-trial findings render XRI's self-serving proclamations of victimhood and damage mere fallacy. Holifield was no perpetrator: he acted with abundant good faith and reasonable reliance upon XRI's knowing participation in the Blue Transfer and Assurance Loan. And XRI was no victim in peril here: it suffered no risk—at all—of 'stranger-danger' infiltration of its equity resulting from the Blue Transfer and Assurance Loan.

XRI knowingly participated in, took credit for, benefited from, and acquiesced to the Blue Transfer *years before* coming to the Court of Chancery seeking affirmative relief to undo the Blue Transfer and claiming money damages resulted from the Blue Transfer. Time-honored principles of equity render that litigation stance repugnant to equity and disqualifying of any relief. *Morente v. Morente*, 2000

WL 264329, at *2 n.9 (Del. Ch. Feb. 29, 2000); *Gottlieb v. McKee*, 107 A.2d 240, 244 (Del. Ch. 1954); *Mead v. Collins Realty Co.*, 75 A.2d 705, 707 (Del. Super. Ct. 1950); *Trounstine v. Remington Rand, Inc.*, 194 A. 95, 99 (Del. Ch. 1937).

XRI avoids any discussion of these principles or the cases applying them, despite these principles having been "affirmed in many decisions and applied in a great variety of fact situations," with "*added force* where the acquiescence relates to rights of the assenting party that are contractual in nature...." *Trounstine*, 194 A. at 99 (emphasis added). Here, XRI engaged in a multi-year, board-sanctioned, calculated business and legal strategy of silence and inaction after knowingly participating in a breaching transaction, all while Holifield reasonably relied upon XRI's assent to the transaction. *This* unfairly opportunistic, exploitative, and inequitable post-contract conduct is what impelled equity's intercession in this case. *See* Op. 75 (quoting *Lehman Bros. Holdings Inc. v. Spanish Broad. Sys., Inc.*, 2014 WL 718430 at *12 n.66. (Del. Ch. Feb. 25, 2014)) ("The acceptance of a benefit 'lends additional credence' to a finding that a party reasonably understood the other side's 'silence to indicate an acceptance of the transactions.'"). *That* post-contract conduct by XRI, respectfully, warrants the relief Holifield seeks by this appeal.

E. ***Stare Decisis Is No Bar To This Court's Consideration Of Absalom's Extension Of CompoSecure.***

Stare decisis does not preclude this Court from addressing whether *Absalom*'s extension of *CompoSecure* should stand. *Stare decisis* is not an inexorable

command, but rather, a principle of policy that eschews any particular "mechanical formula of adherence to the latest decision." *Payne v. Tennessee,* 501 U.S. 808, 828 (1991) (Rehnquist, C.J.) (citations omitted). Stability and predictability are the primary rationale to apply *stare decisis*, but those considerations do not bar reconsideration of a case with no history of stable application. *State v. Barnes*, 116 A.3d 883, 891 (Del. 2015) ("The doctrine of stare decisis exists to protect the settled expectations of citizens."). This Court has long recognized that it is better to reconsider certain decisions "than to have the character of [Delaware] law impaired, and the beauty and harmony of the system destroyed, by the perpetuity of error." *Truxton v. Fait & Slagle Co.*, 42 A. 431, 437 (Del. 1899).

XRI argues that *stare decisis* bars this Court from considering established prior decisions in all but the most extreme and urgent scenarios. AB 3, 40. XRI points to *CompoSecure* being "four years old" in support of it being "settled law" and thus not susceptible to being overruled. AB 40–41. But even if *CompoSecure*'s four-year-old core holdings constitute settled law, the same cannot be said of *Absalom*'s extension of *CompoSecure*. *Absalom* has not been cited at all—let alone approvingly—in an opinion of this Court. Moreover, because *Absalom* is a trial court decision rather than a decision of this Court, principles of *stare decisis* carry less weight. *See e.g. Leonard Loventhal Acct. v. Hilton Hotels Corp.*, 2000 WL 1528909, at *4 (Del. Ch. Oct. 10, 2000), *aff'd sub nom. Acct. v. Hilton Hotels Corp.*,

780 A.2d 245 (Del. 2001) ("As a general rule, the doctrine of *stare decisis* is applicable to a decision of a court higher in rank, or of the same rank, but not to a decision of a court lower in rank than the court in which the decision is cited as precedent.") (quotations omitted)); *see also* BRYAN A. GARNER, ET AL., *The Law of Judicial Precedent*, 244 (2016) ("Inferior-court decisions have less precedential worth because courts superior in rank aren't bound by them.") (forward written by Breyer, J.).

Delaware's alternative entity case law "is continuously being developed in nuanced ways with each new opinion." 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. 5, 28 (2017). This continuous development is driven by the Court's willingness to revisit, clarify, and overrule prior decisions, doctrinal extensions, and precedents that may result in "conflict[] with our prior case law." *Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808, 815 n.13 (Del. 2013) (overruling *Gerber v. Enter. Prod. Hldgs., LLC*, 67 A.3d 400 (Del. 2013)); *see also Brookfield Asset Mgmt., Inc. v. Rosson*, 261 A.3d 1251 (Del. 2021) (overruling *Gentile v. Rossette*, 906 A.2d 91 (Del. 2006)).

> The true function of precedents is that of illustrating principles; they are examples of the manner and extent to which principles have been applied; they are the landmarks by which the court determines the course and direction in which principles have been carried. But with all this guiding, limiting, and restraining efficacy of prior decisions, the 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.

Schoon, 953 A.2d at 204 (quoting 1 POMEROY § 60, at 77–78). Justifications for overruling a prior decision includes where "the decision poses a direct obstacle to the realization of important objectives embodied in other laws." *Brookfield*, 261 A.3d at 1279 (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989)).

Here, *Absalom*'s extension of *CompoSecure* destroys the harmonious co-existence of contract freedom and equity in the Court of Chancery. There is urgency to restore it. *Absalom* is a direct obstacle to the longstanding objective that equitable principles be "always" available to the Court of Chancery in its inherent role to "ascertain, uphold, and enforce rights and duties which spring from the *real* relations of parties...." *Carlisle*, 114 A.3d at 607 (emphasis in original). This Court should, respectfully, consider limiting *CompoSecure*'s application to the ratification-related circumstances presented in that case, thereby addressing the pressing doctrinal uncertainty left in *Absalom*'s wake: Whether Delaware's Court of Chancery retains the inherent ability to consider equitable defenses to a breach of contract claim, even

when the parties have used the word "void" to describe the consequence of contractual noncompliance.

F. ***Recent Legislative Action Is No Bar To Addressing Absalom's Extension Of CompoSecure.***

XRI argues that this Court addressing whether *Absalom* over-extended *CompoSecure*'s holding is to "second-guess the General Assembly." AB 39. XRI maintains that because the Delaware General Assembly's enactment of 6 *Del. C.* § 18-106(e) left *CompoSecure* and *Absalom* intact, except with respect to an LLC controllers' ability to ratify non-compliant acts, the legislature otherwise fully endorsed the doctrinal implications of those cases in all other respects. AB 39. Because Section 18-106(e) does not expressly "extend to conduct such as acquiescence," XRI insists that "legislative silence" signals "accord with judicial application of a statute." AB 38, 41.

XRI's argument misconstrues established canons of statutory interpretation. Neither *CompoSecure* nor *Absalom* interpreted or applied a statute. Thus, legislative silence with respect to *Absalom*'s extension of *CompoSecure* does not preclude or interrupt this Court's further refinement of the doctrines and policy considerations surrounding application of contractually specified incurable voidness.

Where the Court makes "prior statute-interpreting rulings," it may infer legislative approval of its interpretation based on "legislative silence." *Brookfield*, 261 A.3d at 1278 n.144 (Del. 2021) (quoting *Nationwide Prop & Cas. Ins. Co. v.*

Irizarry, 2020 WL 525667, at *4 (Del. Super. Ct. Jan. 31, 2020) (interpreting 18 *Del. C.* § 3902(b)). As this Court has explained, "[a] fundamental canon of statutory construction states that the *long time failure of the legislature* to alter a statute after it had been judicially construed is persuasive of legislative recognition that the judicial construction is the correct one." *Barnes*, 116 A.3d at 892 (cleaned up; emphasis added).

CompoSecure did not interpret a statute or prior legislative act, and a "long time" has not passed since Section 18-106(e)'s enactment in 2021. *CompoSecure* held that Delaware's "common law rule" may be trumped by contract such that contractually void acts are incapable of subsequent ratification. 206 A.3d 807, 817 (Del. 2018). *Absalom* then held, "[a]lthough CompoSecure addressed the defense of ratification, its logic extends to other equitable defenses as well." 2019 WL 2655787, at *4. Because neither *CompoSecure* nor *Absalom* interpreted a statute, the General Assembly's silence concerning *Absalom*'s doctrinal extension does not preclude consideration of it by this Court.

"While evidence of legislative attention to an issue followed by inaction may imply an endorsement of the *status quo*, 'it would require very persuasive circumstances enveloping legislative silence to debar this Court from re-examining its own doctrines.'" *Keeler v. Harford Mut. Ins. Co.*, 672 A.2d 1012, 1016 (Del. 1996), *as amended* (Mar. 11, 1996) (quoting *Helvering v. Hallock*, 309 U.S. 106,

119–20 (1940)). Consideration and clarification of *Absalom*'s extension of *CompoSecure* here would be a re-examination by this Court of its own doctrines involving contractually specified incurable voidness.

XRI belittles the trial court's characterization of Section 18-106(e) as a "half loaf," and the trial court's respectful effort to articulate one possible "better approach" to the voidness doctrines. AB 38; Op. 134 n.83. But the trial court is correct on both fronts. The trial court found that it could not reconcile the order it entered with the specific findings it made concerning the parties' post-contract conduct. The order is "contrary to the equities of the case." Op. 154. That unusual circumstance, of itself, respectfully warrants re-examination of the doctrinal implications of *Absalom* insofar as it extended *CompoSecure*. Any resulting clarification by this Court would thus *supplement* and not override or displace Section 18-106(e):

> [W]here the General Assembly has not defined a right, remedy, or obligation with respect to an LLC, courts should apply the common law. It follows that if the General Assembly *has* defined a right, remedy, or obligation with respect to an LLC, courts cannot interpret the common law to override the express provisions the General Assembly adopted. Supplementing express provisions is altogether different from displacing them or interpreting them out of existence under the guise of articulating and applying equitable principles.

CML V, LLC v. Bax, 28 A.3d 1037, 1045 (Del. 2011), *as corrected* (Sept. 6, 2011) (italics in original, underline added).

XRI's argument fails to acknowledge that common law and equitable doctrines are not (and never have been) susceptible to straight-line development *via* legislative enactments. Indeed, case-by-case context, informed by a rich tapestry of judicial opinions and equitable principles, ensures that the law does not—cannot—develop in a straight line. The trial court observed this too: Section 18-106(e) is a step in the important direction towards refining our common law and equitable doctrines concerning contractually specified incurable voidness. Op. 134 n. 83. No canon of statutory interpretation precludes this Court from considering, clarifying, or supplementing Section 18-106(e) to further refine the doctrinal implications of *Absalom*'s extension of *CompoSecure*.

II. IF CONTRACTUALLY SPECIFIED INCURABLE VOIDNESS CAN ELIMINATE EQUITY IT SHOULD DO SO CLEARLY.

Holifield's position in this appeal is that *Absalom*'s extension of *CompoSecure* heralds a too-harsh doctrinal shift: Contractually designated incurability by use of the word "void" will *both* trump common law *and* eliminate equitable defenses.

Holifield respectfully identifies a need for doctrinal clarity because this case shows why equity must abide. But Holifield also respectfully identifies a need for doctrinal clarity even if *Absalom* remains undisturbed and, by use of the word void, equity cannot abide.

XRI declares that the "void/voidable distinction" is set out in the "plain terms" of its LLC Agreement. AB 51. XRI maintains that the parties to the LLC Agreement here all understood the "plain meaning" of the word "void," and all parties "*intended*" that a void breach would be incurable and subject to "no judicial intervention." AB 50 (emphasis added). This convenient position finds zero support in the trial court's findings. And it strains credulity because the LLC Agreement here was executed by the parties in 2016, two years before *CompoSecure* and three years before *Absalom*.[4] *See* A0049.

[4] XRI argues that this appeal seeks a change in the law that would "disrupt the settled understanding of LLC members" that breaches of core provisions in their founding agreements can have defined consequences. AB 2.

Holifield argues on appeal that arriving at incurable voidness *via* language in an LLC agreement should require more than just *a* word—and more than just *the* word "void." XRI calls this a "self-serving invitation," that is "entirely unmoored" from this case. AB 50–51. It is neither.

Holifield's argument is moored to the salutary ends of doctrinal consistency, clarity, and stability in Delaware law. *First*, use of the word "void" has—for centuries—been misunderstood, misused, misconstrued, and misapplied by lawyers, legislators, law professors, and layman. *See* Op. 120 n. 57; OB 25–28.

Second, contracting parties (particularly in Delaware alternative entities subject to jurisdiction of the Court of Chancery) ordinarily expect that their contracts, and their conduct *qua* contracting parties, are subject to basic standards of fairness and forthrightness—*i.e.*, the implied covenant of good faith and fair dealing, and equity. In order to eliminate fiduciary duties in an LLC Agreement, "drafters must do so clearly, and should not be incentivized to obfuscate or surprise investors

---

But XRI points to nothing to support the notion that LLCs' members generally have a "settled understanding" that they can define consequences of contractual noncompliance to include eliminating the Delaware Court of Chancery's equitable oversight of their post-contract conduct and relations.

Nor can XRI credibly maintain *its own* "settled understanding" concerning the same. XRI would not have needed to manufacture 'secret transaction' claims below if controlling members actually believed their knowing participation in the Blue Transfer and Assurance Loan nevertheless rendered it legally incurable and immune from equitable redress.

by ambiguously stripping away the protections investors would ordinarily receive." *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)). To that same end, Holifield earnestly proposes that eliminating the reach of Delaware's system of equity through an LLC Agreement should require more than the word void—and that voiding language should be more clearly indicate its equity-eliminating effects.

ANSWERING ARGUMENT ON CROSS-APPEAL

III. THE TRIAL COURT PROPERLY DISCERNED AND DETERMINED THAT XRI IS NOT ENTITLED TO A DAMAGES AWARD.

A. Question Presented.

Did the trial court abuse its discretion by determining that post-trial factual findings regarding XRI's knowing participation in the challenged transaction precluded a damages award?

XRI raised the issue, but did not specify any damages in connection with trial, and the trial court determined that contract damages are precluded by the post-trial factual findings. Final Order ¶ 8(b).

B. Scope of Review.

This Court has emphasized the limited scope of appellate review of damages determinations. Damages awards are reviewed for abuse of discretion and the Court will not "substitute our own notions of what is right for those of the trial judge if that judgment was based upon conscience and reason, as opposed to capriciousness and arbitrariness." *Siga Techs., Inc. v. PharmAthene, Inc.*, 132 A.3d 1108, 1128-30 (Del. 2015), *as corrected* (Dec. 28, 2015) (quoting *Gatz Properties, LLC v. Auriga Cap. Corp.*, 59 A.3d 1206, 1212 (Del. 2012)). The Court also will uphold the Court of Chancery's factual findings so long as they are not clearly erroneous, and that standard applies to factual determinations based on credibility and the evidence. *Id.*

Where there is more than one permissible determination to be drawn from the evidence, and the trial court chooses one, its finding cannot be clearly erroneous. *Id.*

C. Merits of Argument.

"In making a decision on damages, or any other matter, the trial court must set forth its reasons. This provides the parties with a record basis to challenge the decision. It also enables a reviewing court to properly discharge its appellate function." *Bako Pathology LP v. Bakotic*, 2022 WL 17243705, at *18 (Del. Nov. 28, 2022) (quoting *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1251 (Del. 2012)). The trial court set forth the reasons for its decision that a damages award was precluded here: "XRI never specified a damages figure," *and* "...the Court's factual findings regarding XRI's knowing participation in the transaction at issue would preclude any relief under Section 8.01(a)." Final Order ¶ 8(b).

XRI seems to suggest on appeal that it is someone else's fault that it could not proffer or specify any dollar amount of claimed money damages in connection with trial. AB 53 ("XRI cannot be faulted for not presenting evidence of the amount of damages."). That is not a credible assertion. The record is devoid of XRI's efforts to prove damages, and XRI offers no explanation in this appeal for its failure to do so.

Trial in this case concluded on June 15, 2022, and XRI settled the Texas Action *days later* on June 21, 2022. Op. 41. XRI promptly notified the trial court

of the settlement within one week after trial and then participated in two post-trial "follow-up teleconferences" concerning XRI's letter advising of the Texas Action settlement—all without presenting or proffering any amount of money damages it was seeking relating to the Texas Action. B0118–139. XRI also did not present or proffer any amount of damages in post-trial briefing, (B0140–207), or at the time of post-trial argument. B0208–338.

The trial court's fact determinations in the Opinion and Final Order bearing upon the damages issues (*i.e.,* that XRI "never specified" a damages amount, and that "XRI's knowing participation" precluded a damages award) cannot be disturbed unless clearly erroneous. Those factual findings include XRI's acquiescence to, assistance with, and participation in a transaction that breached its own LLC Agreement. XRI presents no argument, and can point to no record evidence, that would disturb the trial court's damage determinations as an abuse of discretion.

IV. THE TRIAL COURT PROPERLY DISCERNED AND DETERMINED THAT XRI IS NOT ENTITLED TO RECOUPMENT OF LEGAL EXPENSES.

A. Question Presented.

Did the trial court abuse its discretion by determining that fact findings made after trial precluded XRI from recouping legal expenses advanced to Holifield?

XRI raised the issue but failed to preserve it in connection with trial, and the trial court determined that XRI's requested relief is precluded by post-trial factual findings. Final Order ¶ 8(a) and (c).

B. Scope of Review.

The Court reviews a damages determination for abuse of discretion and reviews for an abuse of discretion the trial court's assessment of an attorneys' fee award. A trial court's interpretation of a contractual fee-shifting provision is reviewed *de novo*. *Bako Pathology LP*, 2022 WL 17243705, at *9.

The Court will uphold the Court of Chancery's factual findings so long as they are not clearly erroneous, and that standard applies to factual determinations based on credibility and the evidence. *Siga Techs., Inc.*, 132 A.3d at 1128–30. Where there is more than one permissible determination to be drawn from the evidence, and the trial court chooses one, its finding cannot be clearly erroneous. *Id.*

C. Merits of Argument.

XRI argues the trial court erred by applying (repeatedly) Holifield's good faith and reasonableness to only *one* of XRI's breach claims,[5] all the while neglecting to make a "required factual finding" that Holifield may have acted with gross negligence or willfulness in connection with *another* one of XRI's breach claims. AB 56; AB 60 ("The trial court neglected to make the required finding under the contractual gross negligence/willful breach standard.").

XRI insists that (i) "*it is undisputed* that Holifield breached provisions of the Company Agreement *beyond* the Transfer Restriction..." (AB 59 (emphasis added)), (ii) Holifield breached the LLC Agreement "again and again" (AB 60), and (iii) "[t]he evidence strongly supports a finding" that Holifield committed *other* breaches "and did so with gross negligence at minimum." AB 57. Tellingly, XRI does not cite to post-trial findings to support any of those statements. Because it cannot. The trial court repeatedly found Holifield acted reasonably and in good faith. Op. 3, 25, 30.

XRI rests it argument on *Eagle Force Holdings, LLC v. Campbell*, 187 A.3d 1209 (Del. 2018), positing that while this Court reviews factual findings for clear error, it must "reverse and remand if the trial court failed to make a required factual

---

[5] AB 57 ("...the court concluded *only* that Holifield believed 'reasonably and in good faith' that XRI condoned his breach of the *Transfer Restriction*.") (emphasis added)

finding." AB 55 (citing *Eagle Force*, 187 A.3d at 1213, 1229–39). But *Eagle Force* does not help XRI here. The trial court properly discerned and determined that it was not required to reach any other breach claim nor required to make additional factual findings. Op. 42, 61–64; Final Order ¶ 8(c) ("As the Opinion explained, the Court's reasoning meant that it was not necessary to reach that issue.").

What XRI seeks on cross-appeal here is a *desired* factual finding, not a *required* one.

XRI desperately wants for its alternate factual narrative to be credited: "Given the multiple breaches discussed above, together with the record of concealment, XRI is entitled to a determination that Holifield acted willfully or with gross negligence." AB 55-56. But XRI's *desired* fact findings are the opposite of what the trial court actually found: One breach; no record of concealment; knowing participation by XRI; and abundant good faith and reasonableness by Holifield.

XRI's position ignores a basic articulation of Delaware's conduct standards. For one to act negligently, he necessarily must depart from a standard of reasonable conduct under the circumstances. *Sears, Roebuck & Co. v. Midcap*, 893 A.2d 542, 554 (Del. 2006); Restatement (Second) of Torts § 283 (1965). And to be *grossly* negligent in the civil context, one must depart *significantly* from that reasonableness standard. *Hecksher v. Fairwinds Baptist Church, Inc.*, 115 A.3d 1187, 1199 (Del. 2015); *Jardel Co. v. Hughes*, 523 A.2d 518, 530 (Del. 1987). Willfulness goes even

further. Under Delaware law, a willful breach of contract (*i.e.*, one for which punitive damages may be available) requires a showing that "the defendant acted maliciously and without probable cause for the purpose of injuring the other party by depriving him of the benefits of the contract." *Callahan v. iLight Techs., LLC*, 2022 WL 2902810, at *5 (Del. Super. Ct. July 21, 2022).

Holifield's good faith and reasonable actions, intentions, and beliefs in connection with the Blue Transfer and Assurance Loan—repeated findings of fact made by the trial court—leaves no daylight under Delaware law for the trial court *to also find* that Holifield acted willfully or grossly negligent in connection with the Blue Transfer and Assurance Loan.

CONCLUSION

The trial court's extensive fact findings are not contested on appeal. The trial court determined that by ruling correctly as a matter of law under *CompoSecure* and *Absalom*, it was ruling incorrectly as a matter of equity under the facts proven at trial. Clarity, consistency, and predictability in Delaware law—*and* confidence in the abiding nature of Delaware's system of equity—respectfully warrant this Court's consideration of *Absalom*'s extension of *CompoSecure*.

The trial court's authority to achieve equipoise and to avoid injustice should be recognized and endorsed by this appeal. The order entered by the Court of Chancery should be reversed and an order entered precluding the relief XRI seeks on the basis of its acquiescence to the Blue Transfer, and recognizing Blue as an assignee-only interest transferee *via* the Blue Transfer.

* * *

BERGER HARRIS LLP

Michael W. McDermott (I.D. No. 4434)
Richard I. G. Jones, Jr. (I.D. No 3301)
David B. Anthony (I.D. No. 5452)
Zachary J. Schnapp (I.D. No. 6914)
Harry W. Shenton, IV (I.D. No. 6919)
1105 N. Market Street, 11th Floor
Wilmington, Delaware 19801
Telephone: (302) 655-1140
Fax: (302) 655-1131
mmcdermott@bergerharris.com
rjones@bergerharris.com
danthony@bergerharris.com
zschnapp@bergerharris.com
hshenton@bergerharris.com

Counsel for Defendants Below-Appellants/Cross-Appellees Gregory A. Holifield and GH Blue Holdings, LLC

Dated: March 3, 2023