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 REPLY BRIEF AND CROSS-APPEAL RESPONSE BRIEF

Hyland Hunt
Ruthanne M. Deutsch
DEUTSCH HUNT PLLC
300 New Jersey Ave. NW, Suite 900
Washington, DC 20001
Tel.: (202) 868-6915
Fax: (202) 609-8410
hhunt@deutschhunt.com

Attorneys for Appellant/Cross-Appellee Carbon Crest, LLC

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INTRODUCTION AND SUMMARY OF ARGUMENT

Tencue and Carbon Crest, both sophisticated parties, negotiated an agreement covering services to be performed virtually entirely in New York. Based in different states, they chose Delaware law to govern their contract, thereby avoiding any uncertainty about whether any service might somehow stray a millimeter over California's licensing line. This goal to preserve certainty in contracting is precisely why choice-of-law clauses exist. And California rightly has a strong public policy favoring their enforcement to protect the reasonable and justified expectations of parties to multi-state transactions (though you'd never know it from Tencue's brief). Here, Carbon Crest reasonably expected compensation for services provided over the course of a year and a half—services that yielded excellent results for Tencue. California law, properly construed, would fulfill that expectation, not vindicate Tencue's decision to "renege[]" "when it came time to honor [its] word to Lewis," ER-27. Especially because Tencue waited until after securing tens of millions extra on the back of Carbon Crest's work before attempting to play the California licensing card that the contract, as agreed, would avoid.

The district court got the facts right, but the law wrong. None of the "points of law" that the district court felt "obliged to uphold … reluctantly," ER-27, require affirmance. At every step of the choice-of-law analysis, the fundamental question is whether California's policy interest in regulating this particular transaction is so

overwhelmingly strong that it should vitiate the parties' choice of Delaware law, possibly resulting in Carbon Crest receiving nothing. It isn't. California's interest is at de minimis at most.

The Agreement was a multi-state bespoke arrangement for services well beyond a broker's typical remit, including a substantial internal CFO-level role for Lewis. The services were to be provided in New York, not California—not just because Lewis lived and worked in New York, but also because AdMedia (the "frontline of negotiations," ER-11) was based there, and New York was the hub of the sale process with entirely non-California buyers. Carbon Crest did not offer its services to the California public; Tencue specifically asked Lewis to help with the sale. And Lewis did an excellent job. Tencue's mere status as a California entity is not enough to justify substituting California law—which would potentially void the contract—for the parties' chosen Delaware law, under which the Agreement is unambiguously valid.

California's minimal interest is confirmed by the fact that the Agreement does not conflict with California's licensing law. The district court got this issue wrong on the law by engrafting an out-of-state license requirement onto the California statute. Tencue makes no genuine attempt to defend the district court's flawed legal holding. And its other arguments run aground on the district court's unimpeachable findings that Lewis did not participate in negotiations in California. Tencue also

relies on a non-controlling real-estate-focused advisory opinion to insist that the licensing statute applies to any services provided to Tencue, wherever in the world the services are performed, simply because Tencue is a California business. But this Court's precedent and persuasive California Supreme Court authority say otherwise. At the very least, the Agreement is severable both because Carbon Crest provided many non-broker services and because it provided them outside of California.

As for corporate law, Tencue again fails—as it did in the district court—to even attempt to make the showing needed to supplant Delaware law. But under either state's law, there is no reason to allow Tencue—a sophisticated business entity that allowed Wilk to negotiate the contract—to walk away from the bargain that it benefitted so handsomely from. Because Wilk was disinterested and approved the Agreement under delegated authority in line with Tencue's regular practice, and in all events Tencue ratified the agreement thereafter, the agreement is valid and enforceable under either Delaware or California law. Neither state permits corporations, especially closely held ones like Tencue, to dodge their obligations simply because they follow sloppy procedures.

As for Tencue's cross-appeal, it is irrelevant unless Carbon Crest's appeal is denied in full. But if reached, the district court's quasi-contract judgment should be affirmed. The quasi-contract award poses no conflict with the policy of the licensing statute or California corporate law: Lewis was trustworthy and competent. ER-30.

He fully performed all obligations under the Agreement and made "significant contributions to Tencue's value." ER-30. California law permits the award of quasi-contract damages for void contracts in these circumstances. Tencue cannot show error, much less abuse of discretion, with any aspect of the district court's remedial judgment.

Tencue ignores its "moral fault" in this "tale of greed" entirely, setting forth a counterstatement and argument on the equities that tracks closer to Tencue's "contrived narrative to place Lewis in a false light and to pretend he had done a poor job when, in fact, his work had been excellent," ER-15, ER-27, than to the district court's findings. It insists (Br. 7) that the board's compliments on Lewis' performance were nothing more than white lies meant to "cushion the blow" or "spare Lewis's feelings." *Contra* ER-17. It minimizes (Br. 4-5) Wilk's role in negotiating the Agreement and as the single person who made all major decisions at Tencue. *Contra* ER-7. And it ignores (Br. 8) the district court's finding that the nearly doubled offer from Opus Agency was largely a result of Lewis' work. *Contra* ER-27. When Tencue tried the same gambit below, the district court repeatedly found Tencue's witnesses not credible, citing specific record evidence that contradicted their testimony. *See, e.g.*, ER-9 (Leimkuhler's testimony "in direct contradiction of her deposition"); ER-15 (Agrell "confronted with evidence contradicting her testimony"); ER-17–18 (email shows "Wilk's testimony was not

truthful"); ER-15 (Tencue gave its expert a "stacked deck," omitting key emails).

This appeal is not an opportunity to re-litigate the facts, and especially not credibility findings, which the district court made following a four-day bench trial. Although Tencue's brief disparages the court's findings and quibbles with its adverse credibility judgments, Tencue frontally challenges neither on appeal, much less establishes clear error. The facts that matter here are simple—and unchallenged: The parties negotiated a bespoke agreement, choosing to be governed by Delaware law. Lewis, from New York, did everything he promised, excellently. As a result, Tencue made tens of millions more on its sale. On these facts, California law would vindicate, not vitiate, the parties' contract.

ARGUMENT

I. The Agreement Should Be Enforced According To Its Terms.

A. The Parties' Choice of Delaware Law Governs.

Tencue agrees (Br. 13) that it must pass three gates to substitute California law for the parties' Delaware choice: (1) California must be the default law absent a choice-of-law clause, (2) the parties' chosen Delaware law must conflict with California's fundamental public policy, and (3) California must have a materially greater interest than Delaware in enforcing its policy on the specific facts of this case. *First Intercontinental Bank v. Ahn*, 798 F.3d 1149, 1153 (9th Cir. 2015).

Like the district court, Tencue ignores, but does not dispute, that "choice of law provisions are usually respected by California courts" and "strong policy

considerations favor[] the enforcement of freely negotiated choice-of-law clauses." *Nedlloyd Lines B.V. v. Sup. Ct. San Mateo Cnty.*, 834 P.2d 1148, 1149, 1151 (Cal. 1992). It is undisputedly Tencue's burden to show that each prerequisite is satisfied to override the parties' choice of Delaware law. *Pitzer College v. Indian Harbor Ins. Co.*, 447 P.3d 669, 673 (Cal. 2019). Here, Tencue fails at all three gates; any one such failure requires reversal.

1. If the parties had chosen no law, California law would not apply.

To determine the applicable law in the absence of a choice-of-law clause, California courts consider the location of (1) contracting, (2) negotiation, (3) performance, (4) subject matter, and (5) the contracting parties' domiciles. *See* Opening Br. 23; Tencue Br. 25.

Here, the place of performance—New York—is dispositive. The Sales Process Advisory Agreement is a service contract. *See* ER-51 (listing six "Advisor Duties"). With a service contract, the location of the "subject matter of the contract" and place of performance are generally the same, because the contract is about performing services. *See Edgington v. L-3 Servs.*, No. CV 09-05464, 2009 U.S. Dist. LEXIS 139134, *9 (C.D. Cal. Dec. 8, 2009). That place was New York. And the place of performance is the most significant factor "with respect to the particular issue," Restatement (Second) Conflict of Laws § 188(2)—which is whether the performance required a license. New York, not California, is the state with "an

obvious interest in the question whether this performance would be illegal." *Id.* § 188 cmt. e.[1]

Although finding performance outside of California, the district court wrongly gave that factor little weight. ER-25. By misclassifying the contract's subject matter as "Tencue" simpliciter, rather than the services provided by Carbon Crest, the court counted two factors favoring California (subject matter and contracting), with only one (performance) against. Tencue barely defends this flawed reasoning, instead fighting the district court's fact findings and warping the score even more, to five-to-zero California. *See* Tencue Br. 25-27. Neither strategy works.

Like the district court, Tencue (Br. 26) mischaracterizes the contract's subject matter—but instead of calling it "Tencue," calls it "the sale of a California entity." Still wrong. The Agreement is not for the sale of Tencue to Opus Agency (or any other potential acquirer). The Agreement is for services connected to a sale, services that did not take place in California. No potential buyer of Tencue was in or from California, ER-8, ER-12, ER-16, and the actual sale contract, when it occurred after

[1] The issue was both pressed and passed on below (*contra* Tencue Br. 26 n.5). Carbon Crest contested Tencue's statement that California law would apply absent the parties' choice, while arguing that the district court need not reach the issue. *See* 4-SER-723. The district court reached the issue. This Court's "practice 'permit[s] review of an issue not pressed so long as it has been passed upon.'" *United States v. Weyne*, 348 F. App'x 260, 261 (9th Cir. 2009) (quoting *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995)) (alteration in original). Here, the issue was both pressed and passed upon.

the benefit of Lewis's services, was governed by Delaware law, not California, 2-SER-353:16–354:2 (Wilk testimony).

Tencue next attempts to re-score three factors for California that the district court scored as neutral or against: negotiation, domicile, and performance. Unavailingly. Negotiation is neutral because "Wilk negotiated the agreement in California while Lewis did so in New York." ER-25. Tencue protests that Lewis "maintained an address" in California (Br. 26), but it is undisputed that Lewis never lived there after he moved to New York, ER-8; he simply did not update his permanent address, 2-SER-236:14-18 (Lewis testimony). Plus this factor "is of less importance when … the parties … conduct their negotiations from separate states," Restatement (Second) Conflict of Laws § 188 cmt. e, as happened here, ER-25.

Domicile is similarly neutral because Tencue and Carbon Crest were incorporated in different states. ER-25. Tencue minimizes (Br. 25-26) Carbon Crest's outside-California location by categorizing it as connected to "various states" without any "real connection" to the dispute. Not so. Lewis's domicile and residence was New York. ER-8. Carbon Crest's place of incorporation was Delaware and its principal place of business was New York. ER-25, 2-SER-262:14-19 (Lewis testimony). New York has a "real connection"—indeed, the most important connection—to the dispute, given that "[a]ll negotiations with potential buyers took place in New York," ER-11.

As for performance, Tencue attempts (Br. 26-27) to leverage a few isolated trips to California, but what matters is where the bulk of work was done. *See Potter v. PNC Fin. Servs. Grp.*, No. CV 15-06352, 2015 U.S. Dist. LEXIS 189847, *2, *13-15 (C.D. Cal. Oct. 20, 2015) (holding Pennsylvania law would apply to employment contract where a California resident worked largely in Pennsylvania, though he also worked in California). Tencue tries to bulk up this factor by mixing in work performed under the Business Advisory Agreement, Carbon Crest's registration to do business in California (which Lewis cancelled three months after the Agreement was signed, 2-SER-261:21–262:5 (Lewis testimony)), and the fact that Tencue was Carbon Crest's only client. None of that helps. Work under the Business Advisory Agreement does not count as performance under *this* Agreement. The Agreement expressly preserved Carbon Crest's ability to work for other clients besides Tencue. ER-53. And Carbon Crest was (briefly) registered to do business in California, but it did not do any business there under the Agreement because New York was the hub of the sale. ER-11–12.

The only factor favoring California is the place of contracting, and "[s]tanding alone, the place of contracting is a relatively insignificant contact." Restatement (Second) Conflict of Laws § 188 cmt. e. Tencue relies (Br. 26 n.5) on *ABF Capital Corp. v. Grove Properties*, 23 Cal. Rptr. 3d 803 (Cal. App. 2005), for the proposition that California contracting is sufficient where the other factors were either neutral or

favored New York. *See id.* at 814-15. But the *Grove* court applied California law because the issue at hand did "not deal with the substance of the partnership or its operations, or with the substance of the [contested] agreement, but with the procedural question of attorney fees" that were "attributable to California litigation." *Id.* at 815. This Court applied a similar analysis on similar facts, concluding that even though the factors did "not lead … to a clear conclusion," California law applied because the case posed the same California-litigation-related question as in *Grove*. *First Intercontinental Bank*, 798 F.3d at 1155-56.

Here, however, the factors are not inconclusive. They favor New York. And this case is about performance under the contract, not a collateral fee issue. Because New York has the most significant interest in that question, California law is not the default. The parties' choice of Delaware law must thus be enforced. *See Edgington*, 2009 U.S. Dist. LEXIS 139134, at *7-10 (enforcing parties' choice of New York law because Virginia law, not California law, would otherwise apply).

2. The California broker licensing requirement is not fundamental for a services contract performed in New York.

Because applying Delaware law poses no conflict with a *fundamental* California policy, Tencue also fails at gate two. California's policy interest is not fundamental because the licensing statute cabins California's policy interest to within-state services. This territorial limitation diminishes California's interest in barring equal, sophisticated parties from choosing to apply another state's law to

largely if not entirely out-of-state services, thereby waiving any licensure requirement that might be triggered by *de minimis* California activity. *See* Opening Br. 26-33.

a. Tencue does not defend the overly broad reasoning of the district court that promotion of the public interest, alone, sustains fundamental policy status. *See* ER-26. But Tencue proposes an equally broad (and equally wrong) rationale, with just two elements—promotion of the public interest and a statute voiding non-compliant contracts. *See* Tencue Br. 14-17.

But the voiding-statute factor does not carry Tencue through the gate. As Carbon Crest explained (Opening Br. 28-29) and Tencue ignores, choice-of-law clauses frequently "enable[] [the parties] to escape prohibitions prevailing in the state which would otherwise be the … applicable law." Restatement (Second) Conflict of Laws § 187 cmt. e. "Usually," the chosen law "will be applied" even when the question is "whether the contract is illegal." *Id.* § 187 cmt. d.

Pitzer College reinforces that a statute voiding certain contracts does not, on its own, confer "fundamental" status. That case relied on a plethora of decisions discussing both statutory and judge-made rules (contrary to Tencue's assertion (Br. 17-18) that its framework is limited to common law rules). And it distilled three criteria for fundamental status—promotion of the public interest, restriction on contractual waiver, and protection against inequitable results generated by superior

bargaining power. 447 P.3d at 675. Although a fundamental policy "*may* be embodied in a statute" that voids a contract, *id.* at 676 (emphasis in original), *Pitzer College* only noted as much to hold that such a statute was not necessary. It did not suggest, much less hold, that a voiding statute was sufficient.

b. Considered under the correct criteria, the licensing statute is not fundamental. Starting with bargaining power, applying the business broker licensing statute here would not "protect[] against inequitable results that are generated by … superior bargaining power." *Pitzer College*, 447 P.3d at 675. Business sales by their nature are likely to involve sophisticated parties, and the bespoke contract here was fully negotiated over the course of two months after Tencue, not Lewis, initiated negotiations. ER-8.

While asserting bargaining disparity is irrelevant, Tencue relies (Br. 19-20) on cases that are paradigmatic examples of protecting the weaker bargaining party. *Brack v. Omni Loan Co.*, 80 Cal. Rptr. 3d 275 (Cal. App. 2008) and *Application Group, Inc. v. Hunter Group, Inc.*, 72 Cal. Rptr. 2d 73 (Cal. App. 1998), involved consumer loans and employment contracts, respectively. Both are "inherently unbalanced" contracts. *Pitzer College*, 447 P.3d at 675 (describing insurance contracts). As the *Brack* court explained, "the weaker party to an adhesion contract may seek to avoid enforcement of a choice-of-law provision therein by establishing that 'substantial injustice' would result from its enforcement." *See Brack*, 80 Cal.

Rptr. 3d at 282 (quoting *Wash. Mut. Bank v. Sup. Ct. Orange Cnty.*, 15 P.3d 1071, 1079 (Cal. 2001)). *Grove Properties*, too, falls into the protect-the-weaker-party category, because the California policy it found fundamental—prohibiting non-reciprocal attorneys' fees—protected against the use of "[o]ne-sided attorney's fees … as instruments of oppression to force settlements" at the litigation stage, even for parties of equal bargaining power. 23 Cal. Rptr. 3d at 812.

In contrast, the business broker license statute protects against neither inequality or oppressiveness, at neither the bargaining nor litigation stage—especially here, given the parties' extensive and equal negotiations. *See* ER-8. Choice-of-law clauses were not unexamined defaults (*contra* Tencue Br. 24). Wilk altered the AdMedia contract to specify California law, 1-SER-297:13-18 (Lewis testimony), but did not do so for the Agreement.

c. The final, and crucial, consideration is the broker license statute's waivability in the multi-state circumstances presented here.

The question is not whether the licensing requirement is generally waivable, but whether it is waivable for a contract that all parties understood would be performed in New York. In *Brack*, the key factor in finding California's consumer lending regime non-waivable was that the statute "expressly prevent[s] parties from avoiding the strictures of the Finance Lenders Law by booking or otherwise making a loan out-of-state," which "strongly suggests the Finance Lenders Law may not be

circumvented by a contractual choice-of-law provision." 80 Cal. Rptr. 3d at 284. The licensing law, on the other hand, expressly disclaims any intent to regulate out-of-state activity. *Consul Ltd. v. Solide Enterps.*, 802 F.2d 1143, 1149-50 (9th Cir. 1986); Cal. Bus. & Prof. Code § 10130 (requiring license only for acts "within this state"). Tencue tries to downplay the import of the licensing statute's limited geographic reach. *See* Tencue Br. 19. But the constrained geographic scope means that the state's policy interest in the substance of the Agreement is significantly weaker, because materially all contract performance was out-of-state.

Pressed on the absence of any California case finding a waivable policy fundamental, Tencue identifies (Br. 18-19) only a single unpublished case (from a federal, not California court) that it insists may have found a waivable policy fundamental. *See Davis Moreno Constr., Inc. v. Frontier Steel Bldgs. Corp.*, No. CV-F-08-854, 2009 U.S. Dist. LEXIS 44076 (E.D. Cal. May 6, 2009). *Davis* involved "an unlicensed contractor who performed work on a California public works project located in California," *id.* at *59-60, rather than work performed out-of-state. It also pre-dates *Pitzer College* by a decade. And the contractor licensing statute may well be non-waivable, because even payment does not waive it. *See id.* at *58-59 (amounts paid to an unlicensed contractor are subject to disgorgement). The broker licensing statute, on the other hand, may be waived by payment, as there are "no similarly draconian [disgorgement] possibilities for unlicensed real estate

brokers" as for unlicensed contractors. *Venturi & Co. LLC v. Pacific Malibu Dev. Corp.*, 92 Cal. Rptr. 3d 123, 127 n.5 (Cal. App. 2009).

Tencue next overreads California Civil Code § 3513, which specifies that "a law established for a public reason cannot be contravened by a private agreement." A "literal construction of section 3513 would be unreasonable," as the California Supreme Court has cautioned, because it "would eliminate the established rule that rights conferred by statute may be waived unless specific statutory provisions prohibit waiver." *Bickel v. City of Piedmont*, 946 P.2d 427, 431 n.4 (Cal. 1997), *superseded by statute on another ground as noted in DeBerard Props., Ltd. v. Lim,* 976 P.2d 843, 849 (Cal. 1999). No express anti-waiver provision exists here—much less a geographic anti-evasion provision like *Brack*'s. When, as here, a law primarily protects an identified group—permit applicants in *Bickel*, 946 P.2d at 432, "persons dealing with real estate licensees" here, Tencue Br. Add.-11-12 (California Department of Real Estate's description of statutory purpose)—and the public benefit beyond that group is incidental, section 3513 does not apply.[2]

At bottom, Tencue fails to grapple with how the geographic dispersion here substantially weakens California's policy interest in voiding Tencue's decision to

[2] In contrast, section 3513 applies in circumstances where a law is intended to bestow a statewide benefit, as with the law prohibiting deficiency judgments in foreclosures for the purpose of "stabiliz[ing] the state's economy, to the benefit of all." *DeBerard Props.,* 976 P.2d at 849.

seek out and contract with Carbon Crest for largely non-broker, and largely (if not entirely) out-of-state services.

3. California's policy interest in a Delaware company's New York work is not materially greater than Delaware's.

Tencue's bid to void its entire bargain by replacing Delaware law fails at the third and final gate, too. California's interest is not materially greater than Delaware's. Here, the "policies underlying [the business licensing statute] in fact have limited application." *Guardian Sav. & Loan Ass'n v. MD Assocs.*, 75 Cal. Rptr. 2d 151, 160 (Cal. App. 1998) (holding California did not have a materially greater interest in applying its antideficiency statute to a purchase money contract for California real estate made by sophisticated Texas business entities).

a. California's broker licensing statute has limited application here for two reasons: Carbon Crest's competence and the Agreement's out-of-state performance.

The policy interest in protecting against untrustworthy and incompetent brokers is not implicated because Lewis had been a key member of Tencue's management team for nearly three years before Tencue asked Lewis to assist with the sale, giving Tencue ample time to verify Lewis's trustworthiness and competence. ER-6, ER-8. Moreover, "Lewis' significant contributions to Tencue's value demonstrate he was competent," and Tencue "ha[s] not shown Lewis to be untrustworthy." ER-30.

Tencue contends (Br. 22 n.4), without authority, that "*post hoc* ruminations"

about competence are irrelevant to this inquiry, but these are district court findings, not "ruminations," and Tencue makes no attempt to establish clear error. Such assessments are required for California choice-of-law analysis. In *Guardian*, a key California policy objective was to "prevent the aggravation of a downturn in market prices." 75 Cal. Rptr. 2d at 160. To decide whether to apply the parties' chosen law, the court evaluated whether the "transaction implicates this policy" and found that any market impact "will be dependent on many circumstances that cannot be … readily presumed," so California's interest was not sufficient to set aside the parties' chosen Texas law. *Id.* Here, the district court made findings, not presumptions, conclusively establishing that the licensing statute's incompetence and dishonesty policy concerns are not implicated.

Second, California's policy interest is materially reduced given the Agreement's performance beyond California's borders, and the licensing statute's within-state reach. Tencue argues (Br. 22) that California's policy interest is just as substantial for out-of-state services when they are provided to California residents. The licensing statute's scope is not so broad. *See* pp. 36-42, *infra*. But more to the point, even the advisory opinion Tencue cites emphasizes that California's regulatory interest is unclear at the margins: the "line between what activities are and what are not 'within this state' cannot be drawn with precision." Tencue Br. Add.-13 (advisory opinion). Where the line is unclear, so too is the strength of

California's policy interest at the outer boundaries. This Agreement falls completely beyond those boundaries, *see* pp. 36-42, *infra*, but even if one or two acts were to fall just inside the regulated space, California's policy interest is at best weak.

b. California's minimal interest in enforcing the licensing statute far outside its wheelhouse cannot materially outweigh the strong Delaware interests on the other side of the scale. Delaware "has a fundamental interest in allowing its citizens to use its law as a commercial lingua franca to transact business across borders." *Advanced Reimbursement Mgmt., LLC v. Plaisance*, No. 17-667, 2019 U.S. Dist. LEXIS 100574, *17 (D. Del. June 17, 2019). That interest protects Carbon Crest as a Delaware LLC and is stronger than Tencue allows (Br. 23). In *Coface Collections N. Am. v. Newton*, 430 F. App'x 162 (3d Cir. 2011), the Third Circuit concluded that Delaware courts would apply chosen Delaware law over Louisiana law to uphold a restrictive covenant, even in a case involving "a citizen of Louisiana, [who] signed the Agreement in Louisiana, and his competing business is headquartered there." *Id.* at 168. The court concluded that Louisiana did not have a materially greater interest than "Delaware['s] substantial interest in enforcing this voluntarily negotiated contract clause that explicitly designates Delaware law to govern." *Id.*

Both of the Delaware cases cited by Tencue as minimizing Delaware's interest (Br. 23-24) applied California law to employment contracts where the employees lived and worked in California—much tighter California ties than exist here. *See*

Ascension Ins. Holdings, LLC v. Underwood, 2015 WL 356002, at *7 (Del. Ch. Jan. 28, 2015); *Focus Fin'l Partners, LLC v. Holsopple*, 250 A.3d 939, 948-49 (Del. Ch. 2020). And both distinguished an earlier Delaware bench decision (*DGWL*) that is much more like this case. In *DGWL*, the Delaware court enforced the parties' choice of Delaware law because even if the challenged contractual provision did not come within a California statutory exception, "it would be so closely related to that exception, and so equitably compelling, that California's interest in promoting its public policy would be small, and insufficient to outweigh that of Delaware in enforcing the parties' contractual choices." *Ascension Ins. Holdings,* 2015 WL 356002, at *16-17 (describing and distinguishing *DGWL*); *see also Focus Fin'l Partners*, 250 A.3d at 961 (same). As in *DGWL*, Carbon Crest's services fall within the out-of-state exception to the broker license statute. But at a minimum, they are so far removed from the heartland of what California is trying to regulate that California's policy interest is not materially greater than Delaware's.

Delaware also has an interest in securing compensation for its corporate citizens for services rendered under freely chosen Delaware law. *See* Opening Br. 36. To "enter into a contract under Delaware law and then tell the other contracting party that the contract is unenforceable due to the public policy of another state is neither a position that tugs at the heartstrings of equity nor is it commercially reasonable." *Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1050

(Del. Ch. 2006).

California, too, recognizes the policy interest in compensation as significant. In *Consul*, this Court relied on a California case addressing cross-state broker activity—*Cochran v. Ellsworth*, 272 P.2d 904 (Cal. App. 1954)—to note that if "*de minimis* brokerage activity in California" made a broker's services non-compensable under California law, then North Carolina (the other state with an interest) "might reject" California law. 802 F.2d at 1151 n.8. "It would not seem to accord with North Carolina's public policy to allow defendants to avoid payment for services actually rendered by a licensed North Carolina broker merely because some small portion of the services were performed in California." *Id.* (citing *Cochran*, 272 P.2d at 909).

In short, the policy concerns driving California's licensing policy are not implicated or at most barely relevant here. Two sophisticated entities freely chose Delaware law to govern to their agreement, and Delaware has a strong interest in enforcing its citizens' contractual choices to avoid uncertainty and secure compensation. California's interest is not "materially greater" than Delaware's.

B. The Agreement Is Enforceable under Both Delaware and California Corporate Law.

Delaware law applies to the interested director question, too, because Tencue has not shown—nor even attempted to show—the three prerequisites for setting aside the parties' chosen law on this issue. But the Agreement passes the test under either state's law, regardless.

It is undisputed that the sole interested director—Lewis—played no role in approving the Agreement for Tencue. Under both Delaware and California law, Wilk's disinterested approval removes any cloud of self-interestedness. Tencue objects that the delegation to Wilk did not occur or was improper, either because the subject matter was non-delegable or the requisite formalities were not met. Neither objection withstands scrutiny. Both states permit delegation of compensation decisions like this one and do not void agreements for slapdash procedures, especially for closely held corporations like Tencue. The primary difference between the two state laws is that under Delaware law, the Agreement is subject to business judgment review (not entire fairness), whereas California courts would review whether it is just and reasonable. Tencue offers no evidence of gift or waste needed to defeat the former standard, and fails to establish the latter because the district court's unfairness holding viewed the Agreement through too narrow a lens, considering only typical broker compensation and not Lewis's broader, internal role in transforming Tencue's accounting system and leading the sale process for Tencue.

In any event, the statutory safe harbors are not the only means of approval under either state's law. Both states adhere to the same long-standing common law principles that bar a corporation from accepting all of the benefits of a contract authorized by one of its agents, then reneging. Tencue impliedly ratified the Agreement by accepting its benefits in full and failing to repudiate it, even after all

shareholders (and board members) knew every contract term.

1. The parties' choice of Delaware law governs notwithstanding the internal affairs doctrine.

In the district court, Tencue affirmatively invoked Delaware corporate law (not California's) as the basis for voiding the Agreement as an interested director transaction, arguing that California law was similar (not in conflict). *See* ER-49–50 (Tencue Proposed Conclusions). Tencue thus forfeited any argument that the transaction must be judged only by California corporate law. *See* Opening Br. 38-39. Tencue made no answer regarding its waiver, and thus doubly forfeited this issue. *See Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009) (argument not made in answering brief is forfeited). But its contention (Br. 38-40) that the choice-of-law clause must be set aside under California's internal affairs doctrine is meritless anyway.

The California Supreme Court explained in *Nedlloyd Lines* that "[w]hen two sophisticated, commercial entities agree to a choice-of-law clause"—as happened here—"the clause … appl[ies] to all causes of action arising from or related to their contract," including claims for breach of fiduciary duty. 834 P.2d at 1153. The California Supreme Court then analyzed the same three gates discussed above for the fiduciary claim, and applied the chosen law because it found no fundamental conflict. *Id.* at 1155. The court mentioned the internal affairs doctrine, but only to note that the doctrine pointed to the same result "even in the absence of a choice-of-

law clause." *Id*. But the decision did not suggest that the internal affairs doctrine supplanted the fundamental-conflict analysis—if that were so, the court could have skipped the conflict analysis altogether.

Subsequent decisions applying California law have reiterated that "the internal affairs doctrine only comes into play when there is no choice-of-law clause." *See Kaul v. Mentor Graphics Corp*., No. 16-cv-02496-BLF, 2016 U.S. Dist. LEXIS 148464, *27 (N.D. Cal. Oct. 26, 2016). And the case Tencue relies upon—*Colaco v. Cavotec SA*, 236 Cal. Rptr. 3d 542 (Cal. App. 2018), reinforces that the internal affairs doctrine does not "override[] the parties' choice-of-law provision," but rather the party raising the "internal affairs" card to repudiate its chosen law still bears "the burden … to identify a fundamental conflict between California and Delaware law and show that [the non-selected state] had a materially greater interest." *Id.* at 560. As in *Colaco*, Tencue has not identified a fundamental policy conflict regarding the interested director issue. It never even attempted to make that showing, here or in the district court. Tencue has therefore not met its burden to jettison the parties' choice of Delaware law to govern the interested director issue, and the district court erred in declining to apply Delaware law. Regardless, the Agreement is valid under both states' corporate laws.

2. *Wilk's approval of the Agreement as a disinterested director exercising the board's authority satisfies both states' statutory safe harbors.*

Tencue does not dispute, nor could it, that Delaware law permits a board of directors to delegate its authority to approve an interested director transaction. *See Toedtman v. TurnPoint Med. Devices, Inc.*, No. CV-N17C-08-210-RRC, 2019 WL 328559, at *24 (Del. Super. Ct. Jan. 23, 2019). In *Toedtman*, although the four disinterested directors over the years "did not directly participate in the negotiation of [the interested director's] employment agreement," *id.* at *25, or even see the contract (and its contested severance payout) until after the interested director had been terminated, *id.* at *15, the Delaware court nonetheless upheld the agreement under § 144(a)(1)'s safe harbor (disinterested board approval), because the board "delegated that power to management," *id.* at *25. Same here, where the board delegated its authority to Wilk, and Wilk (a disinterested director and member of management) negotiated and executed the Agreement. The safe harbor thus applies under Delaware law. California, too, permits both a "committee of the board" and, sometimes, "an officer, who had the necessary authority from the board to engage in that particular type of transaction" to approve interested director transactions. Marsh's Cal. Corp. Law, 5th ed., § 10.07[B].

Tencue agrees (Br. 42-43, 50) that "executive compensation and severance" are properly delegable under both Delaware and California law. Yet Tencue insists

that the Agreement does not fall within this category because Lewis was an independent contractor. But Tencue cannot have its interested "director" cake and eat it too. Lewis was a board member and company "executive," whatever his technical employment status. *See* ER-7. Tencue cites no authority holding that independent contractor status makes a difference to whether compensation decisions can be delegated, and Carbon Crest is aware of none. Delaware law permits boards "to delegate … a broad range of responsibilities," of which "setting executive compensation" is just an example. *In re Walt Disney Co. Derivative Litig.,* 906 A.2d 27, 54 (Del. 2006). Same for California. *See Bell v. Superior Ct.*, 263 Cal. Rptr. 787, 790 (Cal. App. 1989) ("As for the board of directors, except for retaining certain inherent functions, it need not involve itself in ongoing procedures," including terms of employment). Setting Lewis' compensation is a "day-to-day" management function independent of his specific employment status.

3. Procedural informalities in Wilk's delegation do not defeat its effectiveness.

Unable to contest Wilk's disinterested approval, Tencue focuses its energy on attacking the delegation (Br. 44-45, 49-50). None of its objections pass muster, under either Delaware or California law.

First, the board in fact delegated the requisite authority to Wilk. The district court noted (but declined to apply) "Delaware law allowing delegation of board authority," ER-27, a point that would have been irrelevant had the district court not

found a delegation. The court's findings are in accord:

- "[A]ll the board members acknowledged and adhered to a practice whereby Wilk, alone, made the significant decisions on behalf of Tencue." ER-7.
- "As a pattern and practice, Leimkuhler [the other shareholder and a board member] trusted Wilk to make all major business decisions and permitted him to do so. All board members were aware of this practice." ER-9.
- "Vora [the COO and a board member] sent an email to all five board members … stating that Wilk and Lewis should have a conversation to discuss separate compensation." ER-8.
- Besides Lewis and Wilk, the three other board members all knew that Wilk and Lewis had reached an agreement to compensate Lewis upon a sale of Tencue. ER-9.

These findings refute Tencue's assertion (Br. 44-45) that Wilk was authorized only to talk, not decide.

Second, neither the absence of an express resolution nor other procedural irregularities render the de facto delegation to Wilk ineffective.

Under Delaware law, when there is a "small, closely held family corporation" and "corporate action was habitually taken without the approval of the Board of

Directors," "the authority of the officer to act for the corporation is implied from the past conduct never challenged by the corporate officials." *Hessler, Inc. v. Farrell*, 226 A.2d 708, 711-12 (Del. 1967). Where "meetings of directors are few and the directors are completely amenable to the will of the management represented by [the challenged delegee]," express board approval is not required. *Id.* at 710. *Hessler* applies here to cure any informality in the board's delegation: when a board habitually acts informally and lets a principal (here, Wilk) act in its stead, it cannot then insist upon formality of action to void that principal's actions.

California, too, relaxes formality requirements for closely held corporations, including for interested director transactions. "Although section 310 contemplates formal shareholder or director approval of interested transactions, case law suggests more informal approval can be sufficient in cases involving closely held corporations." *Int'l Space Optics, S.A. v. Hamasaki*, No. G045656, 2012 WL 6219044, at *8 (Cal. App. Dec. 14, 2012) (citing *Armstrong Manors v. Burris*, 193 Cal. App. 2d 447 (Cal. App. 1961)). Tencue is correct (Br. 43) that California, unlike Delaware, requires at least two members to form a board committee, but this is a defect of form, not power, which does not render Wilk's act *ultra vires*. *See Sammis v. Stafford,* 56 Cal. Rptr. 2d 589, 593 (Cal. App. 1996) (corporate act not *ultra vires* if "the director's act was within the corporate powers, but was performed without authority or in an unauthorized manner").

4. The Agreement passes muster under the business judgment rule applied in Delaware and the "just and reasonable" standard applied in California.

a. Under Delaware law, satisfaction of the (delegated) board approval safe harbor means the Court "review[s] the interested transaction under the business judgment rule." *Toedtman*, 2019 WL 328559, at *9. Tencue argues (Br. 53) that entire fairness review still applies, relying on an older Delaware Supreme Court case, *Fliegler v. Lawrence*, 361 A.2d 218, 222 (Del. 1976). But the "common interpretation"—endorsed by more recent Delaware Supreme Court decisions—"holds that each [of the first two statutory safe harbors] provides business judgment protection." Andrew F. Tuch, *Reassessing Self-Dealing: Between No Conflict and Fairness*, 88 Fordham L. Rev. 939, 956 & n.120 (2019). As the Delaware Supreme Court has explained, "approval … under section 144(a)(1) … permits invocation of the business judgment rule and limits judicial review to issues of gift or waste with the burden of proof upon the party attacking the transaction." *Marciano v. Nakash*, 535 A.2d 400, 405 n.3 (Del. 1987).

Tencue has not attempted to show gift or waste, or to otherwise overcome the business judgment rule. *See Brehm v. Eisner*, 746 A.2d 244, 263 (Del. 2000) (describing "waste" as "an exchange of corporate assets for consideration so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade"). As in *Toedtman*, the delegation to Wilk, who had long

made all of Tencue's significant decisions, ER-7, easily passes business judgment review. *Toedtman*, 2019 WL 328559, at *10 (declining to "replace the Board's collective wisdom and business judgment with the Court's own judgment").

b. Under California law, a transaction must be "just and reasonable" to satisfy the statutory safe harbor. *See, e.g.*, *Sammis*, 56 Cal. Rptr. 2d at 1593 (holding "just and reasonable" interested director transaction satisfied safe harbor even though approved first by (invalid) single-member board and then by subsequent vote of only interested directors). As explained in the Opening Brief (at 49), the Agreement qualifies. Clear error does not apply (*contra* Tencue Br. 40) because Carbon Crest disputes none of the district court's findings, only its legal conclusion of unfairness. Only Tencue disputes findings (without doing so plainly), including by arguing that the accounting conversion made no difference (Br. 41), flying in the face of the district court's finding that the "painstaking [accounting] conversion made Tencue respectable and more appealing to potential buyers." ER-30.

The district court's unfairness holding hinges solely on its comparison of customary broker compensation to Carbon Crest's. ER-33. But, as Tencue's expert testified, broker compensation ordinarily includes a retainer, 3-SER-628:2–629:1, (whereas the Agreement provided solely contingent compensation, ER-10). In addition, AdMedia was the negotiation's "frontline," ER-11, and fulfilled some typical broker functions. Lewis' role went far beyond broker services, including a

range of internally focused services for Tencue. Wilk agreed that Lewis "le[d] the process" for Tencue, 2-SER-404:2-5 (Wilk testimony). Out of the management team—Wilk, Agrell (the CEO), Vora (the COO), and Lewis—Lewis was the executive and director who quarterbacked the sale for Tencue, "managing the sale process, arranging meetings, preparing financials, handling paperwork, and shepherding the process along." ER-13. In addition, Lewis oversaw the accounting conversion, which required "continuous supervision." ER-12.

Tencue simply shrugs off everything else that Lewis did as not worth the additional compensation. *See* Tencue Br. 41. But the point is that Lewis's key management role makes the comparison to the other directors' compensation appropriate—not other brokers, the district court's mistaken comparator. Tencue's directors received between 6% and 18.8% of the sales proceeds that Lewis' work facilitated; the Agreement would have resulted in compensation within that range (16.3%). *See* ER-18–19. Although the district court doubted the comparison because of the other directors' longer tenures at Tencue, their tenure does not speak to the amount of work they put into the sale, where Lewis was Tencue's leader. Given the breadth and executive level of Lewis' duties and the other directors' compensation, the Agreement is just and reasonable to Tencue and satisfies the safe harbor of Cal. Corp. Code § 310.

5. Tencue ratified the Agreement.

Even if (counterfactually), the board (including both shareholders) did not delegate authority to Wilk *ex ante,* and the statutory safe harbors do not apply, Tencue ratified the Agreement *ex post*. Both Delaware and California law permit implied ratification of corporate acts—including interested director transactions—and the Agreement was impliedly ratified here.

Both states make a distinction between void acts that cannot be ratified and voidable acts, which are subject to implied ratification and other equitable defenses. "The common law rule is that void acts are *ultra vires* and generally cannot be ratified, but voidable acts are acts falling within the power of a corporation, though not properly authorized, and are subject to equitable defenses." *CompoSecure, LLC v. CardUX, LLC*, 206 A.3d 807, 816-17 (Del. 2018); *see also Sammis*, 56 Cal. Rptr. 2d at 593 (same distinction under California law).[3] If the Court finds Wilk was not properly delegated authority, the Agreement nonetheless falls into the "voidable" category, given Tencue's power to enter the Agreement if it *had* properly authorized Wilk.

Interested director transactions are subject to implied ratification like all other

[3] Although the Delaware Supreme Court applied New Jersey law to the question of whether implied ratification had occurred in *CompoSecure*, it analyzed the distinction between void and voidable acts under Delaware law. *See* 206 A.3d at 816-17 & n. 35.

voidable acts, *contra* Tencue Br. 51. In *Robert A. Wachsler, Inc. v. Florafax International, Inc.*, 778 F.2d 547 (10th Cir. 1985), the Tenth Circuit relied on a leading treatise to hold that Delaware would apply "less formal means of corporate ratification" for "merely voidable" interested director transactions. *Id.* at 552.[4] Similarly, *Gaillard v. Natomas Co.*, 256 Cal. Rptr. 702 (Cal. App. 1989), recognized that implied ratification was applicable to interested director transactions in California, although not in a shareholder derivative suit. *Id.* at 717. Here, where the corporation is a party to the suit, ratification applies under *Gaillard* (*contra* Tencue Br. 45).

a. Under the Tenth Circuit's distillation of Delaware law, ratification can occur by shareholder acquiescence or acceptance of benefits in conjunction with knowledge of material facts about the interested director contract. *Robert A. Wachsler, Inc.*, 778 F.2d at 553. California ratification doctrine is much the same. *See Reusche v. Cal. Pac. Title Ins. Co.*, 42 Cal. Rptr. 262, 266 (Cal. App. 1965) (ratification where principal "claim[ed] the benefits of [the agent's] act").

The relevant timeframe for assessing shareholder knowledge is before the "board officially repudiated the contract." *See Robert A. Wachsler, Inc.*, 778 F.2d at

[4] Tencue cites (Br. 53) a Delaware Court of Chancery decision asserting that "informal assent" by a controlling shareholder cannot ratify corporate transactions. *See Espinoza v. Zuckerberg*, 124 A.3d 47, 50 (Del. Ch. 2015). But the Delaware Supreme Court has more recently reiterated the validity of equitable doctrines to ratify voidable corporate acts. *See CompoSecure*, 206 A.3d at 816-17 & n.35.

553. Both shareholders undisputedly had full knowledge of the contract in February 2019, but neither they (nor the full board) repudiated the Agreement at that time. Instead, Tencue terminated the Agreement "to initiate Lewis' three-year compensation period under the agreement." ER-17. Termination shows ratification when undertaken to effectuate a term of the Agreement, not to repudiate it (*contra* Tencue Br. 47). Wilk testified that Tencue "terminated in order … to start the clock running on the tail." 2-SER-337:20-21; *see also* ER-17. Tencue's citation of *Blanton v. Womancare, Inc.*, 696 P.2d 645 (Cal. 1985), is thus inapt, because in that case the principal "repudiated the agreement as soon as she learned of it." *Id.* at 653.

Months after initiating the Agreement's tail period, moreover, Tencue expressly acknowledged that the Agreement was "currently in place." 4-SER-770 (Wilk email). Wilk stated that he did not "feel comfortable with the payout as currently written," but not—as Tencue now insists (Br. 48)—that Tencue would not pay. 4-SER-770. Instead, Wilk stated that Tencue would await the running of the three-year period to consummate any sale transaction (though it ultimately did not wait). *Id.*[5] Throughout this period, as well as before, Tencue benefitted from the

[5] Tencue asserts in passing (Br. 48) that this email was improperly admitted because it was an offer to compromise under Rule 408. The district court was well within its discretion to hold that the email was not a "settlement offer" because it was "an attempt to resolve the parties' dispute before taking it to court." *Telecom Asset Mgmt., LLC v. FiberLight, LLC*, 730 F. App'x 443, 445-46 (9th Cir. 2018) (noting district court's "latitude" to make Rule 408 decisions); *see* 1-SER-52:19-24 (district court overruling objection).

Agreement, including that Wilk, "[c]onfident in the position [he] found himself by virtue of Lewis' work," "asked for $42 million [from Opus Agency] and got it." ER-27. So even if the ratification doctrine is limited to the period after the full contract had been sent to each board member (and shareholder)—when there can be no dispute that all material facts were known—Tencue and its shareholders ratified the Agreement, because their conduct, "'subsequent to the transaction objected to, is such as reasonably to warrant the conclusion that [they have] accepted or adopted it, [and] [their] ratification is implied through [their] acquiescence.'" *Genger v. TR Investors LLC*, 26 A.3d 180, 195 (Del. 2011) (quoting *Frank v. Wilson & Co.*, 32 A.2d 277, 283 (Del. 1943)).[6] Considered in total, Tencue's course of conduct and affirmative representations ratified the Agreement.

b. The record establishes ratification before February 2019, too, because Wilk's knowledge can be imputed to Leimkuhler (the other shareholder), who knew when the Agreement was signed that it involved contingent compensation on a percentage basis, could have asked about any other terms, and was kept informed by

[6] As for its objection that valid ratification under California law depends on knowing of the right to disavow (Br. 48), Tencue cites inapposite cases involving contracting parties ratifying their own deficient contracts. *See Coughenour v. Del Taco, LLC*, 271 Cal. Rptr. 3d 602 (Cal. App. 2020) (minor ratifying contract after age eighteen); *Fergus v. Songer*, 59 Cal. Rptr. 3d 273 (Cal. App. 2007) (client ratifying contingency fee agreement). Regardless, Tencue had consulted counsel before describing the Agreement as "currently in place." 2-SER-345:10–346:6 (Wilk testimony); 4-SER-770 (Wilk email).

Wilk "to the full extent that she so wished." ER-9. Tencue also paid Carbon Crest's Agreement-related expenses during this time. *See* Opening Br. 49-50.

In both *Frank*, 32 A.2d at 283, and *Papaioanu v. Commissioners of Rehoboth*, 186 A.3d 745 (Del. Ch. 1962), the legal rules governing "estoppel by acquiescence" included "sufficient notice or means of knowledge," *Papaioanu*, 186 A.2d at 749-50, and imputed knowledge, *Frank*, 32 A.2d at 283. Even if *dicta* (Tencue Br. 52), the stated rules of Delaware law are predictive of how the Delaware Supreme Court would rule. *See Henkin v. Northrop Corp*., 921 F.2d 864, 867 (9th Cir. 1990) ("Dicta from the highest court in the state, while not controlling, is relevant[.]"). California, too, permits ratification "despite lack of full knowledge" when "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." *Reusche*, 42 Cal. Rptr. at 267.[7]

These cases are also cited in corporate act acquiescence decisions, contrary to Tencue's argument that they do not apply to corporate acts. *See, e.g.*, *Lehman Bros. Holdings Inc. v. Spanish Broad. Sys., Inc*., No. 8321-VCG, 2014 WL 718430, at *1, *10 n.59 (Del. Ch. Feb. 25, 2014) (citing *Frank* and holding acquiescence applied where shareholders "with at least imputed knowledge" made "no objection" to the

[7] Tencue contends (Br. 48-49) that *Reusche* involved "innocent third parties," but so does this one: Tencue is the principal, Wilk was its agent, and Lewis the innocent third party who relied to his detriment on Wilk's signature on the Agreement (and on the known "pattern and practice" whereby Wilk made decisions but kept Leimkuhler informed "to the full extent that she so wished," ER-9).

challenged corporate act). With actual knowledge that Wilk had reached an agreement to pay Carbon Crest separate, contingent, percentage-based compensation for its assistance with the sale process, and imputed knowledge of all other terms, Leimkuhler accepted the benefits of the Agreement throughout the sale process, as Lewis prepped her for the informational "roadshows" and arranged cultural fit meetings in which she participated. ER-12-13. These acts constitute ratification.

C. The Agreement Is Valid under the California Licensing Statute Because Carbon Crest Did Not Provide Broker Services in California.

Even if the parties' choice-of-law clause is nullified, the Agreement is valid. California's broker licensing statute "refer[s] to acts within the state," and this Court has "hesitate[d] to ignore this plain language." *Consul*, 802 F.2d at 1150; *see* Cal. Bus. & Prof. Code § 10130 (making it "unlawful … to act as a real estate broker … within this state" without a license). The licensing statute thus does not "apply to out-of-state acts relating to in-state (California) realty performed by a broker licensed in another state." *Consul*, 802 F.2d at 1149. Here too, because Lewis did not "perform[] any regulated acts in California," the agreement is enforceable in full. *See id.* The only services Lewis provided in California were isolated non-broker services. *See* Opening Br. 52-55.

1. The district court made no findings that Lewis performed regulated acts in

California. Instead, it found that "[a]ll negotiations with potential buyers took place in New York" and Lewis's sale-related "work in California … concerned only informational and cultural integration meetings between Tencue and potential buyers." ER-11. Nonetheless, it held that the lack of an out-of-state license "precludes recovery" "even if Lewis did not perform any broker work 'within this state.'" ER-22–23. This erroneous holding overreads *Consul* and would impermissibly engraft an out-of-state license requirement onto the California licensing statute. *See* Opening Br. 53-54. Tencue's only attempt to defend the district court's reasoning is an ipse dixit footnote with no argument or authority. *See* Tencue Br. 30 n.6.

2. Tencue takes another tack, arguing—against the district court's factual findings—that Lewis performed broker services in California. Its alternative rationale fails as a legal matter, and also founders on Tencue's inability to show clear error.

a. To avoid the inconvenient fact that Lewis performed virtually all his work in New York, Tencue first contends (Br. 28-30)—contrary to grammar, logic, and precedent—that any broker services performed for a California corporation are services "within" California, regardless of the service provider's physical location or any other connection to California. Tencue implicitly recognizes (Br. 28) that its *per se* rule conflicts with this Court's holding in *Consul*, but shrugs off the conflict

on the theory that its reading is supported by a Department of Real Estate advisory that post-dates *Consul*. There are two problems with Tencue's argument.

First, this Court is "bound by [its] prior decisions interpreting state as well as federal law in the absence of intervening controlling authority," meaning either "intervening holding[s] of the California Supreme Court" or "intervening appellate court opinions," *FDIC v. McSweeney*, 976 F.2d 532, 535 (9th Cir. 1992)—of which there are none. Although Tencue argues (Br. 29) that the Advisory is "guidance," it (rightly) does not claim that the Advisory is controlling, in California courts or here. *See* Opening Br. 54.

Second, the Advisory—and the California Supreme Court decision on which it relies—do not support Tencue's California-client-equals-service-within-California rule, especially for business opportunity (not real estate) transactions.

For starters, the Advisory provides little to no guidance about how the Department would view interstate business sales involving sophisticated business entities and no California real property. The Advisory concerns "Real Estate Licensed Activities," and stems from the Department's mandate to "achieve[] the maximum protection for the purchasers of real property and those persons dealing with real estate licensees." Tencue Br. Add.-11-12. Though the Advisory cites the statutory definition that includes "business opportunity" sales, Add.-13, every example involves a consumer real property transaction and relates to the "real estate

needs of Californians," Add.-14-15. Interstate corporate acquisition transactions are not within the Advisory's heartland.

Adding proof to the pudding, the Advisory relies on a California Supreme Court decision that can't be squared with Tencue's bright line rule, and indicates that services must have multiple connections to California to qualify as "within California." In *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998), the California Supreme Court considered whether a New York law firm engaged in the unauthorized practice of law in California when the firm's lawyers repeatedly traveled to California to "perform[] legal services in California for a California-based client under a fee agreement stipulating that California law would govern." *Id.* at 2. The court rejected an absolute physical presence requirement under the law license statute, but also rejected "the notion that a person automatically practices law 'in California' whenever that person practices California law anywhere." *Id.* at 6. Instead, the court suggested that for remote work, several California connections, beyond a California-based client, were required, as when "advising a California client on California law in connection with a California legal dispute" by remote means. *Id.* at 5-6.

The *Birbrower* test rules out Tencue's absolutist statement that any and all services provided to Tencue count as "within this state" simply by virtue of Tencue's California location. True, Carbon Crest advised a California client, but not in

connection with a California transaction. Rather, Carbon Crest's services were provided in New York and related to non-California potential buyers, New York negotiations, and a sale transaction that was ultimately governed by Delaware law. This multi-state transaction, like advising about non-California law in connection with a non-California legal dispute, does not meet *Birbrower*'s test. *See id.*

b. In lieu of its California-client-is-enough approach, Tencue attempts (Br. 30-33) to shoehorn Lewis's two meetings in California—over the course of eight months between the signing of the Agreement and the cancellation of the Nth Degree sale—into the "broker services" category. But this alternative rationale immediately runs up against the district court's findings that "Lewis participated in negotiations … but he did not do so within California" and "[a]ll negotiations … took place in New York." ER-11.

Tencue first disclaims that negotiation is required, hanging its hat on Lewis's participation in the single California introductory meeting with a potential buyer (Bow River) as constituting "solicitation."[8] As the California Supreme Court held, however, in "one sense[,] … all finders"—who do not need to be licensed—"must solicit a prospective borrower or lender" (here, buyer or seller). *Tyrone v. Kelley*, 507 P.2d 65, 70 (Cal. 1973). A simple introductory meeting is not enough to require

[8] Tencue also argues (Br. 29-30) that entering into the Agreement constituted California solicitation. But the solicitation went the other direction: Tencue asked Lewis to help. ER-8.

a license. *Id.* at 69. The intermediary must go "beyond merely bringing the parties together, usually [involving] the authority to participate in negotiations." *Id.* at 70; *see also Preach v. Monter Rainbow*, 16 Cal. Rptr. 2d 320, 326 (Cal. App. 1993) ("The line between brokers and finders is based on whether the person in question has engaged in any negotiating to consummate the transaction.").

But there were no Bow River meetings or discussions beyond that single introductory California meeting. *See* 1-SER-157:4-8; 1-SER-161:17-162:2 (Lewis testimony). That distinguishes this case from *Nein v. HostPro, Inc.*, 95 Cal. Rptr. 3d 34 (Cal. App. 2009), where the person who brought together two companies regarding a potential transaction participated not only in a meeting to "build the relationship" but also a second meeting where the parties "got more serious" and discussed one company's "needs" and the other company's "services"—*i.e.*, the beginning of negotiations. *See id.* at 49.

As for the cultural integration meeting with Nth Degree in California, Tencue contends (Br. 32-33) that it constituted a negotiation because the lack of cultural fit killed the deal, and Lewis tried but was unsuccessful in resolving that issue. But negotiations relate to "the price or any of the other terms of the transaction." *Preach*, 16 Cal. Rptr. 2d at 326 (citation omitted). Cultural fit is not itself a transaction term. Attempts to mitigate cultural fit issues by changing transaction terms—*e.g.*, requiring Nth Degree to end its association with the gun show, *see* ER-14—would

constitute negotiations. The problem for Tencue is that none of that activity took place in California. Rather, as Wilk testified, the meeting in California was for "due diligence" on "organizational structure and culture fit," and the gun show issue was not revealed until shortly after that meeting. 2-SER-392:17–393:7. Attempts to find transaction terms that would mitigate the issue occurred after the meeting, outside of California. *See, e.g.*, 3-SER-461:4-21 (Wilk testimony describing his meeting in Atlanta).

In sum, Tencue has not established clear error in the district court's finding that Lewis did not participate in any negotiations in California. *Bax v. Drs. Med. Ctr. of Modesto, Inc*., 48 F.4th 1008, 1014 (9th Cir. 2022) (Clear error requires finding to be "illogical, implausible, or without support in inferences that may be drawn from the record."). Because Carbon Crest did not provide regulated services "within th[e] state" of California, the licensing statute does not void the Agreement.

D. The Agreement Is Severable.

In all events, the Agreement is severable under California law permitting courts to "partially enforce contracts involving unlicensed services." *Marathon Ent., Inc. v. Blasi*, 174 P.3d 741, 752 (Cal. 2008). Tencue's arguments against severability apply the wrong standard of review; misunderstand how California courts determine if a contract has distinct objects, rendering it severable; and ignore one of the key reasons for severability here—performance in New York. Tencue's hand-waving

about the absence of hourly timekeeping does not help its cause, either.

1. Tencue's contention that severability is reviewed for abuse of discretion (Br. 33) misunderstands California law and the district court's decision. The question whether a contract is capable of severance is a legal one, subject to de novo review. *See Koenig v. Warner Unified Sch. Dist.*, 253 Cal. Rptr. 3d 576, 585 (Cal. App. 2019) ("Whether the termination agreement is capable of being severed is reviewed de novo[.]"). The district court (wrongly) held that the severability did not apply as a legal matter. ER-23–24. Once that legal threshold is crossed, the discretionary decision is whether the "interests of justice" would be furthered by severance. *Marathon Ent.*, 174 P.3d at 754. Because of its (wrong) legal holding, the district court did not reach that question, but given its award of quasi-contract damages "in the interest of rendering 'substantial justice,'" ER-31, there can be little doubt that it would apply its discretion to sever the contract. But that is a question for remand.

2. The district court's chief legal error, which Tencue repeats rather than rehabilitates, is not performing a service-by-service analysis in deciding whether the Agreement has "but a single object." Cal. Civ. Code § 1598. Tencue accepts (Br. 35) that contracts calling for "distinct areas of services" may be severable. Because the Agreement is almost indistinguishable from the contract in *Venturi*, 92 Cal. Rptr. 3d at 127—which Tencue acknowledges (Br. 35) represents a "candidate[] for

severance"—the Agreement, too, is severable.

The contract at issue in *Venturi* involved services related to securing financing for a property development, which qualified as broker services to the extent that, *inter alia*, they involved the negotiation of property-secured loans. *Id.* at 127. The court did not analyze the contract's purpose at a high level of abstraction to determine if it was severable. *Id.* at 127-28. Instead, it examined each of the specific contracted-for tasks in reasoning that the contract "called for [the unlicensed professional] to provide a range of services, some apparently requiring a broker's license, others seemingly not." *Id.* at 125, 128.

The analogue here would be the six specific tasks listed in the Agreement, ER-51, two of which do not involve negotiations and are analogous to tasks *Venturi* held were non-broker, compensable tasks. Carbon Crest agreed to "[e]valuate other potential buyers," ER-51, and in fact "began looking for and researching potential buyers, and … created an 'Information Memorandum' to provide to potential buyers," ER-12, just as the plaintiff in *Venturi* agreed to assist with preparing information materials and due diligence on potential financing sources, *Venturi*, 92 Cal. Rptr. 3d at 125. Carbon Crest also agreed to "[m]anage the sale process." ER-51. Similarly, one of the non-broker tasks identified by the *Venturi* court was "formulat[ing] a marketing strategy." 92 Cal. Rptr. 3d at 127.

Venturi makes plain that not all unlicensed services related to representing a

company in a transaction are unlawful. *Venturi*, 92 Cal. Rptr. 3d at 127. This fatally undermines Tencue's argument (Br. 34-35) that *any* sale-related services are per se non-severable simply because *some* sale-related services require a license. Tencue notes that the *Venturi* contract included a catch-all financial advice task that was not necessarily sale-related. But the court simply listed that task as one among many non-broker tasks; it did not describe it as an essential prerequisite for severability. *See id*. The situation here is thus distinct from *Fair v. Bakhtiari*, 125 Cal. Rptr. 3d 765 (Cal. App. 2011), relied upon by Tencue, where the business transactions themselves—deals an attorney made with his clients without providing certain conflict-of-interest disclosures—were unlawful, and thus no services connected to those transactions were compensable. *Id.* at 783.

Once any no-license-required tasks are identified on the face of the contract, moreover, the severability analysis focuses on the services actually provided. Where a contract calls for "hybrid services," some licensed and some not, "a party's entitlement to compensation under a contract is geared to the nature of his performance rather than his status when the contract is signed." *Exec. Landscape Corp. v. San Vicente Country Villas IV Assn*., 193 Cal. Rptr. 377, 380 (Cal. App. 1983). Here, the services provided include overseeing the "painstaking" conversion of the accounting system, ER-30, which Tencue does not—and cannot—contend is inextricably intertwined with sale negotiations.

Moreover, this actual-service approach requires analyzing what services were provided in connection with the specific transaction resulting in the contract fee. *Venturi*, 92 Cal. Rptr. 3d at 128. Like the Agreement, the *Venturi* contract provided a percentage-based fee for transactions closed within a certain timeframe without the plaintiff's involvement and, as here, the plaintiff was not involved at all with negotiating the closed transaction. *Id.* at 125; *see* ER-19. The *Venturi* court explained that the severability analysis should account for the plaintiff's lesser involvement with the closed deal (making it even less likely that any broker services were performed). *Venturi*, 92 Cal. Rptr. 3d at 128.

3. There is a second reason for severability here, which Tencue ignores altogether: Even services that might otherwise fall within the "broker" category are severable and compensable when provided outside of California. *See* Opening Br. 58; *Birbrower*, 949 P.2d at 13. In *Birbrower,* the California Supreme Court held that even though a New York law firm had engaged in the unlicensed practice of law in California—and therefore its fee agreement was "void, and [the law firm] is not entitled to recover fees … for those [California] services"—the firm may be able to "recover fees under the fee agreement for the limited legal services it performed … in New York to the extent they did not constitute practicing law in California, even though those services were performed for a California client." *Id.* at 11, 13.

The same applies here. As explained above, not every broker service

undertaken for a California client constitutes a service provided "within th[e] state," Cal. Bus. & Prof. Code § 10130, and here Tencue agreed to pay Carbon Crest compensation for services that are doubly removed from the licensure requirement because they are largely, if not entirely, *not* broker services as well as being performed in New York.

4. Under these cases, the Sales Process Advisory Agreement is at the least severable. Tencue's last stand against severability is to claim (Br. 37) that there is no evidence on which to allocate the contract between unlawful and lawful services because Lewis did not keep track of his hours. The issue of how to allocate compensation is for remand, *see, e.g.*, *Birbrower*, 949 P.2d at 13 (remanding for determination of "how much of this [contingent or fixed] sum is attributable to services Birbrower rendered in New York"), but an hour-by-hour accounting is not essential. For example, to allocate services between New York and California, the record recounts the timeline of the sales process and the (few) meetings held in California as compared to New York. *See, e.g.*, 1-SER-157:4-8, 1-SER-176:1-8 (Lewis's testimony identifying at most three days with meetings in California during the eight months between the signing of the Agreement and Tencue's cancellation of the Nth Degree deal). The absence of time records does not preclude the severability of the contract.

II. If The Agreement Is Not Enforceable According To Its Terms, The District Court Correctly Awarded Quasi-Contract Damages.

After presiding over a multi-day bench trial and considering all the evidence, the district court held that even though it was "reluctantly" "obliged to uphold" Tencue's "points of law," the case's "compelling" circumstances warrant equitable relief. ER-27, ER-29. Neither waiver nor an absolute California rule precluded the district court from awarding quasi-contract damages. The amount of damages falls comfortably within legal bounds. And Tencue makes no showing that the district court abused its discretion in awarding equitable relief.

A. The District Court Correctly Held that Quasi-Contract Damages Are Available.

1. Carbon Crest did not abandon any claim to equitable relief.

Tencue argues (Br. 57-58) that Carbon Crest abandoned any claim to quasi-contract damages. Not so. It faults Carbon Crest for failing to submit evidence on the reasonable value of services, but as described below, the record contains ample evidence on that issue. In addition, it notes that Carbon Crest "[a]gree[d] with the general principles" Tencue described in its proposed conclusions of law on "quantum meruit." 4-SER-713. True, but Carbon Crest "[d]isagree[d]" with Tencue's proposed conclusion of law on its "unjust enrichment" claim. *Id.* As the district court held, Carbon Crest's "erroneous or confusing" use of the "unjust enrichment" label did not stand in the way of awarding damages under the correct label. *See* ER-31-32. Especially because there was a bench trial and the district court

resolved the issue, this legal issue of the propriety of equitable relief is not waived. *Cf. Alvarez v. IBP, Inc*., 339 F.3d 894, 910 n.13 (9th Cir. 2003) (reviewing issue raised "only in a pretrial motion for summary judgment" where "judgment was entered after a bench trial and the issue on appeal is one purely of law").

2. California law permits quasi-contract damages here.

The district court held that California law allows equitable remedies for "illegal contracts" to "avoid unjust enrichment to a defendant and a disproportionately harsh penalty upon the plaintiff," depending on "the policy of the transgressed law, the kind of illegality, and the particular facts." ER-28 (quoting *Asdourian v. Araj,* 696 P.2d 95, 105 (Cal. 1985)). Tencue claims error on the theory that California law imposes a rigid bar against awarding any compensation if a contract has been held void for lack of a license. Not so.

a. California does not bar all quantum meruit recovery where a contract is void (*contra* Tencue Br. 64-65). Rather, in many cases—including with broker contracts—California permits quantum meruit recovery for lawful services, even if they were provided under an illegal contract. "Even if the entire contract was illegal and unenforceable, a plaintiff may recover the reasonable value of services rendered provided that those particular services were not legally prohibited." *MKB Mgmt., Inc. v. Melikian*, 108 Cal. Rptr. 3d 899, 907 (Cal. App. 2010) (remanding quantum meruit claims where business refused to pay for a property manager's services

because manager did not have a real estate broker's license).[9]

Quantum meruit thus operates as an equitable backstop to the severability doctrine, such that even where a contract is inseverable, the reasonable value of lawful services can still be recovered. *Selten v. Hyon*, 60 Cal. Rptr. 3d 896, 902-03 (Cal. App. 2007) (holding that even where "illegal portions of the contract cannot be severed," courts may award "the reasonable value of any lawful services rendered"). The text of the broker licensing statute supports quasi-contract recovery because it bars only "action[s]" seeking "compensation for the performance of any of the *acts* mentioned in this article," Cal. Bus. & Prof. Code § 10136 (emphasis added), whereas the much harsher contractor prohibition bars "any action, or recover[y] in law or equity in any action," for "compensation for the performance of any *act or contract* where a license is required," *id.* § 7031(a) (emphasis added).

All but one of the cases cited by Tencue that reject quantum meruit recovery due to a licensing statute apply the much harsher (and inapposite) section 7031.[10] The two cases addressing the business opportunity broker statute do not address

[9] In *MKB Management*, the quantum meruit claims sought recovery of expenses paid on the defendant's behalf, but the court's reasoning did not distinguish between such claims and claims for the reasonable value of services. 108 Cal. Rptr. 3d at 907.

[10] *See MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co.*, 115 P.3d 41 (Cal. 2005); *Hydrotech Sys., Ltd. v. Oasis Waterpark*, 803 P.2d 370 (Cal. 1991); *Lewis & Queen v. N.M. Ball Sons*, 308 P.2d 713 (Cal. 1957); *Kim v. TWA Constr., Inc.*, 294 Cal. Rptr. 3d 140 (Cal. App. 2022); *Pac. Custom Pools, Inc. v. Turner Constr. Co.*, 94 Cal. Rptr. 2d 756 (Cal. App. 2000).

quantum meruit claims. Rather, in those cases the courts declined to enforce the contract based on "equitable considerations." *All Points Traders, Inc. v. Barrington Assocs.*, 259 Cal. Rptr. 780, 789 (Cal. App. 1989); *see also Salazar v. Interland, Inc.*, 62 Cal. Rptr. 3d 24, 31 (Cal. App. 2007) (rejecting request for "monthly fees ... under his contract").[11]

Because virtually all of the services Carbon Crest provided did not require a license—even if, counter to California precedent, some tiny fraction voids the contract—the district court's quasi-contract award can be justified on this equitable severability ground alone.

b. The district court's judgment can also be affirmed under the authority of *Norwood v. Judd*, 209 P.2d 24 (Cal. App. 1949), *Epstein v. Stahl*, 1 Cal. Rptr. 143 (Cal. App. 1959), and *Cochran*, 272 P.2d 904. *See* ER-28–29. While involving joint ventures, the fundamental reasoning applied in *Norwood* and *Epstein* was that equitable relief did not conflict with the licensing statute's purpose: on the facts, the public would not be protected by applying the no-compensation rule, and refusing to award one partner its share of the profits from the unlicensed activity would "permit the defendant to be unjustly enriched at the expense of the plaintiff." *Norwood*, 209 P.2d at 31. The licensing statute "was not intended as an unwarranted

[11] The final license-related case addressed boxing manager licensing, and largely relied on contractor license cases to reject a quantum meruit claim. *See Castillo v. Barrera*, 53 Cal. Rptr. 3d 494, 503-04 (Cal. App. 2007).

shield for the avoidance of a just obligation." *Epstein*, 1 Cal. Rptr. at 149.

Tencue also cannot avoid its "just obligation" here. Although Carbon Crest and Tencue did not form a joint venture, their pre-existing and ongoing business relationship outside of the Agreement—under which Lewis was a key part of Tencue's management team who led the sale process for Tencue—made their relationship more akin to a partnership than a standard contract between a member of the public and a broker, as Tencue implicitly acknowledges by arguing for an interested director bar. Like the plaintiffs awarded relief in *Norwood* and *Epstein*, Carbon Crest did not provide unlicensed services to the public—much less the California public—so the licensing statute's public-protection rationale has little purpose. That Carbon Crest provided services substantially (if not entirely) outside of California is yet one more reason that denying equitable relief would not further the statute's goals, as California courts have recognized when considering the licensing laws of other states. *See Cochran*, 272 P.2d at 909; p. 20, *supra*. And add to that the much stronger countervailing interest in avoiding unjust enrichment where Tencue expressly agreed that Delaware law would govern, thereby avoiding any licensure issue, only to do an about face and insist on California law when it came time to (refuse to) pay.

Tencue argues (Br. 63) that California courts have cabined *Norwood* and *Epstein* to the joint venture context. That may be so for the stricter contractor

licensing statute, but the broker analogue is more flexible. California courts have adjudged that the goals of the rigid contractor statute are best served by an inflexible rule outside of the joint venture context. But those decisions do not cast doubt on the fundamental reasoning of *Norwood* and *Epstein* that equitable relief should be available where (as here) it would *not* frustrate the statute's purpose.[12]

B. The Damages Calculation Is Supported by Sufficient Evidence of Reasonable Value.

As Tencue concedes (Br. 70), the district court correctly stated the law on calculating quantum meruit damages: "the measure of recovery … is the reasonable value of the services rendered," not "the value of the benefit." ER-32 (quoting *Maglica v. Maglica*, 78 Cal. Rptr. 2d 101, 102, 104 (Cal. App. 1998)). The district court expressly disclaimed any "inten[t] to award the value of the benefit Lewis conferred upon" Tencue. ER-32. It went on to calculate reasonable value based on Tencue's expert's testimony that fees are normally between one and five percent of enterprise value. ER-32. Tencue has identified no error in this analysis.

First, the district court's calculation of one "benchmark" based on five percent

[12] Tencue also argues (Br. 61, 63-64) that a void interested-director contract bars quantum meruit, relying on a non-corporate-law unpublished federal district court case that simply asserts a (wrong) per se rule that quantum meruit is never available when a contract is void. *See Hadida v. King,* No. 2:11-cv-8648, 2012 U.S. Dist. LEXIS 199771, at *10 (C.D. Cal. Feb. 2, 2012). But California precedent makes clear that no such per se rule exists—as Tencue elsewhere acknowledges (Br. 62). *Asdourian*, 696 P.2d at 105 ("[T]he rule [barring recovery] is not an inflexible one to be applied in its fullest rigor under any and all circumstances.").

of "the value added by plaintiff," ER-32, is not the same as the district court awarding "the value of the benefit." The value of the benefit was, in the district court's view, the $22 million that the district court described as "the value added by plaintiff." ER-32. An ambiguous (at most) remark is not enough to infer that the district court disregarded the correct legal standard that it had just recited.

Second, Tencue is simply wrong to suggest (Br. 70-71) that any percentage-based method impermissibly awards the value of the benefit. In *Maglica* itself the court approvingly cited an earlier case where the court "allowed a recovery based on a contemplated commission." 78 Cal. Rptr. 2d at 106 (citing *Watson v. Wood Dimension, Inc.*, 257 Cal. Rptr. 816 (Cal. App. 1989)). The contingency fee cases are not to the contrary. Rather, they specify that when a contingency agreement has been invalidated, the jury cannot consider the "contingent" nature of an attorney's work in deciding reasonable value—*i.e.*, increase the reasonable fee to account for the contingent risk—because it would compensate the attorney for the void contingent feature. *See Fergus*, 59 Cal. Rptr. 3d at 290 (California law "does not permit the trier of fact to consider the contingent nature of the fee arrangement in determining a reasonable fee."). Those cases are inapt here, where the question is not enforcing a contingent-risk premium, but assessing reasonable value where market rates are percentage-based.

Finally, Tencue's insistence on an hourly-rate basis for recovery is simply

inconsistent with the flexibility provided by California law. "In determining value in quantum meruit cases, courts accept a wide variety of evidence." *Children's Hosp. Cent. Cal. v. Blue Cross of Cal.*, 172 Cal. Rptr. 3d 861, 872 (Cal. App. 2014). The "party suing for compensation may testify as to the value of his services or offer expert testimony. However, such evidence is not required." *Id.* Reasonable value is simply the "going rate" for the relevant services. *Maglica*, 78 Cal. Rptr. 2d at 102. The district court found—based on Tencue's expert—that the "going rate" for broker services is between one and five percent of the transaction value, and calculated a "reasonable value" falling within that range. ER-32. That award is fully compliant with California law.

C. Tencue Provides No Reason to Disturb the District Court's Conclusion that this Compelling Case Warrants Equitable Relief.

Tencue's final gambit for overturning the district court's equitable award is a naked plea (Br. 65-69) for this Court to both re-do the fact-findings and re-weigh the equities. But Tencue cannot establish either clearly erroneous findings or an abuse of discretion. *See Sheppard, Mullin, Richter, & Hampton, LLP v. J-M Mfg. Co.*, 425 P.3d 1, 20 (Cal. 2018) (scope of quantum meruit remedy falls within trial court discretion).

Tencue's insistence that this case is not "compelling" omits one half of the equitable balancing: all the district court's findings regarding Tencue's actions. Wilk gave "his written word and signature," which Lewis relied on, ER-27; Wilk, "having

reaped the benefit of Lewis' hard work and then having reneged on his word, is the one guilty of the greatest moral fault," ER-31; and "Tencue adopted a pattern and practice of Wilk making all significant decisions," and "cannot, in good consciousness, complain that Lewis followed [those] very procedures," ER-31.

This is not a story of an unlicensed broker selling its California services to the California public and then attempting to recover for his work simply because he was competent—though Lewis' work was not only competent but "excellent," ER-15. This is a story where Tencue, after working with him for years, reached out to Lewis for his help. Wilk assumed authority to contract with Lewis, with full knowledge of the board. The parties negotiated for months and chose Delaware law. As a result, Lewis provided excellent work for a year and a half, reasonably and justifiably expecting compensation. Only after receiving the full benefit of its bargain did Tencue renege and insist that California law applies, and that, contrary to years of practice, Wilk had no authority to make its decisions, in an effort to pay Carbon Crest nothing. That bait-and-switch is an important part of the equities that Tencue simply ignores.

As for the rest, Tencue simply raises irrelevancies or fights the facts.

On the irrelevant side, Tencue objects (Br. 66) that Lewis was paid too much and asked for too much. As for the Business Advisory Agreement, the district court found that it did not cover sale-related services. ER-19. And the amount of

compensation under the Sale Process Advisory Agreement is irrelevant. By definition, equitable relief applies only when that compensation is not enforced.

Tencue next battles the district court's fact findings regarding Lewis' performance, insisting it wasn't that good and didn't matter that much. *See* Br. 66-68. These arguments do nothing more than re-litigate the bench trial. The district court found that "more than anyone else," Lewis "deserves credit for putting Tencue in a position to fetch a better price." ER-27. But for Lewis, "Tencue would have sold for much less than its eventual value on sale to Opus Agency." ER-29. Lewis' work "significantly benefited Tencue by upgrading Tencue and positioning it for favorable sale." ER-29. Tencue's attempts to cherry pick the record to undermine specific findings about this or other aspects of Lewis' performance simply don't match the record.

More fundamentally, Tencue fails to see the forest for the trees: Considering the entire trial record, the district court concluded that Lewis deserves the lion's share of credit for Tencue's ability to nearly double its price in the space of two years, yielding the favorable Opus Agency offer. *See* ER-27. Tencue may not agree with that conclusion, but it has not come close to showing clear error. Coupled with Tencue's moral fault in executing its bait-and-switch maneuver, compelling circumstances support the district court's award of the reasonable value of Lewis's services. Tenue has failed to establish any abuse of discretion.

CONCLUSION

The district court's judgment that the contract is void should be reversed. At a minimum, the case should be remanded for lawful components of the Agreement to be severed. If the Court affirms the district court's judgment that the Agreement is void and denies severance, however, then the district court's judgment awarding quantum meruit damages should be affirmed.

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Respectfully submitted,

s/Hyland Hunt

Hyland Hunt
Ruthanne M. Deutsch
DEUTSCH HUNT PLLC
300 New Jersey Ave. NW, Suite 900
Washington, DC 20001
Tel.: (202) 868-6915
Fax: (202) 609-8410
hhunt@deutschhunt.com

Attorneys for Appellant/Cross-Appellee Carbon Crest, LLC

CERTIFICATE OF COMPLIANCE

The foregoing brief is in 14-point Times New Roman proportional font and contains 13,882 words, and thus complies with the type-volume limitation set forth in Circuit Rule 28.1-1(b).

s/Hyland Hunt
Hyland Hunt

March 1, 2023

CERTIFICATE OF SERVICE

I hereby certify that, on March 1, 2023, 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.

s/Hyland Hunt
Hyland Hunt