EFiled: May 08 2023 04:50PM EDT
Filing ID 69975272
Case Number 60,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEES HUNTON ANDREWS KURTH LLP AND MARC KATZ'S ANSWERING BRIEF

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Dated: May 8, 2023

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NATURE OF PROCEEDINGS

This action has a long and tortured history rooted in Texas litigation (the "Texas Action") between Plaintiff Patrick Daugherty ("Daugherty") and his former company, Highland Capital Management, L.P. ("Highland"), which resulted in a $2.6 million judgment (the "Texas Judgment") in his favor (and a $2.8 million award of attorneys' fees in Highland's favor). This action represents Daugherty's second, duplicative lawsuit seeking to recover the Texas Judgment.

First, Daugherty pursued his former business partner, James Dondero ("Dondero"), Highland and its related entities in an action styled *Daugherty v. Highland Capital Management, L.P.,* C.A. No. 2017-0488-MTZ (the "First Delaware Action"). In the First Delaware Action, Daugherty alleged (among other things) that Dondero and Highland fraudulently transferred certain escrowed assets that were purportedly earmarked to satisfy his Texas Judgment, and breached fiduciary duties in connection with those purportedly self-dealing transfers. (B0015-052). The First Delaware Action was hard fought for two years, involved extensive discovery and motion practice and proceeded to trial on October 14, 2019, but was abruptly stayed on the third and final day of trial because Highland declared bankruptcy.

Undeterred, Daugherty engaged in self-help and filed this serial action to continue his pursuit to collect the Texas Judgment outside of the bankruptcy

proceedings and to end-run the automatic stay imposed in the First Delaware Action. This suit makes the same allegations regarding the same transactions that gave rise to the First Delaware Action, but seeks to implicate and spread liability to Highland's counsel, claiming they orchestrated the transfers Daugherty alleges to be fraudulent.

In this suit, Daugherty sued Dondero and Highland ERA Management, LLC ("HERA Management") and Highland Employee Retention Assets LLC ("HERA") for the second time, and added Highland's counsel as new defendants. The outside counsel defendants include Hunton Andrews Kurth LLP ("Andrews Kurth"),[1] Marc Katz ("Katz," and together with Andrews Kurth, the "Katz Defendants"), who represented Highland and certain affiliates in the Texas Action, and Michael Hurst ("Hurst"), who represented HERA in the Texas Action. Daugherty also sued Highland's in-house attorneys, Scott Ellington ("Ellington"), Thomas Surgent and Isaac Leventon ("Leventon," and together with Ellington, the "In-House Counsel Defendants").

Following motions to dismiss Daugherty's complaint in this action, Daugherty filed his Verified Amended Complaint, asserting five claims: 1) Count I for fraudulent transfer; 2) Count II for conspiracy to commit fraud; 3) Count III for civil conspiracy; 4) Count IV for breach of fiduciary duty; and 5) Count V for aiding

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[1] In 2018, after a merger, Andrews Kurth became Hunton Andrews Kurth LLP, the named defendant in this lawsuit.

and abetting breaches of fiduciary duty. (A0604-652). Defendants briefed motions to dismiss for a second time, and on March 10, 2021—the date reserved for oral argument on defendants' motions—the Court of Chancery stayed this action to permit Daugherty to negotiate a settlement of his claims against Highland within the context of Highland's bankruptcy. (B1152). At that time, the Court observed that "claim-splitting is essentially more or less undisputed, and the question is what to do about it" and commented that "***it seems to me that the Texas immunity doctrine may very well present a fair exit for counsel***." (B1095; B1125) (emphasis added).

In March 2022, Daugherty's settlement with Highland was approved by the bankruptcy court. (Daugherty's Opening Brief ("OB") at 15). Around that time, Daugherty took ownership of HERA and HERA Management pursuant to the terms of his settlement with Highland, and his counsel substituted in to represent those defendants (though they have not been dismissed from this action). (OB at 14-15; B1206-09). Defendant Thomas Surgent was also dismissed pursuant to the terms of Daugherty's settlement. (OB at 15; B1203-05).

During a May 5, 2022 status conference, Daugherty reported that, although his settlement with Highland was approved, the exact amount of his recovery was still contingent and would remain unknown for the foreseeable future. (B1221). The court offered to "lift the stay … to determine the Texas immunity doctrine issue and also whether consolidation is a proper and permissible response to claim-splitting."

(B1236-37). Following supplemental briefing on those two issues, oral argument was held on October 6, 2022. (B1246-1329).

On January 27, 2023, the Court of Chancery issued its letter opinion (the "Ruling") dismissing this action in its entirety on the basis of claim-splitting. (OB Ex. A). The Ruling reasoned that "Daugherty cannot avoid the consequences of his claim splitting on the assertion that he was surprised at trial in the First Delaware Action," thereby rejecting Daugherty's arguments that defendants purportedly concealed the advice of counsel defense until trial in the First Delaware Action. (Ruling at 11, 18). The Ruling relied on ample evidence in the record that revealed Daugherty was on notice of this defense prior to trial in the First Delaware Action, including Dondero's deposition testimony and references to reliance on counsel in pretrial briefing. (Ruling 14).

Daugherty's appeal presents no new arguments and fails to establish any abuse of discretion in the court's management of its docket. The Ruling should be affirmed. Separately, dismissal can be affirmed on the alternative grounds of Texas' attorney immunity doctrine, which immunizes attorneys from civil liability to non-clients "for actions taken in connection with representing a client." *Cantey Hanger, LLP v. Byrd,* 467 S.W.3d 477, 481 (Tex. 2015).

SUMMARY OF ARGUMENT

A. Answer to Daugherty's Summary of Argument

1. Denied. The trial court did not reversibly err or abuse its discretion in dismissing Daugherty's second-filed suit for impermissibly splitting claims, or for declining to remedy Daugherty's split claims through consolidation. The Court of Chancery correctly concluded that Daugherty was on notice of the claims asserted in this action "leading up to trial" in the First Delaware Action "and had an opportunity to pursue" his theories of recovery in the original action. (Ruling 14, 18). Further, the trial court appropriately exercised its discretion to deny Daugherty's request to consolidate the proceedings. Consolidation is inappropriate under the circumstances because the First Delaware Action no longer presents a justiciable controversy – Daugherty is the only remaining party in interest in that action, now occupying both sides of the caption. Additionally, consolidation of these procedurally divergent matters stands to violate Rules 15(aaa), 15(b), and 59 in a manner that would prejudice the Katz Defendants, and should be denied. The Katz Defendants join in the arguments presented by Appellees Dondero, Isaacs, Leventon and Hurst, but file separately to highlight the Texas attorney immunity defense applicable to the Katz Defendants.

B. The Katz Defendants' Alternative Grounds for Affirmance: Texas' Attorney Immunity Doctrine

1. This Court may affirm the dismissal of Daugherty's claims against the Katz Defendants on the alternative grounds of Texas' attorney immunity doctrine, which acts as a complete bar to Daugherty's claims. The Supreme Court of Texas has long applied this doctrine to ensure "attorneys are immune from civil liability to non-clients 'for actions taken in connection with representing a client,'" thereby furthering the state's policy interests of protecting vigorous representation of clients. *Cantey,* 467 S.W.3d at 481; *Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.,* 595 S.W.3d 651, 657 (Tex. 2020).

STATEMENT OF FACTS[2]

A. The Parties and Relevant Non-Parties

Plaintiff Daugherty is a resident of Dallas, Texas, and a former "partner and senior executive of Highland and certain of its affiliates from 1998 until 2011." (A0608 ¶8). On appeal, Daugherty concedes that he has received nearly $8 million in settlement compensation relating, in part, to the events giving rise to his Amended Complaint in this action. (OB at 15; A1082-1083).

Defendant Katz is a resident of Dallas, Texas, and the Managing Partner of DLA Piper's Dallas office. (A0609 ¶14). Before joining DLA Piper in February 2018, Katz was a partner with Andrews Kurth. (*Id.* ¶¶13-14). Katz represented Highland, Highland Capital Business Management L.P., James Dondero, and Sierra Verde, LLC in the Texas Action; he also represented Highland in the First Delaware Action prior to the bankruptcy-imposed stay on the final morning of trial.

Defendant Andrews Kurth is a law firm that was based in Houston, Texas, during the events alleged in the Amended Complaint. (*Id*. ¶13). Through Katz and

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[2] Because this Court "accept[s] all well pleaded factual allegations as true" when "reviewing a ruling on a motion to dismiss," the Katz Defendants accept as true the well pleaded allegations in Daugherty's Verified Amended Complaint for purposes of this appeal. *Central Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings LLC,* 27 A.3d 531, 535 (Del. 2011). The Katz Defendants, however, do not concede the accuracy of his allegations and reserve the right to dispute their accuracy and disprove them if necessary.

other attorneys, Andrews Kurth represented Highland and its affiliates in the Texas Action. (A0621 ¶46).

Defendant Hurst is a resident of Dallas, Texas, and was a partner of the Dallas-based law firm Gruber Hurst Johansen Hail Shank LLP during the events at issue. (A0609 ¶15). Hurst represented HERA and two of its board members in the Texas Action. (*Id.*).

Defendant HERA is a Delaware limited liability company formed in 2009 to serve as an employee compensation vehicle "by granting [certain employees] equity-like awards in certain funds, and then distributing the proceeds of those interests to the employees in their capacity as unit holders." (A0608; A0610 ¶¶11, 20). Daugherty alleges that he held a 19% interest in HERA's equity, but was deprived of this interest because of certain actions on the part of the defendants. (A0611 ¶¶22-24). Through his settlement with Highland, Daugherty is now the owner of HERA. (OB at 15; A1082-1083).

Defendant HERA Management was formed as a Delaware limited liability company in February 2013 to serve as the sole manager of HERA following the resignation of HERA's board after the buyout of the former directors' equity units. (A0616-17 ¶¶36, 39). Daugherty is also the owner of HERA Management. (OB at 15; A1082-1083).

Defendants Scott Ellington and Isaac Leventon are Texas residents and in-house attorneys at Highland. (A0610 ¶¶16-18).

Defendant James Dondero is Highland's co-founder and former president. (A0608-10).

Non-party Highland is a Delaware limited partnership that operates in Dallas, Texas. (*Id*. ¶9). Highland filed for bankruptcy on October 16, 2019, which remains pending in federal court in Texas. (*Id.*).

Non-party Abrams & Bayliss LLP ("A&B") is a Delaware law firm "that Highland used frequently when any Delaware law issues came up" and served as the Escrow Agent for the assets at issue. (A0623 ¶52).

B. The Texas Action

Highland filed the Texas Action against Daugherty in 2012, alleging various violations of Daugherty's employment agreement and duties owed to Highland. (A0613 ¶29). Daugherty responded with several counterclaims and third-party claims. (A0614 ¶30). Katz and Andrews Kurth represented Highland, Highland Capital Business Management L.P., Dondero and Sierra Verde, LLC in the Texas Action, and Hurst and Gruber Hurst represented HERA and two of its individual board members. (A0609 ¶¶13-15). The Texas Action spanned more than four years through appeal, including a three-week jury trial in January 2014. (A0626; A0628 ¶¶62, 66).

C. Highland Restructures HERA

Daugherty alleges that in January 2013 (during the pendency of the Texas Action), "Highland offered to all HERA unit holders-except Daugherty" immediate cash for the rights to their units and "[a]ll offerees accepted the buyout offer." (A0615 ¶34). As HERA's unitholders were bought out, its board members resigned. (A0616 ¶36). Following the repurchases, Daugherty held 19% of HERA's equity and Highland held 81%. (A0611; A0615 ¶¶24, 34). Dondero formed HERA Management on February 1, 2013, to manage HERA. (AA0616-17 ¶¶35, 39). HERA and Highland then entered into an Expense Allocation Agreement to manage the payment of legal fees associated with the Texas Action (the "Expense Allocation Agreement"), which was drafted by the In-House Counsel Defendants. (A0620-21 ¶44).

On April 30, 2013, Dondero executed an Assignment Agreement, which "transfer[red] substantially all the assets of HERA" to Highland "as 'in-kind distribution[s]'" in exchange for Highland's assumption of HERA's litigation risks. (A0622 ¶¶47-48). Assets representing Daugherty's 19% interest were segregated on Highland's books. (A0625-26 ¶60). Following execution of the Assignment Agreement, HERA retained only about $100,000 in cash and, as disclosed to Daugherty, became insolvent by September 2014. (A0630 ¶¶70-71). In fact, HERA

owed several million dollars to Highland for its defense costs in the Texas Action. (*Id.* ¶71).

D. Highland Segregates Assets Subject to the Texas Action Using A&B as its Escrow Agent

On December 13, 2013, just weeks before the jury trial in the Texas Action, Highland executed an Escrow Agreement with A&B (the "Escrow Agreement") for the purpose of formally segregating a portion of the assets HERA had assigned to Highland (roughly equivalent to Daugherty's 19% equity stake) (the "Escrowed Assets"), in case there was an adverse judgment entered in Daugherty's favor. (A0623-24 ¶¶53-54). The Escrow Agreement was drafted by the In-House Counsel Defendants and executed by Highland and A&B. (A0623 ¶¶52-53). Although he was not a party to, or third-party beneficiary of, the Escrow Agreement, Daugherty nevertheless alleges he believed the Escrowed Assets were set aside "for his benefit" as his portion of HERA assets and that they would be immediately turned over to him upon receiving a judgment in the Texas Action. (A0646 ¶118).

E. Texas Judgment is Issued

On July 14, 2014, the trial court in the Texas Action issued the Texas Judgment, memorializing the Texas jury award, issuing Highland a permanent injunction barring further breaches of (i) Daugherty's employment agreement and (ii) his fiduciary duties and confidentiality obligations, and assessing an attorneys' fee award of $2.8 million in Highland's favor. (A0628-29 ¶¶66-68). Daugherty

received a $2.6 million damages award against HERA for its breach of the implied covenant of good faith and fair dealing. (*Id.*). Following appeals, an August 22, 2016 Memorandum Opinion issued by the Court of Appeals for the Fifth District of Texas at Dallas affirmed the Texas Judgment. *Daugherty v. Highland Capital Management, L.P.,* 2016 WL 4446158 (Tex. Ct. App. Aug. 22, 2016). On December 1, 2016, the Texas Court of Appeals issued its mandate, at which point the Texas Judgment became a final, non-appealable order. (A0632 ¶74).

F. A&B Resigns as Escrow Agent

Following receipt of the mandate, and a December 2, 2016 call, A&B recommended that it resign as escrow agent. (A0632 ¶¶74-75; B0004-06; A0439-A0441). Highland relied on AB's advice and accepted its resignation. (A0633 ¶77).

In accepting A&B's resignation, Highland directed A&B to return the Escrowed Assets to it in accordance with the Escrow Agreement's wire instructions. (*Id.*). On December 5, 2016, A&B wired the Escrowed Assets to Highland's Compass Bank account in Dallas, Texas. (*Id.*).

G. The First Delaware Action

In July 2017, Daugherty filed the First Delaware Action against Highland, HERA, HERA Management and Dondero, asserting seven claims. The First Delaware Action was premised upon the same transactions at issue in this case and sought "to collect a judgment entered in Daugherty's favor in Texas against

[HERA]; [and] to return assets fraudulently transferred from [HERA,]" and asserted claims "for breach of fiduciary duty against [HERA Management] and Dondero in connection with self-dealing transactions involving [HERA];" among other things. (B0015-17). Daugherty described his action as seeking to "satisfy his Texas judgment and return fraudulently transferred assets to [HERA]," and challenged events taking place in 2012 and 2013, including an amendment to HERA's operating agreement, the buyout of other HERA unitholders, the formation of HERA Management, the Expense Allocation Agreement, the Assignment Agreement, and the Escrow Agreement. (B0018 ¶6). Daugherty alleged that A&B's resignation and return of the Escrowed Assets to Highland was a fraudulent transfer and "contradict[ed] sworn representations of the defendants and their agents in the Texas Action regarding the Escrow." (B0040 ¶78). Daugherty pled he "hopes to undo the transfer of assets in the Escrow and any other fraudulent transfers from [HERA] so that [he] can collect his judgment and restore full value to his continuing interest in [HERA]." (B0035 ¶63).

Several of his claims were dismissed via two opinions from the Court of Chancery in the First Delaware Action. First, the trial court dismissed the fraudulent transfer allegations made against Dondero, because "the facts only reflect that Highland placed the funds in escrow, and that Highland directed Abrams [& Bayliss] to return them," not actions on the part of Dondero. *Daugherty v. Highland Capital*

Management, L.P., 2018 WL 417270, at *3 (Del. Ch. Jan. 16, 2018). Second, after supplemental briefing, the Court of Chancery dismissed three claims on the grounds of laches, concluding that Daugherty's claims based on the amendment of HERA's operating agreement and other events in 2013 (including the execution of the Expense Allocation Agreement) were presumptively time-barred, and could have been asserted on a timely basis but were not. *Daugherty v. Highland Capital Management, L.P.,* 2018 WL 3217738, at *8, 10 (Del. Ch. June 29, 2018).

H. Discovery in the First Delaware Action

Following the dismissals, the First Delaware Action proceeded through discovery, including voluminous document productions, several depositions and intensive discovery motion practice. (*See* Ruling at 5). Daugherty's discovery efforts included inquiring into counsel's involvement in the relevant transactions, including extensive escrow-related discovery. Daugherty deposed Scott Ellington (one of the In-House Counsel Defendants in this action) and obtained a commission for discovery from Eric Girard, another in-house attorney at Highland. (B1369; B1353 at D.I. 198, 277). Daugherty moved to compel documents from A&B and was granted access to significant escrow-related discovery on the basis of the crime-fraud exception. (B1368 at D.I. 203). Finding that Daugherty "has made a *prima facie* showing that a reasonable basis exists to believe that a fraud has been perpetrated, and that Highland sought A&B to serve as escrow agent and to provide

legal analysis in furtherance of that fraud," any "privilege Highland claims over A&B's legal advice regarding the escrow arrangement and A&B's resignation has been stripped." (A0064-65). In invoking the crime-fraud exception, the court focused on the fact that A&B "provided legal advice interpreting that [Escrow] agreement and charting the course for the transfer; and, [] implemented its own advice to effectuate the transfer." (A0065). Accordingly, the court ordered broad discovery from A&B, including the deposition of attorney Matthew Miller. (B0203-212).

The same day that the court invoked the crime-fraud exception as to A&B, it denied Daugherty's motions for commissions to obtain deposition testimony from Marc Katz and James Bookhout, the Andrews Kurth lawyers who represented Highland in the Texas Action.[3] (B1368-69 at D.I. 200). The court below noted that "Daugherty seeks fact testimony … on five topics, all pertaining to the events surrounding the escrow as alleged in Daugherty's operative complaint." (A0067). The court denied the motions for commissions without prejudice, noting "Daugherty has not made a sufficient showing that he needs to depose Mr. Bookhout and Mr. Katz at this juncture." (A0068). The court reasoned that there was ample discovery

[3] In making both May 17, 2019 rulings, the court had conducted an *in camera* review of certain documents on Highland's privilege log. (A0056). The court limited the crime-fraud exception to A&B discovery, making no suggestions that the Katz Defendants' communications should be similarly stripped of privilege. To the contrary, the court denied unwarranted discovery into Highland's litigation counsel.

into the escrow issues: "Daugherty will receive A&B's documents regarding the escrow. Daugherty can also depose the escrow agents. He can depose the Highland principals who were involved…. He should pursue those avenues before pursuing one that jeopardizes Highland's choice of counsel." (A0068). The court required escrow discovery to be completed by June 14, 2019, and indicated that it would permit renewal of Daugherty's motions for commission by June 17, 2019, if he could "demonstrate what gaps in the record he needs to fill, and why he believes the requested deponents can fill those gaps." (A0069). Daugherty never identified "gaps in the record" following the escrow discovery period and did not renew his motion to depose the Andrews Kurth attorneys.

I. The First Delaware Action Goes to Trial

Daugherty filed his Pretrial Brief in the First Delaware Action on August 29, 2019. (B1342 at D.I. 322; B0309-383). In his Pretrial Brief, Daugherty included a five-page minute-by-minute narrative detailing the events surrounding the release of the Escrowed Assets, which included the purported actions and communications of the Katz Defendants. (B0342-47). Daugherty's narrative, however, did not seek to implicate the Katz Defendants in any purported wrongdoing. Conversely, defendants' Pretrial Brief made clear that "Highland relied upon legal advice received from A&B" and, in connection with the transfer of the Escrowed Assets, "acted on the advice of counsel." (B0264; B0280).

The Court of Chancery granted the parties' Stipulated Joint Pre-Trial Order on October 11, 2019, wherein Daugherty represented that he did "not contemplate any amendment to his pleadings." (A0295). Trial commenced on October 14, 2019. Daugherty contends (incorrectly) that, on the second day of trial, Dondero offered "momentous" trial testimony that, "for the first time" revealed that the buyout of HERA's units was "driven by counsel." (OB at 9, 21; A0334-341). After two days of trial, the First Delaware Action was stayed pursuant to Highland's bankruptcy filing. (B1334 at 358; *see also* A0607 ¶ 7 n.1).

J. Daugherty Takes Another Bite at the Apple

Daugherty filed this serial action on December 1, 2019, seeking to collect on his Texas Judgment "from the parties who were implicated … during the prosecution of the [First] Delaware [] Action," challenging the exact same transactions at issue in the First Delaware Action. (A0607; A0608 ¶¶7, 9; *see also id*. ¶ 7 n.1 ("Daugherty currently is not able to bring the causes of action set forth in this complaint against Highland outside of the bankruptcy proceedings"); A0640-641 ¶99 (describing this action as pursuing an "uncollectable judgment against Highland.")). This secondary lawsuit seeks to spread liability for the $2.6 million Texas Judgment to Highland's lawyers, including its outside counsel, contending counsel facilitated Highland's purported fraudulent transfers and its purported evasion of the Texas Judgment.

Defendants each moved to dismiss Daugherty's complaint based on the Texas attorney immunity doctrine, claim-splitting, laches, and for failure to state a claim. (A0029-032 at D.I. 17, 18, 19, 21, 22). On May 15, 2020, Daugherty filed a Verified Amended Complaint rather than opposing the motions. (A0028 at D.I. 28). Defendants again moved to dismiss on July 15, 2020, based on the same arguments. (A0024-7 at D.I. 31-34). On the day reserved for oral argument on defendants' motions (March 10, 2021), the Court entered a stay of proceedings "in view of the bankruptcy" and to permit Daugherty to negotiate a settlement in the context of Highland's bankruptcy so "we know what recovery Mr. Daugherty will receive through the bankruptcy." (B1152).

K. Daugherty Recovers Millions from Highland

Since filing this 2019 lawsuit, Daugherty has settled claims with Highland in its bankruptcy proceedings and stands to recover $12,750,000 from Highland, nearly $8 million of which is already in his possession. (OB at 15; A1082-83). He also obtained full ownership of HERA and HERA Management. (*Id.*). Daugherty has made no showing that he has not been made whole through the settlement payments, which dwarf the $2.6 million Texas Judgment at the heart of this dispute.

L. The Court of Chancery Dismisses Daugherty's Claims as Impermissibly Split

Following Daugherty's settlement, the Court of Chancery held a status conference in this action on May 5, 2022, and lifted the stay for the limited purpose

of considering the Texas attorney immunity doctrine (which took center stage in the Katz Defendants' motion to dismiss briefing) and the issue of claim-splitting. (B1236-37). The court ordered supplemental briefing on "those discrete issues." (*Id*). Following supplemental briefing, the court held oral argument on October 6, 2022. (A0002 at D.I. 103). On January 27, 2023, the Court of Chancery issued a letter opinion (the "Ruling") dismissing Daugherty's claims solely on the basis of impermissible claim-splitting. The Ruling squarely rejected Daugherty's arguments that he was unable to pursue these claims in the First Delaware Action, citing to ample evidence in the record of the First Delaware Action revealing that Daugherty was on notice of counsel's role in the transactions at issue and had "conducted discovery to his apparent satisfaction in the First Delaware Action." (Ruling at 15). The court found no reason to excuse Daugherty from the implications of his claim-splitting. The Ruling "did not reach whether the Texas immunity doctrine applies." (*Id.* at 8 n.22).

ARGUMENT

I. THE COURT OF CHANCERY'S DISMISSAL ON CLAIM-SPLITTING GROUNDS SHOULD BE AFFIRMED.

A. COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Court of Chancery appropriately exercised its discretion to remedy Daugherty's claim-splitting by dismissing this action without prejudice. (Preserved at A1571-73; A1749-751; A1754; B0714, n.4; B0740, n.14; B1030-1035).

B. SCOPE OF REVIEW

The Court of Chancery's decision to remedy claim-splitting through dismissal of the secondary action is reviewed for an abuse of discretion. *Goureau v. Lemonis,* 2021 WL 1997531, at *12 (Del. Ch. Mar. 30, 2021) ("The Court has ample discretion in considering how to remedy claim splitting."). *See Acosta v. Gaudin,* 2017 WL 4685548, at *2 (W.D. Pa. Oct. 18, 2017) ("A court's decision to dismiss a new complaint under the claim-splitting doctrine is subject to the abuse of discretion standard of review.") (quoting *Schneider v. United States,* 301 Fed. Appx. 187, 190 (3d Cir. 2008)); *Scholz v. United States,* 18 F.4th 941, 951 (7th Cir. 2021) (trial "court has 'significant latitude' and 'broad discretion to dismiss a complaint for reasons of wise judicial administration … whenever it is duplicative of a parallel action already pending….' We review such decisions for an abuse of discretion.") (cleaned up) (internal citations omitted). *See also Anderson v. AIG Auto Ins. Co.,* 933 A.2d 1249

(Del. 2007) (reviewing dismissal of a complaint under an abuse of discretion standard because trial court "has the inherent authority to manage its own docket."); *Chadwick v. Metro Corp.,* 856 A.2d 1066 (Del. 2004) (affirming dismissal of a complaint under abuse of discretion standard because "trial judge acted appropriately within his inherent authority to manage his own trial docket."). The Ruling at issue is premised upon Court of Chancery Rule 1, and the need to administer the Court of Chancery's Rules "to secure the just, speedy and inexpensive determination of every proceeding." (Ruling at 19-20). *See also* B1151 (describing contemplated "exercise of discretion to dismiss the duplicative later filed action"). This is the type of claim-splitting dismissal "that do[es] not require a prior judgment" and is "viewed as a matter of docket management" and "reviewed for abuse of discretion." *Scholz,* 18 F.4th at 950-51.

C. MERITS OF ARGUMENT[4]

As set forth in the Ruling, Daugherty concedes claim-splitting. (Ruling at 7 n.17; OB at 4 ("claims were split")). Thus, Daugherty bears the burden of demonstrating that his claims could not have been raised in the first proceeding. *Maldonado v. Flynn,* 417 A.2d 378, 383-84 (Del. Ch. 1980) ("to prevent dismissal," plaintiff "must show that there was some impediment to the presentation of his entire

[4] The Katz Defendants join in and incorporate by reference herein the arguments presented in the briefing of Appellees Dondero, Isaacs, Leventon and Hurst.

claim for relief in the prior form."). Daugherty contends "procedural necessity" required splitting his claims, so he should be excused from the general prohibition on claim-splitting. (OB at 4). Daugherty's plea for a procedural "hall pass" is unwarranted and must be rejected, as dismissal honors Delaware's policy in deterring and precluding serial litigants like Daugherty.

1. Daugherty Was Aware of these Claims.

Daugherty has engaged in classic claim-splitting, by "prosecut[ing] overlapping or repetitive actions . . . at different times" because he "neglected to present some of [the facts] [and] failed to assert claims which should in fairness have been asserted" in his original trial. *Matter of Estate of du Pont Dean,* 2017 WL 3189552, at *11 (Del. Ch. July 13, 2017). Delaware law holds he should "ordinarily be precluded . . . from subsequently pressing his omitted claim in [this] subsequent action." *Id.*

Daugherty's main justification for claim-splitting is that "defendants improperly withheld evidence implicating them during the Delaware Related Action" and "the information on which [his] second action is based was not reasonably discoverable during the pendency of the first action." (OB at 17-18) (quoting *Havercombe v. Dep't of Educ. Of P.R.,* 250 F.3d 1, 8 n.9 (1st Cir. 2001)). Daugherty's position cannot be squared with the record in the First Delaware Action, which is replete with discovery into counsel's role respecting the Escrowed Assets

and briefing regarding the transactions at issue, all demonstrating Daugherty's knowledge of the Katz Defendants' purported (and benign) involvement in the release of the Escrowed Assets. (*See* B0342-47).

In denying Daugherty's request to depose Highland's litigation counsel (*i.e.,* the Katz Defendants), the Court of Chancery reasoned that such precarious discovery would only be ***cumulative***, as Daugherty would be receiving full discovery from A&B on the escrow issue, along with discovery from Highland's in-house counsel and principals regarding these events. (A0068). (*See* Ruling at 14 (noting Daugherty deposed Dondero who "conveyed that he relied on the advice of counsel several times as to several different matters.")). The court gave Daugherty an opening to pursue such further discovery from the Katz Defendants if he could demonstrate that there were gaps in the record, but Daugherty "conducted discovery to his apparent satisfaction in the First Delaware Action" without making such a motion. (Ruling at 14-5).

Daugherty's contentions regarding Dondero's "bombshell" testimony are a red herring. Dondero's testimony—that certain 2013 events were "driven by counsel"—was not only consistent with his deposition testimony (*see* Ruling at 14 n.43), but also irrelevant, because, as Katz contended, "the issues of the buyout and transaction are not at issue in this case," having been dismissed as time-barred by Vice Chancellor Glasscock in 2018. *See Daugherty v. Highland Cap. Mgmt., L.P.,*

2018 WL 3217738, at *7 (Del. Ch. June 29, 2018) ("those portions of the Complaint arising from the 2013 Amendment and contemporaneous actions are barred by laches."). Nevertheless, Katz and counsel for Daugherty preserved objections on the record about the at-issue exception and its scope, and Daugherty was permitted to question Dondero in a sealed courtroom concerning those matters. (A0334-342). Daugherty's attempt to litigate this open matter in the First Delaware Action through the appeal in this subsequent lawsuit implicates the very policies that prohibit claim-splitting: "prosecut[ing] overlapping or repetitive actions in different courts or at different times," which unfairly gives Daugherty "two bites at a proverbial apple." *Estate of du Pont Dean,* 2017 WL 3189552, at *11.

There is simply no basis to conclude that the Katz Defendants' involvement in the transactions that form the basis of both lawsuits was unknown to Daugherty or concealed by defendants, and Daugherty's justification for claim-splitting fails.

2. Daugherty's Proposal to Consolidate His Actions is Not Viable.

Daugherty proposes consolidation to remedy his claim-splitting. (OB at 23-26). This proposed remedy is not viable and was not properly presented.

First, consolidation is not feasible, as the First Delaware Action is no longer justiciable. Prior to trial, only three claims remained active in the First Delaware Action: 1) Count VIII for unjust enrichment against Highland; 2) Count IX for promissory estoppel against Highland; and 3) Count I for fraudulent transfer against

Highland, HERA and HERA Management. (A0286-87; B0309-383). Daugherty has now settled his claims against Highland, meaning that the only active claim in the First Delaware Action is Daugherty's fraudulent transfer claims against HERA and HERA Management, *i.e.*, ***himself***, following his acquisition of HERA and HERA Management in connection with his settlement. (OB at 14-15). Accordingly, there is no longer a justiciable controversy between adverse parties in the First Delaware Action. "One of the requirements of a justiciable controversy is that it must be a dispute between parties whose interests are real and adverse." *Warren v. Moore,* 1994 WL 374333, at *2 (Del. Ch. July 6, 1994) (quoting *Stroud v. Milliken Enterprises, Inc.,* 552 A.2d 476, 479-80 (Del. 1989)). *See Crescent/Mach I Partners, L.P. v. Dr. Pepper Bottling Co. of Texas,* 962 A.2d 205, 210 (Del. 2008) (settlement destroys "adversity between the parties such that a justiciable controversy … no longer exists.").

Second, Daugherty's proposal to cure claim-splitting through consolidation violates Court of Chancery Rules 15(aaa), 15(b) and 59. Daugherty concedes "[e]ssentially, this action states claims that conform to the evidence presented at trial and arise out of new evidence revealed at trial in the Delaware Related Action." (OB at 14). Daugherty cites no law supporting the permissibility of his would-be amendment to add new claims against new defendants (necessitating new discovery) in what is essentially a post-trial proceeding. In fact, Rule 15(b) forbids the addition

of new ***defendants*** (and generally prohibits the addition of new ***claims***) post-trial, as such amendments would result in prejudice. Del. Ch. Ct. R. 15(b). *See Zutrau v. Jansing,* 2014 WL 6901461, at *3 (Del. Ch. Dec. 8, 2014) ("The primary consideration in determining whether to grant leave to amend under Rule 15(b) is prejudice to the opposing party…. Assertion of entirely new claims via such a motion is disfavored. Rather, motions under Rule 15(b) are intended to correct the theory of an existing claim and not to assert new and different claims.") (cleaned up). Unquestionably, amending a pleading in an essentially post-trial posture to add ***new defendants*** who have not participated in discovery or otherwise defended against a plaintiff's claims results in prejudice. *See Parnell v. Indian Trailer Sales,* 1969 WL 99792, at *2 (Del. Super. May 22, 1969) (post-trial motion to amend pleading to add defendant denied, because such practice "does not allow [defendant] an opportunity to defend herself as a party"); *Beck & Panico Builders, Inc. v. Straitman,* 2009 WL 5177160, at *5 (Del. Super. Nov. 23, 2009) (claims added after trial denied litigant the "opportunity to present a defense"); *Vichi v. Koninklijke Philips Electronics, N.V.,* 85 A.3d 725, 761-762 (Del. Ch. 2014) (plaintiff on notice of claims prior to trial who did not seek to amend until after trial "deprived [defendant] of the opportunity to conduct discovery to support defenses or to rebut elements of the newly asserted claim," resulting in undue prejudice).

Daugherty will contend that this material prejudice can be mitigated by re-opening the trial record in the First Delaware Action, permitting the filing of a consolidated amended complaint and potentially engaging in further discovery, all of which would necessitate a new trial. But Daugherty's unabashed pursuit of a new trial in the First Delaware Action fails to make the requisite showing of manifest injustice – a requirement for getting a second bite at the trial-apple pursuant to Court of Chancery Rule 59. *Zutrau v. Jansing,* 2014 WL 6901461, at *2 (Del. Ch. Dec. 8, 2014). (*See* Ruling at 20 ("Daugherty 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.")). Further, Daugherty should be barred from filing a consolidated amended complaint pursuant to Court of Chancery Rule 15(aaa), given that Daugherty stood on his claims in response to motions to dismiss raising the attorney immunity defense, which should be decided in the event of any remand.

Simply, Daugherty knew all the facts presented in this action prior to trial in the First Delaware Action and represented that he did not contemplate amending his pleadings in the Pretrial Order. His proposed consolidation would amount to an entire (and unwarranted) "do-over" of ***both*** cases, which cannot be reconciled with Rules 15(aaa), 15(b) or 59.

3. The equities favor dismissal.

Since filing this action to collect his $2.6 million Texas Judgment, Daugherty has settled claims against the primary tortfeasor (Highland) and has received nearly $8 million, with further payments to be made. (OB at 14-15). There is no equitable reason to excuse Daugherty's claim-splitting: he is not at risk of being left without full remedy, and his separate theory of recovery against outside counsel is unnecessary and unjustified, particularly in light of the complete immunity Texas affords to counsel for such claims.

II. THE RULING SHOULD BE AFFIRMED ON THE ALTERNATIVE GROUNDS OF TEXAS' ATTORNEY IMMUNITY DOCTRINE

A. QUESTION PRESENTED

Whether the Ruling may be affirmed as to the Katz Defendants on the alternative grounds that Texas affords counsel complete immunity as to Daugherty's claims. (Preserved at (i) A0942-A0945; (ii) A1031-1033; A1053-1062; (iii) A1564-A1580; (iv) A1744-1749; (v) B0730-37; and (iv) B1040-41).

B. SCOPE OF REVIEW

This Court may affirm the Court of Chancery's Ruling on any basis that was fairly presented to the trial court. *Unitrin, Inc. v. Am. Gen. Corp.,* 651 A.2d 1361, 1390 (Del. 1995) ("We recognize that this Court may affirm on the basis of a different rationale than that which was articulated by the trial court. We also recognize that this Court may rule on an issue fairly presented to the trial court, even if it was not addressed by the trial court."). *See also Standard Distributing Co. Through Pa. Mfrs. Ass'n Ins. Co. v. Nally,* 630 A.2d 640, 646-47 (Del. 1993) (this Court may dispose of matters not addressed by the trial court "in the interests of judicial economy, since the issue was 'fairly presented to the trial court'") (quoting Sup. Ct. R. 8); *Windsor I, LLC v. CWCapital Asset Mgmt. LLC,* 238 A.3d 863 (Del. 2020) (affirming dismissal on alternative grounds). "Appellate review of legal issues is *de novo.*" *Anderson v. AIG Auto Ins. Co.,* 933 A.2d 1249 (Del. 2007).

C. MERITS OF ARGUMENT

In Texas, "attorneys are immune from civil liability to non-clients 'for actions taken in connection with representing a client."' *Cantey Hanger, LLP v. Byrd,* 467 S.W.3d 477, 481 (Tex. 2015); *Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.,* 595 S.W.3d 651, 657 (Tex. 2020). This immunity has long been applied to completely bar "a suit by a litigant against opposing counsel" so long as counsel can "conclusively establish that their conduct was within the scope of their legal representation of a client." *Highland Capital Management, L.P. v. Looper Reed & McGraw, P.C.,* 2016 WL 164528, at *1, 3 (Tex. Ct. App. Jan. 14, 2016). *See also Bethel,* 595 S.W.3d at 657 (same). The doctrine applies "in all adversarial contexts [whether litigation or transactional] in which an attorney must zealously and loyally represent his or her client, so long as the conduct constitutes the 'kind' of conduct attorney immunity protects." *Haynes and Boone, LLP v. NFTD, LLC,* 631 S.W.3d 65, 79-80 (Tex. 2021).

This doctrine has been described as a "***complete immunity***" that "is 'a true immunity from suit,' not 'a defense to liability.'" *Tyurin v. B&H Photo Video Pro Audio LLC,* 2018 WL 4760658, at *4 (S.D.N.Y. Sept. 28, 2018) (emphasis added and internal citations omitted) (dismissing claims because "under substantive Texas law, there was not even a 'mere possibility' that Plaintiff could establish a cause of action against" counsel). Because Texas law applies to Daugherty's claims, and the Katz Defendants were sued in their capacity as Highland's outside counsel handling the Texas Action, this doctrine immunizes the Katz Defendants and dismissal should be affirmed.

1. Texas law applies to Plaintiff's claims.

Texas law applies to Daugherty's claims, which he concedes took place "primarily in Texas." (A1655). Delaware "applies the 'most significant relationship test,' as set out in the Restatement (Second) of Conflict of Laws…." *Vichi v. Koninklijke Philip Electronics, N.V.,* 85 A.3d 725, 772-73 (Del. Ch. 2014). This analysis considers: "(1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicil, residence, nationality, place of incorporation and place of business of the parties; and (4) the place where the relationship, if any, between the parties is centered." *Bell Helicopter Textron, Inc. v. Arteaga,* 113 A.3d 1045, 1050 (Del. 2015).

Texas has the most significant relationship to Daugherty's claims, where the relationship between the parties is centered. His claims arise from conduct and purported representations that took place in Texas courts, by Texas attorneys, in resolving a dispute between Texas citizens and implicate an attorney-client relationship formed and based in Texas. (A0605-610 ¶¶3-4 ("Defendants fraudulently told the ***Texas judge and jury***…."); 8-9, 13-18) (emphasis added). In fact, Daugherty's Amended Complaint contains more than 50 Texas-centered allegations, including the parties' relationships and ties to Texas (A0608-610 ¶¶ 8-18); representations made, testimony delivered, or arguments advanced in Texas court (A0604-647 ¶¶1, 4, 5, 33, 50, 59, 60-64, 69-71, 72, 90, 92, 105, 114, 122); a resulting Texas judgment, filings related to collecting the same, or payments made thereon (*id.* ¶¶2, 66, 82-85; 86, 116, 125); services rendered by Texas attorneys in Texas and invoiced to Texas clients (*id.* ¶¶87, 88, 105, 124); and forming a purported conspiracy in Texas (*id.* ¶¶3,75, 78, 91). Further, Daugherty's alleged injury occurred in Texas.

Delaware's only relationship to this case is that Highland, HERA and HERA Manager are incorporated in Delaware, and non-party A&B served as escrow agent. Daugherty did not name A&B as a defendant, despite numerous allegations revealing its central involvement in the allegedly fraudulent release of the Escrowed Assets to Highland. (*See* A0623-634 ¶¶ 52, 57, 77, 78, 80). Based on Daugherty's

omission of A&B from the alleged conspiracy, A&B's actions in Delaware cannot be given weight in the conflict of laws analysis. *Hospitalists of Del., LLC v. Lutz,* 2012 WL 3679219, at *4 (Del. Ch. Aug. 28, 2012) (only the actions of confederates are cross-attributable); *Istituto Bacario Italiano SpA v. Hunter Engineering Co., Inc.,* 449 A.2d 210, 225 (Del. 1982) (same); *In re Am. Intern. Grp., Inc.,* 965 A.2d 763, 815 (Del. Ch. 2009) ("conspirators are considered agents of each other when acting in furtherance of the conspiracy," but without such agency, no basis to impute conduct to others).

The Restatement (Second) of Conflict of Laws § 145(1) (1971) further compels application of Texas law, weighing:

> (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.

Bell Helicopter, 113 A.3d at 1051.

Texas has substantial policy interests in the application of its attorney immunity doctrine, summarized in *White v. Bayless*:

> Under Texas law, attorneys cannot be held liable for wrongful litigation conduct. A contrary policy "would dilute the vigor with which Texas attorneys represent their clients" and "would not be in the best interests of justice." Any other rule would act as a severe and crippling

> deterrent to the ends of justice because a litigant might be denied a full development of his case if his attorney were subject to the threat of liability for defending his client's position to the best and fullest extent allowed by law, and availing his client of all rights to which he is entitled.

32 S.W.3d 271, 276 (Tex. Ct. App. 2000). *See also Ironshore Europe DAC v. Schiff Hardin, LLP,* 284 F. Supp.3d 845, 849-850 (E.D. Tex. 2018) (discussing policy objective of permitting counsel '"to advise their clients and interpose any defense … without making themselves liable for damages.' Without such an immunity, an attorney would face an 'inevitable conflict' in 'balanc[ing] his own potential exposure against his client's best interest'") (internal citations omitted), *rev'd, Ironshore Europe DAC v. Schiff Hardin, L.L.P.,* 912 F.3d 759, 767 (5th Cir. 2019) (dismissing complaint because "[i]mmunity is established on the face of the complaint," meaning "the requirements for attorney immunity are met.").

In matters involving attorneys and their clients, Delaware favors applying the law of the forum where the representation occurred, where the attorneys are licensed to practice law, where the courts to which counsel answered are located, and where the clients are domiciled. *See Sokol Holdings, Inc. v. Dorsey & Whitney, LLP,* 2009 WL 2501542, at *2 n.4 (Del. Ch. Aug. 5, 2009) ("Colorado bears the most significant relationship to the events at issue because the representation occurred in Colorado, involved attorneys licensed to practice law by the state of Colorado, involved responding to an order of a court sitting in Colorado, and involved a client, Sokol,

with a principal place of business in Colorado"); *see also Hearn v. Tote Services, Inc.,* 2017 WL 8788758, at *8 (Del. Super. Oct. 17, 2017) (conflict of law analysis required application of Florida's absolute litigation privilege to "statements made in the course of, and having some relation to, legal proceedings" in Florida, as they were "absolutely privileged [there] and can give rise to no cause of action"). The same analysis mandates application of Texas law, and its attorney immunity, here.

2. The doctrine is broad in scope.

Texas' "policy goal of protecting the public's interest in loyal, faithful and aggressive representation by the legal profession" is achieved through broad application of attorney immunity, which applies to nearly any conduct within the scope of an attorney's representation of a client. *Reagan Nat. Advertising of Austin, Inc. v. Hazen,* 2008 WL 2938823, at *2 (Tex. Ct. App. July 29, 2008) (internal quotation and alteration omitted). *See also Haynes,* 631 S.W.3d at 79-80 ("the attorney-immunity defense applies in all adversarial contexts in which an attorney must zealously and loyally represent his or her client, so long as the conduct constitutes the 'kind' of conduct attorney immunity protects.").

During the pendency of this action, the Texas Supreme Court has reiterated the purpose, scope and application of this doctrine, "[s]ummarizing [its] jurisprudence" as follows: "attorney immunity protects an attorney against a non-client's claim when the claim is based on conduct that (1) constitutes the provision

of 'legal' services involving the unique office, professional skill, training, and authority of an attorney *and* (2) the attorney engages in to fulfill the attorney's duties in representing the client within an adversarial context[]." *Haynes,* 631 S.W.3d at 78.

The Texas Supreme Court instructed that "[w]hether the defense applies depends on whether the claim is based on" the "provision of 'legal' services involving the unique office, professional skill, training, and authority of an attorney" and "***not on the nature of the conduct's alleged wrongfulness***." *Id.* at 78 (emphasis added); *see also id.* at 76 ("Even conduct that is 'wrongful in the context of the underlying suit' is not actionable if it is part of the ***discharge of the lawyer's duties in representing his or her client***.'") (quoting *Cantey,* 467 S.W.3d at 481) (emphasis added). *See also Ironshore Europe,* 912 F.3d at 765 ("'[m]erely labeling an attorney's conduct 'fraudulent' does not and should not remove it from the scope of client representation"' or render the immunity inapplicable as outside the scope of representation) (internal citations omitted); *Cantey,* 467 S.W.3d at 484 (holding fraud is not an exception to the attorney immunity).

Attorney immunity does not insulate wrongful attorney conduct, which is policed by Texas' rules of civil procedure (including "sanctions, contempt, and attorney disciplinary proceedings"), and the bar association ("the remedy is public, not private" for attorney actions "beyond the bounds of ethical behavior."). *Cantey,*

467 S.W.3d at 482; *Bayless,* 32 S.W.3d at 276. *Cantey* barred application of attorney immunity only to those instances when an attorney participated ***independently*** in fraudulent activities, and not on behalf of clients, considering such conduct "foreign to the duties of an attorney." 467 S.W.3d at 484. The key inquiry remains "whether the claim is based on this '***kind***' of conduct"—that involving the "unique office, professional skill, training, and authority of an attorney" in representing the client—"not on the nature of the conduct's alleged wrongfulness." *Haynes,* 631 S.W.3d at 78.

Attorney immunity is a "'legal question of whether said conduct was within the scope of representation.'" *Taylor v. Tolbert,* 644 S.W.3d at 645. Accordingly, it can be applied at the motion to dismiss stage when the trial court "need not look outside [plaintiff's] pleadings to determine whether attorney immunity applied to the alleged facts." *Bethel,* 595 S.W.3d at 656 (Tex. 2020) (affirming dismissal because "the facts—as [Plaintiff] pleaded them—entitled [Defendant] to attorney immunity and thus dismissal."). In *Youngkin v. Hines,* the Texas Supreme Court affirmed the dismissal of claims on attorney immunity grounds because "[t]he only facts required to support an attorney-immunity defense are the type of conduct at issue and the existence of an attorney-client relationship," and the plaintiff's "own allegations set out the conduct at issue," meaning "the necessary facts are not in dispute," permitting the trial court to "decide the legal question of whether said conduct was within the

scope of representation." 546 S.W.3d 675, 683 (Tex. 2018). *See also Taylor,* 644 S.W.3d at 645 (resolving attorney immunity as a matter of law at summary judgment stage where facts were no longer disputed).

3. Immunity applies to the Katz Defendants.

Daugherty's claims against the Katz Defendants all arise from the provision of legal services in representing Highland in an adversarial litigation context—the Texas Action—which puts them squarely within the confines of immunity. Daugherty's allegations against the Katz Defendants (including those attributed through conspiracy theory) include: making (allegedly false) representations in Texas courts in the context of litigation representing Highland (A0606-647 ¶¶4-5, 33, 64, 72, 95 114, 122), receiving e-filing notifications and transmitting them to clients (*id*. ¶74), allegedly participating in the formation of an escrow for assets related to litigation and reviewing the relevant escrow agreement (*id*. ¶¶51, 55), allegedly coordinating with the client's non-litigation counsel regarding the Escrowed Assets (*id*. ¶¶75,78), billing the client for fees and receiving payment for same (*id*. ¶¶45, 46, 89), and filing writs and taking actions to collect on Highland's Texas judgment (*id*. ¶¶82-85). All such conduct is immunized because these "are the kinds of actions that are part of the discharge of an attorney's duties in representing a party in hard-fought litigation" as a matter of law. *Looper Reed,* 2016

WL 164528, *6. *See also Youngkin,* 546 S.W.3d at 683 (applying attorney immunity to allegations where pleading established basis of defense as a matter of law).

Daugherty previously—and inaccurately—contended that his allegations against the Katz Defendants evade this potent immunity because he alleged participation in wrongful behavior, including a fraudulent transfer. Such arguments have been squarely rejected by Texas courts. *Robles v. Nichols,* 610 S.W.3d 528, 537 (Tex. Ct. App. 2020) (rejecting argument that "wrongful or criminal" conduct is "foreign to the duties of a lawyer," and ruling that "the alleged wrongfulness of that conduct does not deprive [counsel] of their defense."). *See also U.S. Bank N.A. v. Sheena,* 479 S.W.3d 475, 480 (Tex. Ct. App. 2015) (applying attorney immunity to bar allegations of fraudulent transfer where counsel's actions were "part of the discharge of Sheena's duties to his client in the litigation context."); *Taylor,* 644 S.W.3d at 649 ("Taylor's conduct falls squarely within the confines of attorney immunity" because she "acted on behalf of her client in a lawyerly capacity because conducting discovery, filing pleadings, obtaining court orders, and seeking the admission of evidence are the kinds of actions that lawyers undertake in representing a client," and "the alleged criminality or wrongfulness of the conduct does not perforce preclude [attorney immunity's] availability as an affirmative defense.").

Lastly, Daugherty's most recent attempt to escape application of attorney immunity was by presenting a belated (and therefore waived) argument in

supplemental briefing that claims for aiding and abetting a Delaware fiduciary's breach of duty must be governed by Delaware, and not Texas, law pursuant to the internal affairs doctrine. (A1655-1657). *See Mack v. Rev Worldwide, Inc.,* 2020 WL 7774604, at *16 (Del. Ch. Dec. 30, 2020) ("It is well settled that arguments … not raised in an opening brief are … deemed waived."). Daugherty presents a false conflict that is not a barrier to application of the immunity, as both Delaware and Texas law provide for the dismissal of counsel-defendants in aiding and abetting claims under the circumstances alleged by Daugherty.

Texas courts have held that attorney immunity applies to aiding and abetting breach of fiduciary duty claims. *Span Enters. v. Wood,* 274 S.W.3d 854, 858 (Tex. Ct. App. 2004) ("Texas courts have refused 'to expand Texas law to allow a non-client to bring a cause of action for 'aiding and abetting' a breach of fiduciary duty, based upon the rendition of legal advice to an alleged tortfeasor client."); *Looper Reed,* 2016 WL 164528, at *7 (rejecting aiding and abetting breach of fiduciary duty claim against counsel as a matter of law where conduct alleged was within scope of counsel's representation of client, implicating attorney immunity, notwithstanding that the purported underlying breach was committed by a Delaware fiduciary).

Delaware courts have almost uniformly dismissed secondary liability claims asserted against fiduciaries' counsel, generally finding that such claims cannot meet the "stringent scienter" requirement so as to constitute "knowing participation" in

the underlying breach. *Jacobs v. Meghji,* 2020 WL 5951410, at *1 (Del. Ch. Oct. 8, 2020). In *Buttonwood Tree Value Partners, L.P. v. R.L. Polk & Co., Inc.,* 2017 WL 3172722, at *9 (Del. Ch. July 24, 2017), the Court of Chancery dismissed an aiding and abetting claim against counsel, noting the standard for pleading such a claim "is a 'stringent one, that turns on proof of *scienter* of the alleged abettor"' and requires plaintiffs to assert "factual allegations in the complaint from which knowing participation can be reasonably inferred'" including allegations "that the secondary actor … provided *substantial assistance* to the primary violation." There, plaintiff's "strained interpretation" of a lawyer's participation in advising a Delaware corporation was "far too thin a reed to support scienter and knowing participation in a breach of duty" and it was not reasonably conceivable that counsel "knowingly provided substantial assistance" to the predicate breach. *Id*.

Likewise, in *Morrison v. Berry,* the Court of Chancery dismissed "fanciful" aiding and abetting allegations against counsel because of plaintiff's failure to "adequately plead[] actions in bad faith through which the aider knowingly advanced the breach." 2020 WL 2843514, at *11 (Del. Ch. June 1, 2020). The court determined that the only "nonconclusory allegations … fall short of well-pled allegations of scienter," specifically ruling that counsel's desires to earn fees "apply to virtually any outside counsel" and do not support "an inference of scienter." *Id.* These are the same scienter allegations Daugherty leveled here, which fail. (A0621

¶46). *See also Sample v. Morgan,* 935 A.2d 1046, 1065 (Del. Ch. 2007) ("In most fiduciary duty cases, it will be exceedingly difficult for plaintiffs to state an aiding and abetting claim against corporate counsel.").

Thus, Delaware's "stringent scienter" standard for pleading counsel's "knowing participation" in the breach of a fiduciary duty aligns with the same standard required to disavow Texas' attorney immunity, which is "independently fraudulent activities." *Haynes,* 631 S.W.3d at 77. Daugherty's allegations fail to meet these requirements, and thus, there is no conflict between Delaware and Texas law that warrants "bypass[ing] the substantive law of [a] sister state[]" to deny the Katz Defendants of their attorney immunity defense. *See Focus Fin. Partners, LLC v. Holsopple,* 241 A.3d 784, 802 n.4 (Del. Ch. 2020).

Delaware's stringent pleading standard for aiding and abetting claims against counsel—not met here—also honors the same policies and fulfills the same gating mechanism as Texas' attorney-immunity doctrine: protecting the attorney-client relationship from unwarranted claims by third parties. *See Morrison,* 2020 WL 2843514, at *11 (any looser inference of scienter against counsel "in addition to being unreasonable, would work much mischief in the ability of a board to have confidential and competent advice from legal advisors"); *Buttonwood,* 2017 WL 3172722, at *9 (noting "significant and perverse chilling effect on the ability of

fiduciaries to obtain legal counsel" if aiding and abetting liability could attach to counsel, who are already "limited by professional responsibilities").

CONCLUSION

For the foregoing reasons, the Court of Chancery's Ruling and dismissal of Daugherty's claims should be affirmed.

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Dated: May 8, 2023

CERTIFICATE OF SERVICE

Kurt M. Heyman, Esquire, hereby certifies that on May 8, 2023, a copy of the foregoing Appellees Hunton Andrews Kurth LLP and Marc Katz Answering Brief was served electronically upon the following:

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