



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,	)	Case No. 179, 2026
LP,	)	
	)	Court Below:
Defendants-Below,	)	
Appellants/Cross-	)	Court of Chancery
Appellees,	)	C.A. No. 2022-0837-LWW
	)	PUBLIC VERSION
v.	)	FILED: September 18, 2026
	)	
ENHABIT, INC., ADVANCED	)	
HOMECARE MANAGEMENT, LLC,	)	
and ENCOMPASS HEALTH	)	
CORPORATION,	)	
	)	
Plaintiffs-Below,	)	
Appellees/Cross-	)	
Appellants.	)	

APPELLEES/CROSS-APPELLANTS' REPLY BRIEF ON CROSS APPEAL

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INTRODUCTION

The Court of Chancery erred in denying plaintiffs’ request to recover as damages in this action the \$11.1 million in attorneys’ fees they incurred litigating against April Anthony in Texas. Those fees are proper mitigation damages because the same egregious misconduct which defendants engaged in and abetted forced plaintiffs to pursue the third-party litigation in Texas. The Court of Chancery acknowledged as much, finding that plaintiffs’ position had “merit on its face.” Op. 110. But the trial court denied plaintiffs’ request on the basis that the Texas court had already issued a ruling foreclosing the award sought. *Id.* That denial was error because the Texas court, which was adjudicating a contract-based injunctive action against someone not a party to this Delaware case, did not even address a request by plaintiffs for attorneys’ fees, much less a request that the defendants in this case pay those fees as a head of damages for aiding and abetting fiduciary breach.

Tellingly, defendants begin their response on this issue not with a defense of the trial court’s procedural finding, but by attacking plaintiffs’ position on the merits.¹ They claim that a Texas statute which by its terms does no more than limit availability of damages in an action to enforce restrictive covenants somehow

¹ Defendants’ answering brief on cross-appeal (Dkt. 19) is cited herein as “DAB.” Plaintiffs’ opening brief on cross-appeal (Dkt. 17) is cited as “POB.” All other defined terms have the meaning provided for in plaintiffs’ opening brief.

trumps Delaware law on damages for aiding and abetting fiduciary breach. In the alternative, defendants insist that the Restatement provision the trial court cited in endorsing plaintiffs' position has no application here. Neither argument has merit, and defendants' efforts to cast the procedural record in a light that could support the Court of Chancery's finding of preclusion fail.

ARGUMENT

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

A. The Texas action judgment does not bar plaintiffs' damages.

Citing generic language in the Texas court's final judgment that each party shall "bear its own fees and costs," the Court of Chancery concluded that awarding plaintiffs their Texas action litigation expenses would be an "end-run around the judgment of a sister court." Op. 110. That conclusion was error. The Texas court's judgment did not even dispose of plaintiffs' entitlement to fee shifting from April Anthony under Texas law, much less plaintiffs' right to recover their Texas fees from the defendants in this case under Delaware law.

Under Texas law, "only issues that are pleaded are disposed of by a judgment." *Polley v. Odom*, 957 S.W.2d 932, 943 (Tex. App. 1997), *judgment vacated due to settlement but opinion expressly preserved*, 963 S.W.2d 917 (Tex. App. 1998).² As defendants now admit (DAB 43), plaintiffs never sought fee shifting in the Texas action, a fact made plain by the Texas trial record:

[Texas] Court: Does the Plaintiff have any claims for attorneys' fees?

² "The preclusive effect of a foreign judgment is measured by standards of the rendering forum." *Acierno v. New Castle Cnty.*, 679 A.2d 455, 459 (Del. 1996) (citation modified).

[Plaintiffs' Counsel]: Not in this proceeding, Your Honor, because it's argued that that is a matter to go to arbitration.

B948/1700:20–24; *see also* B1071–72 (plaintiffs' post-trial brief in Texas disclaiming any request for attorneys' fees). Defendants cite and include in their reply appendix a copy of Anthony's post-trial brief in Texas, and they suggest that submission shows the question of fee shifting was teed up for the Texas court. DAB 43 (citing AR18 n.7). It shows the opposite. In her brief, Anthony acknowledged that "Plaintiffs did not request fees in their pleadings." AR 18 n.7. Plaintiffs refrained from doing so because Anthony's employment agreement mandated arbitration of "any dispute or controversy" between plaintiffs and Anthony other than for injunctive relief. B384–86 §§ 6(f), (q)(ii)–(iii). Monetary relief, including recovery of attorneys' fees and costs, was unavailable in the Texas action under the terms of that agreement. B1071–72.

The record thus makes plain that plaintiffs did not assert, and the Texas court had no authority to adjudicate, a claim for attorneys' fees against Anthony. As a matter of Texas law, then, the Texas court's boilerplate recitation that "the parties shall bear their own costs and attorneys' fees" cannot have decided whether fee shifting was warranted against Anthony in that action. *See Davis v. First Nat'l Bank of Waco*, 161 S.W.2d 467, 473 (Tex. 1942) ("[A] judgment is not conclusive of a question which could not have been adjudicated in the case in which it was

rendered.”); *see also Lopez v. Sulak*, 76 S.W.3d 597, 606 (Tex. App. 2002) (“[R]es judicata does not bar a claim that could not have been brought in the court rendering the prior judgment[.]”).³

Much less can the Texas court have decided the question presented in this case: whether defendants here, who were not parties to the Texas action, should pay as damages the fees and costs that plaintiffs incurred as a foreseeable consequence of defendants’ aiding and abetting fiduciary breach. Plaintiffs’ entitlement to fees from defendants was not “fully and fairly litigated” in the Texas action; it was not litigated at all. *Union Pac. R.R. v. Ameriton Props. Inc.*, 448 S.W.3d 671, 682 (Tex. App. 2014) (explaining that an issue is only precluded if “fully and fairly litigated” in prior action).

B. The Texas Not-to-Compete Act does not block recovery here.

Pivoting, defendants argue that Texas law—specifically the Texas Covenants Not to Compete Act (the “Texas Act”)—bars plaintiffs from recovering the attorneys’ fees they incurred in the Texas litigation because the Texas Act would

³ *Compania Financiară Libano, S.A. v. Simmons*, 53 S.W.3d 365, 367 (Tex. 2001) and *Farm Bureau County Mutual Insurance Co. v. Rogers*, 455 S.W.3d 161, 163 (Tex. 2015), discussed in plaintiffs’ opening brief on cross-appeal, embody the same principle: judgments do not resolve claims that were not and could not have been raised. *See Simmons*, 53 S.W.3d at 367 (“[T]he agreed judgment could not dispose of claims that did not exist [at the time it was entered].”).

have precluded plaintiffs from recovering their fees from Anthony in that action (had plaintiffs sought them). *See* DAB 42–43. That argument fails on at least three levels.

First, plaintiffs’ aiding-and-abetting claims are governed by Delaware law, not Texas law. *See Hamilton P’rs, L.P. v. Englard*, 11 A.3d 1180, 1212 (Del. Ch. 2010) (collecting cases). Defendants suggest that *Naughty Monkey LLC v. MarineMax Northeast LLC*, 2010 WL 5545409 (Del. Ch. Dec. 23, 2010), cited in plaintiffs’ opening brief (POB 61), says otherwise. *See* DAB 42. They are wrong. *Naughty Monkey* discussed whether the law of the forum or the law of the state providing the rule of substantive liability should govern the remedy of specific performance, and concluded that the latter should govern because it reflected a policy judgment favoring broad remedial scope. *Naughty Monkey*, 2010 WL 5545409 at *8 n.59. Here, Delaware is both the forum state and the state providing the rule of substantive liability, and Delaware law adopts a broad remedial approach to fiduciary breach that cannot be displaced by a Texas statute that by its terms addresses neither fiduciary breaches nor their available remedies.

Second, and relatedly, even if Texas law governed, the Texas Act would not. The limitation on recovery of damages under that Act in case of a reformed covenant applies only in “*an action to enforce a covenant not to compete.*” Tex.

Bus. & Com. Code § 15.52 (emphasis added); *see also id.* §15.51(c). This case is not an “action to enforce a covenant not to compete,” so the Texas Act is inapplicable. *See Contemporary Contractors, Inc. v. Strauser*, 2005 WL 1774983, at *2 (Tex. App. July 28, 2005) (“[T]he provisions of the [Texas Act] apply only to actions to enforce a covenant not to compete.”); *Gage Van Horn & Assocs., Inc. v. Tatom*, 26 S.W.3d 730, 733 (Tex. App. 2000) (same).

Third, neither the Texas Act nor any precedent defendants cite precludes recovery of attorneys’ fees as mitigation damages in one action where fee shifting was unavailable in a related prior action. Available authority is to the contrary. *See Etowah Env’t Grp., LLC v. Walsh*, 774 S.E.2d 220, 228 (Ga. Ct. App. 2015) (holding that arbitrators’ denial of fee shifting against initial defendant “is not a bar” to recovering those arbitration fees as damages in subsequent action (citation omitted)). This makes sense because the legal standards are different: fee shifting in the same case is typically prohibited under the American Rule, while recovery of attorneys’ fees from a prior case against a third party is permitted “where they were a natural consequence of the defendant’s wrongful act.” *Nepera Chem., Inc. v. Sea-Land Serv., Inc.*, 794 F.2d 688, 696 (D.C. Cir. 1986). That is so here.

C. Under Delaware law, plaintiffs may recover the Texas action attorneys' fees as damages.

As discussed in plaintiffs' opening brief and above, the Texas court did not resolve the availability of mitigation damages against these defendants, and nothing in Texas law forecloses that availability or even informs the question. Moreover, under Delaware law, which does govern, plaintiffs' position that "they are entitled to over \$11 million in attorneys' fees because the fees were a direct and foreseeable consequence of the defendants' wrongdoing" "has merit on its face." Op. 110.

As the trial court observed, that position accords with the principle reflected in Section 914(2) of the Restatement (Second) of Torts: When a tortfeasor's misconduct forces a plaintiff to initiate litigation against a third party to protect its rights, the plaintiff can recover the attorneys' fees incurred in that third-party litigation from the tortfeasor as mitigation damages. *See* Op. 110 n.556 (citing Section 914 and *Paron Cap. Mgmt., LLC v. Crombie*, 2012 WL 2045857, at *8–9 (Del. Ch. May 22, 2012) (recoverable mitigation damages include "legal fees" from "related litigation" against a third party pursued "to mitigate the damage inflicted by" a defendant's wrongdoing), *aff'd*, 62 A.3d 1223 (Del. 2013) (TABLE)). The record here overwhelmingly establishes that the fees and costs plaintiffs seek to recover flow directly from defendants' "egregious" misconduct. *See* Op. 111–12. Before launching headlong into their wrongful scheme, defendants were specifically

warned that detection of that scheme would cause plaintiffs to “move very quickly” for injunctive relief against Anthony. B551.

Defendants’ only answer under Delaware law is that recovery should be barred because “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.” DAB 45. Far from limiting recovery to “primary” violators, Delaware law well recognizes that different actors can be held responsible for the same harms. *See* 10 *Del. C.* §§ 6301, 6302 (recognizing joint tortfeasor liability); *RBC Cap. Mkts., LLC v. Jervis*, 129 A.3d 816 (Del. 2015) (affirming allocation of joint tortfeasor liability between breaching fiduciaries and aider and abettor); *see also Nutt v. GAF Corp.*, 526 A.2d 564, 566 (Del. Super. Ct. 1987) (“Liability of a defendant does not depend upon a showing that defendant’s conduct was the exclusive cause of plaintiffs’ injuries.” (collecting cases)). And, as the trial court recognized, Op. 110 & n.556, nothing in Delaware precedent suggests Section 914(2) should not apply where the second-suit defendant aided and abetted the first-suit defendant’s breach of fiduciary duty—an application other jurisdictions have accepted. *See Hetronic Int’l, Inc. v. Hetronic Germany GmbH*, 2019 WL 3021689, at *145 (W.D. Okla. Mar. 22, 2019) (allowing plaintiff to seek attorneys’ fees

incurred in prior litigation against former employee as aiding-and-abetting damages in subsequent suit against competitor where competitor “conspired with [employee] to illegally compete with plaintiff”); *Walsh*, 774 S.E.2d at 225, 228 (allowing plaintiff to seek attorneys’ fees from a prior arbitration as damages from defendant in second suit where defendant “participated in the [fraudulent] scheme with [fiduciary]”).

The only authorities defendants cite are inapposite. Their lone Delaware case involved “substantively identical” complaints *against the same defendant* in both the Court of Chancery and the Superior Court, with the plaintiff seeking to wield Section 914(2) as a basis for recovering its attorneys’ fees in both cases. *BDO USA, P.C. v. JSCo Enters., Inc.*, 2025 WL 2390920, at *1–3, *10–11 (Del. Super. Ct. Aug. 14, 2025). Chancellor McCormick (sitting in the Superior Court by designation) found Section 914(2) inapplicable because the plaintiff’s attorneys’ fees had not been incurred in a suit brought by or against a third party, and so the plaintiff’s request for damages was “in essence fee shifting.” *Id.* at *11. That is not the case here—plaintiffs seek damages for fees incurred in a separate action brought against a different defendant.

In re Advanced Telecommunication Network, Inc., a Florida bankruptcy decision, is likewise inapt. The plaintiff there filed separate, successive suits against

joint tortfeasors for the same claims even though it “could have sued both [tortfeasors] in one suit.” 2018 WL 6261496, at *5 (Bankr. M.D. Fla. Jan. 31, 2018), *report and recommendation adopted*, 2018 WL 4405618 (M.D. Fla. Sept. 17, 2018). The bankruptcy court, applying New Jersey law, disallowed recovery against one tortfeasor of fees incurred in pursuing the other. *Id.* at *5. It reasoned that otherwise plaintiffs would be incentivized to bring wasteful successive litigation over the same tort claims. *Id.* That concern is not present here: the suit against Anthony in Texas was not for tort damages but to halt further breaches of contractual restrictive covenants that were a direct and foreseeable—indeed, foreseen—result of defendants’ scheme. As discussed above, and as the trial court recognized, Op. 110 & n.556, Delaware law and the Restatement support recovery under these circumstances.

CONCLUSION

The Court of Chancery's 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 case (plus pre- and post-judgment interest) should be reversed and the Court should remand for consideration of the requested damages. The remainder of the Court of Chancery's judgment should be affirmed.

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