

CASE NO. A-25-429

**IN THE NEBRASKA COURT OF APPEALS**

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Big Iron Auction Company, Plaintiff/Appellee

v.

Harder Capital, LLC and Ryan M. Harder, Defendants/Appellants

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Appeal from the District Court of Hall County, Nebraska  
Honorable Andrew C. Butler, District Judge

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**BRIEF OF APPELLANT**

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## Jurisdictional Statement

This is an appeal from the district court's May 28, 2025 order on motion to assess damages, costs, and fees for wrongful injunction that also rendered judgment in favor of Defendants and Appellants, Harder Capital, LLC ("Harder Capital") and Ryan M. Harder ("Mr. Harder") (Appellants are collectively referred to as "Harder Capital" unless the context indicates otherwise). (T296-303). The district court's May 28, 2025 order on motion to assess damages, costs, and fees for wrongful injunction directs the clerk of the district court to enter judgment in favor of Harder Capital and is file-stamped and dated by the clerk of the district court. (T296-303). "The entry of a judgment, decree, or final order occurs when the clerk of the court places the file stamp and date upon the judgment, decree, or final order." Neb. Rev. Stat. § 25-1301(3).

For purposes of Neb. Rev. Stat. § 25-1301, the district court's May 28, 2025 order on motion to assess damages, costs, and fees for wrongful injunction is a judgment.

We have explained that a "judgment" is a court's final consideration and determination of the respective rights and obligations of the parties to an action as those rights and obligations presently exist upon the matters submitted to the court in the action. A judgment must dispose of the case fully and leave nothing for further determination except for compliance or noncompliance with its terms.

It has been said that the test for a final judgment is "whether the rights of the parties are concluded so that further proceedings cannot affect them."

...There is no judgment "when something further in the nature of judicial action on the part of the court is essential to a final

determination of the rights of the parties.” When there is something further for the court to do in relation to a final determination of the rights of the parties, the court’s direction is merely an order.

*D&M Roofing & Siding, Inc. v. Distribution, Inc.*, 316 Neb. 952, 968-69, 7 N.W.3d 868, 881-82 (2024). The district court’s May 28, 2025 order on motion to assess damages, costs, and fees for wrongful injunction disposed of all issues remaining before the district court and was a final determination of the parties’ rights.

### **Statement of the Case**

#### **A. The Nature of the Case**

The issue presented in this appeal is whether Harder Capital may recover damages and attorney fees pursuant to Neb. Rev. Stat. § 25-1067 after being wrongfully enjoined from doing certain kinds of work pursuant to the terms of an invalid noncompete restrictive covenant contained in an agreement with Big Iron Auction Company (“Big Iron”). Ordinarily, “if an injunction is wrongfully granted, the party requesting the injunction is required to pay all damages and reasonable attorney fees to the enjoined party.” *Koch v. Aupperle*, 277 Neb. 560, 560, 763 N.W.2d 415, 417 (2009). However, the procedural history of the case is relevant to the question presented on appeal.

This case began primarily as a breach of contract case. (T3). Since 2009, Mr. Harder or Harder Capital had been engaged by Big Iron as an independent sales representative (“ISR”), which allowed Harder Capital to sell Big Iron’s online auction platform services to customers in exchange for commissions. (T2). On April 13, 2023, Harder Capital entered into an Independent Sales Representative Agreement (“ISR Agreement”) that contained restrictive covenants

applicable during and after Harder Capital's tenure as an ISR for Big Iron. (T4-5).

In October of 2023, Harder Capital ceased doing business with Big Iron as an ISR and began selling auction services using a different online platform in violation of the terms of the restrictive covenants contained in the ISR Agreement. (T5-7). Big Iron filed suit against Harder Capital and Mr. Harder for breach of the ISR Agreement, injunctive relief, and tortious interference with a business relationship. (T9-13). Shortly after filing its complaint, Big Iron also moved for a temporary injunction. (T21-28). Harder Capital filed a motion to dismiss and compel Big Iron's breach of contract and tortious interference claims to arbitration pursuant to a mandatory arbitration clause contained in the ISR Agreement. (T92). In response to the competing motions, the district court referred the parties' claims and defenses, other than Big Iron's claim for injunctive relief, to arbitration and granted Big Iron's motion for a temporary injunction preventing Harder Capital and Mr. Harder from doing business with customers Harder Capital did business with while Harder Capital was a Big Iron ISR. (T120-122).

During the arbitration proceeding on Big Iron's breach of contract and tortious interference claims and Harder Capital's counterclaim for payment of unpaid commissions and damages caused by a persistent glitch in Big Iron's online platform, it was determined that the restrictive covenants contained in the ISR Agreement were invalid and unenforceable. (T214-226, E15, p. 57-60). Accordingly, on December 6, 2024 the district court vacated the temporary injunction previously entered December 11, 2023 that enforced the restrictive covenants contained in the ISR Agreement and prevented Harder Capital and Mr. Harder from doing business with their former customers. (T211).

Once the temporary injunction was vacated, Harder Capital filed a motion to assess damages, costs, and attorney fees caused as a result of the wrongful injunction pursuant to Neb. Rev. Stat. § 25-1067. (T208).

### **B. The Issues Actually Tried Below**

All of the issues presented in Big Iron's complaint and the various motions filed by the parties were disposed of during the case. Plaintiff's complaint alleged three counts: 1) breach of contract, 2) injunctive relief, and 3) tortious interference with a business relationship. (T1-12).

The district court's December 11, 2023 order disposed of Big Iron's breach of contract and tortious interference with a business relationship claims by referring them to arbitration. (T120-122). Between the district court's December 6, 2024 order vacating the temporary injunction and the district court's May 20, 2025 order on motion to assess damages, costs, and fees for wrongful injunction, the remaining issues of injunctive relief and damages, costs, and fees for wrongful injunction were disposed of. (T211, T296-303).

### **C. How the Issues Were Decided**

The district court denied Harder Capital's motion to assess damages, costs, and fees for wrongful injunction in its entirety. (T296-303). Generally, the district court denied Harder Capital's motion to assess damages, costs, and fees for wrongful injunction on the basis that the issue of damages, costs, and fees caused by the wrongfully entered injunction were a part of the arbiter's award or should have been part of the arbiter's award. (T301-302).



#### **D. Scope of Review**

“On appeal from an equity action, the appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent from the conclusion reached by the trial court.” *Marten v. Staab*, 249 Neb. 299, 300, 543 N.W.2d 436, 440 (1996).

#### **Assignments of Error**

1. The district court erred in denying Harder Capital and Mr. Harder’s motion to assess damages, costs, and fees for wrongful injunction and erred in failing to award Harder Capital and Mr. Harder their damages, costs, and fees as requested in the motion.
2. The district court erred in failing to enter judgment against Big Iron in the amount of \$587,104.68 for damages, costs, and fees caused by the wrongful injunction.
3. The district court erred in apparently determining that Harder Capital’s motion to assess damages, costs, and fees for wrongful injunction was barred by claim or issue preclusion as a result of a previous arbiter’s award.
4. The district court erred in apparently determining that Harder Capital’s motion to assess damages, costs, and fees for wrongful injunction was barred by claim or issue preclusion even though Big Iron never raised preclusion as an affirmative defense.

#### **Propositions of Law**

1. An injunction is wrongfully issued and recovery on the bond is permissible if it is finally determined that the applicant was

not entitled to the injunction. *Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles, Chartered*, 681 P.2d 1258, 1262 (Utah Sup.Ct. 1984).

2. Pursuant to Neb. Rev. Stat. §§ 25-1067 and 25-1079 (Reissue 2008), if an injunction is wrongfully granted, the party requesting the injunction is required to pay all damages and reasonable attorney fees to the enjoined party and is not limited to the amount of the bond. *Koch v. Aupperle*, 277 Neb. 560, 560, 763 N.W.2d 415, 417 (2009).

3. All reasonable damages may be recovered by an enjoined party if the injunction was granted in error. Reasonable attorney fees incurred in dissolving the bond may also be recovered. *Koch v. Aupperle*, 277 Neb. 560, 560, 763 N.W.2d 415, 417 (2009).

4. An action for an injunction sounds in equity. *Robertson v. Sch. Dist. No. 17 of Douglas Cnty., Neb.*, 252 Neb. 103, 560 N.W.2d 469, 471 (1997).

5. Counsel fees, as well as costs and other charges or damages, paid or sustained to obtain the dissolution of a restraining order are damages directly and proximately resulting from the issuance of an injunction and such damages may be assessed and awarded in equity. *Young Chun v. Robinson*, 21 Haw. 193, 195 (1912).

6. Under long settled equity practice, courts of chancery have discretionary power to assess damages sustained by parties who have been injured because of an injunctive restraint ultimately determined to have been improperly granted. *Pub. Serv. Com. v. Brashear Freight Lines, Inc.*, 312 U.S. 621, 629, 61 S. Ct. 784, 788 (1941).

7. Generally, a party cannot recover damages resulting from a wrongful injunction until *after* the entry of final judgment in favor of

the party enjoined. *Static Control Components, Inc. v. Lexmark Int'l, Inc.*, 869 F. Supp. 2d 800, 804 (E.D. Ky. 2012).

8. An action on a temporary injunction bond will not lie until there has been a final adjudication of the injunction cause on its merits. *Johnson v. Bouton*, 56 Neb. 626, 626, 77 N.W. 57, 57 (1898).

9. A motion for wrongful injunction against a bond is a separate and distinct claim from the merits of the underlying controversy, and is not ripe until the merits are resolved and therefore cannot be barred by the doctrine of claim preclusion. *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049, 1056 (2d Cir. 1990).

10. The doctrines of preclusion should be applied flexibly. *In re Interest of Noah B.*, 295 Neb. 764, 780, 891 N.W.2d 109, 122 (2017).

11. Claim preclusion is an affirmative defense which must ordinarily be pleaded to be available. *Boone River, LLC v. Miles*, 314 Neb. 889, 904, 994 N.W.2d 35, 46 (2023).

## **Statement of Facts**

### **Before Arbitration**

Big Iron filed its complaint on November 6, 2023. (T1). The complaint alleged that Big Iron provides auction services across the United States with specialties in the sale of agricultural, construction, and transportation equipment. (T2). Since approximately 2009, Harder Capital or Mr. Harder had been engaged by Big Iron as ISRs to provide sales referral services to promote listings of equipment for auction on Big Iron's online platform. (T2). On April 13, 2023, Harder Capital executed an ISR Agreement that contained restrictive covenants which purported to restrict Harder Capital and/or Mr. Harder from doing

business with customers with whom Harder Capital and/or Mr. Harder had personal contact with during Harder Capital's tenure as an ISR for Big Iron. (T2-3).

On October 23, 2023, Harder Capital stopped working as an ISR and the ISR Agreement was terminated. (T5). After Harder Capital ended its tenure as an ISR for Big Iron, Harder Capital continued to provide auction sales services for its previous customers who Harder Capital serviced previously on the Big Iron online auction platform, and those auction sales services were performed in violation of the terms of the restrictive covenants contained in the ISR Agreement. (T6-7).

Big Iron's complaint alleged three different claims 1) a breach of contract claim seeking money damages, 2) a standalone claim for injunctive relief seeking an injunction that enforced the terms of the restrictive covenants contained in the ISR Agreement, and 3) a tortious interference with a business relationship claim seeking money damages. (T9-13). Big Iron's prayer for relief sought money damages and temporary and permanent injunctions to enforce the restrictive covenants contained in the ISR Agreement. (T13).

Shortly after filing its complaint, Big Iron filed a motion for temporary injunction seeking to enforce the restrictive covenants contained in the ISR Agreement based on similar factual allegations as those made in Big Iron's complaint. (T21-29).

In response to Big Iron's pleadings, Harder Capital filed a motion to dismiss and to compel arbitration. (T92). The motion to dismiss argued that the restrictive covenants contained in the ISR Agreement were invalid and unenforceable and not enforceable against Mr. Harder since he did not personally execute the ISR Agreement. (T92).

The motion to compel arbitration requested that counts I and III of Big Iron's complaint, the breach of contract and tortious interference claims, be stayed and referred to arbitration since they are subject to a mandatory arbitration provision contained in Section 16 of the ISR Agreement. (T92). Section 16 of the ISR Agreement provides:

#### 16. DISPUTE RESOLUTION

The parties recognize that differences may arise between the Company and ISR and enter into a mutual agreement to arbitrate claims. Except as provided in this Agreement, the Federal Arbitration Act shall govern the interpretation, enforcement and all proceedings pursuant to this Agreement. To the extent that the Federal Arbitration Act is inapplicable, or held not to require arbitration of a particular claim or claims, state law pertaining to agreements to arbitrate shall apply. The parties mutually consent to the resolution by arbitration of all claims or controversies ("claims"), past, present or future, whether or not arising out of the independent sales agreement (or its termination), that the Company may have against ISR or that ISR may have against any of the following (1) the Company, (2) its officers, directors, employees, or agents in their capacity as such or otherwise, (3) the Company's parent, subsidiary and affiliated entities, and/or (4) all successors and assigns of any of them.

The only claims that are arbitral are those that, in the absence of this Agreement, would have been eligible for court action under applicable state or federal law. **Claims not covered are: (1) claims by the Company or by ISR for temporary or permanent restraining orders or preliminary or permanent injunctions ("equitable relief") in cases in which such equitable relief would be otherwise authorized by law and any relief by Company for claims related to claims under paragraphs 6, 7, 8, 9, or 11 of this**

Agreement. (2) Claims by ISR or the Company involving (i) a nonconsensual sexual act or sexual contact as such terms are defined in 18 U.S.C. § 2246 or similar applicable Tribal or State law, or (ii) relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law.

(T19) (emphasis added).

After hearings on Big Iron’s motion for temporary injunction and Harder Capital’s motion to dismiss and to compel arbitration, the district court ordered as follows. (T119). Harder Capital’s motion to dismiss was denied. (T120). Harder Capital’s motion to compel arbitration was granted in part. (T120). In its order, the district court wrote:

Defendants’ Motion to Compel Arbitration should be and is hereby granted in part. Pursuant to their agreement to arbitrate found in paragraph 16 of the Independent Sales Representative Agreement, the parties are hereby ordered to submit each of their claims and defenses, other than Plaintiff’s claim for injunctive relief which is addressed below, to arbitration pursuant to the terms and conditions of said paragraph 16. The Court expects such arbitration to include “any dispute relating to the interpretation, applicability, enforceability or formation of [the Independent Sales Representative Agreement], including but not limited to any claim that all or any part of [such] Agreement is void or voidable.”

(T120).

Big Iron’s motion for temporary injunction was granted in part. (T120). Harder Capital and Mr. Harder were ordered to not provide any sales or service to any customers they did business with while Harder Capital was using the Big Iron online platform for auctions.

(T121). To prevent injury to third-parties, Harder Capital was allowed to complete scheduled auctions, but the proceeds were to be placed in trust pending further order of the district court. (T121-122). To allow the temporary injunction to go into place, the district court required Big Iron to give an undertaking in the amount of \$300,000 pursuant to Neb. Rev. Stat. § 25-1067. (T122). After the order was entered, Big Iron deposited \$300,000 with the district court to comply with this undertaking requirement. (T133). After those previously scheduled auctions authorized to move forward concluded, Harder Capital held income of \$37,095.40 in trust pending further order of the district court. (T191, E14, p. 89).

Notwithstanding non-equitable claims being referred to arbitration, the district court appeared to indicate that it was retaining jurisdiction over at least some issues concerning the undertaking required by Neb. Rev. Stat. § 25-1067, particularly the amount of the undertaking or changing its amount. During the hearing, the following discussions were had:

THE COURT: Where does Big Iron anticipate this being, this bond, value-wise? Just a general idea. I mean, I get –

[COUNSEL FOR BIG IRON]: No, I don't anticipate a \$5,000 bond. I think that's ridiculous, but I do anticipate like a \$150,000 bond, something in that nature, which whether we put up a cash bond with the clerk or whether we buy a bond and submit it, either way.

But yeah, that's -- I mean, realistically, I think Big Iron has an expectation that a real bond is going to be put in place, and it's going to be reflective of what the actual damages would be.

In this case, I mean, you know, if you're looking at 2 percent of an \$8 million figure, there you go. I mean, I think you're fairly right on with that....

[COUNSEL FOR BIG IRON]: I think the other thing to consider here, whatever decision you make today on what the bond is can always be revisited. You're not entering a static number that if we don't get this case resolved for two years –

THE COURT: And today I'm not entering a permanent injunction either.

[COUNSEL FOR BIG IRON]: Correct. So I guess –

THE COURT: I could decide tomorrow, wake up, I don't like it, and change it.

[COUNSEL FOR BIG IRON]: You absolutely could. I guess what I'm just trying to say is if the Court decides, okay, I'm going put together an injunction here and I'm going to attach it a \$275,000 bond to it, and we're six months down the road and Mr. Krejci's client says, gee, Your Honor, the damages are actually going to be much greater because X, Y and Z, and we're here and you decide, you know what, you're probably right, I'm going to double that bond, that's -- that's your choice, Your Honor.

So I guess what I'm saying is I don't think you're all that unreasonable in saying okay, if we put a \$275,000 number on it today, and if it's an issue, we'll revisit it...

[after a status hearing was set]



THE COURT: Which, you know, if that's the case at that time, if I need to address the bond or anything else, Mr. Krejci, I mean, that's the time that I'll do that.

(90:17-102:5).

After Harder Capital's motion to dismiss was overruled, Harder Capital filed an answer to Big Iron's complaint in the district court denying Big Iron's allegations and specifically denying Big Iron's breach of contract and tortious interference claims, because those had been referred to arbitration. (T128-130).

After Big Iron's claims other than its claim for injunctive relief were referred to arbitration, most of the proceedings moved from the district court to arbitration before Timothy R. Engler as the arbiter. (T214). However, there was still some action in the district court preceding the arbiter's final decision on the non-equitable issues and claims. (T134). About six months after the district court entered the temporary injunction, Harder Capital requested that the temporary injunction be vacated as a result of a Federal Trade Commission rule that invalidated most non-compete clauses including the restrictive covenants enforced by the temporary injunction. (T134). Around the same time, Big Iron filed an application to hold Harder Capital in contempt for allegedly violating the temporary injunction, and the district court entered an order to show cause requiring Harder Capital to explain why it should not be held in contempt for violating the temporary injunction. (T137-139, T196). The district court declined to vacate the temporary injunction or hold Harder Capital in contempt, and ordered the parties to continue with arbitration. (T198-203).

### **Arbitration of the Non-Equitable Claims**

The arbitration hearing before Timothy R. Engler was held from October 16-17, 2024. (T214). As stated previously, Big Iron's breach of

contract and tortious interference claims were referred to arbitration. (T122). In arbitration, Harder Capital denied liability on those two claims and made a counterclaim against Big Iron. (E15, p. 53-60). Harder Capital's counterclaim alleged that Big Iron breached the ISR Agreement by failing to pay Harder Capital all of its earned commissions and that a repeated glitch on Big Iron's online auction platform caused Harder Capital to receive reduced commissions as sales were decreased as a result of the glitch. (E15, p. 57-60). On its counterclaim, Harder Capital's prayer for relief sought "[s]pecial damages in the amount of earned but unpaid commissions and reduced commissions due to the glitch" as well as interest and any other appropriate relief. (E15, p. 60).

Prior to the arbitration hearing, Harder Capital submitted a pretrial conference memorandum to better describe the issues to be determined in the arbitration hearing. (E15, p. 61-65). Harder Capital's proposed disputed factual issues included: whether either party to the ISR Agreement substantially performed it, the amount of commissions earned but not paid to Harder Capital, factual issues related to enforceability of the restrictive covenants, the number of customers covered by the restrictive covenants, and all aspects of Big Iron's tortious interference claim. (E15, p. 63). Harder Capital identified disputed legal issues as: whether the restrictive covenants were enforceable, whether Mr. Harder was a party to the ISR Agreement, legal issues related to Big Iron's tortious interference claim, whether Harder Capital's obligations under the ISR Agreement were excused, and whether Big Iron's obligated to pay Harder Capital earned commissions were excused. (E15, p. 63-64). In the arbitration proceeding, Harder Capital sought relief only in the form of damages for earned but unpaid commissions and damages caused by lost commissions due to the glitch with Big Iron's website. (E15, p. 64).

Once evidence was submitted at the live arbitration hearing on October 16-17, 2024, Harder Capital submitted a closing argument

brief. (E15, p. 66-76). That brief contained a section with the heading, “What Happens if the Restrictive Covenants are Not Enforceable.” (E15, p. 67). That section states:

If the restrictive covenants are not enforceable, it is Respondents’ position that **much of work of putting Harder Capital in the position it should have been if not wrongfully enjoined would take place in the District Court.** The arbitration clause seems to reserve all issues involving injunctive relief to the judicial process, and it is Respondents’ position that **determining the proper relief to afford a wrongfully enjoined party is a part of a court issuing an injunction.** The relevant language from the arbitration clauses states:

Claims not covered are: (1) claims by the Company or by ISR for temporary or permanent restraining orders or preliminary or permanent injunctions (“equitable relief”) in cases in which such equitable relief would be otherwise authorized by law and any relief by Company for claims related to claims under paragraphs 6, 7, 8, 9, or 11 of this Agreement.

(E15, p. 67) (emphasis added). In its closing argument brief, Harder Capital calculated its damages for earned but unpaid commissions at \$55,155.51, and the relief sought by Harder Capital after the arbitration was a finding that the restrictive covenants are void and an arbitration award of \$55,155.51 based on those unpaid commissions. (E15, p. 74-75).

No issues concerning damages caused by the temporary injunction entered by the district court were submitted to the arbiter. (E15, p. 61-65). At the time of the arbitration hearing, the temporary injunction was in place and not yet determined to be wrongful, so the

issue of damages for a wrongful injunction was not ripe during the arbitration hearing. (T211).

After briefing was concluded, the arbiter issued his final decision and order on December 2, 2024 (E14, p. 108). On the primary issue of the arbitration, the arbiter determined that the restrictive covenants in the ISR Agreement were unenforceable. (E14, p. 103). Determining that the restrictive covenants were unenforceable mooted some other disputed issues. (T14, p. 106). The arbiter determined that there was no way to determine Harder Capital's damages attributable to the website glitch without engaging in pure speculation. (E14, p. 106).

As to other damages, the arbiter determined that Harder Capital was entitled to the funds held in trust that were the income from auctions Harder Capital organized after the ISR Agreement was terminated. (E14, p. 106). The arbiter awarded damages to Harder Capital for earned but unpaid commissions in the amount of \$19,405.91. (E14, p. 107). The arbiter determined that there were "no other recoverable damages that could be awarded to Harder Capital or Ryan Harder based on the invalidation of the restrictive covenants." (E14, p. 107). Measuring those damages would be too speculative. (E14, p. 107). The arbiter determined that each party was responsible for their share of the fees and expenses of the arbitration. (E14, p. 107-108). The arbiter's final decision and order did not discuss damages, costs, or fees caused by entry of the temporary injunction (which was in place when the decision was written and issued). (E14, p. 96-108).

### **District Court Proceedings After Arbitration**

After the arbiter issued his final decision and order, Harder Capital filed an ex parte motion to vacate the temporary injunction based on the determination that the restrictive covenants enforced by the temporary injunction were unenforceable and invalid. (T205). On

December 6, 2024, the district court vacated the temporary injunction it entered on December 11, 2023. (T211).

Harder Capital also filed a motion to assess damages, costs, and fees for wrongful injunction and set that motion for hearing. (T208). At the hearing, unrebutted evidence of the damages, costs, and fees Harder Capital incurred as a result of the wrongfully granted injunction were received into evidence. (E14, p. 1-114; E15, p. 2).

Through his affidavit, Mr. Harder described his business. (E14, p. 1-114). Mr. Harder began working as an ISR for Big Iron in 2009. (E14, p. 1). As an ISR, Mr. Harder was compensated based on commissions earned when customers he serviced sold their property through Big Iron's online auction platform. (E14, p. 1). In 2015, Mr. Harder organized Harder Capital, LLC and ran his auction business through that limited liability company. (E14, p. 2).

Harder Capital was one of Big Iron's most successful ISRs with sales and commissions generally growing year over year. (E14, p. 2). For Big Iron's 2024 fiscal year, Harder Capital's sales goal was \$15 million. (E14, p. 2). Harder Capital's 1099 tax forms from Big Iron showed auction sales income of \$146,861 in 2016, \$140,664 in 2017, \$229,993 in 2018, \$195,494 in 2019, \$250,276 in 2020, \$373,786 in 2021, \$395,502 in 2022, and \$488,903 in 2023. (E14, p. 13-23). Harder Capital's 1099 for 2023 only reflected ten months of auction sales work, because Harder Capital terminated the ISR Agreement in October of 2023. (E14, p. 2). Additionally, 2023's 1099 did not reflect \$19,405.91 which was determined by the arbiter to have been wrongfully withheld from Harder Capital. (E14, p. 2).

When Harder Capital terminated its ISR Agreement with Big Iron, it was Harder Capital's intention to continued its auction sales business through a different online website called AuctionTime. (E14, p. 2). After Harder Capital switched its online platform from Big Iron's

to AuctionTime's, Harder Capital's business initially went on uninterrupted. (E14, p. 3). Between October 24, 2023 and December 8, 2023, Harder Capital signed up sixteen sellers to have auctions on the AuctionTime platform. (E14, p. 3). Fourteen of those sixteen customers were repeat customers who Harder Capital sold for using the Big Iron platform. (E14, p. 3). When the district court entered the temporary injunction on December 6, 2023, Harder Capital's online auction sales business was essentially suspended since most of Harder Capital's customers are repeat customers who were covered by the terms of the restrictive covenants in the ISR Agreement. (E14, p. 3).

Because of the temporary injunction preventing Harder Capital from doing almost all auction sales from December 6, 2023 to December 6, 2024, Harder Capital sustained \$528,34.80 in lost income as damages. (E14, p. 6). Harder Capital calculated its lost income damages by using its 2023 per month average gross revenue of \$50,830.80 as its baseline for lost gross revenue during the period of the injunction. (E14, p. 4). \$50,830.80 multiplied by twelve months equals \$609,969.60. (E14, p. 4). After the lost gross revenue was calculated, Harder Capital subtracted savings caused by the temporary injunction (staffing reduction and fuel savings) to reach a reasonable estimate of \$528,340.80 in lost income caused by the temporary injunction. (E14, p. 5). All of Harder Capital's damages calculations were substantiated by its business records and tax records or records created by Big Iron. (E14, p. 8-89, 109-114).

At the time of the hearing on the motion to assess damages, costs, and fees for wrongful injunction, Harder Capital incurred reasonable attorney's fees of \$50,363.88 caused by the wrongful injunction as well other legal expenses of \$8,400.00 for a total of \$58,763.88 in legal fees and expenses caused by the wrongful injunction. (E15, p. 2).

At the hearing on the motion for damages, costs, and fees for wrongful injunction, Big Iron did not submit any evidence to rebut Harder Capital's damages, costs, and fees caused by the wrongful injunction. Instead, Big Iron argued that the issue of Harder Capital's damages, costs, and fees caused by the wrongful injunction was either decided in the arbitration hearing or should have been submitted during the arbitration hearing. (158:20-178:15). Big Iron further argued that if Harder Capital wanted to seek damages caused by the temporary injunction, the arbiter's award would have to be vacated first to allow that. (164:7-168:19).

### **Summary of the Argument**

When a party is enjoined and it is later determined that the injunction should not have been granted, the enjoined party is able to recover their damages, costs, and attorney's fees caused a result of the wrongful injunction. That is the purpose of requiring a party requesting an injunction to provide security.

In this case, Harder Capital was wrongfully enjoined and the undisputed evidence showed that Harder Capital suffered substantial damages as a result of the wrongful injunction. However, the district court denied Harder Capital's motion for damages, costs, and fees for wrongful injunction on the basis that the issue of damages caused by the wrongful injunction had already been decided or should have been decided in a previous arbitration proceeding concluded before the injunction was vacated.

Harder Capital's motion for damages, costs, and fees for wrongful injunction was not precluded by the arbiter's award for several reasons. The arbiter had no authority over equitable claims and issues pertaining to temporary injunctions. Further, Harder Capital's motion for damages, costs, and fees for wrongful injunction was not ripe at the time of the arbitration proceeding. Since the arbiter

did not decide and could not have decided the issue of damages caused by the wrongful injunction, the district court erred in not granting Harder Capital the relief it requested.

### Argument

1. **Because Harder Capital Was Wrongfully Enjoined, It Was Entitled to Damages, Costs, and Fees Caused by the Wrongful Injunction.**

If Big Iron’s argument about the effect of the arbitration award is set aside for a moment, it is clear that Harder Capital was entitled to damages, costs, and attorney’s fees caused by being wrongfully enjoined. The temporary injunction entered by the district court was a wrongful injunction, because it should not have been issued in the first place. The temporary injunction sought to enforce restrictive covenants that were found to be invalid and unenforceable. “An injunction is wrongfully issued and recovery on the bond is permissible if it is finally determined that the applicant was not entitled to the injunction.” *Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles, Chartered*, 681 P.2d 1258, 1262 (Utah Sup.Ct. 1984).

When an injunction is entered and later determined to have been entered wrongfully, the enjoined party has a right to recover their damages, costs, and attorney’s fees caused by the wrongful injunction.

No injunction, unless provided by special statute, shall operate until the party obtaining the same shall give an undertaking, executed by one or more sufficient sureties, who shall justify as provided in sections 25-2222 and 25-2223. The undertaking shall be approved by the clerk of the court granting such injunction, in an amount to be fixed by the court or judge allowing the same, **to secure to the party enjoined the damages he may**



**sustain, if it be finally decided that the injunction ought not to have been granted.**

Neb. Rev. Stat. § 25-1067 (emphasis added). “Pursuant to Neb. Rev. Stat. §§ 25-1067 and 25-1079 (Reissue 2008), if an injunction is wrongfully granted, the party requesting the injunction is required to pay all damages and reasonable attorney fees to the enjoined party and is not limited to the amount of the bond.” *Koch v. Aupperle*, 277 Neb. 560, 560, 763 N.W.2d 415, 417 (2009). “All reasonable damages may be recovered by an enjoined party if the injunction was granted in error. Reasonable attorney fees incurred in dissolving the bond may also be recovered.” *Id.*

Big Iron moved for and obtained a wrongfully granted injunction that stopped an established and competitive business from operating for a year. The law is clear that Harder Capital is entitled to its damages, costs, and fees caused by Big Iron obtaining the wrongful injunction stopping Harder Capital from its auction work. The undisputed evidence showed that the wrongful injunction caused Harder Capital \$528,340.80 in damages and \$58,763.88 in attorney fees and legal expenses as of the time of the motion to assess damages, costs, and fees caused by the wrongful injunction. Absent Big Iron having some good argument about the effect of the arbitration award, there should be no dispute that Harder Capital is entitled to the damages shown by the undisputed evidence as well as costs and fees.

**2. The Arbitration Clause Did Not Commit Equitable Issues to Mandatory Arbitration.**

Harder Capital moved for damages, costs, and fees caused by the wrongful injunction in the district court, because the arbitration clause reserved issues concerning equitable relief to the district court. The arbitration clause contained in the ISR Agreement explicitly

reserved issues involving equitable relief and injunctions to the district court. The arbitration clause states:

## 16. DISPUTE RESOLUTION

The parties recognize that differences may arise between the Company and ISR and enter into a mutual agreement to arbitrate claims...

**Claims not covered are: (1) claims by the Company or by ISR for temporary or permanent restraining orders or preliminary or permanent injunctions (“equitable relief”) in cases in which such equitable relief would be otherwise authorized by law and any relief by Company for claims related to claims under paragraphs 6, 7, 8, 9, or 11 of this Agreement...**

(T19) (emphasis added). When the district court referred Big Iron’s non-equitable claims to arbitration, the district court expressly retained jurisdiction over Big Iron’s claim for injunctive relief. (T120). Both the arbitration clause and the district court’s order referring part of the case to arbitration make clear that issues pertaining to Big Iron’s request for injunctive relief would be determined by the district court.

The course of conduct by the parties and the district court indicated that issues concerning the temporary injunction would continue to be handled by the district court. When the temporary injunction was entered, the district court required an undertaking of \$300,000. (T123). Those funds were deposited with the district court. (T133, T302). The purpose of the undertaking was to provide security to Harder Capital if it was determined that the injunction was issued wrongfully. One would think that the court holding those funds would have the authority to distribute them to the wrongfully enjoined party.

During the course of the litigation and arbitration, both Big Iron and Harder Capital requested relief related to the temporary injunction from the district court. Six months after the temporary injunction was entered, Harder Capital filed a motion requesting that the district court vacate the injunction based on new legal developments. (T134). Shortly thereafter, Big Iron moved the district court to find Harder Capital in contempt of the temporary injunction. (T137-139). Both sides clearly understood that relief related to the temporary injunction would continue to be decided by the district court. Big Iron cannot now switch its position and argue that the district court did not have authority to grant relief pertaining to the temporary injunction.

All issues concerning injunctions and damages, costs, and fees for wrongfully issued injunctions are equitable and inherent in the remedy of an injunction. “An action for an injunction sounds in equity.” *Robertson v. Sch. Dist. No. 17 of Douglas Cnty., Neb.*, 252 Neb. 103, 560 N.W.2d 469, 471 (1997).

It is the established rule in this jurisdiction that counsel fees, as well as costs and other charges or damages, paid or sustained to obtain the dissolution of a restraining order are damages directly and proximately resulting from the issuance of an injunction under circumstances like those in the case at bar and are recoverable. **Such damages may be assessed and awarded in equity**, it being within the sound discretion of the circuit judge as to whether or not in each particular case he will himself dispose of the matter or leave the parties to an action at law.

*Young Chun v. Robinson*, 21 Haw. 193, 195 (1912) (emphasis added).

Ordinarily the power to assess injunction damages is inherent in the court, independent of the statute. *Sturgis v. Knapp*, 33 Vt. 486. The defendant, both by virtue of the order and by statute, is

entitled to recover the damages caused by the wrongful issuing of the injunction...

“If the court have power to make a payment of damages a condition on which the injunction issues, and to require a bond to secure its performance, it must of necessity have the power to determine the damages, and decree payment, as between the parties to the suit, and the party who takes the injunction takes it subject thereto.” *Sturgis v. Knapp*, 33 Vt. 486.

The purpose of this statute **cannot be held to deprive the court of its inherent right to assess the damages under its own injunction order.**

*Spaulding & Kimball Co. v. Aetna Chem. Co.*, 98 Vt. 169, 126 A. 588, 589 (1924) (emphasis added). “Under long settled equity practice, courts of chancery have discretionary power to assess damages sustained by parties who have been injured because of an injunctive restraint ultimately determined to have been improperly granted.” *Pub. Serv. Com. v. Brashear Freight Lines, Inc.*, 312 U.S. 621, 629, 61 S. Ct. 784, 788 (1941). “It is a power inherent in the court, as a court of equity, and has been exercised from time immemorial.” *Russell v. Farley*, 105 U.S. 433, 438 (1881).

In *Koch v. Aupperle*, Nebraska’s leading case on damages caused by wrongful injunctions, the Supreme Court reviewed the appeal pursuant to the standard of review for equity actions. *Koch v. Aupperle*, 277 Neb. 560, 562, 763 N.W.2d 415, 418 (2009) (“On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court.”). Based on the foregoing, it is clear that Harder Capital’s motion to assess damages, costs, and fees was a request for

equitable relief related to the temporary injunction and not within the scope of the mandatory arbitration clause.

**3. Damages, Costs, and Fees Caused by the Wrongful Injunction Were Never Submitted to Arbitration, Decided in Arbitration, or Part of the Arbitrator's Award.**

Based on the record and the evidence received at the hearing on Harder Capital's motion to assess damages, costs, and fees for wrongful injunction, it is clear that the issue of damages caused by the injunction were not raised or decided in the arbitration. As stated above, Harder Capital did not raise the issue of damages caused by the injunction during the arbitration, because this issue was reserved to the district court. Further, the issue of damages caused by the wrongful injunction was not ripe during the arbitration. During the arbitration, the injunction was in place. During the arbitration, it was too early to determine Harder Capital's full damages caused by the temporary injunction.

The district court appeared to confuse two separate issues that have similarities, but are ultimately different. The district court's order relied heavily on the arbitrator's finding that "[t]here are no other recoverable damages that could be awarded to Harder Capital or Ryan Harder based on the invalidation of the restrictive covenants. (T300). However, damages caused by the existence of an invalid contract is different from damages caused by the temporary injunction. For example, a party to an invalid contract could conceivably suffer damages caused by the contract's existence separate from anything to do with an injunction. Hypothetically, a party to an invalid noncompete agreement could suffer damages caused by the existence of the invalid agreement if the party voluntarily complies with the invalid contract and foregoes earnings.

The invalidity of the restrictive covenants does not necessarily have anything to do with an injunction, and the arbiter's decision says nothing about damages caused by the temporary injunction. As it turned out, the temporary injunction was vacated because the restrictive covenants were invalid, but a finding that the injunction was wrongfully issued did not necessarily depend on a finding that the restrictive covenants were invalid. The injunction could have been vacated based on a finding that Big Iron did not substantially perform its obligations under the ISR Agreement and therefore Harder Capital was relieved of its obligations under the ISR Agreement. In short, the district court mistakenly dove into the merits of why the injunction was determined to be wrongful instead of staying focused on Harder Capital's damages caused by the injunction being issued.

**4. The Arbiter's Award Did Not Preclude Harder Capital from Seeking Damages, Costs, and Fees Caused by the Wrongful Injunction.**

Ultimately, Big Iron's argument that Harder Capital was required to vacate the arbitration award to receive damages for being wrongfully enjoined was probably better characterized as an issue or claim preclusion argument. Unless the arbitration award precluded Harder Capital's right to recover damages, costs, and attorney's fees caused by the wrongful injunction, there was no reason that the arbiter's award would have to be vacated for Harder Capital to pursue its rights caused by Big Iron's request for the district court to issue a wrongful injunction.

It is well accepted that claim and issue preclusion principles apply to arbitration awards similarly to how the principles apply to judgments. *Applied Underwriters v. Milan Express Co.*, No. A-18-570, 2020 Neb. App. LEXIS 79, at \*23 (Ct. App. Mar. 17, 2020). With some exceptions discussed later, "a valid and final award by arbitration has

the same effects under the rules of res judicata...as a judgment of a court.” Restat 2d of Judgments, § 84.

**A. Harder Capital’s Motion Was Not Barred by Issue Preclusion.**

Issue preclusion is not applicable, primarily because the issue of costs, fees, and attorney’s fees caused by the wrongful injunction and recoverable after vacation of the wrongful injunction pursuant to Neb. Rev. Stat. § 25-1067 was never decided in the arbitration. Further, there was no opportunity to decide the issue of damages for the wrongful injunction in the arbitration because issues concerning equitable relief were excepted from the arbitration clause.

Issue preclusion applies where (1) an identical issue was decided in a prior action, (2) the prior action resulted in a final judgment on the merits, (3) the party against whom the doctrine is to be applied was a party or was in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.

*Jordan v. LSF8 Master Participation Tr.*, 300 Neb. 523, 525, 915 N.W.2d 399, 405 (2018). Since the issue of costs, fees, and attorney’s fees caused by the wrongful injunction was not decided in the arbitration and would have been beyond the scope of the arbitration, issue preclusion doesn’t apply.

Big Iron could try to argue that the arbiter decided the issue of costs and attorney’s fees, but again the issue decided by the arbiter was different than the issue raised in Harder Capital’s motion to assess damages, costs, and fees for wrongful injunction. After the injunction had been vacated and determined to be wrongful, Harder Capital then had a legal basis to recover costs and fees under Neb. Rev. Stat. § 25-1067 and *Koch v. Aupperle*, 277 Neb. 560, 560, 763 N.W.2d 415, 417

(2009). During the arbitration, the only possible basis Harder Capital had to recover attorney's fees was Neb. Rev. Stat. § 25-824, the frivolous actions statute, and Big Iron's claims were not frivolous.

**B. Harder Capital's Motion Was Not Barred by Claim Preclusion.**

Claim preclusion did not bar Harder Capital's motion to assess damages, costs, and fees for wrongful injunction, because the issue of damages, costs, and fees caused by the wrongful injunction was not directly addressed or necessarily included in the arbitration award.

Under Nebraska law, claim preclusion bars relitigation of any right, fact, or matter directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.

*Hill v. AMMC, Inc.*, 300 Neb. 412, 413, 915 N.W.2d 29, 31 (2018). "The doctrine of claim preclusion bars relitigation not only of those matters actually litigated, but also of those matters which might have been litigated in the prior action." *Fetherkile v. Fetherkile*, 299 Neb. 76, 79, 907 N.W.2d 275, 283 (2018). Harder Capital's damages, costs, and fees caused by the wrongful injunction was not submitted to arbitration or decided in the arbiter's award and couldn't have been decided in the arbitration that reserved equitable relief to the district court. Further, even if the arbiter hypothetically had authority to decide issues of equitable relief, the issue of damages caused by the wrongful injunction was not ripe at the time the arbiter's award was entered.

As stated previously, the arbiter's award did not directly address or determine the issue of damages, costs, and fees caused by the



wrongful injunction. Therefore, claim preclusion depends on whether the issue of issue of damages, costs, and fees caused by the wrongful injunction was necessarily included in the arbiter's award because it should have been determined in the arbitration. The issue of damages, costs, and fees caused by the wrongful injunction could not have been decided in the arbitration in October of 2024, because issues concerning equitable relief were not within the scope of the arbitration and because the full extent of Harder Capital's damages caused by the wrongful injunction could not be determined until the injunction was vacated on December 6, 2024.

For claim preclusion to bar a second action, it has been said that "the claim in the prior suit and the claim in the present suit must be based on the same cause of action." *Boone River, LLC v. Miles*, 314 Neb. 889, 897, 994 N.W.2d 35, 42 (2023).

We have articulated two different tests to decide whether the cause of action litigated in a prior lawsuit is the same as that asserted in a subsequent lawsuit. One line of cases asks "whether the right to be vindicated rests upon the same operative facts," *id.*, while a different line of cases frames the question as whether the "same evidence will sustain both the underlying case and the instant action," *Baer v. Southroads Mall Ltd.*, 252 Neb. 518, 525, 566 N.W.2d 734, 738 (1997). Despite our differing explanations of what constitutes the same cause of action for claim preclusion purposes, we agree with a commentator that the two tests are, in substance, the same. See John P. Lenich, *Nebraska Civil Procedure* § 8:10 (2023). Simply put, "Claims are based on the same evidence when they rely on the same basic facts." *Id.* at 407.

*Id.* 897-98, 42. In the arbitration, the competing breach of contract claims and Big Iron's tortious interference claim did not rely on the same basic facts as Harder Capital's motion to assess damages, costs,

and fees for wrongful injunction. The basic facts of Harder Capital's motion to assess damages, costs, and fees for wrongful injunction were that Harder Capital was enjoined from working for a year and lost income due to the involuntary vacation. These facts were not relevant to the claims asserted in the arbitration.

At the most basic level, it would just make no practical sense for every enjoined party to submit evidence of their damages caused by the injunction during the merits of the controversy and before the injunction is found to be wrongful. If Big Iron would have its way, an enjoined party would always be required to put on evidence of their damages caused by the injunction during a trial on the merits of the controversy and that procedure would be a waste of time and resources. If the injunction is not found to be wrongful, then evidence of damages caused by the injunction would be pointless.

On this point, it may be useful to conceptualize how this case should have proceeded without the non-equitable claims being referred to arbitration. If all of the parties' claims were determined by the district court, handling Harder Capital's damages caused by the wrongful injunction would have been determined after the merits of the basis for the injunction were decided. The fact that part of this case was decided in arbitration does not largely change how preclusion principles would affect the parties rights as the case proceeded.

Assessing damages caused by a wrongful injunction must be considered an independent proceeding unrelated to the merits of what caused the injunction, and the weight of authority backs up that proposition. "Generally, however, a party cannot recover damages resulting from a wrongful injunction until *after* the entry of final judgment in favor of the party enjoined." *Static Control Components, Inc. v. Lexmark Int'l, Inc.*, 869 F. Supp. 2d 800, 804 (E.D. Ky. 2012). "An action on a temporary injunction bond will not lie until there has been a final adjudication of the injunction cause on its merits."

*Johnson v. Bouton*, 56 Neb. 626, 626, 77 N.W. 57, 57 (1898). “The order operates as a dissolution of the injunction, and a cause of action accrues on the bond.” *Humfeldt v. Moles*, 63 Neb. 448, 450, 88 N.W. 655, 656 (1902).

No right of action accrues upon an injunction bond given on the granting and issuance of a temporary injunction in an action commenced to obtain a perpetual injunction until the final determination of the suit in which the temporary order was granted, and an action at law instituted on the undertaking prior to the final disposition of the cause is prematurely brought and cannot be maintained.

*Browne v. Edwards & McCullough Lumber Co.*, 44 Neb. 361, 362, 62 N.W. 1070, 1070 (1895).

A motion for wrongful injunction against a bond under Fed.R.Civ.P. 65(c) **is a separate and distinct claim** from the merits of the underlying controversy, and was not even available until after the arbitrators decided that Merrill Lynch was not entitled to injunctive relief. *See Medafrica Line, S.P.A.*, 654 F.Supp. at 156; *Wainwright Securities*, 80 F.R.D. at 106–07; *see also Atomic Oil*, 419 F.2d at 1101–02. **Since the claim could not arise except upon a favorable ruling on the lack of merit to the movant’s case, it is not barred by the doctrine of claim preclusion.** *See Burmah Oil Tankers, Ltd. v. Trisun Tankers, Ltd.*, 687 F.Supp. 897, 901 n. 23 (S.D.N.Y.1988).

*Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049, 1056 (2d Cir. 1990) (emphasis added).

*Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049 (2d Cir. 1990) is an eerily similar case that involves many of the same arguments made below by Big Iron. In this case, the

plaintiffs were enjoined from working with their previous clients in a judicial proceeding, and the merits of the underlying controversy were submitted to arbitration. *Id.* 1050. In arbitration, the plaintiffs were successful with respect to the underlying merits and the injunction was dissolved. *Id.* Thereafter, the plaintiffs sought damages for being wrongfully enjoined against the bond posted by the defendants. *Id.*

To begin with, the appellate court found that the lower court had the authority to issue a preliminary injunction before referring the rest of the case to arbitration and that ultimately the preliminary injunction was wrongfully entered. *Id.* 1051-55. Moving on to the same arguments made by Big Iron, the Second Circuit Court of Appeals stated:

Merrill Lynch next argues that the plaintiffs unsuccessfully sought the relief they request now from the arbitrators and are thus barred by principles of *res judicata* and collateral estoppel from relitigating the issue. We are not persuaded. Before the arbitrators, plaintiffs sought damages against Merrill Lynch for its purported misconduct in seeking an injunction in federal court, in the face of NYSE rules and policies requiring claims to be submitted to arbitration, **not for damages for lost business as a result of the improper issuance of the injunction.**

*Id.* 1055 (emphasis added). Damages for lost business “as a result of the improper issuance of the injunction” was never submitted to or decided by the arbiter. It was a fresh issue that was reserved for decision by the district court. The court further wrote, “Claim preclusion is easily rejected, however, because we are not obligated to give *res judicata* effect to an arbitration proceeding, especially where it is unclear whether the arbitrators here would have been able to grant relief against the injunction bond as sought by the plaintiffs in federal court.” *Id.* 1056.

In *Blumental*, the matter was ultimately remanded to the lower court to determine damages recoverable against the bond. *Id.* *Blumental* illustrates that the issue of damages, costs, and fees as a result of the wrongfully issued injunction cannot be determined until the injunction is determined to be wrongful. Since Harder Capital could not have brought up this issue during the arbitration, Harder Capital's motion cannot be barred by claim preclusion.

**C. Other Principles of Preclusion Indicate That Harder Capital's Motion Was Not Barred by Issue or Claim Preclusion.**

Going back to the Restatement, Second, of Judgments, other general guidelines for applying preclusion principles advise against a finding that Harder Capital is precluded from recovering damages caused by the injunction.

[t]he judicial doctrines of [claim preclusion and issue preclusion] are based on the public policy that a party should not be able to relitigate a matter which it already has had an opportunity to litigate. . . . Stability in judgments grants to parties and others the certainty in the management of their affairs which results when a controversy is finally laid to rest. **The doctrines of preclusion, however, should be flexible** and must give way when their mechanical application would frustrate other social policies based on values equally or more important than the convenience afforded by finality in legal controversies.

*In re Interest of Noah B.*, 295 Neb. 764, 780, 891 N.W.2d 109, 122 (2017). Preclusion doctrines are important, but they shouldn't be applied inflexibly to bar a party from having a fair opportunity to present an issue that has not already been decided.

For purposes of claim preclusion, there are exceptions to the general rule prohibiting claim splitting. Restat 2d of Judgments, § 26. Those include the agreement of the parties, limitations on the availability of relief in the first action, and schemes that allow further relief after the first action. *Id.* All of these considerations are present given the arbitration clause's exception for equitable relief and the fact that damages caused by a wrongful injunction cannot be determined until after the underlying merits are decided.

Similarly, an "award by arbitration with respect to a claim does not preclude relitigation of the same or a related claim based on the same transaction if a scheme of remedies permits assertion of the second claim notwithstanding the award regarding the first claim." Restat 2d of Judgments, § 84. Here, the scheme of remedies requires damages caused by the wrongful injunction to be determined after the merits of the controversy. Similarly, a contractual provision, such as the scope of the arbitration clause, may limit the preclusive effect of an arbiter's award. *Id.* This consideration is present since the arbitration clause excepted equitable relief from its scope.

**D. Big Iron Never Raised the Affirmative Defenses of Issue or Claim Preclusion.**

Finally, Big Iron should not be able to argue that the arbiter's award precluded Harder Capital's motion to assess damages, costs, and fees for wrongful injunction, because Big Iron never raised issue or claim preclusion as a defense. "Claim preclusion is an affirmative defense which must ordinarily be pleaded to be available." *Boone River, LLC v. Miles*, 314 Neb. 889, 904, 994 N.W.2d 35, 46 (2023). Since Big Iron did not raise issue or claim preclusion as an affirmative defense, Big Iron's arguments based on these defenses should be considered waived.

## Conclusion

For the reasons stated herein, this Court should reverse and vacate the district court's order on motion to assess damages, costs, and fees for wrongful injunction and remand this case with instructions to enter judgment against Big Iron in the amount of \$587,104.68.

HARDER CAPITAL, LLC and RYAN  
M. HARDER, Appellants

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## Certificate of Compliance

This submission complies with the requirements of Neb. Ct. R. § 2-103(C)(3), specifically its typeface and maximum word limits. Relying on the word-count function of Microsoft Word, Version 19 this document contains 10,401 words excluding this certificate.

By s/ Jared J. Krejci  
Jared J. Krejci, #25785

# Certificate of Service

I hereby certify that on Tuesday, September 30, 2025 I provided a true and correct copy of this *Brief of Appellant Harder Capital, LLC* to the following:

Big Iron Auction Company represented by Jeffrey Charles Jarecki (24411) service method: Electronic Service to **jeff@jymlawpc.com**

Big Iron Auction Company represented by Justin D Eichmann (22405) service method: Electronic Service to **jeichmann@houghtonbradford.com**

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