



IN THE SUPREME COURT OF THE STATE OF DELAWARE

NAUTIC PARTNERS IX, L.P., NAUTIC)
PARTNERS, LLC, VISTRIA FUND III,)
LP, THE VISTRIA GROUP, LP, and)
TVG NP HOMECARE TOPCO, LP,)

Defendants Below,
Appellants,

v.

ENHABIT, INC., ADVANCED)
HOMECARE MANAGEMENT, LLC,)
and ENCOMPASS HEALTH)
CORPORATION,)

Plaintiffs Below,
Appellees.

No. 179,2026

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Court Below:

Court of Chancery of the State of
Delaware C.A. No. 2022-0837-LWW

APPELLANTS' OPENING BRIEF

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NATURE OF PROCEEDINGS

This appeal concerns an unprecedented constructive trust imposed as a remedy for the usurpation of corporate opportunities that did not benefit Defendants or harm Plaintiffs. Plaintiff Encompass Health Corporation (“EHC”) and its former wholly owned subsidiary, Plaintiff Enhabit Inc., a home health and hospice (“HH&H”) business previously known as Encompass Home Health Holdings (“Encompass”), sued Defendants in the Court of Chancery. Plaintiffs alleged that Encompass’s CEO and other executives breached their fiduciary duties by usurping corporate opportunities in the HH&H industry, and that Defendants, private equity sponsors Nautic and Vistria (the “PE Sponsors”) and the holding company they formed (“Topco”), aided and abetted those breaches. The opportunities at issue were three HH&H acquisitions made by the PE Sponsors (through Topco) in 2021 for \$408 million (the “VCG Acquisitions”), which together formed an HH&H platform known as VitalCaring Group (“VCG”). Following these acquisitions, the HH&H industry deteriorated and VCG’s value plummeted.

In the Court of Chancery, Plaintiffs sought all manner of recovery—from rescissory damages and disgorgement to compensatory lost-profits damages. Plaintiffs also sought a constructive trust. But Plaintiffs did not seek the form of constructive trust that Delaware law allows—one that would transfer the equity of

the VCG businesses to Plaintiffs in exchange for what Defendants paid for it. Plaintiffs did not want that remedy for the obvious reason that, by trial in December 2023, the value of that equity had fallen off a cliff. So, instead, Plaintiffs sought a constructive trust over the PE Sponsors’ “expected gains.” Ignoring VCG’s actual performance after the PE Sponsors acquired the businesses, Plaintiffs requested that the PE Sponsors’ “expected gains” be calculated based on PE Sponsor underwriting projections made before the acquisitions and before the HH&H industry downturn.

On December 2, 2024, the Court issued a Post-Trial Opinion finding that certain Encompass executives¹ (the “Executives”) breached their fiduciary duties by usurping the opportunities to make the VCG Acquisitions, and that the PE Sponsors and Topco aided and abetted those breaches. The Court found the Executives’ and PE Sponsors’ conduct was “egregious” and constituted a “willful campaign of disloyalty.” Ex.A(“Op.”) at 2. But the Court did not find that the lost corporate opportunities caused Plaintiffs any harm or that the Executives or PE Sponsors and Topco had profited from them. To the contrary, the Court found Plaintiffs had suffered no lost-profits damages, and that Defendants had suffered massive losses.

¹ The Court found breaches by non-party April Anthony (Encompass’s CEO), non-party Luke James (Encompass’s President), and defendant Chris Walker (Encompass’s CFO). Plaintiffs’ claims against Mr. Walker were settled and dismissed with prejudice and are not at issue on this appeal.

The Court also ruled that Plaintiffs did not prove they would have pursued or completed the VCG Acquisitions themselves—or made money if they had. The Court instead found that “[w]hether Encompass would have passed on the opportunities remains a mystery.” Op.56. That finding did not stop the Court from holding that the PE Sponsors and Topco were liable for aiding and abetting the Executives’ usurpations, however, because the Court held that the proximate-cause question of what Plaintiffs would have done if they had been presented the opportunities was “irrelevant” to their aiding-and-abetting claims. Op.46.

As to damages, the Court rejected Plaintiffs’ claims for lost profits, rescissory damages, and disgorgement. The Court found not only that VCG “has yet to turn a profit,” but also that VCG’s equity was worth nearly \$200 million less than what Defendants paid for the underlying businesses. Op.2, 102-104. The Court concluded that, given VCG’s financial condition and uncertain prospects, the Court “lack[ed] a responsible basis to estimate compensatory damages” and that “defendants cannot disgorge profits that have never materialized.” Op.81-82. Accordingly, the Court awarded no damages tied to Plaintiffs’ usurpation claims. The Court found \$1.62 million in damages for employee solicitations and, based on Defendants’ “pervasive bad-faith conduct,” awarded attorneys’ fees. Op.109, 112.

Defendants settled and paid that damages award plus tens of millions in attorney fees, none of which is at issue on appeal.

Despite finding that VCG had lost much of its value and never came close to turning a profit, the Court imposed a constructive trust, but not over the usurped equity of the VCG businesses. Rather, the Court imposed a trust over VCG's hypothetical future proceeds and granted Plaintiffs a free 43% interest in any such proceeds. The Court defined those proceeds as any amounts available for distribution to Topco's investors and any payments received by the PE Sponsors from the sale or transfer of their equity interests in Topco.

This extraordinary remedy departs from settled Delaware law. A constructive trust must capture specific, identifiable property. But this one attaches to VCG's potential future proceeds, even though the Court found that VCG's future profits were too speculative to calculate. A constructive trust requires a plaintiff to reimburse the defendant for the cost of the usurped asset, thereby returning the parties to the *status quo*, as if no misappropriation had occurred. But the trust here grants Plaintiffs a ***no-cost*** interest in VCG's future "proceeds." This places Plaintiffs in a materially better position than if they had purchased the VCG businesses and then borne the losses those businesses incurred as a result of the steep decline in the HH&H industry. A constructive trust should neither compensate plaintiffs nor

punish defendants. Yet the Court did exactly that by fashioning a first-of-its-kind “vertical” constructive trust, which requires VCG to distribute “proceeds” to Plaintiffs starting from the “first-dollar” received, before Defendants recoup their invested capital. This compensates Plaintiffs, even though they suffered no damages from the usurpations, by offering them a no-cost, no-risk investment, and it punishes the PE Sponsors and other investors in VCG and greatly diminishes the likelihood they will ever break even.

On April 6, 2026, the Court issued its Final Judgment, and on May 5, 2026, Nautic, Vistria, and Topco filed a timely Notice of Appeal.

SUMMARY OF ARGUMENT

1. The Court erred in imposing aiding-and-abetting liability for usurpations of corporate opportunities absent proof that Plaintiffs were injured by losing the opportunities – *i.e.*, that Plaintiffs would have acquired them but for Defendants’ conduct. A plaintiff must prove proximately caused damages to prevail on an aiding-and-abetting claim. *See, e.g., In re Mindbody, Inc., S’holder Litig.*, 332 A.3d 349, 389 (Del. 2024). Here, Plaintiffs did not even try to establish that they would have pursued and closed on the VCG Acquisitions, arguing instead that this question did not matter. *See, e.g.,* A1195-1198. The Court below agreed, holding that “Encompass’s likelihood of pursuit” was “irrelevant.” Op.46. That was wrong as a matter of law. *See Triton Constr. Co. v. Eastern Shore Elec. Servs., Inc.*, 2009 WL 1387115, at *29 (Del. Ch. May 18, 2009) (no corporate opportunity aiding-and-abetting recovery where plaintiff “did not prove that it would have won” the usurped bids “but for [defendants’] illicit acts”).

Moreover, Plaintiffs failed to prove they suffered damages from not making the VCG Acquisitions. Plaintiffs sought lost-profits damages on the theory that, had they made the VCG Acquisitions, they would have achieved returns at least as great as those contemplated by the PE Sponsors’ pre-acquisition underwriting projections. The Court below rejected this claim because it was “based on unreliable projections

anticipating a future that never came to pass,” and because “VitalCaring remains profitless.” Op.82. Thus, the Court did not, and could not, find that Plaintiffs lost anything by failing to make the unprofitable VCG Acquisitions.

Plaintiffs’ failure to prove they would have acquired the VCG businesses, and that they suffered damages because they could not do so, requires reversal of the Court’s finding of aiding-and-abetting liability premised on the usurpation of corporate opportunities.

2. The Court erred in imposing a constructive trust that conflicts with established Delaware law. First, “[a] constructive trust may be imposed upon specific property or identifiable proceeds of specific property” wrongfully obtained by a defendant. *Parseghian v. Frequency Therapeutics, Inc.*, 2022 WL 2208899, at *9 (Del. Ch. June 21, 2022) (citation omitted). Second, the remedy is “designed to prevent a defendant from benefitting as a result of its wrongful conduct.” *Hughes v. Frank*, 1995 WL 632018, at *5 (Del. Ch. Oct. 20, 1995). The objective of a constructive trust is to undo the defendants’ unjust enrichment and “restore [the] status quo” by returning the parties to the positions they would have occupied if the defendant did not usurp the opportunity. *Shuttleworth v. Abramo*, 1994 WL 384428, at *4 (Del. Ch. July 14, 1994). Third, a constructive trust is neither intended to

achieve a “compensatory” goal, Op.77, nor to punish the defendant. *Hogg v. Walker*, 1993 WL 263504, at *2 (Del. Ch. June 30, 1993).

In fashioning an unprecedented “vertical” constructive trust, the Court departed from these settled principles. The Court imposed a constructive trust not over specific, identifiable property, but over VCG’s hypothetical, speculative future “proceeds” that do not now and may never exist. The Court also gave Plaintiffs a “recovery” in the form of a free 43% interest in VCG’s potential proceeds, even though it found Plaintiffs suffered no damages from the usurpation, and the PE Sponsors and Topco lost massively on the VCG Acquisitions. *See, e.g.*, Op.2, 80, 105-06. And the Court’s remedy impermissibly punishes the PE Sponsors by requiring that VCG make distributions to Plaintiffs that will put the PE Sponsors in an even deeper financial hole. Rather than restoring the *status quo*, the Court’s remedy places Plaintiffs in a far better position than if they had completed the VCG Acquisitions, while impairing the PE Sponsors’ ability ever to recover their losses.

This Court should reverse and vacate the Court of Chancery’s constructive trust remedy as contrary to settled Delaware law.

STATEMENT OF FACTS

A. FACTUAL BACKGROUND

1. Anthony and Encompass

April Anthony was the founder and CEO of Encompass. Op.1. In 2014, Anthony sold Encompass to EHC but continued as CEO. Op.4-5. In summer 2020, Anthony began discussing with the PE Sponsors the possibility of repurchasing Encompass. Op.7-9. On January 13, 2021, Anthony and the PE Sponsors proposed to buy 51% of Encompass. Op.13; A1427-1433. EHC never formally responded, and the proposal expired in February 2021. Op.14. Thereafter, Anthony resigned from Encompass and departed in June 2021. A341(¶72).

2. Nautic and Vistria Build An HH&H Platform

Unable to buy Encompass, the PE Sponsors built an HH&H business. A775-777(1604:19-1609:4). In May 2021, Nautic and Vistria formed Topco, which acquired Homecare Holdings (“HCH”) on July 30, 2021, for \$192 million; Vital Health Care Group (“Vital”) on August 20, 2021, for \$106 million; and Kare-in-Home (“Kare”) on December 29, 2021, for \$110 million. Op.27; A341-342(¶¶76, 77, 80).² At trial, Plaintiffs’ expert conceded that Topco paid fair market value for the VCG Acquisitions. A855(1924:1-11).

² Each of the VCG Acquisitions also has a number of non-party equity

3. Plaintiffs Sue in Texas

On October 26, 2021, EHC and Encompass sued Anthony in Texas state court, alleging she breached restrictive covenants and misappropriated trade secrets in connection with the PE Sponsors' formation of VCG. Op.31; *EHHI Hldgs., Inc. et al. v. Anthony*, No. DC-21-15717 (192nd Dist. Ct., Dall. Cnty., Tex. June 17, 2022). The Texas court found Anthony did not steal trade secrets or violate her confidentiality obligations but did breach her restrictive covenants. Op.32. But the court ruled those covenants were overbroad as written and ordered Anthony to comply with narrowed covenants for the remainder of their terms. Op.32. After the reformed covenants expired in August 2022, Anthony joined VCG as a co-owner and CEO. Op.32.

4. VCG Underperforms

VCG struggled from the outset. Beginning in 2021, the entire HH&H industry faced significant headwinds, including declining Medicare reimbursements, a shift to Medicare Advantage (which pays less than traditional Medicare), and significantly increased labor costs. Op.33-34, 80-81, 92. As of the December 2023 trial, VCG's cash flow was negative and was not expected to improve. A789-

investors, principally former owners of the acquired companies.

790(1659:16-1661:2); A1468. VCG’s EBITDA had declined by over 70%—from \$24.9 million at the end of 2021 to \$6.8 million by mid-2023. Op.80. As a result, Vistria and Nautic had written down their investments in VCG to 0.6x and 0.44x of their initial value, respectively. A1434; A790(1661:17-1662:12); A1435-1436; A585-586(848:5-851:14). At trial, Plaintiffs’ expert conceded that VCG’s profitability “went down immediately” and that “things ha[d] only gotten worse from an EBITDA perspective.” A861(1947:4-14). VCG was not alone: Between mid-2021 and mid-2023, the value of comparable publicly traded HH&H competitors declined, on average, by over 50%. A1475.

5. This Litigation

Plaintiffs filed this action in September 2022. Plaintiffs’ principal claim was that Anthony “breached her fiduciary duties to Plaintiffs by usurping their corporate opportunities” to make the VCG Acquisitions, and that the PE Sponsors and Topco aided and abetted those breaches. A206(¶¶110, 111).³

Plaintiffs disclaimed any need to prove that, but for Defendants’ alleged misconduct, they would have pursued the VCG Acquisitions, insisting that “[t]he

³ Plaintiffs also alleged that Anthony (with the assistance of the PE Sponsors) breached her fiduciary duties by “encouraging key managerial executives to leave Encompass” and “misappropriating Plaintiffs’ confidential and proprietary information[.]” A205-206(¶109).

‘likelihood of actually deciding to’ pursue an opportunity forms no part of the analysis.” A1196. Plaintiffs nevertheless sought either rescissory “damages or disgorgement consistent with the \$462 million in value Defendants have appropriated to themselves,” or “compensatory damages for their lost profits.” A1031,1040.

Plaintiffs also argued that “other equitable remedies like constructive trust” were appropriate. A1041. Notably, Plaintiffs never sought a constructive trust over the equity of HCH, Vital, and Kare in exchange for the price the PE Sponsors (through Topco) paid—because, by trial, that equity had plummeted in value. Instead, Plaintiffs asked the Court to “grant[] Plaintiffs a share of VitalCaring’s equity correspondent to Nautic and Vistria’s expected gains, at the time of their investment, in excess of their capital contributions.” A1042. Thus, Plaintiffs sought the equivalent of an equity interest in VCG based on the PE Sponsors’ pre-investment underwriting projections of hypothetical gains for each of the VCG Acquisitions—projections made *before* the HH&H industry headwinds materialized in 2021—*for free*.⁴ Plaintiffs’ expert therefore calculated Plaintiffs’ purported

⁴ In addition to remedies for the usurped opportunities, Plaintiffs sought “mitigation” damages equal to “stock incentives and ... increased compensation that Plaintiffs were forced to pay in response to Defendants’ and Anthony’s solicitation scheme.” A1044-1045. Plaintiffs also sought “costs of bringing suit against

“damages” and Defendants’ purported “expected gains” using the PE Sponsors’ outdated pre-investment projections, ignoring VCG’s actual unfavorable results following the acquisitions. A1032-1034.

6. The Court’s Constructive Trust Remedy.

On December 2, 2024, the Court issued an opinion finding, among other things, that the Executives, assisted by the PE Sponsors and Topco, “took opportunities” belonging to Encompass—namely, the “Original Acquisitions of Homecare Holdings, Vital, and Kare.” Op.1,40.⁵ In particular, the Court held the PE Sponsors and Topco aided and abetted the Executives’ fiduciary breaches by working with them “to identify Homecare Holdings as the base for their platform, with Vital and Kare as the two other components,” and “shar[ing] diligence materials about the acquisition targets with Anthony and consult[ing] her about the negotiations.” Op.70.⁶

Anthony in Texas,” as well as pre- and post-judgment interest and attorneys’ fees. A1031, 1044-1048.

⁵ The Court found that the Executives and Defendants took “resources[] and information belonging to Encompass[.]” Op.1. Specifically, the Court found Defendants “solicited key Encompass employees” and “misappropriated Encompass’s confidential information.” Op.39. The Court did not find that the use of confidential information caused cognizable harm to Plaintiffs or gains to Defendants. Op.63 & n.366.

⁶ Having found for Plaintiffs on their aiding and abetting claims, the Court held it “need not resolve the alternative joint venture liability and unjust enrichment

Critically, the Court did *not* find that Plaintiffs would have pursued or completed the VCG Acquisitions had they been presented with those opportunities. To the contrary, the Court acknowledged that “[w]hether Encompass would have passed on the opportunities remains a mystery,” Op.56, but deemed “Encompass’s likelihood of pursuit” to be “irrelevant.” Op.46. Just as critically, the Court rejected Plaintiffs’ claims for lost profits, rescissory damages, and disgorgement. In doing so, the Court repeatedly emphasized VCG’s poor performance, stating that VCG “has yet to turn a profit” and “has never come close to meeting [the PE Sponsors’] underwriting projections—due at least in part to headwinds in the home health and hospice market.” Op.2, 92. The Court found VCG’s equity was worth nearly \$200 million less than Topco paid for the businesses, Op.102, and that the only way for the PE Sponsors to potentially recover those losses was to invest more in the failing businesses and make additional acquisitions at lower EBITDA multiples. Op.105-106 n.542. The Court also rejected the “damages” calculations of Plaintiffs’ expert because they were based on the PE Sponsors’ “outdated and unreliable” underwriting projections. Op.80. The Court concluded it “lack[ed] a responsible basis to estimate compensatory damages,” it could not “set damages based on

claims.” Op.37.

‘speculation or conjecture,’” and “defendants cannot disgorge profits that have never materialized.” Op.81-82.

Despite these findings, the Court held a constructive trust was warranted. Op.86. But the Court did not impose a traditional constructive trust over the equity of the VCG Acquisitions and transfer that equity to Plaintiffs in exchange for what the PE Sponsors (through Topco) paid. Instead, the Court imposed a novel “vertical” constructive trust over hypothetical and speculative future “proceeds” of VCG—proceeds that do not exist and may never—and granted Plaintiffs the equivalent of a *free* 43% equity interest in those “proceeds” starting at VCG’s first dollar of earnings, long before the PE Sponsors are anywhere close to making a profit. Op.105-106; Ex.B(“Reargument Op.”) at 5-6, 8-9; *see also* Ex.F(“Constructive Trust Order”).⁷ Under the Court’s order, “proceeds” means any amounts available

⁷ In addition to the findings of corporate usurpation, the Court found that “Anthony targeted several members of Encompass’s management team in early 2021 with the lure of Topco equity,” leading Encompass to incur costs “from retention packages intended to prevent key employees from defecting to” VCG. Op.107-108. The Court awarded Plaintiffs \$1,621,446.41 in mitigation damages for these solicitation claims. *Id.* These solicitation-related damages were the only damages the Court awarded on any legal theory. The Court also awarded attorneys’ fees and pre- and post-judgment interest. Op.112-13. As noted above, the parties have settled Plaintiffs’ claims for mitigation damages, as well as for attorneys’ fees and interest (totaling over \$40 million), and those awards are therefore not at issue in this appeal. *See* Ex.G at 3.

for distribution or dividend to Topco’s equity investors and any payments received by Defendants from the sale or transfer of their equity interests in Topco. Constructive Trust Order ¶2.c. The constructive trust therefore punishes all VCG investors, including non-parties who sold the VCG Acquisitions to Defendants and rolled their equity into VCG.

On March 6, 2025, the parties filed competing motions and proposed orders concerning the form of the constructive trust. A1271,1380,1396. The parties agreed that new equity capital invested in Topco would dilute the constructive trust, and on certain other matters. *See* A1385. But they disagreed on key provisions, including what property would be subject to the trust, Defendants’ reporting obligations, Plaintiffs’ information rights, and the mechanics of the trust’s operation. A1271,1380,1396. In their submissions, Defendants opposed granting any management authority to a constructive trustee. A1386(¶13). On May 14, 2025, the Court issued a letter opinion, (Ex.C(“Letter Op.”)), and an Order granting the Constructive Trust.⁸ Ex. D. On April 6, 2026, the Court issued its Final Judgment. Ex.G. Nautic, Vistria and Topco each filed a timely Notice of Appeal on May 5, 2026. This appeal is limited to the Court’s findings of aiding-and-abetting liability

⁸ The Order Granting the Constructive Trust was later amended on May 30, 2025. Constructive Trust Order.

and issuance of its constructive-trust remedy based on Plaintiffs' corporate-opportunity claims.⁹

⁹ Since the entry of the Court's Opinion, the parties have settled and dismissed all claims against Corey, Schuppan, and Walker, with prejudice, except for potential claims not at issue on this appeal.

ARGUMENT

I. THE COURT ERRED IN IMPOSING AIDING-AND-ABETTING LIABILITY ABSENT PROOF THAT DEFENDANTS' VCG ACQUISITIONS HARMED PLAINTIFFS.

A. Question Presented

Whether the Court of Chancery erred in finding Defendants liable for aiding and abetting fiduciary breaches without requiring Plaintiffs to prove proximately caused damages resulting from the alleged breaches. Defendants preserved this issue at A1127-1129; Ex.F ¶35.

B. Scope of Review

This Court exercises de novo review over “questions of law, including the Court of Chancery’s ‘formulation and application of legal principles[.]’” *Sunder Energy, LLC v. Jackson*, 332 A.3d 472, 491 (Del. 2024) (quoting *Reddy v. MBKS Co.*, 945 A.2d 1080, 1085 (Del. 2008)).

C. Merits of Argument

Plaintiffs did not claim that the PE Sponsors and Topco owed or breached fiduciary duties themselves. Rather, Plaintiffs claimed that the Executives breached their fiduciary duties, and that the PE Sponsors and Topco aided and abetted those breaches. This distinction is significant. A plaintiff need not prove proximately caused damages to prevail on a fiduciary-breach claim. *Beard Rsch., Inc. v. Kates*, 8 A.3d 573, 601 (Del. Ch. 2010) (“A claim for breach of fiduciary duty requires

proof of two elements: (1) that a fiduciary duty existed and (2) that the defendant breached that duty.”). But “[l]ogically, in the tort as opposed to the breach of fiduciary duty context, damages must be a necessary element of aiding and abetting[.]” *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, 2014 WL 6703980, at *23 n.233 (Del. Ch. Nov. 26, 2014).¹⁰

Thus, a plaintiff cannot prevail on an aiding-and-abetting claim if “no damages sustained by the Plaintiffs resulted from ‘concerted action’” between the defendant and the fiduciary. *Oliver v. Bos. Univ.*, 2006 WL 1064169, at *34 (Del. Ch. Apr. 14, 2006); *see also Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 172 (Del. 2002) (“The elements of a claim for aiding and abetting a breach of a fiduciary duty” include “damages to the plaintiff resulted from the concerted action of the fiduciary and the non-fiduciary.”) (citation omitted); *In re Mindbody, Inc., S’holder Litig.*, 332 A.3d at 389 (“The basic four-part test for

¹⁰ Commentators addressing aiding and abetting claims agree. *See* Robert W. Tuttle, *The Fiduciary’s Fiduciary: Legal Ethics in Fiduciary Representations*, 1994 U. ILL. L. Rev. 889, 901 (Although a principal “need not prove actual harm before recovering from the fiduciary, a third-party participant is liable only for actual harm caused to the beneficiary.”); Bryan C. Barksdale, *Redefining Obligations in Close Corporation Fiduciary Representation: Attorney Liability for Aiding and Abetting the Breach of Fiduciary Duty in Squeeze-Outs*, 58 Wash. & Lee L. Rev. 551, 559 (2001) (“While a beneficiary need not prove actual harm in an action against a fiduciary for breach of duty, a third party who assisted in the breach is only liable if the beneficiary suffered actual harm.”).

proving an aiding and abetting claim” requires “damages proximately caused by th[at] breach”); *Ross Holding & Mgmt. Co. v. Advance Realty Grp., LLC*, 2014 WL 4374261, at *38 (Del. Ch. Sept. 4, 2014) (“Plaintiffs have not demonstrated that they were damaged by the Board’s breaching its fiduciary duties. They are therefore not entitled to an award under this [aiding and abetting] theory.”) (citation omitted); *Taita Chem. Co. v. Westlake Styrene, LP*, 351 F.3d 663, 670 (5th Cir. 2003) (applying Delaware law) (error to instruct jury “that it could hold [Defendant] liable for aiding and abetting breach of fiduciary duty without finding [Plaintiff] damaged in any way”).

To prevail on their claims that the PE Sponsors and Topco aided and abetted the Executives’ usurpation of corporate opportunities, then, Plaintiffs needed to prove that, but for the PE Sponsors’ and Topco’s concerted actions with the Executives, Plaintiffs would themselves have pursued and completed the VCG Acquisitions and profited from them. *Triton Constr. Co.*, 2009 WL 1387115, at *29 (no corporate opportunity damages where plaintiff “did not prove that it would have won” the usurped bids “but for [defendants’] illicit acts”). The Court’s findings make clear that Plaintiffs failed to prove either causation or damages.

First, Plaintiffs did not even try to establish that they would have pursued and closed on the VCG Acquisitions. Instead, Plaintiffs argued that Defendants deprived

them “of the *chance* to even *consider* the opportunities.” A1014 (emphasis added). That is a far cry from proving causation.

Plaintiffs argued that whether they would have pursued and completed the VCG Acquisitions did not matter. *See, e.g.*, A1195-1198. The Court below agreed, holding that “Encompass’s likelihood of pursuit” was “irrelevant.” Op.46. Both Plaintiffs and the Court were wrong as a matter of law. *See Triton Constr. Co.*, 2009 WL 1387115, at *29. As a result, the Court never found that Plaintiffs would have pursued the VCG Acquisitions, much less completed them. To the contrary, the Court acknowledged that “[w]hether Encompass would have passed on the opportunities remains a mystery.” Op.56. Plainly, Plaintiffs failed to carry their burden of proving causation.

Second, Plaintiffs failed to establish they suffered any damages because they were unable to make the VCG Acquisitions. Notably, Plaintiffs sought “lost profits” damages on the theory that, had they acquired the VCG businesses, Plaintiffs’ returns would have been at least as much as the PE Sponsors initially contemplated in their underwriting projections. Op.82. But the Court below rejected this claim because it was “based on unreliable projections anticipating a future that never came to pass,” and because “VitalCaring remains profitless.” Op.82. In other words, the Court did not and could not find that Plaintiffs lost anything by not making the VCG

Acquisitions. To the contrary, the Court’s findings about VCG’s abysmal performance and sharply diminished value show that Plaintiffs were *better off* and *avoided losses* by having missed out on the VCG Acquisitions.¹¹

Despite these findings, the Court below found aiding and abetting liability and imposed a constructive trust, reasoning that consideration of evidence as to whether Plaintiffs would have acquired the businesses would “give the fiduciaries license to usurp an undisclosed opportunity.” Op.46 n.287. In doing so, the Court overlooked the critical distinction Delaware law draws between what a plaintiff must prove to establish liability against a fiduciary directly (here, the Executives) and what it must prove to establish the liability of aiders and abettors (the PE Sponsors and Topco), namely, that the latter requires proof of causation and damages. The Court identified no authority for abandoning this requirement; the only two cases the Court cited for its position involved neither an aiding-and-abetting claim nor a constructive trust.

¹¹ The only context in which the Court found that Defendants caused damages to Plaintiffs was with respect to the solicitation of employees, where the Court found Plaintiffs were harmed because they were forced to pay retention packages “to prevent key employees from defecting to [VCG].” Op.107. Plaintiffs were compensated for those solicitation damages by a separate damages award. Op.108. Moreover, the solicitation breaches and associated damages are not causally tied to the Court’s constructive trust remedy, such that the constructive trust could in any way be “an apt means of addressing the breach.” *Hammann v. Adamis Pharms. Corp.*, 2023 WL 5424109, at *10 (Del. Ch. Aug. 23, 2023), *aff’d sub nom. Hammann v. Carlo*, 328 A.3d 301 (Del. 2024) (citation modified).

Op.46 n.287 (citing *Metro Storage Int’l LLC v. Harron*, 275 A.3d 810, 853 (Del. Ch. 2022) (ordering defendant to disgorge fees earned from consulting for third-party company while serving as plaintiff’s president), and *Schreiber v. Bryan*, 396 A.2d 512, 520 (Del. Ch. 1978) (allegations of waste and corporate usurpation by controlling stockholder that formed and operated a competitor)).

Indeed, the Court did not find the usurped opportunities caused Plaintiffs any harm collectively, much less harmed each Plaintiff individually, as required to warrant awarding each plaintiff a “joint and several” right to proceeds from the constructive trust. Op.107; Constructive Trust Order ¶8. *See OptimisCorp v. Waite*, 2015 WL 5147038, at *81-82 (Del. Ch. Aug. 26, 2015) (declining to award speculative damages for breach of duty of loyalty where no attempt was made to apportion harm between plaintiffs; “each Plaintiff has to prove that he or it is entitled to damages.”).

In sum, the Court erred in imposing aiding and abetting liability absent proof that, but for Defendants’ conduct, Plaintiffs would have completed the VCG Acquisitions and profited from them.

II. THE COURT’S CONSTRUCTIVE TRUST REMEDY IS CONTRARY TO SETTLED DELAWARE LAW.

A. Question Presented

Whether the Court of Chancery erred in awarding Plaintiffs a constructive trust over a share of VCG’s potential future proceeds, from the first dollar of those proceeds, long before Defendants have recouped their investment in VCG, and without Plaintiffs paying anything for that interest. Defendants preserved this issue at A1151-1156; A1251-1270; Ex.F¶35.

B. Scope of Review

As noted, this Court reviews legal questions de novo and reviews factual questions for abuse of discretion. Applying this framework to remedies, “[w]hether or not an equitable remedy exists or is applied using the correct standards is an issue of law and reviewed de novo.” *Schock v. Nash*, 732 A.2d 217, 232 (Del. 1999).

C. Merits of Argument

The mechanics of a constructive trust are well-settled. “A constructive trust may be imposed upon specific property or identifiable proceeds of specific property” wrongfully obtained by a defendant. *Parseghian*, 2022 WL 2208899, at *9 (citation omitted). The defendant then “surrender[s] that property” to the plaintiff. *Agranoff v. Miller*, 791 A.2d 880, 886-87 (Del. Ch. 2001); *see also Thompson v. Barrow*, 2025 WL 1277048, at *11 (Del. Ch. May 2, 2025) (“constructive trust avoids a continuing

relationship with the beneficiary by requiring transfer of the property to the [party] who has established an equitable entitlement”) (citation omitted). Before taking the property, however, the plaintiff must first “restore[] to the [defendant] the amount” paid to acquire it. *Agranoff*, 791 A.2d at 886-87 (citation omitted).

The purposes of a constructive trust are equally well-settled. The remedy is “designed to prevent a defendant from benefitting as a result of its wrongful conduct.” *Hughes*, 1995 WL 632018, at *5. As the Court below recognized, “[t]he remedy of a constructive trust is less concerned with compensating a plaintiff than with removing the rewards of a defendant’s disloyalty.” Op.88 (citing *Guth v. Loft, Inc.*, 5 A.2d 503, 511 (Del. 1939)). Thus, a constructive trust serves a “remedial goal,” “not a compensatory one,” (Op.77), and “[t]he measure of the constructive trust should reflect the extent of [defendant’s] unjust enrichment.” *Elliott v. Holladay*, 2003 WL 1240497, at *5 (Del. Ch. Mar. 7, 2003). A constructive trust should not be punitive. *Hogg*, 1993 WL 263504, at *2 (“I find that to allow compound interest would subvert the purpose of this constructive trust because compound interest is punitive.”).

The objective of a constructive trust is to “restore[s] [the] status quo” by returning the parties to the positions they would have occupied if the defendant did not wrongfully obtain the property. *Shuttleworth*, 1994 WL 384428, at *4. It is **not**

to provide the plaintiff with a windfall by placing it in a *better* position than it would have occupied absent the usurpation—like transferring a costly asset to the plaintiff for free, even though the lost opportunity was to buy the asset for fair market value. *Sannini v. Casscells*, 1977 WL 5171, at *1 (Del. Ch. Oct. 21, 1977), *aff’d*, 401 A.2d 927 (Del. 1979) (constructive trust “will strive to return the parties to the status quo” and “even a defrauded complainant cannot accept the benefits received on the one hand and shirk the disadvantages on the other”).

In fashioning its constructive trust, the Court below departed from these settled principles. It did not impose a constructive trust over the specific and identifiable property that the PE Sponsors purchased—namely, the equity of HCH, Vital, and Kare and any specific, identifiable profits attributable to those shares—and then transfer that equity to Plaintiffs in exchange for what Defendants paid. Instead, the Court imposed a constructive trust over no property at all, only the hypothetical and speculative future “proceeds” of VCG that do not now and may never exist.

Worse, although a constructive trust is not compensatory, the Court gave Plaintiffs a “recovery” in the form of a free 43% interest in VCG’s pre-profit proceeds. *See, e.g.*, Op.2, 80, 105-06. And, although a constructive trust is not supposed to be punitive, the Court’s remedy punishes the PE Sponsors (and non-

party investors in VCG, including prior owners of the VCG Acquisitions) by requiring VCG to make distributions to Plaintiffs long before the PE Sponsors and VCG's other investors recover the costs of their investments. The Court's "vertical" constructive trust diverts 43% of VCG's proceeds to Plaintiffs, even while the PE Sponsors' investments remain [REDACTED]—and the PE Sponsors are nowhere close to being enriched. Indeed, siphoning off 43% of proceeds from dollar one to Plaintiffs diminishes the chance that the PE Sponsors will ever break even. That is punitive, pure and simple.

Finally, the Court's constructive trust does not restore the *status quo* by returning the parties to the positions they would have occupied had the PE Sponsors not made the VCG Acquisitions. By their own admission, Plaintiffs lost, at most, the opportunity to buy HCH, Vital, and Kare for fair market value; they did not lose an opportunity to obtain a 43% equity interest in the VCG Acquisitions for free. Thus, by granting Plaintiffs a free interest in 43% of Topco's future proceeds starting at Topco's first dollar of earnings, the Court's constructive trust puts Plaintiffs in a materially **better** position than they would have occupied if Plaintiffs had completed the VCG Acquisitions. That is a windfall, not a return to the *status quo* as Delaware law requires.

In short, the Court erred in imposing a constructive trust that conflicts with every established principle underlying such a remedy. Because the Court did not find the PE Sponsors and Topco were enriched by the VCG Acquisitions, and because Plaintiffs failed to prove they were harmed by not having made the VCG Acquisitions, no relief is appropriate beyond what the Court held were Plaintiffs' only damages (\$1.62 million related to employee solicitation) and the attorneys' fees Defendants were required to pay (totaling tens of millions of dollars). Accordingly, the Court's order imposing the constructive trust should be reversed.

1. The constructive trust does not hold specific, identifiable property, only speculative future proceeds that do not and may never exist.

A constructive trust may only “be imposed upon specific property or identifiable proceeds of specific property” wrongfully obtained by a defendant. *Parseghian*, 2022 WL 2208899, at *9 (citation omitted); *Hogg v. Walker*, 622 A.2d 648, 652 (Del. 1993) (“The constructive trust is a remedy that relates to specific property or identifiable proceeds of specific property.”). Identifiable proceeds include amounts “traceable to [the] property” that was misappropriated. *Conigliaro v. Conigliaro*, 659 A.2d 227, at *2 (Del. 1995). In practice, this means a constructive trust is typically imposed over particular assets wrongfully obtained, and/or over existing, identifiable profits generated by those assets. *See, e.g., Stephanis v.*

Yiannatsis, 1993 WL 437487, at *8 (Del. Ch. Oct. 4, 1993) (imposing “a constructive trust on the [] stock” usurped from plaintiffs); *ID Biomedical Corp. v. TM Techs., Inc.*, 1995 WL 130743, at *17 (Del. Ch. Mar. 16, 1995) (finding plaintiff “is entitled to a constructive trust over [defendant’s] property rights” in patent applications); *Hogg v. Walker*, 1989 WL 128572, at *2 (Del. Ch. Oct. 27, 1989) (imposing constructive trust over “proceeds from the sale” of misappropriated property).

Delaware law does not allow a constructive trust over uncertain or speculative profits. In *Maric Healthcare, LLC v. Ramirez-Groothuis*, the court refused to grant “a constructive trust on future profits and proceeds from the sale” of the business that the defendant supposedly appropriated where the plaintiff “failed to prove [the defendant] made any profits on [the business].” 2026 WL 1031702, at *9, 10 n.150 (Del. Ch. Apr. 16, 2026) (awarding nominal \$1 damages). Likewise, in *Cantor Fitzgerald, L.P. v. Cantor*, the court found “no basis for imposition of a constructive trust on [the defendant’s] revenues” where the business venture at issue “proved ultimately unsuccessful” and there was “no evidence” that the defendants “will in

the future so derive any monetary benefit.” 2000 WL 307370, at *29-31 (Del. Ch. Mar. 13, 2000).¹²

Here, the Court could have imposed a constructive trust over the shares of HCH, Vital, and Kare and then transferred those shares to Plaintiffs in exchange for what Defendants paid for them. Doing so would have “extinguish[ed] all possibility of profit flowing from [the defendants’] breach,” *Guth*, 5 A.2d at 510, because Plaintiffs would have owned the businesses and therefore recovered any future

¹² Delaware law is not an outlier in requiring a constructive trust be placed on existing property and its identifiable profits, rather than on speculative future proceeds. *See, e.g., Hogg*, 622 A.2d at 653 (looking to rulings from other states regarding constructive trusts); *Indeck Energy Servs., Inc. v. DePodesta*, 183 N.E.3d 746, 762-63 (Ill. 2021) (constructive trust properly denied because there was “no identifiable property or fund to serve as the res upon which a constructive trust can be imposed” where defendants did not “possess any profits at the time of trial” and the prospect of them earning any profits was “speculative”); *Law Offices of Christy Lee, P.C., v. Rae*, 2025 WL 1381887, at *11 (D. Alaska May 13, 2025) (profits from usurped business opportunity were “too speculative to be placed in [constructive] trust” where “the financial benefit [defendant] allegedly derived from [the usurped opportunity] is ‘unknown’”); *Hy-Vee, Inc. v. Walcott Coliseum*, 690 N.W.2d 695, at *1 (Iowa Ct. App. 2004) (plaintiff’s “speculative interest in the [] settlement proceeds was insufficient to warrant imposition of a constructive trust”); *Corrello v. Corrello*, 2016 WL 7474349, at *7 (N.J. Super. Ct. App. Div. Dec. 29, 2016) (denying motion “to impose a constructive trust on any proceeds from defendant’s personal injury lawsuit ... [as] ‘speculative’ because defendant had not yet received any damages award”); *Turner v. Am. Metal Co.*, 268 A.D. 239, 253 (N.Y. App. Div. 1944) (“In cases of speculative ventures courts have generally declined to impose a constructive trust.”); *Homestake Mining Co. v. Mid-Continent Expl. Co.*, 282 F.2d 787, 800-01 (10th Cir. 1960) (expressing “serious doubt” in applying a constructive trust “to the profits arising from [a] speculative [] enterprise”).

profits they generated. Under that traditional constructive trust scenario, there would be no need for the Court to impose a constructive trust over hypothetical future profits.

Instead, the Court imposed a constructive trust over hypothetical and speculative future VCG proceeds that do not exist and may never exist. The Court recognized that VCG's ability to generate any such proceeds was purely speculative. Given VCG's "dismal state," Reargument Op.15, the Court concluded that VCG would generate profits only "if the enterprise's circumstances change." Letter Op.2; *see also* Op.86 ("If [VCG] realizes gains, [Plaintiffs] will be entitled to a portion of them."). According to the Court, the possibility of VCG generating profits rests on dual assumptions—the "declining home healthcare and hospice industry" must "rebound[]" **and** VCG would need to "implement[] [an] acquisition strategy." Op.83; *see also* Reargument Op.16 ("Without M&A and reinvestment, there may well be no funds to put in the constructive trust in the first place."); Reargument Op.15 (noting that "additional (presumably debt-financed) acquisitions" would be needed "to grow the business"); Reargument Op. 5 (describing VCG as "a risky venture" that would require "strategic acquisitions"). Thus, the likelihood that VCG would generate profits was so uncertain and remote that the Court declined to award lost profits as damages. Op.82. Nevertheless, the

Court used such speculative profit projections to arrive at its 43%/57% split of the potential VCG proceeds over which it imposed a constructive trust.

That is not “specific property or identifiable proceeds of specific property,” as Delaware law requires. *Parseghian*, 2022 WL 2208899, at *9; *Cantor Fitzgerald, L.P.*, 2000 WL 307370, at *29-31; *Maric Healthcare, LLC*, 2026 WL 1031702, at *9-10. Indeed, the Court’s constructive trust has nothing in it, and may never have anything in it. It is a trust over thin air.

The authorities the Court relied upon in placing a constructive trust over non-existent and speculative future proceeds are inapposite. To support its imposition of a constructive trust even though “future profits from a fiduciary’s disloyalty are too speculative to support an immediately payable award,” the Court principally relied on the Court of Chancery’s decision in *PharmAthene, Inc. v. Siga Techs., Inc.*, Op.85 & n.468 (citing 2011 WL 4390726 (Del. Ch. Sept. 22, 2011), *aff’d in part, rev’d in part*, 67 A.3d 330 (Del. 2013)). Largely reversed on appeal, this opinion provides no more than a “crumbling foundation” upon which to base a new legal “theory.” *White Winston Select Asset Funds, LLC v. Good Times Rests., Inc.*, 2022 WL 1659161, at *3 (D. Del. May 25, 2022).

PharmAthene concerned materially different legal claims and remedies than those at issue here. In *PharmAthene*, the plaintiff sued defendant for allegedly

breaching the parties' agreement to negotiate a license agreement's terms in good faith. 2011 WL 4390726 at *1. Upon finding the defendant had breached that *contractual* obligation, the court's self-identified "task" was to fashion a "*compensatory* remedy" that "reasonably *compensate[d]*" the plaintiff for its "expectancy interest" under the contract. *Id.* at *39 (emphasis added). Specifically, as part of a traditional benefit-of-the-bargain analysis, the court sought to "derive a responsible estimate of what [the plaintiff] should have received" if the licensing agreement had been negotiated and "consummated" in good faith. *Id.* (citation omitted). The court concluded that if the parties had negotiated in good faith, they would have agreed for the plaintiff to receive "50% of all net profits" after the defendant reached a certain threshold of net profits. *Id.* at *42.

The *PharmAthene* opinion, addressing contractual expectation damages under a would-be profit-sharing license agreement, has no bearing on how to properly fashion a constructive trust remedy for a usurpation of corporate opportunities. In fact, the "*compensatory remedy*" the court applied in *PharmAthene*, 2011 WL 4390726 at *39 (emphasis added), is the opposite of the "remedial goal" here, which the Court below expressly recognized "is *not a compensatory one.*" Op.77 (emphasis added); Op.88 ("The remedy of a constructive trust is less concerned with compensating a plaintiff[.]"). *PharmAthene's* benefit-of-the-bargain analysis is

wholly inapplicable and offers no basis for imposing a constructive trust over all or a share of non-existent future proceeds absent Plaintiffs' contractual entitlement to those proceeds.

The Court's only other support for its approach is a single Restatement illustration. *See* Op.85 n.468 (citing Restatement (Third) of Restitution and Unjust Enrichment § 55 Illustration 4). But that illustration only highlights how far removed the Court's novel constructive trust is from a proper constructive trust. In the illustration, one partner misappropriated lease rights it had agreed to obtain for a partnership. The Restatement explains that a constructive trust could properly be imposed over misappropriated lease rights themselves—which would then entitle the aggrieved partners to any proceeds those lease rights generated in the future. *See* Restatement (Third) of Restitution and Unjust Enrichment § 55 Illustration 4. More importantly, the very next illustration in the Restatement, which is based on the same facts but also assumes the partner acquired the lease rights for \$30,000, specifically notes that the partner should not “forfeit the money spent in acquiring the leases” but instead must receive a “credit” for “the amount of [his] cost of acquisition.” *Id.* Illustration 5. Viewed together, as they should be, these illustrations reflect the fundamental principles that a constructive trust can be placed only over specific identifiable property and that a plaintiff is not entitled to obtain ownership of that

property for free. While the Court could have fashioned a proper constructive trust over the misappropriated property, Plaintiffs did not seek or want that remedy and the Restatement illustrations do not support the Court's alternative approach.

2. The constructive trust makes Plaintiffs better off than the *status quo* by granting them a free 43% interest in VCG's future proceeds.

Delaware law is clear: a constructive trust is intended "to restore status quo." *Shuttleworth*, 1994 WL 384428, at *4; *Sannini*, 1977 WL 5171, at *1. It should return the parties to the positions they would have occupied if defendants had not seized the corporate opportunities and plaintiffs had instead paid to acquire them. *Shuttleworth*, 1994 WL 384428, at *4.

Here, the wrongfully obtained property was the shares of HCH, Vital and Kare. And the cost of the shares was their fair market value at the time of the acquisitions, or \$408 million. Thus, the Court could have imposed a constructive trust over the shares and then transferred them to Plaintiffs in exchange for what Defendants paid for their investments. *See, e.g., Hogg*, 622 A.2d at 651 (holding that plaintiff was entitled to proceeds from sale of home after defendant offset against payments made to acquire the home); *Agranoff*, 791 A.2d at 886-87 (defendant "must surrender" the misappropriated property to the plaintiff, who, in turn, "restores to the [defendant] the amount of the purchase price"); *Sannini v.*

Casscells, 1975 WL 806, at *9 (Del. Ch. Dec. 15, 1975) (“Thus, I further conclude that a constructive trust must be imposed upon the property for the benefit of the plaintiffs and the property hereafter conveyed to them, conditioned upon their restoration to the defendants of such portion of the purchase price previously paid by them.”). But it did not.

Tellingly, Plaintiffs did not request—because they did not want—that authentic constructive trust remedy because the value of the HCH, Vital, and Kare shares had “plummeted over the [] three years” preceding trial and was worth far less than what Defendants paid. Op.33, 80 (“VitalCaring’s EBITDA declined by over 70% from \$24.9 million in the fourth quarter of 2021 to \$6.8 million in the second quarter of 2023.”). In fact, Defendants’ representatives testified at trial that they would gladly convey VCG to Plaintiffs in exchange for the price Defendants paid. A679-680(1221:19-1222:1); A790(1662:13-1663:1). In response, Plaintiffs confirmed they were unwilling to pay what Defendants paid for those shares. *See* A1238. In short, Plaintiffs did not want what they claimed to have lost—the opportunity to buy the shares of HCH, Vital, and Kare at fair market value. Instead, Plaintiffs asked for, and the Court granted, a constructive trust that conveys to Plaintiffs a *free* 43% cut of VCG’s future “proceeds.” *See* Constructive Trust Order.

What Plaintiffs lost, however, was the opportunity to **buy** the VCG businesses and take on the risks of owning and operating them. Plaintiffs never had the opportunity to acquire the VCG entities **for free**, nor to acquire them on a risk-free basis with all losses borne by someone else. As Defendants argued below, to restore the *status quo*, any constructive trust over VCG's future proceeds must require Plaintiffs to reimburse the cost of their 43% interest in those proceeds. A1151-1156. Instead, the Court impermissibly handed Plaintiffs that interest without requiring them to contribute a single dollar toward Defendants' capital outlays—a far more favorable position than the opportunities Plaintiffs claim they lost.

In excusing Plaintiffs from paying for their 43% interest in VCG's future proceeds, the Court stated that “there is no requirement in law or equity that wrongdoers be reimbursed for their contributions before a constructive trust is imposed.” Reargument Op.10. In support, the Court cited a trial court opinion in *Stephanis v. Yiannatsis*, 1994 WL 198711, at *1, 3 (Del. Ch. May 9, 1994), for the proposition that the Court has discretion to forego reimbursement of capital costs. Reargument Op.19. But, in *Stephanis*, the Court of Chancery held that “it is in my discretion to deduct, or not deduct, from the purchase price, the **interest** Stella incurred as a result of the wrongful purchase of Sunview's stock”—and determined to award the disloyal fiduciary the interest she incurred to finance the purchase of

the usurped opportunity. 1994 WL 198711, at *1, 2 (emphasis added). There was no question in *Stephanis* that the fiduciary was entitled to reimbursement of the purchase price, less any interest and other payments already received. *Id.* at *3 (awarding purchase price plus interest), *aff'd sub nom. Yiannatsis v. Stephanis by Sterianou*, 653 A.2d 275, 280 (Del. 1995) (affirming trial court's deduction of certain sums from purchase price award).

Even *PharmAthene* refutes the notion that a plaintiff need not compensate a defendant for property placed in a constructive trust. The *PharmAthene* court tried to approximate how the parties negotiating a contract would have allocated risks associated with developing a drug, concluding that the defendant would receive \$40 million in net profits *before* plaintiff would share in 50% of all net profits after that. 2011 WL 4390726, at *42. In addition, as discussed above, the Restatement makes clear, in an illustration closely related to and immediately following the one relied on by the Court below, that a fiduciary should not “forfeit the money spent” but instead must receive a “credit” for “the amount of [his] cost of acquisition.” Restatement (Third) of Restitution and Unjust Enrichment §55 Illustration 5.

Finally, the Court below stated that Delaware law does not preclude “reimbursement concurrent with the plaintiffs’ recovery.” Reargument Op.11. In other words, the Court held that the PE Sponsors and Topco could obtain

“reimbursement” for their investment over time, while Plaintiffs concurrently obtained their “recovery,” because no Delaware authority has expressly rejected that approach—or, indeed, directly addressed the question. The Court’s approach, however, violates Delaware law because it runs directly contrary to the foundational principle that a constructive trust is intended “to restore status quo.” *Shuttleworth*, 1994 WL 384428, at *4; *Sannini*, 1977 WL 5171, at *1. Unlike the Restatement, *PharmAthene*, or any other Delaware precedent, the Court’s order allows Plaintiffs to share VCG’s proceeds in perpetuity, starting at dollar one, without making any investment or taking on any risk. This outcome bears no resemblance to the “status quo,” at which time Plaintiffs were denied the chance to consider buying the equity that the PE Sponsors and Topco purchased. Under no circumstances would Plaintiffs have had an opportunity under the *status quo* to share the potential upside of investing in the VCG Acquisitions without paying anything for them, as the constructive trust provides here.

In short, the Court below should have imposed an equivalent purchase price reimbursement requirement, thus returning the parties to the *status quo* absent any misappropriation, and it erred in not doing so.

3. The constructive trust is improperly designed to grant Plaintiffs a “recovery” and to punish defendants.

“The measure of the constructive trust should reflect the extent of [defendant’s] unjust enrichment.” *Elliott*, 2003 WL 1240497, at *5. The Court below, however, did not find the PE Sponsors and Topco were enriched by the misappropriation. Just the opposite, the Court concluded that Defendants had suffered substantial losses. Nevertheless, the Court designed a constructive trust that would provide Plaintiffs with a “recovery” even though they suffered no damages from the misappropriation and, in addition, punish Defendants beyond the losses they have already suffered. Delaware law precludes such a remedy.

a. Absence of Unjust Enrichment.

As the Court acknowledged, “[t]he remedy of a constructive trust is less concerned with compensating a plaintiff than with removing the rewards of a defendant’s disloyalty.” Op.88 (citing *Guth*, 5 A.2d at 511); Op.77 (“The remedial goal is not a compensatory one.”). Here, the PE Sponsors and Topco reaped no profits from the VCG Acquisitions and had no realistic prospect of doing so. There was no “enrichment” to disgorge.

Indeed, the Court’s own analysis demonstrates this. Once the Court determined to impose the “vertical” constructive trust, the Court had to decide how “to allocate [VCG]’s proceeds between Nautic and Vistria, on the one hand, and

Encompass, on the other hand[.]” Op.102. To do so, the Court first considered Plaintiffs’ expert’s methodology to calculate the PE Sponsors’ purported future gain through a VCG exit. Op.102-04. This approach resulted in “*negative economic gains*”—*i.e.*, an expected loss to Defendants—of \$199 million, because the PE Sponsors “contributed more capital than the modified 2023 projections suggest they might recover.” Op.102-04. The Court could have regarded this result as more evidence that Defendants stood no reasonable prospect of avoiding a loss and therefore no constructive trust was warranted. But the Court did not do that.

Instead, the Court devised its novel and unprecedented “vertical” constructive trust. To do that, the Court discarded Plaintiffs’ expert’s methodology and pivoted to comparing the PE Sponsors’ capital contributions to VCG, which the Court described as a “risky venture plagued by early struggles,” to a much higher, *undiscounted* equity value for the entire business at a hypothetical exit through a sale. Reargument Op.5; *see* Op.106 n.543 (“\$330,058,048 capital contribution [by June 2023] / \$580,861,409 projected equity value at exit = 57%”). Simply put, this unsupported, flawed, and result-driven approach artificially inflated the value VCG might recover in the future, thereby avoiding the “absurd mathematical result” and “negative economic gains” the Court had initially projected. Op.102-105. Indeed, correcting this error by properly discounting the Court’s assumed exit value of \$581

million using the 25.7% discount rate the Court adopted when evaluating Defendants' possible economic gains (*see* Op.94-95, 104) would result in an equity value of just \$165 million.¹³ Thus, accounting for the riskiness of achieving these hypothetical profits results in discounted value nearly \$165 million less than the PE Sponsors' \$330 million capital contribution to purchase the VCG entities, again demonstrating not only that there are no profits to disgorge but that there is no reasonable expectation of such profits materializing.

b. Court's Improper Goal to Provide Plaintiffs a Recovery.

Rather than tailoring a remedy consistent with established principles governing constructive trusts and declining to impose such a trust over a venture with dismal performance (and prospects), the Court fashioned a constructive trust that grants Plaintiffs a cost-free 43% interest in VCG's future proceeds starting at dollar one, well before Defendants have earned any profit. The Court's stated reason was to grant Plaintiffs a "meaningful recovery," even absent any proven damages. *See e.g.*, Reargument Op.5 ("My goal was to allow the plaintiffs to recover a portion of [VCG]'s net profits..."); Reargument Op.17 ("Ideally, this structure will . . . grant the plaintiffs a meaningful recovery."). But Plaintiffs have nothing to "recover,"

¹³ \$165 million=\$581 million/(1+0.257)^{5.49}

since the Court *rejected* their claim that they were entitled to lost profits because of their inability to make the VCG Acquisitions.

Notably, the Court declined to impose a so-called “horizontal” constructive trust that would grant Plaintiffs a 100% interest in all of VCG’s profits *after* Defendants recovered the cost of their investments, because it concluded such a structure would incentivize Defendants to operate and grow the businesses only until they recouped their investment capital. Op.87 (“The defect in [the horizontal] approach is that the PE Defendants would be incentivized only to recover their profits.”); *id.* (“They would have no financial motive to generate profits beyond the amount of their capital contributions. Their assets and effort devoted to [VCG] might be reallocated to other projects.”); Reargument Op.9-10 (horizontal structure would create “perverse incentives” for PE Defendants to recover only their investments as “[t]hey would have no financial motive to generate profits beyond the amount of their capital contributions.”). But if the goal of a constructive trust is to extinguish all possibility of profit to Defendants (Op.77), a “horizontal” structure that denies Defendants any profit or an incentive to make such a profit should not be a concern at all. The Court’s alternative goal—to ensure Plaintiffs secure a “recovery” even absent proximately caused damages—led it to fashion an unprecedented and improper “vertical” trust.

The Court therefore erred by fashioning a constructive trust that compensates Plaintiffs even though they failed to prove they were damaged by losing out on the VCG Acquisitions—rather than imposing a constructive trust that simply precludes Defendants from being enriched by the usurped opportunities.

c. The Trust's Punitive Nature.

A constructive trust should not extend beyond the defendant's unjust enrichment to punish the defendant. *Hogg*, 1993 WL 263504, at *2. The constructive trust here obliterates this limiting principle. By granting Plaintiffs a 43% interest in VCG's future proceeds starting at VCG's first dollar of earnings, the Court's "vertical" constructive trust requires PE Sponsors to pay Plaintiffs long before PE Sponsors recover the costs of their investments, *i.e.*, long before they would ever be unjustly enriched. Indeed, it would require payment to Plaintiffs even if PE Sponsors liquidated their investments at a substantial loss. The trust is therefore plainly and unlawfully punitive.

Under the Court's constructive trust, the PE Sponsors would have the opportunity to break even only after VCG generates \$579 million of proceeds (\$330 million of capital contributions divided by .57) before taking account of the additional proceeds VCG would have to generate to offset the PE Sponsors' additional investments in the business or repayment of VCG's outstanding debt

obligations.¹⁴ Thus the PE Sponsors will have paid Plaintiffs at least a whopping \$249 million on account of their 43% interest in VCG’s “proceeds” before the PE Sponsors would generate any profit. This result is punitive and unprecedented.

Moreover, the Court’s trust is punitive because it negatively impacts VCG’s operations. To start, imposing a constructive trust over VCG’s business and future proceeds impedes VCG’s operations, encumbers the business judgment of VCG’s investors and management, and encourages perpetual litigation over the value of the business at the time of each investment. Indeed, Defendants are required to give the Constructive Trustee advance notice of dilutive issuances (Constructive Trust Order ¶9), detailed quarterly financial statements (*id.* ¶17), prior written notice of various transactions (*id.* ¶18), and consent rights before any sale or transfer of property to an affiliate (*id.* ¶19). Plaintiffs may also challenge Defendants’ calculation of proceeds and, with respect to dilutive issuances, any valuations or post-issuance adjustments to the allocation of proceeds initially set by the Court, *id.* ¶¶4, 10, inviting potential perpetual litigation that further impedes the business. This interference with VCG’s

¹⁴ For example, under the contemplated “vertical trust”, if the PE Sponsors contributed an additional \$10 million to VCG to purchase a new business, the Plaintiffs would receive \$4.3 million of value without contributing any money.

business would have been avoided had the Court imposed a traditional constructive trust under which the plaintiff acquires the usurped assets at the defendant's cost.

In addition, the Court's analysis of incentives ignores the deterrent effect of giving a substantial share of every dollar of *proceeds*—not profits—to Plaintiffs. For example, the Court relied on Defendants' investment plan to project VCG's future growth. *See, e.g.*, Reargument Op.5 (“But I accepted Zenner’s increased exit multiple and adjustments for M&A to conform to Nautic and Vistria’s investment strategy.”). But the PE Sponsors' projected strategy was predicated on the assumption that there would be *profits* that could be reinvested, and growth in the business would accrue to them. The fact that Defendants must now turn over a sizeable share of any *future* proceeds to Plaintiffs [REDACTED]

[REDACTED] The Court's failure to confront this reality results in a trust structure that exacerbates the punitive features of the remedy.

In other words, the Court awarded Plaintiffs a free ride: Plaintiffs will capture a substantial share of any possible future proceeds, while Defendants bear 100% of the cost and face further diminished prospects of ever breaking even. This result “subvert[s]” the very purpose of a constructive trust. *Hogg*, 1993 WL 263504, at *2; *Shuttleworth*, 1994 WL 384428, at *4.

CONCLUSION

In sum, the Court erred in imposing aiding and abetting liability absent proof that Plaintiffs would have completed the VCG Acquisitions and profited from them. The Court also erred in awarding a constructive trust remedy that violates well-settled principles of Delaware law. Accordingly, the Court's liability determination and constructive trust remedy should be reversed.

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