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IN THE SUPREME COURT OF THE STATE OF DELAWARE

PATRICK DAUGHERTY, Plaintiff Below/Appellant, v. JAMES DONDERO, HUNTON ANDREWS KURTH LLP, MARC KATZ, MICHAEL HURST, SCOTT ELLINGTON, AND ISAAC LEVENTON, Defendants Below/Appellees.	)	No. 60,2023 (Appeal from Court of Chancery C.A. No. 2019-0956-MTZ)

APPELLEES JAMES DONDERO, SCOTT ELLINGTON, AND ISAAC LEVENTON'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

So continues Patrick Daugherty's journey through the judicial system. Beginning in Texas in 2012, Daugherty's litigation with Highland Capital Management, L.P. ("Highland") and those associated with Highland has traversed time zones and courts, eventually finding its way here, to Delaware's highest court. In the Texas litigation, Daugherty was found liable for breach of fiduciary duty and ordered to pay a $2.8 million judgment to Highland. Daugherty did secure a $2.6 million judgment against Highland affiliate Highland Employee Retention Assets LLC ("HERA") representing the value of Daugherty's interest in HERA. More than four years after the start of the Texas litigation, Daugherty brought his legal odyssey to Delaware. In his first Delaware action, filed in 2017 in the Court of Chancery, Daugherty asserted claims against Highland, HERA, Highland ERA Management LLC ("HERA Management"), and James Dondero, demanding that Highland or Dondero return assets purportedly wrongfully taken from HERA. After years of motion practice and discovery, during which a substantial portion of Daugherty's claims were dismissed, including all of Daugherty's claims against Dondero, the litigation proceeded to trial. However, on October 16, 2019, Highland declared bankruptcy (for unrelated reasons) and the trial was stayed.

In the Highland bankruptcy, Daugherty's proof of claim relied on his claims in the first Delaware action. Daugherty also filed the underlying action. In his

second foray in the Court of Chancery, Daugherty named Dondero, HERA, and HERA Management as defendants (again), but also named counsel (in-house and outside) to Highland and HERA as defendants, asserting an array of meritless claims. The facts and relief sought in the second action in Delaware mirror the first Delaware action. And from that common nucleus of operative facts, Daugherty asserted claims for (i) fraudulent transfer, (ii) conspiracy to commit fraud, (iii) civil conspiracy, (iv) breach of fiduciary duties, and (v) aiding and abetting breach of fiduciary duties. Defendants moved to dismiss Daugherty's second action for the following reasons:

- Daugherty's claims are barred by the doctrine of *res judicata*;
- Daugherty impermissibly split his claims between the two Delaware actions;
- Daugherty failed to sufficiently plead a claim for violation of Delaware's Fraudulent Transfer Act;
- Daugherty failed to plead legally cognizable claims alleging conspiracy;
- Daugherty's aiding and abetting breach of fiduciary duty claim is insufficiently pled; and
- Daugherty's claims against attorneys are barred by Texas' attorney immunity doctrine.

Following argument on the motions to dismiss, the Court of Chancery issued a letter opinion on January 27, 2023 (the "Ruling") dismissing the underlying action for impermissibly splitting claims between the two Delaware actions.

The Ruling dismantles Daugherty's argument that he could split his claims across the two Delaware actions because evidence was allegedly concealed from Daugherty in the first Delaware action. The Court of Chancery described, with abundant detail, the many instances where Daugherty had notice that Dondero, Highland's principal, relied on advice of counsel in the underlying transactions. Daugherty's appeal, nonetheless, asserts that the trial court erred in dismissing the action on the basis that evidence was improperly withheld in the first Delaware action and Daugherty could not reasonably have known of Defendants' purported advice of counsel defense before the trial.

The record, as detailed in the Ruling and herein, irrefutably demonstrates that Daugherty impermissibly split claims between the two Delaware actions. Daugherty admits that he did claim split, but argues that he had no other option. This argument is undermined by the record that Daugherty developed prior to trial in the first Delaware action. From their response to the complaint, through written discovery responses and depositions, and ultimately in their pre-trial brief, defendants were consistent and clear that Dondero had relied upon advice of counsel. Dondero's deposition testimony alone is fatal to Daugherty's argument that he only learned of Dondero's reliance on counsels' advice at trial.

Daugherty also argues that the Court of Chancery improperly refused to consolidate the two Delaware actions. The Court of Chancery did not abuse its

discretion in refusing consolidation. As set forth below, there is no justification for Daugherty's informed decision to prosecute the first Delaware action to trial and then, after that trial, add five additional defendants and a panoply of claims all arising out of the same events that were just tried.

For all the reasons set forth in the Ruling and these papers, the Court of Chancery did not err or abuse its discretion in dismissing the underlying action. Accordingly, this Court should affirm the Court of Chancery's Ruling.

SUMMARY OF ARGUMENT

1. *Denied.* The Court of Chancery's holding that Plaintiff's Amended Complaint should be dismissed for violating the claim splitting doctrine should be affirmed because (i) Plaintiff concedes, and it is irrefutable, that the Delaware Actions arise out of a common nucleus of facts and seek virtually identical relief from the trial court, (ii) the defendants in the Delaware Actions either overlap or are in privity, and (iii) Plaintiff has not presented facts justifying an exception to the claim splitting doctrine.

2. *Denied.* The Court of Chancery's refusal to consolidate the Delaware Actions should be affirmed as the court did not abuse its discretion in finding that Plaintiff belatedly sought to assert claims against five additional defendants relating to facts of which he was aware during discovery and significantly before the trial in the First Delaware Action began.

STATEMENT OF FACTS

A. Highland Capital Management, L.P. And The Formation Of HERA

Founded by James Dondero ("Dondero") in 1993 (A0317), Highland was a global alternative investment manager that operates a diverse investment platform. (A0276.) In April 1998, Patrick Daugherty (Daugherty") was hired by Highland as a Portfolio Analyst. (A0277.) During his tenure at Highland, Daugherty served many roles, ultimately becoming a partner and a senior executive. (A0277-78.)

In 2009, Highland formed HERA as a separate company to hold employee retention assets, which were made available to incentivize Highland's current and former employees through the issuance of Series A Preferred Units. (A0189; A0278; A0610.) HERA encouraged employee retention by offering Highland's employees equity-like awards in certain funds, and then distributing the proceeds of those interests to employees in their capacity as unit holders of HERA. (*Id.*) In October 2009, Daugherty became a member of HERA (A0278), ultimately holding 1,909.69 vested Series A Preferred Units in HERA when he resigned from Highland. (*Id.*)

In September 2011, Daugherty resigned from Highland but remained a director on HERA's board. (A0279.) Thereafter, on February 16, 2012, the other directors of HERA unanimously voted to remove Daugherty from the board and executed a Second Amended and Restated Agreement (the "2012 Amendment").

(A0279.) Article XII of the 2012 Amendment provides that, if any member of HERA, including a holder of Series A Preferred Units, "commences litigation" or "otherwise initiates any dispute or makes any claim ... related to HERA" against HERA, any of its directors, officers, or agents, or any HERA member, including Highland, or that does or could adversely impact the assets held by HERA, "then with the consent of 75% of the Board, all pending and future distributions to" that litigating member "shall be immediately suspended and held in escrow by HERA until the final, non-appealable resolution of the Dispute." (A0612.) Article XII further provides that if the litigating member does not prevail, the full costs of the litigation, including attorneys' fees, are deducted from the escrow account and the remaining balance will be distributed to the litigating member. However, even if the litigating member prevails, the board has sole discretion to withhold the escrowed funds to cover any diminution in value to HERA "resulting from or in connection with" the litigation. Any withheld funds are to be reallocated to the other Preferred Unit holders on a pro-rata basis. (A0613.)

B. The Texas Action Commences

On April 11, 2012, following the adoption of the 2012 Amendment, Highland initiated litigation against Daugherty in Texas, in an action styled as *Highland Capital Management LP, et al. v. Patrick Daugherty*, Case No. 12-04005 in the 68th District Court of Dallas County, Texas (the "Texas Action"). (A0279.) Plaintiff

filed various counterclaims in the Texas Action against Highland for breach of contract and defamation and third-party claims against HERA and others. (A0280.)

1. The HERA Buyout and the Formation of HERA Management

On January 18, 2013, while the Texas Action was pending, Highland offered to purchase all HERA units, with the exception of those units held by Daugherty. (B0059.) All offerees accepted the buyout offer.[1] On that same date, the HERA board transferred HERA's management powers to HERA Management, an entity in which Dondero served as the president and sole member. (B0059.) As Dondero testified at his deposition, the decision to appoint HERA Management as manager of HERA was handled by counsel. (B0217 42:4-8.) The following day, January 19, 2013, Highland bought out the HERA board members, who then promptly resigned, leaving HERA Management as the sole manager of HERA. (A0197; B0059.)

On February 1, 2013, HERA Management, as the manager of HERA, executed the Third Amended and Restated Agreement of HERA (the "2013 Amendment"). (A0197-98; B0060.) The 2013 Amendment provides that the purpose of HERA "shall be to receive and hold assets to be contributed by the Member and to distribute the proceeds of such assets from time to time to certain employees of the Member (or of affiliates of the Member, as applicable) as the Board

[1] Highland subsequently offered Daugherty $0 for his HERA units because the "costs, expenses, and diminution of the assets" exceeded the value of Daugherty's interests." (B0060.)

may from time to time determine in order to create a retention initiative for such employees and to engage in such other lawful purposes and activities in connection with the foregoing." (A0661.)

On the same day the 2013 Amendment was executed, Highland and HERA Management allocated 93.4% of Highland's legal expenses incurred in the Texas Action to HERA though an Expense Allocation Agreement. (B0060; A0198.) As Dondero testified at his deposition, the reasonableness of the allocation of expenses identified in the Expense Allocation Agreement was determined by "accounting and legal." (B0216 39:9-14.)

2. The Assignment Agreement and the Escrow Agreement

On April 30, 2013, Highland entered into an Assignment Agreement with HERA, whereby HERA's assets were transferred to Highland, such that Highland held the sole economic interest in HERA. (A0200; B0061.) As to the Assignment Agreement, Dondero testified at his deposition that his counsel "vetted" the agreement and determined its accuracy. (B0218 45:7-12.)

On December 13, 2013, a draft escrow agreement was provided to Abrams & Bayliss LLP ("A&B"). (B0001.) In their sworn discovery responses, Defendants in the First Delaware Action represented that "Abrams & Bayliss, Highland Capital, and Andrews Kurth LLP drafted and/or proposed edits to the Escrow Agreement." (B0092.) Pursuant to the Escrow Agreement, which was executed that same day

(A0283), a portion of the assets HERA assigned to Highland (the "Escrowed Assets") under the Assignment Agreement were moved into an escrow account held by A&B in the event Daugherty prevailed in the Texas Action. (B0061.) As to the execution of the Escrow Agreement, Dondero testified at his deposition as follows:

> Q. Do you remember communicating with anybody in or around December 2013 regarding the escrow?
>
> A. No. It wouldn't -- it wouldn't have been my idea, but it would've been the advice of counsel.
>
> . . . .
>
> Q. You said it would -- when you were referring to the escrow, you said it would've been the advice of counsel. Which counsel are you referring to?
>
> A. I don't know.
>
> Q. Highland counsel?
>
> A. No. It would've -- yeah, it would've been external counsel, but I don't know which one.
>
> Q. Okay. So outside counsel?
>
> A. Yes.
>
> Q. To Highland?
>
> A. I don't know.
>
> Q. Was it Andrews Kurth?
>
> A. I don't know.
>
> Q. Who, apart from Andrews Kurth, was Highlands [sic] outside counsel related to the Texas case?

A. I don't know.

Q. And as far as you can recall, you never communicated with Abrams & Bayliss about the escrow?

A. Correct.

(B0220 52:19-54:24.)

3. The Texas Judgment

On July 14, 2014, the court in the Texas Action entered final judgment, finding that Daugherty breached contractual and fiduciary duties by retaining Highland information after his employment and awarded Highland Capital $2.8 million in attorneys' fees plus interest. (A0284.) The jury in the Texas Action awarded Plaintiff damages of $2.6 million plus interest for his claims. (*Id.*)

On December 1, 2016, Texas Judgment was affirmed on appeal. (A0284.) The following day, A&B notified Highland of its resignation as escrow agent. (A0285; B0007.) Highland accepted A&B's resignation and directed A&B to return the Escrowed Assets to Highland in accordance with the terms of the Escrow Agreement (B0009.) By email dated December 5, 2016, A&B advised Highland's in-house and outside counsel that the Escrowed Funds has been transferred to Highland. (B0011.)

On December 14, 2016, Daugherty wired approximately $3.2 million to Highland's counsel in satisfaction of the $2.8 million Texas Judgment, plus interest.

(A0286; B0066.) In light of its insolvency (A0184), HERA was unable to satisfy amounts owed to Daugherty under the Texas Judgment. (A0286; B0066.)

On February 16, 2017, A&B notified Daugherty that it had resigned as escrow agent. (B0066; B0013.)

C. Daugherty Initiates The First Delaware Action

Unable to collect the Texas judgment due to HERA's insolvency, Daugherty filed suit in the Court of Chancery against Highland, HERA, HERA Management, and Dondero in July 2017 ("First Delaware Action").[2] (A0272.) Daugherty subsequently amended his Complaint twice in the First Delaware Action. In his Second Amended Verified Complaint filed in the First Delaware Action, Daugherty alleged that the defendants fraudulently transferred assets to prevent him from collecting the Texas judgment. (Ruling at 5.)[3] Among other things, Daugherty sought return of the assets fraudulently transferred from HERA. (A0185.)

In their Answer to the Second Amended Verified Complaint, Defendants pled an affirmative defense that they "did not act with the necessary knowledge, intent, or scienter, and instead acted in good faith and with due care at all times." (A0247.)

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[2] The First Delaware Action is styled as *Daugherty v. Highland Capital Mgmt., L.P.*, No. 2017-0488-MTZ.

[3] References the Court of Chancery's Letter Opinion dated January 27, 2023 which was attached to the Opening Brief of Appellant Patrick Daugherty as Exhibit A are styled as "Ruling at __."

In their written discovery responses, Defendants expanded upon the factual basis underlying this affirmative defense, stating, in part that "[t]he Amended Complaint alleges no specific facts establishing that the transfer of the Deposit Assets was made with the actual intent to hinder, delay, or defraud," and that "Defendants' Counsel," among others, have knowledge concerning this defense. (B0136-37.)

1. Daugherty Conducts Substantial Discovery

In pursuit of his claims, Daugherty conducted substantial fact discovery, which disclosed Highland's counsels' role in the various transactions alleged to be a part of the multi-step fraudulent scheme. Such discovery included, among other things:

- Dondero repeatedly testified at his August 6, 2019 deposition that he relied (or intended to rely) upon the legal advice of in-house and/or outside counsel in connection with: "coordinat[ing] the legal matters on behalf of HERA in the Texas case" (B0215 26:21-25); appointing HERA Management as manager of HERA (B0217 42:4-8); executing the Assignment Agreement (B0218 45:7-12, 48:6-10); the reasonableness of the allocation of expenses stemming from the Texas Action (B0216 39:9-14); executing the Escrow Agreement (B0219 52:19-54:24); determining whether to transfer the Escrowed Assets to Daugherty after A&B resigned as the escrow agent (B0221 76:10-17); and determining whether to transfer

the Escrowed Assets to Daugherty after a forthcoming ruling by the Court of Chancery (B0222 78:8-22).

- In their sworn discovery responses, Defendants stated that: "Abrams & Bayliss, Highland Capital, and Andrews Kurth Kenyon LLP drafted and/or proposed edits to the Escrow Agreement" (B0092); counsel from Gruber Hurst Johansen Hail Shank LLP, Andrews Kurth Kenyon LLP, and A&B were "involved in aspects of the execution, administration, and/or termination of the Escrow Agreement" (B0092-93); Highland "through legal counsel" received A&B's resignation letter on December 2, 2016 (B0102-3).
- In their sworn discovery responses, Defendants refer to their accompanying document production, which includes communications between A&B and Highland concerning A&B's resignation as escrow agent. (B0103-4.)
- Daugherty deposed Leventon, Eric Girard, and Ellington – Highland's in-house counsel – on June 18, July 16, and August 12, 2019, respectively. At Ellington's deposition, he testified that: on behalf of Highland, Girard and Leventon were the "exclusive" contacts with A&B (B0225 59:2-14); Girard and Leventon were involved in preparing the Escrow Agreement (B0226 64:15-22) and were likely in communications with A&B during

the December 2-3, 2016 timeframe when A&B resigned (B0227 82:7-13.) Leventon testified at his deposition that: he calculated the expense allocation split that is referenced in the Expense Allocation Agreement (B0202 189:10-16); Dondero had no role in connection with the creation of the Escrow Agreement (B0198 114:6-9); after execution of the Escrow Agreement, he emailed Miller requesting that Schedule 1 to the Escrow Agreement be changed (B0199 163:22-164:9.)

- Daugherty deposed Matthew Miller of A&B on June 28, 2019. At his deposition, Miller testified that: Eric Girard was his primary contact at Highland regarding the escrow (B0205 14:21-15:17); in December 2016, Leventon or attorneys from Andrews Kurth provided Miller with an update as to the status of the appeal of the Texas Judgment (B0206 167:6-168:20); Miller had a call with attorneys from Andrews Kurth and possibly Leventon to discuss "how we can get the deposit assets back to Texas, whether that's HERA or Highland[]" (B0208 178:15-179:7); Leventon or attorneys from Andrews Kurth communicated to Miller that it was Highland's preference that A&B resign (B0209 236:5-20); Andrews Kurth "signed off" on A&B's resignation letter (B0211 244:11-18).
- The Declaration of Leventon, submitted on April 10, 2019, states, in pertinent part: "I provide legal counsel to both Highland and HERA in

connection with the lawsuit captioned *Highland Capital Management, L.P. v. Daugherty*, 12-04005, District Court of Dallas County, Texas, 68th Judicial District (Dallas)…, including in connection with that certain agreement entitled 'Escrow Agreement' by and between Highland and [Abrams]…, dated December 13, 2013." (B0194.)

- In his Pre-Trial Brief in the First Delaware Action, Daugherty states: "Highland's assistant general counsel, Isaac Leventon, sent a draft of the Escrow Agreement to [Abrams] on December 13, 2013, and the agreement was executed that day." (B0323-24.)
- In his Pre-Trial Brief, Daugherty states: "[O]n December 1, 2016, Defendants and their attorneys began scrambling to unwind the Escrow." (B0343.)

2. The Court of Chancery Invokes the Crime-Fraud Exception and Orders Production of Privileged Communications

In addition to the above-mentioned discovery, Daugherty had the added benefit of being provided with privileged communications between Highland's counsel and A&B. Daugherty filed a Motion to Compel seeking escrow-related discovery in the First Delaware Action (the "Motion to Compel"). The Motion cited 13 emails sent over five days detailing the Highland in-house and outside counsel involvement in the escrow resignation and the actions taken. (B0151-52; B0160-76.) On May 17, 2019, the Court granted the Motion in part. At the hearings on the

Motion to Compel and the subsequent Motion for Reargument, the Court noted that discovery to date had detailed "the speed with which Highland's counsel worked with Abrams & Bayliss to get them to resign and return the escrowed assets." (A0160-61.) The Court further observed that there was a reasonable basis to believe that "Highland sought the services of attorneys to enable or aid it in furtherance of that fraud." (A0063.)

In granting Daugherty's Motion to Compel, the Court applied the crime-fraud exception and ordered the production of documents relating to the following categories:

- Documents regarding the initiation, negotiation, and the establishment of Abrams as Highland's escrow agent;
- Documents regarding Abrams' legal work during the pendency of the Texas action to determine whether and how Daugherty might access the escrowed assets; and
- Documents regarding Abrams' resignation as Highland's escrow agent.

As the Court explained in granting the Motion to Compel, its *in camera* review of these documents revealed, among other things, that "[A&B] and Highland's attorneys at Andrews Kurth were 'on the same page about the resignation strategy.'" (A0163.)

Indeed, the documents produced in response to the Motion to Compel apprised Daugherty of Highland's counsels' involvement in the resignation of A&B as escrow agent:

- A December 2, 2016 email between A&B and Andrews Kurth reveals that A&B's resignation was the "first step of unwinding the escrow," and that "Highland really wants [to get the resignation] done today. (B0003.)
- In an internal A&B email, dated December 2, 2016, Miller of A&B states that he spoke with Highland's attorneys in the HERA litigation and "Highland wants to get the funds back to HERA and/or Highland as quickly as possible in any way we feel comfortable with." (B0004-6.)
- In an internal A&B email, dated December 2, 2016, Miller explains that he "will reach out to Highland's counsel to coordinate the strategy and move forward to get the resignation letter drafted." (B0004-6.)

Significantly, because these privileged documents were produced *before* the depositions of Dondero, Ellington, and Leventon, Daugherty had the opportunity to explore the Highland counsels' role in the resignation of A&B and the subsequent transfer of the Escrowed Assets during their depositions.

3. Trial Commences in the First Delaware Action

Trial in the First Delaware Action commenced on October 14, 2019. (Ruling at 5.) Consistent with his deposition testimony, Dondero testified at trial that he

relied on the legal advice of Highland's in-house and outside counsel in connection with several key events in the "multi-step scheme" that Daugherty asserts as the basis for his claims:

Dondero Deposition Testimony	**Dondero Trial Testimony**
Assignment Agreement	
Q. So is it your position that HERA was receiving $9.5 million worth of services from Highland at the time? A. Yeah. I believe it would have been an appropriate transfer. That's why it was done. Q. And what makes it appropriate, in your view? A. It was strategized, reviewed, and vetted by counsel as appropriate, given facts and circumstances, expenses and ownership. Q. Okay. Apart from the belief of Highland's in-house or outside counsel about the appropriateness, do you have -- is anything else in forming your position that the transfer was appropriate? A. I rely on their expertise. (B0218 48:1-16.)	Q. In connection with this agreement, you determined, as the president of the manager of HERA, that it was in HERA's best interests to transfer its assets to Highland; is that right? A. Yeah, at the advice of counsel. Q. So you agree with that statement? Let's break that down a little bit. So you determined, as president of the manager of HERA, that it was in HERA's best interests to transfer its assets to Highland? A. I rely on counsel. And the document says what it says. I mean, if it says that, then, yes, I believe it was the right thing to do. (A0349-50.) . . . Q. Which in-house counsel at Highland did you rely on in connection with the allocation agreement -- excuse me -- the assignment agreement? A. At that time and place, which was a number of years ago, I believe it

	was the people I just mentioned, in the order I mentioned them. I believe Thomas Surgent, Isaac Leventon and, to a lesser extent, Scott Ellington. But I could be wrong on the mix or exactly who was doing what. (A0352.)
Transfer of Escrowed Assets	
Q. Okay. After the escrow was dissolved, why didn't Highland Capital just transfer the assets to Daugherty? MR. KATZ: You can answer as long as it doesn't require disclosure of communications with counsel. A. If we'd been told by counsel he was entitled to them, we would've. (B0221 76:10-16.) . . . Q. If this court, the Delaware Court of Chancery, ultimately determines that Daugherty is entitled to the assets that were once escrowed, will Highland transfer the assets to Daugherty? MR. KATZ: Objection; form. Hold on a second. (Examined realtime screen.) I don't want you to make any legal conclusions. If you have independent thoughts about that, you can answer the question. THE WITNESS: Yeah. It wasn't that I was -- I wasn't gonna make legal conclusions.	Q. If you had been told by counsel that Mr. Daugherty was entitled to the escrow assets, you would have given them to him; right? A. Anything that counsel would have told us to do or anything they would have put in front of me to sign, I would have signed, yes. Q. My question is a little bit more specific because it relates to the escrow assets and Mr. Daugherty. If you had been told by counsel that Mr. Daugherty was entitled to the escrow assets, you would have given him the escrow assets; right? A. Yes. We would have done whatever counsel told us. (A0366.) . . . Q. Let's talk about which lawyers you're referring to. So I'll start with the in-house lawyers again. Which in-house lawyers of Highland are you relying on with respect to the transfer of the escrow assets?

A. I was just gonna say we rely on counsel to tell us when and how and what amount we should pay, based on whatever the court rules. (B0221 78:8-22.)	A. It would have been the same three internal lawyers working with external counsel. Q. Mr. Ellington, Mr. Leventon, and Mr. Surgent; is that right? A. I believe so. I believe they were the ones at that time and place. (A0367.)

The Court conducted the first two days of trial, but Highland declared bankruptcy (for entirely unrelated reasons) on the morning of the third day. (Ruling at 6.) All proceedings against Highland were automatically stayed, and Daugherty stated that the rest of the First Delaware Action should also be stayed. (*Id.*) The First Delaware Action remains stayed. (*Id.*)

D. Daugherty Impermissibly Splits His Claims And Files A New Action In The Court of Chancery

On December 1, 2019, Daugherty filed suit against Dondero, HERA, HERA Management, Highland's in-house counsel (Ellington, Leventon, and Thomas Surgent) and outside counsel (Hunton Andrews Kurth LLP and its attorney Marc Katz), and HERA's counsel in the Texas Action (Michael Hurst) in an action styled as *Daugherty v. Dondero et al.*, C.A. No. 2019-0956-MTZ (Del. Ch.) (the "Underlying Action"). (A0036-37.) In the Underlying Action, Daugherty asserted claims for fraudulent transfer, conspiracy to commit fraud, and civil conspiracy.

On May 15, 2020, Daugherty filed a Verified Amended Complaint (the "Amended Complaint") in the Underlying Action, adding claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty, and seeking an order compelling Defendants in the Underlying Action to return to HERA the equivalent of all assets that were allegedly fraudulently transferred from HERA to Highland. (*See generally* A604-706.) On July 15, 2020, all Defendants in the Underlying Action moved to dismiss the Amended Complaint arguing (A0024-27), *inter alia*, that Daugherty impermissibly split his claims against the Defendants in the First Delaware Action and the Defendants in the Underlying Action. (A0744-51.)

In opposing Defendants' Motion to Dismiss, Daugherty conceded that the claims in the Underlying Action "are part of the same common nucleus of fact" as those asserted in the First Delaware Action (A0981), but nonetheless contended that the doctrine against claim splitting is inapplicable because Defendants in the First Delaware Action "withheld information and documents regarding the involvement of the Defendants in th[e] [Underlying] [A]ction and changed position at trial." (A0984.) According to Daugherty, "[a]t trial, for the first time, Dondero blamed his advisors for the actions he took or that were taken under his authority to set up and execute the misdeed in 2016." (*Id.*) Daugherty further argues that "in the discovery phase, the defendants in the Related Action consistently withheld such evidence and provided no documents under the broad waiver that Dondero made at trial." (*Id.*)

On January 27, 2023, the Court issued its decision in the Underlying Action and granted Defendants' Motion to Dismiss. (*See* Ruling.) In so ruling, the Court found that Daugherty "failed to persuade me that the defendants in the First Delaware Action concealed either the attorney defendants' involvement in the underlying events or the principals' intention to rely on advice of counsel to defeat the claims against them." (Ruling at 12.) The Court then parses through the record of the First Delaware Action and identifies those pleadings, discovery responses, deposition testimony, third-party discovery, motion practice, and briefing where Daugherty was "on notice that the First Delaware Action defendants might argue that their reliance on the advice of counsel foreclosed a finding that they held the requisite intent in taking the complained-of actions." (Ruling at 12-18.) As the Court concluded, "Daugherty was aware of the defense before that testimony, and had an opportunity to pursue any legal advice put at issue before Dondero's trial testimony. Daugherty cannot avoid the consequences of his claim splitting on the assertion that he was surprised at trial in the First Delaware Action." (Ruling at 18.)

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY HELD THAT DAUGHERTY IMPERMISSIBLY SPLIT HIS CLAIMS

A. Question Presented

Did the Court of Chancery correctly dismiss the Underlying Action for violating the claim splitting doctrine. (Ruling at 10-20.)

B. Scope Of Review

The Court of Chancery's decision to dismiss the Underlying Action for violating the claim splitting doctrine is subject to *de novo* review. *Betts v. Townsends, Inc.*, 765 A.2d 531, 533 (Del. 2000) ("Whether the IAB was barred by *res judicata* or collateral estoppel from deciding the issues presented at Betts' second IAB hearing, however, raises a question of law that this Court reviews *de novo*."); *see also Bailey v. City of Wilmington*, 766 A.2d 477, 479-81 (Del. 2001) (applying *de novo* review to the Superior Court's ruling that plaintiff's claims were barred by *res judicata*).

C. Merits Of Argument

The Court of Chancery's decision to dismiss the Underlying Action because Daugherty impermissibly split his claims should be affirmed. On appeal, Daugherty asks this Court to conclude that the claim splitting doctrine does not apply to the Underlying Action or, even if the doctrine is applicable, an exception to the rule against splitting claims applies justifying a reversal of the trial court's decision. But

as detailed in the trial court's opinion, Delaware law does not support Daugherty's arguments and the Court of Chancery's dismissal should be affirmed.

1. Daugherty Concedes That He Split Claims Between the Underlying Action and the First Delaware Action

It is well-established in Delaware that a "plaintiff must raise all legal theories arising from a common nucleus of operative fact in one action so long as she has had a full and free opportunity to do so." (Ruling at 8-9 (citing *J.L. v. Barnes*, 33 A.3d 902, 918 (Del. Super. Ct. 2011).) The doctrine exists to bring an end to litigation, prevent needless or vexatious litigation, maintain stability of court decisions, promote judicial economy, and prevent double recovery. *See e.g., Balin Amerimar Realty Co.*, 1995 WL 170421, at *4 (Del. Ch. Apr. 10, 1995); *Webster v. State Farm Mut. Auto. Ins. Co.*, 348 A.2d 329, 331 (Del. Super. Ct. 1975) ("The common law rule against the splitting of one cause of action is rooted in the need to protect a defendant from a multiplicity of suits and their attendant harassment…piecemeal litigation of a single cause of action is contrary to the orderly administration of justice.") (internal citations omitted). A party is barred from bringing a subsequent claim if the party could have presented the claim, in its entirety, in the prior forum. *In re Tr. FBO duPont Under Tr. Agreement Dated Aug. 4, 1936*, 2018 WL 4610766, at *8 (Del. Ch. Sept. 25, 2018); *Balin*, 1995 WL 170421, at *4 ("The rule against claim splitting, like its parent doctrine (*res judicata*), is designed to preclude a

litigant from getting 'two bites at the apple.'"). Yet, two bites at the apple is precisely what Daugherty is seeking in this case.

Daugherty concedes that he split his claims between the two Delaware actions. (OB at 17-18;[4] A1810 ("I agree with one thing [Defendants] said. The claims were split, but where I take issue is that the claim splitting was improper here.")). The Court of Chancery also held that Daugherty conceded this threshold issue. (Ruling at 10-11) ("Indeed, Daugherty does not dispute that he has engaged in claim splitting; he argues he should be excused from the consequences of doing so."). Daugherty has good reason to concede that the claims were split; the factual predicate asserted in his Amended Complaint is virtually *identical* to the facts litigated in the First Delaware Action. The two Delaware actions arise from the same transaction -- the allegedly fraudulent transfer of assets from HERA to Highland. (A0632-A0634 ¶¶ 76-79.) This transaction, and the associated agreements, are already the subject of litigation in the First Delaware Action. (*Compare* A0184 ¶ 5 and A0208 ¶ 52 *with* A0605-A0607 ¶¶ 3-6 and A0632-A0634 ¶¶ 76-79.) Moreover, paragraphs 104, 106, and 107 of the Amended Complaint in the Underlying Action are virtually identical to paragraphs 74, 78, and 79 of the complaint in the First Delaware Action, respectively:

[4] References to the Opening Brief of Appellant Patrick Daugherty are styled as "OB at __."

Amended Complaint	**First Delaware Action Complaint**
104. One of the reasons that HERA has failed to satisfy Daugherty's judgment in the Texas Action is that the Defendants secretly caused the Escrow assets—reserved for a judgment in Daugherty's favor—to be transferred to Highland. Now HERA claims to be insolvent. (A0642)	74. One of the reasons that Highland Employee Retention Assets has failed to satisfy Daugherty's judgment in the Texas Action is that the defendants secretly caused the Escrow assets—reserved for a judgment in Daugherty's favor—to revert back to Highland Capital. Now Highland Employee Retention Assets claims to be insolvent. (A0220)
106. Delaware has a potent fraudulent transfer statute enabling creditors, such as Daugherty, to challenge actions by parent companies siphoning assets from subsidiaries. The statute also recognizes that attorneys are liable under the statute if they acted in bad faith as to a transfer. (A0643)	78. Delaware has a potent fraudulent transfer statute enabling creditors, such as Daugherty, to challenge actions by parent companies siphoning assets from subsidiaries. (A0222)
107. The transfer of HERA's funds reserved for Daugherty in the Escrow to Highland, achieved through the resignation of Abrams & Bayliss, constitutes a fraudulent transfer under Delaware law. It also contradicts sworn representations and counsel representations of the Defendants and their agents in the Texas Action regarding the Escrow. (A0643)	79. The transfer of Highland Employee Retention Assets' funds reserved for Daugherty in the Escrow to Highland Capital, achieved through the resignation of Abrams & Bayliss, constitutes a fraudulent transfer under Delaware law. It also contradicts sworn representations of the defendants and their agents in the Texas Action regarding the Escrow. (A0222)

The similarities did not end with the factual background. Daugherty also sought the exact same relief in both the underlying action and the First Delaware

Action: return of the HERA assets in the possession of Highland. *See J.L.*, 33 A.3d at 919 (holding that preventing unwarranted double recovery is at the heart of the claim splitting doctrine); (*compare* A0651 ("Daugherty respectfully requests that the Court: . . . order Dondero, HERA Management, HERA, Andrews Kurth, Katz, Hurst, Ellington, Surgent, and Leventon, jointly and severally, to return to HERA the equivalent of all the assets fraudulently or otherwise wrongfully caused to be transferred from HERA"), *with* B0050-51 ("Daugherty respectfully requests that the Court: . . . order Highland Capital and Dondero to return to Highland Employee Retention Assets all of the assets that Highland Capital fraudulently or otherwise wrongfully caused to be transferred from Highland Employee Retention Assets to Highland Capital or Dondero".).)

Daugherty argues that dismissal based on the claim splitting doctrine is inappropriate here because only Dondero is an overlapping defendant. (OB at 19.) However, the trial court correctly noted that Delaware law does not require identity of parties for the claim splitting doctrine to apply. (Ruling at 9 (citing *Barnes,* 33A.3d at 918-19 (considering that substantial factual overlap between the two pending actions made it likely that the defendants would be subjected to claims or third-party claims for contribution in each case)).) Rather, the claim splitting doctrine will apply where there is privity between the parties. *See Acosta v. Gaudin*, 2017 WL 4685548, at *3 (W.D. Pa. Oct. 18, 2017) (citing *Lewis v. O'Donnell*, 674

Fed. Appx. 234, 237 n.5 (3d Cir. 2017)) ("The claim-splitting doctrine's kinship to the *res judicata* doctrine directs that the rules of privity as applied to *res judicata* also apply to the claim-splitting analysis."). Privity is "a legal determination for the trial court with regard to whether the relationship between the parties is sufficiently close to support preclusion." *Aveta Inc. v. Cavallieri*, 23 A.3d 157, 180 (Del. Ch. 2010) (quoting *Higgins v. Walls*, 901 A.2d 122, 138 (Del. Super. Ct. 2005)). "[P]reclusion can properly be imposed when the claimant's *conduct* induces the opposing party reasonably to suppose that the litigation will firmly stabilize the latter's legal obligations." *Kohls v. Kenetech Corp.*, 791 A.2d 763, 769 (Del. Ch. 2000), *aff'd*, 794 A.2d 1160 (Del. 2002) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 62 cmt. c (Am. Law Inst. 1982)) (emphasis in original).

An employment relationship can create privity between the employer and the employee, for purposes of claim splitting and *res judicata*. *Lewis v. O'Donnell*, 674 Fed. Appx. 234, 237 n.5 (3d Cir. 2017) (holding that attorneys who represented a corporation were in privity with that corporation for the purposes of *res judicata*); *see also Jones v. Holvey*, 29 F.3d 828, 830 (3d Cir. 1994) (finding privity among employees of the Department of Corrections and the Department). Daugherty's allegations that the defendants conspired to aid and abet HERA Management and Dondero's breach of fiduciary duty, indicate that there was privity between the defendants in the two Delaware actions. *Goel v. Heller*, 667 F. Supp. 144, 152

(D.N.J. 1987) (holding that "co-conspirators are by definition in privity" and observing that "plaintiffs' own theory of the case demonstrates the close and special relationship necessary for the application of res judicata"). Furthermore, a third-party that had significant involvement in the litigation stands in privity with a party to the initial litigation. *Orloff v. Shulman*, 2005 WL 3272355, at *9 (Del. Ch. Nov. 23, 2005) (finding mother and son in privity because "it is fair to conclude that the entire Orloff family has long been intricately intertwined in this litigation.").

The Amended Complaint alleges that the Highland Counsel Defendants are not just employees, but were involved in the Texas Action, the buyout allegedly designed to isolate Daugherty, and the drafting of the various agreements between Dondero, the HERA Defendants, and Daugherty. (*See* A0614 ¶ 31, A0615 ¶ 34, A0616-17 ¶ 38, A0622 ¶ 47, A0633-34 ¶ 78, A0634-35 ¶¶ 82-85.) Daugherty also alleges that the Highland Counsel Defendants were involved in the First Delaware Action and in fact, Leventon testified in that litigation. (A0619-20 ¶ 42.) As alleged in the Amended Complaint, the Highland Counsel Defendants participated in the proceedings as attorneys for their client and employer, Highland. *See Orloff*, 2005 WL 3272355, at *9; *see also Kohls*, 791 A.2d at 769. Therefore, their interests are sufficiently aligned with Dondero, the HERA Defendants, and Highland to create the privity necessary to invoke the rule against claim splitting.

At bottom, Daugherty prosecuted separate Delaware actions arising from the same series of events. The complaints in both Delaware actions were grounded in the same factual predicate. The parties named as defendants in both Delaware actions stand in privity. And, as the Court held, "[t]hese simultaneously pending, overlapping cases undoubtedly risk subjecting Defendants to multiple judgments and potentially risk giving Daugherty two chances at prevailing on claims arising from the same series of transactions (in addition to his third opportunity as a creditor in Highland Capital's bankruptcy)." (Ruling at 10.) And while Daugherty argues that he is not seeking a double recovery (OB at 19), the potential for one is significant if this litigation were to proceed. The pleadings in the First Delaware Action formed the basis for Daugherty's proof of claim in the Highland Bankruptcy. (B0962-B1015). Daugherty asserts his $12.75 million settlement with the Highland Bankruptcy Estate applies to claims absent from this case. However, the publicly filed settlement agreement with Highland makes no such distinction. (B1174-1202) Rather, Highland conceded that the settlement includes a minimum of $4 million representing "enforcement of the HERA Judgment against Debtor pursuant to...fraudulent transfer claims," in the amount of Daugherty's $2.6 million HERA judgment plus interest. (B1168 ¶¶ 32-33, B1172 ¶ 47.) The 2014 judgment was

calculated as the value of the same HERA assets that are the subject of this litigation. (A0606 ¶ 4.) Daugherty has been paid on that judgment.[5]

The Court should affirm the Court of Chancery's dismissal of the Underlying Action for Daugherty's impermissible splitting of his claims against defendants.

2. The Court of Chancery Correctly Held That Daugherty is Not Excused From Impermissibly Splitting Claims in the Delaware Actions

While conceding that he split his claims between the two Delaware actions, Daugherty argues that this Court should apply an exception to the claim splitting doctrine that has never been implemented in Delaware. (OB at 20.) Daugherty contends that an exception to the claim splitting doctrine exists "where the defendant has committed fraud on the plaintiff by concealing evidence 'of a part or phase of claim that the plaintiff failed to include in the earlier action'" or where "the information on which the second action is based was not reasonably discoverable during the pendency of the first action." (OB at 20 (citing *Havercombe v. Dep't of Educ. of the Commonwealth of P.R.*, 250 F.3d 1, 8 n.9 (1st Cir. 2001)).) But, as the Court of Chancery correctly held, Daugherty has failed to meet his burden that, even

[5] Daugherty may receive the value of his HERA assets as either an equivalent amount in a money judgment or a fraudulent transfer award for the assets, but not both. The Highland bankruptcy estate, as the transferee, paid him on the money judgment, so he should not be able to pursue the same recovery from the Defendants on tort claims for allegedly facilitating the transfer.

if such an exception were recognized in Delaware, evidence was concealed or information was not reasonably discoverable in the First Delaware Action.

Daugherty grounds his argument in the fact that Dondero testified at trial in the First Delaware Action that he was relying on the advice of counsel in carrying out the underlying acts. (Ruling at 11; OB at 21-22.) Ignoring the undisputed record, Daugherty contends that Dondero's trial testimony concerning the advice of counsel was the first time such a defense was invoked during the First Delaware Action. (OB at 21-22.) As the Court of Chancery correctly held, this argument lacks support from the record. (Ruling at 12-18.)

In his opening papers, Daugherty argues that prior to trial in the First Delaware Action "[d]efendants never disclosed an advice-of-counsel defense or indicated that the challenged acts were directed by counsel." (OB at 21.) As detailed above, defendants were open and transparent throughout the First Delaware Action about Dondero's reliance on counsel in effectuating the disputed transactions. In response to Daugherty's Verified Complaint in the First Delaware Action, defendants contended that they "did not act with the necessary knowledge, intent, or scienter, and instead acted in good faith and with due care at all times." (A0247; Ruling at 12.) Daugherty probed that defense in written discovery, and Defendants stated, in part, that "[t]he Amended Complaint alleges no specific facts establishing that the transfer of the Deposit Assets was made with the actual intent to hinder, delay, or

defraud," and that Defendants' counsel had knowledge concerning the defense. (B0136-37; Ruling at 12-13.) In response to Daugherty's questions during his deposition in the First Delaware Action, Dondero testified that he relied upon the advice of counsel in connection with the following:

- Coordinating legal matters on behalf of HERA in the Texas Action (B0215 26:21-25);
- Appointing HERA Management as the manager of HERA (B0217 42:4-8);
- Executing the Assignment Agreement (B0218 45:7-12, 48:6-10);
- Assessing the reasonableness of the allocation of expenses stemming from the Texas Action (B0216 39:9-14);
- Executing the Escrow Agreement (B0219 52:19-54:24);
- Determination of whether to transfer the Escrowed Assets to Plaintiff after A&B resigned as escrow agent (B0221 76:10-17);
- Determination of whether to transfer the Escrowed Assets to Plaintiff after a ruling from the Court of Chancery (B0222 78:8-22).

For instance, in response to a question asking if he had communicated with anyone in or around December 2013 regarding the escrow, Dondero testified, "[i]t wouldn't – it wouldn't have been my idea, but it would've been the advice of counsel." (B0219 52:19-22.) Similarly, when asked why the escrow funds were not distributed to Daugherty, Dondero testified "[i]f we'd been told by counsel he was entitled to them, we would've." (B0221 76:10-17.) When Daugherty questioned who was responsible for hiring outside counsel for HERA, Dondero stated, "[i]t would have

been our legal team…[o]ur internal legal team would've hired relevant counsel." (B0215 27:5-8.) And, lest there be any doubt, Dondero testified about his reliance on counsel in the following exchange:

> Q. All right. And then under Assignment Number 1 it's listed as -- well, let me just read it.
>
> It says, "Highland Employee Retention Assets, LLC, effective as of the date set forth below, transfers and delivers HERA's limited partner interest in Highland Restoration Capital Partners, L.P. (having a capital account balance of $9,527,375 as of December 31, 2012) unto Highland Capital Management, L.P."
>
> So is it your position that HERA was receiving $9.5 million worth of services from Highland at the time?
>
> A. Yeah. I believe it would have been an appropriate transfer. That's why it was done.
>
> Q. And what makes it appropriate, in your view?
>
> A. It was strategized, reviewed, and vetted by counsel as appropriate, given facts and circumstances, expenses and ownership.
>
> Q. Okay. Apart from the belief of Highland's in-house or outside counsel about the appropriateness, do you have -- is anything else in forming your position that the transfer was appropriate?
>
> A. I rely on their expertise.

(B0218 47:16 – 48:16.)

Daugherty's discovery efforts included deposing Highland's in-house counsel, Leventon, Ellington, and Eric Girard, in the First Delaware Action. As discussed above, those depositions also informed Daugherty that counsel were

involved in preparing, negotiating, and advising on the subjects discussed in Dondero's testimony. (*See, e.g.*, B0225 59:2-14, B0226 64:15-22, B0202 189:10-16, B0198 114:6-9, B0199 163:22-164:9.) Daugherty also deposed Matthew Miller of A&B, who testified about counsel's involvement on behalf of Dondero, HERA, and Highland. (*See, e.g.*, B0205 14:21-15:17, B0206 167:6-168:20, B0208 178:15-179:7, B0209 236:5-20, B02011 244:11-18.) And document production confirmed counsel's involvement in the transactions underlying Daugherty's complaints. (*See, e.g.*, B0003, B0004.) Additionally, and as noted by the Court of Chancery, defendants' pre-trial brief in the First Delaware Action contained references to the advice of counsel defense. (Ruling at 14.)

Daugherty's opening papers ignore the aforementioned testimony and information discovered prior to the trial in the First Delaware Action. Despite the Court of Chancery's recitation of Dondero's deposition testimony wherein he repeatedly states he relied on counsel's advice regarding the disputed acts (Ruling at 13-14, fn.43), Daugherty contends that he was justified in splitting his claims. It strains credulity that anyone could have heard Dondero's deposition testimony, in addition to the testimony of Highland's counsel and defendants' written discovery responses, and not understood Dondero to have relied on the advice of counsel regarding the disputed acts.

The Opening Brief suggests that, despite Dondero's prior testimony, a comment made during trial by outside counsel supports Daugherty's argument that an exception to the claim splitting doctrine applies. (OB at 23.) During trial, Dondero's counsel, Marc Katz, stated that Dondero's response to a question posed by Daugherty's counsel "absolutely does not put the advice [of counsel] at issue." (A0335.) Daugherty argues that Katz's assertion justifies splitting Daugherty's claims across the two Delaware Actions. (OB at 23.) But, as the Court of Chancery's opinion correctly points out, Daugherty "took issue with the fact that the defendants asserted attorney-client privilege over their counsel's advice, arguing privilege was waived under the at-issue exception and that [Plaintiff] 'reserve[d] the right to pursue the at-issue waiver in the event that anyone else at Highland might recall the advice that was received.'" (Ruling at 17-18.) When confronted with this "new" evidence at trial, Daugherty did not object that Dondero's testimony was new or inconsistent with his deposition testimony. Instead, Daugherty only reserved the right to argue that there was a privilege waiver. (Ruling at 17-18.) And, even if the defendants had introduced a "surprise" defense at trial in the First Delaware Action, Delaware courts typically resolve that issue by holding that the party injecting the new argument has waived the defense. (Ruling at 18 fn. 53 (citing *Barra v. Adams*, 1994 WL 369532, at *6 (Del. Ch. July 1, 1994); *Carberry v. Redd*, 1977 WL 9561,

at *1-2 (Del. Ch. Jan. 19, 1977); *Krutkowski v. Cross*, 2011 WL 6820335, at *2 n.10 (Del. Ch. Dec. 22, 2011).)

Daugherty's decision to ignore Dondero's deposition testimony, and the other aforementioned depositions and discovery responses, in his Opening Brief demonstrates that he cannot dispute that he was on notice of the advice of counsel defense during the discovery phase of the First Delaware Action. Moreover, even if the advice counsel defense was newly introduced at trial, which it was not, the appropriate remedy would not be an amendment of the complaint to add defendants but rather a ruling that defendants had waived the defense. For all the foregoing reasons, the Court of Chancery was correct in dismissing the Underlying Action for violating the claim splitting doctrine and the court's opinion should be affirmed.

II. THE COURT OF CHANCERY CORRECTLY DENIED DAUGHERTY'S REQUEST FOR CONSOLIDATION OF THE DELAWARE ACTIONS

A. Question Presented

Did the Court of Chancery correctly deny Daugherty's request to consolidate the Delaware Actions pursuant to Court of Chancery Rule 42(a). (Ruling at 19-20.)

B. Scope Of Review

The Court of Chancery's decision to deny a request to consolidate litigation under Court of Chancery Rule 42(a) is reviewed for abuse of discretion. *Anderson v. AIG Auto Ins. Co.*, 2007 WL 2410898, at *2 (Del. Aug. 24, 2007).

C. Merits Of Argument

The Court of Chancery refused to consolidate the underlying litigation with the First Delaware Action, because Daugherty "[a]fter more than two years of hard-fought litigation involving extensive motion practice […] is effectively requesting that I permit him to amend his complaint on the third day of trial to add, among other things, five new defendants to the case, based on a legal theory and discovery position he was on notice of during discovery." (Ruling at 20.) Daugherty argues that the Court of Chancery erred in refusing to consolidate the Delaware Actions pursuant to Court of Chancery Rule 42(a). (OB at 26.) But Daugherty's argument for consolidation is flawed for precisely the same reasons as his claim splitting exception argument. Daugherty states that "[a]ny inconvenience, delay, or expense

caused by consolidation would be due to the prior withholding of evidence" by defendants in the First Delaware Action. (OB at 26.) Here, again, Daugherty ignores the unrefuted evidence generated by the parties in the First Delaware Action concerning defendants' reliance on counsel relating to the disputed actions.

In *Wilson v. Brown*, this Court confronted a similar set of procedural facts. 2012 WL 195393 (Del. Jan. 24, 2012). In *Wilson*, the Superior Court was faced with a 2008 action and a subsequent 2010 action which arose from a common nucleus of facts against overlapping and related parties. *Id.* at *1. At the time that the 2010 action was filed, "all discovery and dispositive motion deadlines in the 2008 action had passed" and the defendants had not been on notice during the discovery or motion practice stage of the 2008 action that plaintiffs intended to pursue separate causes of action. *Id.* at *3. The Superior Court refused to consolidate the two actions, reasoning that the delay in raising the new claims prejudiced the defendants. *Wilson v. Urquhart*, 2010 WL 2683031, at *11 (Del. Super. Ct. July 6, 2010). This Court affirmed the Superior Court's denial of consolidation. *Wilson v. Brown*, 2011 WL 1434666 (Del. Apr. 14, 2011). Subsequently, the Superior Court dismissed the 2010 action, describing it as a "classic attempt" to split causes of action. *Wilson v. Brown*, 2011 WL 1632348, at *2 (Del. Super. Ct. Apr. 18, 2011). The plaintiffs in *Wilson* appealed the dismissal of the 2010 action, arguing (again) that the Superior Court erred by refusing to consolidate the 2008 and 2010 actions. *Wilson*, 2012 WL

195393, at *3. Again, this Court affirmed the Superior Court's refusal to consolidate the 2008 and 2010 actions and also affirmed the court's dismissal of the 2010 action for violating the rule against claim splitting. *Id.* at *4-5.

As in *Wilson*, Daugherty sought a consolidation order from the trial court to salvage his improperly split claims. But even the *Wilson* plaintiffs asked for consolidation *before* trial. Here, Daugherty seeks consolidation of claims that he cannot reasonably justify having severed. This belated request does not serve the purpose of Rule 42 which seeks to "avoid unnecessary costs or delays." CT. CH. R. 42(a). While Daugherty presumes that he has a legally cognizable basis to sue the additional defendants named in the underlying litigation, he fails to explain how (even absent the automatic stay from the Highland bankruptcy)[6] he was entitled to leave of court to amend his complaint during trial.

It is well-established that trial courts "have broad discretion to manage their dockets," which includes decisions regarding consolidation of matters pending

[6] Daugherty's assertion that the Highland bankruptcy prevented him from adding claims or defendants in the First Delaware Action is wrong. "[T]he automatic stay is not available to non-bankrupt co-defendants of a debtor even if they are in a similar legal or factual nexus with the debtor." *Maritime Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1205 (3d Cir. 1992); *see also Am. Prairie Const. Co. v. Hoich*, 560 F.3d 780, 789 (8th Cir. 2009) (same); *Arnold v. Garlock, Inc.*, 278 F.3d 426, 435 – 436 (5th Cir. 2001). "[S]ection 362 [the automatic stay provision] does not bar an action against the principal of a debtor-corporation." *Maritime Elec.*, 959 F.2d at 1205. The bankruptcy was no impediment to Daugherty proceeding against Defendants in the First Delaware Action. Daugherty voluntarily undertook a stay, and instead sought and obtained the same damages in the Highland bankruptcy.

before the court. *Havens v. Leong*, 2022 WL 363911, at *2 (Del. Feb. 7, 2022). Daugherty has failed to explain how the Court of Chancery abused its discretion by refusing to consolidate the Delaware Actions after Daugherty was on notice of his purported claims against the Defendants in the underlying litigation well before trial began in the First Delaware Action. Based on the foregoing, the Court of Chancery's decision refusing consolidation of the Delaware Actions should be affirmed.

CONCLUSION

For the foregoing reasons, the decision of the Court of Chancery should be affirmed.

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