No. 125733

IN THE SUPREME COURT OF ILLINOIS

INDECK ENERGY SERVICES, INC., *Plaintiff/Appellee*, v. **CHRISTOPHER M. DEPODESTA, KARL G. DAHLSTROM**, and **HALYARD ENERGY VENTURES, LLC**, *Defendants/Appellants*.	On Appeal from the Appellate Court of Illinois, Second Judicial District, Gen. No. 2-19-0043 There Heard on Appeal from the Circuit Court of the Nineteenth Judicial Circuit, Lake County, Illinois, No. 14 CH 602 The Honorable **Margaret A. Marcouiller**, Judge Presiding.

BRIEF OF PLAINTIFF/APPELLEE INDECK ENERGY SERVICES, INC. CROSS RELIEF REQUESTED

Steven J. Roeder (#6188428)
Thomas D. Gipson (#6326949)
Roeder Law Offices LLC
77 W. Washington Street, Suite 2100
Chicago, Illinois 60602
(312) 667-6000
sjr@roederlawoffices.com
tdg@roederlawoffices.com

Of Counsel on Appeal:
Robert G. Black (#6191552)
The Law Offices of Robert G. Black, P.C.
101 N. Washington Street
Naperville, Illinois 60540
(630) 527-1440
rblack@rgb-law.com

E-FILED
9/9/2020 9:21 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

ORAL ARGUMENT REQUESTED

No. 125733

IN THE SUPREME COURT OF ILLINOIS

INDECK ENERGY SERVICES, INC., *Plaintiff/Appellee*, v. **CHRISTOPHER M. DEPODESTA, KARL G. DAHLSTROM**, and **HALYARD ENERGY VENTURES, LLC**, *Defendants/Appellants*.	On Appeal from the Appellate Court of Illinois, Second Judicial District, Gen. No. 2-19-0043 There Heard on Appeal from the Circuit Court of the Nineteenth Judicial Circuit, Lake County, Illinois, No. 14 CH 602 The Honorable **Margaret A. Marcouiller**, Judge Presiding.

BRIEF OF PLAINTIFF/APPELLEE INDECK ENERGY SERVICES, INC. -- CROSS RELIEF REQUESTED

POINTS AND AUTHORITIES

STATEMENT OF FACTS[1]

The Parties.

Indeck Energy Services, Inc. ("Indeck") is a privately held Illinois corporation which develops, operates and owns independent power generating projects. (C 6790 ¶1; R 8398) Indeck commonly partners with larger companies to access capital for developing projects. (R 6208)

Christopher M. DePodesta ("DePodesta") was Indeck's Vice President of Business Development and an officer of the company and 36 of its affiliates. (C 6791 ¶9; R 8398-99; E 36-37) The trial court found DePodesta had overall responsibility for Indeck's development efforts. (C 6791 ¶15; R 8399) It also found, and DePodesta admitted, his job was "to find new business, find opportunities and new development ideas, find partners and develop business for Indeck." (C 6298 ¶48, C 6792 ¶17; R 8415, R 8399)

Karl G. Dahlstrom ("Dahlstrom") was Indeck's Director of Business Development. (C 6793 ¶25; R 8400) Dahlstrom admitted, and the trial court found, his "job was to go find opportunities and bring them back to Indeck." (C 6793 ¶27; R 8400) Aware that Indeck's President Lawrence Lagowski ("Lagowski") "wanted to meet potential partners" with whom to develop projects, the trial court found, and Dahlstrom admitted, his job included bringing opportunities to Indeck and its President "about development of turbines, [and] about potential partners." (C 6793 ¶28; R 8400)

---

[1] The Statement of Facts is drawn either from findings of fact the trial court entered or from evidence that was not disputed at trial. References that include "¶" generally refer to findings of fact the court entered. Additionally, a Statement of Facts is offered as plaintiff is pursuing cross-relief, in addition to responding to the appellant's brief. See, S.Ct.R. 318.

In 2011, DePodesta and Dahlstrom were directed to determine "whether or not it made sense to develop natural gas [projects] and, if so, where to go to develop." (C 6797 ¶44; R 8401-02) DePodesta and Dahlstrom prepared a confidential Natural Gas Development Plan recommending Indeck develop plants in the Electrical Reliability Council of Texas ("ERCOT"). (C 6794 ¶4; R 8401-02) After Indeck's Board approved going forward with development efforts, DePodesta and Dahlstrom identified several sites suitable for natural gas peaking plants, including one in Wharton County, Texas. (C 6797 ¶45; R 8401-02) Gas turbines manufactured for such projects typically required 16 month lead times.

The Mutual Confidentiality Agreement with Carson Bay to "build power plants together."

Carson Bay Energy Ventures IV, LLC ("Carson Bay") is an affiliate of Merced Capital Partners, L.P., a multi-billion dollar group of investment funds. (C 6797-98 ¶¶47-48; R 8401-02)[2] Directly owned by Merced Partners III, L.P., one of Merced Capital's funds, Carson Bay purchased two "grey market" simple cycle gas turbines which were available for immediate deployment in an electrical generating project. (C 6798 ¶49; R 8401-02; R 4173) Since their purchase in 2010, the costs of purchasing, storing and maintaining them were mounting; by 2013, Carson Bay needed to make in excess of $50 million on the turbines to turn a profit but had received no offers for them. (R 4174; E 439,

[2] Carson Bay is owned by Merced Partners III, L.P. ("Merced III") (R 4102), a fund which is in turn owned by Merced Capital Partners, L.P. ("Merced"), a multi-billion dollar investment fund that specializes in "alternative investment strategies." (C6797 ¶¶47-48; R 8401-02) Before June 2014, Merced Capital was known as EBF & Associates, L.P. (C 6797 ¶47; R 8401-02)

4469) Accordingly, Carson Bay and its affiliates were willing sellers, anxious to find "a home for [their] two 7FA gas turbines." (E 422)

On March 5, 2013, Indeck and Carson Bay entered into a Mutual Confidentiality Agreement (the "MCA"). (C 6798 ¶50; R 8401-02) Binding not only Carson Bay but also its affiliates, including Merced and Merced III, the MCA recited the parties' "wish to enter into discussions regarding the development by Indeck of simple-cycle gas turbine projects in the Electric Reliability Council of Texas ***." (C 6798 ¶51; R 8401-02; E 78-85) Under the MCA, the parties agreed, for themselves and their affiliates, that they "shall not *** hire or engage, any employee of the other Party" for two years following the date of the MCA. (E 82 ¶5) DePodesta signed the MCA as Indeck's "V.P. Business Development." (C 6798 ¶50; R 8401-02)

Immediately after DePodesta signed the MCA, Dahlstrom emailed Daniel Barpal, a Carson Bay manager, writing "Dan, [t]he [MCA] has been executed! Let's build some power plants together." (C 6799 ¶53; R 8402) The following day, DePodesta, Dahlstrom, Barpal, and Hendrik Vroege ("Vroege"), the Merced partner in charge of the Carson Bay turbines, scheduled a call. (C 6799 ¶54; R 8402) Only DePodesta and Dahlstrom participated in this call for Indeck, which lasted more than 47 minutes. (*Id.*)

Dahlstrom and DePodesta schedule a meeting with Merced in Houston while Indeck's President, who would be elsewhere, could not attend.

Indeck's President Lagowski, its Director of Finance William Garth ("Garth"), DePodesta and Dahlstrom all planned to attend an industry conference in Las Vegas during the week of April 8, 2013. (C 6799-800 ¶¶55-56; R 8402; E 117) On March 12, 2013, Lagowski received an invitation to a reception to be held April 9 at this conference and sent

the invitation to DePodesta asking if he also received it. (*Id.*) Lagowski noted it "[s]ounds like this might be good to go to." (*Id.*)

DePodesta responded he too was invited, he and Dahlstrom were already scheduling meetings at this conference, and asked Lagowski "what types of firms would you prefer to meet while we are out there?" (C 6799-800 ¶56; R 8402) When Lagowski answered "[p]eople who can help us sell power or maybe potential partners" (*id.*), DePodesta replied he and Dahlstrom "will make initial contacts with *** potential development partners or project 'buyers,'" private equity, and "grey market opportunity" providers. (C 6800 ¶57; R 8402) DePodesta further offered to start a list of firms to contact which could be added to "since there [will be] 4 of us" at the conference. (*Id.*) DePodesta specifically identified Carson Bay, who he and Dahlstrom had talked to just days before, as a private equity and "grey market opportunity" provider. (*Id.*)

The following day, March 13, 2013, DePodesta and Dahlstrom abruptly changed their plans. After Dahlstrom received an email from Barpal "to check in and see what the next steps are" (C 6801 ¶60; R 8402), DePodesta and Dahlstrom scheduled a dinner with Vroege and Barpal in Houston for April 9 – the same day they knew Indeck's President Lagowski would be in Las Vegas and unable to attend. (C 6801 ¶59; R 8402) Dahlstrom admitted this dinner could have been scheduled in Las Vegas so Lagowski could attend. (C 6803 ¶65; R 8402) Vroege even suggested if not Las Vegas, he could travel to Chicago for the meeting. (C 6801-02 ¶62; R 8402; E 121)

Neither Dahlstrom nor DePodesta advised Lagowski they scheduled a dinner in Houston on April 9, 2013, with representatives of Merced and/or Carson Bay. (C 6803 ¶66; R 8402) DePodesta and Dahlstrom deliberately excluded Lagowski; as the trial court

found, "[a] reasonable inference from the evidence is that DePodesta and Dahlstrom did not want to schedule a meeting with Vroege which Lagowski would or could attend." (C 6803 ¶67; R 8402)

DePodesta and Dahlstrom make Merced and Indeck appear unreasonable to the other so they would not do business together.

During the Houston dinner on April 9, 2013, DePodesta and Dahlstrom told Vroege, that Indeck wanted a "free option" on the Carson Bay turbines. (C 6803 ¶70; R 8402) The trial court determined this was not true and DePodesta and Dahlstrom were not authorized by Indeck to demand a free option on the turbines. (C 6804 ¶71; R 8402-03) The trial court specifically found Lagowski testified credibly that Indeck was not looking for a free option; the purported free option position was unreasonable; and Lagowski could not think of a quicker way to kill a deal than by suggesting this was Indeck's position. (*Id.*)

At the Houston dinner, or shortly thereafter (DePodesta was not sure), Vroege told DePodesta and Dahlstrom Merced was interested in contributing the turbines, then worth an estimated $60 million, as equity in an Indeck project, in addition to selling them. (R 1187-89; E 205) An equity contribution this large would provide an important component of any power plant project financing. (R. 1793) While DePodesta testified he told Lagowski that Merced was willing to contribute the turbines as equity, the trial court concluded this testimony was false, finding Lagowski testified credibly that DePodesta did *not* in fact tell him this. (C 6804 ¶71; R 8402-03)

DePodesta also testified he told Lagowski that Carson Bay would agree to take its turbines off the market for an Indeck project only if Indeck made a nonrefundable,

undefined multimillion dollar down payment. (C 6804 ¶72; R 8403) Lagowski and DePodesta both testified this proposal made no sense. (*Id.*)

The trial court specifically found "a reasonable inference from this evidence is that DePodesta and Dahlstrom wanted both Indeck and Merced to believe that the other was unreasonable so they would not do business together." (C 6804 ¶73; R 8403)

DePodesta and Dahlstrom plan their business to develop power projects, solicit the only other Indeck business development employee to leave, and control the flow of information regarding Indeck's Wharton project.

On June 13, 2013, DePodesta, Dahlstrom and the only other Indeck employee in business development, Kelly Inns ("Inns"), travelled to Texas for meetings to kick off the Wharton project the following day. (R 2189) At 5:08 p.m. on June 13, DePodesta emailed Dahlstrom a summary of capital startup requirements for *their* company to develop natural gas power generation projects. (C 6804 ¶74; R 8403) Minutes later, Dahlstrom texted DePodesta he "couldn't have written it better myself. *** This is the first day of the rest of our lives." (C 6804-05 ¶76; R 8403) DePodesta and Dahlstrom used cell service Indeck paid for to send and receive these texts. (C 6804 ¶75; R 8403)

The following morning, at breakfast before the Wharton kick-off meeting, Dahlstrom told Inns she should look for a new job because "he did not think Indeck was committed to development." (C 6805 ¶77; R 8403-04; R 2191) Dahlstrom suggested Inns contact one of Indeck's competitors, run by one of Indeck's former presidents. (R 8404)

While they planned their company, DePodesta and Dahlstrom took steps to control information Indeck would reveal regarding its Wharton project. (See C 6805-06 ¶¶78-79; R 8404) On July 17, 2013, DePodesta sent an email to Indeck personnel directing them, if

called on anything related to Texas or ERCOT, to "refer all calls to Karl Dahlstrom." (C 6805 ¶78; R 8404) The next day, Dahlstrom proposed that Indeck employees not offer any information on the Wharton project and, if asked, not even acknowledge its existence. (C 6805-06 ¶79; R 8404)

Dahlstrom obtains confidential information regarding the Wharton project, contacts Vroege to develop projects with Merced in competition with Indeck, and submits false testimony to conceal the true reasons for the call.

At 1:41 p.m. on July 22, 2013, Dahlstrom requested that Bill Garth, Indeck's Director of Finance, send him Indeck's "most up to date pro forma" for the Wharton project. (C 6806 ¶80; R 8404) Indeck's pro forma forecasts project economics, measures potential returns from projects, serves as a preliminary determination of the project's success, and is central to its business strategy. (C 6847 ¶¶229-30; R 8412) Dahlstrom received a copy of Indeck's Wharton pro forma from Garth at 2:36 p.m. that day. (C 6806 ¶80; R 8404)

At 2:34 p.m. that same afternoon, Dahlstrom emailed Vroege to ask if Vroege had time "to catch up regarding the GE equipment." (C 6806 ¶81; R 8404) Dahlstrom sent this email from his Indeck email address using his Indeck laptop. (*Id.*) Merced's records confirm Vroege called Dahlstrom at Indeck's office that afternoon. (C 6806-07 ¶83; R 8404)

At trial, Dahlstrom provided false testimony regarding the purpose of his call. When questioned by his attorney, Dahlstrom testified he called Vroege to inform him about an RFP that allegedly came out of Duke Energy. (C 6807 ¶84; R 8404) The trial court found this testimony was not credible. (*Id.*) Instead, the court found Dahlstrom called

Vroege to catch-up on the Carson Bay turbines with the ultimate goal of gauging Merced's interest in partnering with defendants – not Indeck – to develop power plants. (C 6807 ¶¶84-85; R 8404-05)

Defendants use Indeck's resources and equipment to compete against Indeck.

After the call with Vroege, Dahlstrom continued to use Indeck's resources and equipment to solicit Merced and compete against Indeck. (C 6807 ¶87; R 8405) At 2:17 p.m. on July 23, 2013, Dahlstrom again called Vroege, using Indeck's phone. (*Id.*) Minutes later, DePodesta invited Lagowski, Dahlstrom and Garth to a meeting at 2 p.m. the following day in Mr. Lagowski's office, purportedly to discuss "Texas Development Regarding Multiple Developments ***." (C 6807 ¶88; R 8405; E 319-21)

At 4:45 p.m. on July 23, Dahlstrom accessed a folder on Indeck's Business Development drive entitled BUS_DEV\$Developments\NATURALGAS\\$Texas \$Wharton\BDReports\Development_Budget." (C 6808 ¶89; R 8405-06)[3] At 11:21 p.m. that evening, Dahlstrom emailed DePodesta an excel spreadsheet entitled "Capital Requirements.xls" (C 6808 ¶90; R 8406) Early the next morning, at 5:41 a.m., DePodesta responded by email "[w]e were closer to $2MM per development, not $1.5MM. *** So if confined strictly to ERCOT, then the $1.5MM works." (C 6808 ¶91; R 8406) DePodesta and Dahlstrom both testified that they did not use Indeck's budget information in their

[3] Because DePodesta and Dahlstrom repeatedly ran CCleaner on the Indeck computers they used, records of the specific documents they accessed in the last months of their employment were wiped from the same. (C 6827 ¶162; R 8410) The version of CCleaner they used, however, did not erase "shellbags" which size a document to the computer and reference the folders from which the document was accessed. (C6827 ¶163; R 8410) Thus, Indeck's forensic expert could determine what files were accessed, even if he could not determine the actual documents accessed. (R 5964-65)

estimates. (R 772, R 4419) The trial court, however, rejected this testimony, finding a "reasonable inference here is that Dahlstrom and DePodesta discussed information from Indeck in preparing their numbers for discussions with Vroege." (C 6808 ¶91; R 8406)

DePodesta and Dahlstrom called Vroege early on July 24, using cell phone service Indeck provided. (C 6808 ¶92; R 8406) During this call, they confirmed Vroege's and Merced's interest in funding the development of power plants in Texas. (C 6808 ¶93; R 8406) They also agreed to meet in Minnesota to present "our ERCOT development plan." (C 6809 ¶96; R 8406) Following this call, Dahlstrom and DePodesta went to Indeck's offices, used Indeck's computers and Indeck's time, and edited a non-disclosure agreement to send to Vroege on behalf of their company, Halyard Energy Ventures, LLC ("HEV"). (C 6809 ¶97; R 8406)

Later that day, at 2 p.m., DePodesta and Dahlstrom attended the meeting DePodesta scheduled with Lagowski and Garth. (C 6809-10 ¶¶98-100; R 8406-07) While DePodesta testified the purpose of this meeting was to "give this one big push" so Indeck could have several developments going at once, he did not ask whether Indeck would be open to working with Carson Bay and Vroege, let alone mention Carson Bay. (C 6810 ¶99; R 8406-7) When asked why he did not raise Vroege, Carson Bay or Merced during this meeting, DePodesta testified "it was not on the agenda." (*Id.*) DePodesta then admitted he drafted the agenda. (*Id.*)

Dahlstrom testified we "were talking through trying to keep multiple developments going at this meeting" and he "understood that the cost of the development is something that would be an issue at Indeck." (C 6810 ¶100; R 8407) Nonetheless, Dahlstrom agreed he "didn't mention, in any way, shape or form that [he] had discussed that very morning

with Mr. Vroege his apparent interest in funding multimillion dollar developments for a greenfield development company" (*id.*), much less mention Vroege, Carson Bay, or the turbines they could contribute. (*Id.*). The trial court found Dahlstrom "never mentioned the possibility of developing projects with Carson Bay, or EBF[/Merced] or any of its affiliates during this meeting." (*Id.*)

DePodesta and Dahlstrom did confirm at this meeting, however, that rather than develop multiple ERCOT sites at once, Indeck would first develop only its Wharton project. (C 6811 ¶101; R 8407)

DePodesta and Dahlstrom use Indeck's offices, computers and resources to develop the opportunity to partner with Merced.

Shortly after the meeting on July 24, at 4:01 p.m., Dahlstrom sent another email to Vroege. Dahlstrom did not send this email, however, from his Indeck email address. Instead, Dahlstrom sent the email on behalf of Halyard Energy Ventures, LLC from a halyardenergy.com email address. (C 6811 ¶102; R 8407) Dahlstrom admitted he sent this email on behalf of Halyard Energy while on Indeck's premises. (R 475-76)

Dahlstrom's email stated that "[w]e enjoyed working with you and EBF to date and look forward to the opportunity to present *our* ERCOT development plan. Attached you will find *our* standard MNDA [*i.e.,* mutual non-disclosure agreement]." (Emphasis added.) (C 6811 ¶102; R 8407) DePodesta and Dahlstrom drafted this agreement before their meeting with Lagowski and Garth. (C 6811-12 ¶¶104-05; R 8407) DePodesta and Dahlstrom agreed to present "their" plan to Vroege on August 6, 2013. (C 6811 ¶103; R 8407; E 328-30)

The "standard MNDA" Dahlstrom sent was between EBF (later renamed Merced) and Halyard Energy Ventures LLC. (C 6811 ¶104; R 8407; E 1591-96) The MNDA recited the "[p]arties desire to exchange certain proprietary and commercially sensitive information in connection with a possible business relationship relating to the development of a portfolio of power plants in the ERCOT region." (C 6812 ¶105; R 8407) While Dahlstrom testified EBF/Merced supplied this recital language, the trial court found "DePodesta and Dahlstrom appear to have supplied this language despite Dahlstrom's testimony that the language came from EBF/Merced." (*Id.*)

The trial court also found this document "admits that DePodesta and Dahlstrom understood that EBF/Merced was interested in discussing 'a possible business relationship relating to the development of a portfolio of power plants in the ERCOT region' before DePodesta and Dahlstrom attended the meeting with Indeck's President and Director of Finance on July 24, 2013." (C 6812 ¶106; R 8407) DePodesta and Dahlstrom executed the MNDA as Managing Directors of Halyard Energy Ventures, LLC. (C 6811 ¶104; R 8407)

DePodesta and Dahlstrom use Indeck's Natural Gas Development Plan, resources, data, information, computers, and time to prepare their Halyard Energy Power Development Strategy.

Dahlstrom put together the Halyard Energy Power Development Strategy ("Halyard PDS") between July 24 and August 5, 2013. (C 6812-13 ¶107; R 8407) Admitting he started with the confidential Indeck Plan, Dahlstrom agreed he "used time, equipment material and facilities of [his] employer to put it together ***." (C 6812-13 ¶¶107, 109; R 8407) Dahlstrom prepared the final presentation on an Indeck computer. (C 6812-13 ¶107; R 8407)

While Dahlstrom contended he did not use Indeck data on the Halyard PDS, the trial court found "a reasonable inference that the data stored by the Defendants in Exhibits 411, 412 and 413" -- emails between DePodesta and Dahlstrom which each attached a draft of the Halyard PDS -- "were based on Indeck's information." (C 6812-13 ¶107; R 8407; E 4246-97) The trial court also found it "a logical inference" that information Dahlstrom included in his budget items on the Halyard PDS derive from bids received at Indeck. (C 6816 ¶120; R 8408) The trial court further found the only basis for any knowledge Dahlstrom had of "recent negotiations with over 25 landowners in Texas" regarding option prices for confidential and proprietary sites, which were referenced in his budget estimates, came from his work at Indeck. (C 6816 ¶119; R 8408)

DePodesta and Dahlstrom travel to Minnesota to present the Halyard PDS and admit that developing projects with Merced was an "opportunity" in Indeck's line of business.

DePodesta and Dahlstrom travelled to Minnesota on August 6, 2013, to present the plan they prepared on Indeck time with Indeck data. (C 6816 ¶121; R 8408) The following day, Dahlstrom emailed Vroege to tell him they "would like to move forward in discussions regarding a potential partnership." (*Id.*) Dahlstrom wrote "the next step would be for EBF to draft a proposed letter agreement." (*Id.*) Dahlstrom sent these emails to Merced from his halyardenergy.com address on behalf of Halyard Energy. (E 368-71)

The trial court found during the weeks after meeting with Merced, DePodesta and Dahlstrom used time during the business day working for Indeck to negotiate a letter of intent ("LOI") with Merced. (C 6817 ¶126; R 8408) The trial court found DePodesta and Dahlstrom used phones Indeck paid for to negotiate with Vroege – and to begin Halyard Energy's operations in August, September, and October 2013. (C 6818 ¶129; R 8409) The

trial court also found DePodesta and Dahlstrom continued to use Indeck computers for Halyard Energy matters. (C 6818 ¶130; R 8409)

Dahlstrom admitted in Indeck's case-in-chief that the "opportunity to develop projects in ERCOT with affiliates of Merced" was a "proposed activity which Indeck had the capacity to engage." (C 6816 ¶122; R 8408) The trial court found Dahlstrom and DePodesta judicially admitted that developing projects with Merced and its affiliates was "incident to Indeck's present or prospective business." (*Id.*) DePodesta and Dahlstrom also recognized they were pursuing an "opportunity," indeed, in correspondence to Vroege dated August 20, 2013 they wrote "[t]he intent of the letter/agenda is to help us move forward with this *opportunity* as quickly as possible." (Emphasis added.) (E 400)

Merced approves the investment with DePodesta and Dahlstrom to develop a site for two Carson Bay turbines.

Vroege and Werwie presented the proposed investment with DePodesta and Dahlstrom to Merced Capital's investment committee on August 28, 2013. (R 4181-82) Because "the focal point of this venture is first finding a home for our two 7FA gas turbines," (E 422), they advised "the venture would focus on placing [Merced's] two 7FA gas turbines in the best development site and moving development of that site as quickly as possible." (E 421) They advised the "central premise is to create a real option to build a simple-cycle peaking plant within one year by permitting a site and having the equipment on the shelf" which "creates a place to put the equipment." (E 439) They noted Carson Bay had not "seen any firm bids" for the equipment over the prior three years, and even though only 50-percent of projects reach commercial operation stage, "[u]ltimately this is more like a $5-10 [million] investment program." (*Id.*)

The investment memo confirmed that the "venture is to be set up in Merced III, separate from Carson Bay, and daily operations would be managed by Karl Dahlstrom and Chris DePodesta" who "will be leaving Indeck and working for us on an exclusive basis for power plant development in the ERCOT market." (E 421) The investment memo did not reference any restrictions on engaging Indeck personnel. (E 421-22)

Defendants sign a Letter of Intent with Merced III and agree not to disclose this opportunity to Indeck.

On August 30, 2013, DePodesta, Dahlstrom and Halyard Energy signed a letter of intent with Merced III to form a limited liability company to develop three natural gas-fired, simple-cycle power plant sites in Texas. (C 6819 ¶131; R 8409; E 425-31) DePodesta, Dahlstrom and Halyard agreed in the LOI to deal exclusively with Merced III to negotiate an LLC Agreement and a Management Agreement for HEV's management of the LLC. (C 6819 ¶¶132, 134; R 8409)

The LOI prevented DePodesta and Dahlstrom from disclosing their negotiations with Merced to Indeck -- even if no LLC agreement were reached and they remained Indeck employees. (C 6819 ¶¶132-33; R 8409) Vroege testified the confidentiality provision in the LOI came from Merced. (C 6304 ¶100; R 8418)

Dahlstrom attends meetings with Indeck's investment bankers, advises Vroege he and DePodesta will be able to move forward soon, and downloads thousands of Indeck documents.

During the week of October 7, 2013, Dahlstrom attended confidential meetings in New York with investment bankers regarding Indeck's Wharton project. (C 6820 ¶¶136; R 8409; E 463) While still in New York on Indeck business on Friday, October 11, 2013, Dahlstrom emailed Vroege "to let you we have reviewed the agreements" and "[t]here are

only a few comments that we will document and send to you by Monday." (*Id.*) Dahlstrom further wrote Vroege "we will be able to move forward very soon." (*Id.*) Dahlstrom sent his email from his halyardenergy.com address. (E 463)

Dahlstrom also advised Vroege he "just finished 4 days of meetings with investment bankers in New York discussing financing options in an energy only market." (C 6820-21 ¶137; R 8409; E 463) In response, Vroege looked forward to talking to Dahlstrom when he returned to his office and Indeck's phone records established they talked when he did. (C 6820-21 ¶136-38; R 8409) The trial court found this evidence created an inference Dahlstrom disclosed to Vroege confidential information he obtained from these meetings that was not in Indeck's best interests, and Dahlstrom failed to rebut this inference. (C 6821 ¶139; R 8409)

On October 15, 2013, Dahlstrom accessed Indeck's business development drive, copied thousands of documents onto an external hard drive, and removed the external drive from Indeck's premises. (C 6822 ¶145; R 8409) The documents Dahlstrom copied included Indeck's Wharton Pro Forma 017.xlxs; a confidential conceptual design report Indeck commissioned; documents regarding confidential site locations, prospective land sellers, and prices they would agree to sell their properties; Indeck's competition tracker; and Indeck's development budget. (C 6823 ¶146; R 8409) When asked why he copied more than 50,000 documents, Dahlstrom answered "it was an emotional time." (C 6823 ¶147; R 8409) Like Dahlstrom, DePodesta also copied thousands of documents from Indeck onto an external drive. (C 6823 ¶148; R 8409)

DePodesta and Dahlstrom complete negotiations for the LLC Agreement and the Management Agreement, run wiping software on their Indeck computers, and resign without notice.

DePodesta resigned from Indeck on Friday, November 1, 2013, effective that day without prior notice. (C 6823 ¶149; R 8409, 1070-71) That same day, DePodesta copied his Personal Storage Table ("PST"), containing emails he sent and received and their attachments, and ran CCleaner on his Indeck computer. (C 6825 ¶155; R 8409) DePodesta testified he did not decide to resign until late in the evening on October 31, 2013, but the trial court rejected this testimony as not credible. (C 6824 ¶151; R 8409)

DePodesta testified negotiations for the LLC Agreement were not complete prior to his resignation. (C 6823 ¶149; R 8409) The trial court found that DePodesta's receipt of a draft LLC Agreement on October 30, 2013, containing identical terms as the LLC Agreement defendants signed, contradicted this testimony. (C 6823-24 ¶150; R 8409) The trial court also found DePodesta: (1) falsely told Lagowski when he resigned he was going to work at his restaurant, and (2) failed to disclose he would be involved in developing peaker plants in ERCOT. (C 6824-25 ¶¶152-54; R 8409)

DePodesta testified "it did not dawn on me to tell Mr. Lagowski" that he would be working with an entity that entered into a Mutual Confidentiality Agreement with Indeck. (C 6824 ¶153; R 8409) The trial court found this testimony not credible. (C 6825 ¶¶154, 156; R 8409) The court further found any disclosure would have violated the confidentiality provision of the LOI and might have caused Indeck to investigate his computer. (C 6825 ¶156; R 8409)

Dahlstrom resigned from Indeck on Monday November 4, 2013, effective that day and without notice. (C 6825 ¶157; R 8409-10) Like DePodesta, Dahlstrom copied his PST

and its attachments on an external hard drive and ran CCleaner on his Indeck computer on his last day. (*Id.*) The trial court likewise rejected Dahlstrom's explanations for his sudden departure. (C 6826 ¶158; R 8410)

Neither DePodesta nor Dahlstrom made any disclosure to Indeck about their plans to form a limited liability company to develop gas fired simple-cycle plants in the state of Texas with any affiliate of EBF/Merced, Merced, Merced III, or Carson Bay. (C 6826 ¶159; R 8410) The trial court found that since they made no such disclosure, they did not tender these opportunities to Indeck or obtain its consent. (*Id.*)

The LLC Agreement and the Management Agreement.

The trial court found DePodesta and Dahlstrom signed the LLC Agreement and the Management Agreement on November 6, 2013. (C 6305 ¶111-12; R 8419)

Under the LLC Agreement, HEV became a member of Merced Halyard Ventures, LLC ("MHV") and obtained a 20-percent profit interest in MHV. (C 6306 ¶113; R 8419) The LLC Agreement also provided HEV, DePodesta, and Dahlstrom with broad rights of indemnification and advancement of costs of defense in the event of litigation. (E 542 ¶5.1(d)) By May 2017, Vroege testified that Merced had advanced $1.5 million to defend Indeck's claims. (R 4257)

Under the Management Agreement, HEV, and its members, DePodesta and Dahlstrom, were exclusively engaged to manage the development of a portfolio of projects in ERCOT for a $500,000 annual fee. (E 560-70) The management fees paid to HEV were split between DePodesta and Dahlstrom as equal owners of HEV. (C 6831 ¶175; R 8411) Through November 6, 2018, DePodesta and Dahlstrom each obtained Management Fees of $1,250,000. (C 6831 ¶176; R. 8411)

Defendants develop two construction-ready projects.

With the financial backing of Merced and Merced III, HEV, DePodesta, and Dahlstrom developed two fully-permitted, construction-ready peaker projects in Texas: the Halyard Wharton Energy Center ("HWEC") and the Halyard Henderson Energy Center ("HHEC"). (C 6832 ¶178; R 8411) Dahlstrom believed there was funding to build low-cost peakers like HWEC and HHEC (C 6832 ¶179; R 8411), and in late January 2018, HEV issued a Confidential Information Memorandum ("CIM") to qualified parties interested in acquiring the equity interests in HWEC through Scotiabank, an investment banker. (C 6833 ¶181; R 8411) Initial bids for HWEC were due on February 26, 2018. (C 6836 ¶192; R 8411) Rather than deliver these bids to Indeck, as required by an order of the trial court, Scotiabank postponed the bids, in part as agent for MHV and HEV. (C 6838 ¶197-98; R 8412-13)

The trial court found this postponement of bids for HEWC deprived Indeck of up-to-date and relevant market evidence of the value of the Wharton project, and thus of the benefits Halyard Wharton, DePodesta, and Dahlstrom would likely receive. (C 6838 ¶199; R 8412) It also found defendants would likely receive no less than $4.67 million – $2,335,000 each – for their 20-percent profit interests in MHV if the projects are sold with the developer fee budgeted in the CIM. (C 6838 ¶200; R 8412)

Dahlstrom testified he expected to obtain a power purchase agreement for the projects. (C 6832-33 ¶180; R 8411) The court found projects sold with these would be valued at nearly $35 million, with defendants likely receiving in excess of $13 million – or $6.5 million each – for their 20-percent profit interests. (C 6838 ¶200; R 8412)

Proceedings in the trial court.

On March 25, 2014, Indeck filed a four-count verified complaint against defendants DePodesta, Dahlstrom, HEV, and Halyard Energy Wharton, LLC ("Halyard Wharton"). (C 39-88) Count I sought a preliminary injunction pursuant to the non-compete provisions of the confidentiality agreements that DePodesta and Dahlstrom signed with Indeck, an order requiring the return of all confidential information defendants took with them, and a permanent injunction enforcing the confidentiality agreement's non-disclosure restrictions. (C 58-61) Count II sought preliminary and permanent injunctive relief under the Illinois Trade Secrets Act. (C 61-64) Count III, entitled "Conspiracy," sought the same injunctive relief. (C 64-65) Count IV, entitled "Disgorgement," sought disgorgement of any and all benefits defendants had and would obtain from breaching their duties of loyalty to Indeck. (C 66-68) The case was assigned to Judge Mitchell Hoffman. (C 90)

When made aware that DePodesta and Dahlstrom entered into an LLC with an affiliate of Carson Bay, Indeck filed Count V, alleging defendants usurped the opportunity to develop projects with affiliates of Merced, including Carson Bay, and to use the Carson Bay turbines. (C 634-66)

Defendants' answer to Count V admitted that "the opportunities presented by Carson Bay were within Plaintiff's line of business." (C 732 ¶100) Indeck further alleged that DePodesta's and Dahlstrom's failures to disclose the Carson Bay – Merced Capital opportunities foreclosed them from exploiting these opportunities (C 748 ¶137), and required that they "disgorge all benefits that have received and will receive from their breaches of fiduciary duties and usurpation of Indeck Energy's corporate opportunities." (*Id.* ¶139)

Due to concerns over producing confidential information to defendants regarding its Wharton project, Indeck withdrew its compensatory damage claim. (C 1272-73)

Sanctions Orders for defendants' violations of discovery orders and false affidavits.

In September 2015, the trial court entered an Update Order requiring defendants produce various categories of documents bi-weekly. (C 2534-37) Shortly before the trial in January 2016, Indeck discovered defendants withheld documents in violation of the Update Order. (C 9666-74) The trial court indicated it was not inclined to accept defendants' explanation that documents were withheld as an "oversight," commenting the failure to produce these documents was a "significant" and possibly intentional violation of the Update Order. (R 294) Defendants agreed the Update Order would remain in place throughout trial. (R 302)

On January 25, 2016, the first day of trial, the case was assigned to Judge Margaret Marcouiller. (R 323)

On April 18, 2017, Indeck moved for sanctions for violations of the Update Order. (C 9358-445) The trial court granted Indeck's motion and ordered a forensic review to ensure compliance with the Order. (C 4798) In entering this sanction, the trial court specifically noted defense counsel made false representations to the court when DePodesta was present and allowed his counsel to make them without correction. (R 5125)

On February 16, 2018, Indeck again moved for sanctions for violations of discovery orders. (C 5220-40) The court once again entered sanctions, this time against defendants and their counsel, finding the violation intentional. (C 5241-42, 6875-76; R 7519-20)

On June 8, 2018, Indeck moved for sanctions arising from the forensic review. (C 6288, 6890-7075) On December 3, 2018, the trial court granted the motion in part and denied it in part. (C 8658-59; R 8349-64) While not specifying the standard it applied, the court ruled a sworn identification of media statement dated July 21, 2017, defendants provided in connection with the court-ordered forensic review "appears to be false" because "the record simply will not support a finding *** [it] was true and accurate." (R 8359-61) The trial court also found "defendants' insistence that their affidavits of complete production were not false to be simply incredible." (R 8359) Nonetheless, the court declined to award Indeck sanctions other than certain fees incurred prosecuting its motion. (R 8362-64)

The Directed Finding Ruling on Count I.

After Indeck's case-in-chief, defendants moved for directed finding on Count I contending, among other things, that the confidentiality restrictions of the confidentiality agreement were unenforceable. (C 10394-97) The trial court granted the motion, ruling paragraph 1(c) of DePodesta's and Dahlstrom's confidentiality agreement unenforceable because the trial court concluded (1) it covered information of any nature or form related to Indeck's business, (2) was not limited to protecting information that gives Indeck an advantage over its competitors, and (3) was unreasonable as to time. (C 3955; R 3582-83)

The Directed Finding on Count V and Indeck's Motion to Reconsider.

Defendants' motion for a directed finding on Count V simultaneously argued (1) "[t]here is no evidence in this case that there was ever a 'funding opportunity' available to Indeck" (C 10434), and (2) "[t]he Individual Defendants did not take anything that was and is not equally available to Plaintiff." (C 10436-37) Defendants' motion cited no testimony

in support of either argument, nor any record evidence that Merced was ready, willing and able to develop projects with Indeck. The only evidence defendants referenced for their "equally available" argument was LLC Agreement itself, which did not expressly prohibit Merced III from making investments in other development companies. (C 10436)

Indeck argued in response that the controlling authority of *Kerrigan v. Unity Savings Ass'n*, 58 Ill.2d 20 (1974), *Mullaney, Wells & Co. v. Savage*, 78 Ill.2d 435 (1980), and *Anest v. Audino*, 332 Ill.App.3d 468 (2d Dist. 2002), only required it to introduce some evidence of a "proposed activity" in Indeck's line of business in which it had the capacity to engage to establish the opportunity prong of its usurpation of corporate opportunity claim, and defendants admitted this both judicially and in trial testimony. (C 4488-91)

On March 21, 2017, the trial court granted defendants' motion for directed finding on Count V. (C 3979) Using defendants' characterization of the opportunity to develop projects with affiliates of Merced as a "funding opportunity" – a term Indeck never used at any time in its case-in-chief – the trial court ruled:

> With respect to funding opportunities, there is no evidence that Merced promised HEV an exclusive development agreement for projects in ERCOT or that Indeck made any attempt to partner with Merced after Defendants resigned from Indeck.
>
> It appears that the Plaintiff may have assumed that there was only one partnership opportunity with Merced, but Plaintiff presented no evidence of that fact in its case in chief.
>
> Defendants' *argument* that no funding opportunity was usurped and that any funding opportunity that Indeck might [have] had in 2013 is still available today is persuasive on this record.
>
> Defendants' motion for Directed Finding on Count 5 with respect to the alleged funding opportunity is also granted. (Emphasis added.) (R 3674-75)

Following the close of all evidence, Indeck moved for reconsideration of the directed finding under Count V, citing case law from this Court, the Second District Appellate Court, and the First District.[4] (C 5620-27, C 6153-61)

On July 17, 2018, the trial court denied Indeck's motion for reconsideration. (C 7561) The trial court stated:

> at the time of the directed finding the Court recognized that the evidence showed that any opportunity, any corporate opportunity that was called the "funding opportunity" throughout the direct, and the Court found that any funding opportunity that was available to Indeck in 2013 was still available to Indeck at the time the Court granted the motion for directed finding. Now, Plaintiff never challenged the Court's finding that the opportunity was still available to Indeck at the time of the directed finding. Essentially, what the Court found was that the Defendants didn't take any opportunity from Indeck because the opportunity was still there to be had.
>
> In the motion to reconsider Indeck extrapolates from the Court's finding that the Court, in fact, ruled that any corporate opportunity must be exclusive before there can be a [usurpation][5] claim. The Court's ruling did not state that the opportunity must be exclusive. I don't think you can even infer reasonably that the opportunity must be exclusive. You can infer anything, it is that the opportunity must no longer be available, not that the opportunity must no longer be exclusive.
>
> At the core of the Court's ruling was the fact that an opportunity must be usurped, it must be taken and that when an opportunity is still available to a plaintiff, that opportunity has not been usurped or taken by the defendant. There is case law that clearly states that a director may embrace an opportunity without liability if the corporation sought without success to obtain it.
>
> Indeck's argument is tantamount to an argument that a corporation may consciously elect to forego an opportunity perhaps because it lacks the resources to acquire the opportunity, perhaps for some other reason but that

---

[4] Indeck's motion and reply cited, among other cases, *Kerrigan, Mullaney, Anest, Lindenhurst Drugs v. Becker*, 154 Ill.App.3d 61, 67 (2d Dist. 1987), *Dremco, Inc. v. South Chapel Hill Gardens, Inc.*, 274 Ill. App. 3d 534 (1st Dist. 1995), and *Levy v. Markal Sales Corp.*, 268 Ill. App. 3d 355 (1st Dist. 1994).

[5] The transcript reads "user-patient."

> after foregoing, after electing to forego the opportunity, the corporation may still prevail on a claim that the opportunity was usurped. I think that the Plaintiff brought no case to the Court's attention that holds that an opportunity that is available to the Plaintiff at the time of trial can be found to have been usurped even though it is currently available to the Plaintiff. Frankly, the argument is not persuasive to the Court.
>
> So, the Motion to Reconsider Entry of the Directed Finding on Count 5 is denied. It is denied due to the delay in bringing the motion until after Defendants' case and also it is denied because the argument raised in the motion is not persuasive to the Court. That is the Court's ruling on the Motion to Reconsider. (Emphasis added.) (R 7638-40)

The trial court's rulings on the merits.

On December 10, 2018, the trial court identified the proposed findings of fact it accepted, accepted in modified form, and/or rejected, and then ruled on the merits. (R 8398-469) The trial court noted "Defendants' testimony was impeached and certain testimony that the Court heard was simply not credible to the Court." (R 8437-38) The trial court noted its conclusions regarding defendants' lack of credibility, "while formed based on trial testimony and witness demeanor, were also reinforced by Defendants' conduct which led to the imposition of sanctions for violations of the Court's Update Order and for Defendants' false statement under oath that they disclosed all their cloud based accounts" in connection with a forensic review it had ordered. (R 8439) In contrast, "Plaintiff's witnesses Lagowski, Inns and Garth were more credible than Defendants and where their testimony conflicts with Defendants, the Court would credit Lagowski, Inns and Garth." (R 8439-40)

Under Count II, the trade secret count, the Court entered injunctive relief in favor of Indeck preventing the use or disclosure of three trade secrets for three years. (R 8450-

59) Under Count III, the conspiracy count, the trial court dismissed it as duplicative of Count IV. (R 8469)

Ruling on Count IV, the trial court found DePodesta and Dahlstrom breached the fiduciary duties they owed Indeck from March 13, 2013, to the dates of their resignations, (R 8464) Among other things, the trial court ruled that DePodesta and Dahlstrom violated their duties of loyalty when they:

- set up a meeting with Vroege in a manner designed to ensure that Lagowski could not attend (R 8461);
- stated that Indeck wanted a free option of the Carson Bay turbines without the authority to make such a representation knowing that this representation would discourage further discussion with Indeck (R 8461);
- discussed Merced's potential investment in HEV but never disclosed that such discussions had occurred (R 8461);
- contacted Vroege from Indeck's offices on July 23, 2013 to tell him that they were starting their own company and in their follow up discussion on July 24, using phone minutes that Indeck paid for to discuss further the possibility of Merced funding defendants' venture as well as accessing Indeck's materials to prepare for an HEV meeting with Vroege (R 8461-62);
- prepared the HEV Power Development Strategy using Indeck's form and using Indeck's time and using Indeck's computers (R 8462);
- downloaded thousands of Indeck records intending to take those records with them to support their new venture and then attempting to destroy the downloaded files and record of the downloading activity (R 8462);
- travelled to Minnesota to present the HEV Power Development Strategy to Merced during the work week while they were paid by Indeck (R 8462);
- engaged in demonstrable business activity when they entered into a Mutual Confidentiality Agreement to exchange proprietary and sensitive information with Merced and keep their discussions confidential (R 8462-63);
- negotiated a Letter of Intent on Indeck's time using Indeck's computers and phone minutes that Indeck paid for (R 8463);

- negotiated a Letter of Intent where they agreed not disclose their negotiations to Indeck even though their jobs required them to bring development opportunities to Indeck's attention (R 8463); and

- negotiated the MHV Operating Agreement and Management Agreement while at Indeck using Indeck's computers. (R 8463)

The trial court further found Dahlstrom violated his duty of loyalty when he encouraged Kelly Inns to look for a new job when Dahlstrom and DePodesta were preparing to leave, knowing that, if all three left, the damage to Indeck would be greater. (R 8463) Finally, the trial court noted DePodesta owed a duty not to actively exploit his position as an officer for his personal benefit and found he competed with Indeck before his resignation. (R 8465)

Despite these findings, the trial court did not require DePodesta and Dahlstrom to disgorge any of the $2.5 million in fees they received under the Management Agreement. (R 8465-66) Instead, it required them only to forfeit the salaries they received during the 7½ months from March 13, 2013 to their resignations. (R 8464)

Although no party argued that DePodesta's or Dahlstrom's fiduciary duties for the Merced transaction ended when they resigned, the trial court ruled any breaches of fiduciary duty ended upon their resignation. (R 8466) Finally, the court refused to impose a constructive trust on the 20-percent profit interest defendants have in MHV on the grounds it was speculative. (R 8467)

The Appellate Court's Ruling.

On December 30, 2019, the Appellate Court, Second District issued its Opinion (hereinafter "Op.") The appellate court reversed the trial court's directed finding as to Indeck's corporate opportunity claim. (Op. ¶71) As to Indeck's breach of fiduciary duty

claim, it affirmed the ruling that DePodesta's and Dahlstrom's fiduciary duties for the Merced transaction ended when they resigned. (*Id.* ¶80) It also affirmed the trial court's decision not to require DePodesta and Dahlstrom to disgorge the management fees they obtained under the deal they negotiated while at Indeck and not to impose a constructive trust over their 20-percent interests in MHV. (*Id.* ¶85) The court further determined that it would not review the trial court's determination that Indeck's Confidentiality Agreement was unenforceable because the disposition would not change the trial court's ruling on Count I. (*Id.* ¶89)

ARGUMENT

I. The appellate court properly applied controlling law in reversing the directed finding.

Defendants variously contend "[t]he appellate court's decision is inconsistent with the application of corporate opportunity law by this Court and every other appellate court," (Brf., p. 16), "[d]efendants are not liable for usurping a corporate opportunity because they did not take anything from Indeck," (*id.* at p.13), and "whether the former employee disclosed and tendered the opportunity to the former employer *** is not the beginning and end of the analysis." (*Id.* at p. 16) These statements are all incorrect.

Indeck, not the defendants, had the right to *first* decide whether to pursue the opportunity to develop projects with Merced and its affiliates in 2013, when DePodesta and Dahlstrom were Indeck employees and Indeck's business development group was intact. *That* opportunity belonged to Indeck and defendants took it. The speculation a hypothetical other opportunity existed for Indeck after defendants' breaches were discovered cannot overrule this Court's disclosure, tender and consent requirements.

This Court's controlling cases establish DePodesta's and Dahlstrom's failure to disclose and tender to Indeck the corporate opportunity that belonged to the company (1) immediately triggered defendants' corporate opportunity liability, (2) foreclosed them from benefiting from the opportunity they did not disclose, (3) and required defendants to return to Indeck all benefits they obtained from exploiting the opportunity.

A. This Court's controlling corporate opportunity jurisprudence.

This Court confirmed the essential points of its corporate opportunity doctrine in *Kerrigan*. It there held (1) an opportunity within the corporation's line of business belongs to the corporation, and (2) a fiduciary cannot exploit that same opportunity without fully disclosing and tendering it to the corporation. The Court's language is clear:

> if the doctrine of business opportunity is to possess any vitality, the corporation or association must be given the opportunity to decide, upon full disclosure of the pertinent facts, whether it wishes to enter into a business that is reasonably incident to its present or prospective operations. If directors fail to make such a disclosure and to tender the opportunity, the prophylactic purpose of the rule imposing a fiduciary obligation requires that the directors be foreclosed from exploiting that opportunity on their own behalf. *Kerrigan*, 58 Ill.2d at 28.

Liability under *Kerrigan* is straightforward and unambiguous: "the failure to disclose and tender an opportunity triggers corporate opportunity liability." Schaller, *The Origin and Evolution of the Third Party "Refusal to Deal" Defense in Illinois Corporate Opportunity Cases*, 46 J. Marshall L. Rev. 937, 957 (2013). Indeed, because no disclosure and tender was made in *Kerrigan*, no trial on liability was necessary. 58 Ill.2d at 31-32 ("While a remand is necessary in order for the trial court to ascertain the amounts to which the plaintiff is entitled and to determine what other relief should be granted, in the view we

take of this case, the question of defendants' liability is established on the basis of the pleadings and no trial is required.").

This Court reaffirmed *Kerrigan*'s strict rule just 10 days later in *Vendo Co. v. Stoner*, 58 Ill.2d 289 (1974). In *Vendo*, the plaintiff sought to purchase the rights to manufacture the Lektro-Vend vending machine – "the vending machine of the future" – and sent defendant Stoner to negotiate its acquisition. 58 Ill.2d at 304. Although president of the company, Stoner contended he had no real authority, arguing plaintiff "gave him the role of a mere figurehead." *Id.* Nor did Stoner acquire the opportunity for the plaintiff; instead, he secretly agreed with the Lektro-Vend's owner to finance its development. *Id.* Thus "Stoner had a foot in each camp" based on his "undisclosed individual interest in controlling the further development and *** sale of the Lektro-Vend ***." *Id.*

Noting the "strong indication that he actually misled the plaintiff while he was purportedly acting as plaintiff's agent with regard to plaintiff's possible acquisition of the Lektro-Vend," *Vendo* reaffirmed this Court's strong interest in maintaining the prophylactic purpose of fiduciary law. 58 Ill.2d at 304. While the plaintiff did not originally plead a corporate opportunity claim, this Court allowed it to amend its complaint to do so – and used the newly allowed allegations to affirm the substantial judgment from the second trial without a remand. *Id.*at 307-08. As in *Kerrigan*, the fiduciary's failure to disclose and tender the opportunity before he exploited it was the beginning and end of the liability analysis.

In *Mullaney Wells & Co v. Savage*, 78 Ill.2d 534 (1980), this Court reaffirmed *Kerrigan* and *Vendo* and held disclosure and tender are not enough before an employee may take an "opportunity which rightfully belongs to the corporation by which he is

employed." *Id.* at 546. In addition, the employee must also obtain the corporation's informed consent *Id.* at 549. In *Mullaney*, the employee Savage determined a proposed debt financing for a firm client would be "unfeasible unless buyers were also to be offered an option to purchase stock in the company at its then market price." 78 Ill.2d at 541. Realizing the potential of a debt-equity transaction, Savage negotiated a stock option for himself and a friend, Williams, and failed to disclose and tender the option to his employer. *Id.* at 542, 549-50. After his disloyalty was discovered, but before he could be fired, Savage "cleaned out his desk and departed, taking with him his files on the *** matter." *Id.* at 543. The day after he resigned, Savage exercised the option. *Id.*

This Court not only made clear in *Mullaney* the obligation to disclose an opportunity applies to employees, it also made clear *when* this obligation arises: *before* the employee starts negotiating the opportunity on his or her behalf. Explaining "when an agent *begins* his exploration of an investment possibility it may not be possible to determine what form it will ultimately assume[,]" this Court held "[i]t does not follow *** that Savage, while still remaining as an employee of the plaintiff, could then, in the appellate court's words, '*begin* to act on his own.'" (Emphasis added.) 78 Ill.2d at 548-49. It continued:

> To accord Savage the option of substituting himself as the investing party without the consent of the plaintiff is to place him in a position where his personal interests will conflict with his duties to his principal. The situation is in principle indistinguishable from that of a real estate broker engaged to sell property owned by the principal who, without full disclosure of all material facts, acquires an interest in the property himself. *Id.* at 549.

As in *Kerrigan* and *Vendo*, the fiduciary's failure to disclose and tender the opportunity in *Mullaney* was the beginning and end of the liability analysis. And like *Kerrigan* and *Vendo*, this Court truncated any further proceedings on remand: after

reversing the trial and appellate courts, it remanded the case with the direction to "overrule the defendants' exceptions to the master's report and to enter judgment in favor of the plaintiff." *Id.* at 555.

In *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill.2d 460 (1998), this Court also addressed a corporate opportunity issue when it described an allegation that departing members of a law firm usurped a corporate opportunity by hiring for their new firm persons who had interviewed with their former firm. This Court noted "[i]f established, this allegation could *** support a claim for breach of fiduciary duty." 181 Ill.2d at 476.

More recently, *Lawlor v. North American Corp.*, 2012 IL 112530, ¶69, cited *Mullaney* in reaffirming the duties and obligations employees owe their employers. In *Lawlor,* however, this Court reversed a judgment for compensatory and punitive damages for an employee's usurpation of a corporate opportunity by steering business to her then employer's competitor because "the record [was] entirely devoid of evidence to support the judgment in favor of North American." *Id.* at ¶71. While reversing the judgment on this basis, this Court recognized that liability existed had the disloyal employee breached her duties by steering business to a competitor of her employer.

B. Appellate court decisions that implement this Court's jurisprudence.

Defendants' argument that the "appellate court's decision is inconsistent with the application of corporate opportunity law by *** every other appellate court" is also wrong. (Brf, p. 16.) On the contrary, decisions of the appellate court uniformly hold that failing to disclose and tender a corporate opportunity is likewise the beginning and end of the liability analysis and disclosure and tender without consent are not enough.

In *Patient Care Services, S.C. v. Segal*, 32 Ill.App.3d 1021 (1st Dist. 1975), issued shortly after *Kerrigan* and *Vendo*, an officer set up a new corporation to compete with the plaintiff for a contract to provide emergency room services and obtained the contract with his new company. *Id.* at 1030. Even though the defendant competed openly for the contract with the plaintiff, disclosure alone was not sufficient to allow the fiduciary to usurp the opportunity. *Id.* at 1031-32. The First District reversed the trial court's judgment for the defendant, entered judgment in favor of the plaintiff, and remanded the case with directions to "impress a constructive trust on the business assets of defendants and to order an accounting in accordance with the views expressed in this opinion." *Id.* at 1034.

The failure to disclose and tender resulted in liability in *Lindenhurst Drugs, Inc. v. Becker,* 154 Ill.App.3d 61, 71 (2d Dist. 1987). There a director and officer of the plaintiff secretly purchased a competing drug store his corporation unsuccessfully attempted to buy. *Id.* at 64. The Second District held "defendant cannot use the fact that he originally disclosed the opportunity to plaintiff, who then made a low initial offer, to excuse his breach of fiduciary duties" by failing to disclose his intention to make a higher offer for the property. *Id.* at 70. Instead, the defendant had a fiduciary duty "to disclose to the corporation that [the seller] was willing to negotiate for the sale of the *** store if the price [the seller] was asking was met." *Id.* at 71. The Second District thus held the defendant breached his fiduciary duties "by taking an opportunity belonging to the plaintiff for himself" without giving the plaintiff "the opportunity to make a decision based upon the pertinent facts" and affirmed the imposition of a constructive trust. *Id.* at 71.

In *Levy v. Markal Sales Corp.*, 268 Ill.App.3d 355, 367 (1st Dist. 1994), the First District determined to "apply the law of *Kerrigan* as explained in *Vendo* and *Mullaney*"

rather than follow pre-*Kerrigan* cases. Insisting the fiduciaries "could not take advantage of the *** opportunity without first offering it to Markal and having Markal reject it[,]" the First District held that "Markal should have been 'given the opportunity to decide that question for itself.'" *Id.* at 368 (citing *Vendo*, 58 Ill.2d at 305). It further held "[t]he trial judge properly determined that Gust and Bakal breached their fiduciary duties to Markal by failing to give Markal that opportunity." *Id.* Again, failing to disclose and tender triggered corporate opportunity liability.

Anest v. Audino, 332 Ill.App.3d 468 (2d Dist. 2002), reaffirmed this rule. There, the Second District reversed a directed finding for the defendants by holding that corporate fiduciaries were estopped from denying that an opportunity developed with corporate assets belonged to the company and should have been disclosed and tendered. *Id.* at 478.

In *Advantage Marketing Group, Inc. v. Keane*, 2019 IL App (1st) 181126, ¶¶38, 40, the First District most recently reaffirmed an employee has a fiduciary duty to fully disclose, tender and obtain his employer's consent before exploiting an opportunity that belongs to the corporation. Notably, *Advantage Marketing* cited *Kerrigan, Mullaney*, *Lindenhurst Drugs*, and *Anest. Id.* at ¶¶23, 29, 35.

Every corporate opportunity decision of this Court since *Kerrigan*, and all subsequent decisions of appellate courts that follow *Kerrigan* and address actual corporate opportunities, hold the corporate opportunity belongs to the corporation. These decisions also hold the corporation has the first and prior right to decide, after full disclosure and tender of the opportunity, whether to exploit that particular opportunity for itself, and whether to grant consent to an employee's taking the opportunity. These decisions make

clear the failure to disclose and tender the opportunity triggers the fiduciary's liability for taking it.

C. The appellate court's decision properly applied *Kerrigan*, *Mullaney*, *Lawlor*, and the cases that follow them.

In reversing the trial court's directed finding, the appellate court properly applied *Kerrigan*, *Mullaney*, *Lawlor,* and the appellate court cases that follow them. It correctly noted the corporate opportunity doctrine "prohibits a corporation's fiduciary from taking advantage of business opportunities that *belong* to the corporation." (Emphasis added.) (Op. ¶60) Following *Mullaney*, the appellate court noted that even "after the fiduciary discloses and tenders the corporate opportunity, he or she cannot begin to act on his or her own 'without the consent' of the corporation." *Id.* (citing *Mullaney*, 78 Ill.2d at 549, and *Advantage Marketing*, 2019 IL (1st) 181126, ¶¶40-42).

The appellate court accurately described the test for determining a corporate opportunity: "[a] corporate opportunity exists when a proposed activity is reasonably incident to the corporation's present or prospective business and is one in which the corporation has the capacity to engage." *Id.* at ¶61 (quoting *Lindenhurst Drugs*, 154 Ill.App.3d at 67). This test echoes *Kerrigan*. See 58 Ill.2d at 28 ("the corporation *** must be given the opportunity to decide *** whether it wishes to enter into a business that is reasonably incident to its present or prospective operations.")

The appellate court further noted the defendants' "judicial admission that the opportunity 'to develop projects with Carson Bay and its affiliates' was 'an activity that was incident to Indeck's present or prospective business[,]'" and was therefore in Indeck's line of business. (Op. ¶64) The appellate court noted (and the trial court found) "DePodesta and Dahlstrom developed this opportunity for themselves by using Indeck's corporate

assets." *Id.* The appellate court further noted the opportunity was in Indeck's line of business and that Indeck had the capacity to engage in the same. *Id.* ¶¶64-65. [6] Indeed, because corporate assets and confidential information were used to develop the opportunity, DePodesta and Dahlstrom were estopped from denying that the opportunity they exploited *belonged* to Indeck. See *Anest*, 332 Ill.App.3d at 478. "Based on the foregoing," the appellate court held, "it is a rather straightforward conclusion that the potential to develop projects with Merced and its affiliates in Texas was a corporate opportunity for Indeck." (Op. ¶65)

The appellate court then turned to whether DePodesta and Dahlstrom disclosed and tendered to Indeck the opportunity that belonged to their employer. It noted that DePodesta and Dahlstrom "admitted (and the trial court found) that they *never* disclosed it *any* time, before or after they resigned." (Emphasis in original.) *Id.* at ¶64. It further noted, "[s]ince they did not disclose it, they did not tender any such opportunities to Indeck or obtain its consent to their taking the same." (*Id.*) This established more than a *prima facie* claim that DePodesta and Dahlstrom usurped Indeck's corporate opportunity; it established Defendants' liability for usurping that very opportunity.

Defendants' repeatedly proclaim that nothing was taken from Indeck, apparently hoping that repeating this false statement will cause this Court to believe it is true. Something, however, was taken from Indeck: the specific opportunity that belonged to Indeck to develop projects with Merced and its affiliates in 2013, with Indeck's business

[6] In fact, Dahlstrom admitted on the first day of trial that the opportunity to develop projects in ERCOT with affiliates of Merced was a "proposed activity which Indeck had the capacity to engage" and the trial court entered this as a finding of fact. (R. C6816 ¶ 122; R. 8404)

development team intact. *That* opportunity was forever taken by DePodesta and Dahlstrom, who breached their fiduciary duties "by taking an opportunity belonging to plaintiff for [themselves]" without giving Indeck "the opportunity to make a decision based on the pertinent facts." *Lindenhurst Drugs*, 154 Ill.App.3d at 71.

The appellate court's ruling on the directed finding faithfully applies this Court's controlling authority, is consistent with decisions from other courts that follow this same authority, and should be affirmed.

D. The appellate court properly held the trial court erred when it failed to focus on whether the Merced opportunity was in Indeck's line of business and whether it was disclosed, tendered and consented to.

Stare decisis requires that appellate and trial courts faithfully follow this Court's decisions. *Ocasek v. Children's Home & Aid Society of Illinois,* 229 Ill.2d 421, 439 (2008). The trial court, however, chose to ignore this Court's controlling corporate opportunity precedents. Because the appellate court not only cited these cases but followed them, its ruling reversing the trial court should be affirmed.

This Court has emphasized its opinions must be followed. "Where the Supreme Court has declared the law on any point, *it alone can overrule and modify its previous opinion*, and the lower judicial tribunals are bound by such decision and it is the duty of such lower tribunals to follow such decision in similar cases. [Citations.]" (Emphasis in original.) *Price v. Phillip Morris, Inc.*, 2015 IL 117687, ¶39; see also *Blumenthal v. Brewer*, 2016 IL 118781, ¶61 ("The appellate court had no authority to depart from our decision. It could question *Hewitt* and recommend that we revisit our holding *** but it could not overrule it."); *Yackich v. Aulds*, 2019 IL 123667, ¶13 (while "free to question the

continued vitality" of controlling authority, "trial court committed serious error by not applying it.").

This Court's corporate opportunity case law has been consistent and unambiguous. From *Kerrigan* through *Vendo* through *Mullaney,* this Court's requirement that fiduciaries fully disclose, tender and obtain their employers' consent before exploiting the very corporate opportunity they concealed has been clear. Moreover, this Court has cited this authority thus signaling its continuing vitality. See *Lawlor,* 2012 IL 112530, ¶69 (citing *Mullaney*, 78 Ill.2d at 546-47, and *E.J. McKernan Co. v. Gregory*, 252 Ill.App.3d 514, 529 (2d Dist. 1993)).

Notwithstanding Indeck's continuing reference to this Court's controlling precedents, the trial court ignored them. Indeed, it failed to cite one corporate opportunity decision of this Court or the appellate court in its rulings, let alone discuss their holdings on disclosure, tender and consent. In reviewing this record, the appellate court held:

> the trial court erroneously focused on the fact that Merced did not promise HEV (in either the Operating or the Management Agreement) an exclusive development agreement. The proper focus was whether the opportunity DePodesta and Dahlstrom took was within Indeck's line of business (it was) and whether it was disclosed, tendered, and consented to (it was not). (Op. ¶69)

Because the appellate court properly followed this Court's decisions and the trial court did not, the order reversing the trial court's directed finding should be affirmed.

E. Because the trial court's directed finding is otherwise unreasonable, arbitrary, and not based on evidence, the appellate court's reversal should be affirmed.

The trial court committed error when it refused to apply controlling precedent which required DePodesta and Dahlstrom to disclose, tender and obtain Indeck's consent or "be foreclosed from exploiting that opportunity on their own behalf." *Kerrigan*, 58 Ill.2d

at 28. It also erred in granting a directed finding that was unreasonable, arbitrary, and not based on evidence. The reversal of the trial court's directed finding should be affirmed on that basis as well.

Defendants' motion for directed finding argued two fundamentally inconsistent things were simultaneously true: (1) "[t]here is no evidence in this case that there was ever a 'funding opportunity' available to Indeck" (C 10435), and (2) "[t]he Individual Defendants did not take anything that was and is not equally available to Plaintiff." (C 10436) When the trial court granted defendants' motion, it stated the "*argument* that no funding opportunity was usurped and that any funding opportunity that Indeck *might [have] had* in 2013 is still available" was "persuasive." (Emphasis added.) (R 3675)[7]

Even though the record shows the trial court accepted an "argument" and made no factual finding when granting defendants' motion, on reconsideration the trial court incorrectly claimed it previously made a finding of fact. Wrongly stating "the Court found that any funding opportunity that was available to Indeck in 2013 was still available to Indeck at the time that the Court granted the motion for directed finding[,]" (R 7638), the trial court then commented Indeck "never challenged the Court's finding that the opportunity was still available to Indeck at the time of the directed finding." (*Id.*) Since no finding was made when the motion was granted, there was no finding for Indeck to challenge on reconsideration. Nonetheless, based on these false premises, defendants argue

[7] This "argument" also contradicts the finding of fact the trial court entered that Defendants never disclosed or tendered any opportunity to Indeck. (C 6826 ¶159; R 8410) Since no disclosure of the opportunity was ever made to Indeck, any ruling the opportunity was nonetheless "available" to Indeck in 2013 is unreasonable, arbitrary, and not based on evidence.

Indeck never "challenged this evidence nor the fact that the Funding Opportunity is, and always was, available to it." (Brf., p. 18) Since defendants admitted "[t]here is no evidence in this case that there was ever a 'funding opportunity' available to Indeck" (C 10435), there is and was no such evidence to challenge.

Beyond the absence of evidence for this proposition, the appellate court rightly ruled "it is immaterial whether additional opportunities were (or still are) available for Indeck to partner with Merced or its affiliates." (Op. ¶70) Any such opportunity, if it existed, is not "that opportunity" which *Kerrigan* foreclosed DePodesta and Dahlstrom from exploiting. 58 Ill.2d at 28. Nonetheless, it is unreasonable and arbitrary to conclude that the mere absence of an exclusivity clause in the Management Agreement or the LLC Agreement means an additional, equivalent opportunity is equally available to Indeck. See *Lawlor*, 2012 IL 112530, ¶72 (ruling evidence "too speculative and wholly insufficient to conclude" plaintiff attempted to divert business while employed); *Id.* ¶70 (reviewing court will reverse a trial court's judgment on a manifest weight of the evidence standard "when an opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on evidence.").

Indeck was wronged by its fiduciaries' misconduct. It was entitled to expect its employees would honor the obligations this Court recognized. It was entitled to expect its employees would disclose, tender and seek Indeck's consent before they exploited the opportunity in Indeck's line of business, developed with Indeck's assets, which belonged to Indeck. When it is defendants who breached their duties, it is inappropriate and unfair to require Indeck to prove or disprove whether opportunities other than "that opportunity," which Kerrigan foreclosed them from exploiting, exist and were available in some form.

By fashioning a new rule that circumvented this Court's disclosure, tender and consent obligations, the trial court allowed disloyal fiduciaries to breach their duties without consequence and required Indeck to prove a negative. By ignoring *Kerrigan*, *Vendo* and *Mullaney*, as well as controlling appellate court decisions, the trial court's decision frustrated the deterrent purpose of fiduciary duty law and the doctrine of *stare decisis.*

This Court identified what happens when fiduciaries fail to disclose and tender corporate opportunities *before* they exploit them: the doctrine of business opportunity is deprived of "any vitality." *Kerrigan*, 58 Ill.2d at 58. Because the trial court's directed finding is also arbitrary, unreasonable, and not based on evidence, the appellate court's reversal of it should be affirmed. *Lawlor*, 2012 IL 112530, ¶70.

F. The appellate court properly determined defendants were foreclosed from exploiting the very opportunity they failed to disclose and tender to Indeck.

The appellate court properly determined that the prophylactic purpose of fiduciary duty law foreclosed Defendants from exploiting the very opportunity they failed to disclose and tender to Indeck. To keep the benefits they wrongly obtained, defendants misrepresent the appellate court's Opinion, ignore *Kerrigan*'s precise holding, and ignore the reasons for this Court's rule.

Defendants state "[a]though the appellate court acknowledged that Defendants took no opportunity from Indeck, it still found that Defendants' actions constituted a wrongful usurpation." (Brf., p. 20) This statement is false. The appellate court's opinion did not acknowledge defendants took no opportunity from Indeck. On the contrary, it stated "the opportunity that DePodesta and Dahlstrom pursued (according to Indeck's case-in-chief)

was clearly within Indeck's line of business, and their failure to disclose it to Indeck precluded Indeck from determining whether to pursue it." (Op. ¶68)

In holding the defendants exploited this opportunity and thus are liable to Indeck for the benefits they obtained (Op. ¶71 n.4), the appellate court followed *Kerrigan*, which expressly requires this result. This Court chose its language in *Kerrigan* carefully. The word "prophylactic" in the dictionary sense means "preventive" or "intended to prevent disease." When used with the "rule imposing a fiduciary obligation" it refers to the primary purpose of fiduciary duty law: "deterrence of disloyalty, not simply compensation of victims." *Kerrigan*, 58 Ill.2d at 28; Schaller, *Corporate Opportunity and Corporate Competition in Illinois, a Comparative Discussion of Fiduciary Duties*, 46 J. Marshall L. Rev. 1, 12 (2012).

Preventing the "disease" of fiduciary disloyalty does not merely "suggest" a strong remedy; this Court ruled it "requires" one. Additionally, "foreclosed" means "prevented." Foreclosing a fiduciary from "exploiting" the opportunity means preventing him or her from "exploiting" the opportunity. And, eliminating all doubt concerning the precise opportunity the prophylactic purpose forecloses the disloyal fiduciary from exploiting, *Kerrigan* confirms it is "*that* opportunity," *i.e.,* the same opportunity the fiduciary fails to disclose and tender. 58 Ill.2d at 28.

Kerrigan's holding that DePodesta and Dahlstrom are foreclosed from exploiting the Merced opportunities they failed to disclose and tender is perfectly in accord with settled law in Illinois and elsewhere. See, *e.g.*, *Winger v. Chicago City Bank & Trust Co.*, 394 Ill. 94, 116 (1946) (quoting *Davoue v. Fanning*, 2 Johns.Ch 252, 270 (1816) (where one is readily seized with the inclination to serve his own interests at the expense of those

for whom he is entrusted, "[n]othing less than incapacity [to benefit] is able to shut the door to temptation, where the danger is imminent and the security against discovery is great")); *Graham v. Mimms*, 111 Ill.App.3d 751, 762-63 (1st Dist. 1982) (noting "wise public policy that, for the purpose of removing all temptation, extinguishes all possibility of profit flowing from the breach of the confidence imposed by the fiduciary relation"); *Guth v. Loft, Inc.*, 5 A.2d 503, 511 (Del. 1939) (if a fiduciary claims all the benefits of seizing a corporate opportunity, "the corporation may elect to claim *all of the benefits of the transaction for itself*, and the law will impress a trust in favor of the corporation upon the property, interests, and profits so acquired.") (Emphasis added.)

Despite *Kerrigan*'s clear language, and despite defendants' admission that their salary forfeiture was for "a breach of fiduciary [duty] claim [which] is separate from a corporate usurpation claim[,]" they argue that the 7½ month salary forfeiture the trial court ordered fulfilled the prophylactic purpose of fiduciary duty law. (Brf., p. 20) This cannot be taken seriously. Nor is there any inconsistency in awarding both salary forfeiture and requiring disgorgement of all benefits the fiduciary obtained.

This Court's decision in *Vendo* confirms both propositions. There this Court held the disloyal employee must forfeit his salary during the period of his disloyalty as well as return to the plaintiff all benefits obtained from the opportunity he usurped. *Vendo*, 58 Ill.2d at 314. This Court specifically rejected limitations on recovery that "would mean that a fiduciary could violate his duty without incurring any risk" and which "operated only to restore him to the same position he would have been in had he faithfully performed his duties." *Id.* at 305-06. It also cited authority recognizing a fiduciary may not keep any benefits of his breach. *Id.* at 305 (citing Restatement (Second) of Agency §407 ("If an agent

has received a benefit as a result of violating his duty of loyalty, the principal is entitled to recover from him what he has so received, its value, or its proceeds, and also the amount of damage.").

While DePodesta and Dahlstrom are guilty of breaching their fiduciary duties to Indeck, they are in much better positions than if they had faithfully performed their duties. Both received millions in fees and other benefits from breaching their duties of loyalty. The argument that the prophylactic purpose of fiduciary duty law is satisfied by an award that requires defendants to pay *none* of the benefits they received from breaching their duties completely ignores settled precedent and destroys the deterrent purpose of fiduciary law. The appellate court's ruling "that the measure of damages on the usurpation claim [is] the benefits to the defendants" should be affirmed. (Op. ¶71 n.4)

G. No reported Illinois decision requires a concrete and identifiable corporate opportunity before fiduciary obligations attach but the opportunity defendants negotiated and exploited nonetheless satisfies the standard they propose.

Defendants argue Indeck did not submit evidence of a "concrete, identifiable opportunity necessary to qualify as an actionable corporate opportunity[.]" (Brf., p. 21) Because the law does not require this showing, and because Indeck met this standard if it did, their objections are without merit.

1. Controlling law does not require an opportunity to be concrete and identifiable before a fiduciary must disclose, tender and obtain consent.

While defendants argue a "characteristic fact pattern followed in Illinois corporate opportunity doctrine cases includes an identifiable, concrete opportunity that an agent takes for themselves[,]" they fail to cite one reported decision that imposes such a requirement.

(Brf., pp. 21-22) *Kerrigan* does not. On the contrary, it indicates the "possibility" or "intention" a fiduciary may exploit an opportunity in the company's line of business is enough to trigger disclosure and tender obligations. See 58 Ill.2d at 28 ("no claim is made that Unity was informed of the *possibility* that it might enter into the insurance business or of the *intention* of the defendants to do so if Unity did not."). (Emphasis added.)

This Court also made no mention of a concrete, identifiable opportunity requirement in *Mullaney*. Instead, it held the obligation to disclose arises with the beginning of the employee's disloyalty, before negotiations over the potential opportunity commence. See 78 Ill.2d at 548 (noting "when an agent *begins* his exploration of an investment *possibility* it may not be possible to determine what form it will ultimately assume.") (Emphasis added.); *Id.* at 548-49 ("It does not follow, however, that Savage, while still remaining as an employee of the plaintiff, could then, in the appellate court's words, '*begin* to act on his own.'"). (Emphasis added.)

Following *Kerrigan* and *Mullaney*, appellate courts have held a corporate opportunity is a "*proposed activity* *** reasonably incident to the corporation's present or prospective business and is one in which the corporation has the capacity to engage." (Emphasis added.) *Lindenhurst Drugs*, 154 Ill.App.3d at 67; *Anest*, 332 Ill.App.3d at 478; *Advantage Marketing*, 2019 IL App (1st) 181126 at ¶23. A "proposed activity" is of course "proposed," *i.e.* one that is different in some way from an activity or business in which the corporation had been engaged. This is not the same as a "concrete, identifiable deal." The argument that a concrete, identifiable opportunity must first exist before disclosure, tender and consent obligations attach is without merit and should be rejected.

2. Indeck proved the existence of a concrete, identifiable opportunity.

Even if proof of a concrete and identifiable deal were required, Indeck provided ample evidence of this. Indeck established defendants knew Merced was willing to finance the development of greenfield projects in ERCOT before they attended the July 24, 2013 meeting they scheduled with Lagowski and Garth, ostensibly to determine whether Indeck would proceed with multiple sites at once or would proceed with its plan of building one project first. (C 6811 ¶101; R 8407) This alone shows a sufficiently concrete and identifiable opportunity requiring disclosure, tender and Indeck's consent before DePodesta and Dahlstrom "began to act on their own" and negotiate it for themselves.

The "standard MNDA" DePodesta and Dahlstrom prepared on behalf of Halyard Energy Ventures, LLC before the July 24 meeting to protect negotiations regarding the opportunity confirmed its concrete and identifiable nature. The MNDA recited "[t]he Parties desire to exchange certain proprietary and commercially sensitive information in connection with a possible business relationship relating to the development of a portfolio of power plants in the ERCOT region ***." (E 341) Since the opportunity was sufficiently concrete and identifiable to enter into an agreement to keep discussions and information exchanges concerning it secret, it was sufficiently concrete and identifiable to require disclosure, tender and consent.

The opportunity became even more concrete on August 7, 2013, the day after DePodesta and Dahlstrom presented the Halyard Energy PDS they developed on Indeck time, with Indeck information, and with Indeck assets. In an email to Vroege, Dahlstrom wrote "we would like to move forward in discussions regarding a potential partnership."

(E 369) Dahlstrom recognized the opportunity would become more concrete when he wrote "the next step would be for EBF to draft a proposed letter agreement." (*Id.*)

The opportunity became more concrete and identifiable still on August 20, 2013, when DePodesta and Dahlstrom wrote Vroege that "we have enjoyed the discussions to this point and feel as though we are close to coming to terms regarding the LOI." (E 408). Expressly acknowledging they were discussing an "opportunity[,]" DePodesta and Dahlstrom wrote "[t]he intent of this letter/agenda is to help us move forward with this *opportunity* as efficiently as possible." (Emphasis added.) (*Id.*)

The opportunity to build projects in Texas with Merced was certainly concrete and identifiable when DePodesta and Dahlstrom signed the LOI on August 31, 2013 to develop "three (3) natural gas fired, simple cycle F-class power plant sites within the state of Texas (the "Development Portfolio")." (E 426-31) And the opportunity was set in stone on October 30, 2013, when Merced's general counsel sent DePodesta, Dahlstrom and their attorney the final version of LLC Agreement. (C 6823-24 ¶ 150; R 8409) They signed this version days after they resigned. (*Id.*)

Finally, it is worth noting while defendants contend Indeck has a heavy burden of showing a concrete and identifiable deal to impose corporate opportunity liability on them, they inconsistently argue the mere lack of an exclusivity clause in the LLC Agreement is all that is needed to show a corporate opportunity was available to Indeck. (Brf., p. 17) They cannot have it both ways.

If the case law required Indeck prove a concrete, identifiable opportunity in its line of business – it does not – Indeck nonetheless satisfied any such requirement. Defendants'

argument that Indeck failed to introduce evidence of a sufficient corporate opportunity is without merit and should be rejected.

3. There is no conflict between the appellate court's opinion and the First District's distinguishable decision in Cooper Linse.

Defendants' petition for leave to appeal contended the appellate court's decision here "creates an explicit conflict" with the First District's decision in *Cooper Linse Hallman Capital Management, Inc.. v. Hallman*, 368 Ill.App.3d 353 (1st Dist. 2006). (PLA, p. 15) Missing from defendants' brief is any coherent argument based on *Kerrigan* and its progeny of why *Cooper Linse* accurately followed controlling law on corporate opportunity and thus is in explicit conflict with the appellate court's opinion. Defendants nonetheless contend that while the appellate court did distinguish the First District's decision, "[t]he appellate court failed to meaningfully distinguish *Cooper Linse.*" (Brf., p. 19) A review of *Cooper Linse* makes apparent it is distinguishable and no conflict exists between the First and Second Districts.

Among key differences, *Cooper Linse* does not involve an actual "corporate opportunity," either under the definition of the term based on controlling case law or the new one defendants would impose. In *Cooper Linse*, the plaintiff investment advisor sold a market timing methodology known as the "Rydex sector fund." 368 Ill.App.3d at 355-56. Cooper Linse had no written confidentiality or non-compete agreements with the employees although it contended it had oral confidentiality agreements with them, which they denied. 368 Ill.App.3d at 355. When the defendants resigned, started a new business, and advertised their personal Rydex sector fund track records, Cooper Linse sued and

argued the former employees "usurped its corporate opportunity to capitalize on its success with its Rydex sector fund." *Id.* at 359.

"Capitalizing on the success" of its former employees' sector fund trading at best means selling a product the corporation sold before. This, however, does not fit the definition of a "corporate opportunity" under this Court's existing case law. Those cases make clear a corporate opportunity is something that is new and would occur in the future. *Lindenhurst Drugs*, 154 Ill.App.3d at 67; *Anest*, 332 Ill.App.3d at 478 (2d Dist. 2002); *Advantage Marketing* 2019 IL App (1st) 181126, ¶23 (a corporate opportunity is a "*proposed activity* reasonably incident the corporation's present or prospective business *** in which the corporation has the capacity *to engage*.") (Emphasis added.) Notably, *Cooper Linse* does not cite *Kerrigan, Mullaney, Lindenhurst Drugs, Anest*, or any other corporate opportunity case. Nor is capitalizing on the success of an existing product a "concrete and identifiable opportunity," which defendants now argue is required to show a corporate opportunity. (Brf., p. 22)

What was really at issue in *Cooper Linse* is that the plaintiff, which had no non-compete or confidentiality agreements with its former employees, sought to prevent them from competing by attempting to fashion a corporate opportunity claim that did not exist into a non-compete, trade secret claim. Understood in that context, the "corporate opportunity" ruling in *Cooper Linse* makes sense.

At least one commentator has noted that other aspects of *Cooper Linse* make less sense. See Schaller, *Corporate Opportunity*, 46 J. Marshall L. Rev. at 22, n. 98 (noting the decision "excusing fiduciary's misuse of company computers to prepare business plan for rival start-up firm, on the ground that such 'conduct did not rise to the level of breach of

their fiduciary duties' – even though all Illinois cases cited by the court held to the contrary with respect to such conduct ***.").

Notwithstanding this objection, *Cooper Linse* is distinguishable from this case on its own terms. The defendants there "did not use and steal property belonging to plaintiff to operate its rival business nor did their new corporation actually begin doing business while they were still employed by plaintiff." 368 Ill.App.3d at 362. The trial court found otherwise here. The defendants in *Cooper Linse* "did not actively exploit their position as employees *** to establish a rival business." *Id.* And while the First District held the defendants "simply did not participate in the monkey business participated in by the defendants in the discussed cases" (*id.*), the same cannot be said of DePodesta and Dahlstrom here.

There is no conflict between the appellate court's opinion and *Cooper Linse* on the issue of corporate opportunity. Because *Cooper Linse* is otherwise distinguishable, all defendants' arguments based on that case should be rejected.

H. The corporate opportunity doctrine applies to all fiduciaries of the corporation.

Defendants contend the corporate opportunity doctrine only "applies to fiduciaries with authority and control who are subject to the *heightened fiduciary duties,* typically associated with and corporate officer or member [sic] of the board of directors." (Emphasis in original.) (Brf., p. 25) They are wrong. The false contention that defendants were not "fiduciary enough" is baseless and should be rejected.

1. Standard agency doctrine defines the duty of loyalty *employees* owe their employers, without reference to any authority and control.

Defendants concede no decision by this Court or any appellate court actually requires a fiduciary to have a significant level of authority or control before corporate opportunity obligations attach. (Brf., p. 26) (contending courts have so applied the doctrine "without specifically delineating this as a requirement.") Defendants nonetheless maintain courts have implicitly imposed this requirement and ask this Court to do so explicitly. (*Id.*) Because it is clear this Court has imposed corporate opportunity liability on employees without any requirement of substantial authority and control, and because this requirement is inconsistent with its controlling cases and is otherwise unworkable, defendants' request to change the law should be rejected.

When this Court confirmed in *Mullaney* that corporate opportunity obligations apply to employees as well as directors and officers, it did so without requiring proof the employee had authority and control. Indeed, this Court suggested in *Mullaney* that these obligations had always applied to employees. (Emphasis added.) 78 Ill.2d at 545-46 (noting its prior cases held "it is a breach of fiduciary obligation for a *person* to seize for his own advantage a business opportunity which rightfully belongs to the corporation by which he is employed."). Further emphasizing this point, and citing *Kerrigan*; *Vendo*; *Shlensky v. South Parkway Building Corp.*, 19 Ill.2d 268 (1960); and *Paulman v. Kritzer*, 38 Ill.2d 101 (1967), this Court stated "[a]lthough they do not so limit the rule, the cases just cited do in fact involve defendants who are corporate officers and directors ***." *Mullaney*, 78 Ill.2d at 546.

With these cases in mind, this Court agreed in *Mullaney* that Savage, although neither an officer nor a director, nonetheless owed his employer fiduciary duties. 78 Ill.2d at 546. This Court so concluded citing cases outside the corporate context which

recognized the fiduciary duties an agent owes a principal. *Id.*[8] *Mullaney* then expressly held Savage's fiduciary duty to his employer derived from "standard agency doctrine[,]" which imposes a duty of loyalty on an *agent* "to act solely for the benefit of the [principal] in all matters connected to the agency and not to compete with the [principal]." *Id.* at 546-47 (citing Restatement (Second) of Agency, §§ 387, 393). "Standard agency doctrine" does not presuppose the agent has the power and authority to control the principal, as defendants' rule would require. It presupposes precisely the opposite: the principal has the power to control the agent.[9]

Since this Court gave its reasons for imposing corporate opportunity liability on Savage, an employee, defendants are left to argue this Court did not mean what it said in *Mullaney*. They thus contend this Court held Savage owed his employer a fiduciary duty because it secretly determined Savage exercised substantial authority and control over his employer. (Brf., p. 27) Contrary to defendants' untethered interpretation, Indeck believes this Court gave its real reasons when it held Savage, like DePodesta and Dahlstrom, owed his employer a duty of loyalty as an employee/agent under standard agency doctrine.

While defendants' argument regarding *Mullaney* is legally unsupportable, it is also factually unsupportable. Since this Court emphasized Savage was an employee, and not an

---

[8] *Mullaney*, 78 Ill.2d at 546 (citing *Rieger v. Brandt*, 329 Ill. 21, 27-28 (1928) (fiduciary relationship existed between agent and principal regarding sale of property)); *Lerk v. McCabe*, 349 Ill. 348, 360 (1932) (fiduciary relationship based on trust and confidence reposed by principal to her agents); *Moehling v. O'Neil Construction Co.*, 20 Ill.2d 255, 267 (1960) (citing Restatement of Agency §90 (agent who failed to disclose all material facts to her principal concerning transaction breached duty)).

[9] *See* Restatement (Second) of Agency §1(1) (1958) ("Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act.")

officer or director, defendants argue he was "much more than a rank-and-file employee" because "he established and directed an entire division of the company and shared in 50% of the profits." (Brf., p. 27) This overlooks Savage's unsuccessful attempt to argue he was not even an employee and was instead an independent contractor. *Mullaney, Wells & Co. v. Savage*, 66 Ill.App.3d 853, 857 (1st Dist. 1978). It also fundamentally misapprehends Savage's position, as the appellate court's description shows:

> Savage started working immediately [after his agreement was signed], and was paid his $6,000 per year draw. Savage was given a position in the company's conference room from which to operate, and was later given a stenographer's desk. When the conference room was being used, Savage had to vacate. Savage's supervisor testified before the master that Savage's primary function was "go out and find deals." Accordingly, he spent the majority of his time outside the office. Savage testified he had no regular hours and that no control by the company was exercised over him. *Mullaney,* 66 Ill.App.3d at 857.

Savage was essentially a salesman who received a draw against commissions with no office, no desk (and later a small one), who reported to a supervisor (and thus was not even his own boss), who argued he was not even an employee. Nonetheless, this Court held Savage's fiduciary duties as employee/agent required him to disclose, tender and obtain consent before he began negotiations to take for himself "a business opportunity which rightfully belongs to the corporation by which he is employed." *Mullaney*, 78 Ill.2d at 546.

This Court's decision in *Lawlor*, 2012 IL 112530, ¶4, reaffirmed this rule. Similar to the position Savage occupied, Lawlor was a "commission-based salesperson" whose "role was to generate business***." Nonetheless this Court reaffirmed the basis for imposing corporate opportunity liability on an employee remains the same: "[e]mployees as well as officers and directors owe a duty of loyalty to their employer." *Id.* at ¶69 (citing *Mullaney*, 78 Ill.2d at 546-47, and *E.J. McKernan*, 252 Ill.App.3d at 529). If there were

any doubt as to the degree and nature of this duty, *Lawlor* eliminated that too, reaffirming "a fiduciary cannot act inconsistently with his agency or trust and cannot solicit his employer's customers for himself." *Id.* (citing *ABC Trans National Transport, Inc. v. Aeronautics Forwarders, Inc.*, 62 Ill.App.3d 671, 683 (1st Dist. 1978) ("While acting as an agent or employee of another, one owes the duty of fidelity and loyalty; accordingly, a fiduciary cannot act inconsistently with his agency or trust ***.")).

Similarly, while *Advantage Marketing*, 2019 IL App (1st) 181126, ¶33, discussed the nature and duty of the defendant's duties, the First District there followed *Mullaney* and *E.J. McKernan* and specifically held the corporate opportunity doctrine applied to the defendant because, "as a mere 'employee' *** [Keane] owed a fiduciary duty to AMG."

Because this rule is clear, this Court should reject defendants' request to impose some variable, unworkable standard that would require a case-by-case analysis whether each employee had substantial authority and control over significant business decisions. Instead, this Court specifically should reaffirm (1) that employees, like officers and directors, owe a duty of loyalty to their employers to act solely for the benefit of the their employers in all matters connected to their agencies; and (2) consistent with that duty, employees cannot take opportunities in their employers' line of business that belong to their employer without disclosure, tender and obtaining consent.

2. The duty of loyalty officers and directors owe their corporations is based on agency and trust principles, and not on any alleged significant authority and control.

Even though defendants contend they "never disputed that they were fiduciaries to Indeck" (Brf., p. 28 n.4), they argue the appellate court erred when it "held that Defendants were subject to the corporate opportunity doctrine because they had no authority and

control over Indeck's substantial business decisions." (Brf., p. 26) Since this Court rejected this argument with respect to employees in *Mullaney*, the argument must be rejected for officers too. Nonetheless, DePodesta argues he "was an officer in title only" and thus could usurp corporate opportunities belonging to Indeck without consequence. (Brf., p. 30) Because this Court has already rejected the "officer in title only" argument in *Vendo*, and because officers' and directors' fiduciary obligations to their corporations are not based on an undefined level of authority and control, these arguments should also be rejected.

In *Vendo*, Stoner argued although he held the title of president, "plaintiff did not take advantage of Stoner's talents and gave him the role of a mere figurehead." *Vendo*, 58 Ill.2d at 304. This Court affirmed the award against Stoner anyway.[10]

As this Court later made clear when it referred to "fiduciaries" in *Lawlor*, an officer's duty and a director's duty of loyalty to the corporation he or she serves is based on agency principles. *Lawlor*, 2012 112530, ¶69 ("a fiduciary cannot act inconsistently with his agency or trust ***."). An earlier decision of this Court also held a director's fiduciary duty derived from trust and agency law. See *Dixmoor Golf Club v. Evans*, 325 Ill. 612, 616 (1927) (directors are "subject to the general rule, in regard to trusts and trustees" and are "subject to the ordinary rule that an agent to sell cannot sell to himself ***."). Either way, the existence of fiduciary duties is not based on individualized

[10] Defendants argue Stoner was a controlling shareholder as well. (Brf., p. 27) Neither this Court's decision nor the two appellate court decisions state this. While this Court and the earlier appellate court decisions report Stoner received shares of plaintiff, none indicate what percentage of ownership Stoner had. *Vendo*, 58 Ill.2d at 301; *Vendo Co. v. Stoner*, 13 Ill.App.3d 291 (2d Dist. 1973); *Vendo Co v. Stoner*, 105 Ill.App.2d 261, 276 (2d Dist. 1969).

assessments of the particular control and authority an officer or director has over the corporation.

Moreover, unless he or she is the corporation's sole director, a single director has no individual authority or control over the corporation in his or her capacity as a director. By statute control of the corporation is vested in the board of directors as a whole, and not in any individual director. See 805 ILCS 5/8.05(a) ("each corporation shall have a board of directors and the business and affairs of the corporation shall be managed by or under the direction of the board of directors"); see also 805 ILCS 5/8.15(c) ("The act of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors ***."). It is the nature of the position an officer or board members holds, and not the individual authority or control of the officer or director, which imposes fiduciary duties upon those duly appointed to those positions.

Defendants nonetheless argue "[a]ppellate courts consistently looked at the employees' actual management responsibilities, the extent of corporate oversight and guidance over them, and whether they exercised certain powers of officers, regardless whether they were formally elected corporate officer." (Emphasis added.) (Brf., p. 29) Even the inapposite cases defendants cite do not support these assertions.

Defendants cite three *district* court cases – two unpublished – which involve *de facto* officers who, though not duly elected as officers, allegedly acted with the actual or apparent authority of officers and thus could be treated as such. See *Hay Group, Inc. v. Bassick*, 2005 U.S. Dist. LEXIS 22095 (N.D. Ill. 2005) (summary judgment on lack of officer status denied as defendant, even if not formally elected, may still owe duties of an officer); *Superior Environmental Corp. v. Mangan*, 247 F.Supp.2d 1001, 1002-1003 (N.D.

Ill. 2003) (dismissal denied where court could not determine if defendant, though not formally elected, exercised powers of an officer); *MPC Containment System v. Moreland*, 2008 U.S. Dist. LEXIS 60546 *35-36 (N.D. Ill. 2008) (failure to list defendant as officer on Secretary of State filings not dispositive on his officer status as defendant was referred to as Executive Vice President and performed duties of an officer). These red herring cases have no relevance for why duly elected officers (like DePodesta) or directors owe their corporations fiduciary duties. Further, the lone appellate court decision defendants cite for this does not even involve an officer or director. *Graham*, 111 Ill.App.3d at 761 (defendant not an officer, but a controlling shareholder). It has no relevance for this issue.

3. Defendants' request that this Court "reaffirm" a holding it never made should be rejected.

Defendants request this Court "*reaffirm* that the corporate opportunity doctrine does not apply without a factual analysis into the degree and nature of the employee's duty of loyalty and actual ability to exercise control over their employer's meaningful business decisions." (Emphasis added.) (Brf., p. 30 (significantly, stated without supporting authority)) This Court has never held, in any case, that this analysis is required. There is nothing to "reaffirm" here.

Nor should there be. The prophylactic purpose of fiduciary law requires clear rules that impose certain liability when a fiduciary violates his or her duty of loyalty. Such clarity and consequences are necessary as corporations must rely on their agents to act for their interests in all matters connected to their agencies. These agents include employees whose scope of agency is limited and who have no duties to find opportunities for their employers. See, *e.g., Blackman Kallick Bartelstein v. Sorkin*, 214 Ill.App.3d 663 (1st Dist. 1991)

(accounting firm employee had no duty to seek out investment work from accounting client thus no duty to inform firm of investment opportunity.) They also include employees like DePodesta and Dahlstrom, whose very jobs required that they seek, find and present opportunities to Indeck.

4. Defendants exercised substantial authority and control over Indeck's opportunities.

Finally, even though this Court's decisions confirm the basis for requiring an employee to disclose, tender and obtain consent is not based the employee's alleged authority or control over the corporation, the fact remains both DePodesta and Dahlstrom did exercise substantial authority and control at Indeck, and especially over its opportunities.

Whether expressly authorized by Indeck or not, DePodesta and Dahlstrom had the apparent authority to make representations concerning Indeck's development, including what it would or would not agree to (even if, as here, they misrepresented Indeck's position when it suited them). (C 6804 ¶71; R 8402-03) DePodesta had the authority to sign agreements like the Merced confidentiality agreement that committed Indeck to substantial obligations and liabilities (even if the agreements were subject to standard lawyer approval). (C 6792 ¶¶19-20; R 8400)

DePodesta and Dahlstrom also made the decision to exert control when it suited their purposes. Even as they started competing with Indeck, they directed Indeck's employees not to disclose anything concerning its Wharton project and further instructed them to refer all communications regarding the same to Dahlstrom, who would speak for the company and control information flow. (C 6805 ¶¶78-79; R 8404) And most

importantly, DePodesta and Dahlstrom controlled the opportunities they purported to seek on behalf of Indeck (C 6791-92 ¶¶15-18; R 8399), deciding what to disclose, what to conceal and what to secretly negotiate for themselves and exploit.

In fact, the record confirms DePodesta and Dahlstrom were quintessential gatekeepers for Indeck's opportunities. This was, after all, what they were hired to do. DePodesta admitted his job was "to find opportunities and new development ideas, find partners and develop new business for Indeck." (C 6298 ¶48) Dahlstrom admitted his "job was to go find opportunities and bring them back to Indeck," including opportunities "about development of turbines, [and] potential partners." (C 6793 ¶¶27-28) Exercising total control in this area, they had strong financial incentives to take for themselves what they were required to disclose and tender. It is these incentives the deterrent and prophylactic purpose of fiduciary duty law addresses and must protect against.

What commentators have posited about officers and directors in publicly traded corporations applies with equal force to the actual roles DePodesta and Dahlstrom played in controlling opportunities at Indeck. See, *e.g.,* Talley, *Turning Serville Opportunities to Gold: A Strategic Analysis of the Corporate Opportunity Doctrine*, 108 Yale L.J. 277, 286-87 (1988) (noting that "what corporate fiduciaries appear jointly to share from an agency-cost perspective is a macro-organizational role as 'gatekeepers.'"). Paraphrasing that same commentator, DePodesta and Dahlstrom played a predominant, gatekeeping role in evaluating the relative merits of prospective new projects, recommending which ones Indeck should pursue and which it should not, and therefore were not "rank-and-file employees or mid-level management." *Id.* at 286. One of the primary purposes of the corporate opportunity doctrine "is to address incentive problems that are unique to this

gatekeeping function." *Id.* at 287. Or, as this Court aptly put it years earlier, to implement "the prophylactic purpose of the rule imposing a fiduciary obligation ***." *Kerrigan*, 58 Ill.2d at 28.

The prophylactic purpose of the corporate opportunity doctrine requires those charged with seeking opportunities, *i.e.*, those performing this gatekeeping function, must properly present them to the corporation or be foreclosed from benefitting from taking the opportunities they fail to disclose and tender. The doctrine must apply to gatekeepers like DePodesta and Dahlstrom. Any objections to the contrary must be rejected out of hand or the corporate opportunity doctrine will not "possess any vitality." *Id.*

II. Even if the appellate court applied the wrong standard of review, its corporate opportunity holding was proper and should not be reversed.

Defendants assert the appellate court erred by applying the wrong standard of review. According to defendants, the appellate court "appears to have reviewed the trial court's decision *de novo*," as opposed to under a manifest weight of the evidence standard. (Brf., pp. 23-24) As support, defendants set out two cases describing generally the manifest weight standard of review on appeal. (Brf., pp. 23-24) They then ask this Court to find the proper standard of review was manifest weight, and to reverse the appellate court on the grounds that the trial court's findings on corporate opportunity were not against the manifest weight. (Brf., p. 25)

Conspicuous by its absence, though, is any direct support for the proposition that an appellate court employing the wrong standard of review on directed finding constitutes reversible error. Any point raised in a brief but not supported by citation to relevant authority fails to satisfy the requirements of Supreme Court Rule 341(h)(7) and is forfeited.

Vine St. Clinic v. HealthLink, Inc., 222 Ill.2d 276, 301 (2006) (citing *People v. Ward,* 215 Ill.2d 317, 332 (2005)).

Even without forfeiture, there is no error, let alone reversible error. A reviewing court may affirm a proper ruling although based on an improper ground. *People v. Dominguez*, 366 Ill.App.3d 468, 473 (2d Dist. 2006) (post-conviction petition). See also *Shibata v. City of Naperville*, 1 Ill.App.3d 402, 405-406 (2d Dist. 1971) (even assuming trial court erred in its classification, its judgment will not be affected on review, as a court of review "will not reverse a judgment which is a correct one even if it is based on an incorrect reason."); *Maske v. Kane County Officers Electoral Board*, 234 Ill.App.3d 508 (2d Dist. 1992) (if circuit court applied incorrect standard of review of electoral board decision, such error was harmless when correct decision is made).

Even assuming *arguendo* the appellate court applied the wrong standard of review – and Indeck says it did not – whether it did is not a true issue because the appellate court's ruling is correct as supported by the record. No matter how you slice it, this Court is ultimately being asked to review the trial court's determination.

Thus there is nothing to decide on this purported issue, as well as nothing preserved. Defendants have not demonstrably shown: (a) a difference in standards between the trial court and the appellate court, and (b) that any difference makes a difference, for reversible error. This is a non-issue, and there is nothing actually to consider. See *Peach v. McGovern*, 2019 IL 123156, ¶63 (courts of review ordinarily will not consider issues that are not essential to the disposition of the causes before them or where the results are not affected regardless of how the issues are decided); see also *Italia Foods, Inc. v. Sun Tours, Inc.*,

2011 IL 110350, ¶41 (courts of review will not decide moot or abstract questions, will not review cases merely to establish precedent, and will not render advisory opinions).

ARGUMENT ON CROSS RELIEF

I. The trial court erred in holding DePodesta's and Dahlstrom's fiduciary duties for the Merced transaction ended when they resigned and in allowing them to benefit from their disloyalty.[11]

The transaction DePodesta and Dahlstrom entered into with Merced began during their employment relationships at Indeck. Founded on information they acquired during their employment, DePodesta and Dahlstrom negotiated the transaction and concealed it in breach of the fiduciary duties they owed Indeck. DePodesta further breached his duty as an officer not to actively exploit his position within the company for his own personal benefit. DePodesta's and Dahlstrom's disloyalty continued through the last second they purportedly worked for Indeck. All that remained for them to benefit from disloyalty was to resign and sign.

Defendants did not specifically argue before the trial court that their fiduciary duties for the Merced transaction ended when they resigned. The trial court, however, surprisingly and without prior explanation ruled that "Defendants breach of fiduciary duty ended with DePodesta [sic] and Dahlstrom's employment at Indeck." (R 8466) This was a ruling, not one of the 651 findings of fact the trial court entered. (*Id.*) Defendants do not

[11] Because the Opinion would otherwise allow full recovery under the corporate opportunity claim, Indeck did not independently petition for leave to appeal the decision on Counts IV and I. Nonetheless, since the Opinion creates a conflict among the districts of the appellate court on officer liability and failed to follow a decision of this Court expressly allowing review of the ruling on Count I, Indeck seeks cross-relief pursuant to Supreme Court Rule 318.

contest on appeal any of the trial court's findings, including those finding they breached their fiduciary duties.

A court's determination of the substantive law to be applied to undisputed facts under review is *de novo*. *In re Chicago Flood Litigation*, 308 Ill.App.3d 312, 322 (1st Dist. 1999). The appellate court nonetheless affirmed the trial court's ruling, incorrectly stating the trial court "reasonably found that any breach ended when DePodesta and Dahlstrom resigned from Indeck." (Op. ¶80) No further explanation was given for this affirmance.

As to DePodesta, an officer, the appellate court's ruling creates a direct conflict with all 10 prior published decisions in Illinois on the subject. As to Dahlstrom, an employee, the appellate court's ruling on this issue is foreclosed by this Court's decision in *Mullaney* and conflicts with decisions forbidding an employee's pre-termination competition with his or her employer. Both rulings should be reversed.

The trial court also denied Indeck's request that DePodesta and Dahlstrom disgorge the management fees they obtained through Halyard Energy, ruling no authority cited allowed disgorgement of salaries a disloyal fiduciary obtains after his or her fiduciary duty has ended and "the argument that every penny Defendants received from Merced/HEV was due to their disloyalty to Indeck is speculative at best" and not proven at trial. (R 8466)

These rulings should also be reversed as they depend on the erroneous conclusion that DePodesta's and Dahlstrom's fiduciary duty did not extend to this transaction. Additionally, in fiduciary duty cases, a "but for" test requiring disgorgement of all benefits received should apply that eliminates the burden on the wronged party to prove proximate

cause. Finally, the trial court's decision not to impose a constructive trust to insure that DePodesta and Dahlstrom cannot further benefit from their disloyalty should also be reversed under controlling authority holding constructive trusts are necessary to prevent the *possibility* that a fiduciary will benefit from his wrongdoing.

A. The trial court's ruling that DePodesta's fiduciary duty for the Merced transaction terminated when he resigned is error that conflicts with every other reported Illinois decision.

All but one district of the appellate court previously considered whether a corporate officer's fiduciary duty continues, after resignation, for transactions that began during the officer's employment or were based on information acquired during the employment. The First, Second, Third, and Fifth Districts have all ruled on this issue. *Every* published decision by these courts – prior to the appellate court's decision below – holds the officer's fiduciary duty continues for such transactions. The appellate court's decision here therefore creates an unassailable conflict among the appellate courts which should now allow this Court to preserve the uniformity in Illinois law that previously existed and to insure that the deterrent purpose of fiduciary duty law remains. Whether reviewed on a *de novo* basis or under a manifest weight of the evidence standard, this ruling should be reversed.

The following decisions of the appellate court have ruled *as matter of law* that an officer's fiduciary duty continues after his or her resignation:

First District.

> *H. Vincent Allen & Associates, Inc. v. Weis*, 63 Ill.App.3d 285, 292 (1st Dist. 1978) (court deemed "[t]he constructive trust imposed upon officers and directors applies as well to transactions completed after the termination of the party's association with the corporation 'if the transactions began during the existence of the relationship or were founded on information or knowledge acquired during the relationship.' [Citation.]");

Smith-Shrader Co., Inc. v. Smith, 136 Ill.App.3d 571, 578 (1st Dist. 1985) (court determined officer will be liable for transactions completed after termination of relationship if founded on information acquired during relationship);

Comedy Cottage, Inc. v. Berk, 145 Ill.App.3d 355, 360 (1st Dist. 1986) (court held "the resignation of an officer will not sever liability for transactions completed after the termination of the party's association with the corporation if the transactions began during the existence of the relationship or were founded on information acquired during the relationship.");

Veco Corp. v. Babcock, 243 Ill.App.3d 153, 161 (1st Dist. 1993) ("[t]he resignation of an officer, however, will not sever liability for transactions completed after the termination of the party's association with the corporation of transactions which began during the existence of the relationship or were founded on information acquired during the relationship.");

Dowd and Dowd, Ltd. v. Gleason, 284 Ill.App.3d 915, 926 (1st Dist. 1996) ("The resignation of an officer, however, will not sever liability for transactions completed after the termination of the party's association with the corporation or transactions that began during the existence of the relationship or were founded on information acquired during the relationship.");

Alpha School Bus Co., Inc. v. Wagner, 391 Ill.App.3d 722, 737 (1st Dist. 2009) ("This duty of loyalty is not inconsistent with the officer's right to enter into competition with a former employer upon leaving such employment, but the officer's resignation does not sever liability for transactions that began (or were based upon information acquired) while the officer was employed and completed after the officer resigned.");

Second District.

Dangeles v. Muhlenfeld, 191 Ill.App.3d 791, 796 (2d Dist. 1989) ("We are aware, as plaintiff points out, that resignation of an officer will not sever liability for transactions completed after termination of the party's association with the corporation if the transactions began during the existence of the relationship or were founded on information acquired during the relationship.");

E.J. McKernan Co. v. Gregory, 252 Ill.App.3d 514, 530-31 (2d Dist. 1993) ("An officer's duty of loyalty is not inconsistent with his right to enter into

> competition with a former employer upon leaving such employment. However, the resignation of the officer will not sever liability for transactions completed after the termination of the person's association with the corporation on transactions which began during the existence of the relationship or were founded on information gained during the relationship.");
>
> Fourth District.
>
> *Dowell v. Bitner*, 273 Ill.App.3d 681, 691-92 (4th Dist. 1995) ("The resignation of an officer will not sever liability for transactions completed after termination of the officer's association with the corporation for transactions which (1) began during the existence of the relationship, or (2) were founded on information acquired during the relationship."); and
>
> Fifth District.
>
> *Mile-O-Mo Fishing Club, Inc. v. Noble*, 62 Ill.App.2d 50, 57 (5th Dist. 1965) (constructive trust "applies not only to transactions consummated while the fiduciary relationship exists, but also to transactions consummated after it has ended, if the transactions began during the existence of the relationship or were founded on information or knowledge acquired during the relationship").

Thus, an unaltered line of case law in the appellate court from 1965 has uniformly held that a corporate officer's fiduciary duty continues for transactions consummated after resignation that began during his or her employment and/or were based on information obtained during the employment – until this appellate court's opinion. In fact, the appellate court actually cited two of these decisions, *Veco* and *Smith-Shrader*, in the paragraph immediately preceding its ruling. (Op. ¶79) Although it noted the rule, it did not note that its ruling contradicts the rule. (Op. ¶80)

The prevailing case law in this State recognizes an officer does not have the unilateral right to eliminate his fiduciary duty for transactions negotiated in violation of his or her duty of loyalty simply by engaging in the voluntary act of resigning. The unbroken line of cases in Illinois, until now, all recognize the danger in allowing an officer to

structure the transaction to receive the benefits from pre-resignation disloyalty until after he or she is out the door. The loophole now created, if affirmed, will doubtless provide a powerful incentive for officers to breach their duties of loyalty in Illinois. This loophole would equally damage the deterrent purpose of fiduciary duty law related to officer conduct.

The trial court's determination is especially arbitrary since it ruled DePodesta owed a fiduciary duty not to actively exploit his position as an officer for his personal benefit. (R 8465) It makes no sense whatsoever that an officer who violated his duty should nonetheless be allowed to keep the personal benefits he obtained though this improper exploitation. The trial court's ruling turned this duty into a dead letter.

The trial court's legal determination that DePodesta's fiduciary duty as an officer of Indeck ended when he resigned, therefore, is not only legally wrong, it is arbitrary and unreasonable. Nor is it based on the evidence as the Merced transaction began during DePodesta's employment and was based on information he acquired during the relationship. Based on the great weight of every prior decision on this issue in Illinois, the opposite conclusion is apparent. See *Lawlor*, 2012 IL 112530, ¶70.

Reversal of the appellate court's ruling on this issue may be accomplished on a *de novo* basis or under a manifest weight of the evidence standard to restore uniformity to the law in Illinois and to deter disloyal officers. As *Veco*, *Smith-Shrader*, and all other cases cited above establish, an officer's fiduciary duty to his or her corporation should continue after his or her resignation for transactions that began during the existence of the relationship or were founded on information acquired during the employment relationship. This Court should therefore reverse the lower court's determination on this issue and

remand with directions to impose liability upon DePodesta for all benefits he obtained under the Management Agreement and the LLC Agreement.

B. The trial court's ruling that Dahlstrom's fiduciary duty for the Merced transaction terminated when he resigned is error and should be reversed.

The trial court ruled that, like DePodesta, Dahlstrom breached his fiduciary duty while an employee of Indeck by competing with his employer. Dahlstrom did so by engaging in demonstrable business conduct by, among other things: entering to the Mutual Confidentiality Agreement as a Managing Partner of Halyard Energy Ventures, LLC to exchange proprietary and sensitive information with Merced; negotiating a Letter of Intent (LOI) on Indeck's time and using Indeck's computers, and Indeck's phone time; negotiating the LOI in which Dahlstrom agreed not to disclose his negotiations to Indeck, even though his job required him to bring all developmental opportunities to Indeck's attention; and negotiating the LLC Agreement and the Management Agreement while at Indeck using Indeck's computers. (R 8462-63) Despite this, the trial court also ruled, without explanation, that Dahlstrom's fiduciary duty ended when he resigned without notice.

While employees may make arrangements to compete before resigning, they breach their duties of loyalty if they commence business operations or engage in any demonstrable business activity. See *E. J. McKernan,* 252 Ill.App.3d at 530-31)("general employees may plan and outfit a competing corporation, but not commence operation, while still working for the employer" and "plaintiffs made no claim that the defendants *** engaged in any demonstrable business activity prior to resigning from the plaintiff company; thus, no *** breach of fiduciary duty was alleged."); see also *Dangeles*, 191 Ill.App.3d at 795-96

(because defendants were not "engaged in any demonstrable business activity prior to resigning[,]" no breach of duty of loyalty). At least one commentator has noted "[t]he 'continuation' theory also bars a fiduciary and those who collude with him from undertaking a transaction founded upon information acquired during his employment, regardless of his resignation." Schaller, *Corporate Opportunities*, 46 J. Marshall L.J. at 17 (citing *E.J. McKernan*, 252 Ill.App.3d at 531). This should obviously include a transaction based on pre-termination competition.

Dahlstrom does not dispute he breached his duties of loyalty when he was an Indeck employee by negotiating his deal with Merced, stealing Indeck's information to use in his new company, and secretly competing with Indeck. Nor does he contest his disloyalty continued through the second he resigned from Indeck to sign (with DePodesta) the documents for their deal with Merced. Indeed, he did not even specifically argue before the trial court that his fiduciary duty ended when he resigned.

Under these circumstances, it makes no sense that a fiduciary who was obliged to act solely for the benefit of the principal in all matters connected to his agency should be able to terminate his fiduciary duty mid-breach, while he was secretly competing against his employer, so he can benefit handsomely from his disloyalty and secret competition immediately upon resignation. Yet that is the unreasonable and arbitrary result of the trial court's ruling, and the appellate court's affirmance of that ruling, made without any substantive discussion.

This decision also conflicts with this Court's decision in *Mullaney*, where the disloyal employee Savage exercised the option to purchase the shares from which he (and his friend Williams) benefitted handsomely the day *after* Savage resigned. *Mullaney*, 78

Ill.2d at 543 ("On March 29, 1961, the stock options were exercised" and "[a]fter the close of business [on March 28], however, Savage cleaned out his desk and departed" leaving "behind a letter of resignation ***."). Even though his employment had terminated, this Court "conclude[d] *** Savage did breach his fiduciary obligations to the plaintiff." 78 Ill.2d at 550. This Court's holding in *Mullaney* confirms the fiduciary duty Savage had as an employee for the option transaction, which began during his employment and was founded on information he acquired during his employment, continued *after* he resigned.

In addition to requiring Savage to pay the benefits from the disloyal transaction to his former employer, this Court also refused to allow Savage's friend Williams to keep the benefits of Savage's disloyalty, even after the benefits were laundered through various corporate forms. *Id.* at 550-53. It specifically held that Savage's friend, who was not a fiduciary, "was liable to the plaintiff for Savage's breach of fiduciary obligations." *Id.* at 553.

Like Savage, Dahlstrom failed to disclose the facts of the deal he negotiated while his agency existed. Like Savage, Dahlstrom signed the documents under which he benefitted – the results of his secret competition with his employer – promptly after he resigned. And, like Savage, Dahlstrom's fiduciary duty cannot properly be held to have terminated for this transaction with his voluntary resignation.[12]

The trial court's ruling that Dahlstrom's fiduciary duty for this transaction terminated with his resignation is arbitrary and unreasonable. If affirmed, any fiduciary

[12] Even if Dahlstrom's personal fiduciary duty somehow terminated with his resignation, he certainly colluded with DePodesta, whose fiduciary duty as officer continued. Like Savage's friend, Dahlstrom should also be liable for colluding with DePodesta under this theory as well. *Mullaney*, 78 Ill.2d at 553.

could terminate the fiduciary relationship mid-breach while secretly competing with his or her principal or breaching fiduciary duties, and obtain the benefits of the disloyalty and unlawful competition after resignation from the fiduciary office. The prophylactic purpose of fiduciary duty law requires that such an arbitrary result be reversed.

Whether reviewed on a *de novo* basis or under a manifest weight of the evidence standard, the trial court's ruling and the appellate court's perfunctory affirmance of it encourages fiduciaries to breach their duties of loyalty and severely undermines the deterrent purpose of fiduciary duty law. *Lawlor*, 2012 IL 11530, 70 (a judgment is against the manifest weight of the evidence "when an opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary or not based on the evidence.")

This Court should reverse these rulings and hold clearly that the fiduciary duties of disloyal employees continue through their resignations for transactions they negotiate in breach of their fiduciary duties during their employment relationships, which were based on information acquired during their relationships, and/or are the result of pre-termination competition with their former employers..

C. The trial and appellate court should have ordered disgorgement.

The trial court denied Indeck's request that DePodesta and Dahlstrom disgorge the management fees they received because "Indeck has not brought a case to the Court's attention that holds that *after a breach of fiduciary duty has ended*, a Plaintiff is entitled to compel a Defendant to disgorge any *future salary* earned from a subsequent employer as a result of the fact that the Defendant negotiated with the subsequent employer during a period of disloyalty." (Emphasis added.) (R 8466) The appellate court affirmed on the same

basis. (Op. ¶80) Although Indeck cited to the trial court this Court's decision in *Vendo*, which endorsed the rule a principal is entitled to recover all benefits an agent obtains from violating his duty of loyalty, the trial court ignored it.

As detailed above, DePodesta's and Dahlstrom's fiduciary duties for this transaction continued after their employment ended. Since the trial court's decision on the management fees, defense costs and interests in projects in Texas is based on its ruling that their fiduciary duties terminated, it should be reversed on that reason alone.

In addition, the management fees were not "salaries;" indeed, the trial court specifically *declined* to find the Management Agreement was akin to an employment agreement.[13] The management fees undoubtedly were benefits DePodesta and Dahlstrom obtained from violating their duties of loyalty to Indeck. This Court has specifically recognized a principal's damages and recovery are not limited to lost profits but extend as well to any benefit an agent receives from violating his duty of loyalty. *See Vendo*, 58 Ill.2d at 305, citing Restatement (Second) of Agency, §407 ("If an agent has received a benefit from violating his duty of loyalty, the principal is entitled to recover from his what he has so received, its value, or its proceeds,***.") The issue is not whether DePodesta and Dahlstrom received a salary. It is whether they received any benefits from violating their duties of loyalty. The conclusion is inescapable they did and the order denying such recovery is error.

[13] Defendants' proposed finding of fact 118 stated "[t]he Management Agreement is set up as an employment contract to manage an LLC, akin to a consulting agreement or an employment contract." (C 6306 ¶118) The trial court ruled "118 is not, repeat, not adopted." (R 8419)

Requiring disgorgement of benefits obtained after disloyal employees resign is a well-recognized remedy. See, *e.g*, *Paulman v. Kritzer*, 74 Ill.App.2d 284, 291 (2d Dist. 1966); *Veco*, 243 Ill.App.3d at 165 ("A constructive trust may be imposed when an employee breaches his or her fiduciary duty by competing with his or her employer during employment" and may be applied on remand to commissions for business lost to pre-termination competition); *Hill v. Names and Address, Inc.*, 212 Ill.App.3d 1065, 1082 (1st Dist. 1991) (constructive trust properly imposed on profits earned from customers diverted before termination but received after), *Patient Care Services, S.C.*, 32 Ill.App.3d at 1032-34 (proper remedy when defendants improperly competed with employer for contract before resigning is for court to impress constructive trust over all assets of defendants); *Guth*, 5 A.2d at 511 (if "the interests of the corporation are betrayed, the corporation may elect to claim all of the benefits of the transaction for itself***.").

Nor is it correct to impose the burden on Indeck to prove "every penny Defendants received from Merced/HEV was due to their disloyalty to Indeck ***" (R 8466) "The right to recover from one who exploits his fiduciary position for his personal benefit is triggered by the gain to the agent rather than the loss to the principal." *Hill*, 212 Ill.App.3d at 1083 (citing *Chicago ex rel. Cohen v. Keane*, 64 Ill.2d 559, 565-66 (1976)). Indeed, the prophylactic purpose of fiduciary duty law entitles a principal to recover *anything* a disloyal agent receives from his disloyalty. Restatement (Second) of Agency, §403 ("[i]f the agent received anything as a result of a violation of a duty of loyalty to the principal, he is subject in liability to deliver it, its value, or its proceeds to the principal.") The burden is not on Indeck to prove every penny defendants obtained was proximately caused by

their disloyalty. Indeck was only required to show "the gain to the agent," *i.e.,* that the benefit was received from violating his duty of loyalty. Indeck met that burden.

Defendants secretly competed against Indeck for management fees, rights under the LLC Agreement and interests in projects – and not salaries. The trial court's ruling that no case allowing post-fiduciary duty disgorgement of salaries was cited thus asked for authority that is beside the point and overlooked settled principles of law, including those this Court endorsed. (R 8466) And, because defendants argue their salary forfeiture was for their pre-termination conduct, an order holding they breached their fiduciary duties by signing the Merced agreements shortly after resigning requires further disgorgement and other relief.

The order allowing defendants to keep more than $2.5 million in management fees and the other benefits (including for defense and indemnification) through their disloyalty is arbitrary, unreasonable and against the manifest weight of the evidence. The appellate court's affirmance, simply because no inapposite case was cited, should be reversed.

D. The trial court should have imposed constructive trust on any benefits and profits DePodesta and Dahlstrom may receive as a result of breaching their duties of loyalty.

Defendants do not deny the enormity of profits they may obtain through their 20% interest in MHV's peaker plants. Because the prophylactic purpose of fiduciary duty law is to prevent the *possibility* that fiduciaries will benefit from their disloyalty, the trial court's ruling denying Indeck any recovery here because such profits were speculative imposes the wrong legal standard and is error.

This Court and other courts have repeatedly confirmed that Illinois courts have been "inveterate and uncompromising" in their use of constructive trusts in the corporate context

and the "application of the constructive trust *** [reflects the] 'wise public policy that, for the purpose of removing all temptation, extinguishes *all possibility of profit* flowing from the breach of the confidence imposed by the fiduciary relation." (Emphasis added.) *Graham*, 111 Ill.App.3d at 762-63 (quoting *Guth*, 5 A.2d at 510); see also *White Gates Skeet Club v. Lightfine*, 276 Ill.App.3d 537, 541 (2d Dist. 1995) (same); *Paulman*, 74 Ill.App.2d at 292 (same). These cases say "possibility," not probability. Possibility, not probability, is the standard when the prophylactic purpose of fiduciary duty law is at stake. See also *Hill*, 212 Ill.App.3d at 1083 (citing *Chicago ex rel. Cohen v. Keane*, 64 Ill.2d 559, 565-66 (1976)) ("[a] constructive trust may be imposed even when it more than compensates the plaintiff for injury or damage resulting from a breach of loyalty by an employee, ***."); *Winger*, 394 Ill. at 111.

The inveterate and uncompromising approach of fiduciary duty law requires extinguishing the *possibility* fiduciaries who have breached their duties will profit from their disloyalty, even if doing so would overcompensate the plaintiff. The trial court's order refusing to impose a constructive trust is based on the wrong legal standard and should be reversed.

II. The trial court's ruling on Indeck's confidentiality agreement should be reversed.

A. The appellate court failed to follow controlling authority which plainly supported review of the trial court's ruling on Indeck's confidentiality agreement.

Finding that disposition of the issue would not affect the trial court's decision on irreparable injury, the appellate court declined to address Indeck's issue on appeal that section 1 of the confidentiality agreement was enforceable. Although Indeck cited this

Court's decision in *Berlin v. Sarah Bush Lincoln Health Center*, 179 Ill.2d 1 (1997), which plainly allows review here, the appellate court did not address *Berlin*. (Op. ¶89)

Berlin clearly supports review. In *Berlin*, this Court recognized that, where a decision could have "important consequences" for the parties before the court, it is proper to entertain the appeal. *Berlin*, 179 Ill.2d at 8 (citing *Balmoral Racing Club, Inc. v. Illinois Racing Board*, 151 Ill.2d 367, 387 (1992)). In addition, as in *Berlin*, "[a] determination in this case *** could mean that the [company] must implement significant changes in its working relationships with its *** staff." *Berlin,* 179 Ill.2d at 8. Additionally, as in *Berlin*, DePodesta and Dahlstrom may also have further liability under the confidentiality agreement if it were reinstated. There is therefore still "life in the appeal" and the issue is not moot. *Id.*

The appellate court thus erred in failing to follow *Berlin* and refusing to consider this issue.

B. The trial court erred in holding that Indeck's confidentiality agreement was unenforceable.

Defendants do not dispute the trial court made no attempt to give effect to the language in the first sentence of paragraph 1 and only construed subparagraph (c) of Indeck's confidentiality agreement. For the convenience of the Court, it is attached as Exhibit A. While trial courts should not read parts of the contract in isolation but should carefully consider the whole of the contract, *Justin Time Transportation, LLC v. Harco National Insurance Co.*, 2014 IL App (5th) 130124, ¶39, the trial court made no attempt to fulfill this obligation. Indeed, rather than consider the whole contract, the trial court deliberately chose not to give effect to all the words of the *same paragraph*.

In doing so, the court ignored the definition of the term "Information." Paragraph 1 states:

> Employee will occupy a position of trust with respect to technical, scientific, financial, and business information of a secret and confidential nature, as more specifically defined in subparagraph (c) hereof, which is the property of the Employer or Employer's contractors and which will be imparted to or developed by Employee from time to time in the course of Employee's duties ('Information'). (E 25)

Paragraph 1 indicates the forms that the "technical, scientific, financial and business information which are of a secret or confidential information, *as more specifically defined in subparagraph (c) hereof*, which is the property of Employer or Employer's contractors and which will be imparted to or developed by Employee from time to time in the course of Employee's duties" may take. (Emphasis added.) (*Id.*) To insure there is no question that subparagraph (c) applies to "secret and confidential information," it concludes with the phrase "and other trade secrets." (E 26) Paragraph 1 does not state that it covers information, "as *exclusively* defined in subparagraph (c)."

Read as a whole, the clear intent of paragraph 1 is to protect secret and confidential information belonging to Indeck or its contractors that the employee may learn or develop in the course of his employment. There is no necessity under settled principles of contract construction to ignore the important qualifying language in the first sentence, especially since it applies to all of paragraph 1, including subparagraph (c). Nor is there any reason to strain to reach an interpretation that ignores the clear intent of the parties. See *Hobbs v. Hartford Ins. Co. of the Midwest,* 214 Ill.2d 11, 31 (2005) (noting the court will not "torture ordinary words until they confess to ambiguity."). The trial court erred when it ignored the first sentence of Paragraph 1 so that it could interpret subparagraph (c) in isolation, failing

to give full meaning to all the provisions of the same paragraph. Its determination that paragraph 1 is unenforceable should be reversed on a *de novo* review.

C. Defendants' reliance on *AssuredPartners* is misplaced.

Defendants argued before the appellate court that the trial court's order was appropriate under the First District's decision in *AssuredPartners, Inc. v. Schmitt*, 2015 IL App (1st) 141863. *AssuredPartners*, of course, will not be binding on this Court. Moreover, as even the trial court recognized, Indeck's confidentiality provision is not as broad as the confidentiality agreement in *AssuredPartners.* (R 3582)

More importantly, paragraph 1 of Indeck's confidentiality agreement avoids the problems with the agreements before the First District in *AssuredPartners*. Those agreements purported to cover all information, whether owned by the employer, whether learned by the employee before or during the employment, and from whatever source. *Id.* ¶¶44-45. The first sentence of paragraph 1 makes clear Indeck's confidentiality agreement only covers information of a secret and confidential nature that belongs to Indeck or its contractors and which the employee learns during the course of his employment duties. Indeck's agreement is apples to *AssuredPartner*'s oranges.

D. The holding that a confidentiality agreement is not enforceable unless it only protects competitive information and has a time limit misstates Illinois law.

No reported Illinois decision holds a confidentiality agreement is not enforceable unless it only protects information that provides a competitive advantage. Nonetheless that is how the trial court ruled. (R 3582) Sensitive and private information is also entitled to protection, even if that information does not provide a competitive advantage. *Cody v. Harpo, Inc.*, 308 Ill.App.3d 153, 160-62 (1st Dist. 1999). Moreover, the decision on which

the trial court relied for this unprecedented holding, *Lifetec Inc. v Edwards*, 377 Ill.App.3d 260 (4th Dist. 2007), does not even involve a confidentiality agreement. Indeck's confidentiality agreement protects information that Indeck receives from third-parties which would not provide a competitive advantage but is otherwise entitled to protection. That information must be protectable in a confidentiality agreement and the trial court's ruling to the contrary should be reversed.

Finally, the trial court ruled Indeck's confidentiality agreement was invalid because it did not have a time duration. This too is contrary to law and should be reversed. See 765 ILCS 1065/8(b)(1).

For all these reasons, the trial court's determination that Indeck's confidentiality agreement is unenforceable should be reversed.

CONCLUSION

For all these reasons, plaintiff Indeck Energy Services, Inc. respectfully requests this Court:

On defendants' appeal:

(1) affirm the appellate court's reversal of the trial court's directed finding on Indeck's corporate opportunity claim and remand with directions that judgment be entered against defendants DePodesta, Dahlstrom and Halyard Energy Ventures, LLC requiring them to disgorge all management fees, benefits and profits they have received and may receive, including imposing a constructive trust.

On cross relief:

(2) reverse the appellate court's affirmance of the trial court's ruling that DePodesta's and Dahlstrom's breaches of their fiduciary duties for the Merced transaction

ended when they resigned from Indeck;

(3) reverse the appellate court's affirmance of the trial court's ruling refusing to require DePodesta and Dahlstrom to disgorge any management fees, benefits and profits they have received and may receive, including the imposition of a constructive trust; and

(4) review and reverse the trial court's ruling that paragraph 1 of Indeck's confidentiality agreement was unenforceable.

Respectfully Submitted,

INDECK ENERGY SERVICES, INC.

By: /s/ Steven J. Roeder
One of its attorney

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rule 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, this Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 79 pages.

/s/ Robert G. Black
Robert G. Black

Dated: September 9, 2020

No. 125733

IN THE SUPREME COURT OF ILLINOIS

INDECK ENERGY SERVICES, INC., *Plaintiff/Appellee*, v. **CHRISTOPHER M. DEPODESTA, KARL G. DAHLSTROM**, and **HALYARD ENERGY VENTURES, LLC**, *Defendants/Appellants*.	On Appeal from the Appellate Court of Illinois, Second Judicial District, Gen. No. 2-19-0043 There Heard on Appeal from the Circuit Court of the Nineteenth Judicial Circuit, Lake County, Illinois, No. 14 CH 602. The Honorable **Margaret A. Marcouiller**, Judge Presiding.

APPNEDIX TO THE BRIEF OF PLAINTIFF/APPELLEE INDECK ENERGY SERVICES, INC. (CROSS RELIEF REQUESTED)

E-FILED
9/9/2020 9:21 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

No. 125733

IN THE SUPREME COURT OF ILLINOIS

INDECK ENERGY SERVICES, INC. *Plaintiff/Appellee/Cross-Appellant*, v. CHRISTOPHER M. DEPODESTA, KARL G. DAHLSTROM, and HALYARD ENERGY VENTURES, LLC *Defendants/Appellants/Cross-Appellees*.	On Petition for Leave to Appeal from the Appellate Court of Illinois, Second Judicial Circuit, No. 2-19-0043. There Heard on Appeal from the Circuit Court of the Nineteenth Judicial Circuit, Lake County, Illinois, No. 14 CH 602. The Honorable **Margaret A. Marcouiller**, Judge Presiding.

Table of Contents to Appendix

CONFIDENTIALITY AGREEMENT

This Agreement made as of this 12TH day of MARCH 2007, by and between INDECK ENERGY SERVICES, INC., located at 600 N. Buffalo Grove Road, Suite 300, Buffalo Grove, Illinois 60089 (Employer"), and Christopher M. DeFalco ("Employee").

In consideration of Employer's employment of Employee, the mutual promises and agreements herein contained, and other valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. TRADE SECRET INFORMATION. Employee recognizes that as a member of the staff of the Employer, Employee will occupy a position of trust with respect to technical, scientific, financial and business information of a secret or confidential nature, as more specifically defined in subparagraph (c) hereof, which is the property of Employer or Employer's contractors and which will be imparted to or developed by Employee from time to time in the course of Employee's duties ("Information"). Employee therefore agrees that:

(a) Employee shall not at any time during the term of this Agreement or thereafter, except in the performance of his/her duties for or on behalf of Employer, use, permit a third person to use, or disclose directly or indirectly to any third person any such Information;

(b) Employee shall return promptly on termination of Employee's employment for

PLAINTIFF'S EXHIBIT 1

A1

whatever reason (or in the event of Employee's death, Employee's personal representative shall return) to Employer at its direction and expense any and all equipment, computers, including without limitation software, peripherals and accessories and copies of records, drawings, writings, blueprints, materials, memoranda and other tangible manifestations of and pertaining to such Information; and

(c) The term "Information" shall include information of any nature and in any form which at the time or times concerned is not generally known to the public or to those persons engaged in research, development and education similar to that conducted or contemplated by Employer which relates to any one or more of the aspects of Employer's or Employer's contractors' business, research and development concerning cogeneration and other actual or potential products of Employer; development projects, plans and designs; methods, policies, processes, formulas; designs, drawings or blueprints, data bases, computer designs, computer programs, computer languages or formats and other facts relating to design, construction, development utilization, or servicing of equipment or relating to materials for equipment, plans or projects; operations, policies, compensation levels, know-how and other facts relating to sales, advertising, promotions, financial matters, customers, customer lists, customers' purchases, or requirements for systems, projects or equipment; any government or military information imparted to or learned by Employee pursuant government contracts of Employer; and other trade secrets.

2. PATENTS AND COPYRIGHTS. (a) Employer shall have all rights including international priority rights in: all inventions, developments and discoveries, whether or not

patentable, and all suggestions, proposals, computer programs, works, drawings, plans or designs and writings, including any copyright interests therein, which Employee authors, conceives or makes, either solely or jointly with others during his/her employment with Employer, and for a period of one (1) year thereafter, which: (i) relate to any subject matter with which Employee's work for Employer may be concerned; or (ii) relate to the business, products or services or actual or demonstrably anticipated research or development projects of Employer or Employer's contractors; or (iii) involve the use of the time, equipment, materials or facilities of Employer; or (iv) relate or are applicable to any phase of Employer's research and development. Employee specifically acknowledges that all suggestions, proposals, computer programs, designs, works, drawings, plans or designs and writings authored, conceived or made by Employee either solely or jointly hereunder shall be works made for hire. Further, Employee agrees to execute all documents and to take all actions as may be necessary in order to assign as necessary all rights to or otherwise vest good title to Employer in the property and proprietary rights in this subparagraph (a).

(b) Employer shall not have rights in inventions and writings made or conceived by Employee prior to his/her employment with Employer, which are: (i) embodied in a United States Letters Patent, Copyright Registration or an application for United States Letters Patent or Copyright Registration filed prior to the commencement of his/her employment; or (ii) owned by a former employer prior to Employee's employment by Employer; or (iii) disclosed in detail in a writing set forth below or provided to Employer within one (1) week of the execution hereof, which shall be incorporated by reference herein. The acceptance of such disclosure by Employer shall not create a confidential relationship.

In addition to the foregoing, Employer shall have no rights in any inventions made or conceived by Employee which do not involve any Information, equipment, supplies, facilities or materials of Employer or Employer's contractors and which are developed entirely on Employee's own time unless: (i) the invention relates to the business, products or services of Employer or Employer's contractors; or (ii) the invention relates to actual or demonstrably anticipated research or development projects of Employer or Employer's contractors, or (iii) the invention results from any services performed by Employee for Employer or Employer's contractors.

(c) Employee shall disclose promptly in writing to Employer all ideas, inventions, improvements, discoveries, works and writings, whether or not patentable or copyrightable, made or conceived by him/her either solely or in collaboration with others during his/her employment with Employer, whether or not during regular working hours and, if based on Information as defined in Paragraph 1(c) hereof, within one (1) year thereafter, if such inventions or writings relate to either: (i) the subject of Employee's work for Employer or Employer's contractors; or (ii) products, projects, programs or business of Employer or Employer's contractors of which Employee had knowledge in the course of Employee's work, or otherwise; or (iii) any business of Employer or Employer's contractors during Employee's employment.

(d) Employee shall maintain for disclosure to Employer, complete written records, including, where appropriate, blueprints, design drawings, photographs, prototype designs, and prototypes of all such inventions and writings. Such records shall bear dates and signatures and show (i) the full nature thereof, and (ii) the critical dates pertaining to conception, development, reduction to practice, and embodiment in a tangible form with witness signature and dates. Such

records shall be the sole property of and be readily available to Employer.

(e) Employee shall, during the term of his/her employment and thereafter, at the request of Employer and without expense to Employee: (i) cooperate in the procurement in the name of Employee of patent, utility model, design and, in the name of Employer, copyright protection, to cover such inventions and writings, including the execution of domestic, foreign, divisional, continuing and reissue applications for Letters Patent, Utility Models, Designs and Copyright Registrations and full assignments, as appropriate, thereof; and (ii) execute all documents, make all rightful oaths, testify in all proceedings in Government Offices or in the Courts concerning such inventions and writings, and generally do everything lawfully possible in any controversy or otherwise to aid Employer to obtain, enjoy and enforce proper protection of such property, including execution of appropriate assignment documents.

3. COVENANT NOT TO COMPETE. Employee shall not engage directly or indirectly at any time during the period of employment with Employer and for a period of one (1) year following termination for any reason of such employment, in: (a) the development of projects in the independent power industry which are in direct competition with Employer; (b) the marketing or sale to or the solicitation of any customers of Employer in any areas in the United States or the world for which Employee has or had contact or responsibility on behalf of Employer; or (c) the solicitation by Employee of any employees of Employer to leave the employment of Employer for whatever reason. This covenant on the part of Employee is of the essence of this Agreement; it shall be construed as independent

of any other provision in this Agreement, and the existence of any claim or cause of action of Employee against Employer, whether predicated on this Agreement or otherwise shall not constitute a defense to the enforcement by Employer of this Covenant. Following the expiration of said one (1) year period, Employee shall continue to be obligated under Paragraph 1 of this Agreement so long as Information shall remain proprietary or protectable as confidential or trade secret information.

4. REAFFIRMATION OF POST TERMINATION OBLIGATIONS. On the termination of Employee's employment for whatever reason, Employee shall, at the request of Employer, execute such documents and take such actions as may be necessary in order to reaffirm the covenants and obligations set forth herein. Failure to request reaffirmation shall not act as a waiver of any requirement of this Agreement.

5. REMEDY. Employee understands that Employer would not have an adequate remedy at law for the material breach or threatened breach by Employee of any one or more of the covenants set forth in this Agreement and agrees that in the event of any such material breach or threatened breach, Employer may, in addition to the other remedies which may be available to it, file a suit in equity to enjoin Employee from the breach or threatened breach of such covenants and obtain an injunction without the necessity of posting a bond or other security or proof of damages.

6. ENTIRE AGREEMENT. This Agreement contains the entire agreement between

Employee and Employer and supersedes any and all previous agreements, written or oral, between the parties relating to the subject matter hereof. No amendment or modification to the terms of this Agreement shall be binding upon either party unless reduced to writing and signed by Employee and a duly appointed officer of Employer. This Agreement shall be governed by the law of the State of Illinois. This Agreement shall be binding on the parties hereto and their successors, assigns, heirs, executors and personal representatives.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement in duplicate on the date first above written.

EMPLOYER:

By: _____

Its HR Director

EMPLOYEE:

_____

Paragraph 2 (b) (iii) disclosed inventions and writings (if "none", so indicate):

None.

No. 125733

IN THE SUPREME COURT OF ILLINOIS

INDECK ENERGY SERVICES, INC. *Plaintiff/Appellee*, v. CHRISTOPHER M. DEPODESTA, KARL G. DAHLSTROM, and HALYARD ENERGY VENTURES, LLC *Defendants/Appellants*.	On Petition for Leave to Appeal from the Appellate Court of Illinois, Second Judicial Circuit, No. 2-19-0043. There Heard on Appeal from the Circuit Court of the Nineteenth Judicial Circuit, Lake County, Illinois, No. 14 CH 602. The Honorable **Margaret A. Marcouiller**, Judge Presiding.

NOTICE OF FILING

TO: Stuart Krauskopf
Jamie Ritchie
Krauskopf & Kauffman P.C.
414 North Orleans Street, Suite 210
Chicago, Illinois 60654

The undersigned hereby certifies that September 9, 2020, before midnight, we electronically filed with the Clerk of the Supreme Court of Illinois, **Indeck Energy Services, Inc.'s Brief on Appeal as Appellee and for Cross Relief**, a true and correct copy of which is attached and hereby served upon you.

Dated: September 9, 2020

Respectfully submitted,

INDECK ENERGY SERVICES, INC.

By: /s/ Steven J. Roeder
One of its attorneys

Steven J. Roeder (#6188428)
Thomas D. Gipson (#6326949)
Roeder Law Offices LLC
77 West Washington Street, Suite 2100
Chicago, Illinois 60602
General Number: (312) 667-6000

Robert G. Black (#6191552)
The Law Offices of Robert G. Black, P.C.
101 N. Washington Street
Naperville, Illinois 60540
(630) 527-1440
rblack@rgb-law.com

E-FILED
9/9/2020 9:21 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

PROOF OF SERVICE

I, hereby certify pursuant to Section 1-109 of the Illinois Code of Civil Procedure, that I caused a copy of the foregoing Notice of Filing & Indeck Energy Services, Inc.'s brief on appeal to be served via E-File IL, the Court's electronic filing system by provider Green Filing, and via electronic mail upon the following:

Stuart Krauskopf
Jamie Ritchie
Krauskopf & Kauffman P.C.
414 North Orleans Street, Suite 210
Chicago, Illinois 60654
stu@stuklaw.com
jamie@stuklaw.com

on this 9 September 2020.

/s/ Robert G. Black