



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

Plaintiffs,

v.

NAUTIC PARTNERS IX, L.P.; NAUTIC PARTNERS, LLC; CHRISTOPHER COREY; VISTRIA FUND III, LP; THE VISTRIA GROUP, LP; DAVID SCHUPPAN; TVG NP HOMECARE TOPCO, LP; and CHRIS A. WALKER,

Defendants.))))))) C.A. No. 2022-0837-LWW

MEMORANDUM OPINION

Date Submitted: August 23, 2024 Date Decided: December 2, 2024

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Kenneth J. Nachbar, Megan Ward Cascio & Alexandra M. Cumings, MORRIS, NICHOLS, ARSHT & TUNNELL LLP, Wilmington, Delaware; Bruce Sperling & Eamon P. Kelly, SPERLING & SLATER, LLC, Chicago, Illinois; Counsel for Defendants Vistria Fund III, LP, The Vistria Group, LP, David Schuppan, TVG NP Homecare Topco, LP, and Chris A. Walker



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

WILL, Vice Chancellor Delaware law demands that corporate officers act with the utmost loyalty to expense. They cannot compete with the corporation or divert corporate opportunities from it without its consent. And they must undertake good faith efforts to .

The former officers at issue here lost sight of this enduring duty.

April Anthony is the wildly successful founder of Encompass Home Health

& Hospice and its former CEO. She became disillusioned after her business was

bought by a large public healthcare company. She and two of her fellow officers Luke James and Chris Walker secretly partnered with two private equity firms to

forge another path.

Anthony first tried to buy back her business. When she failed, she and her partners decided to form a new home health and hospice company instead.

Anthony and her co-venturers identified three acquisition targets to form the

base of their enterprise. Their scheme was kept from Encompass. They took

opportunities, resources, and information belonging to Encompass to set themselves

up for success. After the new company was formed, Anthony induced Encompass

employees to join her.

active participants in misconduct. They undertook stunning efforts to conceal their actions. Documents were exchanged on the golf course or through webs of lawyers. Code names like

referred to Anthony in written correspondence. A sham employee

recruitment process was used involvement were deleted or scrubbed.

The result of this deceit is VitalCaring Group, which provides home-based



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

healthcare services in the Southern United States and plans to expand nationwide.

Anthony is its CEO, James its President, and Walker its CFO. Anthony and the two private equity firms are each one-third partners.

Encompass sued to right these wrongs. After trial, the defendants are liable for breaches of the duty of loyalty or aiding and abetting such breaches. This is an easy call.

The remedy proves more challenging. VitalCaring has yet to turn a profit and there is nothing for it to disgorge.

Still, equity cannot grant the defendants a pass. The private equity firms remain years away from their anticipated exit. They may do so at a considerable profit as they have in prior investments that initially faltered.

Encompass is entitled to an equitable payment stream from any such future gains. To deny

it any recovery on these egregious facts would bless a willful campaign of disloyalty. I. FACTUAL BACKGROUND

Unless otherwise noted, the following facts were stipulated to by the parties or proven by a preponderance of the evidence at trial. 1 To the extent that conflicting evidence was presented, I have weighed it and made findings of fact accordingly.

A. April Anthony and Encompass Home Health

In 1998, April Anthony founded a Dallas, Texas-based home health and hospice firm called Encompass Home Health & Hospice



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

. 2 It was her second home health venture. Her first Liberty Health

Services began as a small business with about 25 employees serving 50 in-home

patients. 3 It was sold for \$40 million in 1996. 4

Anthony used the \$3 million she made from the Liberty sale to buy 17

struggling Texas home healthcare providers. 5 She combined the companies to form

1 Joint Pre-trial PTO The trial includes 7 days of live testimony from 11 fact and 1 expert witness, 4,112 joint exhibits, and 55 deposition transcripts. See Trial Tr. (Dkts. 465-71). Facts drawn from exhibits jointly submitted by the parties at trial are referred to according to the defined. See

2 Anthony Tr. 555. 3 JX 3172 at 4. 4 Id. at 5-6. 5 Id. at 8. Encompass Home Health. 6 After early struggles, the new business made remarkable

strides. Anthony became a driving force in the home healthcare industry.

Today, Anthony is #45 on Forbes -Made

Women, tied with Beyonce Knowles. 7

B. Encompass Health Corporation

In 2004, Anthony sold a majority interest in Encompass Home Health to

private equity firm Cressey & Company at a valuation of \$280 million. 8 She also

created and spun out a medical records software business called Homecare

Homebase, making \$422 million by early 2020 from the sales. 9

Anthony and Cressey sold Encompass Home Health in 2014. 10 By then, the

company had grown to about 200 agencies with 140 locations across 13 states and

over 5,000 employees. 11 The buyer was HealthSouth Corporation a Birmingham,

Alabama based public company that later changed its name to Encompass Health



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

12

6 Id. at 8. 7 Forbes,⁹⁶ -Made Women (May 28, 2024), <https://www.forbes.com/self-made-women>. 8 JX 3172 at 9; Anthony Tr. 555. 9 JX 3172 at 9; Anthony Tr. 556-58. 10 Anthony Tr. 555. 11 Id. at 556; JX 18 at 1; JX 4003 at 6. 12 Anthony Tr. 555. The sale closed on January 2, 2015 for \$750 million. 13 At the time,

HealthSouth was in the inpatient rehabilitation facilities business. 14 Acquiring

Encompass Home Health gave it a second major business line: home health and

hospice. That business became housed within a new EHC subsidiary, Encompass

Home Health Holdings, Inc. 15 Encompass Home Health Holdings and its

subsidiaries conducted business under the name Encompass Home Health &

Hospice. 16

This decision refers to the operating business as Encompass Home Health.

The plaintiff entities are referred to collectively as Encompass.

C. The Post-Closing Business

Anthony received \$70 million in proceeds from the sale to HealthSouth and

rolled over about \$53 million into the acquired entity. 17 She stayed on as Chief

Executive Officer of Encompass Home Health. 18 Other members of the prior

management team who worked with Anthony also remained, including Luke James

13 PTO ¶ 15 (date of closing); JX 18 (date of closing); Anthony Tr. 561 (sale price). 14 JX 18; Coltharp Tr. 368. 15 JX 2505. The main operating subsidiary of Encompass Home Health Holdings was Advanced Homecare Management, LLC. Id.; Jacobsmeyer Tr. 28; Anthony Tr. 681. 16 Anthony Tr. 681; Jacobsmeyer 11; see also JX 2505. 17 Anthony Tr. 561-62. 18 PTO ¶ 16. as President of Encompass Home Health. 19 James likewise received rollover

equity. 20



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

Anthony home health and hospice sector. 21

Anthony and James became key members of

22 sourcing potential acquisition opportunities. 23

\$1.1 billion in annual revenues. 24

EHC made 36 home health and hospice

acquisitions at an aggregate price of over \$765 million during the same period. 25

The COVID-19 pandemic caused an exponential surge in demand for in-home

healthcare. By mid-2020, multiples for publicly traded home health and hospice

-to- 26 Inpatient

19 James Tr. 1021-22; Anthony Tr. 578. 20 James Tr. 1020; Coltharp Tr. 373. 21 Coltharp Tr. 375-76. 22 Id. 23 Id. at 375-76, 380-81. 24 PTO ¶ 17. 25 JX 3155. 26 Coltharp Tr. 406. rehabilitation facilities lacked comparable growth. 27 The

market thus discounted undervalued and disadvantaged in making acquisitions. 28

Anthony grew discontent with EHC. By spring 2020, she and James had sold

the last of their rollover equity back to EHC and exercised their stock appreciation

rights. 29 Anthony made \$370 million and James made \$45 million. 30 The two were

EHC. 31 As Anthony told Forbes for a June 2020 article,

- focused on

end-of-life care. 32

D. Nautic

About a month after the Forbes article was published, Chris Corey a

managing director at the middle-market healthcare private equity firm Nautic



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

Partners, LLC approached Anthony. 33 Corey was interested in working with

27 Id. at 405. 28 Id. at 508; JX 339 at 6. 29 Anthony Tr. 677, 682; James Tr. 1021; Coltharp Tr. 374. 30 Coltharp Tr. 374. 31 James Tr. 954-55; see JX 172; JX 4085 at 1. 32 JX 3172 at 7. 33 JX 171; Corey Tr. 1241-42; see Nautic Partners, <https://nautic.com> (last visited Nov. 30, 2024). Anthony, who he had known for over a decade. 34 Anthony told Corey about her

35 She said she would be ready

: bidding to

take Encompass Home Health private. 36

Anthony and James began collaborating with Nautic on a potential buyout. 37

Nautic first created a financial model using publicly available information. 38 At

39

Anthony and

metrics for Encompass Home 34

Corey Tr. 1241-43. 35 Id. at 1242; JX 172 (Corey telling fellow Nautic partners that Anthony

36 Corey Tr. 1243; JX 172 (Corey reporting to [Anthony] would like to take before making [a] final decision that [they] should discuss ; see PTO ¶ 20. 37 JX 4085 at 2; Corey Tr. 1242-43, 1250. 38 JX 174; JX 179; James Tr. 1030-32. 39 JX 181 at 1; see infra note 352. 40 Nautic refined

its model based on the information received from Anthony and James. 41

By September 2020, Anthony had contacted David Schuppan a Senior

Partner at private equity firm The Vistria Group, LP to discuss her buyback plan. 42

Schuppan had a long history with Anthony and James. He had been with Cressey

while it co-owned Encompass Home Health and previously sat on Encompass Home

43 Anthony had also invested in other Cressey portfolio companies



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

where Schuppan was a director. 44 45

Anthony introduced Schuppan to Corey. 46

Financial Officer Chris Walker that she was planning a buyout with Nautic. 47

40 James Tr. 1032-35; see also Corey Tr. 1262-63 (testifying that four meetings with Anthony and James were held to exchange information over screen shares). 41 Corey Tr. 1266-67; JX 191 at 1 (listing nine adjustments to based on ; JX 192 at 1 (Nautic noting that its analysis was based ; see also Anthony Tr. 583-84 (testifying . 42 Schuppan Tr. 1742-43; see also JX 2025. 43 Anthony Tr. 580; Schuppan Tr. 1596; JX 1998 (James Tex. Dep.) 82; JX 1980 (Anthony Tex. Dep.) 169. 44 Schuppan Tr. 1596. 45 JX 205; Schuppan Tr. 1743. 46 PTO ¶ 21. 47 Walker Tr. 1449, 1519. Walker had joined Encompass Home Health in 2019 as Senior Vice President of

Finance and became CFO in 2020. 48

E.

On September 18, 2020, as planned with Nautic and Vistria, Anthony and

Executive Officer Mark Tarr to float their interest in

buying a majority of Encompass Home Health. 49 After the meeting, Anthony

emailed Tarr to reiterate their proposal. 50 Anthony and James did not tell Tarr that

they were working with private equity firms on the buyout. 51

l to EHC CFO Doug Coltharp and updated

him about the conversation with Anthony and James. 52 Coltharp then called

Anthony to express his concerns with her proposal. 53 Coltharp revealed to Anthony

that EHC would be considering a confidential strategic review of its home health

48 PTO ¶¶ 18-19. 49 Id. ¶ 22; James Tr. 1040; Anthony Tr. 577, 682-84; see also JX 212; JX 213 (talking ; Corey Tr. 1244-45 (discussing talking points). 50 PTO ¶ 22; JX 214; Anthony Tr. 587. 51 See James Tr. 1040; Anthony Tr. 684. 52 PTO ¶ 23; JX 222; Anthony Tr. 683; Coltharp Tr. 401. 53 Coltharp Tr. 402-03. and hospice unit during an October board meeting. 54 55



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

Anthony told Sc planned strategic review. 56

Over the ensuing weeks, Vistria and Anthony strategized on potential transaction structures. 57 58

Anthony responded

59

F. The Brookdale Bid

EHC continued to explore home health acquisition targets after its strategic review process began. 60 In November 2020, Anthony submitted a \$350-400 million hospice business. 61

She told Nautic and Vistria about the Brookdale bid, and they

54 Id. at 403-04. 55 Id. 56 go see Anthony Tr. 699; Schuppan Vol. I Dep. 231. 57 See, e.g., JX 3189 at 13-16, 18 (various texts regarding possibly monetization methods, including through an IPO or de-SPAC transaction); JX 267; see also PTO ¶¶ 24-26. 58 JX 3189 at 15 (Oct. 26, 2020 text message from Schuppan to Anthony). 59 Id. at 16; see Anthony Tr. 683. 60 JX 357; Coltharp Tr. 410-11. 61 Anthony Tr. 732-33. began to evaluate partnering with EHC to acquire Brookdale. 62 EHC was not apprised of these discussions.

On recommendation, Nautic submitted its own bid for Brookdale

in December to access the sales process. 63 Corey connected with Walker with

beforehand. 64 In mid-December, shortly after EHC publicly

announced its strategic review, Vistria approached EHC about jointly acquiring

Brookdale. 65

modeling a

combined leveraged buyout of Encompass Home Health and an acquisition of



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

66 The deck was then husband). 67

Anthony sought input from Walker and James to refine the projections

using Encompass information. 68

62 JX 307 at 2; JX 3197 at 2; JX 461; see also Corey Tr. 1291-96. 63 . 64 Corey Tr. 1290; Walker Tr. 1505, 1509-11; JX 347 at 2. Walker checked on whether he had a non-compete before speaking to Corey. Walker Tr. 1506-09; JX 1116 at 2. 65 Schuppan Tr. 1600-01; JX 404. 66 JX 441 at 1, 7; Corey Tr. 1296-97. 67 JX 441 at 1; cf. JX 485. 68 JX 485; James Tr. 1051; Walker Tr. 1518-22; cf. JX 441 at 1. G. The Buyout Proposal

EHC passed on Brookdale. 69 With Brookdale out of play, a joint venture with

EHC became unlikely. Nautic, Vistria, and Anthony changed tactics and focus on of buying out Encompass.

On January 13, 2021, Nautic, Vistria, and Anthony sent board a

non-binding proposal to acquire a majority interest in Encompass Home Health for \$3.6 billion. 70 James and Walker were neither signatories to nor mentioned in the proposal. The proposal explained that it would expire in 30 days. 71

The proposal cautioned that [was] not likely to support an alternative transaction involving the sale of [Encompass Home Health] to another third party or a public offering of the [Encompass Home Health] business in a spin-out

72 Anthony planned to resign if EHC rejected it. 73

EHC was surprised. 74 Before receiving the proposal, EHC had no idea that

Anthony was partnering with private equity firms on a transaction involving

Encompass Home Health. EHC CFO Coltharp felt that Anthony was trying to

69 JX 434 at 1; Coltharp Tr. 425-27. 70 PTO ¶ 28. 71 JX 502 at 5. 72 PTO ¶ 28; JX 502 at 2; see Anthony



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

Tr. 713-14. 73 JX 78 at 24. 74 See Coltharp Tr. 434-35. preempt the EHC strategic review process. 75 Two EHC directors worried that

Anthony might have shared confidential company information with Nautic and

Vistria. 76 EHC wondered whether Walker and James were involved.

When EHC raised these concerns, Anthony (who also represented

Nautic and Vistria) assured it that Anthony discussions with Nautic and Vistria. 77

The attorney also told EHC that Anthony

78

The buyout proposal expired on February 12. 79 EHC never responded to it. 80

H. Newco

Meanwhile, Nautic, Vistria, and Anthony began exploring an alternate plan in

case their buyout failed. It involved launching a new home health and hospice

business that would compete with Encompass. 81 In mid-December 2020, Nautic and

Vistria exchanged (and Corey discussed with Anthony) a draft term sheet for

75 Id. at 434-35, 536. 76 See id. at 438. 77 JX 579 at 1-2. 78 Id. at 2. 79 PTO ¶ 28; see also JX 502. 80 See Schuppan Tr. 1604. 81 See JX 172; JX 388. c a three-way joint venture [ing] the investments in and/or

acquisitions of healthcare services and healthcare information and technology

businesses. 82

The draft term sheet contemplated pro rata \$250 million investments from

each of Nautic, Vistria, and Anthony. 83 It provided for a Founding Manager

Anthony. 84 Since Anthony it outlined

a 15% management equity incentive plan MEIP for future hires. 85



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

While EHC remained unresponsive on the buyout proposal, Nautic, Vistria, and Anthony took steps to advance their partnership. They began by retaining joint advisors.

counsel at Ropes & Gray LLP. 86

According to Schuppan, the joint representation

would ensure it with April (amongst

87 Schuppan emphasized this goal by sending a Ropes attorney a YouTube clip

82 JX 388 at 2. 83 JX 423 at 2; Corey Tr. 1303. 84 JX 388 at 2; Corey Tr. 1301. 85 JX 414 at 1; see JX 424 at 1; JX 423 at 2-3. 86 Schuppan Tr. 1681; Corey Tr. 1231. 87 JX 471 at 1. of Ari Gold (a character from the television show Entourage) tearing up documents

never 88

Nautic and Vistria also jointly engaged an investment banker. They chose

middle market investment bank Harris Williams to guide their search for platform

acquisition targets. 89 Though Anthony was not listed on the official engagement

letter, she was closely involved in the selection. She and Harris Williams banker

Turner Bredrup had interacted regularly since August 2020. 90 Bredrup had

previously worked with Anthony and Schuppan on the sale of Encompass Home

Health to EHC in 2014. 91

I.

Harris Williams advise on the EHC buyout proposal. 92

After the Brookdale angle failed and while EHC remained unresponsive to the

proposal, Anthony, Schuppan, and Corey became focused on the broader home



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

health and hospice sector. 93 Harris Williams to

88 JX 470. 89 Schuppan Tr. 1605; JX 580; JX 602; JXs 613-14. 90 JX 3187. 91 Anthony Tr. 675; Bredrup Dep. 19-20, 42. 92 JX 369; Anthony Tr. 746-47. 93 See Anthony Tr. 746-47; Schuppan Tr. 1605-06; JX 329. identifying potential acquisition targets assuming that the buyout failed. 94

Due to her expertise, Anthony took the lead on setting the criteria for

acquisition targets. 95 She asked Harris Williams for information about transaction

multiples for home health and hospice businesses that did not use her Homecare

Homebase software platform. 96 This approach created an additional opportunity:

Causing the companies to use Homecare Homebase could increase transaction

multiples. 97 Anthony also prioritized businesses operating in Texas and Florida two of the largest states for Medicare beneficiaries. 98

94 the path we go down and that works out but we are looking forward to engaging in a

95 See Corey Tr. 1151-

that [they] were going to . . . 96 JX 329; Anthony Tr. 747. 97 JX 329; JX 336. 98 Anthony Tr. 753; James Dep. 197-99. 1. Homecare Holdings

Harris s list of potential targets included Homecare Holdings,

LLC. 99 This target 100 Harris Williams was

running a sale process for Homecare Holdings. 101

Homecare Holdings was a strong contender for a platform asset a

company acquired by a private equity firm that serves as the foundation for future

acquisitions of similar businesses. 102 Homecare Holdings preferred markets of Florida and Texas. 103

It was also based in Dallas, where



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

Anthony and her management team lived. 104

On February 3, Schuppan and Anthony had a 35-minute acquisition ideas. 105

The next day, Schuppan told Corey and Harris Williams that

Homecare Holdings [to be determined] 106

99 JX 580 at 11. 100 JX 3133 at 1. 101 Schuppan Tr. 1757; JX 799. 102 See generally -and-Build: A Powerful PE Strategy, but Hard to Pull <https://www.bain.com/insights/buy-and-build-global-private-equity-report-2019/> (last visited Nov. 26, 2024). 103 JX 631; JX 602. 104 Anthony Tr. 753-54. 105 JX 3189 at 29; JX 3215 at 50; Schuppan Tr. 1754-56. 106 JX 602 at 1 (referring to Homecare Holdings by the name of its CEO) email also noted in that email that Id.

Edgewater is a private equity firm that owned Homecare Holdings. Schuppan Tr. 1757. 2. Vital Health Care

Another platform target identified was Louisiana-based Vital Health Care

Group. On February 4, Schuppan reached out to a broker in Nashville, Tennessee

he had not spoken with for nearly a year. 107 108

Schuppan wanted to discuss Vital, which

the broker was representing in a sale process. 109 They planned a meeting in

Nashville for early March. 110

3. Kare-in-Home

The third target identified was Mississippi-based company Kare-in-Home,

Inc. 111 Anthony had a long history with Kare 112

In 2018, she and James had considered acquiring Kare

for Encompass, but owners were not ready to sell. 113 That had changed by

hoped to partner with a private equity firm to grow their



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

business. 114

107 PTO ¶ 33; see JX 3215 at 50; Schuppan Tr. 1766-68; Cunningham Tr. 2106-08. 108 See supra note 105. 109 Schuppan Tr. 1626-28, 1767. 110 JX 601; JX 606. 111 JX 692 at 2. 112 Anthony Tr. 763. 113 JX 65; JX 53; James Tr. 1005; James Dep. 205-06. 114 Galyan Dep. 269. J.

On February 9, 2021, Schuppan, Corey, and Anthony met by Zoom to discuss

potential acquisition targets. 115

beforehand that listed targets . 116

Homecare Holdings and Vital were included. 117

The next morning, Schuppan told Harris Williams that Homecare Holdings

. 118 Nautic and Vistria were brought into the Homecare Holdings

sale process. 119

Anthony remained in close contact with Nautic and Vistria about the platform

acquisitions throughout February and March. 120 She kept a low profile. 121 Their

discussions took place over the phone or by Zoom. 122

115 JX 611; Schuppan Tr. 1761-64. 116 PTO ¶ 36; JX 608; JX 616. 117 JX 616; Schuppan Tr. 1778-83. 118 PTO ¶ 37; JX 620. 119 Schuppan Tr. 1612-13. 120 JX 78 at 31-39; JX 3190 at 2; JX 3169 at 280-392. 121 Schuppan Tr. 1612-13, 1710-13. 122 See e.g., JX 611; JX 781. Anthony was still the CEO of Encompass Home Health at this point. She did

not mention to Encompass the opportunities to acquire Homecare Holdings, Vital,

or Kare. Nor did she mention her plan to launch a competing venture. 123

K. The Ropes Roadmap

It was not lost on Nautic and Vistria that Anthony fiduciary duties to

Encompass created risks to their plans. They were also concerned about contractual



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

restrictive covenants that would continue to bind Anthony after her employment

ended. 124 They asked Ropes for advice on navigating these issues. 125

On February 24, Ropes sent Corey and Schuppan a memorandum that would

employment agreement [with EHC]. 126

Anthony was included in the

correspondence. The memo gave an overview restrictive covenants,

including a one-year non-compete provision and a two-year non-solicitation

provision. 127 128

123 Anthony Tr. 775-80; Jacobsmeyer Tr. 21-24. 124 JX 108 at 6-7. 125 Corey Tr. 1230-34. 126 JX 676 at 1. 127 Id. at 2. 128 Id. at 2 n.2. [James] should

129

The Ropes memo also provided detailed guidance on how Nautic and Vistria

should interact with Anthony to minimize risk. For example, Nautic and Vistria

were encouraged to while engaging with

acquisition targets. 130 They were advised to only [the

matter] and emphasize until after her applicable restrictive Encompass. 131

As an immediate next step, Vistria and Nautic were counseled [a] term sheet to April . . . lay[ing] out a plan for future potential collaboration. 132

The term sheet was to address after the expiration of her

applicable restrictive covenants 133

The next day, Corey sent Anthony a revised version of their earlier term sheet

as advised. 134 It stated that Nautic, Vistria, and Anthony would each invest \$250



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

129 Id. 130 Id. at 5. 131 Id. 132 Id. 133 Id. (emphasis in original). 134 PTO ¶ 41; JX 688; see also JX 662. million in their new venture. 135 It contemplated that 136

It also reflected (as in the

December version) that a 15% MEIP would be divided among Newco management. 137

L. Anthony Resigns and Recruits.

On March 18, 2021, after consulting Nautic and Vistria, Anthony told EHC that she would be resigning effective June 18. 138 She said that she planned to spend time at her homes in Idaho and Cabo and work on her golf game. 139 That was false.

Anthony instead continued her efforts to form a home healthcare company with Nautic and Vistria.

venture. 140

She used a spreadsheet showing a MEIP allocation of equity worth millions to lure Encompass Home Health employees to Newco. 141

135 JX 662 at 7. 136 Id. at 7; see also Corey Tr. 1305-06; Anthony Tr. 723-24. 137 JX 688 at 3. 138 PTO ¶ 43. 139 Jacobsmeyer Tr. 24. 140 See infra Section II.A.2.a 141 Jolley Tr. 144-48; see JX 722 (spreadsheet metadata showing Anthony saved the file on Mar. 10, 2021). James and Walker were among those persuaded to leave Encompass for

Newco. James had been on board since the outset. 142 In time,

so was Walker. 143 Walker resigned from Encompass in June 2021 to join Newco in July. 144

M. Topco

Through the spring, Newco diligenced and negotiated with its three chosen



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

platform acquisition targets: Homecare Holdings, Vital, and Kare. 145 By mid-May, Topco had executed an agreement to buy Homecare Holdings, had a signed letter of intent for Vital, and had submitted a letter of intent to acquire Kare. 146

Anthony suggested that be formed to facilitate the acquisitions. 147 Vistria and Nautic entities formed Bridgestone Topco, LP Topco , with Corey and Schuppan serving as its managers. 148 On June 7, a letter of intent with Kare was executed. 149

142 Corey Tr. 1243-1251. 143 Walker Tr. 1537-42. 144 PTO ¶¶ 66, 74. 145 See, e.g., JX 4005; JX 742; Cunningham Tr. 2116-18; JX 605. 146 PTO ¶¶ 59-60, 67; JX 1113; JX 1059. 147 JX 974 at 2. fees three ways among herself, Nautic, and Vistria. Id.

148 JX 1090 at 1-2. 149 PTO ¶ 71; JX 1205. Anthony, James, and Walker remained at Encompass during this time. 150

They did not tell Encompass that these opportunities were on the market. Nor did they consider them for Encompass. 151

N.

played a major role

in securing each of the platform acquisition targets for Topco. 152 She had frequent Zoom meetings, phone calls, and in-person meetings with Nautic, Vistria, and representatives from the target companies. 153 References to her involvement were scrubbed or replaced with sly codenames. 154

In April, Schuppan handed a packet of Homecare Holdings diligence materials to Anthony while golfing. 155 She shared them with James and Walker. 156



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

Later that month, she attended a three-hour meeting in Dallas with Schuppan, Corey,

Homecare Holdings. 157

150 See JX 790; JX 986; PTO ¶ 66. 151 Coltharp Tr. 448; Anthony Tr. 775-80; James Tr. 1085-87; Walker Tr. 1554-57. 152 Anthony Tr. 777-78. 153 JX 882; JX 1025; JX 966; JX 748 at 35; JX 974 at 2; JX 952; Anthony Tr. 755, 767-68; Corey Tr. 1337, 1341, 1363. 154 Schuppan Tr. 1695-98; JX 1557 at 2; Corey Dep. 250-56; see JX 791; Kuchibhotla Dep. 119-20; see infra .

155 Schuppan Tr. 1699-1700; Anthony Tr. 755-61. 156 Anthony Tr. 759. 157 PTO ¶ 53; Anthony Tr. 767-68; Corey Tr. 1363-64. In May, Anthony encourage it to authorize the Homecare Holdings acquisition. 158

Contemporaneous

notes of the meeting show that Anthony discussed Homecare Holdings in detail. 159

She told Nautic that she saw value in getting the venture off the ground while she

still . 160 She highlighted the

involvement of James and Walker. She emphasiz [about Newco] sooner

- 161

Anthony played a similar role in the Kare and Vital acquisitions. She received

diligence materials about Kare and Vital from Ropes. 162 She also met with CEO to goad him into selling the business to Topco. 163

Anthony, Corey, and

Schuppan had ongoing discussions about Kare and Vital throughout the summer,

with Anthony providing insights on the targets and negotiation strategy. 164

158 Anthony Tr. 772-77; Vinciguerra Tr. 886-91; see PTO ¶ 59; JX 1025. 159 JX 748 at 45; Vinciguerra Tr. 830-31, 887-91; see infra note 371 (discussing the credibility of Vinciguerra and his handwritten notes). 160 JX 748 at 45. 161 Id.; Anthony Tr. 774. 162 PTO ¶ 55; Anthony Tr. 754-55; JX 1083; JX 967. 163 Anthony Dep. 239-41. 164 See, e.g., JX 1157; Anthony Tr. 765-66; Corey Tr. 1372-73. Topco Homecare Holdings closed on July 30 for \$192



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

million. 165 The next month, it acquired Vital for \$106 million. 166 The Kare acquisition closed a few months later in December for \$110 million. 167 The Homecare Holdings, Vital, and Kare deals Original Acquisitions Add- -and- 168

O. Walker Resigns

Walker left Encompass on June 18, 2021 employment ended. 169

Walker acquisitions. 170

He not only reviewed diligence materials that Nautic and Vistria funneled to Anthony, but also spoke to Homecare Holdings and Vital principals about selling their businesses to Topco. 171

Like Anthony and James, Walker hid his actions from Encompass. Walker cryptically told Coltharp 165

PTO ¶ 76. 166 Id. ¶ 77. 167 Id. ¶ 80. 168 See infra note 514 (re: future M&A projected); see generally supra note 102 (discussing -and-). 169 PTO ¶ 72; Anthony Tr. 633; Walker Tr. 1525. 170 Anthony Tr. 730; Coltharp Tr. 377-78. 171 Walker Tr. 1551-54; JX 3099; JX 1162 at 2-3. him a more operational role. 172 When Coltharp asked Walker where he would be

working, Walker on Anthony refused to answer. 173

Unlike Anthony and James, Walker was not subject to a contractual

non-compete. 174 He became acting CEO in July shortly after departing

Encompass. 175 But he was CEO in name only. He passing along her insights and implementing her strategies. 176

He merely held the

-compete expired. 177



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

On June 22, Nautic and Vistria held a strategy session in Dallas to prepare for a meeting with Homecare Holdings management. 178 The email invite suggested that Anthony was not present. 179 In reality, she attended and led discussions. 180 She announced during the meeting that Walker and James would be joining management team. 181 172 Coltharp Tr. 445. 173 Id. at 444-45. 174 JX 1116 at 25-27. 175 PTO ¶ 74; JX 1112. 176 Walker Tr. 1566-69. 177 Id. at 1566-67 Anthony. Id.; Schuppan Tr. 1734-35. 178 JX 1297. 179 Id. 180 PTO ¶ 73; Anthony Tr. 798-800, 802-03; Kuchibhotla Dep. 152-53. 181 Anthony Dep. 222-23. Although Walker was absent from the Dallas strategy session, he was working with Anthony to launch the new venture. For a week in July, Walker visited Anthony in Idaho to strategize. 182 Walker and Anthony prepared 60- and 90-day business plans for Topco, which Walker sent to Nautic and Vistria. 183 After his Idaho trip, Walker began executing on the objectives he and Anthony had discussed. He instructed a former Encompass employee, who had joined Topco in July, to implement 60- and 90-day priorities. 184 He also worked to recruit more Encompass employees to Topco . 185

P. Jolley

save one. For months, she tried to

Jolley. Anthony told Jolley that James and Walker would be joining the new venture and that she hoped to recruit others, Vice President of Clinical Services Janice Riggins. 186

182 Thompson Dep. 55-57; JX 2068 at 720-21, 1225-29. 183 JX 2050; JX 1443; JX 1449; Walker Tr. 1568-69; JX 2068 at 1229-33; Corey Tr. 1386-87; Ramaker Dep. 138-42; JX 1485; JX 1474; JX 1431; JX 1476; JX 3190 at 3. 184 Jolley Tr. 184; JX 1492. 185 JX 1442; JX 2002 at 194-95, 200-08; JX 1989 at 208-12; Jacobsmeyer Tr. 47. 186 Jolley Tr. 142-43, 163, 198-202; Jacobsmeyer Tr. 39. Jolley was initially tempted Topco MEIP spreadsheet. 187



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

Anthony instructed Jolley to wait until June 23 to resign the same day new CEO Barbara Jacobsmeyer was starting. 188 But when the time came, James gave Jolley a cryptic message about restrictive covenants and litigation risk. 189 Jolley interpreted it as a warning not to resign yet. 190

A few days later, Jolley was instructed to 191

Anthony told Jolley that she should wait to resign because . 192 Corey passed along a similar message to Jolley the same day, urging her to wait. 193

While Jolley waited for the green light to quit, she had a change of heart. 194

By August, Jolley came to respect Jacobsmeyer and decided to stay at Encompass. 195

She became uncomfortable with actions. 196 When another senior

Encompass Home Health employee announced her decision to join Topco, Jolley

187 Id. at 144-48. 188 Id. at 150. 189 Id. at 173-79; James Tr. 1066-71. 190 Jolley Tr. 179-81. 191 Id. at 179-80. 192 Id. at 181-82. 193 Corey Tr. 1390. 194 Jolley Tr. 170-71; see infra note 335 (). 195 Id. at 179, 192 196 Id. . 197

Jacobsmeyer quickly authorized retention packages to prevent further defections. 198

In September 2021, Encompass sent cease and desist letters to Anthony,

Walker, Nautic, Vistria, and others. 199

Q. The Texas Litigation

In October 2021, Encompass sued Anthony in Texas state court for breaching the restrictive covenants in her employment agreement. 200 After a trial, the court held that Anthony had breached the covenants by [ing] Walker,



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

were . . . the business and growth strategies of [VitalCaring] even while still CEO of

201 The court also found that Nautic and Vistria had tried to conceal

. 202

197 Id. at 196-98. 198 Jacobsmeyer Tr. 52-54. 199 PTO ¶ 78. 200 Id. ¶ 79; see also EHHI Hldgs., Inc. et al. v. Anthony, No. DC-21-15717 (192nd Dist. Ct., Dall. Cnty., Tex. June 17, 2022). 201 JX 2105 ¶¶ 123, 145, 149, 152. 202 Id. ¶¶ 58-67, 99, 105-110; see infra notes 403-07 and accompanying text (describing the Chartwell recruitment effort). The Texas court It found that

Anthony did not solicit certain other Encompass employees. 203 It determined that

Anthony neither stole Encompass trade secrets nor violated the confidentiality

provisions of her employment agreement. 204 And it rejected s request

for an equitable extension of non-compete and non-solicitation

covenants. 205

To remedy her breaches, the court ordered Anthony to comply with her

restrictive covenants for the brief remainder of their terms. 206 For Vistria, this was

since no damages were awarded. 207 Anthony was free to start

at Topco as soon as the covenants expired. 208

R.

In August 2022 Anthony and

James joined Topco as CEO and President, respectively. 209 Anthony also purchased

\$87 million of Topco equity from Nautic and Vistria to become a one-third equal

203 Id. ¶¶ 71-79, 146. 204 Id. ¶¶ 111-19, 176-78. 205 Id. ¶ 174. 206 Id. ¶ 179. 207 JX 2085. 208 Id. 209 PTO ¶ 83. partner, as contemplated in the term sheet. 210 Topco began conducting

business under the name VitalCaring Group. 211



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

-and- planned on multi-year growth through acquisitions and an exit after no fewer than

five years. 212 Nautic underwriting models dated July 2021,

October 2021, and May 2022 projected returns ranging from 3.1 to 5.5 times their

initial investments upon a 2026 exit. 213 In more recent June 2023 quarterly

projections, Nautic projected meaningful growth for VitalCaring. 214

These predictions have yet to come to fruition. business has plummeted over the past three years. 215

Negative market forces

affecting the home health and hospice industry .

These headwinds include revenue challenges associated with the adoption of

210 JX 1014 at 8-9; Schuppan Tr. 1723; Corey Tr. 1318. In March 2023, Anthony bought approximately \$145 million and received preferred stock in return. Anthony Tr. 810; Corey Tr. 1401. 211 PTO ¶ 13. 212 Vinciguerra Tr. 903-04; Zenner Tr. 1875-80. 213 JX 3209 at 32; JX 1779 at 1; JX 2034 at 13. 214 JX 2422 at 2; Vinciguerra Tr. 914-15. 215 See Zenner Tr. 1941-42; Anthony Tr. 660; Vinciguerra Tr. 846; Schuppan Tr. 1643-44; Dudney Tr. 2026-27, 2071. Medicare Advantage plans, Medicare reimbursement changes, and persistent labor

cost pressures. 216

Even so, Nautic and Vistria remain committed to VitalCaring. They view

home health investments as - 217

Corey and Schuppan expect that VitalCaring will deliver

significant returns and increased EBITDA as it pursues large acquisitions to

increase its exposure to the [home health and hospice] industry. 218

VitalCaring continues to assess future acquisitions to further its buy-and-build

acquisition strategy. 219



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

One example is

its June 2024 agreement to purchase certain care centers from Amedisys Inc. and

United Health Group. 220

S. This Litigation

On September 9, 2022, Enhabit, Inc. (the spun-off successor entity to

Encompass), 221 Advanced Homecare Management, LLC, and EHC filed a complaint

216 See *Jacobsmeier Tr.* 74-79; JX 2135 at 8-9; JX 2487; JX 2114 at 3. 217 JX 3205 at 2, 3. 218 *Schuppan Tr.* 1841-45; *Corey Tr.* 1394-95. 219 -areas- vitalcaring/ (last visited Nov. 27, 2024). 220 See Dkts. 506, 508; see Dkt. 503 Ex. A at 2; *infra* note 462 (discussing the deal). 221 PTO ¶¶ 81-82; JX 2502; *Jacobsmeier Tr.* 12. in this court against Nautic, Vistria, and certain associated entities; as well as Corey,

Schuppan, *Topco*, and *Walker*. 222 This decision refers to the plaintiffs collectively

Encompass d funds, *Corey*, and *Schuppan* are

called the PE Defendants

After the defendants moved to dismiss, *Encompass* filed an amended

complaint. 223 It brought six counts. Count I is a claim against all the defendants for

224 Count II is a claim for

breach of fiduciary duty against *Walker*. 225 Count III is a claim against the PE

Defendants duty. 226

Count IV is a claim against *Walker* for breach of contract. 227 Count V is a

joint venture liability claim against *Nautic* and *Vistria*. 228 Count VI is an unjust

enrichment claim against all defendants. 229

222 Dkt. 1; see *infra* note 236 and accompanying text (discussing that *James* and *Anthony* are not



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

parties). 223 Dkt. Compl. 224 Id. ¶¶ 107-13. 225 Id. ¶¶ 114-18. 226 Id. ¶¶ 119-24. 227 Id. ¶¶ 125-30. 228 Id. ¶¶ 131-34. 229 Id. ¶¶ 135-39. The defendants moved to dismiss the amended complaint on March 9, 2023. 230

partial motion to dismiss Count IV. 231 I otherwise

denied the motions. 232

A seven-day trial was held from December 11 to December 19. 233 Post-trial

briefing was completed on May 3, 2024, and a post-trial argument was held on

May 16. 234 After the parties submitted letters regarding acquisition activities by

VitalCaring, the matter was submitted for decision on August 23. 235

II. LEGAL ANALYSIS

Encompass contends that Anthony, James, and Walker breached their duties

of loyalty by working to form VitalCaring a direct competitor. Anthony and James

are not defendants. 236 The PE Defendants and Topco are accused of aiding and

.

230 Dkts. 95-96. 231 Dkt. 182. 232 Dkts. 183, 186. Advanced Homecare had previously filed a breach of contract claim against Walker in Texas that remained pending when motions to dismiss. Dkt. 186. 233 Dkts. 465-71. 234 Dkts. 479, 485, 491, 497. 235 Dkts. 503-05. Additional letters were since filed, including as recently as last week. Since they were largely updates to prior letters, the date of submission did not change. See Dkts. 510, 516-18. 236 Their employment agreements with Encompass contain mandatory arbitration provisions. See JX 107 § 6(q)(ii); JX 108 § 6(q)(ii). Encompass has the burden to prove its claims by a preponderance of the

evidence. something is

more likely than not. 237 Encompass met its burden of proving that Anthony, James,

and Walker breached their fiduciary duties to Encompass. It also proved that PE

Defendants and Topco aided and abetted these breaches.



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

Because Encompass has prevailed on its fiduciary duty and aiding and abetting claims, I need not resolve the alternative joint venture liability and unjust enrichment claims. Encompass is entitled to one recovery. 238 That recovery takes the form of administered via a constructive trust fees.

A. Breach of Fiduciary Duty

Encompass alleges that Anthony, James, and Walker breached their fiduciary duty claim for breach of fiduciary duty requires proof of two elements: (1) that a fiduciary duty existed and (2) that the defendant breached that duty. 239

237 Del. Express Shuttle, Inc. v. Older, 2002 WL 31458243, at *17 (Del. Ch. Oct. 23, 2002)

compared to the evidence opposed to it, has the more convincing force and makes you believe that something is more likely. 238 See Brookfield Asset Mgmt., Inc. v. Rosson, 261 A.3d 1251, 1277 (Del. 2021) (describing the double recovery rule). 239 See Beard Rsch., Inc. v. Kates, 8 A.3d 573, 601 (Del. Ch. 2010), Inc. v. Beard Rsch., Inc., 11 A.3d 749 (Del. 2010). The first element is not meaningfully in dispute. Anthony was the CEO of

Encompass Home Health until June 18, 2021. 240 James was President and Chief Strategy Officer of Encompass Home Health until August 2, 2021. 241 Walker was 2021. 242 During

their terms, each owed fiduciary duties to Encompass Home Health and EHC. 243

Anthony, James, and Walker each held key managerial roles leading one of driver of 244

Encompass relied on Anthony and

James to source acquisition targets. 245 Walker collaborated with Anthony and James to evaluate targets and advise EHC on strategy. 246



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

240 JX 790; Jacobsmeyer Tr. 15-16. 241 JX 986; Coltharp Tr. 376; James Tr. 1020-22. 242 PTO ¶¶ 18-19; Walker Tr. 1492-93, 1525. 243 See Jacobsmeyer Tr. 16; Coltharp Tr. 375-78, 381-81; Anthony Tr. 681-82; James Tr. 1023; Walker Dep. 270; see also both EHC and Encompass Home Health, stating that her duties extended to serving as an regarding James); Coltharp Tr. 375- The job responsibilities of Anthony, James, and Walker extended to

See Jacobmeyer Tr. 28; JX 2505. 244 See JX 3211 at 8; Jacobsmeyer Tr. 32; Blessing Tr. 301; Coltharp Tr. 378-81, 399; Anthony Tr. 729-30; James Tr. 987; see also JX 3185 at 16; Jacobsmeyer Tr. 120-21. 245 Coltharp Tr. 379-80, 464, 466-67; Jacobsmeyer Tr. 34, 62. 246 Anthony Tr. 730; Coltharp Tr. 379-80. Anthony, James, and Walker allegedly breached their duties of loyalty to

Encompass in three interrelated ways. First, they corporate

opportunities. Second, they solicited key Encompass employees for VitalCaring.

And third, they misappropriated Encompass confidential information. Although I analyze these sets of actions separately, they together form an overarching scheme.

VitalCaring is the direct result of their disloyalty.

1. Usurpation of Corporate Opportunities

loyalty, and it exists to prevent officers or directors of a corporation . . . from

247 This duty

248

Claims for usurpation of corporate

249

In *Broz v. Cellular Information Systems, Inc.*, the Delaware Supreme Court

for herself if:

247 *Grove v. Brown*, 2013 WL 4041495, at *8 (Del. Ch. Aug. 8, 2013). 248 *Personal Touch Hldg. Corp. v. Glaudbach*, 2019 WL 937180, at *13 (Del. Ch. Feb. 25, 2019) (citation omitted). 249 *Guth v. Loft, Inc.*, 5 A.2d 503, 511 (Del. 1939). (1) the corporation is financially able to exploit the opportunity; (2) the opportunity is within the corporation s line of business; (3) the corporation has an interest or



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

expectancy in the opportunity; and (4) by taking the opportunity for his own, the corporate fiduciary will thereby be placed in a position inimicable to his duties to the corporation. 250

account insofar as they

are applicable. 251 The analysis is a flexible one guided by equitable considerations.

252

The opportunities at issue here are the Original Acquisitions of Homecare

Holdings, Vital, and Kare. These three companies were the platform assets used to

launch VitalCaring. I consider them in view of each Broz factor.

a. Financial Ability

Broz factor looks to whether the company had the financial ability

253 254

-in- 250

Broz v. Cellular Info. Sys., Inc., 673 A.2d 148, 154-55 (Del. 1996). 251 Id. at 155. 252 Equity Corp. v. Milton, 221 A.2d 494, 497 (Del. 1966). 253 Deane v. Maginn, 2022 WL 16557974, at *15 (Del. Ch. Nov. 1, 2022). 254 , 2016 WL 4045411, at *9 (Del. Ch. July 28, 2016); see also Yiannatsis v. Stephanis by Sterianou, 653 A.2d 275, 279 n.2 (Del. 1995) (noting that a court can assess various measures of financial ability). position to commit capital, notwithstanding the fact that the corporation is actually

255 The factor is generally met so long as the entity is solvent and can

commit capital. This flexible 256

257

Encompass had a \$1 billion revolving credit facility and access to the

public debt markets. 258 It could have committed \$408 million to acquire Homecare

Holdings, Vital, and Kare. 259



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

260

Encompass from making these acquisition in 2021. 261

Encompass had historically

made just one large acquisition (over \$50 million) per year because of integration

255 Personal Touch, 2019 WL 937180, at *14 (citing Riverstone, 2016 WL 4045411, at *9). 256 In re Mobilactive Media, LLC, 2013 WL 297950, at *23 (Del. Ch. Jan. 25, 2013). 257 Coltharp Tr. 399. 258 EHC had \$872 million available under its \$1 billion revolving credit facility as of the end of the third quarter 2021. Topco had acquired Homecare Holdings and Vital by this point and was finalizing its acquisition of Kare. JX 2751 ¶ 23. 259 Coltharp Tr. 399-401; see also Zenner Tr. 1871-74; JX 2451 ¶¶ 22-30. 260 -trial Response Br. (Dkt. -trial Br 56. 261 Id. complexities. 262 After EHC announced its strategic review in 2020, it operated under

263

It

chose to acquire Frontier Home Health and Hospice for \$95 million rather than

Brookdale. 264 leverage ratio beyond that permitted by bond indenture covenants, potentially

precluding a tax-free spin-off of Encompass Home Health. 265

Regardless, the Broz 266

matter than its financial ability to make them. The leverage thresholds did not block

Encompass from making acquisitions. At the time the Original Acquisition

opportunities emerged, EHC was months away from deciding to spin off its home

health and hospice business. If it was concerned about its debt covenants, it could

262 See James Tr. 980-81; Blessing Tr. 320-25; Blessing Dep. 12-18. 263 See JX 528; see also Blessing Tr. 310-12 (testifying that Coltharp told Encompass it Tr. 429-30.

264 PTO ¶ 69; Coltharp Tr. 386. 265 See JX 340 at 48 (identifying a \$240 million breakage cost if Encompass exceeded its net leverage of 3.0x post spin-off); Coltharp Tr. 412-14; see also JX 206 at 3.



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

266 Sorrento Therapeutics, Inc. v. Mack, 2023 WL 5670689, at *26 (Del. Ch. Sept. 1, 2023) (explaining that Broz have renegotiated or circumvented the leverage thresholds. 267 None of these

ability to commit \$408 million.

capacity to fund the transactions. 268

b. Line of Business

269

Home health and hospice was

270 Vital and Kare offered home health

and hospice services. 271 Homecare Holdings had other ancillary businesses, but it

was primarily a home health and hospice company. 272

The defendants assert that this factor is unmet because EHC was not a home

health business but a holding company with a majority interest in an operating

company it planned to divest. 273 Their argument is unpersuasive for two reasons.

First, the corporate opportunity doctrine does not require a plaintiff parent entity to

267 Coltharp Tr. 418-20 (testifying that EHC would have sought a consent solicitation for a further leverage increase if the value from pursuing additional targets was greater than the cost of obtaining consent). 268 See withdrawn expert testifying that Encompass Original Acquisitions). 269 Guth, 5 A.2d at 514. 270 See supra notes 14-16 and accompanying text. 271 See -trial Br. (Dkt. 398) 44 (conceding this point); Cavanaugh Dep. 80. 272 See -trial Br. 43. 273 -trial Br. 63-64. itself operate in the line of business in question. If it did, fiduciaries would have

license to engage in disloyal behavior whenever the relevant business was held at

the subsidiary level. Second 274

When

the Original Acquisition opportunities became available to Topco, EHC had yet to



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

spin off Encompass Home Health. 275

The defendants next insist that Homecare Holdings, Vital, and Kare were not

276 Their argument relies on the Broz corollary test for

when a director or officer can take a corporate opportunity. 277 The corollary to the

278

But essential does

not mean that the opportunity was necessary to the corporation. Instead, the 274

Broz, 673 A.2d at 156; see also *id.* Guth, 5 A.2d at 513)).

275 PTO ¶¶ 81-82. The record suggests that when the Original Acquisition opportunities became available, EHC was continuing to explore acquisitions in the home health and hospice sector. See, e.g., JX 430; cf. Broz, 673 A.2d at 156 (concluding that no usurpation occurred assets when the opportunity became available).

276 -trial Br. 41. 277 Broz, 673 A.2d at 155. 278 Guth, 5 A.2d at 510-11. 279

280

c. Interest or Expectancy

281

The ties here are obvious.

Homecare Holdings, Vital, and Kare were all home health and hospice companies.

by acquisitions

to stay competitive. 282 It devoted significant resources to seek out acquisition

targets, relying on James and Anthony to source them. 283

The defendants highlight features of the Original Acquisitions that they



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

believe break those ties. 284 For example, Homecare Holdings and Kare had

279 Johnston v. Greene, 121 A.2d 919, 923 (Del. 1956); see also Lewis v. Fuqua, 502 A.2d having an ; see also Schreiber v. Bryan, 396 A.2d 512, 518- .

280 Guth, 5 A.2d at 510-11. 281 Sorrento, 2023 WL 5670689, at *26. 282 Jacobsmeyer Tr. 32-33; see also Coltharp Tr. 378-79, 383-84. 283 See supra notes 21-23 and accompanying text; see also Sorrento, 2023 WL 5670689, at *26 (considering, in assessing the third Broz . 284 -trial Br. 41-48. which could have caused market

cannibalization in shared geographic markets. 285 constraints on out-of-state businesses posed challenges. 286

The defendants also

contend that the owners of Homecare Holdings, Vital, and Kare would have been uninterested in selling to Encompass. 287

288 A loyal fiduciary

would have presented the opportunities to Encompass so that it could assess and explore them. 289 Encompass could then decide for itself whether the targets were worth pursuing. Encompass never got the chance. Anthony, James, and Walker kept the Original Acquisition opportunities for themselves, their private equity partners, and the competing business they were forming.

285 Id. at 42-46. 286 Anthony Tr. 645; James Tr. 1010; see also id. at 44-45. 287 -trial Br. 65. Even if this assertion were true, it would not give the fiduciaries license to usurp an undisclosed opportunity. , 275 A.3d 810, 853 (Del. Ch. 2002) (rejecting as insufficient the

disclosed or attempted to pursue the opportunity with the plaintiff); see also Schreiber, 396 A.2d at 520 (concluding

288 Sorrento, 2023 WL 5670689, at *26. 289 , 844 A.2d the opportunity may not be the right one after thorough consideration, it was [the



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

872 A.2d 559 (Del. 2005). d. Inimical Position

The final Broz some way with the entity he serves or depriving it of an advantage. 290

It is

implicated where -interest of the

291

This factor is easily met. VitalCaring closed on its first acquisition (Homecare

Holdings) weeks after Anthony, James, and Walker left Encompass. 292 The three

had worked extensively toward the Original Acquisitions by then. 293 They did so

while they owed fiduciary duties to Encompass and were charged with furthering

294

e. Defenses

Anthony, James, and Walker took numerous steps to form a competitor and

help it acquire businesses in the space Encompass Home Health occupied. 295 They

290 Maginn, 2022 WL 16557974, at *18 (citing Metro Storage, 275 A.3d at 854). 291 Broz, 673 A.2d at 157. 292 PTO ¶¶ 72, 76; James Dep. 28. 293 See Corey Tr. 1254-55, 1266-70; Anthony Tr. 583-84. 294 See supra notes 240-43, 283 and accompanying text. 295 See supra Sections I.J-N. Topco. 296

And they took remarkable efforts to hide their behavior. 297

Original Acquisitions for Topco were legitimate. They assert that the opportunities

were (1) presented to Anthony in her personal capacity, (2) found without using

Encompass resources, (3) identified by Nautic and Vistria, and (4) part of

blatant disloyalty.

i. Personal Capacity



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

The defendants argue that no usurpation occurred because Nautic and Vistria approached Anthony in her personal capacity. 298 But the relevant point is not whether Anthony was offered an opportunity personally rather than as an officer of Encompass. It is whether the opportunity business, forming a conflict when Anthony exploited it. In Guth, the Delaware Supreme Court rejected a personal capacity theory similar to that advanced here. Charles Guth, the president of Loft, Inc., was approached with an opportunity to acquire Pepsi-Cola assets on favorable terms.

296 See, e.g., Corey Tr. 1170-71, 1223-25; JX 940; JX 3004; JX 952; James Tr. 1032-33; JX 181; JX 191 at 1; JX 78 at 11; JX 196; JX 3136; Walker Tr. 1464-65, 1519-23; JX 3190. 297 See infra Section II.B.1.c. 298 -trial Br. 40-41; see Anthony Tr. 651-52. 299

Though the court found it reasonably inferable that Guth was approached due to skills gained at Loft, it deemed the point non-dispositive. 300 opportunity was associated with the existing business activities of Loft, and so essential thereto, as to bring the transaction within that class of cases where the acquisition of property would throw the corporate officer purchasing it into competition with his 301 core of the Pepsi- 302

The court therefore held that the opportunity 303

So too here. Nautic and Vistria desired Anthony not only for her expertise but also because of her visibility into the home health and hospice industry as Encompass . The Original Acquisition



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

299 Guth, 5 A.2d at 512. 300 Id. at 513. 301 Id. 302 Id. at 514. 303 Id. at 515. opportunities were in the same space that Encompass Home Health occupied. They

were the very sort that Anthony was charged with sourcing for Encompass.

In arguing otherwise, the defendants rely on Johnston v. Greene, where the

court held that a director did not usurp a corporate opportunity. 304 . [the] offer . . . came to [the defendant], not as a director of [the plaintiff], but in his

305 More importantly,

though, the court found that the opportunity was not

since the plaintiff had divested any related assets by the time the opportunity arose. 306

That the offer was presented to the defendant individually underscored the absence

of [s] 307

Here, Encompass maintained a home healthcare business at the time of the

usurpation. 308

The Original Acquisitions were not simply presented to Anthony (or James or

Walker). The fiduciaries actively collaborated with Nautic and Vistria to develop

them. Anthony, with help from James and Walker, sought out, researched, analyzed,

304 -trial Br. 40-41; 121 A.2d at 923. 305 Johnston, 121 A.2d at 923. 306 Id. at 920-21. 307 Id. at 924. 308

See supra notes 273-75 and accompanying text. and presented on the three opportunities and encouraged the PE Defendants to

pursue them for their shared venture.

ii. Use of Encompass Resources

Relatedly, the defendants argue that no usurpation occurred because the

Original Acquisitions relied on Nautic 309



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

This statement is belied by the damning record presented at trial.

The time and focus of Anthony, Walker, and James were Encompass assets. 310

But Anthony, James, and Walker pursued the formation of a competing venture

311

Anthony reviewed thousands of pages of materials about

the new venture and its targets. Walker provided his guidance on the targets as well.

Anthony even met with Nautic and Vistria representatives in Arkansas and Dallas,

309 -trial Br. 48. 310 See 3 William Meade Fletcher, Fletcher Cyclopedica of the Law of Corporations § 861.10, Westlaw (database updated Sept. 2024 A see also Agranoff v. Miller, 1999 WL 219650, at *19

311 Metro Storage, 275 A.3d at 848. 312 She

. 313

iii. Sourcing

The defendants next assert that the fiduciary duties owed to Encompass by

Anthony, James, and Walker are irrelevant because acquisition opportunities were

corporation does not own opportunities identified by non- 314

In Triton Construction Co. v. Eastern Shore Electric Services Inc., a non-

officer employee of an electrical subcontracting company violated limited duties to

315 He did so by preparing and

submitting bids for the competitor through his job responsibilities for the

subcontracting company involved the same tasks. He did not, however, usurp any



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

opportunities by sourcing projects for the competitor. The court made this

distinction not because the employee was a non-fiduciary but because his employer

lacked an interest or expectancy in such opportunities. 316

312 -trial Opening Br. (Dkt. 479) 32-36; PTO ¶¶ 50, 53; Anthony Tr. 755-56, 761, 767-69; 772-73; Corey Tr. 1363-64. 313 See infra Section II.A.2. 314 -trial Br. 21. 315 2009 WL 1387115, at *13 (Del. Ch. May 18, 2009), , 988 A.2d 938 (Del. 2010). 316 Id. at *10, *13-14. Similarly, Science Accessories Corp. v. Summagraphics Corp. involved non-

officer employees. 317 As in Triton, the determination turned on the plaintiff

lack of interest or expectancy rather than the defendants non-fiduciary

statuses. The Court of Chancery held that key managerial employees who developed

a competing product while working for a competitor did not breach their fiduciary

318

The opportunity

319

The plaintiff abandoned its usurpation claim on appeal. 320

Neither case addresses a non- sourcing of an

opportunity. And neither case supports the notion that a fiduciary responsible for

opportunities if a third party first identifies them. Holding otherwise would

undermine the teachings of Guth 321

317 425 A.2d 957, 960 n.5 (Del. 1980). 318 Id. at 963 (citing Sci. Accessories Corp. v. Am. Rsch. & Dev., 1979 WL 2712, at *2 (Del. Ch. Oct. 10, 1979)). 319 Id. at 963. 320 Id. at 961. 321 Guth, 5 A.2d at 515. iv. Preparing to Compete

that Anthony, James, and Walker were permitted to plan for their future roles while



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

employed by Encompass. 322 They cite again to Summagraphics, which recognized a privilege in favor of employees which enables them to prepare or make arrangements to compete with their employers prior to leaving the employ of their prospective rivals without fear of incurring liability for breach of their fiduciary duty of loyalty 323

As Summagraphics explains, however, this privilege stands in tension with the unremitting obligation of undivided loyalty placed on corporate fiduciaries. 324 The doctrine of corporate opportunity represents one aspect of the law's effort to reconcile these competing policy interests. 325 Employees have a limited privilege injury done [to the] principal

326
322 -trial Br. 59-60. 323 425 A.2d at 963 (quoting *Md. Metals, Inc. v. Metzner*, 382 A.2d 564, 569 (Md. 1978)). 324 Id. at 962-63. 325 Id. at 963. 326 Id. at 962 (citing Restatement (Second) of Agency § 303 cmt. e (1957)); see also id. at 964- (citing *Metzner*, 382 A.2d at 569-70)); *Fletcher*, supra

note 310, employer for customers and employees, and must continue to exert their best efforts on There is a stark line between permissible preparations to compete and unfair

or wrongful conduct. Summagraphics [an] 327

thorough[] 328

This case is not a close call. The conduct at issue went far beyond permissible plans to compete. On the same facts, the Texas court found that Anthony affirmatively engaged in competition when she was a fiduciary of Encompass. 329 The record here warrants an even sharper rebuke. Anthony, James, and Walker



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

actively worked to build a competing business while they owed duties of loyalty to Encompass. The preparing to compete doctrine is no excuse for their disloyalty.

* * *

The evidence establishes that Anthony and James strove to benefit themselves at expense. They did so willfully, using code names and secretly exchanging diligence materials to hide their misconduct. This deception is

327 Summagraphics, 424 A.2d at 965 (citing Raines v. Toney, 313 S.W.2d 802, 809-10 (Ark. 1958)). 328 Id. at 965 (citing Metzner, 382 A.2d at 569-70). 329

(alteration in original)). striking than those taken by Anthony and James.

But he was disloyal just the same. Walker was immersed in form VitalCaring from the outset. 330 He was motivated by the hope of a payout for himself.

The record leaves no doubt that these three individuals a CEO, President, and CFO placed themselves in positions inimical to their fiduciary duties. Each worked to covertly set up a competing venture while serving as an Encompass fiduciary. 331 Their efforts included selecting acquisition opportunities within diverting them to Topco. Whether Encompass would have passed on the opportunities remains a mystery since Anthony, James, and Walker deprived it 332

Doing so violated the corporate opportunity doctrine.



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

2. The Broader Disloyal Scheme

The misdeeds of Anthony, James, and Walker were not limited to taking

330

See, e.g., supra note 171 and accompanying text (discussing that Walker spoke with Vital and Homecare Holdings principals regarding the acquisitions while he was Encompass Home Health). 331 PTO ¶¶ 50, 55, 61, 68; see also JX 2105 ¶¶ 58-67, 99, 105-10. 332 Guth, 5 A.2d at 510. broader plan to build a new home health and hospice company. They erected this

is

overall scheme and the resulting enterprise are the products of breaches of the duty of loyalty.

a.

promise to EHC that she would not discuss her buyout proposal when she disclosed it to Jolley. 333 Anthony went on to recruit Jolley, Riggins, and Walker to take up employment at the new venture. 334

In early March, Anthony told Jolley about her intention to leave

Encompass. 335 Anthony promised 336

Anthony approached Jolley several more times before leaving Encompass to her plans, the platform acquisition targets. 337

333 See supra note 78 and accompanying text; Jolley Tr. 131-32, 264-66. 334 See supra Section I.L. 335 Jolley Tr. 132-32, 264-66. Jolley was an exceptionally credible witness. She took initially shared) to Jacobsmeier.

336 Id. 337 Id. at 134-37. During one discussion, Anthony showed Jolley a spreadsheet based on the

338 The spreadsheet



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

assigned multi-million-dollar values to Topco equity that Jolley and others would receive. 339 - Topco. 340

Anthony initially convinced Jolley to join her got the better of her. 341

Anthony showed Riggins a similar spreadsheet and discussed the MEIP with

her in June. 342 Riggins decided to leave Encompass on the promise of earning

millions from Topco equity. 343 Walker was also swayed. He testified that it was

spreadsheet valuing his Topco stake at \$21 million. 344

338 Anthony Tr. 663-64; Jolley Tr. 144-48. 339 See supra note 141. 340 Jolley Tr. 145; see also JX 2068 at 481 (testifying that she hoped the equity spreadsheet recruiting employees to Newco). 341 See Park Lawn Corp. v. PlotBox, Inc., 2021 WL 5038751, at *3 (D. Del. Oct. 29, 2021)

sufficient to plead a breach of fiduciary duty claim). 342 Jolley Tr. 155-57; Anthony Tr. 653-54. 343 Jolley Tr. 146-49, 162-63; JX 1114. 344 Walker Tr. 1537-42; see also JX 1114; JX 2105 ¶ 63. The defendants admit that Anthony solicited Jolley, Riggins, and Walker. 345

It is undeniable. T those

individuals breached restrictive covenants in her Encompass employment

agreement. 346 Still, the defendants actions aligned with her

347

An officer need not cause a mass employee exodus to breach her duty of

loyalty. Delaware courts have recognized that inducing the resignation of just a few

employees to join a competitor may constitute a breach of fiduciary duty. 348 Here,

Anthony convinced several key employees to join a competing venture while she

was Encompass Home Health . This is not the behavior of a loyal fiduciary.

345 See - see also id. at 6, 61. The defendants insist that



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

Anthony only pursued Walker and Riggins after they expressed a desire to leave Encompass. But it seems more likely than not that Anthony and her MEIP spreadsheet were the driving force behind Walker resignations. See Walker Tr. 1461- 65, 1504-06, 1518-19; JX 1989 (Riggins Tex. Dep.) 25; Jolley Tr. 155-57. 346 -trial Br. 18-19; JX 2105 ¶¶ 145, 163-65. 347 -trial Br. 95 (quoting Summagraphics, 425 A.2ds at 965). Unlike the defendant in Summagraphics, Anthony was not middle management. She was the CEO of Encompass Home Health and tasked with running its operations. Summagraphics also

brightline test based on the number of employees solicited. Summagraphics, 425 A.2d at 964- among other disloyal acts, Anthony put her personal interests above those of Encompass.

348 See, e.g., Beard Rsch., 8 A.3d at

plaintiff, which was one of several breaches of fiduciary duty in connection with a corporate opportunity scheme). b. Misuse of Encompass Information

information . . . for [his] own purposes or those of a third party. This duty prohibits

349

Anthony, James, and Walker failed to fulfill this obligation when

to advantage themselves at the

.

Medicare reimbursement rates, and costs per visit. 350

Certain information that was

non-public at the time model. 351

The defendants dispute the sensitivity of this information, but Anthony

to be kept in confidence. 352

emised on

349 Triton, 2009 WL 1387115, at *15. 350 See James Tr. 1032-33; Anthony Tr. 583-84; Corey Tr. 1254-58; supra notes 40-41 and accompanying text. 351 See - 2020); JX 3135 at 61 (disclosing Q3 2020 cost per visit as \$75 in Oct. 29, 2020 earnings



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

presentation); Corey Tr. 1266-72. 352 see also JX 186 353

James and Walker admitted at trial that the

information they relayed to the PE Defendants 354

In the fall of 2020, Anthony and James told Nautic and Vistria about the non-

public strategic review EHC was launching of its home health and hospice

business. 355 Anthony, James, and Walker also gave Nautic information about

356 After EHC passed on Brookdale,

Anthony line combination of Brookdale and Encompass Home Health. 357

Another example of confidential information came

In May 2021, about a month before her last

(Nautic Zoom invite to James for Aug. 25, 2020 meeting); JX 196 (James forwarding the Zoom invite to his personal email address). 353 Beard Rsch., 8 A.3d at 602 (citing Summagraphics, 425 A.2d at 965). 354 James Tr. 1051; see Walker Tr. 1516-19, 1521-24. 355 Anthony Tr. 694-701; Coltharp Tr. 404-05; Schuppan Tr. 1736-42, 1800-01; cf. United States v. Contorinis, 692 F.3d 136, 143-44 (2d Cir. 2012) (holding that confirmation a board was actively considering a strategic review was material non-public information). 356 E.g., Corey Tr. 1290-93; Walker Tr. 1505-06, 1509-

357 JX 441 at 1; cf. JX 485; see supra notes 66-67 and accompanying text. day at Encompass, Anthony hosted a weekend retreat at her Idaho lake house. 358 The

Encompass Home Health management team (other than the general counsel)

attended. 359 360

The team was asked

should be given fresh perspective; if [they] had to do over, what [they] wish [they]

361 Anthony took

notes.



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

362

The document contained confidential information about Encompass

363 Anthony

saved the document for use in her new endeavor. She later gave the document to

Walker on a flash drive during his stay at her home in Idaho. 364 He used the

information to form the operational plan for their new venture. 365

358 JX 979; Jolley Tr. 203-06; Anthony Tr. 669-70. 359 Id. 360 JX 979 (native). 361 Id. 362 Jolley Tr. 208.

363 See id. at 209-12. 364 Anthony Tr. 804. 365 See id. at 804-06; JX 2068 at 111-15. The universe of confidential information that Anthony, James, and Walker

shared with Nautic and Vistria remains unknown. That may be a function of their

concealment efforts. Whether the use of this information caused cognizable harm

to Encompass or gains for the defendants is also opaque. 366 What is clear, though,

Vistria in furtherance of establishing a competitor. Doing so was a breach of

fiduciary duty. 367 prospect of increased competition with a new home health care business in

Texas . . . 368

366 Some information sharing seems to have been inconsequential. For example, neither Nautic nor Encompass acquired Brookdale. See *supra* Section I.F. That is not the point. information to compete against it. No separate damages are being awarded for these

specific acts. See *infra* Section III. 367 See *Metro Storage PT China LLC v. PT Korea LLC*, 2010 WL

761145, at *7 & n.36 (Del. Ch. Feb. 26, 2010)); *BelCom, Inc. v. Robb*, 1998 WL 229527, if he engages in transactions that had their inception before the termination of the fiduciary

relationship or were founded on information acquired during (emphasis in original)).

368 VitalCaring possessing certain



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

-trial Br. 108-09. But the narrow issue litigated in Texas was whether Anthony misappropriated trade secrets or employee manuals. The Texas court was not asked to consider whether Anthony acted disloyally. Nor was it confronted with certain instances of information sharing addressed here. See Eagle Props., * * *

Disillusioned with EHC 369 She

partnered with Nautic and Vistria and brought along James and Walker. When her

plan failed, she turned her focus to creating a competitor. 370 investment committee, there was value in getting started while she remained at

371

So they did. Anthony, Walker, and James all senior officers usurped

acquisition opportunities falling key Encompass employees to join them using the promise of Topco equity. Their

efforts were fortified with Encompass confidential information. Great pains were

taken to conceal their actions.

372

Anthony, James, and Walker did the opposite.

Ltd. v. Scharbauer, 807 S.W.2d 714, 721-22 (Tex. 1990) (explaining that collateral

369 JX 3189 at 16 (text from Anthony to Schuppan on Oct. 26, 2020); see Anthony Tr. 683. 370 See supra Section I.H. 371 JX 748 at 45. The contemporaneous notes of this meeting were prepared by Chris Vinciguerra, a managing director at Nautic. Vinciguerra Tr. 837. Vinciguerra was a highly credible witness. Despite his role at Nautic, he testified in detail about Anthony thick involvement in the Original Acquisitions. 372 BelCom, 1998 WL 229527, at *3 (citing Guth, 5 A.2d at 510). They strove to benefit themselves and their co-venturers to the detriment of

Encompass. Each of the three committed acts that amount to egregious breaches of

the duty of loyalty.

B. Aiding and Abetting



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

Encompass accuses the PE Defendants and Topco of aiding and abetting breaches of fiduciary duty. 373 For a claim of aiding and abetting a breach of (i) the existence of a fiduciary relationship, (ii) a breach of the fiduciary's duty, (iii) knowing participation in that breach by the defendants, and (iv) damages proximately caused by the breach 374 The first two elements were proven by Encompass, as addressed above. 375 As explained below, the knowing participation element the most difficult to prove 376 is also met.

373 Encompass also brought an aiding and abetting claim against Walker. See Compl. ¶¶ 107-13. Its post-trial briefs are silent on that specific claim. I consider it waived by omission and decline to address it. , 726 A.2d 1215, 1224

374 RBC Cap. Markets, LLC v. Jervis, 129 A.3d 816, 861 (Del. 2015) (quoting Malpiede v. Townson, 780 A.2d 1075, 1096 (Del. 2001)). 375 See supra note Section II.A. 376 In re Mindbody, Inc., S holder Litig., No. 484, 2023, slip op. at 70 (Del. Dec. 2, 2024). In Mindbody, the Delaware Supreme Court explained that knowing participation requires . Id. at 74 (quoting Buttonwood Tree ., 2017 WL 3172722, at *10 (Del. Ch. July 24, 2017)). The court distinguished the facts presented from those in RBC, where intentional and purposeful actions were taken in furtherance of a breach of fiduciary duty. Id. at 75 n.88 Aiding and abetting claims are difficult to prove by design. 377 An accused

aider and abettor only faces liability if she participated in the breach with scienter.

This standard is met here. The record is replete with facts demonstrating knowing participation.

1. The PE Defendants

Knowing participation consists of two factors: knowledge and culpable participation. 378 For the first factor, a plaintiff must prove that a defendant had 379 The



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

380

The second factor involves

culpable participation alongside a fiduciary in making the challenged decision,

facilitating or inducing a breach of fiduciary duty, misleading the fiduciary with

(citing RBC, 129 A.3d at 865). As in RBC With full awareness that their actions were wrong, the aiders and abettors drove the

efforts to covertly siphon opportunities, information, resources, and employees from Encompass. See infra notes 396-419 and accompanying text. 377 RBC, 129 A.3d at 865-

378 See Mindbody, slip op. at 70-71. 379 In re Baker Hughes Inc. Merger Litig., 2020 WL 6281427, at *11 (Del. Ch. Oct. 27, 2020) (citing Malpiede, 780 A.2d at 1097). 380 Id. at *17 (citing RBC, 129 A.3d at 862); see also Mindbody, slip op. at Knowledge that the primary party has breached its fiduciary duty is not enough . . . a plaintiff must also demonstrate that the aider and abettor had actual knowledge that their conduct was legally improper. (quoting RBC, 129 A.3d at 862)). materially false information, or creating an information vacuum. 381 Encompass

proved both factors.

a. Knowledge

Nautic and Vistria knew that Anthony, James, and Walker could not create a competitor without violating their fiduciary duties to Encompass.

Nautic provided them with a

general understanding of this risk. In 2016, Nautic disgorged \$70 million to settle claims involving its acquisition of Reliant Hospital Partners. It had been sued for confidential information, and soliciting employees. 382

Corey had been named as a

defendant. 383 Vistria had been embroiled in similar litigation when an operating



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

partner was sued by her former home health company employer (a Vistria portfolio company) for breaching non-competition and non-solicitation covenants. 384

381 See Firefighters Pension Sys. of City of Kansas, Missouri Trust v. Presidio, Inc., 251 A.3d 212, 275 (Del. Ch. 2021); see also Mindbody, slip op. at 73- in an quoting , 2015 WL 5052214,

at *41 (Del. Ch. Aug. 27, 2015)). 382 See Corey Tr. 1227-31; JX 36 ¶¶ 54-55; JX 32; see also Cornerstone Healthcare Grp. Hldg, Inc. v. Nautic Mgmt. VII, L.P., 493 S.W.3d 65 (Tex. 2016). 383 See Corey Tr. 1223-29. 384 See Deary v. Great Lakes Acquisition Corp., 2021 WL 5234500 (E.D. Mich. Nov. 10, 2021). Schuppan served on the board of that company and was deposed in the matter. 385

The experiences served as cautionary tales for Corey and Schuppan. 386

The Ropes roadmap memo eliminates any remaining doubt that Nautic and Vistria understood how to engage with Anthony while she was an Encompass fiduciary. Counsel told the PE Defendants agreement that

387

The Ropes memo further outlined how Newco could recruit employees

without colliding with -solicitation restrictions. 388 It

cautioned that Anthony should not openly recruit Encompass Home Health

389

-solicit and no-hire obligations d[id] not apply to Nautic or

385 Schuppan Vol. I Dep. 12-13. 386 See Corey Tr. 1223-25; see Schuppan Vol. I Dep. 12-22. 387 JX 904 at 2; see also JX 676 at 4

388 discussions at the appropriate time, and to continue to build a favorable record

JX 676 at 6. 389 Id. at 3. 390 The memo suggested that Nautic and Vistria retain an outside recruiting

391



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

Encompass. 392

They were discouraged from discussing Newco matters using

393

394

be carefully crafted by counsel to avoid any inference that April is violating her

395

390 Id. at 6. 391 Id. 392 Id. at 7. 393 Id. at 8. 394 Id. at 3, 7. 395 Id. at 7-8. b. Participation

Despite their knowledge of the risks of aiding and abetting liability, Nautic

and Vistria through Corey and Schuppan actively encouraged and facilitated

breaches in pursuit of financial upside. Their

participation began by December 2020 when they wrote a term sheet for their new

venture. 396 By early 2021, they acted to make it a reality. 397

The PE Defendants worked with Anthony, James, and Walker to identify

Homecare Holdings as the base for their platform, with Vital and Kare as the two

other components. 398 They shared diligence materials about the acquisition targets

with Anthony and consulted her about the negotiations. 399 Nautic even had Anthony

present to its investment committee as the presumptive leader of the venture. 400

These events took place while Corey and Schuppan knew that Anthony, James, and

Walker were Encompass Home Health officers. 401

396 See JX 388; see also JX 390; Corey Tr. 1300-02. 397 JX 662; JX 688; Corey Tr. 1304-06. 398 See supra text accompanying note 102. 399 E.g., JX 3189 at 29; JX 3215 at 50; Anthony Tr. 754-61; Schuppan Tr. 1699-1700, 1754-56; JX 748 at 45; Vinciguerra Tr. 830-31, 887-91; JX 1083; JX 967. 400



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

Anthony Tr. 772; JX 1025; Vinciguerra Tr. 886-87. 401 The knowledge of Corey and Schuppan is imputed to the entities they serve as agents. See *Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 2130607, at *11 (Del. Ch. Aug. 26, Triton, 2009 WL 1387115, at *16

knowledge and conduct of Elliott, its controlling officer, are imputed solicitation of from the start was to

¶ 402 To obscure

this plan, the PE Defendants hired a recruiting firm in mid-April 2021 called

Chartwell Partners to create a 403 The process

was a sham. 404 . 405

Corey and Schuppan gave

Chartwell the names of Walker, Jolley, and Riggins. 406 Chartwell then arranged

interviews. 407

The PE Defendants further drove efforts to gain Encompass confidential

information, first for a buyout of Encompass Home Health and then to form a

402 JX 414. 403 Jolley Tr. 157-60, 263-66; Bush Tr. 283-90; see also Anthony Tr. 795; James Tr. 1064-66. 404 In support of its final judgment, the Texas state court found that Nautic and Vistria

Encompass employees. See JX 2105 at ¶¶ 58-60, 64; see also *supra* Section I.Q. 405 See

406 Bush Tr. 281, 286-87, 290. 407 Chartwell was unaware that its work was pretense. For example, Schuppan thanked a

see Bush Tr. 281-83; JX 1048 at 1. In another strange move, Corey asked that a call invitation to the two had been communicating for months. JX 1057; see Corey Tr. 1377-79; Walker

Tr. 1535-37. from Anthony and James by screen share. 408

The PE Defendants sought from



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

Walker and Anthony information about acquisition targets Encompass had considered and reasons why they were passed on. 409

c. Concealment

The PE Defendants scheme. 410

Their deception is indicative of their knowledge that these actions were wrong. 411

The PE Defendants shielded their discussions with Anthony by filtering them through counsel. Ropes executed a common interest agreement with Nautic and 412 Nautic and Vistria believed that this agreement

provided a layer of protection, allowing them to share diligence materials with their

408 JX 181; JX 188; JX 191. Corey testified that he preferred using screen sharing to avoid disseminating Nautic information. Corey Tr. 1248. This excuse is illogical since he was

to screen share because he knew Nautic was improperly receiving sensitive Encompass information from James and Anthony. 409 See, e.g. Queen City); Vinciguerra Dep. 281-82; Schuppan Vol. I Dep. 282-82, 311-12.

410 See, e.g., PTO ¶¶ 50, 55, 61; Jolley Tr. 137-42; Anthony Tr. 755-61; Schuppan Tr. 1684-85, 1699; James Tr. 1059-60; Corey Tr. 1338-39; JX 990; JX 952; JX 940; JX 910 at 1. 411 See Stone & Paper Invs., LLC v. Blanch, 2021 WL 3240373, at *25 (Del. Ch. July 30, 2021) (observing that the

412 JX 860 at 2-4. litigation counsel, who would send them to Ropes lawyers, who would then forward them to Anthony. 413

which litigation counsel sent to Ropes lawyers, who sent it to Anthony, who then sent feedback to Ropes, who sent it to litigation counsel, who forwarded it back to Corey the next day. 414 ounsel billed time for the forwarding to a



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

a reference to April Anthony and Luke James. 415 In

communications without lawyers, Schuppan, Corey, and their teams avoided

mentioning Anthony by name. T 416

When a Nautic employee slipped

417

413 See JX 990; JX 952; JX 1022 at 2; JX 910 at 1. 414 JX 9004; JX 952. 415 JX 3201 at 7. 416 See Schuppan Tr. 1695-98; JX 1557; Schuppan Dep. 154; see also Kuchibhotla Dep. 119; Tang Dep. 136-37 (confirming that the use of the nickname Voldemort to refer f] on the Voldemort he-who-must-not-be- No

417 Vinciguerra Tr. 939-40; JX 933 at 1. name from its deal file, the HCH opportunity. 418

Schuppan manually deleted all text messages on the

matter even after receiving a subpoena from Encompass. 419

The PE Defendants willfully ignored R s advice. Instead of striving to

heed it, their focus was on not getting caught. Their clandestine actions were

duty. 420

2. Topco

Though the evidence is thinner than that relating to the PE Defendants, Topco

is also liable under an aiding-and-abetting theory. Topco existed no later than May

18, 2021 while Anthony, James, Walker remained Encompass fiduciaries. 421

Because Corey and Schuppan are fiduciaries of Topco as its managers, their

knowledge and acts are imputed to Topco under agency principles. 422 This

418 Corey Dep. 250-56; see JX 791 at 1. 419 Schuppan Tr. 1687-88. 420 See Agranoff, 1999 WL 219650, at *21 (finding that a defendant aided and abetted



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

421 PTO ¶ 62 (stipulating that Topco extended a formal offer to Walker on May 18, 2021). 422 See Carr v. New Enter. Assocs., 2018 WL 1472336, at *16 (Del. Ch. Mar. 26, 2018) -fiduciary see also Stewart v. Wilm. Tr. SP Servs., Inc., 112 A.3d 271, 302-03; supra note 148 and accompanying text; JX 1090 at 1-2. imputation includes aiding and abetting usurpation of the

Original Acquisitions, solicitation of key Encompass employees, and

misappropriation of confidential information. 423 after June 18, 2021 when Anthony and Walker left Encompass. In July, Walker Anthony

. 424

* * *

Encompass proved by a preponderance of the evidence that the PE Defendants

and Topco knowingly participated in breaches of

fiduciary duty. It was damaged as a result. 425 Time, talent, and resources belonging

to Encompass were used to form a competitor. The PE Defendants and Topco are

jointly and severally liable with Walker for . 426

423 See supra Section II.B.1. 424 See supra notes 362-65 and accompanying text; PTO ¶ 74. 425 See infra Sections III.A, B. 426 See Malpiede, 780 A.2d at 1096 n.75 (citing Laventhol, Krekstein, Horwath & Horwath v. Tuckman, 372 A.2d 168, 170 (Del. 1976) [P]ersons who knowingly join a fiduciary in an enterprise which constitutes a breach of his fiduciary duty of trust are jointly and severally liable for any injury which results). Although Encompass claims breaches of fiduciary duty by Anthony, James, and Walker, Walker is the only defendant of the three. See PTO ¶ 1. Accordingly, Walker is the only former fiduciary who is jointly and severally liable with the PE Defendants and Topco. L.P., 817 A.2d 160, 172 (Del. 2002); Beard Rsch., 8 A.3d at 619 (holding that defendants fiduciary). This is a distasteful outcome in a sense, since Walker is on the hook while III. REMEDIES

Encompass proved that Anthony, James, and Walker breached their fiduciary

duties and that the PE Defendants and Topco aided and abetted the breaches.

Encompass must also prove its damages by a preponderance of the evidence. 427

Three types of recoveries are sought. First, Encompass requests monetary



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

damages to remedy the disloyal formation of VitalCaring and usurpation of opportunities from Encompass. Second, it seeks mitigation damages to lessen the it for the costs of the Texas litigation. Third, it asks that the defendants pay its attorneys

My assessment of the appropriate relief is guided by several tenets of our law.

Delaware does not 428

of damages with reasonable certainty . . . [t]he amount of damages can be an

Anthony and James are not. The nature of the primary remedy awarded may lessen this imbalance to some extent, it concerns See *infra* Section III.A. Joint and several

427 E.g., *Mobilactive*, 2013 WL 297950, at *24. 428 , 1992 WL 251380, at *7 (Del. Ch. Sept. 29, 1992). 429 These principles are bolstered where the harm is caused by

disloyalty. 430 431

dictates that the scope of recovery for a breach of the duty of loyalty is not to be

432

A. Damages for the Disloyal Formation of VitalCaring

Guth decision outlines the policy

goals animating remedies for breaches of the duty of loyalty, including for usurpation of corporate opportunities. 433 The remedial goal is not a compensatory

a broader foundation of a wise public policy that, for the

purpose of removing all temptation, extinguishes all possibility of profit flowing

from a breach of the confidence imposed by the fiduciary relation. 434 That is,

429 *Siga Techs., Inc. v. PharmAthene, Inc.*, 132 A.3d 1108, 1111 (Del. 2015); see also *Beard Rsch.*, 8



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

A.3d at

430 ., 794 A.2d 1161, 1184 (Del. Ch. 1999), , 766 A.2d 437 (Del. 2000). 431 Maginn, 2022 WL 16557974, at *19 (citation omitted). 432 Thorpe v. CERBCO, Inc., 676 A.2d 436, 445 (Del. 1996). 433 Guth, rest upon the narrow ground of injury or damage to the corporation resulting from a betrayal of confidence . . . 434 Id. at 510; see also Mobilactive, 2013 WL 297950, at *23 (explaining that defendants damages must ensure that a fiduciary cannot profit from actions counter to the

interests of the corporation she is duty bound to serve. 435

Despite these plaintiff-friendly principles, fashioning a remedy here is tricky.

Encompass asks that I award it rescissory damages, disgorgement, or compensation

for lost profits. 436 But VitalCaring has no profits to disgorge.

437

After considering the typical damages measures, I conclude

that Encompass is entitled to a portion of any future gains VitalCaring realizes. This

punitive. But it maintains incentives for the defendants to grow VitalCaring while

.

1. Rescissory Damages and Disgorgement

Rescissory damages are intended to restore the injured party to the position it

was in before the challenged event occurred. 438 Disgorgement prevents unjust

435 Guth as such, acquires gain or advantage for himself, the law . . . denies to the betrayer all benefit

436 -trial Opening Br. 92. 437 ., 67 A.3d 496, 532 (Del. Ch. 2013), M&F Worldwide Corp., 88 A.3d 635 (Del. 2014).

438 See, e.g., Lynch v. Vickers Energy Corp., 429 A.2d 497, 501 (Del. 1981), overruled in part on other grounds by Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983); see also enrichment by requiring a wrongdoer to return any profits they have gained through



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

improper acts. 439 Encompass treats rescissory damages and disgorgement

interchangeably insofar as it demands the value the defendants appropriated for

themselves. Rescissory damages would [s] to disgorge profits

that the[y] 440

Encompass seeks rescissory damages or disgorgement of \$462 million. 441

This estimate is supported by the work of Dr. Marc Zenner a corporate finance and

valuation expert and former investment banker. 442 profits. His analysis is based on projections
Nautic and Vistria prepared for their

respective investment committees Nautic in July 2021 and Vistria in October 2021

In ., 52 A.3d 761, 815 (Del. Ch. 2011)

Mining Corp. v. Theriault, 51 A.3d 1213 (Del. 2012). 439 See TIAA-CREF Individual & Inst. , 2016 WL
(citing Disgorgement

440 ., 88 A.3d 1, 39 (Del. Ch. 2014). 441 -trial Opening Br. 92. 442 JX App. A. and May 2022. 443 Using
the projections, Zenner calculated the present value of

to be between \$291 million and \$462 million

using an 11% discount rate. 444

The underwriting projections were prepared in the ordinary course of business

and formed the basis 445 They capture the

-and-build strategy, including accretive

mergers and acquisitions. 446

Even so, the projections are both outdated and unreliable. Nautic and

increase from approximately \$30 million in 2021 to between \$46 and \$60 million by



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

2023. 447 In reality, EBITDA declined by over 70% from \$24.9 million

in the fourth quarter of 2021 to \$6.8 million in the second quarter of 2023. 448 This

negative performance is in line with a steep decline across the home health and

443 Zenner Rep. ¶ 75; Zenner Tr. 1874-75, 1895-96; JX 3209 at 15; JX 1779 at 15; JX 2034 at 13. 444 Zenner Tr. 1895-96; Zenner Rep. ¶ 75. 445 Id. at 1878-81. 446 Zenner Rep. ¶ 56; Zenner Tr. 1920-21, 1925. 447 See JX Dudney Rebuttal Rep see also JX 3209 at 31; JX 1779 at 15; JX 2034 at 13. 448 Dudney Rebuttal Rep. ¶ 34 fig.6. hospice industry precipitated by labor shortages and falling fee-for-service Medicare

volumes. 449

Although this court is uncompromising in its condemnation of disloyalty, it

450 The Nautic and Vistria

Even under the broad tenets guiding damages for breaches of the duty of loyalty, the

projections provide no reliable basis to make a responsible damages assessment. 451

The defendants cannot disgorge profits that have never materialized. 452

449 JX 4108 at 3 (identifying fee-for-service reimbursement and clinical labor retention as key risks); Dudney Tr. 2033-34; see also affecting the home health space in Q4 2022). 450 Medek v. Medek, 2009 WL 2005365, at *12 n. 78 (Del. Ch. July 1, 2009) (quoting Henne v. Balick, 146 A.2d 394, 396 (Del. 1958)). 451 E.g., Highfields Cap., Ltd. v. AXA Fin., Inc., 939 A.2d 34, 53 n.55 (Del. Ch. 2007) dated management projections . . . undermine[d] his ., 2006 WL 2403999, at *17 (Del. Ch. Aug. 18, 2006) (concluding that five-

452 principle to argue that the court ought to resolve uncertainties in its -trial Opening Br. 95. It does not attempt to calculate the highest intermediate value. Nor could it. Doing so would assume that there was an increase in the value of VitalCaring since completing the Original Acquisitions. There was not. 2. Compensatory Damages for Lost Profits

453

Zenner calculated a present value of \$92 to \$157 million

in gains solely from the Original Acquisitions using an 11% discount rate to Nautic



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

454 Encompass asserts that

this remedy is appropriate since, had it pursued the Original Acquisitions, an estimate of its expected returns would have been at least as great as the PE

455

This approach suffers from the same fatal flaw as the disgorgement measure.

It is based on unreliable projections anticipating a future that never came to pass. 456

VitalCaring remains profitless. 457 I lack a responsible basis to estimate compensatory damages.

3. Constructive Trust over VitalCaring

financial struggles create a remedial quandary. I have found

egregious breaches of the duty of loyalty by Anthony, James, and Walker with

453 -trial Opening Br. 102. 454 Zenner Rep. Exs. 12, E.1A-E.1C; Zenner Tr. 1904-05. 455 See -trial Opening Br. 101-02; Zenner Tr. 1869-70; Zenner Rep. ¶¶ 112-14. 456 See Dudney Tr. 2048-50; Dudney Rebuttal Rep. ¶¶ 24, 30-31, 36 fig.7; see also Zenner Tr. 1938. deep involvement by the PE Defendants. 458 Yet there is no benefit to be disgorged.

The declining home healthcare and hospice industry is part of the problem. But what

if the industry rebounds while VitalCaring implements the acquisition strategy

Vistria and Nautic contemplated multi-year growth through acquisitions and

a profitable exit no fewer than five years later. 459 They tout successful track records

and have turned sizable profits on their investments even those that initially

underperformed. 460 461 In fact, they

have begun exploring new acquisition opportunities. 462 Any future gains through



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

457 See Metro Storage damages based on the lost profits from a new business, deeming evidence of lost profits to

458 See supra Sections II.A-B. 459 E.g., JX 831 at 7 (forecasting a

opportunities in the home health and home care space accessible through M&A). 460 See Schuppan Tr. 1836-37 (discussing a profitable exit from a Vistria investment once written down); Corey Tr. 1402-04 (confirming Nautic has exited companies once written down at a profit). 461 See JX 3221 at 2-3 (Anthony confirming in 2023 that she does not see an IPO in

she expected the company to perform well enough to make Nautic and Vistria money); JX 3205 at 2-3 (Schuppan in 2023 stating that the home - and that Vistria planned to re

462 After trial, the defendants submitted several letters to this court about a suit brought by the United States Department of Justice (DOJ) to block a transaction between home the exit of the investment would be, in part, the consequence of disloyalty, aided and

abetted by the PE Defendants. It would be inequitable for the defendants (and

Anthony) to retain the entirety of such gains simply because this trial occurred before they were realized.

Equity provides a solution: the constructive trust. As explained by Pomeroy Equity Jurisprudence:

Constructive trusts include all those instances in which a trust is raised by the doctrines of equity for the purpose of working out justice in the most efficient matter, where there is no intention of the parties to create such a relation, and in most cases contrary to the intention of the one holding the legal title, and where there is no express or implied, written or verbal, declaration of the trust. 463

A constructive trust is . 464 The point of the

healthcare firm Amedisys, Inc. and UnitedHealth Group I UHG . That transaction

planned acquisition of UHG and Amedisys care centers in various markets. See 13, 2024 Letter (Dkt. 516) Ex. A ¶ 10. If the Amedisys/UHG deal closes, VitalCaring

expects to also close on its purchase of the home health assets. See Letter - See

Letter (Dkt. 518) Exs. A-B. Regardless of whether the transactions are completed, these letters show that VitalCaring is actively pursuing M&A. 463 4 John Norton Pomeroy, § 1044 (5th ed. 1941). 464



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

Hogg v. Walker, 622 A.2d 648, 652 (Del. 1993). where one party is unfairly enriched at the expense of another to whom a duty is

owed. 465

C device

through which precedence of self is compelled to give way to the stern demands of

466 over which a plaintiff

claims equitable ownership. 467 They have been ordered where future profits from a

award. 468

465 Id. Beatty v. Guggenheim Exploration Co., 122 N.E. 378, 380

(N.Y. 1919)); see also Adams v. Jankouskas constructive trust . . .

conduct causes him to be unjustly enriched at the expense of another to whom he owed Snapp v. U.S . . . is the natural and customary consequence of a breach of trust. It deals fairly with both parties by

466 Guth, 5 A.2d at 510 (citation omitted); see supra note 465. 467 Hogg, 622 A.2d at 652; see also PharmAthene Inc. v. Siga Techs., Inc., 2011 WL corpus of a constructive trust be specific property, identifiable proceeds of specific property

, 67 A.3d expectation damages for promissory estoppel).

468 See PharmAthene, 2011 WL 4390726, at *37 (awarding equitable interests in a business

money damages award); see also Restatement (Third) of Restitution and Unjust Enrichment § 55 illus. 4 (Am. L. Inst. 2011), Westlaw (database updated June 2024) A constructive trust is warranted here. Encompass has been wronged by its

former fiduciaries and the third parties who aided them. This court must endeavor

to 469

The trust would furnish Encompass . 470

If VitalCaring realizes



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

gains, Encompass will be entitled to a portion of them.

The mechanics of the trust are more complicated.

a. Capital Contributions

The first issue in forming the constructive trust concerns Nautic and

range

from approximately \$199.5 million to \$263.2 million in the 2021 and 2022

underwriting projections, 471 to \$330.1 million . 472

One approach would be to permit Nautic and Vistria to retain 100% of every

dollar of VitalCaring profits until they have recovered their capital contributions in

469 Guth, 5 A.2d at 510. 470 See McMahon, 532 A.2d at 608 (stating that a constructive trust

471 Zenner Rep Ex. 8; see also Zenner Rep. ¶¶ 71-75; JX 3209 at 14; JX 1779 at 6; JX 2034 at 4-5. 472 JX 2422 at 1; see infra note 494 and accompanying text (describing the June 2023 projections). full. At that point, Encompass would receive 100% of every dollar of profits made

by VitalCaring until an exit.

Visually represented, the trust would have a horizontal structure:

The defect in this approach is that the PE Defendants would be incentivized

only to recover their profits. They would have no financial motive to generate profits

beyond the amount of their capital contributions. Their assets and effort devoted to

VitalCaring might be reallocated to other projects.

Another approach involves sharing future profits between Nautic and Vistria,

on the one hand, and Encompass, on the other hand. In PharmAthene Inc. v. Siga

Technologies, Inc, Vice Chancellor Parsons ordered



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

profits would be shared with the plaintiff when

received. 473 He contemplated that the profit sharing would track an agreement the

473 PharmAthene, 2011 WL 4390726, *40. parties would have been amenable to before the breach. 474
The resulting split

475

A similar approach to the one outlined in PharmAthene is apt here. If Nautic

and Vistria recover their capital contributions while Encompass receives a fixed

portion of the payment stream, risk will be appropriately allocated. Encompass will

at which

point exit proceeds will be apportioned, and the trust will cease to exist. Nautic and

Vistria will remain incentivized to support VitalCaring to recover their

investments. If they choose not to grow the business, they do so at their own peril.

The remedy of a constructive trust is less concerned with compensating a plaintiff

than with removing the rewards of a s disloyalty. 476

474 Id. at *40-42. 475 Id. at *38-40. 476 Guth, 5 A.2d at 511. The trust will be split vertically rather than horizontally:

b. Economic Gains to Nautic and Vistria

Having adopted a vertical payment waterfall for the constructive trust, I must

that is, the amount they expect to

receive above their capital contributions. 477 This exercise requires projecting

The projections should account for M&A beyond the Original Acquisitions.

The overarching wrong is the formation of the competing enterprise using



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

first as a planned

home healthcare venture, then as Topco, and later as VitalCaring. It is not limited

477 See, e.g., Zenner Rep. Ex. 9. to usurping the Original Acquisitions, which were intended to serve as a platform

-up growth strategy. 478

That leaves the matter of which projections reflecting the Original

Acquisitions and subsequent M&A to employ. Encompass believes that the remedy

should be based on the underwriting projections. But I find the most recent Nautic

projections in the record from June 2023 to be more reliable. I adopt them after

making several adjustments.

i. Underwriting Projections

Encompass relies on the 2021 and 2022 underwriting projections to calculate

479

There is some logic to using these projections to form a remedy. The projections

the time of the wrongdoing. They were

committees. And they include not only projected gains from the Original

Acquisitions, but also those from additional acquisitions. 480

Zenner uses these underwriting projections. After calculating

478

See supra text accompanying note 102. 479 See Tr. of May 16, 2024 Post-trial Oral Arg. (Dkt. 498) 61-62. 480 See infra note 514; see also JX 3209 at 16; JX 2034 at 13; JX 1779 at 15; Zenner Rep. ¶ 68; id. at Exs. E.1AE.1C, 9. as of that time consistent with a five-year exit. 481 He explained that Nautic and



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

Vistria would not receive all of equity value for two reasons. One, part of the equity value would be distributed to VitalCaring employees under the MEIP. 482 And two, the equity value would be adjusted based on the ownership stake Nautic and Vistria expected to have upon exit. 483 and October 2021 investment committee presentation projected that equity stake upon exit would be around 78%. 484 committee presentation projected an 82% stake. 485 Zenner used these projections and the 1% sponsor exit fee to determine total proceeds to Nautic and Vistria for the Original Acquisitions plus additional M&A. 486 exit proceeds as of 2026 using a 11% discount rate. 487 He 481 Zenner Tr. 1876. Schuppan testified that the PE Defendants used a five-year exit as their standard underwriting plan, though in practice they were often flexible in their exit timeline and targeted a 3x return. Schuppan Tr. 1834-35. 482 Zenner Rep. ¶ 34. 483 Id. 484 Id. at Exs. E.4A nn.1-2, E.4B nn.1-2 (calculating the sponsor share of preferred and common equity in July 2021 and October 2021, respectively); see also id. ¶ 34. 485 Id. at Ex. E.4C nn.1-2 (calculating the sponsor share of preferred and common equity in May 2022); see Zenner Rep. ¶ 34. 486 Id. at Exs. E.4A-E.4C; Zenner Rep. ¶¶ 36-39. 487 Zenner Rep. ¶ 40. are the difference between the present value of their exit proceeds and their capital contributions. 488 He was thus able to calculate the gains to Nautic and Vistria from VitalCaring. 489 But VitalCaring has never come close to meeting the underwriting projections due at least in part to headwinds in the home health and hospice



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

market. 490 Though there are signs that the industry may be poised for a resurgence,

I cannot responsibly grant a remedy premised on the prospect of an economic

turnaround. There is no evidence in the record suggesting that VitalCaring is on

sound basis to estimate damages. 491

The underwriting projections are unreliable. I

decline to

488 Id. ¶ 43. 489 See id. Exs. E.1A-E.1C, 12; Zenner Rep. ¶ 79. 490 See Schuppan Tr. 1638-39, 1643-44; Dudney Tr. 1976-79; Zenner Tr. 1938-39, 1941-42; see also supra note 449. 491 See NetApp, Inc. v. Cinelli, 2023 WL 4925910, at *25 (Del. Ch. Aug. 2, 2023)

estimate should be construed against the breaching party . . . d[id] not relieve [the plaintiff] of its burden to present cf. *Duncan v. Theratx, Inc.*, 775 A.2d 1019, 1023-24, 1024 n.12 (Del. 2001) (observing that uncertainty regarding (citing *Madison Fund, Inc. v. Charter Co.*, 427 F. Supp. 597, 608 (S.D.N.Y. 1977))); Del.

Express damages] . . . ii.

Zenner quarterly projections for VitalCaring. 492

These projections were revised downward

hospice sector. 493

Nautic prepared the projections consistent with its regular

market value of the investment as of the quarter ending June 30, 2023. 494

Nautic ran a discounted cash flow (DCF) analysis, in which it discounted

unlevered cash flows from 2023 to 2028 using a weighted average cost of capital

(WACC) of 19.9%. 495 It computed the WACC based on the then-current yield on

high yield bonds for similar companies (8.5%), a 27% tax rate, projected leverage



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

of 30%, and a 25.7% cost of equity. 496 Based on these inputs, Nautic estimated

VitalCaring million. 497

492 Zenner Rep. ¶¶ 84- 493 Compare JX 2422 (Nautic June 2023 Projections) 2, with JX 3209 at 32; JX 1779 at 15; JX 2034 at 13. 494 Corey Tr. 1210-11. Nautic delivered this information to investors along with commentary on position as of the time of projections. Id. 495 See JX 2422 at 2. 496 Id.; Zenner Rep. ¶ 98. The WACC is equal to $(\% \text{ debt}) \times (\text{cost of debt}) \times (1 - \text{tax rate}) + (\% \text{ equity}) \times (\text{cost of equity})$. See Zenner Rep. Ex. 14. 497 JX 2422 at 1; Zenner Rep. ¶ 96; id. at Ex. 14. Zenner proposes three adjustments to calculations: (1) a lower cost

of equity, (2) a higher exit multiple, and (3) additional EBITDA and net debt

corresponding to an active M&A pipeline. 498 I reject his suggested cost of equity

reduction but adopt his adjustments accounting for an increased exit multiple and

additional M&A. Based on these adjustments, I arrive at an enterprise value of

approximately \$408 million and an equity value of approximately \$220 million. I

discuss each adjustment below.

Decreasing the Cost of Equity. calculating the cost of equity, which involves adding an equity risk premium to the

risk-free rate, and adjusting for size, industry, and company-specific risks. 499

Specifically, Nautic with the projections in light of [VitalCaring] 500

498 Zenner Rep. ¶¶ 99-101, 105, 107-08. 499 JX 2422 at 2; Zenner Rep. ¶ 99. 500 -trial Br. 86 (emphasis omitted). Zenner argues that this method of calculating VitalCaring contradicts the basic principles of a capital asset pricing model (CAPM). 501

He

argues Nautic should not have included non-systematic company-specific risks or

industry-specific risks in its model since these risks could be diversified away. 502

VitalCaring were a public



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

company. In this case, it would be easier to measure the market value of a given

a measurement of a

relative to the broader market. 503 But a reliable beta requires

historical performance data that is unavailable for a private company like

VitalCaring. 504 In such circumstances, the build up method employed by Nautic is

an accepted valuation technique. 505

I therefore reject . Instead, I accept the 25.7%

506

501 Zenner Rep. ¶ 99. 502 Id. 503 Id. ¶ 66 n.80; id. at App. D ¶ B. 504 See Aswath Damodaran, Investment Valuation: Tools and Techniques for Determining the Value of Any Asset . . . the absence of market

see also Glob. GT LP v. Golden Telecom, Inc., 993 A.2d 497, 518 (Del. Ch. 2010), aff'd, - Andaloro v. PFPC Worldwide, Inc., 2005 Increasing the Exit Multiple. Nautic used a 10.0x EV/LTM EBITDA exit

multiple to calculate terminal value. 507 An EV/LTM EBITDA multiple compares a

is unclear.

This multiple is materially lower than that used by Nautic and Vistria in prior

investment committee presentations from July 2021 to May 2022, which ranged

from 14.0x to 15.0x. 508 There were strong pressures on the home health and hospice

company that does not trade on the public markets, its beta cannot be determined by direct

505 See, e.g., Damodaran, supra note 504 Educational Foundation, Valuing a Business: The Analysis and Appraisal of Closely Held

Companies the [equity discount rate] are: [the] capital asset pricing model (CAPM) [and the] build up method) (citation omitted); see also Delaware Open MRI Radiology Assocs., P.A. v. Kessler - up



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

model is the proxy that has found the most favor among but see *Hintmann v. Fred Weber, Inc.*, 1998 WL 83052, at *4 (Del. Ch. Feb. 17, 1998) (rejecting use of the build up method in favor of CAPM and

506 See JX 2422. 507 See *id.* at 2; Zenner Rep. ¶¶ 102, 105. The calculation of terminal value is standard practice in a DCF analysis, which typically involves projecting future cash flows for a short period into the future (often five years), and then applying an exit multiple to determine cash flows thereafter. See Pratt *supra* note 505, at 169; see also Zenner Rep. ¶ 59 n.71 (citing Joshua Rosenbaum & Joshua Pearl, *Investment Banking: Valuation, Leveraged Buyouts, and Mergers & Acquisitions* 232 (2009)). 508 See JX 3209 at 32 (using a 14.0x exit multiple); JX 1779 at 15 (using a 14.5x exit multiple); JX 2034 at 13 (using a 15.0x exit multiple). sector that led to a downturn in market valuations. 509 But the Louis G. Dudney, noted that comparable companies were trading at an average

multiple of 14.5x as recently as September 2023. 510

On this logic, I agree with adoption of a higher exit multiple and

adopt a 14.5x exit multiple for my analysis. This multiple is consistent with

. 511 It is

in line with multiples employed

in more recent investment committee presentations by the PE Defendants. 512

509 See *supra* note 216 and accompanying text. 510 Dudney Rebuttal Rep. ¶ 78 fig.19. Zenner and Dudney dispute the correct computation of the exit multiple using comparable companies, with Zenner calculating a higher industry average. Compare *id.*, with Zenner Rep. Ex. 4. There are several key differences between the metrics used by the experts. First, although they use largely the same company set, Inc.), which trades at the lower end of the range (12.6x in September 2023). *Id.*

use a single point in time. *Id.* Finally, there appear to be data discrepancies, with some of the same companies trading at different multiples in two reports for the period ending June 30, 2023 (Q2 2023). *Id.* I need not resolve re accurate, however. Zenner lists the median exit multiple of comparable companies only for reference and uses See Zenner Rep. ¶ 61

presentations for purposes of my analysis, I note that this range of multiples is lower than

511 Dudney Rebuttal Rep. ¶ 78 fig.19. 512 Zenner Rep. ¶ 61 (adopting an exit multiple range of 14.0x to 15.0x); *id.* ¶ 104 n.123 (showing that five-year exit multiples for valuations performed by Nautic and Vistria between July 2021 and December 2022 range from 14.0x-15.0x). Future M&A. exclude M&A beyond the



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

Original Acquisitions. 513 This omission is inconsistent with the record and

. 514 To correct for this flaw, Zenner

investment committee presentations, respectively. 515 He projects hypothetical

potential

acquisitions. 516

In rebuttal VitalCaring will make acquisitions as projected in 2021 despite the downward

June 2023 projections. the

underperformance of [VitalCaring], the company does not have the excess free cash

flow previously projected to be used to fund add-on acquisitions 517 He also notes

the higher borrowing costs both in the market generally and for VitalCaring due to

its poor performance 513

514 Zenner Rep. ¶ 93; Corey Dep. 35-36, 42-43; see also supra note 462 and accompanying text; supra note 219 and accompanying text reference to expanding nationwide on its website). 515 Zenner Rep. Ex. 15. 516 Id. at Exs. 16.a-b. 517 Dudley Rebuttal Rep. ¶ 58. acquisitions. 518 Dudley further observes that V actual acquisitions in

2022 and 2023 significantly trailed initial forecasts. 519

Both experts have a point. V financial performance has fallen

short of . 520 It cannot fairly be assumed that

projected rate. At the same time,

business model relies on a roll-up strategy: some acquisitions (albeit

fewer than expected) were in fact made in 2022 and 2023, and more are planned. 521

As such, additional acquisitions should not be excluded from the model.



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

To balance these realities, I take an approach that considers the actual, reduced rate acquisition assumptions.

Although the underwriting projections Nautic and Vistria each prepared diverge overall, they share two common assumptions: a compound annual growth rate (CAGR) of 52.2% for future EBITDA growth and net debt from acquisitions equal to 7.5x projected EBITDA. 522 These common assumptions, applied to the actual

518 Id. ¶ 58. 519 Id. ¶ 56. 520 See supra notes 215, 447-48. 521 Dudney Rebuttal Rep. fig.14; see supra note 462. 522 See Zenner Rep. Ex. 15 (citing JX 3209 at 31; JX 1779 at 13). Zenner arrived at his M&A projections by subtracting projected EBITDA and net debt without acquisitions from projected EBITDA and net debt with acquisitions. Id. The CAGR was computed as follows for Nautic: $(\$40,800,000 / \$5,000,000)^{1/5} - 1 = 0.522$. For Vistria, the calculation acquisition volumes of \$1.5 million in EBITDA for 2022 and \$1.0 million for

2023, 523 provide a sound basis to project EBITDA and net debt from acquisitions for 2024 through 2028.

This approach includes future M&A, but at a more realistic capacity than Zenner projected. Under these assumptions, the maximum EBITDA from acquisitions in 2028 is approximately \$8.2 million. 524 This figure is more sensible than \$40.8 million and \$81.6 million projected for 2026 by . 525

Carried through to the end of 2028, VitalCaring will have incurred \$61.3 million in net debt from M&A beyond the Original Acquisitions. 526

In short, I rely primarily on projections that as of 2023 with certain modifications. I 25.7% but account for hypothetical add-on acquisitions and use a greater EBITDA

exit multiple as Zenner suggests. 527 And I take a more conservative approach to add-



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

is $(\$81,655,000 / \$10,000,000) 1/5 - 1 = 0.522$. For both Nautic and Vistria, I calculated the 7.5 average net debt to EBITDA ratio for the years 2023 to computations and then averaging it across this five-year time span. 523 Dudney Rebuttal Rep. fig.14. 524 For 2023, Nautic had actual EBITDA from M&A of \$1.0 million. Dudney Rebuttal Rep. ¶ 56 fig.14. $\$1.000 \text{ million} \times (1.522) 5 = \8.167 million . 525 See Zenner Rep. Ex. 15 (citing JX 3209 at 31; JX 1779 at 13). 526 $\$8,167,201 \times 7.5 = \$61,254,010$; see supra note 523 and accompanying text. 527 See supra note 507-16 and accompanying text. actuals. 528

Adding the EBITDA from acquisitions and adjusting the exit multiple to

14.5x yields total cash flows of \$925,768,258. 529 An enterprise value of

\$407,837,158 results from discounting these total cash flows using a 19.9% WACC

(corresponding to a 25.7% cost of equity). 530 Subtracting June 2023 projections (\$126,141,000) 531

from this enterprise value and additional

528 See supra note 520-26 and accompanying text. 529 I rely on the back- See Dkt. 515. There, his analysis pulls from a replicated version of the DCF Nautic used for its 2023 projections. Compare -up), with JX 2422 at 2. To compute the total cash flows, I use the same EBITDA projected by Nautic as a base, adding only EBITDA from M&A projected in 2023 using a 52.2% CAGR. I also calculate a different terminal value than Nautic since I apply a 14.5x exit multiple. This yields a terminal EBITDA of \$768,256,419 ($\$52,983.201 \text{ EBITDA for } 2028E \times 14.5$) rather than \$448,160,000 (\$44,816,000 for projections with one exception. Nautic seemingly intended to calculate taxes by applying a 27% tax rate to pre- tax earnings (calculated by adding back depreciation and amortization as well as changes in working capital). But its formula pulls from a blank row, which seems to be an error. 530 I apply the same methodology Nautic used in its 2023 projections in discounting projected cash flows using the WACC. 531 See JX 2422 at 1 ($\$140,000,000 - \$13,859,000 = \$126,141,000$). net debt from M&A (\$61,254,010) 532 results in a total equity value of

\$220,442,148. 533

c. Allocation of Payment Streams

The next step is to allocate Vistria, on the one hand, and Encompass, on the other hand, by way of a vertical

payment waterfall.

Zenner calculates a relative distribution by dividing the present value of



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

target exit proceeds from their expected gains. 534 His analysis

suggests that share should be between 56% and 70% based on the 2021

and 2022 underwriting projections. 535

yield negative economic gains for Nautic and Vistria. That is because they have

532 See supra note 526. 533 $\$407,837,158 - \$126,141,100 - \$61,254,010 = \$220,442,148$. 534 Zenner Tr. 1897-99. 535

$(\$336,880,267 / \$600,049,153)$. See Zenner Tr. 1897-99; Zenner Rep. Exs. E.1A-E.1C; see also Zenner Rep. E-15 (explaining computations). contributed more capital than the modified 2023 projections suggest they might

recover.

The following table presents my calculations using the modified 2023

projections compared to projections: 536

536 Numbers in column are from Zenner Rep. Ex. E.1A. 2023 2023 projections, with certain modifications. Like the 2021 numbers, the 2023 numbers are based on projections over five years, after which point an exit multiple is applied to calculate a terminal value. See supra note 507 (describing the calculation of terminal value). The 2023 numbers in this table assume a 2028 exit; the 2021 numbers assume a 2026 exit. 537 This number was calculated by multiplying the EBITDA projected at exit by the exit

2023 projections. 538 Zenner presumed that Nautic and Vistria would receive proceeds equal to 78% of total equity value. See supra note 484 and accompanying text; Zenner Rep. Ex. E.4A. n exit fee equal to 1.22% of the total equity value at exit $(\$15,200,000 / \$1,247,100,000)$ See JX 3209 at 32; Zenner Rep. Ex. E.6. This compares closely to the 1.29% exit fee used

2022 presentation $(\$17,132,000 / \$1,329,347,000)$. See Zenner Rep. Ex. 6; see also

JX applied a 78% overall share of equity proceeds and a 1.22% exit fee. 539 proceeds by the number of days between the last day of the year in 2026 and the release of the projections on July 26, 2021. That is, the present value was computed as $\$870.9 / (1+0.11)^{5.43}$. See Zenner Rep. Ex. 9. Using this back to July 4, 2023 the last date in the record on which Nautic recorded its 2023

proceeds. See calculation is: $\$460.2 / (1+0.257)^{5.49}$. 540 See JX 2422 at 1. 541 See Zenner Rep. Ex. 8.



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

(all \$ in millions) Modified 2023 Projections 2021 Projections Projected EBITDA at Exit \$53.0 \$108.3 Exit Multiple 14.5x 14.0x Enterprise Value at Exit 537 \$768.3 \$1,516.8 Net Debt Balance at Exit \$187.4 \$269.7 Equity Value at Exit \$580.9 \$1,247.1 Nautic & Vistria Proceeds 538 \$460.2 \$870.9 Discount Rate 25.7% 11.0% Present Value of Nautic & Vistria Proceeds 539 \$131.0 \$494.1 Nautic & Vistria Contributions \$330.1 540 \$203.4 541 Economic Gains to Nautic & Vistria (\$199.0) \$290.7 thus yields an absurd mathematical result. 542

comparison of value of their expected proceeds is one way to measure an equitable distribution.

But it is not the only way.

Another way to conceptualize the allocation percentage is as Nautic and

upon exit they could recover on each dollar

they contributed to the enterprise. This approach c measurement, Nautic and Vistria would be entitled to recover 57% percent of every

dollar of VitalCaring profits. 543

There is merit to this alternative approach. First, it provides an intuitive proxy

Second,

it produces a rational result that allocates risks and rewards. With a 57% share,

Nautic and Vistria can recover their capital contributions and remain incentivized to

grow the business. A sizable 43% portion of the proceeds will flow to Encompass

due to the willful misconduct that produced VitalCaring.

542 to the significant declines in performance projected by Nautic. Adding back projected This resulting trust will take the following vertical structure:

* * *

balanced remedy that is

equitable and reasonably tailored to address the precise nature of the misconduct at



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

544 Here, the remedy must balance the equities with the hazards of creating incentive misalignment. The solution is the formation of a constructive trust. It

M&A and increasing the exit multiple as described above increase the expected gains to Nautic and Vistria. 543 \$330,058,048 capital contribution / \$580,861,409 projected equity value at exit = 57%. See JX 2422 at 1; supra notes 536-42 and accompanying text. This result differs from

value at exit, i.e., there is less value to disgorge to plaintiffs. 544 *Agilent Techs. v. Kirkland*, 2010 WL 610725, at *25 (Del. Ch. Feb. 18, 2010). disgorges -gotten gains while preserving incentives to service their investment.

Encompass is entitled to a quarterly payment from the constructive trust, assuming the defendants realize profits on their investment.

A downside to this remedy is that it requires ongoing monitoring. A trustee will be appointed to supervise and guide its execution. The trustee will have the power to request information from VitalCaring, its principals, and the PE Defendants to assess the total allocation Encompass is entitled to in a given period. The defendants must provide quarterly financial updates on VitalCaring to the trustee. The trustee may determine, in his or her discretion, to request a modification to the trust based on information received from VitalCaring. The trustee will also provide regular updates to the court.

B. Mitigation Damages

Encompass claims that it is entitled to two forms of mitigation damages. 545

First, it requests costs incurred from retention packages intended to prevent key employees from defecting to VitalCaring. 546 545



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

Cf. Paron Cap. Mgmt., LLC v. Crombie, 2012 WL 2045857, at *8 (Del. Ch. May 22, , 62 A.3d 1223 (Del. 2013) (TABLE); Paradee v.

Paradee, 2010 WL 3959604, at *16 (Del. Ch. Oct. 5, 2010) (concluding that the defendant

546 -trial Opening Br. 105-06. costs from the Texas litigation against Anthony for breaching the restrictive

covenants in her employment agreement. 547 I award the former but not the latter.

1. Retention Packages

In October 2021, Encompass paid retention packages to ten employees.

Although the packages were awarded a few months after Anthony left Encompass, they were prompted by her actions while she remained an Encompass fiduciary. 548 with the lure of Topco equity. 549

But she did not expect them all to leave

immediately. In June 2021, she directed Jolley to postpone her resignation from

an exodus would set off alarm

550

547 Id. at 107-08. 548 Jacobsmeyer Tr. 52-54; see also JX 1928 at 2 (stating that the packages were awarded home

retention bonuses). Although the defendants maintain

-trial Br. 99. 549 Jacobsmeyer Tr. 40-41, 47; Jolley Tr. 194-97; see also supra note 141. 550 Jolley Tr. 181-82. Upon Jolley coming forward in October, Jacobsmeyer prepared a list of ten

awardees. 551 Several of the listed employees were ones Anthony had told Jolley she

planned to recruit. 552 The awards were granted to these ten employees shortly after

Tarr . 553



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

These retention awards were issued because of by the PE Defendants. Jacobsmeyer credibly testified that she would not have issued

554 Encompass is entitled to the fair value of

the restricted stock awards and increased management compensation as damages,

totaling \$1,400,353.92 in restricted stock awards and \$221,092.49 in increased

compensation. 555

551 Jacobsmeyer Tr. 52. 552 See Jolley Tr. 139-40, 142-43, 199-200. 553 See JX 3183; JX 1642. 554 Jacobsmeyer Tr. 52. Jacobsmeyer was also concerned that Encompass was about to begin a strategic review and needed to know who was committed to staying with Encompass before sensitive information was distributed. See JX4077 (noting as a rationale

see also id. at 104-06. 555 See JX 4012 at 3-4 (computing the total restricted stock award of \$1,400,353.92 and an annual aggregate salary increase for all employees of \$387,127.00). The value of the restricted stock awards was determined as of the closing price of the common stock as of the grant date. See JX 2296 at 124. As for the salary increases, Encompass seeks to recover the prorated portion of the annual salaries paid before the spin-off on July 1 to account for the plausibility that some employees might have received a similar increase after the spin- -trial Opening Br. 106 n.141. In calculating the prorated salary, Encompass reduced 2. Texas Litigation Fees and Costs

Encompass contends that the Texas litigation against Anthony was also

precipitated by breaches of fiduciary duty in soliciting Encompass employees.

which arose from the same facts here. As Encompass sees it, they are entitled to

over \$11 million in fees because the fees were a direct and foreseeable

consequence of wrongdoing. 556

Their position has merit on its face. But the Texas court determined that each

party in that matter had to bear its own fees and costs consistent with Texas law. 557

To award fees here would be an end-run around the judgment of a sister court. I

decline to effectively overrule the Texas court and risk running afoul of applicable



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

Texas law.

(22.2%). Id.; JX 2296 at 126 (providing the 2022 effective tax rate). The defendants assert that any damages should be reduced because Encompass obtained restrictive covenants in -trial Br. 99-100. But there is no evidence that the covenants constitute misconduct. , 2017 WL 4151172, at

*19-20 (Del. Ch. Sept. 19, 2017), , 188 A.3d 824 (Del. 2018) (rejecting damages offsets where the defendant proffered no evidence supporting them). 556 -trial Opening Br. 107; see also Paron, 2012 WL 2045857, at *8-9 (citing Restatement (Second) of Torts § 914 (Am. L. Inst. 1979)). 557 JX 4008 at 3. Moreover, under the Texas Not-to-Compete Act, employers may not - Franlink, Inc. v. GJMS Unlimited, Inc., 401

S.W.3d 705, 712 (Tex. App. 2013). The Texas court concluded that the non-compete and non-solicitation provisions of EHC employment agreement JX 4008 at 2-3. It reformed them to be less restrictive. Id. C. in This Litigation

558 Delaware courts grant exceptions to the rule cautiously. 559

There is no single standard of bad faith

shifting under the bad faith exception is a fact- 560

Fee shifting

that the losing defendants: i) engaged in bad faith conduct that increased the costs of the litigation; or ii) engaged in pre-litigation conduct of a sufficiently egregious

561

558 Johnston v. Arbitrium (Cayman Is.) Handels AG, 720 A.2d 542, 545 (Del. 1998). 559 Weinberger, 517 A.2d at

560 Auriga Cap. Corp. v. Gatz Props., LLC, 40 A.3d 839, 880-81 (Del. Ch. 2012). 561 HMG/Courtland Props., Inc. v. Gray, 749 A.2d 94, 124 (Del. Ch. 1999); see also Arbitrium (Cayman Is.) Handels AG v. Johnston, 705 A.2d 225, 231 (Del. Ch. 1997) -

, 720 A.2d 542 (Del. 1998); Cantor Fitzgerald, L.P. v. Cantor . . . justif[ied] . -litigation conduct was nothing short of egregious. They

willfully promoted breaches of the duty of loyalty by high-level Encompass



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

officers. 562 They did so in direct contravention of legal advice from Ropes.

Their purposeful efforts to conceal these improper acts made matters worse. 563

The defendants falsified records. They deleted evidence. They used a fake

recruiting process. And they manipulated communications through lawyers. These

actions warrant fee shifting under the bad faith exception to the American Rule. 564

565

The pervasive bad-faith conduct here coupled with the risk that

damages prove limited 562

See supra Section II.B. 563 See Johnston, 720 A.2d at unnecessarily prolonged or delayed litigation, falsified records, or knowingly asserted

564 See Cantor, 2000 WL 307370, at *31 (shifting fees under the bad faith exception for,

565 Kaung v. Cole Nat Corp., 884 A.2d 500, 506 (Del. 2005). damages. 566 Encompass is asked to submit a Rule 88 affidavit to the extent that the

567

D. Pre- and Post-Judgment Interest

Encompass requests an award of pre- and post-judgment interest. 568 It is

entitled to both at the legal rate. 569 Interest will accrue on the mitigation damages

awarded above. Regarding any damages paid from the constructive trust, the parties

are to confer on whether and how the equitable payment stream should account for

interest.

566 , 2015 WL 2265669, at *2-3 (Del. Ch. May 7,

v. Saliba, 13 A.3d 749, 759 (Del. 2011))).



Enhabit, Inc., et al. v. Nautic Partners IX, L.P., et al.

2024 | Cited 0 times | Court of Chancery of Delaware | December 2, 2024

567 See Ct. Ch. R. 88. 568 PTO ¶ 99.i. 569 Lamourine v. Mazda Motor of Am., Inc., 979 A.2d 1111 (Del. 2009) (TABLE) - Moskowitz v. Mayor and Council of Wilmington is awarded in Delaware as a matter of right . . . the plaintiff is entitled to recover interest . . . Murphy Marine Servs. of DE, Inc. v. GT USA Wilmington, LLC, 2022 WL 4296495, at *24 (Del. Ch. Sept. 19, 2022) Del. C. - and post- (quoting Summa Corp. v. Trans World Airlines, Inc., 540 A.2d 403, 409 (Del. 1988))). IV. CONCLUSION

Judgment on Counts I, II, and III is entered for the plaintiffs as set forth above.

Counts V and VI are moot.

Within 30 days, the parties must submit a letter listing the names of three mutually agreed-upon potential trustees. The parties are also to confer on and file a proposed form of order outlining the formation of a constructive trust, the function of the trust, and the role and authority of the trustee consistent with this decision.

If the parties cannot agree on a form of order, they may file separate proposed orders with a redline comparing them and a joint letter explaining the differences.

After an order appointing a trustee and forming the constructive trust is entered, the parties are asked to confer on and file a form of final order.

