Nos. 22-15707, 22-15740

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CARBON CREST, LLC, a Delaware Limited Liability Company,
Plaintiff-counter-defendant-Appellant,
v.
TENCUE PRODUCTIONS, LLC, a California Limited Liability Company; JEFFREY D. WILK, an individual,
Defendants-counter-claimants-Appellees,
v.
PAUL LEWIS, Counter-defendant.

CARBON CREST, LLC, a Delaware Limited Liability Company,
Plaintiff-counter-defendant-Appellee,
v.
TENCUE PRODUCTIONS, LLC, a California Limited Liability Company; JEFFREY D. WILK, an individual,
Defendants-counter-claimants-Appellants,
v.
PAUL LEWIS, Counter-defendant.

On Appeal from the United States District Court
for the Northern District of California
No. 3:19-cv-08179-WHA

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE

Under Federal Rule of Appellate Procedure 26.1, Appellant/Cross-Appellee Carbon Crest, LLC makes the following disclosure: Carbon Crest, LLC has no parent corporation and no publicly held company holds ten percent or more of Carbon Crest, LLC's stock.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1332. The appeal is from a final judgment after a bench trial, so this Court has jurisdiction under 28 U.S.C. § 1291. Final judgment was entered on April 11, 2022. ER-3. The notice of appeal was timely filed on May 9, 2022, within 30 days of the judgment per Federal Rule of Appellate Procedure 4(a)(1)(A). ER-35.

ISSUES FOR REVIEW

1. Whether two sophisticated business entities' freely negotiated choice of Delaware law to govern their contract should be enforced, or whether that choice should be supplanted by California law, which could void the entire agreement, resulting in a party who fully performed his side of the bargain being denied his earned contract payment.

2. Whether a contract involving an interested director is valid under Delaware law when it was negotiated and approved by a disinterested director with delegated board authority to do so, consistent with the corporation's practice for all significant business decisions.

3. Whether, even if this Court finds that the trial court correctly applied California law, a California licensing statute that by its terms applies only to services within California voids a contract where any broker services for which a license may have been needed were provided outside of California.

Relevant statutory provisions are reproduced in an addendum to the brief.

STATEMENT OF THE CASE

After two months of negotiations, Appellant Carbon Crest and Appellee Tencue Productions signed a contract. Paul Lewis—the sole owner of Carbon Crest and then a Tencue director—signed on behalf of Carbon Crest, agreeing to advise Tencue regarding a potential sale to another business, with sale negotiations to take place in New York. Jeffrey Wilk—who made all of Tencue's significant business decisions—signed on behalf of Tencue, agreeing to pay Carbon Crest a tiered percentage of the sale price. The parties agreed that Delaware law would govern their contract. ER-11.

After a bench trial, the district court found that "[i]n reliance on Wilk's written word and signature, Lewis did excellent work to position the company for an eventual sale at twice the amount Wilk had been willing to accept." ER-27. But "when it came time to honor his word to Lewis, Wilk reneged" and refused to pay Carbon Crest the compensation it was due under the contract. ER-27.

Despite recognizing Tencue's breach, the district court "fe[lt] obliged to uphold … reluctantly" two "points of law" to void the contract—issues interposed by Tencue only after Lewis fulfilled his side of the bargain. ER-27. Setting aside the parties' choice of Delaware law, the district court held that two California laws made the contract unenforceable: a California licensing statute requiring brokers of

"business opportunities" within the state to have a real estate license, and a California statute governing approval of contracts involving a corporation's directors. ER-20-22; ER-26-27.

The district court's holding that California courts would jettison the parties' freely negotiated choice of Delaware law and void the entire contract after one side completely fulfilled its obligation—despite attenuated contacts with California—fails to grapple with California's strong public policy favoring enforcement of choice-of-law clauses. California courts would not reward Wilk's bait-and-switch of agreeing to Delaware law to secure Lewis's "excellent work" which "put Tencue in a position to fetch a better price," ER-27, only to invoke California law when it came time to (refuse to) pay for that work, leaving Wilk with a windfall. ER-19.

A. Formation of the Contract Between Carbon Crest and Tencue

1. In 2014, Lewis operated a search fund, aiming to find a company with growth potential, help maximize its value, and then acquire it. ER-6. Lewis identified Tencue Productions, a California company that provided event production services, as a potential acquisition. ER-6. Lewis approached Wilk, one of Tencue's two shareholders, about working with Tencue with an eye toward acquisition. ER-6. Lewis and Tencue signed a Business Advisory Agreement—with Wilk alone signing on behalf of Tencue—and Lewis began advising Tencue on company operations, finances, and Tencue's acquisition of other business. ER-6-7. The services covered

by the Business Advisory Agreement did not include Lewis advising on any sale of Tencue to another business. ER-7.

One of Lewis's recommendations was that Tencue expand its board of directors. ER-7. Tencue had two shareholders, each with a 50% share—Wilk and his life partner, Kristin Leimkuhler—and they were also then the only two directors. ER-6. Wilk agreed with Lewis, expanding the board to five directors: Wilk, Leimkhuler, Lewis, Miriam Agrell (Tencue's CEO), and Kavita Vora (Tencue's Chief Operating Officer). ER-7.

Even after the board was expanded, it "acknowledged and adhered to a practice whereby Wilk, alone, made the significant decisions on behalf of Tencue." ER-7. The board "never had a practice of formal voting." ER-7. Aside from one decision by unanimous written consent to approve an employee profit-sharing plan, there was no formal vote for any decision. ER-7. Lewis moved away from California in early 2016 but continued working with Tencue under the Business Advisory Agreement. ER-8.

2. In 2017, Opus Agency expressed interest in buying Tencue. ER-8. Although Lewis had intended to acquire Tencue himself, he agreed to assist with Tencue's sale to another entity. ER-8. Because such advice was not covered by the Business Advisory Agreement, Lewis emailed Vora (the COO) to request separate compensation for assisting with a potential sale. ER-8. After Vora and Wilk

discussed the issue, Vora sent an email to all five board members, stating that Wilk and Lewis would discuss separate compensation. ER-8.

Over the course of the next two months, Wilk and Lewis negotiated the contract terms governing Lewis's advice related to a potential sale, culminating in the Sales Process Advisory Agreement. ER-8. Lewis had previously formed Carbon Crest as a Delaware Limited Liability Company, and chose to use Carbon Crest as the vehicle for fulfilling his obligations under the Agreement. ER-8. Wilk signed the contract on behalf of Tencue, and Lewis signed on behalf of Carbon Crest. ER-8. Neither Tencue's full board of directors nor its shareholders (Wilk and Leimkuhler) held a formal vote on the agreement. ER-8. All five directors were aware that Wilk and Lewis had reached a compensation agreement. ER-9. Four of them—Wilk, Lewis, Vora (the COO), and Leimkuhler (Wilk's life partner and the other shareholder)—were aware that the compensation was percentage-based and contingent on the sale. ER-9.[1] As a "pattern and practice, Leimkhuler trusted Wilk to make all major business decisions and permitted him to do so." ER-9. All board members were aware of this practice, and none asked Wilk for further details regarding the Agreement. ER-9.

[1] At trial, Leimkuhler testified that she did not know about the contingent fee. The district court found that "[h]er attempt to contradict her deposition testimony was unreasonable and false." ER-9.

B. Terms of the Carbon Crest-Tencue Agreement

In the Sales Process Advisory Agreement, Carbon Crest agreed to act as "Advisor" to "assist with representing [Tencue] in a potential sale transaction." ER-9; ER-51 (Trial Ex. 36, Agreement p. 1). Because Opus Agency had already expressed interest in an acquisition, Tencue sought to "maximize its value and find an acquirer that can offer interesting new opportunities for Jeffrey Wilk and the management team." ER-9-10; ER-51 (Agreement ¶1). Carbon Crest's specific duties were to "evaluate other potential buyers," "negotiate and maximize value," negotiate various acquisition terms, and "[m]anage the sale process." ER-10; ER-51 (Agreement ¶2).

Based on a tiered compensation approach first proposed by Wilk, ER-8, Carbon Crest's compensation—contingent on a successful sale—was either 7% or 10% of the enterprise value up to $25 million (depending on the buyer) and 30% of value above $25 million, ER-10; ER-51 (Agreement ¶3). Tencue also agreed to reimburse Carbon Crest for "reasonable costs and expenses." ER-52 (Agreement ¶8). The Agreement acknowledged that Carbon Crest had arranged for a "banking partner to support the deal process" for a 1%-2% fee, to be split between the parties for enterprise values exceeding $30 million. ER-10; ER-52 (Agreement ¶4). Contingent fees for brokers are normally between 1% and 5% of total transaction value. ER-11. Tencue had no obligation to complete a sale, but the Agreement

provided for compensation to be paid for any sale within three years of the Agreement's termination. ER-11; ER-52 (Agreement ¶¶5-6).

Lewis negotiated the Agreement from New York, and the parties signed it in California. ER-25. The parties specified that the Agreement would be "governed by, construed and interpreted in accordance with the internal laws of the State of Delaware" (where Carbon Crest was formed), "without giving effect to principles of conflicts of laws." ER-11; ER-53 (Agreement ¶11).

C. Lewis's Sale-Related Services for Tencue

1. Lewis's Services to Identify Potential Buyers, Maximize Tencue's Value, and Manage the Sale Process

As recommended by Lewis, Tencue selected a banking partner, AdMedia, to "serve[] as the frontline of negotiations" with potential buyers. ER-11. AdMedia was a New York corporation and "[a]ll negotiations with potential buyers took place in New York." ER-11. Lewis participated in these negotiations outside of California, ER-11.

Lewis's advice and assistance to Tencue encompassed a much broader array of services. After the initial offers from Opus Agency failed to yield a sale, Lewis began researching potential buyers. ER-12. He created an "Information Memorandum" for potential buyers and prepared Wilk and Leimkuhler for ten "roadshow" meetings with potential buyers, where Lewis also fielded financial questions. ER-12. All but one of the "roadshow" meetings took place outside of

California (mostly in New York). ER-12.

To "make Tencue's financials presentable to potential buyers," Lewis worked with a New York accounting firm to make Tencue's accounting system compliant with Generally Accepted Accounting Principles. ER-12. Because a full conversion was not possible, Tencue effectively had to run two accounting systems, which "required Lewis' continuous supervision to ensure that any errors were corrected." ER-12.

Lewis "encouraged Tencue to discuss cultural fit with potential buyers" and arranged meetings for that purpose, all but one of which took place in New York. ER-13; ER-30. In general, "Lewis did an excellent job managing the sale process, arranging meetings, preparing financials, handling paperwork, and shepherding the process along." ER-13. Tencue paid Carbon Crest for related expenses, as the Agreement required. ER-56 (Trial Ex. 57, Tencue Expense Ledger).

2. Offers from Opus Agency

Opus Agency, an Oregon corporation, had approached Tencue before the Sales Process Advisory Agreement was signed, and made two offers: $20 million and then $25 million. ER-8, ER-11. After assuming his sales advisory role, Lewis "made reasonable requests for financial information that would help him assess Opus Agency's valuations of Tencue," but Opus's representative "refused to provide such information." ER-11. Wilk was prepared to accept both offers, but Lewis

recommended that Wilk reject them, because he believed Tencue could receive better offers from other buyers, ER-11—as in fact happened. Wilk rejected Opus Agency's offers. ER-11.

3. Offers from Other Buyers, Including Nth Degree

After Tencue declined Opus Agency's offers, two other buyers (both Delaware corporations headquartered outside of California) made offers. ER-16. One offered a minimum price of $24.6 million with a maximum price of $79.5 million (depending on Tencue's post-sale growth). ER-16. The other offered a minimum price of $34 million and maximum price of $41.5 million. Both offers fell through, however. ER-16.

Lewis introduced a third potential buyer to Tencue, Nth Degree, a Georgia corporation that managed trade shows and events. ER-12. After meetings in New York, including one arranged by Lewis to discuss cultural fit, Tencue signed a letter of intent to sell to Nth Degree, based on an offer "substantially comparable to [] $37.5 million cash." ER-13. Nth Degree had ties to thousands of trade shows, which were managed in a separate division from events (the division Tencue would have joined). ER-14. Subsequent integration meetings revealed that one of the thousands of trade shows hosted by an Nth Degree customer was the Shooting, Hunting, Outdoor Trade show, "which was essentially a gun show." ER-13-14. Despite the "attenuated," "two steps removed" connection that would exist between Tencue and

the gun show, Wilk rejected Nth Degree's offer in 2018—a decision that Lewis supported. ER-14. Lewis "did an excellent job exploring the companies' cultural fit," including arranging the related meetings. ER-14. The district court rejected Tencue's "trial criticism that Lewis did not perform ample due diligence" as "a false narrative designed for litigation, one unanchored in the truth." ER-14.

D. Tencue's Initiation of Renewed Discussions with Opus Agency and Termination of the Sales Process Advisory Agreement

After the Nth Degree sale fell through, Tencue, "one step at a time, discontinued Lewis' role in the company, … all the while praising him for his contributions." ER-16. In June 2018, Tencue removed Lewis from the board, but kept him on as a consultant. ER-16.

In November 2018, Opus Agency again approached Wilk about a potential sale, and "contrary to the false narrative presented at trial," Tencue "re-opened communications for a sale." ER-18.[2] The Sales Process Advisory Agreement was a "problem" for Wilk and Tencue, so "negotiations with Opus Agency paused until [Wilk and Tencue] could disengage from Lewis." ER-18. In February 2019, Agrell (Tencue's CEO) terminated the Agreement to initiate Lewis' three-year compensation period under it. ER-17. Agrell praised Lewis in several emails, "in

[2] At trial, Wilk testified that Opus Agency did not reinitiate sale discussions until April 2019, after the Sales Process Advisory Agreement was terminated. ER-17. The district court found "Wilk's testimony was not truthful." ER-18.

stark contrast to the defense's false narrative and the board members' expressions of displeasure with Lewis at trial." ER-17.

When Opus Agency returned to the table, it valued Tencue at $40 million—$15 million more than its highest prior offer, ER-11—reflecting "Nth Degree's $37.5 million offer as a baseline." ER-18. Tencue and Opus Agency ultimately agreed on a sale, with the final price set at $42 million. ER-18. That same day, Wilk offered Lewis money "to release Tencue from its obligation" under the Sales Process Advisory Agreement, which Lewis declined. ER-18-19. Agrell (the CEO) and Vora (the COO) received $7.9 million and $2.5 million, respectively, through their own sale-related contingent compensation agreements negotiated with Tencue; neither agreement was approved by a board vote. ER-19. Under Carbon Crest's agreement, Lewis was entitled to $6.85 million because the sale took place within the agreement's three-year compensation period. ER-19. But Tencue paid none of that compensation. ER-19.

E. District Court Decision

a. The district court recognized that Lewis "performed all services required of him under the Sales Process Advisory Agreement," ER-31, and that his work was "excellent," rejecting Tencue's "contrived narrative to place Lewis in a false light and to pretend he had done a poor job," ER-15. The district court nonetheless held the Agreement void because Carbon Crest did not have a real estate broker's license.

Unlike Delaware, California requires such a license not only for real estate transactions, but also for sales of "a business opportunity" within California. Cal. Bus. & Prof. Code §§ 10130, 10131(a). Applying the California case *All Points Traders, Inc. v. Barrington Assocs.*, 259 Cal. Rptr. 780, 781-84 (Cal. App. 1989) to the out-of-state services provided by Carbon Crest, the district court concluded that Tencue's sale involved a "business opportunity," ER-20-21, and that Carbon Crest acted as a broker because it "help[ed] to conclude the transaction by taking part in negotiating the details," ER-21 (citing *Tyrone v. Kelley*, 507 P.2d 65, 72 (Cal. 1973)).

The district court acknowledged that California prohibits unlicensed brokers from "act[ing] as a real estate broker" only "within th[e] state," Cal. Bus. & Prof. Code § 10130, and that all negotiations with potential buyers took place in New York. ER-11, ER-22. The court nonetheless held it was immaterial whether Carbon Crest acted "within th[e] state," because Carbon Crest (and Lewis) did not have an out-of-state broker's license, either. The district court recognized that this Court held in *Consul Ltd. v. Solide Enterprises., Inc.*, 802 F.2d 1143 (9th Cir. 1986), that brokers are not required to hold California broker's licenses when they provide services outside of California to sell California property. *Id.* at 1145, 1151. But the district court interpreted that decision to apply only to brokers who were licensed in the states where services were performed. ER-23. The court therefore held that Lewis's

"lack of licensure from the states where he performed the services" categorically barred recovery under the Agreement. ER-23. The court further held that the Sales Process Advisory Agreement was "incapable of severance" because the contract had a single "unlawful object: to sell Tencue." ER-23.

b. After holding that California's licensing statute would void the contract in the entirety, the district court turned to the parties' choice of Delaware law. The district court held that California courts would not enforce the choice-of-law clause, because three necessary conditions to void the clause were met: First, the district court held that California law would apply in the absence of the clause, despite the fact that "Lewis performed nearly all work … outside of California," ER-25. Second, the district court reasoned that Delaware's law permitting business opportunity sales without a broker's license conflicted with California's fundamental public policy to "protect the public from incompetent or untrustworthy practitioners." ER-25 (quoting *Salazar v. Interland, Inc*., 62 Cal. Rptr. 3d 24, 27 (Cal. App. 2007)). Third, the court concluded that California's interest in "protect[ing] a resident corporation from untrustworthy practitioners" is materially greater than Delaware's interest in enforcing a contract made by one of its citizens. ER-25.

c. The district court also held the Agreement invalid for a second California-law reason. Because Lewis was a Tencue director at the time the Agreement was signed and also had a material interest in Carbon Crest, the court concluded that the

Tencue-Carbon Crest contract qualified as an "interested director transaction" requiring board or shareholder approval under California Corporations Code Section 310. ER-26-27. The district court held that the lack of a formal board or shareholder vote voided the transaction, "[n]otwithstanding that everyone knew that Wilk, alone, made major decisions for Tencue." ER-27. While noting that "Carbon Crest cites Delaware law allowing delegation of board authority" to Wilk, the district court concluded that California did not permit such a delegation. ER-27.

d. Although holding the Agreement unenforceable, the district court "grant[ed] some relief to plaintiff to avoid an unjust result." ER-27. In "compelling cases," California law permits a remedy under a void contract to "avoid unjust enrichment to a defendant and a disproportionately harsh penalty upon the plaintiff." ER-28 (quoting *Asdourian v. Araj*, 696 P.2d 95, 105 (Cal. 1985)). Citing cases where California courts had permitted recovery to individuals who performed all of the services required under their contracts but lacked the requisite licenses, ER-28-29, the district court found a "compelling case" warranting a quasi-contract remedy here. First, "Lewis' services … significantly benefited Tencue by upgrading Tencue and positioning it for favorable sale." ER-29. Second, "allowing Lewis to recover would not conflict with the 'policy of the transgressed law,'" because Lewis was not an "incompetent or untrustworthy practitioner[]." ER-30 (quoting *Asdourian*, 696 P.2d at 105). Likewise, "equity allows" the court "to excuse … the lack of shareholder

approval" because Lewis "simply followed the pattern and practice that Wilk and Tencue had themselves shown was acceptable." ER-31.

The court awarded Carbon Crest $1.5 million in quasi-contract damages, as the reasonable value of Lewis' services. ER-32. The district court denied Tencue and Wilk's counterclaims for breach of fiduciary duty and professional negligence.

SUMMARY OF ARGUMENT

California policy strongly favors choice-of-law clauses. They are enforced unless all three stringent criteria for a narrow exception are satisfied. The district court's analysis turned this principle upside down, adopting a test that would void choice-of-law clauses in nearly every case. California law requires the party opposing the chosen law (Tencue) to pass through three mandatory gates to escape the law it contracted for: (1) California must supply the law that would apply absent the parties' choice of Delaware; (2) Delaware law must conflict with a fundamental public policy of California; and (3) California's interest in enforcing that policy in this case must be materially greater than Delaware's. The district court erred on all three counts. Finding error on any one of them requires reversal.

At the first gate, the district court wrongly held that California law would apply absent the parties' choosing Delaware. It wouldn't. The subject matter of the Agreement (Lewis's services, not "Tencue"—as the district court would have it) and the place of performance both weigh against California. And heavily so, because the

issue at hand is whether Lewis's services required a license. The outside-California location of those services strongly favors Delaware law, given that California's licensing statute disclaims any interest in regulating extraterritorially.

At the second gate, the district court erred in classifying California's licensing statute as a "fundamental public policy" for three independent reasons: Merely promoting the "public interest" is not enough for a law to count as fundamental. If it were otherwise, California's policy strongly favoring choice-of-law clauses would be a nullity. Moreover, the licensing statute is waivable when applied to multi-state transactions, which disqualifies it from "fundamental" status. And the licensing statute, which by definition applies only to business contracts, does not largely protect weaker bargaining parties from stronger ones, and did not do so here, where two sophisticated business entities carefully negotiated terms at arms' length.

The third and final gate is closed to California law as well, because on these facts, California's interest in enforcing its licensing statute is not materially greater than Delaware's interest in fulfilling the justified expectations of its resident business in having its performance—and entitlement to payment—judged under Delaware law. Here, the parties are sophisticated entities with a pre-existing relationship, Carbon Crest performed its work nearly entirely outside of California, and the work was excellent. No incompetent-practitioner concerns are implicated. Because Tencue cannot pass any of these three gates, much less all of them,

California would enforce the parties' choice of Delaware law.

Applying Delaware law, as the district court should have done (but failed to), the contract is valid. The parties agree that Delaware law requires no broker's license. Delaware corporate law also validates the Agreement, even though Lewis was a Tencue director. Lewis had no role in approving the Agreement on Tencue's behalf; Wilk alone did that, exercising the delegated authority of the Tencue board. Just as Wilk did for the sale-contingent compensation agreements for other directors, none of which were approved by a full board vote. Because Wilk was fully aware of the facts and entirely disinterested, his approval constitutes approval by a disinterested committee of the board, and falls within one of Delaware's statutory safe harbors for interested director transactions. Tencue also impliedly ratified the Agreement under Delaware law when it knowingly accepted the benefits of the bargain, only repudiating the agreement years later when it came time to pay.

The district court doubly erred when it rejected both delegated authority and implied ratification doctrines for validating the Agreement, first when it declined to apply Delaware law and second when it held that neither doctrine applied in California. Not so; California law is very similar to Delaware's on both points and the Agreement passes California scrutiny under either theory. The Agreement is also fair to Tencue, because Lewis received (or should have received) sale-related compensation consistent with other directors' sale-related compensation for the wide

scope of services he provided under the Agreement, far beyond a typical broker's role—including managing a complex conversion of Tencue's accounting system.

Finally, if California law even applies, its broker licensing statute does not void the Agreement. Even if Lewis provided some "broker" services by participating in negotiations (however minimally), he did not do so in California, and the California statute expressly reaches only broker services "within th[e] state." As this Court has already held, out-of-state services are not in-state merely because they relate to California property, and Tencue's status as a California business is the only (insufficient) California connection here. As the district court found, all negotiations—the sine qua non of broker services—took place in New York, and Lewis did not participate in any negotiations in or from California. The California licensing statute therefore does not apply. And, contrary to the district court's holding, Lewis's lack of a non-California broker's license is beside the point, both because no element of the California statute turns on out-of-state licensing and because both New York and Delaware (like most states) permit business opportunity negotiations without a license.

At a minimum, the contract must be severed under California law, and Lewis compensated for the bulk of his services, which did not require a license because they were distinct from any work negotiating terms. Justice, which is the overriding consideration for severability, demands it. Lewis's work, more than anyone else's,

directly led to Tencue doubling its sale price. Lewis did this excellent work in reliance on Wilk's signature on the Agreement, and Tencue was not tricked or misled into entering it. Tencue received the full benefit of its bargain and then "reneged."

In sum, California law would enforce the parties' bargain according to its terms—and therefore apply Delaware law, under which the Agreement is wholly valid. But at the very least, California law would not brook wholesale invalidation of the Agreement and would compensate Lewis for the extensive non-broker work he performed.

ARGUMENT

I. The Parties' Choice Of Delaware Law Governs And Validates The Contract.

A. Choice of Law and Contract Validity Is Reviewed De Novo.

The parties' choice of Delaware law—and the Agreement's validity under Delaware law—were raised in Carbon Crest's proposed conclusions of law. ER-39-41. This Court "review[s] de novo the district court's legal conclusions, including its decision that California law applies to the … dispute." *First Intercontinental Bank v. Ahn*, 798 F.3d 1149, 1153 (9th Cir. 2015). The Court "review[s] the district court's findings of fact after the bench trial for clear error," under a "deferential" standard that accepts the findings unless the court is "left with the definite and firm conviction that a mistake has been committed." *O'Bannon v. NCAA*, 802 F.3d 1049, 1061 (9th Cir. 2015).

B. Delaware Law Governs the Sales Process Advisory Agreement.

When, as here, a federal court is exercising diversity jurisdiction, it applies the forum state's choice of law rules. *Patton v. Cox*, 276 F.3d 493, 495 (9th Cir. 2002). The district court misapplied those rules. California courts would enforce these sophisticated business entities' choice, in arms-length negotiations, to apply Delaware law.

1. California disregards contracting parties' choice of law only when three narrow prerequisites apply.

Tencue and Carbon Crest agreed that their agreement would be "governed by … the internal laws of the State of Delaware, without giving effect to principles of conflicts of laws." ER-11. Under California law, the "the parties' choice generally will be enforced unless [the party opposing the chosen law] can establish both that the chosen law is contrary to a fundamental policy of California and that California has a materially greater interest in the determination of the particular issue." *Wash. Mutual Bank v. Sup. Ct.*, 15 P.3d 1071, 1078 (Cal. 2001). This approach "reflect[s] strong policy considerations favoring the enforcement of freely negotiated choice-of-law clauses." *Id.* (quoting *Nedlloyd Lines B.V. v. Superior Court*, 834 P.2d 1148, 1149 (Cal. 1992)).

To determine whether to displace the parties' choice, California courts follow the Restatement (Second) Conflict of Laws § 187. *First Intercontinental Bank*, 798 F.3d at 1153; *Nedlloyd Lines*, 834 P.2d at 1151. Section 187 first asks "whether the

chosen state has a substantial relationship to the parties or their transaction." *First Intercontinental Bank*, 798 F.3d at 1153. Delaware has a substantial relationship to the parties, as the district court held, because Carbon Crest is a Delaware limited liability company. ER-25 (citing *Nedlloyd Lines*, 834 P.2d at 1153).

Once a substantial relationship is established, the party seeking to void the choice-of-law clause (Tencue) bears the burden to establish three prerequisites, or gates. *Pitzer College v. Indian Harbor Ins. Co.*, 447 P.3d 669, 673 (Cal. 2019). The first gate is passed only if California would supply the applicable law in the absence of a choice-of-law clause. *First Intercontinental Bank*, 798 F.3d at 1153. If so, the second gate opens only if "the relevant portion of the chosen state's law is contrary to a fundamental policy in California law." *Id.* If there is a conflict, the third and final gate is passed only if California "has a materially greater interest than the chosen state in the determination of the particular issue." *Id.* California law supplants the parties' choice only when "*all* of these criteria are met." *Id.* (emphasis added). The district court wrongly held that Tencue's attempt to void the choice-of-law clause passed all three gates. This Court need only find one gate closed to reverse. *See id*.

2. California law would not apply in the absence of the choice-of-law clause.

The district court went wrong from the very first gate because it improperly discounted the place of performance (outside California) in holding that California

law would apply absent the parties' choice-of-law clause. The district court recognized that the place of performance "weighs against California" because "Lewis performed nearly all work under the agreement outside of California." ER-25. That highly significant contact weighing against California is enough, under California law, to close the gate and disqualify California law from displacing the parties' choice.

a. In examining the first prerequisite for displacing the parties' choice of law—whether California law would apply absent the parties' choice—California courts follow Section 188 of the Restatement (Second) Conflict of Laws. *First Intercontinental Bank*, 798 F.3d at 1154. The district court held that this analysis pointed toward California law, and bolstered that conclusion by reasoning that the "internal affairs doctrine would likely" lead to the same result. ER-25.

Such bolstering was in error. The internal affairs doctrine is "a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs." *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982). It does not apply to contract disputes and it does not apply when there is a choice-of-law clause, because applying it "would ignore the strong public policy [the] Supreme Court has declared in favor of the enforcing choice-of-law provisions." *Colaco v. Cavotec SA*, 236 Cal. Rptr. 542, 560 (Cal. App. 2018). Where there is a choice-of-law clause, California law requires applying Restatement § 188 to determine which

state's law would apply absent the clause, without any presumption favoring California law. *See Nedlloyd Lines*, 834 P.2d at 1152 n.5.

b. Shorn of its errant internal affairs bolstering, the district court's § 188 analysis cannot stand. This analysis considers five "contacts" to decide which state's law would apply absent the parties' choice: (i) the place of contracting, (ii) the place of negotiation, (iii) the place of performance, (iv) the location of the subject matter of the contract, and (v) the place of incorporation and place of business of the parties. *First Intercontinental Bank*, 798 F.3d at 1154; Restatement (Second) of Conflicts § 188. The district court rightly concluded that the place of negotiation and place of incorporation are neutral, because each contact points to two states. ER-25; *see, e.g.*, *First Intercontinental Bank*, 798 F.3d at 1155. The district court went wrong in scoring the remaining contacts 2-1 for California, counting the place of execution and subject matter for California, and the place of performance against. ER-25. The district court further erred in reasoning that a 2-1 score (even if it were accurate) meant that California law would apply, without considering the relative importance of each contact.

First, the district court's 2-1 pro-California score was wrong; it should be 2-1 against. The parties signed the Agreement in California (after negotiating it from California and New York), so that single happenstance counts in favor of California. But that's all. The place of performance counts against, as the district court

recognized. ER-25. As for the contract's subject matter, the district court wrongly assessed it as favoring California, declaring "Tencue" to be the contract's subject. ER-25. But the Agreement's substance was not simply "Tencue," or even the sale of Tencue (as it would be for the actual sale contract). The substance of the contract was the "engage[ment of] Paul Lewis/Carbon Crest … to assist with representing [Tencue] in a potential sale transaction." ER-51 (Agreement p.1). That subject matter—Lewis's services—and the place of performance thus overlap, and both weigh against California law.

From the beginning, the parties contemplated that Lewis's services would be provided outside of California, interfacing with non-California entities, and that is what happened:

- Lewis had moved out of California over a year before the Agreement was signed. ER-8.
- All negotiations with potential buyers took place in New York, with AdMedia—a New York corporation—acting as the "frontline" of negotiations. Lewis did not "participate[] in negotiations with potential buyers … within California." ER-11.
- All but one of the ten "roadshows" for potential buyers and all but one of the cultural fit and integration meetings were outside California. ER-12-13.
- Lewis worked with a New York accounting firm to revamp Tencue's

accounting system. ER-12.

- None of the potential buyers who submitted offers were California companies. ER-8; ER-12; ER-16.

Given the non-California nature of the services that were the subject of the Agreement, the contract's subject matter counts against California law, not for it. At most, this "contact" is neutral, and cannot bear the decisive pro-California weight the district court placed on it. *See* ER-25.

Moreover, even if the district court's 2-1 score was right, it was still error to hold that California law would apply (absent the parties' Delaware choice). Evaluating contacts under Restatement § 188 is not an arithmetic exercise. Rather, contacts must "be evaluated according to their relative importance with respect to the particular issue." Restatement (Second) Conflict of Laws § 188(2). Here, the particular issue is whether the Agreement is void because performing certain functions requires a broker's license. The place of performance is of paramount importance to that question, and especially so because the licensing requirement is geographically constrained. California's licensing requirement is expressly limited to broker services provided "within th[e] state," Cal. Bus. & Prof. Code § 10130, and it does not extend to broker services provided outside of California related to the sale of California property, *Consul Ltd.*, 802 F.2d at 1149. This geographic constraint not only validates the Agreement under California law, *see* pp. 51-55,

infra, it also makes the place of performance the most important "contact" by far, and weighs heavily against applying California law.

Because California law would not apply in the absence of the parties' Delaware choice, it cannot be imposed against the terms of their contract. *See ABF Cap. Corp. v. Berglass*, 30 Cal. Rptr. 3d 588, 597 (Cal. App. 2005) (holding New York law would apply to contract dispute where location of negotiation and execution were unknown, and the "place of performance was New York, which also was the residence and place of business of at least one party to the contract"). The district court erred in not holding this first gate was closed.[3]

3. Delaware law does not conflict with a fundamental public policy of California.

Even if Tencue could get past the first gate for setting aside the parties' freely negotiated choice to apply Delaware law, it would stumble at the second: Tencue failed to establish a fundamental public policy conflict between California and Delaware law. The district court's opposite conclusion rests on three errors: the licensing law is not "fundamental" simply because it promotes the public interest;

[3] The only conflict that could displace the parties' choice would thus be between New York and Delaware, not California and Delaware. *See Wash. Mutual Bank*, 15 P.3d at 1078 n.5. Tencue has never suggested any such conflict, and there is none. *See* N.Y. Real Prop. L. § 440(1) (broker's license required for real estate transactions, without reference to business opportunities); Business Brokerage Press, *State Licensing*, https://tinyurl.com/36b96mz7 (New York does not require a business opportunity broker's license).

the licensing law is waivable as applied to out-of-state services; and the licensing law does not protect against unequal bargaining power.

a. Although "no bright-line rules" "determine[e] what is and what is not contrary to a fundamental policy of California," *Pitzer Coll.*, 447 P.3d at 674, the California Supreme Court has outlined three necessary criteria. Rules "have been found to be fundamental public policies when (1) they cannot be contractually waived; (2) they protect against otherwise inequitable results; and (3) they promote the public interest." *Id.* at 675. The district court treated these criteria as disjunctive, holding that any of the factors—including the very broad category that a law "promote the public interest"—was sufficient to qualify for "fundamental public policy" status. ER-26. But the California Supreme Court used "and," not "or" (which the district court used) in discussing the three criteria, and concluded that the policy at issue was fundamental only after examining each criterion and finding every one of them satisfied. *See Pitzer Coll.*, 447 P.3d at 675.

The district court's one-criterion-is-enough test, on the other hand, would sweep almost any law into the "fundamental public policy" category, because almost any law will "promote the public interest" in some way. Presumably every time the Legislature passes a statute, it does so in the public interest. If furthering the "public interest" were alone enough, California law would almost always supplant the parties' choice, conflicting with California's recognition of equally important

"strong policy considerations favoring the enforcement of freely negotiated choice-of-law clauses," especially in arms-length negotiated agreements. *Nedlloyd Lines*, 834 P.2d at 1149. The district court wrongly held the licensing law was fundamental without requiring all three markers of fundamental status: non-waivability, inequity protection, and public interest promotion.

b. When the three fundamental-policy criteria are properly applied, the district court's recognition that there is no "anti-waiver provision in … Section 10130," ER-26, should have been the end of the analysis. Non-waivability is not merely "one consideration," ER-26, but an essential condition for a fundamental public policy. *Pitzer Coll.*, 447 P.3d at 675. Carbon Crest is unaware of any California case holding a waivable policy is fundamental. *See Brack v. Omni Loan Co., Ltd.*, 80 Cal. Rptr. 3d 275, 282 (Cal. App. 2008) ("The relative significance of a particular policy or statutory scheme can be determined by considering whether parties may, by agreement, avoid the policy or statutory requirement."). Because the broker licensing policy at issue here is waivable through a contractual choice-of-law clause, it is not fundamental.

Although an express anti-waiver statute is not required for a California policy to be non-waivable (and thus a candidate for "fundamental" status), something more than mere illegality under California law is required. The policy favoring choice-of-law clauses necessarily means that parties can "escape prohibitions prevailing in the

state which would otherwise be … the applicable law"—a policy justified by the interest in certainty and predictability served by such clauses. Restatement (Second) Conflict of Laws § 187 cmt. e. Instead of a *per se* application of a state's statutes voiding certain contracts, "the extent to which the significant contacts are grouped in th[e] state" guides this fundamental public policy inquiry. *See id.* § 187 cmt. g. Just as the district court impermissibly discounted the place of performance at gate one (whether California law would otherwise apply), it erred by wholly ignoring the place of performance at gate two (fundamental public policy).

In *Brack*, California's financial lending regulatory regime was found non-waivable based not only on the law "provid[ing] that an agreement entered into in violation of the statute is void," but also on a law precluding evasion of California requirements by originating loans outside the state, which "strongly suggests the [law] may not be circumvented by a contractual choice-of-law provision." 80 Cal. Rptr. 3d at 284. In stark contrast here, the broker licensing statute has no such out-of-state anti-evasion provision, and expressly regulates services only within California. Cal. Bus. & Prof. Code § 10130. Even if the licensing statute were non-waivable as to an entirely in-state undertaking, it is not so when applied to a multi-state one, given the absence of a similar anti-circumvention restriction.

This Court's decision in *Consul Ltd.* supports that parties can waive the broker licensing requirement as applied to out-of-state broker services. In that case, this

Court explained that even though a "contract to perform acts barred by California's licensing statutes is illegal," California's licensing statute does not apply to "out-of-state acts relating to in-state (California) realty performed by a broker licensed in another state." 802 F.2d at 1149. In so holding, the Court noted that many jurisdictions "find no interference with … public policy" of state A in permitting compensation to a broker who was not licensed in state A but performed services in state B related to state A property. *Id.* at 1149-50. The Court's holding was supported by a California Court of Appeals decision that "refused to require an Arizona license for an Arizona land transaction involving work done primarily in California." *Id.* at 1151 (citing *Cochran v. Ellsworth*, 272 P.2d 904, 908-09 (Cal. App. 1954)). The California statute's geographic restriction and court decisions recognizing that multi-state transactions require a flexible approach indicate that sophisticated parties may use a choice-of-law clause to contract with non-California-licensed entities for business services to be largely (if not entirely) performed in other states.

c. The waivable nature of the licensing requirement as applied to largely out-of-state services is enough to find it non-fundamental and close down Tencue's attempt to void the choice-of-law clause at gate two. But there is a second, independent reason to find the licensing statute non-fundamental: it does not protect against "inequitable results that are generated by … superior bargaining power," *Pitzer Coll.*, 447 P.3d at 675. The district court held that this criterion was satisfied

because the licensing statute "protects the public from unlicensed practitioners." ER-26. But this criterion demands that a policy protect specifically against unequal bargaining power to qualify as "fundamental."

In *Pitzer College*, the California Supreme Court explained that a fundamental policy is "'designed to protect a person against the oppressive use of superior bargaining power.'" 447 P.3d at 675 (quoting Restatement § 187 comment g). California courts have found that policies protect against unequal bargaining power (and thus satisfy this criterion for "fundamental" status) when they address particular kinds of contracts that are likely to bury oppressive terms in contracts of adhesion and therefore raise bargaining power concerns, such as between insurers and insureds, *id.*; lenders and borrowers, *Brack,* 80 Cal. Rptr. 3d at 277; and employers and employees, *Application Grp., Inc. v. Hunter Grp., Inc*., 72 Cal. Rptr. 2d 73, 85 (Cal. App. 1998).

The business broker licensing statute, on the other hand, does not generally protect weaker bargaining parties from oppressive contract terms, nor did it do so on the facts of this case.

In general, there is no reason to suppose that the class of contracts at issue will involve unequal bargaining power. Unlike other laws that have been found to qualify as "fundamental," the business broker licensing law definitionally applies only to business transactions, not consumer sales. *See ABF Cap. Corp. v. Grove Props. Co.*,

23 Cal. Rptr. 3d 803, 810-11 (Cal. App. 2005) (holding a law that applied to a business contract was fundamental when the law applied equally to consumer contracts). Business buyers and sellers are not, as a class, likely to be weaker bargaining parties, as compared to business opportunity brokers. Nor does the licensing law do anything to prohibit oppressive contract terms for business opportunity transactions. It does not regulate contract terms at all. Instead, the law precludes any contract between a business buyer/seller—no matter how powerful—and an unlicensed business opportunity broker for broker services within California. Because the business broker licensing law is not designed to protect weaker bargaining parties, when roughly equal parties agree to apply a different law, California would not apply the licensing law to displace the parties' freely bargained-for choice.

The facts here are consistent with the general rule. There was no unequal bargaining power between Tencue and Carbon Crest. Tencue was under no pressure to secure Carbon Crest's services and could have worked with any advisor(s) it wished for its potential sale. The Agreement was not a contract of adhesion with terms dictated by Carbon Crest, but a bespoke contract negotiated by two sophisticated business entities over a two-month period. ER-8. Because the Agreement—like business opportunity sale-related contracts generally—raises no concerns of unequal bargaining power, the "inequitable results" criterion for a

"fundamental" policy is not met. The district court erred in holding otherwise.

In sum, the district court's holding that Tencue's attempt to void the choice-of-law clause passes gate two (fundamental public policy) can be reversed for any one of three independent reasons: the licensing statute's promotion of the public interest is not enough; it is waivable as applied to multi-state transactions; and it does not protect against unequal bargaining power.

4. California's interest is not materially greater than Delaware's.

Even if California's business-opportunity broker licensing policy is fundamental in the abstract—and thus passes gate two for voiding the parties' choice-of-law clause—it nonetheless fails to pass gate three because California does not have a "materially greater interest" than Delaware "in the determination of the particular issue." Restatement (Second) Conflict of Laws § 187(2)(b). The district court's contrary holding wrongly substituted an abstract conception of each state's interest for the fact-specific balancing that California law requires.

Crucially, California law dictates that each state's interest must be analyzed in the context of the case's specific facts. The "reference to 'the particular issue' … call[s] for an inquiry into the specific facts of an individual case." *Guardian Sav. & Loan Ass'n v. MD Assocs*., 75 Cal. Rptr. 2d 151, 160 (Cal. App. 1998). The court "must consider which state, *in the circumstances presented*, will suffer greater impairment of its policies." *Brack*, 80 Cal. Rptr. 3d at 287 (emphasis added).

Three aspects of this Agreement are particularly salient for the interest analysis, yet went unconsidered by the district court. First, the parties are sophisticated business entities with a pre-existing relationship. Carbon Crest did not offer broker services to the public, and Tencue did not choose to work with Carbon Crest (and Lewis) based on a Google search. Rather, Tencue—having worked with Lewis for two and half years when Opus Agency first made an offer—reached out to Lewis and specifically requested that he assist Tencue with a potential sale. ER-6, ER-8. The parties' freely and carefully negotiated choice of Delaware law (after two months of debating terms) enabled Tencue to secure Lewis's services for that project, as it desired, and to avoid any barrier the licensing requirement might have posed (though it does not, in fact, apply, *see* pp. 51-55, *infra*).

On these facts, California's interest in enforcing the licensing statute is minimal. *Guardian Savings*, 75 Cal. Rptr. 2d at 159-60, is instructive. There, the court held that California's statute prohibiting deficiency judgments in foreclosures embodied a fundamental public policy. *Id.* at 159. The court nonetheless upheld the parties' choice of Texas law (which permitted deficiency judgments) because the "policies underlying [the California statute] … have limited application to the present case." *Id.* at 160. Specifically, the statute at issue in *Guardian Savings* was designed to protect homeowners, and the transaction did not involve the purchase of a home. *Id.* Moreover, the policy of "equitable risk allocation [between lender and

borrower] does not apply to a transaction negotiated between sophisticated Texas domiciliaries." *Id.* California's interest in an equitable transaction is "absent where, as here, the bargain was negotiated between sophisticated, professional investors in a specialized field" outside the state. *Id.*

Second, as *Guardian Savings* indicates, the contract's out-of-state connections matter when gauging the strength of California's interest. *Id.* Here (again), the district court wrongly ignored the out-of-state locus of contract performance when considering California's (reduced) interest in imposing its licensing regime in derogation of the parties' agreement. Although Tencue was a "resident corporation" protected by the licensing statute in the abstract, the statute's express limitation to in-state services, Cal. Bus. & Prof. Code § 10130, disclaims any interest in restricting California corporations' broker choices to California-licensed entities whenever they explore business sales anywhere in the world.

Finally, the sole California interest identified by the district court—"protect[ing] a resident corporation from untrustworthy practitioners," ER-25, has no relevance here, where the district court found that "Lewis was not such a practitioner." ER-30. Rather, "Lewis' significant contributions to Tencue's value demonstrate he was competent." ER-30. "In fact, more than anyone else in this tale of greed, Lewis deserves credit for putting Tencue in a position to fetch a better price." ER-27. On the facts of this case, California has no interest—or at most a *de*

minimis one—in imposing its licensing statute to override the parties' choice of Delaware law.

On the other side of the ledger, Delaware's interest is not simply a "general interest in enforcing the provision[] of [a] contract[] made by one of its citizens." ER-25 (quoting *Brack*, 80 Cal. Rptr. 3d at 287). Rather, Delaware's interest lies in "assuring the justified expectations of the parties," who selected "the law of a specified jurisdiction" to "avoid … uncertainty" when they "expect[ed] to perform their respective obligations in multiple jurisdictions." *Guardian Sav. & Loan Ass'n*, 75 Cal. Rptr. 2d at 160. Delaware has a strong interest in protecting the predictability (usually) achieved by a choice-of-law clause for its resident businesses engaging in multi-state transactions. And that interest is at its apex when Delaware businesses enter freely negotiated contracts—not contracts of adhesion—with counterparties that seek out a Delaware company's services, voluntarily accept them under Delaware law, and then refuse to pay, resorting to bait-and-switch tactics of claiming California law applies after they've received the full benefit of their bargain. In these circumstances, involving a single bespoke contract between California and Delaware entities, performed in New York, with stellar results for the California business, ER-27, California does not have a materially greater interest in imposing its licensing requirement than Delaware does in vindicating its resident business's justified expectation of agreed-upon compensation for its excellent work.

C. The Sales Process Advisory Agreement Is Valid under Delaware Law.

Applying Delaware law, as the parties agreed, it is undisputed that no licensing requirement voids the contract. ER-25 (citing 24 Del. C. §§ 2901, 2902). That leaves only the issue of whether the Agreement can be voided as an interested director transaction, given Lewis's status as a Tencue board member when Tencue entered into the contract with Carbon Crest. *See* ER-26-27. Applying California law, the district court held that the Agreement was void because neither the board nor the shareholders (Wilk and Leimkuhler) formally voted to approve it—"[n]otwithstanding that everyone knew that Wilk, alone, made major decisions for Tencue," ER-27. The court noted that "Carbon Crest cites Delaware law allowing delegation of board authority," but declined to consider it because, the court held, California does not permit the board to "'delegate its function to govern.'" ER-27 (quoting *Kennerson v. Burbank Amusement Co.*, 260 P.2d 823, 832-33 (Cal. App. 1953)). The district court further held that no case permitted "ratification of a transaction under Section 310" of the California Corporations Code "without a vote." ER-27.

These holdings were doubly error: the court should have applied Delaware law and California, like Delaware, permits the sort of delegation that occurred here and allows for ratification without a formal vote, *see* pp. 47-51, *infra*. Although the district court (wrongly) failed to apply Delaware law, the Court can decide these

pure questions of law without additional fact-finding. *See, e.g., In re Veritas Software Corp. Sec. Litig.*, 496 F.3d 962, 969 (9th Cir. 2007).

1. The district court erred by not applying Delaware law on interested director transactions.

The district court erred when it applied California law to the interested-director issue because California law requires analyzing the "relevant portion" of a chosen state's law and assessing California's interest in "the particular issue" when deciding whether to enforce a choice-of-law clause. *First Intercontinental Bank*, 798 F.3d at 1153; *see, e.g.*, *Nedlloyd Lines*, 834 P.2d at 1153, 1155 (separately analyzing potential fundamental public policy conflicts related to fiduciary duty and the implied covenant of good faith).

Tencue bore the burden to displace the parties' Delaware choice. *Pitzer Coll.*, 447 P.3d at 673. Rather than claiming a policy conflict with respect to interested director transactions, Tencue affirmatively invoked Delaware corporate law as the basis for voiding the Agreement, and argued that California law was "substantially the same." ER-49-50 (Defs. Proposed Conclusions ¶1). The district court did not identify any fundamental public policy conflict between Delaware and California on the interested director issue, nor consider any other aspect of the choice-of-law analysis. *See* ER-24-26. Applying California law on interested director transactions was thus error because Tencue did not submit, and the district court did not analyze, a germane policy conflict, *see Nedlloyd Lines*, 834 P.2d at 1153, 1155—though the

contract is valid under California law, too, *see* pp. 47-55*, infra*.

2. Delaware law supplies two mechanisms for approving this interested director transaction.

The concern when a director stands on both sides of a transaction is that shareholders could be harmed by a transaction that benefits the interested director at the expense of the corporation. *See, e.g.*, Craig W. Palm & Mark A. Kearney, *A Primer on the Basics of Directors' Duties in Delaware: The Rules of the Game (Part I)*, 40 Vill. L. Rev. 1297, 1310 (1995). But many circumstances can remove the "cloud of interestedness." *Marciano v. Nakash*, 535 A.2d 400, 405 n.3 (Del. 1987).

Here, two such circumstances apply, and either is sufficient to validate the Agreement. First, the Agreement falls within a statutory safe harbor for interested director transactions because Wilk (a non-interested director) approved it with delegated authority as a committee of the board. Second, the board (including all of the shareholders) implicitly ratified the Agreement by accepting the fruits of the contract after awareness of its terms.

3. The Agreement falls within the § 144(a)(1) safe harbor because the board delegated authority to Wilk to approve the Agreement.

Section 144 of the Delaware General Corporation Law, 8 Del. C. § 144, sets out statutory safe harbors that can "remove the taint of the self-interest in an interested director transaction by obtaining the approval of a neutral decision maker." Craig W. Palm & Mark A. Kearney, *A Primer on the Basics of Directors'*

Duties in Delaware: The Rules of the Game (Part II), 42 Vill. L. Rev. 1043, 1100 (1997); *see also, e.g.*, 1 Delaware Corporation Law and Practice § 15.05 (2021). Under section 144, a transaction is not void for interestedness "if approved by either a committee of independent directors, the shareholders, or the courts." *Oberly v. Kirby*, 592 A.2d 445, 467 (Del. 1990). Wilk acted as a committee of independent directors here.

The Agreement is an interested director transaction in a technical sense, because it is a contract "between a corporation" and another entity in which one of its directors "has a financial interest." 8 Del. C. § 144(a). But this is no typical interested-director transaction. Unlike in situations where a financially interested director approves a transaction for himself, *Telxon Corp. v. Meyerson*, 802 A.2d 257, 265 (Del. 2002), or where the interested directors are "negotiating with themselves," Palm & Kearney (Part I), 40 Vill. L. Rev. at 1310 (collecting cases), Lewis had no role in approving Tencue's entry into the Agreement, ER-8. Instead, the Agreement was negotiated and approved for Tencue by Wilk alone, and Wilk was not only disinterested, but spent two months driving a hard bargain on behalf of Tencue, one in line with the contingent compensation Tencue negotiated and paid to other directors. ER-8; ER-19. Wilk's approval of the transaction satisfies the first Section 144(a)(1) safe harbor.

The Section 144(a)(1) safe harbor applies to transactions authorized by a

committee of disinterested directors, as long as the committee knows of the "material facts as to [the interested director's] relationship or interest" and the "committee in good faith authorizes the contract or transaction by the affirmative votes of a majority of the disinterested directors." 8 Del. C. § 144(a)(1); *see also, e.g.*, *Oberly*, 592 A.2d at 467; 1 *Delaware Corporation Law and Practice* § 15.05. The committee can be a single member of the board. *See, e.g.*, *Lewis v. Fuqua*, 502 A.2d 962, 965 (Del. Ch. 1985) (single-member committee in different context); George W. Dent, Jr., *Independence Of Directors In Delaware Corporate Law*, 54 U. Louisville L. Rev. 73, 78 (2016).

That is just what happened here: The Tencue board delegated authority to a single disinterested board member (Wilk) to negotiate the Agreement, and Wilk approved the Agreement with full knowledge of the material facts. The board did not delegate this authority by formal vote, because it "never had a practice of formal voting." ER-7; *see also* ER-19 (board did not vote to approve the $7.9 million and $2.5 million contingent sale compensation to two other directors). Instead, the board "adhered to a practice whereby Wilk, alone, made the significant decisions on behalf of Tencue." ER-7. Beyond this standard practice, moreover, Wilk was delegated specific authority to negotiate the Agreement when Vora (the COO) emailed all five board members, explaining that Wilk would be negotiating Lewis's compensation. ER-8. No board member objected to this delegation, and all three of the other board

members knew that Wilk had reached an agreement about compensation for Lewis, contingent upon Tencue's sale. ER-9. And when the board decided to terminate the Agreement, they did so "to initiate Lewis' three-year compensation period under the agreement," ER-17, thereby recognizing the validity of the agreement Wilk signed with delegated authority—not repudiating it.

The district court did not disagree that Wilk had been delegated authority by the board; instead it (wrongly) declined to consider Delaware law permitting boards to delegate the approval of interested director contracts. ER-27. Cases applying Delaware law confirm that a disinterested director's approval of a contract, on delegated authority, cures any interested director problem. For example, in *Godina v. Resinall International, Inc.*, 677 F. Supp. 2d 560 (D. Conn. 2009), the court held that Delaware law permitted the board to delegate to a committee the authority to approve a pension plan benefitting interested directors, especially where "officer compensation and employee compensation plans were not systematically approved by the Board of Directors," but that the committee's approval would not cure the problem because both committee members were "interested" in the plan. *Id.* at 570-71. Not so here—Wilk was undisputedly disinterested.

In *Toedtman v. TurnPoint Med. Devices, Inc.*, No. CV-N17C-08-210-RRC, 2019 WL 328559, at *10 (Del. Super. Ct. Jan. 23, 2019), the Turnpoint board of directors instructed "management" and "proper officers" to negotiate employment

contracts with certain employees, including Toedtman (who was also a director). *Id.* at *13. As here, a single, disinterested member of Turnpoint's board approved an employment contract with Toedtman (the interested director) on behalf of Turnpoint. *Id.* The court rejected Turnpoint's later attempt to void the contract, holding that the single disinterested board member's negotiation and approval under the board's delegation satisfied the § 144(a)(1) safe harbor. *Id.* at *9-10. The same analysis applies here.

Wilk's disinterested approval puts to rest any question of the Agreement's fairness. Although the district court awarded Tencue and Wilk nothing on their counterclaims—and they have not cross-appealed that aspect of the judgment—the court held that Lewis breached a duty of loyalty because it considered the Agreement's fee structure "excessive and unfair." ER-33. That was in error, and it is irrelevant to the contract's validity under the § 144(a)(1) safe harbor. The district court found that Lewis's compensation under the agreement, at 16%, exceeded normal rates for brokers of 1% to 5%. ER-33. But, as the district court recognized, Lewis performed many services under the Agreement that were far outside the scope of a broker's role, including managing a "painstaking conversion" of Tencue's accounting system that "made Tencue respectable and more appealing to potential buyers." ER-30. And Lewis's sale-contingent compensation was in line with that of other Tencue directors (whose agreements were also approved without a formal

vote); for example, Agrell (the CEO), whose contingent sale compensation was nearly 19% of the sale value. ER-19.

Regardless, the point of the § 144 statutory safe harbors is that it is for disinterested corporate decision-makers to judge the fairness of a transaction in the first instance, with courts judging entire fairness only if no disinterested approval was obtained. *Oberly*, 592 A.2d at 467. Wilk was both disinterested and fully informed, and he judged the price fair. Tencue (and Wilk) also benefitted greatly. Lewis's "work to position the company for an eventual sale" resulted in "an eventual sale at twice the amount Wilk had been willing to accept." ER-27. At the end of the day, "Lewis conferred significant value on Tencue and the shareholders, and they cannot, in good consciousness, complain [because] Lewis followed the very procedures held out by Tencue as normal." ER-31 (quasi-contract analysis).

4. Tencue ratified the Agreement by knowingly accepting the fruits of the contract.

Section 144 "does not provide the only validation standard for interested transactions." *Marciano*, 535 A.2d at 403. An alternative way to remove the cloud of interestedness is implied ratification, when "a corporation simply accepts the benefits of an otherwise unauthorized agreement." *Robert A. Wachsler, Inc. v. Florafax Int'l, Inc.*, 778 F.2d 547, 552 (10th Cir. 1985); *see also Genger v. TR Investors, LLC*, 26 A.3d 180, 195 (Del. 2011) (ratification "may be either express or implied through a party's conduct"). "Where the conduct of a complainant,

subsequent to the transaction objected to, is such as reasonably to warrant the conclusion that he has accepted or adopted it, his ratification is implied through his acquiescence." *Genger*, 26 A.3d at 195 (quoting *Frank v. Wilson & Co., Inc*., 32 A.2d 277, 283 (Del. 1943)).

To ratify a transaction, the corporation must have "[k]nowledge, actual or imputed, of all material facts." *Frank*, 32 A.2d at 283; *see also Hannigan v. Italo Petroleum Corp. of Am.*, 47 A.2d 169, 172 (Del. 1945). Inquiry notice suffices. *Papaioanu v. Commissioners of Rehoboth*, 186 A.2d 745, 749-50 (Del. Ch. 1962) (Ratification occurs "[w]hen a man with full knowledge, or at least with sufficient notice or means of knowledge ... of all the material circumstances ... freely and advisedly does anything which amounts to the recognition of a transaction, or acts in a manner inconsistent with its repudiation."). Because the district court applied California law, which it (incorrectly) interpreted as precluding implied ratification and requiring a formal vote, ER-27, *see* pp. 47-51, *infra*, it (wrongly) failed to consider whether the Agreement was approved through implied ratification.

In *Wachsler*, the Tenth Circuit held that under Delaware law, ratification at the shareholder level cures a board-level conflict. 778 F.2d at 552. Whether considered at the board or shareholder level, there was implied ratification here. Every member of the board (including both shareholders) knew the Agreement existed and that Lewis was providing services for contingent compensation. ER-9.

Wilk knew every detail of the agreement, and all but Agrell (the CEO) knew the compensation was percentage-based. ER-9. None of the directors asked Wilk or Lewis for more specifics about the contract terms, even though they had the opportunity to do so. ER-9. The other shareholder—Leimkuhler—in particular had a "pattern and practice" of "trust[ing] Wilk to make all major business decisions and permit[ing] him to do so," and "Wilk informed her to the full extent that she so wished." ER-9. Every member of the board accepted the benefits of the Agreement for nearly two years, including both shareholders, who were prepped by Lewis for the potential buyer "roadshows" and participated in the many cultural fit and other meetings that Lewis arranged. ER-12-13.

And even after all other directors (and thus both shareholders) were aware of every detail, the board did not repudiate the Agreement, but instead, thanked Lewis for his work and terminated the Agreement in accordance with its terms, "to initiate Lewis' three-year compensation period under the agreement." ER-17. A few months later, moreover—the same day that Tencue and Opus Agency reached agreement on a $42 million sale price—Tencue still did not repudiate the Agreement. Instead, Wilk offered Lewis money (substantially less than the compensation owed) to "release Tencue from its obligation to pay." ER-19. This constitutes ratification by knowing acquiescence. If it were otherwise, directors and shareholders could knowingly retain the benefits of a transaction and purposefully avoid knowledge of the specific

details in order to later avoid payment. Delaware corporate law does not require such an inequitable result. *See* ER-27 ("Lewis had already done the hard work…. But when it came time to honor his word to Lewis, Wilk reneged").

When Delaware law is properly applied, the transaction is valid given approval by Wilk as the board's disinterested delegee or ratification by the entire board (including both shareholders)—either one of which suffices.

II. The Agreement Is Valid Under California Law.

A. The District Court's Interpretation of California Law Is Reviewed De Novo.

The district court erred in voiding the parties' choice of Delaware law to govern the Agreement, but even if California law applied, the judgment would require reversal, because the Agreement is valid under California law, too. The validity of the contract under California law was raised in Carbon Crest's proposed conclusions of law. ER-44-46. Following a bench trial, a "district court's interpretation of state law is reviewed de novo," as are "[m]ixed questions of law and fact." *EEOC v. UPS*, 424 F.3d 1060, 1068 (9th Cir. 2005). If, however, "the application of the law to the facts requires an inquiry that is essentially factual," then "review is for clear error." *Id*.

B. California Corporate Law Does Not Void the Agreement Because It Was Approved by a Disinterested Director and Ratified by Tencue.

a. The district court held that the Agreement was a void interested director

transaction because California law (unlike Delaware's) does not permit the Tencue board to delegate its authority to Wilk to approve the Agreement. ER-27. Not so. In fact, the board-approval safe harbor under California law operates very similarly to Delaware's, and both permit approval of interested director transactions by a disinterested committee of the board, which—as described above—is precisely what happened here.

The district court rested its holding on the principle that "the board cannot delegate its function to govern," ER-27 (quoting *Kennerson*, 260 P.2d at 832-33), but that principle is inapt for two reasons. First, compensation decisions are not corporate governance functions, and California permits boards to delegate such decisions. *See* Cal. Corp. Code § 300(a) (authorizing board to "delegate the management of the day-to-day operation of the business"); *Bell v. Superior Ct.*, 263 Cal. Rptr. 787, 790 (Cal. App. 1989) (holding corporate officer could pursue case for breach of implied employment contract despite absence of board-approved bylaws setting particular employment terms). Second, the plain language of California Corporations Code § 310—the analogue to Delaware's § 144—permits interested director transactions when the "board *or committee* authorizes, approves or ratifies the contract or transaction." Cal. Corp. Code § 310(a)(2) (emphasis added). As described above, Wilk was delegated the board's authority to negotiate and approve the agreement, and he did so as a fully informed, disinterested director

acting as a committee of the board.

Unlike Delaware's § 144 safe harbor, California's disinterested-committee-approval safe harbor requires consideration of whether the transaction is "just and reasonable as to the corporation." Cal. Corp. Code § 310(a)(2). But given Wilk's approval as a disinterested director, it is Tencue's burden to prove unfairness. *See Sammis v. Stafford*, 56 Cal. Rptr. 2d 589, 594 (Cal. App. 1996) ("Where a disinterested majority approves the transactions and there was full disclosure, section 310(a)(2) applies, and the burden of proof is on the person challenging the transaction."). Tencue cannot carry that burden, for the reasons discussed above: The scope of Lewis's services, including a "painstaking" revamp of Tencue's accounting system, far exceeded a broker's remit. ER-30. His sale-related compensation was in line with the other directors' contingent compensation, with 16% of enterprise value compared to Agrell's nearly 19% of enterprise value, *see* ER-19, even though Lewis "more than anyone else … deserves credit for putting Tencue in a position to fetch a better price," ER-27—more than double the first offer received from Opus Agency, ER-11. Tencue "was not tricked or misled." ER-31. And "Lewis's services … significantly benefitted Tencue by upgrading Tencue and positioning it for a favorable sale." ER-29.

b. Even if Wilk's approval of the Agreement did not qualify under Section 310(a), California—like Delaware—continues to recognize implied ratification as

an alternative to the Section 310 safe harbors, contrary to the district court's ruling that a formal vote is always required, ER-27. Under "ratification, a corporation is estopped from denying the validity or enforceability of a contract, after accepting performance and making payment on account thereof." *Gaillard v. Natomas Co*., 256 Cal. Rptr. 702, 717 (Cal. App. 1989). In actions against a corporation (as distinct from shareholder derivative actions in which the corporation is a "nominal party" only), implied ratification applies to interested director transactions. *See id.* at 716-17. In addition, California (like Delaware) permits ratification based on inquiry notice: "where ignorance of the facts arises from the principal's own failure to investigate and the circumstances are such as to put a reasonable man on inquiry, he may be held to have ratified despite lack of full knowledge." *Reusche v. California Pac. Title Ins. Co*., 42 Cal. Rptr. 262, 267 (Cal. App. 1965).

The same ratification analysis that applies under Delaware law thus applies under California law, too: Tencue ratified the Agreement because all board members were aware of the basic facts underlying the Agreement from the beginning, and Tencue both accepted Lewis's performance and made payments (for expenses) under the Agreement. ER-9; ER-56. The board did not repudiate the Agreement even after all directors had reviewed the contract in full, but terminated it in accordance with its terms, to initiate the three-year compensation period. ER-17.

Because Wilk approved the Agreement as the board's delegee and it was fair

to Tencue, or because Tencue ratified it, the Agreement is valid under California law as well as Delaware's.

C. California's Licensing Statute Does Not Void the Agreement Because Carbon Crest Did Not Provide Broker Services in California.

The parties' contract is valid under California's licensing law, as well. California's licensing statute provides that it is "unlawful for any person to … act in the capacity of … a real estate broker … *within this state* without first obtaining a real estate license." Cal. Bus. & Prof. Code § 10130 (emphasis added). "Real estate broker" includes anyone who "negotiates the purchase, sale, or exchange of … a business opportunity." *Id*. § 10131(a). Carbon Crest argued below that it did not act as a broker at all, because AdMedia—the banking partner for the sale—"served as the frontline of negotiations with Opus Agency (and other potential buyers …)," as the district court found. ER-11. Carbon Crest accepts on appeal, however, the district court's holding that Lewis's peripheral involvement in negotiations could count as a "broker" under California's business opportunity law, ER-22, despite AdMedia's "frontline" role, given California's slight-participation-counts standard. *See Abrams v. Guston*, 243 P.2d 109, 110 (Cal. App. 1952) ("The law is established that if a broker takes any part in the negotiations, no matter how slight, he is … a broker."). Even so, Carbon Crest did not act as a "broker" (as California defines that term) *in California* and the district court erred in holding that the outside-California locus of

Carbon Crest's services is irrelevant given Carbon Crest (and Lewis's) lack of an out-of-state broker's license.

1. Broker services outside California do not require a California license.

As this Court reasoned in *Consul Ltd.*, the "plain language" of the California licensing statute "refer[s] to acts *within the state*," and that limitation cannot be ignored. 802 F.2d at 1150. Then, as now, there appear to be no California court decisions interpreting the limitation, but the Court held that "California would follow the other jurisdictions that do not bar recovery by a broker unlicensed in the state in which the property is located where no brokerage functions are performed in that state." *Id.* at 1151. In other words, something more than the California location of the property to be sold is required to trigger the licensing requirement. There is no other relevant California connection here.

The quintessential "broker" activity, and the line that distinguishes brokers from "finders" (who introduce potential buyers and sellers, and do not need to be licensed), is participation in negotiations. *Tyrone*, 507 P.2d at 72. The district court's findings establish that "[a]ll negotiations with potential buyers took place in New York." ER-11. Lewis's only work in California "concerned … informational and cultural integration meetings between Tencue and potential buyers." ER-11. But these sorts of "informational" meetings—which involved only one "roadshow" and one integration meeting in California, ER-12-13—did not involve negotiations. The

roadshows were "largely educational; the goal was for both Tencue and the potential buyers to learn about one another." ER-12. Merely providing information to (and collecting information about) prospective buyers does not constitute negotiating the terms of a transaction, and therefore does not involve broker services. *See Tyrone*, 507 P.2d at 72.

The district court held it would not matter "if Lewis did not perform any broker work 'within this state," because he lacked a broker's license from any state. ER-22-23. This was error. The district court drew the out-of-state license requirement from this Court's description in *Consul Ltd.* of the question before it as involving "whether the California licensing statutes apply to out-of-state acts relating to in-state (California) realty performed by a broker *licensed in another state*." 802 F.2d at 1149 (emphasis added). But the Court's reasoning does not turn on the broker's out-of-state license, nor could it. The statute being interpreted turns on whether or not services are provided "in this state." Cal. Bus. & Prof. Code § 10130. Engrafting a requirement that turns on whether out-of-state services are properly licensed would "violate the cardinal rule of statutory construction that courts must not add provisions to statutes." *Sec. P. Nat'l Bank v. Wozab*, 800 P.2d 557, 561 (Cal. 1990). It would be especially odd to engraft that atextual requirement here. Unlike real estate licenses, New York (like most states, including Delaware) does not require a license to broker business opportunities. *See* p. 26 n.3, *supra*.

Thus, although this Court discussed out-of-state licensing in analyzing California's public policy, *see Consul Ltd.,* 802 F.2d at 1150-51, the relevant public policy consideration is not the existence *vel non* of a license, but whether the acts were lawful in the state where performed. Here, there is no dispute that they were.

Although not deciding whether Lewis's participation in negotiations qualified as within California, the district court noted that the California Department of Real Estate had issued an advisory opinion on this issue. ER-22. *See* Wayne S. Bell, *Advisory—What Constitutes Engaging in Real Estate Licensed Activities "Within this State" Requiring a Real Estate Broker or Salesperson License?*, at 3 (July 2012), https://tinyurl.com/bbw8svb7. That opinion addressed real estate activities (not business opportunity sales), and would not be entitled to the deference afforded legislative rules in any event. *See Yamaha Corp. v. State Bd. of Equalization*, 960 P.2d 1031, 1033 (Cal. 1998). What's more, the opinion focused specially on protecting "California consumers," Advisory Opinion at 2, not sophisticated business entities negotiating with potential buyers that were uniformly located outside of California, ER-12, ER-16, so its relevance is limited here.

Even so, its framework, too, suggests that Lewis did not provide broker services in California. The opinion emphasizes that each case must be decided on its individual facts, Advisory Opinion at 3, and turns on whether the broker services connected to California "were substantial, repeated, systematic, and substantive, or

random, isolated, fortuitous or insignificant," *id.* at 4. Lewis did not solicit California business-opportunity work or purposefully avail himself of the California business-opportunity market. Tencue sought out Lewis's services to assist with this single transaction, outside of California, interfacing with non-California buyers. ER-8. The mere fact that Tencue happened to be a California business is not alone enough for Lewis's entirely out-of-state negotiation work to qualify as "within th[e] state," Cal. Bus. & Prof. Code § 10130, just as the outside-California negotiation of the sale of California property on behalf of a California domiciliary is not enough, *Consul Ltd.*, 802 F.2d at 1150.

Because the only services Lewis provided in California were isolated and fortuitous non-broker services, and all negotiations took place in New York, even assuming that any of Lewis's services fell within California's "broker" category, Lewis did not act as a broker within California.

2. Even if some of Carbon Crest's services required a California license, the contract is severable.

Even if the Court were to conclude that some of the services provided under the Sales Process Advisory Agreement were "broker" services in California, requiring a license, that does not render the entire contract void. "Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest." Cal. Civ. Code § 1599. A contract is capable of severance "if some of the

services provided are wholly independent of the unlawful object," *MKB Mgmt., Inc. v. Melikian*, 108 Cal. Rptr. 3d 899, 905 (Cal. App. 2010), whether or not the agreement delineates separate payment for each type of service. The question is whether other services are "dependent upon or inextricably related to the acts for which a real estate broker's license was required." *Id.* at 906. If the contract is capable of severance, the "decision whether to sever the illegal portions and enforce the remainder is a discretionary decision for the trial court to make based on equitable considerations." *Id.* at 905.

The district court held that the Agreement was not capable of severance because all of the services were inextricably linked to the "unlawful object" of selling Tencue. ER-23-24. California law says otherwise. The California Supreme Court has recognized that severability is available in "a wide range of cases that have applied the doctrine to partially enforce contracts involving unlicensed services," including unlicensed broker services. *Marathon Entertainment, Inc. v. Blasi*, 70 Cal. Rptr. 3d 727, 740-41 (Cal. 2008). Assisting with the sale of a business is not an unlawful objective, because many services provided in connection with a sale—like Lewis's preparation of informational materials and complete revamping of Tencue's accounting systems—do not require a broker's license.

California courts have generally severed contracts covering sale-related services that only partly fell within the licensing regime. In *Venturi & Co. LLC v.*

Pacific Malibu Development Corp., 92 Cal. Rptr. 3d 123 (Cal. App. 2009), the court reversed for the trial court to apply the severability doctrine when an individual who did not have a broker's license agreed to help negotiate sale-related financing (not compensable for lack of a license), but also agreed to review a project's costs and financials, help prepare information materials, formulate a marketing strategy, and provide financial advice, all of which were services "different from . . . a real estate broker." *Id.* at 127-28; *see also GreenLake Cap., LLC v. Bingo Invs., LLC*, 111 Cal. Rptr. 3d 82, 88 (Cal. App. 2010) (California law "does not bar the recovery of fees for services for which no real estate license was required."). So, too, here.

Properly understood, the only possibly "unlawful objective" of the Agreement would be negotiating the terms of any sale directly with the buyer. Here, AdMedia (the banking partner) was the "frontline" of external negotiations, ER-11; such negotiations were far from Lewis's main task. Instead, Lewis performed many other tasks similar to those in *Venturi*: preparing informational materials, providing financial advice, preparing the Tencue team for roadshow meetings, drafting model answers for the two shareholders (Wilk and Leimkuhler) to use when responding to questions from potential buyers, and working on the transaction's marketing/outreach by "evaluating potential buyers." ER-51 (Agreement ¶1); ER-12.

Some of these tasks, like evaluating potential buyers, are "finder" activities

that can be severed from "broker" tasks. *See Venturi*, 92 Cal. Rptr. 3d at 128 n.6. Other tasks relate to "maximiz[ing] value," ER-51 (Agreement ¶1), and they—like the severable financial advice in *Venturi*—were internally oriented and also distinct from negotiating the terms of any sale. A prominent example is Lewis's "continuous" work to revamp Tencue's accounting system, ER-12, which is entirely independent from any negotiations—far from being inextricably intertwined. What's more, even negotiation services falling within California's "broker" definition are impermissible only to the extent that they are provided within California, so broker services provided outside the state are severable and compensable.

"In deciding whether severance is available," the California Supreme Court has explained that the "'overarching inquiry is whether the interests of justice ... would be furthered by severance.'" *Marathon*, 70 Cal. Rptr. 3d at 743. The district court made a legal error in holding that severance was categorically unavailable, but its findings make plain that severance would further the interests of justice: Lewis's services significantly benefitted Tencue, resulting in a purchase price more than double Opus Agency's initial offer, ER-29; Lewis "did excellent work to position the company for an eventual sale" in "reliance on Wilk's written word and signature," ER-27; "Tencue was not tricked or misled," ER-31; and the "greatest moral fault" here lies with Wilk, not Lewis, ER-31. At a bare minimum, the contract should be enforced as to Lewis's services for which no license is required, to limit

the windfall to Tencue and Wilk.

CONCLUSION

The district court's judgment that the contract is void should be reversed.

September 30, 2022

Respectfully submitted,

s/Hyland Hunt

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CERTIFICATE OF RELATED CASES

Counsel is not aware of any related case pending in this Court.

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September 30, 2022

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FOR THE NINTH CIRCUIT

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I hereby certify that, on September 30, 2022, I served the foregoing brief upon all counsel of record by filing a copy of the document with the Clerk through the Court's electronic docketing system.

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ADDENDUM

Delaware Code, Title 8

Section 144. Interested directors; quorum.

(a) No contract or transaction between a corporation and 1 or more of its directors or officers, or between a corporation and any other corporation, partnership, association, or other organization in which 1 or more of its directors or officers, are directors or officers, or have a financial interest, shall be void or voidable solely for this reason, or solely because the director or officer is present at or participates in the meeting of the board or committee which authorizes the contract or transaction, or solely because any such director's or officer's votes are counted for such purpose, if:

(1) The material facts as to the director's or officer's relationship or interest and as to the contract or transaction are disclosed or are known to the board of directors or the committee, and the board or committee in good faith authorizes the contract or transaction by the affirmative votes of a majority of the disinterested directors, even though the disinterested directors be less than a quorum; or

(2) The material facts as to the director's or officer's relationship or interest and as to the contract or transaction are disclosed or are known to the stockholders entitled to vote thereon, and the contract or transaction is specifically approved in good faith by vote of the stockholders; or

(3) The contract or transaction is fair as to the corporation as of the time it is authorized, approved or ratified, by the board of directors, a committee or the stockholders.

(b) Common or interested directors may be counted in determining the presence of a quorum at a meeting of the board of directors or of a committee which authorizes the contract or transaction.

California Corporations Code

Section 310

(a) No contract or other transaction between a corporation and one or more of its directors, or between a corporation and any corporation, firm or association in which one or more of its directors has a material financial interest, is either void or voidable because such director or directors or such other corporation, firm or association are parties or because such director or directors are present at the meeting of the board or a committee thereof which authorizes, approves or ratifies the contract or transaction, if

(1) The material facts as to the transaction and as to such director's interest are fully disclosed or known to the shareholders and such contract or transaction is approved by the shareholders (Section 153) in good faith, with the shares owned by the interested director or directors not being entitled to vote thereon, or

(2) The material facts as to the transaction and as to such director's interest are fully disclosed or known to the board or committee, and the board or committee authorizes, approves or ratifies the contract or transaction in good faith by a vote sufficient without counting the vote of the interested director or directors and the contract or transaction is just and reasonable as to the corporation at the time it is authorized, approved or ratified, or

(3) As to contracts or transactions not approved as provided in paragraph (1) or (2) of this subdivision, the person asserting the validity of the contract or transaction sustains the burden of proving that the contract or transaction was just and reasonable as to the corporation at the time it was authorized, approved or ratified.

A mere common directorship does not constitute a material financial interest within the meaning of this subdivision. A director is not interested within the meaning of this subdivision in a resolution fixing the compensation of another director as a director, officer or employee of the corporation, notwithstanding the fact that the first director is also receiving compensation from the corporation.

***

California Business and Professions Code

Section 10130

It is unlawful for any person to engage in the business of, act in the capacity of, advertise as, or assume to act as a real estate broker or a real estate salesperson within this state without first obtaining a real estate license from the department, or to engage in the business of, act in the capacity of, advertise as, or assume to act as a mortgage loan originator within this state without having obtained a license endorsement.

The commissioner may prefer a complaint for violation of this section before any court of competent jurisdiction, and the commissioner and his or her counsel, deputies, or assistants may assist in presenting the law or facts at the trial.

It is the duty of the district attorney of each county in this state to prosecute all violations of this section in their respective counties in which the violations occur.

Section 10131(a)

A real estate broker within the meaning of this part is a person who, for a compensation or in expectation of a compensation, regardless of the form or time of payment, does or negotiates to do one or more of the following acts for another or others:

(a) Sells or offers to sell, buys or offers to buy, solicits prospective sellers or buyers of, solicits or obtains listings of, or negotiates the purchase, sale, or exchange of real property or a business opportunity.

***