



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,)

Case No. 179, 2026

Defendants-Below,)
Appellants/Cross-)
Appellees,)

Court Below:

Court of Chancery)
C.A. No. 2022-0837-LWW)

v.)

REDACTED PUBLIC VERSION

Filed: August 6, 2026

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

Plaintiffs-Below,)
Appellees/Cross-)
Appellants.)

**APPELLEES' ANSWERING BRIEF ON APPEAL AND
CROSS-APPELLANTS' OPENING BRIEF ON CROSS APPEAL**

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NATURE OF PROCEEDINGS

Following a seven-day trial, the Court of Chancery found defendants' behavior grounding the claims in this case "nothing short of egregious." Ex. A ("Op.") at 112.¹ Defendants' "pervasive bad-faith conduct" included "willfully promot[ing] breaches of the duty of loyalty by high-level Encompass officers," "in direct contravention of legal advice," and engaging in "purposeful efforts to conceal the[ir] improper acts." *Id.* Defendants worked with three of plaintiffs' faithless fiduciaries to acquire companies in plaintiffs' line of business, solicit plaintiffs' employees, and steal plaintiffs' confidential information, all to build a direct competitor to plaintiffs' home health and hospice business while the fiduciaries were still pretending loyalty to plaintiffs. It was disloyalty on a scale Delaware courts rarely see, and defendants tried to conceal it with "falsified records," "deleted evidence," a "fake recruiting process," and "manipulat[ion of] communications through lawyers." *Id.* Defendants' liability for aiding and abetting breach of fiduciary duty was, accordingly, "an easy call" for the trial court. Op. 2.

To remedy defendants' wrongdoing, the trial court awarded plaintiffs both monetary damages and equitable relief. The monetary relief comprises mitigation damages for amounts paid to retain employees and, "as an element of damages,"

¹ Exhibits A–G cited herein are the exhibits to Defendants' opening brief ("OB").

plaintiffs' attorneys' fees and expenses in connection with the litigation. Op. 108–09, 112–13. The equitable relief comprises a constructive trust over the future profits of the competing enterprise (VitalCaring Group), with 43% of those profits to be conveyed to plaintiffs when they are realized. Op. 105–07. The trial court declined to award plaintiffs mitigation damages for the attorneys' fees and expenses they incurred in a preceding Texas lawsuit to stem the harm inflicted by defendants' scheme, and the trial court denied plaintiffs' request for immediate disgorgement of defendants' expected profits. Op. 80–81, 110.

Defendants now come before this Court seeking a determination that, notwithstanding the trial court's findings, Delaware law absolves them of liability. Defendants' first point of appeal is that they cannot be held accountable because plaintiffs did not prove they would have acquired the subject opportunities had their fiduciaries presented them. OB 6–7. Defendants' second point of appeal is that the Court of Chancery's "vertical" constructive trust over VitalCaring's future profits constitutes legal error because equity does not permit such a remedy. OB 7–8.

Defendants' positions are unsupported by law, logic, or equity. Governing authorities confirm that, just like breaching fiduciaries, aiders and abettors of a usurpation of corporate opportunity may be compelled to disgorge ill-gotten gains, regardless of whether the plaintiff can prove that it would have otherwise acquired

the opportunity. The Court of Chancery has broad discretion to tailor equitable remedies, such as a constructive trust, to effectuate that disgorgement. No precedent bars the trial court’s carefully considered remedy, which sought to avoid value-destructive incentives while adhering to the principle that a court of equity must seek to “extinguish[] all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation.” *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939).

The final point before this Court, raised by plaintiffs’ cross-appeal, relates to the Court of Chancery’s denial of plaintiffs’ request for mitigation damages for the legal fees and costs they incurred in Texas. Plaintiffs submit that the trial court’s ruling in this respect is based on a misunderstanding of the procedural record before the Texas court and a misapplication of Delaware law. That part of the judgment, but that part only, should be reversed.²

² Like defendants’ notice of appeal, plaintiffs’ notice of cross-appeal listed as among the orders to be reviewed the Court of Chancery’s Letter Opinion Regarding the Order Granting Constructive Trust, dated May 14, 2025 (Ex. C, the “CTO Opinion” or “CTO Op.”) and the Court of Chancery’s Order Granting Constructive Trust (Ex. D, as amended on May 30, 2025, Ex. F, “CTO”). For the avoidance of doubt, plaintiffs are not pursuing an appeal of the CTO Opinion or the CTO.

SUMMARY OF ARGUMENT

On Appeal:

1. Denied. Even if defendants are right that “[a] plaintiff must prove proximately caused damages to prevail on an aiding-and-abetting claim,” OB 6, plaintiffs made that showing. Plaintiffs were awarded mitigation damages and, as a head of damages, their attorneys’ fees in the Delaware litigation, all resulting from defendants’ aiding and abetting usurpation of corporate opportunities. But defendants are also wrong on the law. Damages are only a required element of an aiding and abetting claim where that is the relief sought. Precedent squarely holds that equitable relief is available against aiders and abettors, and damages are not a predicate to obtaining equitable relief. Defendants’ argument that plaintiffs were required “to prove they would have acquired the VCG businesses,” OB 7, is contradicted by Delaware precedent holding that a plaintiff need not show likelihood of pursuit to prove usurpation of corporate opportunity. No precedent supports defendants’ argument that a different standard applies for aiding and abetting.

2. Denied. A defining quality of courts of equity is their ability to tailor remedies to suit the facts of a case. That is what the Court of Chancery did here. The constructive trust the court fashioned does not violate any principle of law or equity. The trust holds the future profits of VitalCaring Group, which are the proceeds of the acquisition opportunities that were usurped from plaintiffs. Treatises and case

law, including Delaware case law, recognize that a constructive trust may be placed on the future proceeds of property that is wrongfully obtained. The trial court also did not commit legal error by ordering a “vertical” constructive trust, where plaintiffs and defendants share profits beginning from dollar one. Delaware law does not mandate that a constructive trust include either an immediate conveyance of the property to the beneficiary or an immediate cash reimbursement of the trustee’s capital contributions. The trial court’s constructive trust compensates defendants for their capital contributions through a continued interest in the enterprise. This structure ensures that defendants and their co-conspirators remain incentivized to maximize value while reducing, if not eliminating, the possibility that they ultimately profit from their egregious misconduct. The contours of the constructive trust were entrusted to the Court of Chancery’s discretion, and the Court of Chancery did not abuse its discretion.

On Cross Appeal:

1. Plaintiffs’ attorneys’ fees in the Texas litigation are a direct and foreseeable result of defendants’ scheme. They are therefore recoverable as mitigation damages. While the Court of Chancery acknowledged that plaintiffs’ claim for these damages “has merit on its face,” Op. 110, the Vice Chancellor declined to award the fees because she mistakenly believed that the Texas court had

already ruled that plaintiffs were not entitled to them. Op. 110. The record shows that the Texas court did not make that ruling. The Court of Chancery also erroneously relied upon a Texas statute that prohibits recovery of attorneys' fees from an employee whose noncompetete is judicially reformed. Op. 110 n.557. This statute has no bearing on plaintiffs' entitlement to mitigation damages from these defendants under Delaware law.

STATEMENT OF FACTS

A. The parties

Plaintiffs are three healthcare companies that, at the time of the principal events in question, were affiliated. Encompass Health Corporation (“EHC”) is an Alabama-based public company that, from 2015 to 2022, owned a Texas-based home health and hospice business comprising Encompass Home Health & Hospice (now plaintiff Enhabit, Inc.) and Advanced Homecare Management, LLC (together, “Encompass Home Health”).³ Op. 4–5 & n.15; A331–34 ¶¶1, 4–6, 15–16.

Defendants are two private equity firms, Nautic Partners, LLC (“Nautic”) and The Vistria Group, LP (“Vistria”); associated Nautic and Vistria funds; Nautic managing director Christopher Corey; Vistria partner David Schuppan; former Chief Financial Officer of Encompass Home Health Chris A. Walker; and an entity called TVG NP Homecare Topco, LP (“Topco”), which does business as VitalCaring Group (“VitalCaring”). Op. 7, 9; A331–34 ¶¶1, 7–14, 19.

As described below and in the Court of Chancery’s post-trial opinion, beginning in 2020, Corey, Schuppan, and the defendant private equity firms and funds (the “PE Sponsors”) schemed with Walker and two other of plaintiffs’ then-fiduciaries, April Anthony and Luke James, to usurp plaintiffs’ corporate

³ In July 2022, EHC spun off Encompass Home Health, which does business today under the name Enhabit, Inc. A342 ¶82.

opportunities, solicit plaintiffs' employees, and steal plaintiffs' confidential information, all in service of building VitalCaring, a direct competitor to Encompass Home Health. Op. 1–2, 7–29.

B. Anthony and James make fortunes from EHC.

April Anthony founded Encompass Home Health in 1998. Op. 3. She attracted private equity investors, including the firm at which defendant David Schuppan then worked. Op. 4, 9. In late 2014, Anthony and her co-owners sold a controlling interest in Encompass Home Health to EHC, then known as HealthSouth Corporation, for \$750 million. Op. 4–5; A334 ¶15; A511/555:18–24; A512/561:3–23. Anthony received \$70 million in proceeds from the sale and \$53 million in “rollover equity” pursuant to a private equity structure that allowed Anthony to monetize the value of her interest over time. A465/370:23–371:24, 372:20–373:22; Op. 5; A495–96/492:11–494:24; A512–13/559:24–562:11. As part of the deal, Anthony stayed on to run Encompass Home Health as its CEO. Op. 5–6; A334 ¶16. Other members of the pre-acquisition management team remained as well, including Luke James, who, coming in as Encompass Home Health's president, also received rollover equity and stock appreciation rights. Op. 5–6; A465/371:6–16, 373:23–24; A516–17/577:21–578:2; A629/1020:19–1022:1.

Anthony and James were key members of EHC's executive team, responsible for leading EHC's home health and hospice operations and sourcing potential

acquisition opportunities. Op. 6; A466/375:6–376:24; A467–68/380:15–382:11. In 2019, defendant Chris Walker joined Anthony and James, and by February 2020 was Encompass Home Health’s CFO. Op. 10; A334 ¶¶18–19; A736/1447:8–13. Walker assisted Anthony and James in evaluating acquisition targets. A466–67/377:12–378:4; A555/730:21–24. Anthony, James, and Walker all owed fiduciary duties to plaintiffs. Op. 38 n.243.

By spring 2020, Anthony and James had sold the last of their rollover equity and redeemed the last of their stock appreciation rights. Op. 7; A466/374:11–14; A541/677:6–8; A543/682:4–12; A629/1021:14–17. After being paid their fortunes, Anthony and James decided they were “ready to move on.” Op. 7; A612/954:7–955:21. In the summer of 2020, while still plaintiffs’ fiduciaries, Anthony and James launched a covert campaign to prioritize their personal interests and those of a direct competitor. Op. 7–8.

The PE Sponsors were involved in the campaign from the outset.

C. The PE Sponsors and faithless fiduciaries begin working together.

1. Anthony and James share confidential Encompass information with Nautic to develop a buyout proposal.

As a first step, Anthony reconnected with Nautic’s Chris Corey, with whom Anthony was friendly. Op. 7–8; A684–85/1241:15–1243:13. Anthony told Corey she was done with EHC but wanted to see if she could take Encompass Home Health

private. Op. 8; A685/1242:10–23. This was the summer of 2020, at the beginning of the COVID-19 pandemic, and home health and hospice valuations were high. Op. 6–7. Anthony wanted to capitalize, and she figured private equity investors would see the opportunity as she did.

Anthony was right. Nautic was interested, and Anthony and James began collaborating with the PE firm. Op. 8; A685/1242:7–1244:1; A687/1250:5–17. The collaboration included secretly funneling plaintiffs’ confidential information to Nautic so the firm could build out a valuation model and assess the opportunity. Op. 8–9, 60; A385–86/56:9–60:10; A631/1029:10–1030:21; A632/1032:5–1035:20; A690/1262:4–1263:5; A691–92/1266:4–1272:13; B390; B391–441; B442. Anthony and James sat at their work computers and, over Zoom, screen-shared all manner of key metrics with Corey and his team. Op. 8–9, 20, 72; A545/690:1–693:23; A631/1028:20–1029:9; B239; B390; B391. Plaintiffs had no idea this was happening.

By September 2020, defendant Schuppan, by now a senior partner at Vistria, had joined the scheme. Op. 9; A810/1742:19–1743:16; B239. Walker was brought under the tent as well. Op. 9; A736/1449:11–18; A750–51/1505:11–1506:4; A754/1519:11–23. The group was ready to launch.

2. Anthony and James make an overture to EHC, leak EHC's plans for a strategic review, and plot to preempt that review.

On September 18, 2020, Anthony and James approached EHC CEO Mark Tarr, told him they were interested in buying a majority of Encompass Home Health, and asked him to share the thought with EHC CFO Doug Coltharp. Op. 10; A334–35 ¶22; A516/577:11–20; A543/682:13–684:7; A634/1040:10–24; A685/1244:2–1245:3. What Anthony and James did not disclose was that they were backed by two PE firms with whom they had surreptitiously shared plaintiffs' confidential information. Op. 10; A543/684:8–21; A634/1040:17–24. From EHC's perspective, this was just two leaders of Encompass Home Health floating an idea. *See* Op. 10; A473/402:3–11; B445.

EHC's response was one of concern and caution. Coltharp reminded Anthony that her position as a public company insider necessarily complicated any transaction and informed her that EHC's board was considering a possible strategic review of Encompass Home Health. Op. 10–11; A473/402:12–404:16. Coltharp told Anthony to keep the board's deliberations confidential. Op. 10–11; A473/404:4–16. Anthony instead immediately shared the fact of the possible strategic review with Nautic and Vistria. Op. 11; A547/699:4–700:20.

The strategic review was not good news for Anthony and the PE Sponsors—with a strategic review, there would be competition. So the conspirators sought to

preempt the strategic review. Anthony surreptitiously coached Nautic to get involved in bidding for Brookdale Senior Living's home health and hospice business ("Brookdale"). Op. 11–12; B1214. EHC was bidding on Brookdale, and Anthony thought the PE Sponsors might position themselves to approach EHC management about a joint venture. Op. 11–12; A697–98/1291:13–1296:11; B497; B1214. Continuing her exfiltration of confidential information, Anthony shared with Nautic and Vistria information on EHC's bid. Op. 61; B1214.

In mid-December, days after EHC publicly announced its strategic review, Vistria approached EHC about jointly acquiring Brookdale—without, of course, revealing its scheming with Anthony, James, and Walker. Op. 12; A774–75/1600:10–1601:6. EHC's response was equivocal. A774–75/1600:20–1601:2. But the PE Sponsors continued to explore the idea of a Brookdale acquisition. On December 30, Corey emailed Anthony's husband's Gmail account a Nautic deck modeling projections for a leveraged buyout of Encompass Home Health, alone and in combination with Brookdale. Op. 12; A698/1296:18–1297:13; B470; B476. Anthony forwarded the deck to Walker's Gmail, with the false subject line "From Mark Anthony" and solicited Walker's and James's input to further refine the projections using Encompass Home Health's confidential information. Op. 12; B470; B504. They obliged. Op. 61; A636/1051:10–14; A753–55/1516:7–1524:1.

D. Anthony and the PE Sponsors conceive an alternate plan to form a competitor, but are advised doing so would violate the law.

A preemptive buyout of Encompass Home Health was Anthony's and the PE Sponsors' "Plan A." Recognizing that EHC might not take the bait, the conspirators began formulating "Plan B": a new home health and hospice venture to compete with Encompass Home Health (the "New Venture"). Op. 14–15; B389; B458–61. The sketch for Plan B was memorialized no later than December 2020, when Nautic and Vistria exchanged, and Corey discussed with Anthony, a draft term sheet for "NewCo"—a three-way joint venture to search for, invest in, and acquire home health and hospice assets to form the New Venture. Op. 14–15; B458–61. The draft term sheet, which would go through various drafts into early 2021, contemplated that Anthony, Nautic, and Vistria would each invest \$250 million; Anthony would lead the company as the "Founding Manager"; and the Encompass Home Health management team would come with her. Op. 15; B459; B465. To ensure the latter, the term sheet contemplated a 15% management equity incentive plan. Op. 15; B462; B465–66; B468.

There were serious obstacles to Plan B, however: Anthony's and James's employment contracts with plaintiffs had noncompete and nonsolicit provisions, and all three of Anthony, James, and Walker were still plaintiffs' fiduciaries, barred from taking for themselves business opportunities in plaintiffs' lane. *See* Op. 21; B379–

80. The PE Sponsors knew just how real these obstacles were. In 2016, Nautic had disgorged \$70 million to settle allegations it aided and abetted an executive's usurpation of corporate opportunity, misappropriation of confidential information, and solicitation of employees in connection with a healthcare acquisition. Op. 67; A681–82/1227:20–1231:6; B191–92 ¶55. Corey was named personally as a defendant in that action. A681/1227:20–22. Vistria had dealt with similar litigation concerning allegations that a Vistria operating partner had engaged in unlawful competition and poaching of employees from her former home health company. Op. 67–68. Schuppan had been deposed in that matter. Op. 68.

Burned by these experiences, in early 2021, the PE Sponsors commissioned a legal memorandum from the firm Ropes & Gray (“Ropes”) to provide a “roadmap” for their dealings with plaintiffs’ executives. Op. 15, 21; A682–83/1230:24–1234:15; B545. The memo identified Anthony’s and James’s contractual and fiduciary duties and detailed the restrictions that flowed from those duties. Op. 21; B546–51. The Ropes memo warned of the risks associated with pursuing home health and hospice acquisition targets, soliciting Encompass Home Health employees, and misappropriating plaintiffs’ confidential information. Op. 21–22, 68–69; B546–52. Ropes advised that Nautic and Vistria should not devote meaningful time to

substantive interactions with Anthony before she left Encompass Home Health. B547.

The PE Sponsors would ignore this advice.

E. Nautic, Vistria, and Anthony propose to take Encompass Home Health private.

Meanwhile, defendants pursued Plan A. With the Brookdale overture having fallen flat, the time had come for the conspirators to try a preemptive strike by other means.

On January 13, 2021, Anthony, Nautic, and Vistria sent EHC's board a joint letter with a nonbinding proposal, set to expire in 30 days, to acquire a majority interest in Encompass Home Health. Op. 13; A335–36 ¶28; A1428–33. This was the first EHC had heard that Anthony was working with Nautic and Vistria. Op. 13; A481/434:23–435:16. The letter threatened that Anthony was “not likely to support an alternative transaction,” making the proposal the only way “for EHC to continue its successful partnership with April and her loyal management team.” Op. 13; A1429.

EHC was blindsided. Op. 13; A481/434:23–435:7. Two EHC directors conveyed to Anthony the board's concerns about her attempt, as an insider, to preempt the strategic review, and explained that her proposal would be considered as part of the broader ongoing process. A483/442:4–12; A506/536:3–22; A527–

28/621:6–622:10; A551–52/714:21–715:18; B1158. EHC also investigated whether Anthony had shared confidential information with Nautic or Vistria. Op. 14; A527–28/621:6–624:6. Anthony and her attorneys (who also represented Nautic and Vistria) falsely assured EHC that she had not. Op. 14; A552/715:2–8; B510–11. They also misrepresented Walker’s participation, claiming that he had “general discussions” with Anthony and James, but had “not been involved in discussions with Nautic and Vistria.” Op. 14; B511. Anthony’s counsel promised on Anthony’s behalf that she would not discuss the proposal with any other employee, including James or Walker. Op. 14; B511.

F. Anthony, Nautic, and Vistria pivot to Plan B: creating the New Venture.

With these assurances, plaintiffs kept Anthony, James, and Walker in their positions at Encompass Home Health, as fiduciaries. Plaintiffs did not know that, in concert with the PE Sponsors, the fiduciaries would use their positions to exfiltrate confidential information, evaluate acquisition opportunities, and solicit employees for a nascent direct competitor to Encompass Home Health.

As the Ropes memo made plain, Plan B was a no-go from a legal perspective. But the conspirators moved forward with it nonetheless. And because they knew from their own lawyers’ advice that it was wrong, they “undertook stunning efforts to conceal their actions.” Op. 1. The stage was set with a January 2021 email from

Schuppan to a Ropes attorney suggesting that joint legal representation of Nautic, Vistria, and Anthony would avoid a “formal communication trail with April,” and including a link to a YouTube clip of Ari Gold, the talent agent character from *Entourage*, tearing up documents and shouting “never again!” Op. 15–16; B499–500.

True to that theme, over the ensuing months defendants deleted text messages, scrubbed business records, and even falsified records. Op. 2, 73–74, 112; A796/1687:16–1688:7. Rather than refer to Anthony by name, they called her “Voldemort” or “our Idaho friend.” Op. 73, 25 n.154; A608–09/939:17–940:8; A798–99/1695:21–1698:13; B5:4–6:8; B716; B755; B794. To get key New Venture documents to Anthony while she was still CEO of Encompass Home Health, Schuppan made a surreptitious hand-off on a golf course. Op. 1–2, 25; A562–63/755:22–757:9; A799/1699:6–1700:9. Both Nautic and Vistria laundered diligence materials and solicited and received Anthony’s feedback through a daisy chain of lawyers, all to try and hide evidence under improper claims of privilege. Op. 26, 73, 112; A561–62/754:16–755:12; B717–24; B726; B732–39; B760; B764–77; B779; B785.

The PE Sponsors took these steps—and the risks they entailed—because, in their own words, getting “into business with April Anthony” was worth the risk.

B781; A595/884:10–885:9. The financial upside was immense: in their underwriting projections forming the basis of their investment decisions, Nautic and Vistria predicted that their “buy-and-build strategy” would yield as much as \$1.1 billion in gains upon exit. Op. 27, 80, 18 n.102; B809; B912; B1249.

Key to the New Venture was identifying and pursuing home health and hospice businesses that the conspirators could acquire, merge, and operate. Anthony guided the PE Sponsors in setting the criteria for acquisition targets. Op. 17; A661–62/1151:19–1152:10. The conspirators intended their first proposed target, Homecare Holdings (“HCH”), to be the initial platform for the New Venture. Op. 18. It suited Anthony perfectly: it operated in Anthony’s preferred markets of Florida and Texas; it was headquartered in Dallas, Anthony’s home; and it was running a sales process headed by the same banker that the PE Sponsors retained for the New Venture (and an old friend of Anthony’s). Op. 16–19; A541/675:18–23; A561/753:3–754:15; A813/1754:3–1756:6; A815/1761–63; B524; B543; B792.

Another New Venture acquisition target was Louisiana-based Vital Health Care Group (“Vital”). Op. 19. Anthony also helped the PE Sponsors source this target while she was still CEO of Encompass Home Health. Op. 19. The initial contact with Vital happened immediately following a February 3, 2021 call between Anthony and Schuppan to “spitball” acquisition ideas. Op. 19; A813/1754:10–

1756:6; A816/1766:1–1768:7; B18:4–19:12; B1163; B1305. On February 9, Schuppan and Corey discussed Vital with Anthony, and the decision to pursue the target was made with Anthony’s blessing. Op. 26; A819–20/1778:21–1783:22; B533–35; B537–38.

Later in February, Anthony and her PE Sponsors alighted upon a third platform opportunity: Mississippi-based Kare-in-Home, Inc. (“Kare”). Op. 19. Anthony had a long history with Kare’s owners and had “thought highly of their business for many years.” Op. 19; A564/763:13–24. In 2017 and 2018, she and James had considered acquiring Kare for Encompass Home Health, but Kare’s owners were not ready to sell. Op. 19; A625/1005:11–21; B226; B228. Now they were. Op. 19.

Anthony remained in close contact with Nautic and Vistria about each acquisition opportunity throughout February and March. Op. 20; B536. On March 18, 2021, Anthony told EHC she would be resigning effective June 18. Op. 23; A338 ¶43; B553; B1167. Anthony claimed she planned to spend the period of her noncompete at her vacation homes and playing golf. Op. 23; A377/23:21–24:6. This was false. Op. 23.

After announcing her departure, but while still Encompass Home Health’s CEO, Anthony continued actively building the New Venture. Op. 25. On April 28,

Schuppan, Corey, and Scott Hilinski, the managing partner of Nautic, met Anthony in Dallas to discuss the acquisition targets. Op. 25; A565/767:16–768:15; A605/926:5–927:7; A715/1363:6–1364:14. The next day, Anthony proposed that she, Nautic, and Vistria, which she called the “newco consortium,” create a new entity to facilitate the acquisitions, with costs split three ways. B763. Nautic and Vistria formed Topco (now d/b/a VitalCaring) a few weeks later, on May 18. A340 ¶64; B789–91. Also in April, Anthony met with Kare’s CEO, Chad Blalack, to goad him into selling his business to Topco. Op. 26.

On May 10, 2021, while still Encompass Home Health’s CEO, Anthony presented to Nautic’s investment committee to convince it to authorize investment in the New Venture. Op. 26; A566–57/772:12–774:22; A595–96/886:4–891:24. Anthony emphasized the importance of launching the New Venture while she was still CEO of Encompass Home Health: there was “[v]alue in getting started to access people and relationships.” A595–96/887:9–891:18; A566/773:20–774:22; B598. Anthony confirmed for Nautic that James and Walker would be joining the New Venture. Op. 26; A566/774:5–22; B598. In fact, both had already played a meaningful role in pursuing the usurped opportunities, supplying Anthony with feedback on the acquisition targets, which she relayed to Nautic and Vistria. Op. 25,

27. Nautic and Vistria meanwhile arranged for Walker to speak with the owners of HCH and Vital. Op. 27; A762–63/1551:11–1554:16; A781/1627:9–1628:13; B1087.

All through this period—with every secret meeting, sly exchange of diligence, and step in building a direct competitor to Encompass Home Health—Anthony, James, and Walker were pretending loyalty to plaintiffs as Encompass Home Health’s senior-most officers and were still vested with responsibility to identify and pursue acquisition targets for plaintiffs’ benefit. Yet, none of them mentioned to plaintiffs the opportunities to acquire HCH, Vital, or Kare, nor the consortium’s plan to launch a competing business. Op. 21; A377–78/21:11–26:7; A567–68/775:14–780:16. All three acquisition targets were in Encompass Home Health’s line of business and would have been of interest to plaintiffs. Op. 43–45; A426–27/217:15–222:16; A461/360:1–5; A488/464:14–465:5; B12–13/34:21–35:2.

Topco’s acquisition of HCH closed on July 30 for \$192 million. Op. 27; A341 ¶76. The next month, Topco acquired Vital for \$106 million. Op. 27; A341 ¶77. The Kare acquisition closed a few months later in December for \$110 million. Op. 27; A342 ¶80.

G. Defendants aid and abet Anthony’s solicitations.

Another key to building the New Venture was talent. So, again while Anthony, James, and Walker were still plaintiffs’ fiduciaries, the consortium took steps to poach members of Encompass Home Health’s management team. Op. 59. As noted,

James had been in the fold since no later than summer 2020, and Anthony brought Walker on board not long after. Op. 8–9. With the PE Sponsors’ help, Anthony then set about recruiting other Encompass Home Health leaders, including EVP of Operations Julie Jolley and EVP of Clinical Services Janice Riggins. Op. 57, 71; A407/142:1–143:15; A410–11/155:3–158:14; A421–22/198:14–202:15; B1359.

In breach of her express undertaking to EHC, Anthony told her poaching targets that she had tried to buy back Encompass Home Health but that her bid had been rejected. A409/151:14–20; A430/235:12–15; A571/791:18–792:21. Revealing her plans for the New Venture, Anthony dangled the prospect of multi-million-dollar equity awards. Op. 23, 29, 58; A407–11/144:8–149:6; A538/663:6–664:21; A571/792:18–794:23; A637–38/1053:20–1058:22; A758–60/1537:2–1542:24; A770/1582:6–24. To obscure Anthony’s role in the solicitations, the PE Sponsors retained a third-party search firm, Chartwell Partners, and they had Chartwell representatives arrange “interviews” of Encompass Home Health employees. Op. 71; A758/1534:13–1535:24; B449. The Chartwell process was a sham, backed up by another false paper trail. Op. 71; A339 ¶52; A441–42/280:3–283:12; B783. Two weeks before being contacted by Chartwell, Walker texted a friend that Chartwell was “who the PE firm has ‘hired’ to reach out from the newco team”; “they needed a 3rd party to conduct a ‘search.’” B449. All scare quotes in original.

In 2021, Anthony and her co-conspirators successfully solicited six members of Encompass Home Health’s management team to the New Venture: James (who would formally join in 2022), Walker, Riggins, Senior Regional President of Operations Missy Nash, Senior Regional President of Sales Bridgitte Brown, and Vice President of Integration Susan Stell. Op. 29; A383/47:3–7; B1359.

H. Walker resigns and becomes Anthony’s puppet CEO.

Anthony and Walker left Encompass Home Health on the same day, June 18, 2021. Op. 27. James left Encompass Home Health in early August 2021. Op. 27–28. Unlike Anthony and James, Walker was not subject to a contractual noncompete. Op. 28. He became the New Venture’s acting CEO in July. Op. 28; A341 ¶74. But Walker was CEO in name only, holding the title on an interim basis until Anthony’s noncompete expired. Op. 28. He functioned as Anthony’s conduit, passing along her insights and implementing her strategies. Op. 28; A766/1566:3–1569:8.

Just four days after Walker and Anthony resigned, Anthony presided over a New Venture strategy session in Dallas with HCH’s management. Op. 28; A572–74/798:5–800:7, 802:18–803:9. Walker, tapped as the interim “CEO,” was not even present. Op. 29. Then in July, Anthony summoned Walker to her vacation home in Idaho for a secret week-long strategy meeting. Op. 29. During the meeting, Walker and Anthony developed business plans for Topco, built off confidential Encompass Home Health information. Op. 29, 61–62; A721/1386:3–1387:4; A766/1568:1–

1569:8. After his Idaho trip, Walker began executing on the objectives he and Anthony had discussed. Op. 29.

I. The truth begins to surface.

It was not until after Anthony, Walker, and James had left plaintiffs' employ that plaintiffs began to uncover the scheme that had been hatched and executed under their noses. One of Anthony's key recruits, Julie Jolley, had a change of heart. Op. 29–30. On September 10, 2021, Jolley confessed the conspiracy to Encompass Home Health's new CEO. Op. 30–31; A420–21/196:2–198:13. In response, Encompass offered retention packages to key Encompass Home Health executives to prevent further defections, which included salary increases, stock awards, and greater bonus potential. Op. 31, 108–09; A383/45:20–46:13; A384–85/52:4–54:13; B827–31; B1089–134; B1369; B1370–72.

J. The Texas litigation

In October 2021, one eventuality Ropes had warned of in its “roadmap” memo came to pass: plaintiffs sued Anthony in Texas state court seeking to enjoin her from further breaching the noncompete and nonsolicit provisions of her employment agreement. Op. 31; A341 ¶79. After a bench trial, the Texas court found that Anthony had breached her restrictive covenants by “directly solicit[ing] key, hand-selected Encompass employees to join the New Venture, even while she was still employed by Encompass”; “play[ing] an active role in forming the New Venture”; and

“actively advis[ing] and consult[ing] with Nautic, Vistria, and Walker, among others, in the business and growth strategies of the New Venture—even while still CEO of Encompass [Home Health].” B965–66 ¶¶33–34; B991–92 ¶¶150, 152. The Texas court rejected Anthony’s, Corey’s, and Schuppan’s denials of wrongdoing as “implausible and contrary to the weight of the evidence,” “factually unsupportable,” and “not credible.” B979–81 ¶¶99, 104, 110; B970 ¶55. And the Texas court found that Anthony’s efforts to conceal her misconduct (B995 ¶163) and “operate clandestinely” (B981 ¶108) “strongly suggest[ed] that Anthony knew she was acting in breach of her contractual obligations but acted in breach anyway, hoping to avoid detection” (B995 ¶165). The Texas court enjoined Anthony from breaching her restrictive covenants, as reformed by the court to narrow certain portions that were found to be overbroad under Texas law. B999 ¶179.

Plaintiffs incurred more than \$11 million in legal fees pursuing their claims against Anthony in Texas. A484/447:10–23; B832–74; B875–99; B1001–29; B1030; B1031–45; B1046. Plaintiffs did not seek recovery of these fees in the Texas case because of Anthony’s employment agreement, which channeled claims for monetary relief to arbitration. B384–87 §§6(f), (q); B948/1700:20–24. Anthony sought her attorneys’ fees, but the Texas court denied that request. B999 ¶180.

Defendants were relieved by the outcome in Texas. Vistria’s co-CEO called the result “not a bad outcome”; there were no “monetary damages” awarded. B950. And defendants had managed to keep hidden troves of damaging evidence from the Texas court, including the Ropes “roadmap” memo, the records of Anthony’s and James’s exfiltration of confidential information to Nautic in 2020, the contemporaneous notes showing Anthony’s meetings with Nautic’s investment committee and with acquisition targets while she was still Encompass Home Health’s CEO, and the *Entourage* clip of Ari Gold tearing up evidence. This evidence would only come to light after further discovery and motion practice in Delaware. Op. 15–16, 21–22, 25–29.

In August 2022, weeks after the Texas trial ended and Anthony’s noncompete expired, Anthony and James formally joined Topco as CEO and President, respectively. Op. 32–34. At the same time, Topco began operating as VitalCaring. Op. 33.

K. The Delaware litigation

On September 19, 2022, plaintiffs filed suit in the Court of Chancery, asserting among other claims a count of aiding and abetting breach of fiduciary duty against Schuppan, Corey, the PE Sponsors, and Topco/VitalCaring. The Delaware action was tried over seven days in December 2023.

In December 2024, after considering “the damning record presented at trial,” Vice Chancellor Lori W. Will found that Anthony, James, and Walker had engaged in “egregious breaches of the duty of loyalty,” aided and abetted by Nautic, Vistria, Schuppan, Corey, and VitalCaring. Op. 51, 65. As the Vice Chancellor explained, while employed by Encompass Home Health, Anthony, James, and Walker “usurped acquisition opportunities falling within Encompass’s line of business”; misused Encompass Home Health’s confidential information; and “swayed key Encompass [Home Health] employees to join them with the promise of Topco equity.” *Id.* at 64. Just like the Texas court, the Court of Chancery found that Anthony, James, Walker, and the private equity defendants took “[g]reat pains” to hide their misconduct (*id.*) and that VitalCaring was “[t]he result of this deceit.” Op. 2.

As a remedy for defendants’ misconduct, the trial court awarded mitigation damages of \$1.62 million based on the cost of the retention packages, and the trial court awarded plaintiffs their attorneys’ fees “as an element of [their] damages” based on defendants’ “egregious” conduct. Op. 109, 112–113. The trial court denied plaintiffs’ request for damages to cover their Texas litigation fees and costs because it believed, incorrectly, that the Texas court had already denied those fees and costs. Op. 110; A1161–62; B109; B999 ¶180.

The trial court also rejected plaintiffs' request for immediate disgorgement of defendants' expected future profits. Op. 81. Based on Nautic and Vistria projections that were prepared to underwrite the PE Sponsors' investment in VitalCaring, plaintiffs calculated the present value of the PE Sponsors' expected gains upon exit to be between \$291 million and \$462 million. Op. 80. This included substantial value generated by future add-on acquisitions, an essential part of the PE Sponsors' "buy-and-build strategy." Op. 80. The trial court found these projections to be "outdated" based on a decline in the home health and hospice industry at the time of trial, which the trial court found reflected in VitalCaring's own financial performance. Op. 80. The trial court therefore concluded that the underwriting projections did not provide a "reliable basis to make a responsible damages assessment." Op. 81.

The trial court recognized, however, that the PE Sponsors might still profit from their misdeeds: "what if the industry rebounds while VitalCaring implements the acquisition strategy underpinning the PE Defendants' investment thesis?" Op. 83. The trial court found that the PE Sponsors "remain committed to VitalCaring" and "view home health investments as 'long-term secular winners' and 'enduring businesses.'" Op. 34 (alterations omitted). The court also found that the PE Sponsors were still "exploring new acquisition opportunities" for VitalCaring, Op. 83, and that "it would be inequitable for the defendants (and Anthony) to retain the entirety of

such gains simply because the trial occurred before they were realized,” Op. 84. The trial court therefore fashioned a tailored equitable remedy, in the form of a constructive trust entitling plaintiffs to a portion of VitalCaring’s future profits. Op. 86–107.

To determine the manner of dividing VitalCaring’s profits, the trial court first considered how to reimburse Nautic and Vistria for their capital contributions to VitalCaring. The court considered a constructive trust with a “horizontal structure,” where “Nautic and Vistria [would] retain 100% of every dollar of VitalCaring profits until they have recovered their capital contributions in full.” Op. 86–87. But the trial court recognized that this structure would give the PE Sponsors “no financial motive to generate profits beyond the amount of their capital contributions.” Op. 87. The court therefore concluded that the trust would have a “vertical payment waterfall,” meaning plaintiffs and the PE Sponsors would share in VitalCaring’s profits beginning at dollar one. Op. 89.

The court allocated profits within the “vertical” structure by calculating the expected equity value of VitalCaring upon exit using not the underwriting projections plaintiffs had cited but conservative projections prepared by Nautic after the filing of the Delaware litigation. Op. 102–04. The trial court then divided Nautic’s and Vistria’s capital contributions (approximately \$330.1 million) by the

court's calculation of expected exit value (approximately \$580.9 million) to reach an "intuitive proxy for the total equity value attributable to Nautic's and Vistria's investments" in VitalCaring. Op. 105. As a result, the trial court determined that defendants "would be entitled to recover 57% [] of every dollar of VitalCaring's profits," while plaintiffs would receive the remaining 43%. Op. 105.

Defendants moved for reargument and clarification regarding the constructive trust. A1251. The Court of Chancery denied the motion for reargument, while clarifying that only "proceeds flowing through Topco for distribution to investors" were subject to the trust. Ex. B ("Reargument Op.") at 16.

L. The constructive trust

The parties thereafter conferred on the form of order implementing the trial court's constructive trust and submitted certain disputed issues to the court for resolution. On May 14, 2025, the court entered its constructive trust order (Ex. D, as amended on May 30, 2025, Ex. F, "CTO"), which resolved nearly all of the disputed issues in defendants' favor. *See also* Ex. C ("CTO Op."). Among other things, the trial court denied plaintiffs' request for additional information and consent rights, and it denied plaintiffs' request that defendants and Anthony owe plaintiffs fiduciary duties in connection with matters affecting the constructive trust. CTO Op. 14–15, 19–20.

The CTO appoints a trustee whose responsibilities include distributing VitalCaring’s “proceeds.” CTO ¶¶3–8. The trustee is entitled to quarterly financial statements and annual budget information and must approve of certain affiliate transactions involving VitalCaring. CTO ¶¶17–19. The CTO also permits defendants and Anthony to make (without trustee approval) future equity investments in VitalCaring that can dilute the constructive trust’s interest in VitalCaring’s profits. CTO ¶¶9–12. These dilutive issuances are subject to challenge by plaintiffs, and subject to input from the constructive trustee on the equity valuation applied to the issuance (which in turn affects the degree of dilution suffered by plaintiffs’ interest). CTO ¶¶10–11.

At the joint request of the parties, on August 4, 2025, the Court appointed Timothy Pohl to serve as the trustee of the constructive trust (the “Trustee”). A155.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁴

Today, VitalCaring is a growing business. The PE Sponsors and Anthony remain committed to a “buy-and-build” strategy designed to make them hundreds of millions of dollars in profits when they exit the investment. Op. 34, 83–84. Through this appeal, defendants seek to nullify the constructive trust that stands between them and those profits.

⁴ [REDACTED]

ARGUMENT

I. THE COURT OF CHANCERY PROPERLY FOUND DEFENDANTS LIABLE FOR AIDING AND ABETTING FIDUCIARY BREACH AND PROPERLY AWARDED EQUITABLE RELIEF.

A. Question Presented

Whether defendants may be held liable for aiding and abetting fiduciary breach, and subject to attendant equitable relief, absent a finding that plaintiffs would have acquired and profited from the corporate opportunities at the center of defendants' scheme. A1000–09; A1223–24.

B. Scope of Review

This Court reviews questions of law *de novo* and factual findings for clear error. *CompoSecure, L.L.C. v. CardUX, LLC*, 206 A.3d 807, 816 (Del. 2018).

C. Merits of Argument

Defendants' lead argument on appeal is that they should not have been held liable for aiding and abetting fiduciary breach because plaintiffs failed to prove "they would have pursued and closed on" Topco's acquisitions (HCH, Vital, and Kare). OB 20. Defendants do not dispute that likelihood of pursuit is not an element of a claim for fiduciary breach predicated on usurpation of corporate opportunity. But they claim it was a required element here because defendants were not themselves fiduciaries, and damages is an essential element of aiding and abetting. OB 20. The argument fails for two independent reasons.

First, even assuming damages is an element of aiding and abetting fiduciary duty, that element was satisfied. Plaintiffs not only proved but were awarded damages. As defendants acknowledge, the trial court assessed \$1,621,446 in mitigation damages for the improper solicitation of plaintiffs' employees, which the court expressly found was part of "the broader disloyal scheme" defendants had aided and abetted. Op. 56, 109; *see also* Op. 56–57 ("The usurpation formed a pillar of the[] broader plan to build a new home health and hospice company. [Defendants] erected this competitor using Encompass's resources, people, and confidential information."). The trial court also awarded plaintiffs their attorneys' fees as a head of damages because defendants "willfully promoted breaches of the duty of loyalty by high-level Encompass officers" and did so "in direct contravention of legal advice." Op. 111–12. Defendants assert that these damages "are not causally tied to the Court's constructive trust remedy," OB 22 n.11, but that assertion is contradicted by the trial court's factual findings and in all events nonsensical. No authority defendants cite, and none of which plaintiffs are aware, supports the proposition that one remedy for aiding and abetting fiduciary breach must be "causally tied" to another.

Second, although plaintiffs proved damages, defendants are wrong that this was a required element of plaintiffs' aiding and abetting claim. There is no support

for defendants’ argument that one who aids and abets disloyal usurpation of corporate opportunity escapes equitable sanction absent a finding that the plaintiff suffered lost profits. At its core, “[a] claim for aiding and abetting [fiduciary breach] requires the following three elements: (1) the existence of a fiduciary relationship, (2) a breach of the fiduciary’s duty, and (3) a knowing participation in that breach by [defendant].” *In re Santa Fe Pac. Corp. S’holder Litig.*, 669 A.2d 59, 72 (Del. 1995); *see also, e.g., Nash v. Schock*, 1998 WL 474161, at *2 (Del. Ch. July 23, 1998); *Zimmerman v. Crothall*, 62 A.3d 676, 712 (Del. Ch. 2013). A fourth element of damages is required where damages are the relief sought, as they often are. *See, e.g., Malpiede v. Townson*, 780 A.2d 1075, 1096 (Del. 2001) (rejecting as inadequate allegations supporting damages claim predicated on disclosure violation); *In re PLX Tech. Inc. S’holders Litig.*, 2018 WL 5018535, at *27 (Del. Ch. Oct. 16, 2018), *aff’d*, 211 A.3d 137 (Del. 2019) (TABLE) (requiring proof of damages for claim that aider and abettor interfered with sales process). But Delaware law does not require that showing where other forms of relief, like equitable relief, are sought. None of defendants’ authorities speak to the availability of equitable relief for usurpation of corporate opportunity; all involved demands for damages as the exclusive remedy for other kinds of fiduciary breach. *See, e.g., In re Mindbody, Inc. S’holder Litig.*, 332 A.3d 349 (Del. 2024) (claim for money damages); *Gotham P’rs, L.P. v.*

Hallwood Realty P'rs, L.P., 817 A.2d 160, 169 (Del. 2002) (same); *Great Hill Equity P'rs IV, LP v. SIG Growth Equity Fund I, LLLP*, 2014 WL 6703980 (Del. Ch. Nov. 26, 2014) (same); *Ross Hldg. & Mgmt. Co. v. Advance Realty Grp., LLC*, 2014 WL 4374261, at *35 (Del. Ch. Sept. 4, 2014) (plaintiff had “not sought disgorgement”); *Oliver v. Boston Univ.*, 2006 WL 1064169, at *34 (Del. Ch. Apr. 14, 2006) (declining to find aiding and abetting liability for damages claim where plaintiff also failed to prove knowing participation); *see also Taita Chem. Co. v. Westlake Styrene, LP*, 351 F.3d 663, 670–71 (5th Cir. 2003) (reversing verdict on abetting-and-abetting damages claim for disclosure breach; noting plaintiff did not plead disgorgement, restitution, or unjust enrichment).

Defendants cannot reasonably dispute that equitable remedies are available for an aiding and abetting claim. An aider and abettor may be enjoined. *See, e.g., C & J Energy Servs., Inc. v. City of Miami Gen. Empls.*, 107 A.3d 1049, 1072 (Del. 2014); *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 837–38 (Del. Ch. 2011). An aider and abettor may be subject to disgorgement. *See, e.g., Goldstein v. Denner*, 2022 WL 1797224, at *14 (Del. Ch. June 2, 2022); *Triton Constr. Co. v. E. Shore Elec. Servs., Inc.*, 2009 WL 1387115, at *28 (Del. Ch. May 18, 2009), *aff'd*, 988 A.2d 938 (Del. 2010) (TABLE); *Nash*, 1998 WL 474161, at *2. Neither remedy requires proof of damages. Injunctions, by definition, issue only when damages are

inadequate. *See Gradient OC Master, Ltd. v. NBC Universal, Inc.*, 930 A.2d 104, 131 (Del. Ch. 2007). Disgorgement may be ordered “even though no specific injury to [plaintiffs] can be measured.” *Triton*, 2009 WL 1387115, at *28. There is no logical basis to require a predicate showing of damages to obtain equitable remedies that are awarded as an alternative to damages.

Defendants’ argument also cannot be squared with Delaware law holding that a claim for usurpation of corporate opportunity does not require proof that the plaintiff would have pursued, let alone taken, the opportunity. *See, e.g., Sorrento Therapeutics, Inc. v. Mack*, 2023 WL 5670689, at *26 (Del. Ch. Sept. 1, 2023) (“[T]he *Broz* test focuses on the company’s ability to pursue the opportunity, not the board’s likelihood of actually deciding to do so.”); *Hollinger Int’l, Inc. v. Black*, 844 A.2d 1022, 1061 n.82 (Del. Ch. 2004), *aff’d*, 872 A.2d 559 (Del. 2005) (“While the opportunity may not be the right one after thorough consideration, it was [the company’s] to explore[.]”). As it happens, plaintiffs demonstrated below that they likely would have pursued the opportunities in question. A1007–09; A1200–02.⁵ But

⁵ EHC’s CFO, Doug Coltharp, testified plaintiffs would have been interested in pursuing the opportunities, particularly if they had been recommended by Anthony and James. A488/464:4–465:5. Plaintiffs’ employees testified that plaintiffs had the capacity for pursuit (more so than Topco). A426–27/217:15–222:16; A461/360:1–5; B12–13/34:21–35:2.

the Court of Chancery did not need to reach that question because it found, correctly, that “Encompass’s likelihood of pursuit is irrelevant.” Op. 46.

Defendants do not dispute this is the correct analysis for the underlying claim for usurpation of corporate opportunity; they just argue that the standard is different when an aiding and abetting claim is involved. OB 20–21. Defendants cite no case to support this proposition. The lone authority defendants can muster is one in which the court found no usurpation at all. *See* OB 21; *Triton*, 2009 WL 1387115, at *13. Delaware courts have applied the *Broz* test identically to claims against both fiduciaries and aiders and abettors, all without suggesting any discrepancy in essential elements to support the claim. *See, e.g., In re eBay, Inc. S’holders Litig.*, 2004 WL 253521, at *4–5 (Del. Ch. Feb. 11, 2004); *Grove v. Brown*, 2013 WL 4041495 (Del. Ch. Aug. 8, 2013); *Agranoff v. Miller*, 1999 WL 219650 (Del. Ch. Apr. 12, 1999), *aff’d*, 737 A.2d 530 (Del. 1999) (TABLE).

Finally, the secondary sources that defendants invoke undercut their position. Defendants cite two law review articles for the proposition that “actual harm” must be established to ground liability for aiding and abetting fiduciary breach. OB 19 n.10. But proving “actual harm” is not the same thing as proving quantifiable damages. That point is well illustrated by this case. While the trial court declined to award expectation damages or immediate disgorgement on the basis that they were

too speculative, the trial court found that plaintiffs had suffered harm—that VitalCaring “got a head start at Encompass’s expense,” Op. 57, 78, and Encompass Home Health faced “increased competition with a new home health care business in Texas . . . armed with Encompass’s confidential information,” Op. 63. This harm may not have been quantifiable, but it supports liability. *See Cantor Fitzgerald, L.P. v. Cantor*, 2000 WL 307370, at *24, *29 (Del. Ch. Mar. 13, 2000) (finding aiding and abetting liability when plaintiff failed to prove “any specific quantifiable harm”); *see also Caerus Grp., LLC v. Chemicar Europe NV*, 2026 WL 668208, at *7 (Del. Ch. Mar. 10, 2026) (“[A] party seeking *equitable* relief need not allege *quantifiable* harm.”). In any event, plaintiffs did prove quantifiable damages.

II. THE COURT OF CHANCERY’S CONSTRUCTIVE TRUST WAS AN APPROPRIATE EXERCISE OF ITS REMEDIAL DISCRETION.

A. Question Presented

Whether the constructive trust ordered by the Court of Chancery exceeded its remedial discretion. A1041–44; A1236–42.

B. Scope of Review

“This Court reviews the Court of Chancery’s fashioning of remedies for abuse of discretion.” *Gotham P’rs*, 817 A.2d at 175. *De novo* review applies only to the question of whether a remedy “was erroneous as a matter of law, because the trial court erred in formulating or applying legal principles.” *Berger v. Pubco Corp.*, 976 A.2d 132, 139 (Del. 2009) (quotations omitted).

C. Merits of Argument

Nearly a century ago, this Court in *Guth v. Loft* set forth the foundational remedial principle governing breaches of the duty of loyalty. A court of equity must seek to “extinguish[] all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation.” 5 A.2d at 510. This means that “the scope of recovery for a breach of the duty of loyalty is not to be determined narrowly.” *Thorpe v. CERBCO, Inc.*, 676 A.2d 436, 445 (Del. 1996). And the Court of Chancery has “broad discretion . . . to fashion such relief as the facts of a given case may dictate.” *Weinberger v. UOP, Inc.*, 457 A.2d 701, 715 (Del. 1983).

In an attempt to benefit from a *de novo* standard of review, defendants argue that the Court of Chancery committed legal error because the constructive trust it fashioned violated “settled principles” of law or equity. OB 26. Defendants are wrong. The Court of Chancery correctly applied Delaware law and equitable principles in awarding a constructive trust over VitalCaring’s future profits. The terms of the trust were a matter for the Vice Chancellor’s discretion, and the Vice Chancellor did not abuse her discretion. The constructive trust should therefore be affirmed.

1. The constructive trust in this case reflects an appropriate exercise of the Court of Chancery’s remedial discretion.

“A constructive trust is the formula through which the conscience of equity finds expression.” *Hogg v. Walker*, 622 A.2d 648, 652 (Del. 1993) (citation omitted); *see Guth*, 5 A.2d at 510 (“[A] constructive trust is the remedial device through which precedence of self is compelled to give way to the stern demands of loyalty.”). That remedy “effectuates the principle of equity that one who would be unjustly enriched, if permitted to retain property, is under an equitable duty to convey it to the rightful owner.” *Hogg*, 622 A.2d at 652. Befitting the conscience of equity, a constructive trust “is an equitable remedy of great flexibility and generality.” *Id.*; *see also* John Norton Pomeroy, *A Treatise on Equity Jurisprudence* § 1045 (5th ed. 1941) (“The specific instances in which equity impresses a constructive trust are numberless,—

as numberless as the modes by which property may be obtained through bad faith and unconscientious acts.”).

Two factual findings, made after seven days of trial, shaped the Court of Chancery’s constructive trust. First, the Vice Chancellor found that defendants engaged in egregious misconduct that demanded a remedy. Second, the Vice Chancellor found that, notwithstanding VitalCaring’s poor performance as of trial, the possibility remained that defendants would ultimately achieve “considerable profit—as they have in prior investments that initially faltered.” Op. 2.

The record of misconduct in this case is stark. Anthony, James, and Walker engaged in a “pervasive” and “willful campaign of disloyalty,” aided and abetted by the PE Sponsors, to “erect[] [a] competitor using Encompass’s resources, people, and confidential information.” Op. 2, 57, 112. This included usurping three acquisition opportunities directly in Encompass Home Health’s line of business, one of which (Kare) Encompass Home Health had previously explored acquiring. Op. 18–19, 40–56. The PE Sponsors participated in this usurpation despite being advised by counsel that ““entering into an agreement with respect to a specific opportunity that would be competitive’ while Anthony was still with Encompass Home Health would support ‘claims that Nautic/Vistria aided and abetted the breach.’” Op. 68 (quoting B717–25) (alterations omitted). And the PE Sponsors “undertook stunning

efforts to conceal their actions,” demonstrating they were conscious wrongdoers. Op. 1–2, 15–16.

While the PE Sponsors continue to profess they have “no realistic prospect” of profiting from their misdeeds, OB 40, the trial court found to the contrary. The Vice Chancellor noted that the PE Sponsors “tout successful track records and have turned sizable profits on their investments—even those that initially underperformed.” Op. 83. Statements by the PE Sponsors and their co-conspirators show they “remain bullish on VitalCaring’s prospects.” Op. 83; B1216–17; B1354–55.⁶ The trial court concluded that “it would be inequitable for the defendants (and Anthony) to retain the entirety of such gains simply because this trial occurred before they were realized.” Op. 84.

Defendants’ overarching critique is that the Court of Chancery’s “vertical” constructive trust is, purportedly, “unprecedented.” OB 1, 8, 41, 43, 45. Defendants overstate this point. *See infra* II.C.2. But their critique rests on a false premise. Equity’s powers “are not necessarily limited by a lack of early precedents.” *Lichens Co. v. Standard Com. Tobacco Co.*, 40 A.2d 447, 452 (Del. Ch. 1944); *see also In re Stream TV Networks, Inc. Omnibus Agreement Litig.*, 283 A.3d 1183, 1193 (Del. Ch.

⁶ [REDACTED]

2022) (“[T]he fact that a particular form of relief is unprecedented does not mean it is unwarranted or unavailable.”). “Equitable remedies . . . are distinguished by their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use.” Pomeroy, *supra*, § 109; *see also id.* § 170 (“It is absolutely impossible to enumerate all the special kinds of [equitable] relief which may be granted, or to place any bounds to the power of the courts in shaping the relief[.]”). “[T]he Chancellor always has had, and always must have, a certain power and freedom of action, not possessed by the courts of law, of adapting the doctrines which he administers.” *Schoon v. Smith*, 953 A.2d 196, 204 (Del. 2008) (quoting Pomeroy, *supra*, § 60); *see also Wilmont Homes, Inc. v. Weiler*, 202 A.2d 576, 580 (Del. 1964). One of the Court of Chancery’s enduring strengths is its “readiness to adapt to the circumstances of each case and craft appropriate remedies.” *Taylor v. Jones*, 2006 WL 1510437, at *5 (Del. Ch. May 26, 2006); *see, e.g., Shawe v. Elting*, 157 A.3d 152, 155 (Del. 2017) (affirming appointment of custodian to sell deadlocked company); *Paramount Commc’ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 51 (Del. 1994) (affirming injunction prohibiting enforcement of defensive measures); *In re Loral Space & Commc’ns Inc.*, 2008 WL 4293781, at *33 (Del. Ch. Sept. 19, 2008) (reforming stock issuance to remedy fiduciary breach); *Portnoy v. Cryo-Cell Int’l, Inc.*, 940 A.2d 43, 82 (Del. Ch. 2008) (ordering new stockholder

meeting following tainted vote); *Hollinger*, 844 A.2d at 1081 (refusing to enforce bylaw amendments inequitably adopted by controlling stockholder).

Defendants' position is that, rather than craft an equitable remedy in keeping with this tradition, the Court of Chancery should have thrown up its hands and left defendants free to profit from their misdeeds. Defendants' position defies a fundamental maxim of equity: "Equity will not suffer a wrong without a remedy." *In re Del. Pub. Sch. Litig.*, 239 A.3d 451, 511 (Del. Ch. 2020). The constructive trust ordered in this case was an appropriate exercise of the Court of Chancery's equitable authority to remedy breaches of the duty of loyalty.

2. Delaware law permits a constructive trust over future proceeds.

Defendants claim that the trial court committed legal error because a constructive trust must be placed on "specific property or identifiable proceeds of specific property." OB 28 (citation omitted). But the constructive trust in this case satisfies that test. As defendants acknowledge elsewhere, "the wrongfully obtained property was the shares of HCH, Vital, and Kare," OB 35, which were "the platform assets used to launch VitalCaring." Op. 40. The constructive trust contains the proceeds of those shares: the profits of Topco available for distribution to Topco's equity investors. Op. 105; CTO ¶2(d). Defendants do not dispute that those proceeds can be readily identified and tallied when realized.

Boiled down, defendants' argument is that proceeds are not "identifiable" if they are not quantifiable to an amount certain at trial. Defendants, however, cite no case that has adopted this cabined view of constructive trusts.⁷ Authorities inside and outside of Delaware recognize that a constructive trust may be imposed on future proceeds of property, including future profits of an enterprise.

Treatises recognize such a constructive trust. In his seminal treatise on equity, Pomeroy explained that "[p]roperty which has been appropriated by another, and upon which a trust character has been fixed, may in equity be followed, either in its original *or in any altered form*, so long as it can be identified" Pomeroy, *supra*, § 1058 (emphasis added). Thus, Pomeroy observed, a constructive trust may be placed on the future proceeds of a life insurance policy. Pomeroy, *supra*, § 1058c. Pomeroy also noted that, if a constructive trustee "delays to convey the property to its beneficial owner," and thereafter profits from it, those future profits must be paid to the beneficiary. *Id.* § 1058.

The Restatement (Third) of Restitution and Unjust Enrichment specifically recognizes that a constructive trust may be placed over "future revenues" even when "[d]amages from [a fiduciary's] disloyalty would be purely speculative." § 55 cmt.

⁷ The "identifiable" requirement, rather, exists to ensure that the property subject to the trust is "not so mingled up with other moneys or property that it can no longer be specifically separated." Pomeroy, *supra*, § 1058c; *see Hogg*, 622 A.2d at 652.

c, illus. 4. Contrary to defendants’ description, the constructive trust in the Restatement’s underlying illustration was not placed over the “lease rights themselves,” which had been transferred to a third party. OB 34. The constructive trust was awarded on the royalties generated by the lease rights—in other words, the property’s future proceeds.⁸

The United States Supreme Court ordered a constructive trust on future profits in *Snepp v. United States*. 444 U.S. 507, 515 (1980). In that case, a former CIA agent published a book in breach of his obligations to submit the material to the agency for prepublication review. *Id.* at 510. The Supreme Court placed a constructive trust on all of Snepp’s profits, including future royalties, finding that “[t]his remedy is the natural and customary consequence of a breach of trust.” *Id.* at 515; *see also id.* at 508 n.2.

The Court of Chancery ordered a similar remedy in *PharmAthene, Inc. v. SIGA Technologies, Inc.*, providing the plaintiff with an “equitable payment stream” over 50% of a drug’s future profits as a remedy for the defendant’s breach of a preliminary agreement to partner with the plaintiff on the drug’s development. 2011

⁸ Defendants also point to the discussion in the next illustration in the Restatement about the wrongdoer receiving a credit for the amount spent to acquire the lease rights. OB 34. As discussed below, the Court of Chancery’s constructive trust compensates defendants for their capital contributions to VitalCaring. *See infra* II.C.3.

WL 4390726, at *34 (Del. Ch. Sept. 22, 2011), *aff'd in part, rev'd in part*, 67 A.3d 330 (Del. 2013). The trial court explained that this remedy operated “somewhat similarly to an award of a constructive trust or of an equitable lien” and “comport[ed] with the Court’s authority to provide relief ‘as justice and good conscience might require.’” *Id.* at *38. After this Court later held that expectation damages are available for a breach of a preliminary agreement, 67 A.3d at 351, the Court of Chancery decided on remand to award damages instead. 2014 WL 3974167 (Del. Ch. Aug. 8, 2014), *aff'd*, 132 A.3d 1108 (Del. 2015). But neither that court nor this one questioned the equitable foundation of the trial court’s initial remedy.

Defendants dismiss *PharmAthene* by arguing that the case involved a “contractual obligation” and the court sought to impose a “compensatory remedy.” OB 33. The first distinction does not help defendants. The policing of trust relationships “affords the widest field for the jurisdiction of equity in granting its special remedies.” Pomeroy, *supra*, § 1030. The second distinction selectively quotes and therefore mischaracterizes *PharmAthene*’s reasoning. Other portions of the decision demonstrate that the court also regarded the equitable payment stream as a restitutionary remedy to address the defendant’s unjust enrichment. *See* 2011 WL 4390726, at *38.

Against these authorities, defendants cite no case supporting their claim that “Delaware law does not allow a constructive trust” over future proceeds. OB 29. *Maric HealthCare, LLC v. Ramirez-Groothuis* did not address that issue because the plaintiff failed to prove liability. 2026 WL 1031702, at *10 n.150 (Del. Ch. Apr. 16, 2026). In *Cantor Fitzgerald, L.P. v. Cantor*, the competing venture was inactive and so there were no “revenue producing enterprises upon which a constructive trust should or even could be imposed.” 2000 WL 307370, at *29. VitalCaring is an operating—and growing—business.⁹ Op. 34, 83–84; B122–24; B125–70; B171–74;

The Court of Chancery’s remedy is therefore not “a trust over thin air.” OB 32. The trust holds the equity value of VitalCaring. Defendants are wrong when they say this property “do[es] not exist” simply because it cannot be reduced to dollars and cents today. OB 31. Like shares of stock, the trust provides plaintiffs with an

⁹ Defendants’ non-Delaware authorities are also inapposite. OB 30 n.12. In *Indeck Energy Services, Inc. v. DePodesta*, the plaintiff failed to prove usurpation of corporate opportunity. 183 N.E.3d 746, 761 (Ill. 2021). Similarly, in *Turner v. American Metal Co.*, the court found no usurpation because of the “speculative nature of the enterprise.” 268 A.D. 239, 253 (N.Y. App. Div. 1944). *Homestake Mining Co. v. Mid-Continent Exploration Co.* questioned the availability of relief for the same reason and found the claim barred by laches. 282 F.2d 787, 800–01 (10th Cir. 1960). In both *Law Offices of Christy Lee, P.C. v. Rae*, 2025 WL 1381887, at *11 (D. Alaska May 13, 2025), and *Corrello v. Corrello*, 2016 WL 7474349, at *7 (N.J. Super. Ct. App. Div. Dec. 29, 2016), the court denied pre-trial motions to impose constructive trusts as premature. *Hy-Vee, Inc. v. Walcott Coliseum* was a worker’s compensation case involving subrogation, not breach of trust. 690 N.W.2d 695, 2004 WL 1853923, at *1 (Iowa Ct. App. 2004) (TABLE).

economic claim on VitalCaring's profits. Nothing in law or equity prohibits such a constructive trust.

3. Equity does not require that a constructive trust include an immediate conveyance of property for cash reimbursement.

Defendants next argue that a constructive trust must “restore status quo,” which they define as “the positions [the parties] would have occupied if defendants had not seized the corporate opportunities and plaintiffs had instead paid to acquire them.” OB 35. Defendants’ cases do not declare such a rigid rule, and it does not exist. The Court of Chancery’s mandate following a loyalty breach is to “extinguish[] all possibility of profit,” *Guth*, 5 A.2d at 510, while doing equity. This may, in some circumstances, call for an immediate conveyance of the property. But that does not hold in every case. The constructive trustee’s obligation “to surrender the constructive trust property to the claimant” is subject to “such conditions as the court may direct.” RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55(2).

“The facts of this case create unusual complications” to an immediate conveyance of HCH’s, Vital’s, and Kare’s shares to plaintiffs. Reargument Op. 11. Among them, EHC and Enhabit became separate companies following the usurpation. A342 ¶¶81–82. The three usurped companies, which “were the platform assets used to launch VitalCaring,” have been merged and integrated with each other

and with additional companies acquired as part of defendants’ “buy-and-build” strategy. Op. 34, 40; A341–42 ¶¶76, 77, 80. Even if these and other complexities to conveyance could be overcome, plaintiffs would be left holding businesses run by the same management team that defrauded them. What defendants call an “authentic constructive trust remedy” (OB 36) was impractical.

The same was true of a “horizontal” constructive trust where plaintiffs would receive 100% of VitalCaring’s profits after the PE Sponsors recovered their capital contributions. As the trial court observed, this remedy would have created “perverse incentives” because Nautic and Vistria would be “incentivized only to recover their investments,” rather than maximizing profits. Reargument Op. 9–10; *see* Op. 88. Defendants’ suggestion that the trial court should have countenanced such a value-destructive result only demonstrates their misunderstanding of equity. *See* OB 43.

The trial court’s “vertical” constructive trust mitigated these problems. And, contrary to defendants’ assertion, this structure compensated the PE Sponsors for their capital contributions. They were compensated through the 57% interest they retained in VitalCaring, reflecting the proportion of their capital contributions to the projected value of VitalCaring upon exit. Op. 105. If VitalCaring achieves or exceeds those projections, defendants will be fully reimbursed for their capital contributions. They may even profit.

Defendants complain they are not compensated for their capital contribution up front and in cash. OB 26–27, 40–41. As the trial court correctly observed, “there is no requirement in law or equity that wrongdoers be reimbursed for their contributions before a constructive trust is imposed.” Reargument Op. 10.¹⁰ There is no requirement that defendants be reimbursed for their contributions at all. *See, e.g., Snapp*, 444 U.S. at 510 (imposing constructive trust over profits without first requiring reimbursement); *Grove v. Brown*, 2015 WL 4076435, at *1 (Del. Ch. June 30, 2015) (granting plaintiffs a “fifty percent ... interest in [the usurped business]” without first requiring reimbursement). The trial court did not abuse its discretion in devising a constructive trust where defendants are reimbursed through a continued interest in VitalCaring.

4. The constructive trust neither improperly punishes defendants nor rewards plaintiffs.

Defendants lastly argue that the trial court’s remedy is “unlawfully punitive” and improperly provides plaintiffs with a “recovery.” OB 42, 46. Neither is true, and none of defendants’ arguments establish that the Court of Chancery abused its discretion.

¹⁰ Defendants falsely claim the trial court based this statement on *Stephanis v. Yiannatsis*, 1994 WL 198711 (Del. Ch. May 9, 1994). The trial court cited that case when deciding a different issue—whether defendants should be reimbursed for their cost of capital. *See* Reargument Op. 19.

Defendants first claim that “the Court’s analysis demonstrates” that “the PE Sponsors and Topco reaped no profits from the VCG Acquisitions and had no realistic prospect of doing so.” OB 40. That mischaracterizes the trial court’s decision. The trial court found that VitalCaring’s projected equity value at exit was \$580.9 million, generating an approximately \$250 million profit on the PE Sponsors’ capital contributions. *See* Op. 104, 106. Only if the PE Sponsors are compensated for their cost of capital at a high enough rate are they deemed to have not “profited.” Op. 104.

As below, defendants have cited “no authority providing that wrongdoers are entitled to reimbursement for their cost of capital in a constructive trust.” Reargument Op. 19. That is a matter of the trial court’s discretion. *See Yiannatsis*, 1994 WL 198711, at *3. As the Vice Chancellor explained, “dividing the present value of Nautic and Vistria’s target exit proceeds from their expected gains” was one way of allocating VitalCaring’s proceeds within the constructive trust. Op. 102. “But it is not the only way.” Op. 105. The trial court instead “conceptualize[d] the allocation percentage [] as Nautic and Vistria’s rate of recovery, or how much upon exit they could recover on each dollar they contributed to the enterprise.” Op. 105. This method “provides a rough proxy for the value one could attribute to Nautic and Vistria’s return on invested capital.” Reargument Op. 18. The Vice Chancellor’s

allocation method “was based upon conscience and reason, as opposed to capriciousness or arbitrariness,” so it was not an abuse of discretion. *Gatz Props., LLC v. Auriga Cap. Corp.*, 59 A.3d 1206, 1221 (Del. 2012).

Defendants also complain that “the Court’s trust is punitive because it negatively impacts VCG’s operations.” OB 45. The facts belie defendants’ rhetoric. The trial court provided the trustee with minimal information and consent rights, and plaintiffs with none.¹¹ CTO ¶¶17–19. VitalCaring continues to grow both organically and through acquisitions. Op. 34, 83–84; B1354–55. [REDACTED]

[REDACTED]¹² Regardless, the trial court considered that “ongoing monitoring” could be a “downside to this remedy,” but nonetheless found its constructive trust appropriately “balance[d] the equities with the hazards of creating incentive misalignment.” Op. 106–07. That was an appropriate exercise of discretion.

Defendants next argue that the Vice Chancellor improperly sought to provide plaintiffs a “recovery.” OB 42–44. That too mischaracterizes the trial court’s

¹¹ Defendants agreed to the notice and consent rights complained of in their brief. The same is true of the provisions in the CTO for dilutive issuances.

¹² [REDACTED]

decision. As the trial court explained in the rest of a sentence that defendants only partially quote, the trial court’s “goal was to allow the plaintiffs to recover a portion of VitalCaring’s net profits *while ensuring that Nautic and Vistria could recover their investment and remain incentivized to grow the business.*” Reargument Op. 5 (emphasis added). The constructive trust was therefore designed to cause the PE Sponsors to disgorge their expected profits to plaintiffs, to compensate the PE Sponsors for their capital contributions, and to ensure that the PE Sponsors and VitalCaring’s management remained incentivized to maximize value. Op. 88. The result was “a balanced remedy that is equitable and reasonably tailored to address the precise nature of the misconduct at issue.” *Agilent Techs., Inc. v. Kirkland*, 2010 WL 610725, at *24 (Del. Ch. Feb. 18, 2010).

Finally, defendants’ argument that the constructive trust “awards Plaintiffs a free ride” is inaccurate and misstates the relevant inquiry. OB 46. There is no requirement that a plaintiff “earn” a defendant’s ill-gotten gains. Indeed, there is no dispute that had defendants already realized profits from VitalCaring, the Court of Chancery could have disgorged those profits to plaintiffs. The constructive trust simply provides a mechanism to disgorge defendants’ profits when they are realized, while preserving incentive alignment in the interim. Defendants complain that plaintiffs do not have the same downside risk on the VitalCaring investment that they

do, but defendants ignore that, through their (at least) 57% interest, they have retained significant upside on the investment. That is “arguably more than [defendants] are entitled to under *Guth*.” Reargument Op. 12.

Defendants’ criticism of the constructive trust misses *Guth*’s core teaching. It is *not* inequitable for a wronged beneficiary to be awarded profits that the beneficiary may not have ever realized had there been no breach of fiduciary duty. It *is* inequitable for disloyal fiduciaries and those who abet them to retain profits, or even the possibility of future profit, obtained in breach of duty. As *Guth* long ago explained, disgorgement of “all benefit and profit” under these circumstances does not “rest upon the narrow ground of injury or damage to the corporation.” 5 A.2d at 510. It rests upon “the broader foundation of a wise public policy that, for the purpose of removing all temptation, extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation.” *Id.*

The Court of Chancery’s constructive trust does not give plaintiffs a “free ride.” It ensures defendants do not get a free pass. In granting plaintiffs a constructive trust over VitalCaring’s future profits, the trial court heeded *Guth*’s command.

III. PLAINTIFFS ARE ENTITLED TO RECOVER AS MITIGATION DAMAGES THEIR TEXAS LEGAL FEES AND COSTS.

A. Question Presented

Whether plaintiffs should have been awarded as mitigation damages the \$11,102,369.39 in attorneys' fees and costs they incurred in the Texas litigation against Anthony. A1046–47; A1245.

B. Scope of Review

“Damages awards are reviewed under an abuse of discretion standard.” *Gatz Props., LLC*, 59 A.3d at 1220–21. The factual findings underlying the award are reviewed for clear error, *SIGA Techs., Inc. v. PharmAthene, Inc.*, 132 A.3d 1108, 1128 (Del. 2015), but this Court’s “review of embedded legal issues is *de novo*,” *Holifield v. XRI Inv. Hldgs. LLC*, 304 A.3d 896, 937 (Del. 2023).

C. Merits of Argument

Delaware law has long allowed plaintiffs to recover their reasonable costs of mitigating a defendant’s wrongful conduct. *See Wise v. W. Union Tel. Co.*, 181 A. 302, 305 (Del. Super. 1935). Recoverable mitigation costs include “legal fees” from “related litigation” pursued “to mitigate the damage inflicted by” a defendant’s wrongdoing. *Paron Cap. Mgmt., LLC v. Crombie*, 2012 WL 2045857, at *8 (Del. Ch. May 22, 2012), *aff’d*, 62 A.3d 1223 (Del. 2013) (TABLE). This is not fee-shifting in derogation of the American Rule, but a reflection of the well-settled

damages principle that “[o]ne who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover” the expenses of that earlier litigation. RESTATEMENT (SECOND) OF TORTS § 914(2) (1979); *see also Ramada Inns, Inc. v. Dow Jones & Co.*, 543 A.2d 313, 331 (Del. Super. 1987) (“[W]hether characterized as an exception to the American Rule or as a rule in its own right, § 914(2) of the Restatement, Second, Torts allows for the recovery of legal fees and costs from an earlier action”); *Paradee v. Paradee*, 2010 WL 3959604, at *16 (Del. Ch. Oct. 5, 2010) (the defendant “must bear the cost of remedying [] breaches of fiduciary duty”).

The evidence at trial here established that plaintiffs incurred \$11,102,369.39 in attorneys’ fees and costs for the Texas litigation (Op. 110; A484/447:10–23; B832–74; B875–99; B1001–29; B1030; B1031–45; B1046), and that those damages were a natural consequence of defendants’ misconduct as adjudicated in Delaware. A484/446:10–447:23; B25–27/184:17–186:3. Defendants even foresaw as much: Ropes warned that defendants’ and Anthony’s scheme, once discovered, would prompt plaintiffs to “move very quickly” for “injunctive relief” against Anthony. B551. The Texas fees and costs were thus a “natural and proximate consequence” of defendants’ wrongdoing, and, therefore, recoverable in this litigation. *Pharm.*

Prod. Dev., Inc. v. TVM Life Sci. Ventures VI, L.P., 2011 WL 549163, at *6 (Del. Ch. Feb. 16, 2011).

Though acknowledging that plaintiffs’ position “has merit on its face,” the trial court denied recovery on the ground that an award “would be an end-run around the judgment of a sister court,” which the trial court thought had “determined that each party in that matter had to bear its own fees and costs consistent with Texas law.” Op. 110. The Court of Chancery’s finding was incorrect for two independent reasons, one factual and one legal. First, as to the procedural facts, the Texas court never adjudicated—because plaintiffs never presented—a claim for plaintiffs’ fees and costs. B948/1700:20–24. Second, whether plaintiffs could have recovered the subject fees from Anthony under Texas law has no bearing on whether they may recover those fees as damages for defendants’ fiduciary breaches under Delaware law.

With respect to the first issue, the Texas court did not deny plaintiffs their fees and costs as against Anthony, nor could it have: the issue was never before the Texas court. Plaintiffs expressly disclaimed any fee request, explaining that fees were “not” being sought “in this proceeding” because “that is a matter to go to arbitration” pursuant to Anthony’s employment agreement. B948/1700:20–24; B384–86 §§6(f),

(q). The only fee application before the Texas court was Anthony's, which was denied. B999 ¶180; B1071–72

The language the trial court read as a fee ruling was the final judgment's boilerplate recitation that "the parties shall bear their own costs and attorneys' fees." Op. 110 (citing B1367). Such a residual clause does not adjudicate—much less bar—claims that were not and could not have been brought in the earlier proceeding. *See Compania Financiara Libano, S.A. v. Simmons*, 53 S.W.3d 365, 367 (Tex. 2001) (boilerplate language that "all relief not expressly granted herein . . . is denied" does not adjudicate claims that "could not have been brought"); *see also Farm Bureau Cty. Mut. Ins. Co. v. Rogers*, 455 S.W.3d 161, 163–64 (Tex. 2015) (per curiam) (holding that "language taxing courts costs" did not dispose of an unraised claim for attorneys' fees). There was thus no "judgment of a sister court" to end-run.

With respect to the second issue, the availability and propriety of *fee-shifting* in the Texas litigation (an issue the Texas court never passed on) has no bearing on the availability and propriety of awarding the Texas fees and costs as *damages* in this case. The trial court cited as grounds for its decision the Texas Covenant Not to Compete Act, which it reasoned would have barred fee-shifting (had plaintiffs sought it) in Texas. Op. 110 & n.557 (citing *Franlink, Inc. v. GJMS Unlimited, Inc.*, 401 S.W.3d 705, 712 (Tex. App. 2013)). But whether fee-shifting was available

against Anthony under a Texas statute applicable to the claims against her is irrelevant to the question of whether defendants who have violated Delaware law owe as mitigation damages the fees and costs plaintiffs incurred as a result of those violations. That question is governed by Delaware law, *Naughty Monkey LLC v. MarineMax Ne. LLC*, 2010 WL 5545409, at *8 n.59 (Del. Ch. Dec. 23, 2010), which directs that damages for disloyalty “not [] be determined narrowly,” *Triton*, 2009 WL 1387115, at *28.

CONCLUSION

The judgment of the Court of Chancery should be affirmed with respect to its finding of aiding and abetting liability and its awarding of a constructive trust as a remedy for that liability. The Court of Chancery's December 2, 2024 post-trial memorandum opinion should be vacated solely with respect to its denial of plaintiffs' request for \$11,102,369.39 in mitigation damages for their attorneys' fees and costs incurred in the prosecution of the Texas action (plus pre- and post-judgment interest), and the case should be remanded for further proceedings on that issue.

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