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-Appellee*.	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.

CROSS-REPLY BRIEF OF PLAINTIFF INDECK ENERGY SERVICES, INC.

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INTRODUCTION

The loose relationship between the facts and the law that characterized DePodesta's and Dahlstrom's Opening and Reply briefs unfortunately continues in their Response to Indeck's Request for Cross Relief. The trial court's rulings that allowed them to keep the enormous benefits of their disloyalty, if affirmed, will establish a road map for the disloyal and dishonest to breach their fiduciary duties of loyalty with impunity. To preserve the deterrent purpose of fiduciary duty law, this Court should grant Indeck's Request for Cross-Relief in its entirety.

I. The trial court's ruling that defendants may keep all their ill-gotten gains should be reversed.

A. Defendants do not contest their fiduciary duties to Indeck for the Merced transaction continued after they resigned.

Indeck's Request for Cross Relief cited an unbroken line of authority which holds a corporate officer's fiduciary duty prevents him or her from personally benefitting from transactions that began or were founded on information obtained during the existence of the officer's employment – even if completed after he or she resigned. (See Cross Relief, p. 63-65, and nine cases cited therein.) DePodesta and Dahlstrom do not attempt to refute any of these decisions; indeed, not one of the nine decisions appears or is discussed in defendants' Response. Their refusal to address any of these cases concedes the point: when DePodesta, an officer, signed the LLC Agreement and the Management Agreement days after resigning, he violated his duty of loyalty to Indeck. See *Reliable Fire Equip. Co. v. Arredondo*, 2011 IL 11871, ¶29 (failure to challenge employer's legitimate interest argument conceded the point.)

Indeck's Request for Cross Relief also noted this Court imposed liability on a non-officer employee in *Mullaney, Wells & Co. v. Savage*, 78 Ill.2d 534 (1980), for post-resignation conduct which allowed the employee to benefit from pre-resignation breaches of loyalty. (Cross Relief, p. 68-69.) Again, defendants' Response makes no attempt to refute this controlling law. Indeed, it does not even cite *Mullaney.* By failing to contest this law, DePodesta and Dahlstrom also concede that after they resigned, they continued to owe fiduciary duties to Indeck, as employees, not to consummate the deal they negotiated with Merced, which they breached by promptly signing the LLC Agreement and the Management Agreement.[1]

To avoid any doubt on this issue, this Court should clarify that both officers and employees owe fiduciary duties of loyalty to their employers that continue after their employment terminates for transactions which began during their employment, which were founded on information obtained in the employment, and/or which were negotiated in violation of the officers' and employees' fiduciary duties to their employers.

B. Defendants mischaracterize the record by stating the trial court entered a *finding* that defendants' breaches of fiduciary duty ended with their employment.

Rather than forthrightly confront the unbroken line of controlling authority Indeck cited, defendants contend they need not address "each of Indeck's arguments regarding

[1] Defendants contend Indeck did not claim until its Request for Cross Relief that the transaction with Merced was a breach of DePodesta's and Dahlstrom's fiduciary duties in Count IV of the Complaint. (Resp., p. 25.) This is false. At the beginning of this case, Indeck pleaded in Count IV that "DePodesta and Dahlstrom breached the fiduciary duties they owed Indeck by *** soliciting investors in or financing for Halyard Energy *** and by entering into agreements with such investors or financing sources." (C 66-67) In its closing argument, Indeck specifically referenced the Management Agreement defendants signed upon their resignation. (R 7247) In between these two points, the references to the LLC Agreement, the Management Agreement, and Merced are too numerous to reference.

whether and when Mr. DePodesta's and Mr. Dahlstrom's duties of loyalty ended." (Resp., p. 24.) Instead, defendants falsely contend Indeck did not "address the lower courts' *actual* rulings and blatantly mischaracterized what happened below ***." (Emphasis in original) (*Id.*) Why? Because, say defendants, "[t]he trial court *found* that Mr. DePodesta's and Mr. Dahlstrom's breaches of fiduciary duty ended when they resigned." (Emphasis added) (*Id.*)

It is this statement, however, which mischaracterizes what happened below. The entirety of the trial court's "actual ruling" is as follows:

> Further, the breach – the defendants' breach of fiduciary duty ended with DePodesta's and Dahlstrom's employment.

(R 8466)

Notably missing from this "actual ruling" is the word "find." The trial court had just orally entered 651 specific *findings* of fact from the 789 proposed findings the parties submitted. (R 8398-8437) It also made several *additional* specific findings of fact on the record, each time using the word "find." (R 8445-48, 8453-54) Yet despite all these other instances, it did not use "find" in the "actual ruling" cited above. This flatly contradicts defendants' false assertion that the "actual ruling" was a finding of fact.

The only reasonable interpretation of the trial court's "actual ruling" is that it ruled DePodesta's and Dahlstrom's breaches of fiduciary duty ended with their employment at Indeck because the fiduciary duty they owed Indeck regarding the Merced transaction stopped when they resigned. This misstates the law and should be reversed on a *de novo* basis.

C. Even if the trial court had entered a finding of fact that defendants' breaches of fiduciary duty ended with their employment, any such finding must be reversed.

Since DePodesta and Dahlstrom do not contest their duties of loyalty to Indeck for the Merced transaction continued after their resignations, any finding that they could sign the LLC Agreement and Management Agreement without breaching these duties, even if it had been made, must be reversed.

The facts and the law here are not in dispute. DePodesta and Dahlstrom owed Indeck fiduciary duties of loyalty not to personally benefit from transactions that began or were founded on information obtained during the existence of their employment, even if the transactions were completed after they resigned. It is undisputed that the LLC Agreement and the Management Agreement, indeed the entire Merced deal, began and was founded on information obtained during defendants' employment with Indeck. It is equally undisputed that DePodesta and Dahlstrom breached their duties of loyalty when they negotiated the Merced transaction while they were employed and failed to disclose it to Indeck. Those breaches alone, which they concede, precluded DePodesta and Dahlstrom from signing the agreements and benefitting from the same.

The general standard of review in a bench trial is manifest weight of the evidence. *Lawlor v. North Amer. Corp. of Ill.*, 2012 IL 112530, ¶70. This is clearly met here. Where the issue is whether the trial court applied the correct legal test to the evidence presented, its determination presents a question of law reviewed *de novo. In re A.H.*, 207 Ill.2d 590, 593 (2003); *Reliable Fire Equip Co.*, 2011 IL 11871, ¶13. Because that standard is also met, any finding defendants' breaches of fiduciary duty ended with their employment and thus allowed them to benefit from their disloyalty, if it had been made, should be reversed.

D. Indeck did not need to prove loss causation to recover DePodesta's and Dahlstrom's ill-gotten gains.

Defendants repeatedly note Indeck declined to pursue claims for compensatory damages and instead sought to recover the benefits DePodesta and Dahlstrom obtained as a result of their disloyalty. While emphasizing this, defendants ignore the fundamental differences between the causation required to recover ill-gotten gains and the causation required to recover damages for losses. Because the very authority from this Court defendants cite confirms that Indeck did not need to prove loss causation to recover the gains and benefits they obtained as a result of breaching their duties of loyalty, the trial court imposed the wrong standard and its order denying recovery should be reversed.

Primarily intended to deter wrongdoing, this Court has "long regarded breach of fiduciary duty as controlled by the substantive laws of agency, contract and equity." *Kinzer v. City of Chicago*, 128 Ill.2d 437, 445 (1989); *Armstrong v. Guigler*, 174 Ill.2d 291, 293-94 (1996) ("fiduciary relationship is founded on the substantive principles of agency, contract *and* equity.") (Emphasis in original.) Because "a fiduciary relationship is an amalgamation of various aspects of legal jurisprudence" (*id.*), the causation requirements of contract or tort law are not fully interchangeable in all fiduciary duty cases.

Martin v. Heinold Commodities, 163 Ill.2d 33, 53 (1994), illustrates this. While defendants cite *Martin* for the proposition a plaintiff must prove proximate cause to prevail on a fiduciary duty claim (Resp., p. 26), this begs the question of what constitutes "proximate cause" for the different types of fiduciary duty claims in that case.

Specifically, the plaintiffs in *Martin* brought two different fiduciary duty claims. The first alleged Heinold breached its fiduciary duty by charging the plaintiffs fake foreign service fees, a claim based in agency and equity. *Martin*, 163 Ill.2d at 55-56. The second alleged Heinold's fiduciary breaches resulted in the total losses of the plaintiffs'

investments, a damage claim that was essentially a fraud claim. *Id.* Not distinguishing between the separate fiduciary duty claims, the trial court entered an award for both on a "but-for" causation basis. It thus "awarded plaintiffs full investment losses, irrespective of causation, due to Heinold's bad-faith breach of its fiduciary duty." *Id.* at 53.

Citing *City of Chicago ex rel. Cohen v. Keane*, 64 Ill.2d 559, 565-66 (1978), this Court recognized that for constructive trust/equitable fiduciary duty claims "it is the gain to the agent from the abuse of the relationship that triggers the right to recover, rather than the loss to the principal." *Martin,* 163 Ill.2d at 57. For such claims, no showing of loss is required. Since Heinold improperly benefitted from breaching its duty by charging fake fees, it had a duty to convey this benefit to the plaintiffs under agency and equity principles. *Id.* at 56, 61, 79. This Court thus affirmed the trial court's award of all the ill-gotten fees without a showing of loss causation. *Id.* at 61, 79.

In contrast to the causation required to recover the fake fees, *Martin* held that recovery of the plaintiffs' investment losses, the full damages they sought, required proof of loss causation. *Id.* As this Court confirmed, loss causation requires proof that the "injury suffered by the plaintiff must be the natural and not merely a remote consequence of the defendant's act." *Id.* at 58 (quoting *Town of Thornton v. Winterhoff*¸ 406 Ill. 113, 119 (1950)). *Martin* thus recognized that when the fiduciary duty claim seeks damages for losses, and does not seek recovery of ill-gotten gains under the agency and equity branches of fiduciary duty law, a showing of loss causation is necessary. Other cases have recognized the distinction between recoveries under equitable and legal claims. See, *e.g.*, *Hill v. Names & Addresses, Inc.*, 212 Ill.App.3d 1065, 1073 (1st Dist. 1991) (court awarded alternative remedy of constructive trust on gains wrongfully realized by disloyal employee

and new employer, when a lost profits damage award would have enabled disloyal fiduciary to profit from breach.)

Because Indeck's right to recover the gains defendants obtained from their disloyalty does not depend on any showing of loss at all, requiring Indeck to prove loss causation is entirely inappropriate under *Martin*, established principles of agency law and prior authority from this Court. See, *e.g.*, *Vendo Co. v. Stoner*, 58 Ill.2d 289, 306 (1974) (citing Restatement (Second) of Agency, §407 ("[i]f the agent received a benefit as a result of breaching his duties 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 thereby caused ***.")); see also *id.*, §403 ("If an agent received *anything* as a result of his violation of his duty of loyalty to the principal, he is subject in liability to deliver it, its value, or its proceeds to the principal.") (Emphasis added.) Under this established authority, Indeck only needed to establish that the defendants received benefits as a result of breaching their duties of loyalty to recover them. Because Indeck satisfied that burden, the trial court's order, which imposed loss causation principles, applied the wrong standard and should be reversed. [2]

Finally, defendants argue the gains they obtained were somehow too remote for Indeck to recover them. (Resp., p. 26.) This argument relies on the wrong legal standard, as remoteness is fundamentally a damage concept, and cynically ignores the choice DePodesta and Dahlstrom each made every two weeks to accept the benefits of their disloyalty. Both DePodesta and Dahlstrom could have terminated the Management

[2] Defendants' citation to Restatement (Third) of Restitution and Unjust Enrichment §51, *comments i* and *f* (Resp., p. 26), is not to the contrary. The defendants' gains attributable to their disloyalty are the total benefits they received.

Agreement and eliminated or reduced the gains they received and thus Indeck's claims for the same. They did not do so. They chose instead to continue to accept the fees and benefits of their disloyalty to obtain an even bigger payday through projects in which they hold a 20-percent profit interest.

Indeck met its burden of proof under this Court's jurisprudence of showing the fees and other benefits DePodesta and Dahlstrom obtained were the result of breaching their duties of loyalty. Case law prevents them from benefitting personally from this transaction. See, *e.g.*, *E.J. McKernan Co. v. Gregory*, 252 Ill.App.3d 514 (2d Dist. 1993). Because allowing defendants to keep these benefits frustrates the deterrent purpose of fiduciary duty law by incentivizing disloyal fiduciaries to violate their duties, the trial court's determination should be reversed on a *de novo* basis.

II. A constructive trust should be entered to prevent the defendants from profiting from breaching their duties of loyalty.

Defendants do not dispute DePodesta and Dahlstrom may collect millions through the 20-percent profit interest they obtained as a result of their disloyalty. They nonetheless argue they also should be allowed to keep these profits, if and when they materialize, and no constructive trust should be entered, because Indeck could not establish them with the reasonable certainty required to sustain a damages award. Defendants' constructive trust argument relies on the wrong legal standard, rewrites the trial court's rulings to fit this incorrect standard, and would further destroy the deterrent effect of fiduciary duty law. Because this ruling is arbitrary, unreasonable and against the manifest weight of the evidence, it should be reversed.

Recognizing that the trial court's rulings rest on shaky legal ground, defendants audaciously seek to change them. Rather than admit that the trial court's consistent

references to "damages" referred to and imposed the wrong legal standards, DePodesta and Dahlstrom presume to recharacterize the rulings to refer instead to "benefits." (Resp., p. 28, n. 13.) It is not for defendants to presume to divine what the trial court meant and change what the trial court said.

Defendants similarly massage the cases they rely upon. All their cases refer to damages and the standards for damage awards that require proof of loss causation. Not one refers to wrongful gains a disloyal fiduciary may obtain.[3] Nonetheless, defendants also mischaracterize them to refer to "benefits" rather than solely damages. (See Resp., p. 29.)

Unlike the damages cases defendants rely upon, constructive trust cases involving disloyal fiduciaries are on point. As this Court confirmed in *Martin*, when a person "is subject to an equitable duty to convey [property] to another on the ground he would be unjustly enriched if he were permitted to retain it, a constructive trust arises." 163 Ill.2d at 56. The Restatement (Second) of Agency repeatedly requires a disloyal agent to deliver any benefit, indeed, anything, he or she receives as a result of the agent's disloyalty. Restatement (Second) of Agency, §§ 403, 407(1).

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[3] *See Professional Exec. Ctr. v. LaSalle Nat. Bank*, 211 Ill.App.3d 368, 378 (1st Dist. 1991) (defendant's counterclaim for unspecified damages properly dismissed where it failed to allege current injury and only alleged possible future damages if he were unable to tie into septic system); *Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 339 (1971) ("future damages that might arise from the conduct sued on are not recoverable if the fact of their accrual is speculative or their amount and nature unprovable"); *Moede v. Pochter*, 701 F.Supp.2d 997, 1003 (N.D. Ill. 2009) ("party seeking to recover damages has the burden of proving them 'to a reasonable degree of certainty'"); *Healy v. CTP, Inc.*, 1994 WL 846898 *4 (N.D. Ill. 1994) (plaintiff could not assert damage claim for commissions on sales she would have consummated had she stayed in defendants' employ); *Winston Res. Corp. v. Minn. Mining. & Mfg Corp.*, 350 F.2d 134, 144 (9th Cir. 1965) (where district court entered injunction, it did not err in also denying money damages as "[t]o enjoin future sales and at the same time make an award based on future profits from the prohibited sales would result in duplicating and inconsistent relief ***.")

Applying the correct standard, a constructive trust should be imposed on defendants' 20-percent profit interest to remove any possibility they will benefit from their wrongdoing. See *Graham v. Mimms*, 111 Ill.App.3d 751, 762-63 (1st Dist. 1982) (courts have been "inveterate and uncompromising" 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); *Hill*, 212 Ill.App.3d at 1083 ("only 'a total disgorgement' of profits 'would recognize the seriousness of the wrongdoing' in this case.")

Indeck's fiduciary duty constructive trust cases support the deterrent purpose of fiduciary duty law: eliminating the *possibility* disloyal fiduciaries may profit from their disloyalty. Defendants' cases, and the loss causation requirements they impose, do precisely the opposite and allow the disloyal and dishonest to profit from their wrongdoing. Defendants' cases simply rely on and apply the wrong legal standard. Accepting them and applying the incorrect damages standard to deny a constructive trust and allow a disloyal fiduciary to profit simply incentivizes fiduciaries to breach their duties.

Finally, relying on *Eychaner v. Gross*, 202 Ill.2d 228, 274 (2002), defendants argue that no *res* exists to support a constructive trust for the proceeds of their wrongful conduct. (Resp., p. 29.) This is simply wrong. As this Court held in *Martin*, "a constructive trust is imposed to recover *any* illegal benefit a breach of fiduciary duty may have given the fiduciary." (Emphasis added) 163 Ill.2d at 55. The trial court found that defendants' postponement of bids until after the trial "deprived Indeck of up to date and relevant market evidence of the value of the Halyard Wharton project, and thus of the benefits that Halyard

Wharton, DePodesta and Dahlstrom would be likely to receive." (C 6838 ¶199; R 8412) Nonetheless, despite defendants' actions depriving Indeck of this evidence, the 20-percent profit interest itself is an illegal benefit which confers rights. It is an existing, identifiable *res*. This is all the *res* that Illinois law, and this Court's decision in *Eychaner*, require to impose a constructive trust to prevent the possibility a fiduciary may profit from his or her disloyalty.

This Court should reject defendants' invitation to endorse the fundamentally inequitable argument that disloyal fiduciaries should keep enormous benefits obtained from their disloyalty, simply because these benefits cannot be established with the reasonable certainty required to prove an inapposite damage claim. The order denying a constructive trust on DePodesta's and Dahlstrom's 20-percent profit interest is arbitrary, unreasonable, against the manifest weight of the evidence, and would defeat the deterrent purpose of fiduciary duty law. It should be reversed.

III. The trial court erred in ruling Indeck's confidentiality agreement was unenforceable.

Defendants did not move for directed finding on the grounds that Indeck failed to present evidence of irreparable injury. The trial court made that determination *sua sponte*, further ruling that paragraph 1 of Indeck's confidentiality agreement was unenforceable. (C 10392-99; R 3586-87) At the same time it granted defendants' motion on Count I, the trial court denied defendants' directed finding motion on Count II, Indeck's trade secret claim for injunctive relief. (R 3627) At the conclusion of the case, the trial court entered a three-year injunction preventing defendants from using or disclosing Indeck's trade secrets. (R 8450)

Since Indeck obtained injunctive relief under Count II, the injunctive relief Indeck sought in Count I became moot; an appeal of Count I in its entirety would only seek to obtain the relief Indeck already obtained in Count II. As a result, the only issue of practical importance that remained for review was the trial court's ruling that paragraph 1 of Indeck's confidentiality agreement is unenforceable. Indeck thus appealed that ruling. It did so pursuant to settled authority from this Court, authority the appellate court did not discuss.

Because the trial court's ruling that paragraph 1 of Indeck's confidentiality agreement is unenforceable is *not* moot under this Court's established authority, the appellate court should have reviewed that ruling and reversed it.

A. The trial court's order is reviewable under settled law.

In *People ex rel. Bernardi v. City of Highland Park*, 121 Ill.2d 1, 6-7 (1988), this Court held that even though an order would not affect the judgment below, "[t]here is life in the appeal because our decision could have a direct impact on the rights and duties of the parties." *Bernardi* further recognized that where a decision rendered by this Court will have "important consequences" for the parties involved, it is proper to entertain the appeal, even though the issues concerning the relief sought were moot. *Bernardi*, 121 Ill.2d at 7 (quoting *People v. Lynn*, 102 Ill.2d 267, 273 (1984)). This Court reaffirmed its holding in *Bernardi* in *Balmoral Racing Club, Inc. v. Illinois Racing Board*, 151 Ill.2d 367, 387 (1992) ("where a decision could have 'important consequences' for the parties before the court, it is proper to entertain the appeal" even though its decision could not change the judgment below.)

This Court again affirmed this rule in *Berlin v. Sarah Bush Lincoln Health Center*, 179 Ill.2d 1 (1997). There, quoting *Bernardi* and *Balmoral Racing*, this Court held that review of the enforceability of a restrictive covenant was appropriate, even though it would not have an effect on the judgment below, because "[a] determination in this case [adverse to the defendant] could mean that the Health Center must implement significant changes in its working relationship with its medical staff." *Id.* at 8. At the same time, it noted a contrary determination "may mean that the Health Center may have various causes of action against Dr. Berlin based on the contract." *Id.*

Review of a restrictive covenant was again before this Court in *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill.2d 52 (2006). While this Court noted its decision on the covenant would not affect the judgment below, it again addressed the enforceability issue, holding where its "decision 'could have a direct impact on the rights and duties of the parties' there is life in the appeal." *Id.* at 63.

Indeck's appeal of the decision holding paragraph 1 of its confidentiality agreement unenforceable fits squarely within this settled authority. The existence of an enforceable confidentiality agreement is significant for any employer like Indeck that importantly seeks to protect its intellectual property and enforce claims of trade secret misappropriation. See, *e.g.*, *Liebert Corp. v. Mazur*, 357 Ill.App.3d 265, 279 (1st Dist. 2005) ("failure to require employees to sign confidentiality agreements" supported determination that customer lists were not trade secrets); *Stampede Tool Warehouse, Inc. v. May*, 272 Ill.App.3d 580, 589 (1st Dist. 1995) (because employees signed confidentiality agreement, decision holding information met trade secret status affirmed). Additionally, entering into new confidentiality agreements with existing employees raises issues of consideration. See,

e.g., *Diederich Insurance Agency, LLC v. Smith*, 2011 IL App (5th) 100048, ¶¶ 10-15. As in *Berlin*, the trial court's decision, if not reversed, would require Indeck to "implement significant changes in its working relationship with its *** staff." 179 Ill.2d at 8.

These "important consequences" are as important as those that justified review of the restrictive covenants in *Berlin* and *Mohanty*. They are also as important as the consequences which justified review in other cases. See, *e.g.*, *Lynn*, 102 Ill.2d at 273 (nullification of misdemeanor conviction reviewed even though time was served as "it may have important consequences to a defendant"); *Balmoral Racing Club*, 151 Ill.2d at 388 ("[a] determination that the Board's procedures were deficient could mean that the Board must undergo significant changes in the conduct of its race meetings.").

At the same time, a determination that paragraph 1 of Indeck's confidentiality agreement is enforceable "could have a direct impact on the rights and duties of the parties." *Berlin*, 179 Ill.2d at 8. DePodesta and Dahlstrom secretly downloaded thousands of Indeck documents they knew were confidential for the purpose of using them to compete against Indeck. (R 8462) In addition to this dishonesty and deception, DePodesta and Dahlstrom filed false affidavits with the trial court regarding the completeness of the documents they did produce. (R 8359) Under these circumstances, Indeck continues to have well-grounded concerns that DePodesta or Dahlstrom could still retain, use or disclose Indeck's confidential information.[4] See *Mohanty*, 225 Ill.2d at 64 ("[a] decision as to the enforceability of the restrictive covenants could have a direct impact on [a party's] rights and obligations in these matters.")

[4] Indeck notes DePodesta and Dahlstrom failed to return 18 of the 23 external drives they used to access the Indeck computers in the days before they resigned. (C 6829 ¶169; R 8410)

Because there is life in Indeck's appeal of the trial court's ruling that paragraph 1 of its confidentiality agreement is unenforceable, the appellate court should have followed this Court's precedent, reviewed this discrete issue, and reversed the trial court's ruling.

B. Paragraph 1 of Indeck's confidentiality agreement was not overbroad.

In ruling that paragraph 1 of Indeck's confidentiality agreement was unenforceable, the trial court erred in failing to give effect to the "secret and confidential" language in the first sentence of the paragraph. Specifically, the trial court incorrectly ruled "[t]he definition of 'Information' is contained in section 1(c) of the Agreement" (R 3579), when the definition of the term "Information" is defined in the first sentence of paragraph 1. In doing so, the trial court chose not to give effect to all the words of the same paragraph.

Applying to all provisions of the paragraph, the first sentence of 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)

While Defendants claim that paragraph 1(c) "merely provides that everything not known to the public, or persons engaged in research, development and education similar to Indeck's business enterprises, without specifics, is confidential" (Resp., p. 34), that construction ignores the key "secret and confidential" terms of the first sentence of the paragraph which modified it. When read in its entirety, including the language the trial court discounted, it is clear paragraph 1 protects "technical, scientific, financial, and business information of a *secret and confidential nature*" belonging to Indeck or its contractors that the employee may learn or develop in the course of his employment.

(Emphasis added.) Moreover, paragraph 1(c) ends with the phrase "and other trade secrets," indicating that the language coming before was intended to relate to trade secrets.

The case of *Service Centers of Chicago, Inc. v. Minogue*, 180 Ill.App.3d 447 (1st Dist. 1989), which defendants cite, is inapposite. There the plaintiff sought to protect its "unique pricing formula," which the First District held was based on a survey that embodied nothing more "than the obvious questions any salesman in the industry would need to ask in determining a customer's needs." *Id.* at 454. The *Service Centers* court further held it would not enforce the confidentiality agreement since it defined "confidential information" as "essentially all the information provided by Deliverex to Minogue 'concerning or in any way relating' to the services offered by Deliverex ***." *Id.* at 455. Paragraph 1, only applying to information "of a secret and confidential nature" imparted to the employee or developed by the employee in the course of his or her employment, stands in sharp contrast to the provision in *Service Centers.*

Paragraph 1 is also materially different from the clause in *North American Paper Co. v. Unterberger*, 172 Ill.App.3d 410, 416 (1st Dist. 1988). There the challenged clause applied to any information learned during employment, even if that information was not confidential. *Id.* Again, paragraph 1, applying only to secret and confidential information, is much narrower.

The trial court erred when it ignored the key language in the first sentence of paragraph 1 and instead focused exclusively on subparagraph (c). Because it failed to give full meaning to all the provisions of the same paragraph, the trial court ignored settled principles of contract construction and its determination that paragraph 1 is unenforceable should be reversed on a *de novo* review.

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

While claiming that paragraph 1 of Indeck's confidentiality agreement is similar to the overbroad confidentiality provision in *AssuredPartners, Inc. v. Schmitt*, 2015 IL App (1st) 141863, defendants fail to acknowledge the material differences between both confidentiality provisions. Indeed, even the trial court recognized Indeck's confidentiality agreement is not as broad as the confidentiality agreement in *AssuredPartners,* while declining to note these differences. (R 3582)

A review of *AssuredPartners*, however, confirms these significant differences. In *AssuredPartners*, the confidentiality agreement prohibited the use or disclosure of "any information, observations and data (including trade secrets) obtained by [Schmitt] during the course of [his] employment with [Jamison/ProAccess] concerning the business or affairs of [plaintiffs] and their respective Subsidiaries and Affiliates." Id. at ¶44. The *AssuredPartners* court read this provision to cover all information, whether owned by the employer, whether learned by the employee before or during the employment, and from whatever source. *Id.* at ¶¶44-45. This clause did not require the information to be secret or confidential. That is far removed from paragraph 1 of Indeck's confidentiality agreement.

Paragraph 1 of Indeck's confidentiality agreement makes clear it only covers information of a secret and confidential nature that belongs either to Indeck or to its contractors which is imparted to or developed by employee in the course of his or her employment duties. Accordingly, the trial court's reliance on the overly broad and distinguishable agreement in *AssuredPartners* was misplaced and reversible error.

D. The trial court erred in holding a confidentiality agreement is unenforceable unless it only protects competitive information.

The trial court also held that paragraph 1 of Indeck's confidentiality agreement is unenforceable because it is not limited to protecting information that provides a competitive advantage. (R 3581-82) Under the trial court's view, even confidential financial information of a privately held entity cannot be protected by contract. This is a startling concept. Indeck has not found any Illinois decision that holds confidential information alone cannot be protected. Indeed, Indeck's research has not identified any published decision *anywhere* that so holds.

In making its unprecedented ruling the trial court ignored the First District's decision in *Coady v. Harpo, Inc.*, 308 Ill.App.3d 153 (1st Dist. 1999). *Coady* specifically held "the 1995 confidentiality agreement restricts plaintiff's ability to disseminate *confidential* information that she obtained or learned while in defendant's employ." (Emphasis added.) *Id.* at 161. *Coady* thus made clear that sensitive and private information, even if it does not provide a competitive advantage, is also entitled to protection in an enforceable confidentiality agreement. See also *Office Mates 5, North Shore, Inc. v. Hazen*, 234 Ill.App.3d 557, 574 (1st Dist. 1992) (rejecting the idea that "only trade secrets – as distinct from confidential information – are entitled to legal protection.")

The trial court did not discuss, let alone distinguish, *Coady*. Instead, the trial court relied only on *Lifetec, Inc. v Edwards*, 377 Ill.App.3d 260 (4th Dist. 2007), for its unprecedented holding. *Lifetec* does not support the trial court's new rule of law. Indeed, its holding concerned the time restriction of a covenant not to compete, not the enforceability of a confidentiality agreement. The portion of the decision defendants cite referred to confidentiality agreements some Lifetec's employees signed which evidenced protectable interests sufficient to enforce the covenant not to compete. *Id.* at 270.

Businesses, like natural persons, may have information that is secret, confidential, private, and entitled to protection – even if the information cannot be proven to provide a competitive advantage. The trial court's order depriving Indeck of the ability to protect that information is error and should be reversed.

E. The trial court's ruling that Indeck's confidentiality agreement must contain a time provision is error.

Finally, the trial court ruled Indeck's confidentiality agreement was invalid because it was "unenforceably vague and unreasonable as to time." (R 3583) This objection simply does not withstand analysis.

With the enactment of the Illinois Trade Secrets Act, there is simply no requirement that a confidentiality agreement must contain a time provision. One of the principal draftsmen of the Illinois Trade Secrets Act confirmed shortly after it was enacted that Section 8(b)(1) was intended to overrule prior authority that held that time restrictions were necessary. See Jager, *Illinois Returns to the Mainstream of Trade-Secret Protection*, CBA Record, October 1988, at 18-19 (confirming that Section 8(b)(1) was specifically enacted to overrule *Disher v. Fulgoni*, 124 Ill.App.3d 257 (1st Dist. 1984) and *Cincinnati Tool Steel Co. v. Breed*, 136 Ill.App.3d 267 (2d Dist. 1985), which imposed such restrictions.) *Coady* also relied on Section 8(b)(1) to hold that the absence of any time restriction was not fatal to the enforceability of a confidentiality agreement. 308 Ill.App.3d at 161.

Recognizing the obvious effect of the Illinois Trade Secrets Act, the Second District in *Abbott-Interfast Corp. v. Harkabus*, 250 Ill.App.3d 13, 22 (2d Dist. 1992), did not follow its prior decision in *Cincinnati Tool*. On the contrary, relying on Section 8(b)(1), that court specifically held that it "could not say as a matter of law, the contractual prohibition on the disclosure of trade secrets in this case is void because it contains no time provision" and

reversed the trial court's order refusing to enforce the confidentiality agreement on that basis. *Id.* In requiring a durational time limit as a matter of law, the trial court ignored this controlling Second District authority.

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

CONCLUSION

For all these reasons, plaintiff Indeck Energy Services, Inc. respectfully requests this Court for Indeck's Request for Cross Relief:

(1) 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;

(2) 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;

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

(4) remand these matters for further proceedings.

Respectfully Submitted,

INDECK ENERGY SERVICES, INC.

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

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding the pages contained in the Rule 341(d) cover, this Rule 341(c) certificate of compliance, and the certificate of service, is 20 pages.

Dated: December 3, 2020

Respectfully submitted,
INDECK ENERGY SERVICES, INC.

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No. 125733

IN THE SUPREME COURT OF ILLINOIS

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

NOTICE OF FILING AND CERTIFICATE OF SERVICE

The undersigned certifies and states that on December 3, 2020, he caused to be filed electronically with the Clerk of the Supreme Court of Illinois, this **Cross-Reply Brief of Plaintiff-Appellee**, and that this **Cross-Reply Brief** was served via email and/or via the Odyssey eFileIL system to the parties and attorneys of record indicated below:

See, attached service list.

Under penalties as provided by law pursuant to 735 ILCS 5/1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this Notice of Filing and Certificate of Service are true and correct, except for those matters therein stated to be upon information and belief, and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

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