



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

Court Below:

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

PUBLIC VERSION

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APPELLANTS/CROSS-APPELLEES' REPLY/ANSWERING BRIEF

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INTRODUCTION

Plaintiffs mischaracterize the nature and scope of this appeal, claiming that Defendants seek a determination that “Delaware law absolves them of liability.” AB 2.¹ That is false. The trial court found that Defendants aided and abetted three types of fiduciary breaches: usurpation of corporate opportunities, wrongful solicitation of employees, and misuse of confidential information. AB 7-8, 14, 16, 27. Defendants are not appealing the lower court’s findings on, or any remedy associated with, the latter two claims. And Defendants have paid more than \$43 million of monetary damages and attorneys’ fees awarded by the court below. Ex. A, (“Op.”) at 109-113.²

Nor are Defendants challenging, for purposes of this appeal, any findings of fact associated with Plaintiffs’ claim that Defendants aided and abetted the Executives’ usurpation of corporate opportunities. On that claim, Defendants are appealing only: (1) the court’s legal determination that Defendants could be held liable for aiding and abetting the usurpation absent proof that Plaintiffs suffered damages as a result of the concerted action between Defendants and the Executives; and (2) the court’s decision to award Plaintiffs a constructive trust remedy that gives

¹ “AB” refers to Plaintiffs’ Answering Brief.

² Exhibits A-G cited herein refer to the exhibits to Defendants’ opening brief.

Plaintiffs a 43% share of VCG’s future proceeds—instead of the right to purchase VCG for what Defendants paid for it—placing Plaintiffs in a far better position than the *status quo ante* and, at the same time, punishing Defendants.

Plaintiffs devote much of their brief to reciting findings of fact that are irrelevant to these two issues on appeal, as well as post-judgment “facts” outside the record that, when scrutinized, undermine their positions. With respect to the trial court’s factual findings, Plaintiffs seek to convince this Court that, because Defendants’ conduct was bad, Defendants deserve what they got, even if the remedy clashes with Delaware law. Plaintiffs’ strategy in introducing post-judgment “facts” is equally transparent: portray VCG and its future in an unrealistically favorable light. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] What sets this case apart is that Defendants reaped no gain and Plaintiffs suffered no injury from the usurped “opportunities.”

None of Plaintiffs’ tactics justify discarding clear Delaware law regarding the elements of an aiding-and-abetting claim. Aiding-and-abetting liability requires proximately caused damages, and the trial court found the evidence presented did

not show that usurpation harmed Plaintiffs. The trial court concluded that it “remains a mystery” whether Encompass would have pursued the VCG businesses. Op. 56. And even if Plaintiffs had made the VCG Acquisitions, the trial court did not find they would have benefitted. To the contrary, the court found that VCG’s equity had lost value (Op. 102); that neither Plaintiffs’ fiduciaries nor any Defendant had profited (Op. 2, 92, 102); and that any damages award for the usurpation would be speculative and therefore impermissible. Op. 80-82. Further, the Court found “[t]here is no evidence in the record suggesting that VitalCaring is on track to meet Nautic’s and Vistria’s 2021 and 2022 projections. Quite the opposite.” Op. 92. Plaintiffs do not challenge any of these findings.

Nor do Plaintiffs’ tactics warrant the abandonment of well-settled Delaware law regarding the mechanics and purpose of a constructive trust. The trial court could have imposed a conventional constructive trust that would have required Plaintiffs to pay Defendants’ acquisition costs in exchange for ownership of the opportunities. That would have been consistent with the equitable purpose of a constructive trust, which is to restore the *status quo ante*, not to punish the defendant or manufacture a “recovery” for plaintiffs in the absence of proven damages. The only opportunity Plaintiffs lost here was the chance to acquire the usurped companies’ stock at its then-fair-market value. A traditional constructive trust

granting Plaintiffs the right to buy that stock in exchange for its cost would have given them what was taken. Plaintiffs, however, spurned that remedy because the assets were not worth anything close to what Defendants paid for them—confirming that Plaintiffs were not injured and Defendants did not benefit from the acquisitions. Nevertheless, the court below granted Plaintiffs a constructive trust remedy that punished Defendants, gave Plaintiffs a windfall, and put Plaintiffs in a far better position than the *status quo ante*.

Finally, this Court should affirm the trial court’s ruling that Plaintiffs are not entitled to recover as “mitigation damages” the attorneys’ fees and costs from their Texas lawsuit to enforce Anthony’s non-compete agreement. The Texas court already settled the issue by ruling that the contract was governed by Texas law and that the parties should bear their own fees and costs. Because Texas public policy prohibits an employer from recovering fees incurred in seeking to enforce an overbroad non-compete agreement, the court below was well within its discretion to refuse the requested fee award.

For these reasons, this Court should (1) reverse the trial court’s finding of aiding-and-abetting liability premised on the usurpation of corporate opportunities; (2) reverse and vacate the trial court’s constructive trust remedy; and (3) affirm the

trial court's ruling that Plaintiffs are not entitled to recover their Texas attorneys' fees.

REPLY ARGUMENTS ON APPEAL

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

Plaintiffs failed to prove that Defendants' aiding and abetting of the Executives' usurpation caused Plaintiffs any damages. The trial court found that "[w]hether Encompass would have passed on the opportunities remains a mystery," and that Plaintiffs' claim for usurpation damages in the form of lost profits was "based on unreliable projections anticipating a future that never came to pass." Op. 56, 82. Without a finding that the usurpation caused Plaintiffs any damages or harm, the trial court's imposition of aiding-and-abetting liability and its associated constructive trust remedy was error.

Nothing in Plaintiffs' answering brief alters this conclusion. *First*, Plaintiffs ask this Court to disregard black-letter law requiring proof of proximately caused damages for an aiding-and-abetting claim. *Second*, Plaintiffs did not—and could not—prove they were harmed by Defendants' VCG Acquisitions. Plaintiffs do not even attempt to argue that they would have made or even pursued the VCG Acquisitions. The closest they come is one footnote asserting that Plaintiffs' CFO "testified plaintiffs would have been interested in pursuing the opportunities" and that "Plaintiffs' employees testified that plaintiffs had the capacity for pursuit." AB

37 n.5. This self-serving testimony is a far cry from showing that Plaintiffs would have pursued, much less completed and benefitted from, the acquisitions. The trial court found Plaintiffs made no such showing. Op. 56. Recognizing this, Plaintiffs also claim the “proximately caused damages” element was satisfied based on findings of harm unrelated to the usurpation. AB 34, 39. But the law requires more—namely, a causal connection between the harm and the usurpation that is absent here.

A. Plaintiffs Must Prove Defendants’ Usurpation Proximately Caused Plaintiffs Harm.

1. Delaware Law Requires Proof Of Proximately Caused Damages.

Delaware law is clear that proximately caused damages are an essential element of a claim for aiding and abetting breach of fiduciary duty. *Malpiede v. Townson*, 780 A.2d 1075, 1096 (Del. 2001) (“[T]he four elements of an aiding and abetting claim” include “damages proximately caused by the breach.”). This Court recently confirmed that “[t]he basic four-part test for proving an aiding and abetting claim is well-settled under Delaware law and was articulated by this Court in *Malpiede*. The test requires ... damages proximately caused by the breach.” *In re Mindbody, Inc., S’holder Litig.*, 332 A.3d 349, 389 (Del. 2024). Plaintiffs rely on *Santa Fe*, a 1995 Delaware Supreme Court case, to argue otherwise. AB 35. But

Delaware law has plainly evolved since *Santa Fe*. As the Court of Chancery recognized in 1999—four years after *Santa Fe*—“[t]he courts of this state have added a fourth requirement—the necessity of alleging damages.” *In re Lukens Inc. S’holders Litig.*, 757 A.2d 720, 734 (Del. Ch. 1999). Plaintiffs’ other authorities—*Nash* (an unpublished Court of Chancery decision) and *Zimmermann* (a case where the aiding-and-abetting claim failed for lack of breach)—cannot overcome this clear precedent. Notably, Plaintiffs cite no Delaware Supreme Court opinion involving an aiding-and-abetting claim post-dating *Malpiede* that omits the causation and damages requirement.

This requirement of proximately caused damages is grounded in tort law. “An aiding and abetting claim is a tort claim.” *Principal Growth Strategies, LLC v. AGH Parent LLC*, 2024 WL 274246, at *6 (Del. Ch. Jan. 25, 2024). “The basic elements of a common-law tort are familiar” and include “***injury, and a causal connection between the breach and an injury that is sufficient to warrant a remedy.***” *Young Women’s Christian Ass’n of Rochester & Monroe Cnty. v. Hatteras Funds, LP*, 356 A.3d 459, 480 (Del. Ch. 2026). By contrast, a “breach of fiduciary duty [] is an ***equitable*** tort.” *Principal Growth Strategies, LLC*, 2024 WL 274246, at *6. Unlike a tort against a third party, it is “derived from a special relationship between one person and another[.]” J. Travis Laster & Michelle D. Morris, *Breaches of Fiduciary*

Duty and the Delaware Uniform Contribution Act, 11 Del. L. Rev. 71, 89 (2010).³ Corporate fiduciaries owe a duty of loyalty to their corporation; if they breach that duty, they can be held liable regardless of whether their breach caused harm. *Beard Rsch., Inc. v. Kates*, 8 A.3d 573, 601 (Del. Ch. 2010). Non-fiduciaries are treated differently because they owe no such duty. Thus, “[b]ecause an equitable tort differs from a common law tort, it should come as no surprise that an equitable tort could involve different burdens of proof and elements.” Laster & Morris, *supra*, at 96. On this basis, Delaware courts “distinguish[] this equitable tort from common law torts” that, unlike fiduciary-breach claims, “require not only a duty and breach but also injury, and a causal connection between the breach and injury.” *Henkel of Am., Inc. v. Bell*, 825 F. App’x 243, 254 (6th Cir. 2020) (citation and quotations omitted). The distinction therefore turns on whether the defendant is a fiduciary with a “special relationship” to the plaintiff or a non-fiduciary whose liability arises under tort law—*not*, as Plaintiffs suggest (AB 35), on the nature of relief sought.

2. Plaintiffs’ Equitable Remedy Exception Is Unsupported.

Plaintiffs nevertheless argue that proximately caused damages are not required “where other forms of relief, like equitable relief, are sought.” AB 35. The

³ All emphasis has been added unless otherwise noted.

law does not support this distinction. Aiding and abetting is a common-law tort requiring proof of proximately caused harm regardless of the remedy sought. *Malpiede*, 780 A.2d at 1096. Notably, Plaintiffs cite no case holding that the proximately caused damages element of an aiding and abetting claim applies only “where damages are the relief sought,” AB 35, or that it somehow falls away if plaintiff seeks only equitable relief. And even if such a distinction existed, it would not apply where, as here, Plaintiffs sought and obtained the equivalent of a damages award—a “vertical” constructive trust giving them a substantial chunk of VCG’s proceeds long before Defendants might ever reach profitability.

Regardless, Delaware case law makes clear that plaintiffs bringing an aiding-and-abetting claim must plead and prove causation and injury even when seeking only equitable remedies. *See, e.g., McGowan v. Ferro*, 859 A.2d 1012, 1041 (Del. Ch. 2004) (recognizing requirement of “damages proximately caused by the breach” where plaintiff sought a constructive trust over profits realized from allegedly appropriated business opportunities). The very cases Plaintiffs cite required all four elements despite plaintiffs seeking equitable relief. AB 36 (citing *In re Del Monte Foods Co. S’holders Litig.*, 25 A.3d 813, 836 (Del. Ch. 2011) (recognizing the element of “damages proximately caused by the breach” where plaintiff sought an injunction); *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) (requiring plaintiff to “establish[] that an injury occurred” and “demonstrate that the defendant caused the injury” where plaintiff sought disgorgement); *Goldstein v. Denner*, 2022 WL 1797224, at *10 (Del. Ch. June 2, 2022) (same requirement).

To excuse their failure to prove causation and damages, Plaintiffs mischaracterize Delaware law. Plaintiffs, for example, assert that “all” of the cases Defendants cited “involved demands for damages as the exclusive remedy.” AB 35. That is wrong. For example, *Gotham* (OB 19) did not “involve[] demands for damages as the exclusive remedy.” AB 35. The *Gotham* plaintiff sought rescission—an equitable remedy—and the court still recognized that aiding and abetting requires proof of “damages to the plaintiff resulted from the concerted action of the fiduciary and the non-fiduciary.” *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 172 (Del. 2002). The plaintiff in *Ross Holding* (OB 20) sought appointment of a receiver—another equitable remedy—and the court rejected the claim outright on the sole ground that “Plaintiffs ***have not demonstrated that they were damaged*** by the Board’s breaching its fiduciary duties ... [and] are therefore not entitled to an award under this theory.” *Ross Holding & Mgmt. Co. v. Advance Realty Grp., LLC*, 2014 WL 4374261, at *38 (Del. Ch. Sept. 4, 2014). Plaintiffs also misrepresent *Taita Chemical*, claiming the plaintiff “did not

plead disgorgement.” AB 36. Not so. There, applying Delaware law, the Fifth Circuit reversed the jury award that “was based on *disgorging* [] profits” because the jury had not been instructed that plaintiff was required to prove damages and there was “no evidence of any injury resulting from [the] aiding and abetting breach of fiduciary duty.” *Taita Chem. Co v. Westlake Styrene, LP*, 351 F.3d 663, 671 (5th Cir. 2003).

In sum, controlling Delaware law—including cases Plaintiffs cite—refute Plaintiffs’ attempt to excuse their failure to prove that usurpation caused them damages.

3. Plaintiffs’ “*Broz* Test” Argument Is Misplaced.

Plaintiffs also contend that they need not “prove they would have acquired the VCG businesses” because “Delaware precedent hold[s] that a plaintiff need not show likelihood of pursuit to prove usurpation of corporate opportunity.” AB 4, 37. This argument conflates two distinct legal issues: (i) whether, under *Broz*, a usurped opportunity was the plaintiff’s corporate opportunity (a determination that does not require proof of proximately caused harm), and (ii) proving *liability* for aiding and abetting (which *does* require such proof). The *Broz* test bears on *one element*—the underlying fiduciary breach—of a claim for aiding and abetting a usurpation; the test says nothing about the other three elements, including causation and injury. Thus,

Plaintiffs' reliance on cases discussing the *Broz* test is misplaced. In *In re eBay, Inc. S'holders Litig.* (AB 38), for example, the court denied a motion to dismiss a claim for aiding and abetting the usurpation of a corporate opportunity where plaintiffs alleged they had "been damaged because of the concerted actions of the individual defendants and Goldman Sachs." 2004 WL 253521, at *5 (Del. Ch. Feb. 11, 2004). In *Agranoff v. Miller* (AB 38), another case involving claims for aiding and abetting usurpation of corporate opportunities, the court applied all four elements and found liability only after determining that "through their joint actions," the fiduciary and the aider and abettor "damaged" plaintiffs. 1999 WL 219650 (Del. Ch. Apr. 12, 1999), *aff'd*, 737 A.2d 530 (Del. 1999). In short, because aiding and abetting claims, unlike fiduciary breach claims, are classic torts, they require proving causation and injury.

B. Plaintiffs Failed To Prove Causation Or Damages From Not Pursuing The VCG Acquisitions.

Plaintiffs asserted that Defendants' purported scheme involved three types of fiduciary breaches: solicitation, confidential information, and usurpation of corporate opportunities. *See* A1001; AB 1, 7-8. The trial court adopted this framework. AB 39. For the usurpation breach to have caused damage to Plaintiffs, the usurpation would have had to deny Plaintiffs an acquisition they would have made and profited from. *Triton*, 2009 WL 1387115, at *29 (finding "[n]o further

award is warranted in connection with the gross or net profits earned from the 195 jobs on which [fiduciary] worked for [aider and abettor]” because plaintiff “did not prove that it would have won” the usurped jobs “but for [defendants’] illicit acts”). Plaintiffs did not prove, and the Court made no finding of either fact. Plaintiffs claim that they “demonstrated below that they likely would have pursued the opportunities.” AB 37. But the trial court found otherwise, concluding that “[w]hether Encompass would have passed on the opportunities remains a mystery.” Op. 56. Plaintiffs do not appeal that finding and could not, in any event, show clear error.

Notably, Plaintiffs did try—and failed—to prove lost-profits damages based on the usurpation. Plaintiffs sought lost profits damages on the theory that, had they made the acquisitions, “their expected returns would have been at least as great as Defendants projected for themselves.” A1041. The trial court rejected this claim, finding it was “based on unreliable projections anticipating a future that never came to pass.” Op. 82. The trial court did not—and could not—find that Plaintiffs had suffered any damages for not making the VCG Acquisitions.

Plaintiffs also argue they proved they were damaged by not making the VCG Acquisitions because (1) the trial court awarded mitigation damages, (2) granted attorneys’ fees, and (3) found that VCG “got a head start at Encompass’s expense”

and that Plaintiffs faced “increased competition with a new home health care business ... armed with Encompass’s confidential information.” AB 34, 38-39. These arguments miss the mark because they are causally untethered from the loss of the usurped opportunities.

First, as Plaintiffs concede, the trial court awarded mitigation damages “***for the improper solicitation of plaintiffs’ employees***”—not for usurpation. AB 34. Damages from solicitation, therefore, lack “a sufficient causal linkage” to the constructive trust, such that the constructive trust is “an apt means for 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 and quotations omitted).

Second, Plaintiffs’ award of attorneys’ fees are not damages proximately caused by the usurpation. Plaintiffs argued that they were entitled to attorneys’ fees because of the “‘egregious’ nature of Defendants’ ‘underlying prelitigation conduct’” and “bad faith” conduct in “deleting evidence, creating a false paper record, abusing privilege, and lying under oath.” A1048. The Court agreed that such “actions warrant fee shifting under the bad faith exception to the American Rule.” Op. 112. Plaintiffs did not argue—and the Court did not find—that fees were damages proximately caused by the usurpations. *Id.* Plaintiffs cite no case

supporting that a plaintiff can justify an award of far-reaching equitable relief by pointing to its own legal expenses. Imposing a constructive trust to remedy the harm of attorneys' fees would be particularly inequitable here, where Defendants have already paid that fee award. Plaintiffs' position would also render meaningless the requirement of proximately caused damages in cases tried in the Court of Chancery, where virtually every plaintiff incurs substantial attorneys' fees.

Third, the court made no finding that a "head start" on VCG or "increased competition with a new home health care business . . . armed with Encompass's confidential information" (AB 39) actually *harmed* Plaintiffs. To the contrary, the trial Court found that "[w]hether the use of [confidential] information caused cognizable harm to Encompass or gains for the defendants is also opaque." Op. 63. Moreover, Plaintiffs did not even seek, much less prove, "head start" damages or damages from increased competition, which is unsurprising given that the VCG entities were preexisting companies among "over 11,000 home health providers across the country." A397(104:12-13).

Finally, Plaintiffs argue that "[n]o authority defendants cite ... supports the proposition that one remedy for aiding and abetting fiduciary breach must be 'causally tied' to another." AB 34. That misstates Defendants' position. Plaintiffs had to prove they were damaged by the usurpation to prevail on a claim for aiding

and abetting that usurpation. *Ross Holding & Mgmt. Co.*, 2014 WL 4374261, at *38. Here, at Plaintiffs’ request, the trial court imposed a constructive trust as a remedy for the usurpation without finding that the usurpation caused Plaintiffs harm. Plaintiffs cite *Caerus Grp., LLC v. Chemicar Europe NV*—a breach of contract case—for the principle that “[a] party seeking equitable relief need not allege quantifiable harm.” AB 39 (emphasis omitted). But even outside the tort context, that court explained it did “not understand established Delaware precedent to excuse a plaintiff from pleading facts supporting every element of a claim for breach of contract, including that a contractual breach caused some harm.” *Caerus Grp., LLC v. Chemicar Europe NV*, 2026 WL 668208, at *6 (Del. Ch. Mar. 10, 2026). Similarly, although the plaintiff in *Cantor Fitzgerald, L.P. v. Cantor* did not prove “any *specific quantifiable* harm,” the court recognized that “resulting damages to plaintiff” was a necessary element and found the defendant’s “actions caused ‘harm’ to or ‘damaged’” the plaintiff. 2000 WL 307370, at *24, *29 (Del. Ch. Mar. 13, 2000). The trial court did not find that Plaintiffs had lost anything by forgoing the VCG Acquisitions, and the court’s findings show that Plaintiffs actually avoided harm by not making those acquisitions.

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

Plaintiffs’ defense of the trial court’s unprecedented “constructive trust” relies heavily on maxims about the discretion afforded courts of equity and *Guth*’s general directive to “extinguish[] all possibility of profit” from a breach of fiduciary duty. *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939). But Plaintiffs ignore the equitable principles that *Guth* applied in the context of a direct fiduciary breach claim. The remedy awarded in *Guth* was straightforward and available to Plaintiffs here: a traditional constructive trust that would have awarded the wrongfully acquired property—*i.e.*, the shares of HCH, Vital, and Kare—at the price Defendants paid for it. That remedy would have eliminated any possibility of Defendants ever profiting and fully restored the *status quo ante* by transferring to Plaintiffs the stock they were denied the opportunity to purchase. Defendants would no longer enjoy any fruits of the underlying fiduciary breach, and Plaintiffs would own the usurped property at the same price they would have paid had they taken the opportunity to purchase it in 2021.

Although it would have been consistent with *Guth*, Plaintiffs did not seek a traditional constructive trust because they did not want one, and they did not want one because the value of the VCG businesses has plummeted. As the trial court found, VCG is in a “dismal state,” and any prospect of recovery depends on a “risky”

strategy requiring “additional (presumably debt-financed) acquisitions.” Ex. B, (“Reargument Op.”) at 5, 15. Thus, Plaintiffs had no interest in taking ownership of VCG at its 2021 price. And in refusing that traditional constructive trust remedy, Plaintiffs made clear they do **not** expect that Defendants’ years-old investment in VCG will be profitable.

The trial court granted Plaintiffs its unprecedented “vertical” constructive trust remedy despite its finding (and Plaintiffs’ clear belief) that Defendants are worse off for making the VCG Acquisitions. In doing so, the trial court ran afoul of several bedrock principles of equity.

First, the trial court granted a “constructive trust,” not over the wrongfully acquired property—the shares of the usurped companies—but over a portion of any proceeds that VCG might generate in the future. Plaintiffs identify no precedent for a constructive trust over non-existent and uncertain future proceeds, rather than over the existing and identifiable property that was wrongfully taken.

Second, the trial court violated the principle that a constructive trust should “strive to return the parties to the status quo ante,” *Sannini v. Casscells*, 1977 WL 5171, at *1 (Del. Ch. Oct. 21, 1977), *aff’d*, 401 A.2d 927 (Del. 1979), by granting Plaintiffs a **cost-free** right to a 43% share of VCG’s future proceeds. That remedy makes Plaintiffs far **better off** than if they had the opportunity to acquire these

businesses. Rather than acquiring and paying for the now-underwater companies, Plaintiffs enjoy the upsides of ownership without its costs, risks, or responsibilities. That was not, and never could have been, the *status quo ante*.

Third, the trial court's remedy furthers an improper "punitive" goal that "subvert[s] the purpose of [a] constructive trust." *Hogg v. Walker*, 1993 WL 263504, at *2 (Del. Ch. June 30, 1993). Because Defendants have not benefitted from acquiring the usurped companies, the court's remedy serves only to punish Defendants by handicapping their efforts to reduce their steep losses: \$199 million under the court's calculations, Op. 104, [REDACTED]

[REDACTED] The court insisted on granting Plaintiffs a "recovery" because it believed Defendants' conduct was "egregious," Op. 2, but those punitive considerations should play no role in crafting an equitable remedy.

In each of these respects, the trial court's ruling was "erroneous as a matter of law" and should be reversed under a *de novo* standard of review. *Berger v. Pubco Corp.*, 976 A.2d 132, 139 (Del. 2009). The problem with the court's ruling is not that the court exceeded the bounds of its discretion in setting "[t]he terms of the trust," as Plaintiffs suggest. AB 41. The problem is that the court violated Delaware law by establishing a constructive trust over non-existent property that, by granting Plaintiffs a free interest in VCG's hypothetical future proceeds starting at dollar one,

plainly punishes Defendants and puts Plaintiffs in a far better position than the *status quo ante*. These errors warrant reversal.

A. The Constructive Trust Was Not Imposed On The Specific, Identifiable Property That Was Taken.

Plaintiffs acknowledge that a constructive trust must “relate[] to specific property or identifiable proceeds of specific property,” *Hogg v. Walker*, 622 A.2d 648, 652 (Del. 1993), but insist that the remedy entered here satisfies that rule, citing treatises and two cases that recognized constructive trusts over “future proceeds.” AB 45. That response misunderstands Defendants’ argument and obscures a critical distinction between this case and the examples Plaintiffs cite. Defendants’ argument is not, as Plaintiffs contend, that a constructive trust can never convey a right to future payments that are “not quantifiable to an amount certain at trial.” AB 46. A trust over future proceeds may be warranted if, as in each of Plaintiffs’ examples, the property that the defendant wrongfully acquired was a ***contractual right to future revenue***, such as a royalty on future sales. A contractual right to future payments is a specific, well-defined property right, even if the amounts of any such payments are uncertain. But there is no such right present in this case. The only identifiable property here is the stock of the usurped companies. (If there had been distributions made on account of that stock, they would have been identifiable proceeds of the stock, but there were none here.) That is ***not***, however, what the

constructive trust conveys to Plaintiffs. Here, the trial court created the “property” held by the constructive trust: a right to (hypothetical) future proceeds that relieves the trust beneficiary of the costs, risks, and responsibilities of equity ownership.

Each of the cases and authorities on which Plaintiffs rely illustrates the principle that a constructive trust must relate to existing, identifiable property (or identifiable proceeds of that property) that the defendant wrongfully acquired. *See* 90 C.J.S. *Trusts* § 176 (updated April 2026) (“Definitive, designated property, wrongfully withheld from another, is the very heart and soul of the constructive trust theory. Thus, it is necessary that there be a res or specific fund on which the trust may be fixed.”). In Plaintiffs’ cited example from the Restatement—Plaintiffs’ only example or authority that involves the usurpation of a corporate opportunity by a fiduciary—one member of a three-person partnership acquired lease rights for a competitor, in exchange for a 1/16 royalty on all revenue. Restatement (Third) of Restitution and Unjust Enrichment § 55, cmt. c, illus. 4 (2011). The Restatement explains that a court would remedy the defendant’s wrong “by declaring that [he] holds one-third interests in his 1/16 royalty in constructive trust” for his two partners. *Id.* The constructive trust did not simply attach to speculative “future proceeds,” as Plaintiffs contend. It conveyed to the business partners a share of the defendant’s existing, wrongly acquired, contractual royalty right.

The same goes for *Snepp v. United States*, 444 U.S. 507 (1980), which was *not* a corporate opportunity case. There, the defendant had a “contract with his publisher” that “provide[d] for royalties and other potential profits” on a book that he had published in violation of his fiduciary obligations to his former employer, the CIA. *Id.* at 508 n.2. The court effectively transferred that contractual right to the government by imposing a constructive trust on the defendant’s contractual earnings. *Id.* at 515-16.

The Court of Chancery’s initial decision in *PharmAthene* is distinguishable for the same reason, even putting aside that the court’s equitable remedy was reversed on appeal and the trial court concluded a constructive trust was *not* available on remand.⁴ The *PharmAthene* court originally granted the plaintiff an “equitable payment stream”—which the court described as having “at least some of the characteristics of a constructive trust or equitable lien”—that replaced the

⁴ Plaintiffs argue that this Court’s decision on appeal did not “question[] the equitable foundation of the trial court’s initial remedy,” AB 48, but the Court of Chancery concluded otherwise in its remand opinion, noting that this Court’s holding “persuades me that I should be chary about pursuing a more amorphous damages award in the form of an equitable payment stream” and explained that “[n]o ... equitable basis exists in this case to award a constructive trust for SIGA’s breach” because “the defendants had [not] obtained” the property at issue “by fraud.” *PharmAthene, Inc. v. SIGA Techs., Inc.*, 2014 WL 3974167, at *7 n.33 (Del. Ch. Aug. 8, 2014), *aff’d*, 132 A.3d 1108 (Del. 2015).

payments the plaintiff would have been owed under a license agreement had the defendant complied with its duty to negotiate an agreement in good faith. *PharmAthene, Inc. v. SIGA Techs., Inc.*, 2011 WL 4390726, at *34, *38-40 (Del. Ch. Sept. 22, 2011), *aff'd in part, rev'd in part*, 67 A.3d 330 (Del. 2013). The court conveyed to the plaintiff the contractual right that it would have possessed but for the defendant's misconduct, not an amorphous right to future proceeds, disconnected from any real-world property interest.

Finally, Plaintiffs cite an example of a constructive trust from the Pomeroy treatise, where the defendant used “embezzled or stolen funds to pay premiums for insurance on his life,” and the court required the defendant to pay the plaintiff “the proceeds of the policy in such proportion as the amount of premiums paid with stolen or embezzled funds.” John Norton Pomeroy, *A Treatise on Equity Jurisprudence* § 1058c, at 149 (5th ed. 1941). The treatise uses this example to illustrate the principle that “[n]o change in the form of the trust property, effected by the trustee, will impede the rights of the beneficial owner[s] to reach it and to compel its transfer, provided it can be identified as a distinct fund.” *Id.* at 148. Because the defendant had put his ill-gotten money into a life-insurance policy (*i.e.*, a contractual right to payment in the event of death), it made sense to award the plaintiff a *pro rata* share of that policy's proceeds. Nothing like that took place in this case. The wrongfully

acquired property—the stock of the companies paid for by Defendants and used to form VCG—has not been transformed in a way that prevents the imposition of a traditional constructive trust over that property.

Unlike the cases and authorities on which Plaintiffs rely, no contractual right to future proceeds exists here. The only property at issue is the shares of HCH, Vital, and Kare that Plaintiffs were deprived of the opportunity to acquire. A constructive trust could be imposed on those shares, but Plaintiffs do not want them because they are not worth what Defendants paid. Having refused the straightforward equitable remedy where they would take possession of the wrongfully acquired property, Plaintiffs cannot demand that equity fashion a so-called constructive trust over a non-existent property right.

Recognizing that there is no basis for a constructive trust over anything besides the shares of the usurped companies, Plaintiffs vaguely suggest that the trust holds something equivalent to equity in VCG, arguing that “the trust holds the equity value of VitalCaring” and that, “[l]ike shares of stock, the trust provides plaintiffs with an economic claim on VitalCaring’s profits.” AB 49-50. But the constructive trust does *not* hold equity in VCG or the companies that Defendants acquired to form it. Instead, the constructive trust gives Plaintiffs a right to a substantial percentage

of VCG's future proceeds, untethered from any ownership interest or contractual agreement. The trust can and should be set aside for that reason alone.

B. A Constructive Trust Over Future Proceeds, Without The Obligation To Pay For Shares Of The Usurped Companies, Does Not Restore The *Status Quo Ante*.

The trial court's remedy is also invalid for the independent reason that, by granting Plaintiffs a cost-free share of VCG's proceeds rather than an opportunity to purchase the usurped companies at their 2021 price, it makes Plaintiffs far better off than they would have been absent the Executives' breach. Although Plaintiffs trumpet *Guth*'s statement that the remedy for the usurpation of a business opportunity should "extinguish[] all possibility of profit," they ignore that *Guth* prescribed a specific remedy that would accomplish that goal by restoring the *status quo ante*: giving the plaintiff the opportunity to acquire the usurped property through constructive trust. 5 A.2d at 510. As *Guth* explained, if "the interests of the corporation are betrayed" in a transaction by a fiduciary, then "the corporation may *elect* to claim all of the benefits of the transaction for itself, and the law will impress a trust in favor of the corporation upon the property, interests and profits so acquired." *Id.* at 511; *see also id.* at 510 ("If an officer or director of a corporation, in violation of his duty as such, acquires gain or advantage for himself, the law charges the interest so acquired with a trust for the benefit of the corporation, *at its*

election, while it denies to the betrayer all benefit and profit.”). And where the fiduciary purchased the usurped property, as here, the corporation must “restore[] to the fiduciary the amount of the purchase price.” *Agranoff v. Miller*, 791 A.2d 880, 886-87 (Del. Ch. 2001) (quoting Restatement (First) of Restitution and Unjust Enrichment § 194, cmt. b (1937)).⁵

Plaintiffs could have sought such a remedy here— a constructive trust that would have given them the shares of HCH, Vital and Kare at the price they would have paid for them in 2021. *Id.* at 511.⁶ Such a remedy would have been consistent with *Guth*. And it would have granted Plaintiffs the opportunity they lost because of the Executives’ breach: the opportunity to purchase the shares of HCH, Vital, and Kare at their fair market value in 2021. But, knowing how the companies have fared

⁵ In *Guth*, the plaintiff was not required to pay the purchase price for the business only because the defendants had wrongfully used the plaintiff’s funds to purchase the business in the first place. *See* 5 A.2d at 507 (noting “that as against Loft’s contribution to the Pepsi-Cola venture, the [defendants] had contributed practically nothing”). Even then, the trial court noted that Guth would be entitled to “the return of his five hundred dollars” that he had contributed to the acquisition. *Loft, Inc. v. Guth*, 2 A.2d 225, 246 (Del. Ch. 1938).

⁶ In addition to recovering the shares of stock that Defendants usurped, Plaintiffs could have recovered any past distributions received or “profits” earned from ownership of those shares. *Guth*, 5 A.2d at 510. But, as the trial court found, “there were no profits to disgorge.” Reargument Op. 12.

in the subsequent five years, Plaintiffs knowingly and intentionally eschewed the constructive trust remedy contemplated by *Guth*.

On appeal, Plaintiffs argue for the first time that two “unusual complications” prevented an “immediate conveyance of HCH’s, Vital’s, and Kare’s shares,” AB 50 (quoting Reargument Op. 11), but neither of those supposed “complications” has any basis in the record, the trial court’s opinion, or logic.

First, Plaintiffs argue the three companies “have been merged and integrated with each other and with additional companies.” AB 50-51 (citing Op. 34, 40; A341-42 ¶¶ 76, 77, 80). Nothing Plaintiffs cite establishes that the shares of HCH, Vital, and Kare have been merged or combined with the shares of other companies, and the trial court did not identify this supposed intermingling as a barrier to Plaintiffs’ recovery. And even if the shares of the individual companies had been combined as Plaintiffs suggest, Plaintiffs could acquire shares in Topco, which “is the holding company at the top of the entity stack” that “operates as VitalCaring Group.” Reargument Op. 14 & n.47. The trial court clearly did not think (and Plaintiffs did not argue below) that any intermingling of the usurped companies under the aegis of Topco and VCG was a barrier to recovery, given that the court granted Plaintiffs a right to proceeds from VCG, not the proceeds of HCH, Vital, and Kare specifically.

Second, Plaintiffs argue that transferring the shares of the usurped companies

would leave Plaintiffs “holding businesses run by the same management team that defrauded them.” AB 51. Plaintiffs cite no support for this claim, and none exists. If Plaintiffs had acquired the shares of HCH, Vital, and Kare, or the shares of Topco, they would have had full control of the companies and could have fired and replaced the management team. (Plaintiff Encompass, after all, is in the same home health and hospice business as VCG.) In fact, it is the trial court’s novel constructive trust remedy—not the traditional one that Plaintiffs refused—that entangles Plaintiffs with the Executives’ ongoing operation of VCG. One of the benefits of a traditional constructive trust is “avoid[ing] a continuing relationship with the beneficiary by requiring transfer of the property to the plaintiff.” *Hogg*, 622 A.2d at 652. But the remedy entered here *requires* a continuing relationship by giving Plaintiffs an ongoing interest in Defendants’ business and granting Plaintiffs numerous information rights. Ex. F, (“Constructive Trust Order”) ¶¶ 9, 17-19.

There was nothing “impractical” about a constructive trust over the shares of the usurped companies, as Plaintiffs argue. AB 51. Plaintiffs simply did not want that remedy because the opportunity—purchasing HCH, Vital, and Kare—is not remotely worth what Defendants paid for it.

The trial court’s remedial analysis should have ended when Plaintiffs made clear they did not wish to receive the usurped equity in exchange for the price paid.

But, believing Plaintiffs should receive some “recovery,” Op. 2, the court granted Plaintiffs a 43% interest in VCG’s future proceeds, at zero cost to Plaintiffs. That remedy made Plaintiffs vastly better off than they would have been if the Executives had never usurped the opportunities to purchase HCH, Vital, and Kare. If the Executives had presented those opportunities to Plaintiffs, then Plaintiffs either would have purchased the companies at their 2021 prices (in which case they would be worse off than they are today, because they would be holding underwater investments) or not (in which case they would be in the same position as they are today). The court gave Plaintiffs a far more attractive outcome than was ever available in the real world: obtaining a significant share of any proceeds from the businesses, without paying anything for it. In other words, Plaintiffs get a substantial share of the upside potential of VCG with none of the downside costs or risks.

That remedy runs afoul of the principle that “a constructive trust ... will strive to return the parties to the status quo ante.” *Sannini*, 1977 WL 5171, at *1. “Even a defrauded complainant cannot accept the benefits received on the one hand and shirk the disadvantages on the other.” *Id.*; see also *Technicorp Int’l II, Inc. v. Johnston*, 2000 WL 713750, at *53 (Del. Ch. May 31, 2000) (“[W]here the property rights of the parties are readjusted remedially and after the fact to implement the maxim that ‘equity regards as done that which should have been done,’ true equity

requires that the readjustment operate fairly in both directions.”). The Court gave Plaintiffs the “benefits” of ownership by granting them a right to VCG’s proceeds but allowed them to “shirk the disadvantage[]” of having to pay for that right and accept the attendant risks of ownership. *Sannini*, 1977 WL 5171, at *1. The trial court’s grant of this zero-risk share of VCG’s proceeds does not “strive to return the parties to the status quo ante”; instead, it gives Plaintiffs a windfall. *Id.*

Plaintiffs respond that the law does not require a defendant receive compensation for its capital contributions, much less that the defendant receive that compensation “up front and in cash.” AB 52. But Plaintiffs cite no case where a defendant wrongfully *purchased* property, and the plaintiff was permitted to obtain that property without paying the fair market price. In that circumstance, Delaware law is clear that “[t]he fiduciary must surrender that property if the beneficiary ‘restores to the fiduciary the amount of the purchase price, or the price for which he could have obtained it for the beneficiary, whichever is less.’” *Agranoff*, 791 A.2d at 886-87 (quoting Restatement (First) of Restitution and Unjust Enrichment § 194, cmt. b (1937)).⁷ There is no option to take a share of the property’s proceeds without

⁷ The complete Restatement quote on which *Agranoff* relied is: “The beneficiary can **at his option** permit the fiduciary to keep the property or compel him to surrender it; but he can compel the fiduciary to surrender it **only if** he restores to the fiduciary the amount of the purchase price, or the price for which he could have obtained it for the beneficiary, whichever is less.” Restatement (First) of Restitution and Unjust

paying for the property itself. In the cases on which Plaintiffs rely, AB 52, the constructive trusts were imposed on property that the defendants had created through their own labor, not property that they purchased, and there was no indication that the defendant fiduciaries sought reimbursement for any outlays. *See Snepp*, 444 U.S. at 510 (defendant wrote book that disclosed confidential information); *Grove v. Brown*, 2013 WL 4041495, at *3 (Del. Ch. Aug. 8, 2013) (defendants “formed a new home health agency” while operating a competing agency with plaintiffs). The absence of any discussion of reimbursement in those decisions is irrelevant to a case like this one, where the property at issue was acquired through a nine-figure purchase.

C. The Court’s Remedy Serves Only To Provide Plaintiffs A Recovery And Punish Defendants, Not To Eliminate The Possibility Of Profit.

The trial court’s remedy also violates the principles—which Plaintiffs do not contest—that a constructive trust “should reflect the extent of [the defendant’s] unjust enrichment,” *Elliott v. Holladay*, 2003 WL 1240497, at *5 (Del. Ch. Mar. 7, 2003), and that imposing any additional “punitive” losses on the defendant would

Enrichment § 194, cmt. b (1937). That is exactly the “option” Plaintiffs had here. They could have “compel[led] [Defendants] to surrender” their shares of HCH, Vital, and Kare (or their shares of Topco), but “only if” they “restore[d] to [Defendants] the amount of the purchase price.” *Id.*

“subvert the purpose of [a] constructive trust.” *Hogg*, 1993 WL 263504, at *2. The Court of Chancery “is a court of conscience”; its remedies should include “no element of vengeance,” nor should it “enforce penalties or forfeitures.” *Beals v. Washington Int’l, Inc.*, 386 A.2d 1156, 1159 (Del. Ch. 1978). The requirement that Defendants remit a substantial share of **any** future proceeds to Plaintiffs is just such an impermissible, punitive forfeiture.

The trial court stated that its remedy was necessary because, although VCG is currently in a “dismal state,” Reargument Op. 15, the **possibility** remained that Defendants could achieve a profitable exit from their investments, as they have with other investments that “initially faltered.” Op. 2. But any **possibility** of profit is speculative at best and cannot justify the court’s remedy. Because Defendants are unquestionably worse off for having acquired HCH, Vital, and Kare, and Plaintiffs are better off for not having done so, the court’s remedy is necessarily punitive.

Although Plaintiffs try to suggest otherwise, the trial court’s findings make clear that Defendants are highly unlikely to ever profit from the acquisition of HCH, Vital, and Kare. The court found that, according to the only reliable projections in the record, Defendants will experience “**negative** economic gains” of \$199 million upon exit from the investment. Op. 102. Plaintiffs attempt to confuse matters when they argue that Defendants will only be “deemed to have not ‘profited’” if they “are

compensated for their cost of capital at a high enough rate.” AB 53. The court used Defendants’ 25.7% cost of capital as a “discount rate” when determining the present-day value of Defendants’ stake in VCG, Op. 104, to “account for the high level of risk associated with the projections in light of [VCG’s] substantial underperformance relative to all prior forecasts.” Op. 94. In other words, the high cost of capital—which the court “accept[ed],” Op. 95, in a ruling Plaintiffs do not appeal—reflects the high likelihood that even the substantially diminished 2023 projections will not pan out. When accounting for the “risky” nature of VCG’s business, the court found that “the projected proceeds” from Defendants’ investments “were lower than [their] capital contributions”—*i.e.*, that they will most likely have lost money, overall, after exiting from VCG. Reargument Op. 5; *see id.* (describing VCG as “a risky venture plagued by early struggles that may yet succeed through strategic acquisitions”). To ignore the substantial risk of failure, as Plaintiffs would apparently prefer, would be to assume that VCG’s strategy is *certain* to succeed, contrary to the trial court’s findings on the risks VCG faces.

Plaintiffs also argue that Defendants’ supposed “confidence” in VCG

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

If Plaintiffs truly believed that VCG is likely to enjoy the massive growth that would be necessary to justify its purchase price, they could have taken the business through the type of constructive trust that *Guth* envisioned. That they did not, and instead sought the unprecedented, zero-risk remedy the trial court awarded here, speaks volumes about the business's prospects. It is beyond reasonable dispute that Plaintiffs are better off today having lost the opportunity to purchase VCG; the payment stream ordered by the court is pure windfall. And because that windfall comes at the direct expense of Defendants' recovery of invested capital, it is punishment.

Plaintiffs argue that the trial court's remedy is favorable to Defendants because it leaves open the possibility that they could profit from VCG if, after subtracting the proceeds owed to Plaintiffs, Defendants earned enough from their exit to cover their capital contributions. *See* AB 51. But any prospect of profit on the acquisitions of HCH, Vital, and Kare would be remote even without the requirement to transfer a share of all VCG proceeds to Plaintiffs; with that requirement in place, [REDACTED]

[REDACTED] And if Defendants were somehow able to achieve such improbable growth, the increase in VCG's valuation would be attributable to additional investment, sound management, and new acquisitions, not the acquisitions for which they overpaid many years earlier.

A simple example illustrates the point. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] That would be pure punishment. On a sale netting the price paid—\$408 million—Defendants would still suffer a massive loss while Plaintiffs would be entitled to massive gain—all for no investment and at no risk. Defendants would need an exit value that exceed their purchase price *and* Plaintiffs'

share of VCG's proceeds—[REDACTED]—to break even.

What the trial court's remedy does is give Plaintiffs a "recovery" by requiring Defendants to give them a substantial share of whatever Defendants earn from VCG, even if (as is far more likely) Defendants end up losing money on their investment. Op. 2. The court's rationale for rejecting a "horizontal" constructive trust, in which Plaintiffs "would only receive a payment after [Defendants] recovered 100% of their capital contributions," Reargument Op. 9, makes clear that the court was motivated by a desire to compensate Plaintiffs and punish Defendants, rather than the need to eliminate the possibility that Defendants will profit. The court explained that a horizontal trust would create "perverse incentives" because Defendants "would be incentivized only to recover their investments." *Id.* at 9-10. But if the lodestar for designing a remedy is avoiding the possibility of profit, as the court and Plaintiffs agree it should be, then it should have been a *virtue* that a horizontal trust disincentivizes Defendants from making any money on their investments. That incentive is only "perverse" if the goal of the remedy is to give Plaintiffs compensation, which the court itself acknowledged would be inappropriate under *Guth*. See Op. 77 ("The remedial goal is not a compensatory one."). Plaintiffs have no answer to this argument. Instead, they simply repeat the court's statements about

the need to incentivize Defendants to “maximiz[e] profits” and thereby generate a recovery for Plaintiffs, AB 51, without any acknowledgment of how that explanation undermines their argument that the remedy was necessary to eliminate the possibility of profit.⁸

The trial court made the rationale for its remedy explicit when it stated it was necessary to grant Plaintiffs a monetary recovery, regardless of whether VCG ever turns a profit for Defendants, because “to deny [Plaintiffs] any recovery on these egregious facts would bless a willful campaign of disloyalty.” Op. 2. The Defendants’ conduct should not have controlled the remedial analysis, which ignores “punitive” considerations, *Hogg*, 1993 WL 263504, at *2, and depends only on “the extent of [the defendant’s] unjust enrichment,” *Elliott*, 2003 WL 1240497, at *5. Nothing in the record can justify an equitable remedy that, rather than eliminating unjust enrichment or extinguishing the possibility of profit, only compounds the financial harm Defendants have suffered from their conduct.

⁸ To be clear, a horizontal trust would still violate Delaware law for the same reasons given above: it would be a trust over speculative future proceeds, unattached to any property, and it would fail to restore the *status quo ante*.

SUMMARY OF ARGUMENT ON CROSS-APPEAL

1. Denied. The trial court did not abuse its discretion in denying Plaintiffs recovery of legal fees they incurred pursuing claims against non-party April Anthony. *First*, Texas law applies to Plaintiffs' request and forecloses any recovery of attorneys' fees where, as here, the underlying employment contract has been reformed as overbroad. *Second*, the trial court properly deferred to and enforced a binding order of the Texas court denying attorneys' fees to Plaintiffs.

ARGUMENT ON CROSS-APPEAL

I. THE TRIAL COURT DID NOT ERR IN DENYING PLAINTIFFS' REQUEST FOR TEXAS LEGAL FEES.

A. Question Presented

Whether the trial court properly denied Plaintiffs' recovery of attorneys' fees and costs incurred in litigation against non-party Anthony in Texas. A1161-63.

B. Scope of Review

This Court reviews “findings as to damages by the Court of Chancery for an abuse of discretion.” *In re Mindbody*, 332 A.3d at 406 (citation omitted). “[Q]uestions of law, including the Court of Chancery’s ‘formulation and application of legal principles’” are reviewed *de novo*. *Sunder Energy, LLC v. Jackson*, 332 A.3d 472, 491 (Del. 2024) (citation omitted).

C. Merits of Argument

In addition to recovering tens of millions in fees and costs incurred litigating this Delaware lawsuit (which Defendants have paid), Plaintiffs seek over \$11 million in “mitigation” damages comprised of attorneys’ fees incurred in earlier litigation they brought against non-party Anthony in Texas. AB 57-61. This Court should affirm the trial court’s denial of that request for two independent reasons. *First*, Plaintiffs attempt an end run on governing Texas law, which plainly prohibits their

request. *Second*, even if Delaware law applies, the trial court did not err in exercising its discretion to defer to the Texas court's prior judgment on attorneys' fees.

1. Texas Law Is Not Only Relevant To, But Dispositive Of Plaintiffs' Fee Request.

Texas law applies here and bars Plaintiffs' requested fee award. The Texas court found that Texas law, and in particular, the Texas Covenants Not to Compete Act (the "Texas Act"), governed the enforceability of Anthony's employment agreement, on which Plaintiffs' Texas claims were based. B985(¶125). To disincentivize employers from drafting overbroad non-compete provisions, the Texas Act bars an employer from recovering attorneys' fees if the non-compete is adjudicated as being so overbroad as to require reformation. *E.g., Franlink, Inc. v. GJMS Unlimited, Inc.*, 401 S.W.3d 705, 712 (Tex. App. 2013) (rejecting prevailing employer's request for attorneys' fees as prohibited by the Texas Act); *Rieves v. Buc-ee's Ltd.*, 532 S.W.3d 845, 854 (Tex. App. 2017) (same; Texas Act fee prohibition "exclusive" and "preempt[s]" other grounds for fee award). The Texas court ruled that both the non-compete and non-solicit provisions of Anthony's employment agreement were "unreasonably broad and thus unenforceable" and reformed both terms. B1366-67; B987(¶134). That ruling forecloses an award of attorneys' fees under the Texas Act. Because the Texas Act reflects a substantive policy choice by the Texas legislature, that statute applies here, as Plaintiffs' own

authority demonstrates. *Naughty Monkey LLC v. MarineMax Ne. LLC*, 2010 WL 5545409, at *8 n.59 (Del. Ch. Dec. 23, 2010) (applying Maryland law regarding the availability of specific performance).

Accordingly, the court below properly denied Plaintiffs' request for mitigation damages equal to fees incurred in the Texas litigation.

2. Even If Delaware Law Applies, The Trial Court Did Not Err In Declining To Award Attorneys' Fees From The Texas Lawsuit.

The trial court's decision to award fees incurred in this litigation but not to award those incurred in the Texas litigation was proper and a valid exercise of its discretion.

The Texas court ordered that the parties to that litigation—including Plaintiffs—each bear their own fees and costs: “The Court further ORDERS that the parties shall bear their own costs and attorneys’ fees.” B1367. Given that order, the trial court properly denied Plaintiffs’ attempt to recover those same costs and fees in the case before it, which would “risk running afoul of applicable Texas law,” “effectively overrule the Texas court,” and constitute “an end-run around the judgment of a sister court.” Op. 110; *see Day v. Loucks*, 181 A.3d 154 (Del. 2018) (“Under the doctrine of comity, the courts of one state or jurisdiction give effect to the laws and judicial decisions of another, not as a matter of obligation but out of

deference and respect.” (citations and quotations omitted)); *see also Richardson v. New Residential Mortg. Loan Tr.* 2019RPL3, 2025 WL 2491199, at *7 (Del. Ch. Aug. 29, 2025) (“[A]ttempt to avoid, defeat, evade, or deny the force and effect of a final order or judgment [of another court] in an incidental proceeding other than by appeal, writ of error, certiorari, or motion for new trial” is impermissible collateral attack (citations and quotations omitted)).

Plaintiffs challenge this ruling by arguing that the fee issue was never before the Texas court and that the Texas court’s unambiguous order was merely “boilerplate.” AB 59-60. But Plaintiffs ignore that Anthony expressly argued to the Texas court that Texas law prohibited a fee award to Encompass. AR18 n.7.⁹ While Plaintiffs argued that any fee request would be subject to arbitration, B1071, the Court ruled that “the parties shall bear their own costs and attorneys’ fees.” B1367. Plaintiffs identify nothing in the record suggesting that the Texas court did not mean what it said in denying an award that Texas law indisputably bars. Plaintiffs neither sought reconsideration of, nor appealed, the Texas court’s judgment denying fees and costs. Given this record, the trial court was well within its discretion to

⁹ The Court may take judicial notice of this publicly filed brief. *See Baldwin v. New Wood Res. LLC*, 283 A.3d 1099, 1123 (Del. 2022) (taking judicial notice of pleadings in separate action).

determine that the Texas court had ruled on the issue of Plaintiffs' attorneys' fees and to deny them consistent with Texas law.

The cases Plaintiffs cite for support are inapposite. AB 60. Both cases address whether so-called "Mother Hubbard" clauses—catch-all phrases that "all relief not granted is denied"—can be deemed to adjudicate claims not raised. *Farm Bureau Cty. Mut. Ins. Co. v. Rogers*, 455 S.W.3d 161, 163 (Tex. 2015); *see also Compania Financiera Libano, S.A. v. Simmons*, 53 S.W.3d 365, 367 (Tex. 2001). Here, however, the trial court's ruling was based on Texas law and the Texas court's express denial of attorneys' fees and costs to both parties, not a "Mother Hubbard" clause. Op. 110 (citing B1367).

Plaintiffs' reliance on Restatement (Second) of Torts § 914(2) is also misplaced. AB 57-58. As an initial matter, section 914(2) does not address a scenario where, as here, the party seeking attorneys' fees incurred in an earlier lawsuit was denied those fees by a final, binding order in the first lawsuit. Thus, section 914(2) does not apply here.

In any event, even if the Texas court had not denied Plaintiffs a fee award, section 914(2) still would not support their request here. The commentary to that section states that it applies "when the present plaintiff has been led by the *defendant's tort* to take legal proceedings against a third person." Restatement

(Second) of Torts § 914(2) cmt. b (1979). That is not this case. Here, the Texas action for which Plaintiffs now seek attorneys' fees concerned claims about Anthony's own conduct for breach of her employment agreement. It appears that no Delaware court has allowed a plaintiff to recover from a defendant sued for secondary or derivative liability the attorneys' fees that plaintiff incurred in an earlier lawsuit against a defendant who allegedly committed the primary violation. Compare *BDO USA, P.C. v. JSCo Enters., Inc.*, 2025 WL 2390920, at *11 (Del. Super. Ct. Aug. 14, 2025) (denying recovery under section 914(2) where plaintiff was "in essence fee shifting" between two cases it initiated); see also *In re Advanced Telecomm. Network, Inc.*, 2018 WL 6261496 (Bankr. M.D. Fla. Jan. 31, 2018), report and recommendation adopted sub nom. *In re Advanced Telecomm. Network Inc.*, 2018 WL 4405618 (M.D. Fla. Sept. 17, 2018) (section 914(2) inapplicable to attorneys' fees incurred in successive lawsuits against joint tortfeasors).

CONCLUSION

For these reasons, this Court should reverse the trial court's finding of liability and its constructive trust remedy and affirm the denial of Plaintiffs' request for their Texas attorneys' fees.

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