



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

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

**APPELLEE/CROSS-APPELLANT'S REPLY BRIEF ON CROSS-APPEAL**

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## **PRELIMINARY STATEMENT**

XRI's cross-appeal concerns the consequences of Holifield's breaches of contract. The trial court's findings of historical fact are not at issue here. XRI cross-appealed because the trial court fundamentally misperceived the business context of this dispute, and thereby erred in its conclusions about the impact of Holifield's breaches on XRI. The legally cognizable and remediable consequences of Holifield's breach follow from the undisputed facts.

There is no dispute that Assurance sued XRI in Texas. There is no dispute that Assurance was able to bring the Texas Action only because Holifield breached the Company Agreement by entering into an arrangement with Assurance that gave Assurance a legal basis to assert an interest in Holifield's XRI Units. There is no dispute that Holifield and his counsel, when structuring the deal with Assurance and seeking XRI's consent to it, withheld from XRI the documents that evinced the interest Assurance later asserted in XRI's Units. Finally, there is no dispute that XRI had to defend the Texas Action or face the potential consequences of an open-market valuation and sale of its equity. Pejoratively referring to those consequences as "stranger-danger" does not make them less real.

The legal question is what follows from these facts.

The first issue on cross-appeal concerns the trial court's error in concluding that XRI is not entitled to recover what it had to spend in defending and resolving

the Texas Action. The trial court erroneously ruled that damages are foreclosed by XRI's acquiescence. That conflicts with *CompoSecure, L.L.C. v. CardUX, LLC*, 206 A.3d 807 (Del. 2018), and with the trial court's own ruling on XRI's claim for declaratory relief. The trial court ignored XRI's vital interest as an LLC in keeping its equity out of the hands of third parties, with their own potentially conflicting agendas. The court also failed to understand that XRI was harmed as a creditor when Holifield encumbered the collateral securing XRI's \$10.6 million loan to him, and it sidestepped ruling on XRI's claim for breach of the encumbrance provision in the Company Agreement. The trial court finally erred in concluding that XRI waived its right to recover the amounts spent to litigate and resolve the Texas Action. The Texas Action remained ongoing through the completion of the trial here, and Holifield himself agreed to preserve issues related to XRI's breach of contract damages by means of a partial final judgment under Court of Chancery Rule 54(b).

The second issue on cross-appeal concerns the trial court's error in concluding that XRI may not recoup the attorneys' fees it has advanced (and continues to advance) to Holifield in this action. Like XRI's losses related to the Texas Action, this amount was unliquidated at trial (and remains unliquidated to this day). The parties appropriately stipulated to preserve XRI's recoupment claim under Rule 54(b). The trial court rejected that stipulation, but that does not mean XRI waived the claim.

The remaining issue on recoupment is whether Holifield's breaches of contract were willful or grossly negligent. As noted, the trial court did not rule on Holifield's breach of the Encumbrance Prohibition, which broadly prohibits XRI's members from borrowing against or allowing any restriction to be placed on their XRI Units. But the breach of that provision is undeniable: Assurance was able to bring the Texas Action only because Holifield encumbered his XRI Units through his arrangement with Assurance. In light of Holifield's deliberate choice to withhold from XRI the documents evincing Assurance's interest—and given the undisputed fact that Assurance extended the loan to Holifield in exchange for the encumbrance he placed on the Units—it is difficult to see how the breach of the Encumbrance Prohibition could have been anything less than grossly negligent.

Holifield objects to XRI's depiction of him as a "bogeyman." This cross-appeal is not about Holifield's character—although it is undisputed that Holifield *is* a "serial breacher" of his contractual obligations to many counterparties. He defaulted on the \$10.6 million XRI Loan, defaulted on the \$3.5 million Assurance Loan, and he and the entities within the Entia portfolio have been sued in 19 actions brought by former employees, vendors and lenders for unpaid wages, invoices, and loans. AB 11. This cross-appeal concerns only Holifield's breaches of his obligations to XRI, and the harm those breaches caused. XRI is entitled to relief.

## ARGUMENT

### **I. XRI IS ENTITLED TO RECOVER DAMAGES RELATED TO THE TEXAS ACTION**

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#### **A. The Source of XRI's Claim**

XRI sought to recover losses it incurred in defending itself in the Texas Action—both attorneys' fees and the payment it made to settle the case. In his answering brief on cross-appeal, Holifield for the first time acknowledges the Texas Action, but he invites this Court to disregard it, arguing that it is “legally and equitably irrelevant” and attributing that position to XRI. Appellants' Reply Brief and Cross-Appellees' Answering Brief (RAB) 12.

Holifield is playing word games. The Texas Action itself is undeniably relevant. The trial court discussed the Texas Action in its post-trial memorandum. Op. 40-41. Holifield sought to intervene in the Texas Action, and when that failed, he moved the trial court in this case to stay proceedings in favor of the Texas Action. The trial court denied that motion, and at the same time confined this litigation to a single issue: whether the June 2018 Blue Transfer was valid. B0038-39. If the Blue Transfer was not valid—if the transfer breached Holifield's contractual obligations to XRI—then, among other things, XRI is entitled to recover losses it suffered as a result of that breach in this breach of contract action.

This is not to deny that certain other issues were excluded from this litigation. The trial court ruled that the propriety of XRI's October 2020 strict foreclosure on

Holifield's Units and the valuation of the Units at the time of foreclosure would need to be resolved in a different lawsuit, before a different court. *Id.* For that reason, as XRI explained in its prior brief, the strict foreclosure and valuation issues are "legally and equitably irrelevant" in this case. AB 4. But the Texas Action itself is plainly relevant. It was the catalyst of this lawsuit and the source of the losses XRI seeks to recover in its claim for breach of contract damages.

The plaintiff in the Texas Action, Assurance, kicked off this dispute when it sought to compel a commercial sale of Holifield's Units. Undisputed testimony establishes that likely buyers would have included XRI's competitors, which would have been "horribly damaging" to XRI and its investors. Op. 37. Holifield now scoffs at this peril, calling it "never-exist[ent]." RAB 12. While it is true that no commercial sale of Holifield's Units occurred, the possibility that Assurance would force such a sale has been eliminated only because XRI paid to defend and ultimately settle the Texas Action. It is these losses—which Holifield does not dispute were caused by his breach—that XRI seeks to recover.

The trial court rejected XRI's claim for two reasons: (1) because it concluded XRI had not preserved it, and (2) because it believed XRI's claim was foreclosed by its acquiescence to the Blue Transfer. The court was wrong on both counts.



**B. XRI Did Not Waive Its Claim**

XRI showed in its opening brief that it claimed recovery of losses expended in the Texas Action in its complaint and reiterated that claim in post-trial proceedings. AB 54-55. Holifield agrees that XRI “raised the issue,” but maintains that the trial court’s ruling was nevertheless correct because XRI “did not specify any damages in connection with trial.” RAB 39. But Holifield does not dispute that damages were unliquidated at the time of trial. The Texas Action was ongoing. XRI could not have presented evidence of the amount it paid to settle the Texas Action because, at the time of trial, the settlement had not yet occurred.

Holifield notes that the Texas Action settled after trial but before the close of post-trial briefing, and suggests that XRI should have presented evidence of the amount of damages in its post-trial brief. RAB 40-41. That would have been improper and would have denied Holifield his right to test the evidence in an appropriate setting. The parties instead agreed to handle the issue in a way that would both preserve the claim for XRI and protect Holifield’s rights. They agreed to carve off XRI’s claim for breach of contract damages from the trial court’s ruling on declaratory relief by means of a partial final judgment under Rule 54(b). B0339. Holifield stipulated to that procedure. *Id.*

The trial court rejected the parties’ stipulation, but that does not mean that XRI waived the issue. In faulting XRI for raising the issue as an “oh-by-the-way,”

the trial court ignored the fact that damages were not liquidated at the time of trial, and rejected the fair and workable way the parties had proposed to address that issue.

As XRI discussed in its opening brief, this Court may independently review the record in assessing waiver. AB 54 (citing authority). Although Holifield does not dispute XRI's authority, he contends that the standard of review is abuse of discretion because damages are at issue. RAB 39. But Holifield cites only cases in which an award of damages turned on factual issues. *Siga Techs, Inc. v. PharmAthene, Inc.*, 132 A.3d 1108, 1111 (Del. 2015) (recoverability of expectation damages turned on whether plaintiff could "prove the fact of damages with reasonable certainty"); *Gatz Props., LLC v. Auriga Cap. Corp.*, 59 A.3d 1206, 1221 (Del. 2012) (recoverability of damages turned on whether property that defendant improperly disposed of had "positive value," which was the subject of testimony from an expert and a potential purchaser). There is no factual dispute about damages here. The issue is waiver, and that too is undisputed. Again, the parties agreed on a method of preserving XRI's claim for damages. This Court should reverse the trial court's erroneous ruling on waiver.

**C. XRI's Claim Is Not Foreclosed by Acquiescence**

The trial court also stated that damages were foreclosed by XRI's "knowing participation in the transaction at issue"—that is, acquiescence. XRI argued in its

opening brief that this cannot be reconciled with *CompoSecure*. AB 54. Holifield ignores the argument.

Both Holifield and the trial court recognized that *CompoSecure* is controlling with respect to XRI's claim for declaratory relief as a remedy for breach of contract. *CompoSecure* holds that parties may contractually eliminate equitable defenses in a breach of contract action. Following *CompoSecure*, the trial court held that the parties did so here, and that XRI is accordingly entitled to relief on its breach of contract claim:

Under the Contractual Voidness Provision and the reasoning of *CompoSecure II*, the Blue Transfer is void *ab initio*. The Blue Transfer is therefore incurably void, and Holifield cannot defeat the claim of breach or the relief XRI seeks by invoking the doctrine of acquiescence.

Op. 153-54. Neither Holifield nor the trial court has explained why XRI's claim for damages should be treated differently from Holifield's claim for declaratory relief. The two issues depend on the same rationale: *CompoSecure* precludes equitable arguments from disrupting the express provisions in LLC agreements. The trial court correctly recognized that this principle forecloses Holifield's acquiescence defense, which means that XRI is entitled to declaratory relief as a remedy for breach of contract. The court nonetheless applied the acquiescence defense to block XRI's claim for damages as a remedy for breach of contract. That ruling is self-

contradictory and incorrect as a matter of law.<sup>1</sup> This Court should accordingly reverse.

The Court should remand this case with instructions to award XRI damages for its settlement payment and attorneys' fees incurred in the Texas Action. The trial court should be directed to permit XRI to present evidence showing the specific amounts it has paid.

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<sup>1</sup> Because the application of *CompoSecure* to a claim for breach of contract damages is a legal issue, the standard of review is *de novo* rather than abuse of discretion (as Holifield contends).

## **II. XRI IS ENTITLED TO RECOUP THE STILL-ACCUMULATING FEES IT HAS ADVANCED TO HOLIFIELD**

### **A. Holifield Breached the Encumbrance Prohibition**

Under the Company Agreement, XRI is entitled to recover attorneys' fees advanced to Holifield if Holifield breached the contract willfully or with gross negligence. AB 57-58 (citing record); A0090 (§ 4.07(a)); A0093-94 (§ 5.04(a)). The trial court erroneously concluded that XRI has not met that standard.

The Texas Action, is again critical to understanding the trial court's error. The very existence of that litigation is irrefutable evidence that Holifield breached the Encumbrance Prohibition. That prohibition is both clear and broad. Members may not "pledge, borrow against, collateralize, otherwise encumber or allow any Liens to exist on any of the Units or Company Interests"; "Liens" include "adverse claims or restrictions, of any kind or character whatsoever." AB 13, 57; A0058 (§ 1.01); A0106 (§ 8.03).

The trial court chose not to rule on whether Holifield breached the Encumbrance Prohibition. But the breach is undeniable. Assurance was able to advance a colorable claim against XRI precisely because Holifield "borrowed against" the Units to obtain the Assurance Loan. The interest Holifield conveyed to Assurance—whether it was an interest in the Units themselves or an interest only in the proceeds of their sale—was also a "Lien" under the Company Agreement. The proof that Holifield made a "restriction" on the Units, "of any kind or

characterization,” is that when XRI foreclosed on the Units, a third party challenged that foreclosure. *Holifield* did not bring the Texas Action. Assurance did, and Holifield’s breach of the Encumbrance Prohibition is what gave Assurance the ability to do so.

**B. Holifield’s Breaches Were at Least Grossly Negligent**

The trial court found that Holifield breached the Transfer Restriction, while Holifield’s breach of the Encumbrance Prohibition is undeniable. The remaining issue is whether Holifield’s breaches meet the contractual standard of willfulness or gross negligence. XRI has preserved the issue, the evidence of gross negligence (at a minimum) is substantial, and the trial court’s finding of acquiescence cannot be substituted for the findings required by contract. The Court should remand this case so the trial court can make the required findings.

**1. XRI Did Not Waive Its Recoupment Claim**

Holifield does not meaningfully address XRI’s argument that the trial court erred in finding waiver. AB 57-58. Holifield concedes that “XRI raised the issue,” but then contradicts himself by asserting, without support, that XRI “failed to preserve it in connection with trial.” RAB 42. Holifield does not dispute that he stipulated below to preserve the issue for remand. The amount XRI seeks to recover in recoupment, like the damages XRI seeks to recover related to the Texas Action, was unliquidated at the time of trial. Indeed, it remains unliquidated today. XRI is

honoring its contractual commitment to advance Holifield’s fees—including fees incurred in this appeal—despite its belief that Holifield is wrongfully requiring it to bear that burden. Because the amount of Holifield’s fees was unliquidated at trial, XRI and Holifield agreed to reserve XRI’s recoupment claim for remand. There has been no waiver.

**2. The Record Shows That Holifield Acted With Gross Negligence**

The business context of the dispute, rightly understood, leaves little room for doubt that Holifield’s breaches were at least grossly negligent. As noted, XRI was forced to defend the Texas Action, in which Assurance threatened to force a commercial sale of Holifield’s Units. The Texas Action would not have occurred if Holifield had not encumbered the Units through his arrangement with Assurance.

Holifield tries to minimize the risk the Blue Transfer posed to XRI. He mocks XRI for identifying the risk his breach caused to XRI’s interest as an LLC, pejoratively characterizing it as “stranger-danger.” RAB 27. But Holifield cannot deny that Delaware law carefully guards the “pick-your-partner” principle reflected in LLC agreements. AB 34-35 (citing authority). Nor can Holifield deny that XRI told him that it did not want its equity to be used as collateral for a third-party loan. As XRI director Logan Burt testified, XRI rejected Holifield’s initial request to give Assurance even a second-lien position in the Units because it was not in XRI’s “interests to have those units further borrowed against and have the prospect of

additional parties around the units or with claims on the collateral.” AB 9 (citing record).

Holifield does not dispute this. Holifield himself testified that Burt told him that XRI had no objection to Holifield’s efforts to raise capital—so long as he kept matters “on [his] side of the ledger.” Op. 17. Holifield failed to do so, and the Texas Action is the proof. The Texas Action imperiled XRI’s interests as an LLC: Again, Assurance sought to compel a commercial sale of the Units, which would have put XRI’s equity in the hands of strangers.

Holifield’s breach just as obviously harmed XRI in its role as a creditor. After Holifield defaulted on the XRI Loan, XRI exercised its right as a creditor to strict foreclosure. And the consequence was that XRI was sued by Assurance, a party that, before Holifield breached the Encumbrance Prohibition, lacked any ability to intervene in XRI’s and Holifield’s debtor/creditor relationship.

As was its right, XRI denied Holifield’s initial request that he be allowed to give Assurance a second-lien position in the Units. XRI did so to prevent the risk of an occurrence like the Texas Action. XRI then told Holifield that a different arrangement might be acceptable—but again, only if Holifield kept risk on “his side of the ledger”. The point here too was to prevent an occurrence like the Texas Action. But after XRI told Holifield that it would not agree to an arrangement that posed a risk to the company or the Units, Holifield proceeded to make exactly such



an arrangement with Assurance. Holifield was, at a minimum, grossly negligent in doing so.

Holifield seeks to brush off the magnitude and consequences of his breach. He argues that “[t]he ‘pick-your-partner’ principle was never threatened here, because ‘XRI would continue to enjoy its exclusive status as the only secured creditor.’” RAB 11. That is wholly illogical. XRI’s interest in controlling who holds its equity is distinct from its interest as a secured creditor. XRI did not want its equity to fall into strangers’ or competitors’ hands regardless of the fact that it had made a \$10.6 million loan to Holifield. The commercial sale Assurance sought to effect would have put XRI’s interests as an LLC in grave jeopardy—not only because competitors may have become owners but also because a forced valuation in an unfavorable market environment causes its own set of harms.<sup>2</sup>

The risks and the harms to which Holifield subjected XRI when it breached the Company Agreement are obvious. And Holifield was aware of them. As the trial court recognized, “Holifield and his counsel admittedly did not disclose the full details of the Assurance Loan.” Op. 71.<sup>3</sup> Those “details” include six critical

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<sup>2</sup> The public airing of information concerning the value of a privately held entity can compromise important confidentiality interests. A0515.

<sup>3</sup> Holifield suggests that XRI acted improperly or even deceitfully in making “sworn allegations” in this case that the “details [of the Assurance Loan/Blue Transfer transaction] were entirely ‘unbeknownst’ to XRI.” RAB 1. The trial court’s finding aligns with XRI’s allegations.

transaction documents that reveal that the Blue Transfer was made in consideration for the \$3.5 million Assurance Loan, and that the Units were encumbered under a side letter that restricted their use. AB 15, 59-60 (citing record). In the proceedings below, Holifield argued that the side letter containing the encumbrance is the centerpiece of this litigation: *“This case is about the ‘Side Letter Agreement’”* BR0009 (all emphases in original); *see also id.* (“This Court’s legal construction and interpretation of the Side Letter Agreement is the fulcrum of the controversy upon which this case rests”). Holifield’s suppression of the side letter agreement in June 2018 bears heavily on the question of whether he breached the provisions of the Company Agreement willfully or with gross negligence.

Holifield ultimately seeks refuge in the trial court’s acquiescence determination. He argues that remand is unnecessary because the trial court determined that he breached the Transfer Restriction “reasonably and in good faith.” Holifield is conflating distinct issues. AB 57-58. The trial court made no findings about the reasonableness or good faith of Holifield’s breach of the Encumbrance Prohibition because the trial court made no findings about that breach at all. Even as to the Transfer Restriction, the court’s acquiescence finding depended on events that occurred *after* Holifield committed his breach on June 6, 2018: The court cited a conversation between Gabriel and a representative of Assurance on June 13, 2018, and an email from Gabriel to Holifield dated August 24, 2018. Op. 72; A0379;

A0382. But the nature of Holifield's breach must be evaluated as of the time the breach occurred, and not by reference to XRI's subsequent conduct. Stated differently, whether one party to a contract later acquiesces to a grossly negligent breach does not change the fact that the breach was grossly negligent. Acquiescence turns on XRI's conduct, while the contractual willfulness/gross negligence standard concerns Holifield's conduct.

The trial court's analysis of acquiescence underscores the disconnect. The trial court stated, inconsistently, that XRI was unaffected by the Assurance Loan/Blue Transfer transaction and that XRI benefited from it. Op. 21, 73-75. The court's view appears to have been that by means of the Blue Transfer, other potential Holifield creditors were kept further from Holifield's XRI Units. It is unclear how this helped XRI, which was the only creditor with a secured interest in the Units. More significantly, any potential additional advantage the Blue Transfer provided to XRI as against Holifield's general creditors came at the cost of giving a particular creditor—Assurance—a plausible legal claim against Holifield's Units. The trial court overlooked the harm of bringing one third party—Assurance—closer to Holifield's Units; the court saw only the (theoretical) benefit of pushing other potential third parties further away from the Units. No facts support the conclusion

that XRI was made better off—either as an LLC or as a Holifield creditor—by the existence or structure of the Blue Transfer and Assurance Loan.<sup>4</sup>

Finally, the trial court’s acquiescence finding does not encompass a third set of breaches litigated at trial but not discussed in the trial court’s ruling. XRI presented unrefuted evidence that Holifield repeatedly breached his obligation of confidentiality under the Company Agreement. AB 59-60 (citing record). While XRI did not assert a standalone claim based on those breaches, they are plainly relevant to intent. Holifield conceded at trial that he elevated his obligation to provide information to Assurance above his obligation to protect sensitive company information. *Id.* The confidential information Holifield improperly disclosed to Assurance reflected, among other things, XRI’s business performance. Holifield divulged that information in an effort to persuade Assurance not to foreclose on the Assurance Loan but instead to wait for a windfall in the event XRI was sold. *See* A0542-43. Holifield’s willingness to breach the Company Agreement’s non-

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<sup>4</sup> Holifield appears to suggest that because Entia, not Holifield, was the borrower on the Assurance Loan, Gabriel, who was a cofounder of Entia, benefited from the loan and hence from Holifield’s breach of the Company Agreement. RAB 6-7. This is false for multiple reasons. Gabriel was not an owner of Entia at the time of the Assurance Loan, *see* A0480, A0489, and ladening an entity with debt does not benefit the equity holders in any event. Most significantly, it is undisputed that Holifield used the Assurance Loan exclusively for his personal benefit. *See* A0581. And of course, a benefit to Gabriel—even if there was any, which there was not—would be distinct from a benefit to XRI.

disclosure obligations, repeatedly, bears on his state of mind in breaching both the Transfer Restriction and Encumbrance Prohibition.

XRI asks the Court to remand with instructions that the trial court (1) rule on XRI's claim for breach of the Encumbrance Prohibition, (2) rule under the contractual willfulness/gross negligence standard on both Holifield's established breach of the Transfer Restriction and Holifield's breach of the Encumbrance Prohibition, if the court determines that the latter breach occurred, (3) hear evidence concerning the amount XRI spent on attorneys' fees and settlement in the Texas Action, (4) award damages to XRI in the amount proven, and (5) award XRI all fees advanced to Holifield in this action.

## CONCLUSION

This Court should reverse the trial court's dismissal of XRI's claims for breach of contract damages and recoupment of legal expenses advanced to Holifield and remand with instructions that the court rule on Holifield's breach of the Encumbrance Provision, rule under the contractual scienter standards associated with Holifield's breaches, and award XRI the proper measure of damages flowing from those breaches based on evidence concerning XRI's legal fees in the Texas Action and the amounts advanced to Holifield in this action.

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