No. 125733

IN THE SUPREME COURT OF ILLINOIS

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

BRIEF OF *AMICUS CURIAE* ILLINOIS CHAMBER OF COMMERCE IN SUPPORT OF PLAINTIFF-APPELLEE

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INTEREST OF THE *AMICUS CURIAE*

Amicus curiae Illinois Chamber of Commerce (the Chamber) is a non-profit organization comprised of businesses and organizations of all types and sizes across the State of Illinois. The Chamber is the unifying voice of the varied Illinois business community. The Chamber represents business in all components of Illinois' economy, including mining, manufacturing, construction, transportation, utilities, finance and banking, insurance, gambling, real estate, professional services, local chambers of commerce, and other trade groups and membership organizations. Members include many small to mid-sized businesses as well as large international companies headquartered in Illinois.

The Chamber works collaboratively with trade organizations on specific policy issues or in specific areas of activity. It is dedicated to strengthening Illinois' business climate and economy for job creators. Its mission focuses on representing the business community at the state level by working with state representatives, senators, and the Governor's Office to advocate for Illinois businesses. Accordingly, the Chamber provides these businesses with a voice as it works with state lawmakers to make business-related policy decisions. To find that voice, the Chamber's members are involved in all aspects of its mission, and they participate in policy councils providing members with peer forums to discuss issues and concerns; critique, create, and propose new business policies; and provide forums to bring in policymakers to discuss members' ideas and concerns.

In addition to its work with state legislators, the Chamber also operates an Amicus Briefs Program to bring attention to specific cases and provide additional information for the court to consider. Over the last few years, the Chamber has appeared as an *amicus* before this Court in matters of significant importance to its members including the proper scope of actions brought under the Illinois Biometric Information Privacy Act, the appropriate role and compensation of relators in Illinois false claims actions, and limitations on a municipality's authority to tax.

This appeal squarely implicates the interests of Illinois' business community, for the issues presented go to the heart of the employer-employee relationship. Trust between an employer and its employees is a cornerstone of that relationship and is vital to the fair and efficient operation of any business. The rule Defendants invite this Court to embrace not only breaks from established Illinois precedent and the law in other jurisdictions, but threatens the proper ordering of the employer-employee relationship by circumscribing an employee's duty not to usurp its employer's business opportunities. At the same time, Defendants would require employers to apply an indeterminate, multi-factor balancing test to predict which employees would be subject to which level of fiduciary duty. Such limitations on the corporate opportunity doctrine, and such uncertainty in the doctrine's application, would dramatically affect the business climate in Illinois and undercut the State's ability to retain and attract new businesses.

ARGUMENT

Businesses necessarily operate through and rely on their agents. And all agents (employees) owe their principal (employer) a foundational duty of loyalty, which forbids an employee from acting contrary to their employer's best interests. Real-world experience and common sense teach that an employee may in the course of their employment learn about or have a chance to develop a business opportunity for their employer. Usurpation of that opportunity by the employee violates the basic duty of loyalty and harms the employer regardless of the employee's position within the company hierarchy. So long as the individual is an agent with a duty of loyalty, there is an obligation not to usurp a corporate opportunity.

Defendants disregard that easily administrable test and invite this Court to adopt a rule that only those with a "heightened" fiduciary duty can improperly usurp business opportunities. This rule is both illogical and indeterminate. First, limiting the duty not to usurp opportunities to officers and directors ignores the role that other employees—like DePodesta and Dahlstrom here—may play in discovering and developing those opportunities. The principal suffers harm regardless of which agent steals the opportunity, and artificially limiting the duty to officers and directors improperly elevates form over substance. Second, Defendants' amorphous, fact-intensive test to determine who may owe a duty not to usurp corporate opportunities is needlessly uncertain and complicated, when a bright-line rule would better protect the principal's interest.

In short, businesses need both robust protection against employee disloyalty and certainty and predictability in the way they structure their operations and employer-employee relationships. Defendants' test would deprive employers of both.

I. The Duty Not To Usurp Corporate Opportunities Does Not Depend On The Existence Of Some Heightened Version Of The Fiduciary Relationship Or A Complex, Fact-Intensive Inquiry.

Illinois courts have long recognized that employees owe their employers a duty of loyalty regardless of whether the employee is an officer or director of the company. That basic duty of loyalty owed by all employees (all agents of the employer) forbids employees from acting against their employer's interest—a prohibition that logically includes the bar on agents claiming their employers' corporate opportunities as their own. Defendants' effort to limit this prohibition against usurpation of corporate opportunities to officers and directors, or other employees who satisfy a multi-factor test Defendants concoct, has no basis in law. Nor would such a limitation be reasonable, for why should an employee be allowed to steal their employer's corporate opportunities simply because the employee is not an officer or director? Such a rule would risk assigning legal duties, and corresponding liability, based on the happenstance of a job title and a mix of other factors, without regard to the harm that unscrupulous employees cause their employers. Further, a complex, fact-intensive test would disserve employers who need to know with certainty that the law will not permit their employees to steal their business opportunities.

A. Established Illinois Law Holds That The Corporate Opportunity Doctrine Is Not Limited To Officers And Directors.

Defendants are incorrect that the corporate opportunity doctrine applies only to persons with "heightened fiduciary duties." AT Br. 25. This Court has long recognized that employees have a "duty of fidelity to [their] employer's interest" and are required to act "for the furtherance and advancement of the business in which [they are] engaged." *Davis v. Hamlin*, 108 Ill. 39, 45-46 (1883). As this Court explained in *Mullaney, Wells & Co. v. Savage*, 78 Ill. 2d 534, 545-46 (1980), "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." That is because "[u]nder standard agency doctrine," an employee is "obligated to act solely for the benefit of the plaintiff in all matters connected with his agency, and to refrain from competing with" his employer. *Id.* at 546; *see* Restatement (Second) of Agency § 387 (1958) ("Unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency."); *id.* § 393 ("Unless otherwise agreed, an agent is subject to a duty not to compete with the principal concerning the subject matter of his agency.").

This doctrine extends to all agents who are exposed to corporate opportunities as part of their employment, not just officers and directors. *Mullaney*, 78 Ill. 2d at 546. That is because "[e]mployees as well as officers and directors owe a duty of loyalty to their employer." *Lawlor v. N. Am. Corp. of*

Ill., 2012 IL 112530, ¶ 69. And that stands to reason, for employees other than officers and directors are frequently engaged in locating business opportunities for an employer, and the usurpation of a business opportunity by those employees is just as harmful to the company. Simply, the loss of a business opportunity to an unscrupulous employee injures the employer to the same degree regardless of the employee's job title, and the law therefore recognizes that all employees have a basic duty of loyalty to their employer that includes a bar on stealing corporate opportunities.

Indeed, the prohibition on any agent claiming the principal's business opportunities is grounded in several converging agency rules that compel a broad rule. As the Restatement (Third) of Agency explains, "[i]f the agent's work for the principal involves identifying, assessing, and pursuing [business] opportunities on the principal's behalf, the agent's duties of performance require the agent to exercise reasonable care and diligence in connection with the opportunity." Restatement (Third) of Agency § 8.02 cmt. d (2006). But "*all agents*, even those whose assigned work does not involve the assessment or pursuit of business opportunities, have a fiduciary duty to the principal not to take personal advantage of an opportunity … when either the nature of the opportunity or the circumstances under which the agent learned of it require that the agent offer the opportunity to the principal." *Id.* And even if the opportunity is one that an agent need not offer the principal, the agent still

has a duty "not to use property or confidential information" without the employer's consent. *Id*.

In line with these fundamental, common-law principles, federal and state courts applying Illinois law have repeatedly held that a defendant need not be a member of management to breach fiduciary duties by usurping an opportunity that belongs as of right to the corporation. *E.g.*, *Foodcomm Int'l. v. Barry*, 328 F.3d 300, 304 (7th Cir. 2003) (under Illinois law, "employees, as agents of their employer, do not fall outside the purview of a breach of fiduciary duties"); *E.J. McKernan Co. v. Gregory*, 252 Ill. App. 3d 514, 530 (2d Dist. 1993) ("An employee need not be an officer or a director to be accountable since an agent must act solely for the principal in all matters related to the agency and refrain from competing with the principal."); *Radiac Abrasives, Inc. v. Diamond Tech., Inc.*, 177 Ill. App. 3d 628, 637 (2d Dist. 1988) ("*Mullaney* … is a case in which defendant was neither an officer nor a director of the plaintiff corporation … [n]evertheless, the defendant in *Mullaney* was found to owe a fiduciary duty to the corporation because there was an agency relationship."); *Regal-Beloit Corp. v. Drecoll*, 955 F. Supp. 849, 864 (N.D. Ill. 1996) (citing *Mullaney* and holding that "Defendants' conduct likely violated the principle that an agent (or employee) may not compete with his principal (or employer) concerning matters within the scope of his agency (or employment)").

Commentators agree, including the author of one of the articles that Appellants cite in support of their position. *See* William Lynch Schaller,

Corporate Opportunities & Corporate Competition in Illinois: A Comparative Discussion of Fiduciary Duties, 46 J. Marshall L. Rev. 1, 4 (2012) ("To understand corporate opportunity and corporate competition claims, one must first appreciate the capaciousness of Illinois fiduciary duty law—it covers a much wider range of players than many initially realize, from outside directors down to mere employees."); *see also id.* at 9 ("sabotage by any employee, from highest to lowest, is not an act 'for the benefit of' the employer,' and it therefore should not be permitted by Illinois fiduciary duty law").

Moreover, Illinois' approach is consistent with the corporate opportunities doctrine in other jurisdictions. For instance, the Wisconsin Supreme Court has held that an employee who was not an officer or director breached his duty of loyalty when he used his job to steal business for himself from his employer. *Gen. Auto. Mfg. Co. v. Singer*, 120 N.W.2d 659, 662-63 (Wis. 1963); *see InfoCorp, LLC v. Hunt*, 780 N.W.2d 178, 182-87 (Wis. App. Ct. 2009) (collecting cases and explaining that under Wisconsin law duty not to usurp corporate opportunity extends to employees beyond officers and directors). Likewise, a federal court applying Michigan law held that an employee who worked "as a project and service engineer" and was not an officer or director was subject to a duty not to usurp his employer's corporate opportunities. *Nedschroef Detroit Corp. v. Bemas Enter. LLC*, 106 F. Supp. 3d 874, 879, 882-83 (E.D. Mich. 2015).

Other courts around the country agree. *See, e.g.*, *Benchmark Med. Holdings, Inc. v. Rehab Sols., LLC*, 307 F. Supp. 2d 1249, 1266 (M.D. Ala. 2004) ("Simply because someone is an employee, rather than a corporate officer or director, does not, under Delaware law, exempt him from responsibility for breach of a fiduciary duty, including wrongful appropriation of a corporate opportunity."); *Gomez v. Bicknell*, 756 N.Y.S.2d 209, 213 (App. Div. 2002) (holding that employee hired to provide merger and acquisition services "diver[ted] … a corporate opportunity" when he kept the name of a prospective client to himself and pursued the prospect after resigning from the firm); *Cameco, Inc. v. Gedicke*, 724 A.2d 783, 790 (N.J. 1999) ("If the employee usurped a corporate opportunity or secretly profited from a competitive activity, the employer may recover the value of the lost opportunity or the secret profit."); *BIEC Int'l, Inc. v. Glob. Steel Servs., Ltd.*, 791 F. Supp. 489, 549 (E.D. Pa. 1992) ("an employee who improperly and unfairly competes with his employer could be liable for diverting corporate opportunities").

The Illinois cases on which Defendants rely (at 25-30) are not to the contrary. Those decisions certainly recognize that a director or officer owes fiduciary duties to the corporation that can support a corporate usurpation claim. But they nowhere imply that non-management employees who violate their fiduciary duties cannot be held liable for usurping a corporate opportunity. *Advantage Mktg. Grp., Inc. v. Keane*, 2019 IL App (1st) 181126, in fact holds precisely the opposite. It concludes that an employee need not be an

officer or a director to be accountable, because under "standard agency doctrine," an employee too has a duty "to act solely for the benefit of the plaintiff [employer] in all matters connected with his agency and to refrain from competing with the plaintiff." *Id*. at ¶¶ 27, 31, 33.

In any event, this Court squarely held in *Mullaney* that the fact that many corporate usurpation cases happen to "involve defendants who are corporate officers and directors" does not mean that the doctrine is "so limit[ed]." 78 Ill. 2d at 546. What matters is whether the plaintiff and defendant "st[an]d in the relationship of principal and agent." *Id*. That is because when a defendant "substitute[es] himself" for the employer with respect to a business opportunity within the scope of the defendant's employment, the defendant "place[s] him[self] in a position where his personal interests will conflict with his duties to his principal" in violation of bedrock fiduciary obligations. *Id*. at 549-50.

B. Defendants' Proposed Rule Is Unworkable.

Defendants' position is not only contrary to Illinois law, but it also would require fact-intensive inquiries that would make day-to-day operations, not to mention any ensuing litigation, more difficult and uncertain for all parties. The test articulated in *Mullaney* and subsequent decisions is straightforward: Is the defendant "subject to fiduciary obligations with respect to the subject matter of his agency," and did the defendant's actions violate those duties? 78 Ill. 2d at 546. Defendants would replace this familiar framework with an open-ended test, asking whether the defendant was subject to "heightened" fiduciary

standards based on "the degree and nature of the defendant's duty of loyalty." AT Br. 25, 27.

Unsurprisingly, the precise scope of Defendants' proposed test is unclear, but it apparently includes at least the following factors: (1) the defendant's "actual management responsibilities"; (2) "the extent of corporate oversight and guidance"; (3) whether the defendant in fact "exercise[s] certain powers of officers"; (4) how the defendant's compensation is structured; (5) how the defendant "h[o]ld[s] himself out to third parties"; and (6) the "reasonable expectations" of the parties "at the beginning of the relationship." AT Br. 28-30. No doubt Defendants or future litigants will argue that additional factors are relevant. Courts then must apply this mix of unweighted factors to decide whether an employee exercised "sufficient" authority and control to be held liable for usurpation in a given instance. That is a recipe for confusion, inconsistent outcomes, and added expense for Illinois businesses and, ultimately, Illinois consumers and workers.

The Court should decline Defendants' invitation to unsettle Illinois law. In fact, one of Defendants' principal authorities recognizes that the purpose of fiduciary doctrines is to "facilitate[] commercial efficiency by imposing a duty of loyalty on fiduciaries, thereby relieving the parties to such relationships of the obligation of, in every case, individually negotiating contracts which specify the fiduciary's duties in a large number of hard to anticipate situations." *Graham v. Mimms*, 111 Ill. App. 3d 751, 760 (1st Dist. 1982). Another

commentator cited by Defendants laments that recent modifications to the corporate opportunity doctrine have "merely muddie[d] the waters, add[ed] new layers of confusion to already murky doctrine, and provide[d] no predictable guidelines." Eric Talley, *Turning Servile Opportunities to Gold: A Strategic Analysis of the Corporate Opportunities Doctrine*, 108 Yale L.J.277, 295 (1998). There is no reason to add yet another open-ended, fact-intensive question to the inquiry.

Indeed, Defendants' rule would require businesses to balance a number of factors—with the uncertainty inherent in such balancing—every time they expose an employee to potential corporate opportunities. This is needlessly inefficient when a workable, and suitably protective, bright-line rule already exists—it is much easier for an employee to understand that he or she is not allowed to steal the principal's business opportunities than it is to balance a changing set of factors. Nor is it an answer to claim that businesses can contract around the problem, for it is impossible to predict all the circumstances in which a corporate opportunity may arise. Continued use of the broad rule against usurpation avoids this costly unpredictability.

II. Illinois' Business Community Needs The Protection Offered By A Broad Corporate Opportunities Doctrine.

Illinois businesses face intense national and global competition in the marketplace. Under such strong market pressures, they often must rely on their employees to discover new commercial opportunities or develop new business relationships and projects. They also must trust their employees with

their confidential business information. When that trust is breached, the business suffers. Just as any employee would be liable stealing their employer's trade secrets, so too should they be liable for appropriating business opportunities. The breach of duty is the same in both cases because both involve an employee acting contrary to the employer's best interests. It may be true in some cases that an officer or director has more chances to usurp corporate opportunities, but the underlying duty (to act in the employer's best interest) and the resulting harm (loss of a business opportunity) is the same in either case.

Businesses need to be able to structure their expectations of employees in an ordered way. Defendants' rule would make that impossible, for it would either artificially restrict the corporate opportunity doctrine to officers and directors or permit its extension only after a fact-intensive and unpredictable inquiry. Instead, businesses are entitled to expect that none of their employees will usurp their business opportunities.

Illinois has provided significant legal recognition of an employee's fiduciary duty of loyalty for a long time. The Court should not accept Defendants' invitation to revisit that rule and set Illinois' business community at a distinct market disadvantage.

CONCLUSION

For these reasons, *amicus* Illinois Chamber of Commerce respectfully requests that the Court reaffirm that the duty not to usurp corporate opportunities extends to all agents of a business, not only those individuals with a "heightened" fiduciary duty.

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Respectfully submitted,

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Supreme Court Rule 341(c) Certificate of Compliance

I certify that this brief conforms to the requirements of Rules 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, the Rule 341(c) certificate of compliance, and those matters appended to the brief under Rule 342(a) is 14 pages.

s/*Michael Scodro*
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