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**No. 125733**

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**In the**  
**Supreme Court of Illinois**

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INDECK ENERGY SERVICES, INC.,

*Plaintiff-Appellee,*

v.

CHRISTOPHER M. DEPODESTA,  
KARL G. DAHLSTROM, and HALYARD ENERGY VENTURES, LLC,

*Defendants-Appellants.*

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On Appeal from the Appellate Court of Illinois,  
Second Judicial District, 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.

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**BRIEF AND APPENDIX OF APPELLANTS**

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## POINTS AND AUTHORITIES

NATURE OF THE ACTION .....	1
ISSUES PRESENTED FOR REVIEW .....	2
STATEMENT OF JURISDICTION.....	2
Illinois Supreme Court Rule 304(a) .....	2
Illinois Supreme Court Rule 315 .....	3
STATEMENT OF FACTS .....	3
I.    BACKGROUND FACTS.....	3
A.    Mr. DePodesta and Mr. Dahlstrom’s work for Indeck .....	3
B.    Mr. DePodesta and Mr. Dahlstrom work for Merced Halyard Ventures .....	5
C.    The alleged corporate opportunities.....	6
D.    Influx of energy developers in the ERCOT region .....	8
E.    Energy development is speculative and risky .....	8
F.    Mr. DePodesta and Mr. Dahlstrom have not received, and may never receive, any additional pecuniary benefit from MHV .....	8
II.   PROCEDURAL HISTORY .....	9
A.    The trial court’s entry of directed finding in Defendants’ favor.....	9
735 ILCS 5/2-1110 .....	10
B.    The appellate court’s decision affirming the trial court, in part, and reversing judgment in Defendants’ favor .....	11
STANDARD OF REVIEW .....	12
735 ILCS 5/2-1110 .....	12
<i>Prodromos v. Everen Securities</i> , 389 Ill. App. 3d 157 (1st Dist. 2009) .....	12

<i>People ex Rel. Sherman v. Cryns</i> , 203 Ill. 2d 264 (2003) .....	12
<i>Greater Pleasant Valley Church</i> , 2012 IL App. (1st) 111853.....	12
<i>River Forest State Bank &amp; Trust Co. v. Rosemary Joyce Enters.</i> , 294 Ill. App. 3d 173 (1st Dist. 1997) .....	12
ARGUMENT .....	13
I. SUMMARY OF ARGUMENT .....	13
<i>Kerrigan v. Unity Savings Assoc.</i> , 58 Ill. 2d 20 (1974) .....	13, 14, 15
William Lynch Schaller, <i>Corporate Opportunities and Corporate Competition in Illinois: A Comparative Discussion of Fiduciary Duties</i> , 46 J. Marshall L Rev. 1 (2012) .....	13
<i>Cooper Linse Hallman Capital Mgmt. v. Hallman</i> , 368 Ill. App. 3d 353 (1st Dist. 2006) .....	13-14
<i>Anest v. Audino</i> , 332 Ill. App. 3d 468 (2d Dist. 2002).....	14
<i>Comedy Cottage, Inc. v. Berk</i> , 145 Ill. App. 3d 355 (1st Dist. 1986) .....	14
<i>Levy v. Markal Sales Corp.</i> , 268 Ill. App. 3d 355 (1st Dist. 1994) .....	14
<i>Lindenhurst Drugs, Inc. v. Becker</i> , 154 Ill. App. 3d 61 (2d Dist. 1987).....	14
II. THE APPELLATE COURT MISSAPPLIED <i>KERRIGAN</i> AND USED THE WRONG STANDARD OF REVIEW WHEN IT IGNORED THE TRIAL COURT’S FINDING THAT THE UNDEFINED AND NON-SPECIFIC OPPORTUNITY WAS AVAILABLE TO INDECK.....	16
A. If the Funding Opportunity is still available to Indeck, then it cannot be taken as that term is understood under the Illinois corporate opportunity doctrine.....	16
<i>Kerrigan v. Unity Savings Assoc.</i> , 58 Ill. 2d 20 (1974) .....	16, 17

	<i>Cooper Linse Hallman Capital Mgmt. v. Hallman,</i> 368 Ill. App. 3d 353 (1st Dist. 2006) .....	16, 17
	<i>Anest v. Audino,</i> 332 Ill. App. 3d 468 (2d Dist. 2002) .....	16
	<i>Comedy Cottage, Inc. v. Berk,</i> 145 Ill. App. 3d 355 (1st Dist. 1986) .....	16
	<i>Levy v. Markal Sales Corp.,</i> 268 Ill. App. 3d 355 (1st Dist. 1994) .....	17
	<i>Lindenhurst Drugs, Inc. v. Becker,</i> 154 Ill. App. 3d 61 (2d Dist. 1987) .....	17
B.	The trial court and the First District in <i>Cooper Linse</i> followed Illinois law and correctly recognized that it is material under the corporate opportunity doctrine whether the alleged opportunity was (and still is) available to the former employer .....	17
	<i>Cooper Linse Hallman Capital Mgmt. v. Hallman,</i> 368 Ill. App. 3d 353 (1st Dist. 2006) .....	17, 18, 19
	<i>Kerrigan v. Unity Savings Assoc.,</i> 58 Ill. 2d 20 (1974) .....	18
C.	The appellate court erred in finding that the prophylactic purpose of fiduciary law prohibited Defendants from exploiting an opportunity even though nothing was taken by Defendants .....	20
	<i>Kerrigan v. Unity Savings Assoc.,</i> 58 Ill. 2d 20 (1974) .....	20
D.	Alternatively, even if this Court declines to confirm that an opportunity was not taken, the appellate court should be reversed, and trial court affirmed, because the “Funding Opportunity” is not a concrete, identifiable opportunity necessary to qualify as an actionable corporate opportunity .....	21
	<i>In re Marriage of Rife,</i> 376 Ill. App. 3d 1050 (2d Dist. 2007) .....	21
	William Lynch Schaller, <i>Corporate Opportunities and Corporate Competition in Illinois: A Comparative Discussion of Fiduciary Duties,</i> 46 J. Marshall L Rev. 1 (2012) .....	21

	<i>Anest v. Audino</i> , 332 Ill. App. 3d 468 (2d Dist. 2002) .....	22
	<i>Comedy Cottage, Inc. v. Berk</i> , 145 Ill. App. 3d 355 (1st Dist. 1986) .....	22
	<i>Levy v. Markal Sales Corp</i> , 268 Ill. App. 3d 355 (1st Dist. 1994) .....	22
	<i>Kerrigan v. Unity Savings Assoc.</i> , 58 Ill. 2d 20 (1974) .....	22
	<i>Lindenhurst Drugs, Inc. v. Becker</i> , 154 Ill. App. 3d 61 (2d Dist. 1987) .....	22
E.	The appellate court erred by applying the wrong standard of review .....	23
	<i>Prodromos v. Everen Securities</i> , 389 Ill. App. 3d 157 (1st Dist. 2009) .....	23
	<i>Bernstein &amp; Grazian, P.C. v. Grazian &amp; Volpe, P.C.</i> , 402 Ill. App. 3d 961 (1st Dist. 2010) .....	23, 24
	<i>Joel R. Salazar v. Board of Educ.</i> , 292 Ill. App. 3d 607 (1st Dist. 1997) .....	24
III.	THE CORPORATE OPPORTUNITY DOCTRINE DOES NOT APPLY TO FIDUCIARIES WITH NO AUTHORITY AND CONTROL .....	25
	Eric Tally, <i>Turning Servile Opportunities to Gold: A Strategic Analysis of the Corporate Opportunities Doctrine</i> , 108 Yale L.J. 277 (Nov. 1998) .....	25
	<i>Teixeira &amp; Co. v. Teixeira</i> , 699 A.2d 1383 (R.I. 1997) .....	25
A.	The degree and nature of the duty of loyalty controls .....	26
	<i>Kerrigan v. Unity Savings Assoc.</i> , 58 Ill. 2d 20 (1974) .....	26, 27
	<i>Vendo v. Stoner</i> , 58 Ill. 2d 289 (1974) .....	27

<i>Mullaney, Wells &amp; Co. v. Savage</i> , 78 Ill. 2d 534 (1980) .....	27
<i>Advantage Mktg. Grp. v. Keane</i> , 2019 IL App. (1st) 181126.....	27, 28
<i>E.J. McKernan v. Gregory</i> , 252 Ill. App. 3d 514 (2d Dist. 1993).....	28
<i>Patient Care Services, S.C. v. Segal</i> , 32 Ill. App. 3d 1021 (1st Dist. 1975) .....	28
<i>Valiquet v. First Federal Sav. &amp; Loan Assoc.</i> , 87 Ill. App. 3d 195 (1st Dist. 1979) .....	28
<i>Graham v. Mimms</i> , 111 Ill. App. 3d 751 (1st Dist. 1982) .....	28, 29
<i>Comedy Cottage, Inc. v. Berk</i> , 145 Ill. App. 3d 355 (1st Dist. 1986) .....	28-29
<i>Lindenhurst Drugs, Inc. v. Becker</i> , 154 Ill. App. 3d 61 (2d Dist. 1987).....	29
<i>Nordhem v. Harry's Café, Inc.</i> , 175 Ill. App. 3d 392 (1st Dist. 1988) .....	29
<i>Hay Group, Inc. v. Bassick</i> , 2005 U.S. Dist. LEXIS 22095 (N.D. Ill. 2005) .....	29
<i>Superior Envtl. Corp. v. Mangan</i> , 247 F. Supp. 2d 1001 (N.D. Ill. 2003) .....	29
<i>MPC Containment Sys. v. Moreland</i> , 2008 U.S. Dist. LEXIS 60546 (N.D. Ill. 2008) .....	29
B. The appellate court failed to analyze the Defendants' degree of authority and control as a predicate to whether the corporate opportunity doctrine applies .....	30
<i>Kerrigan v. Unity Savings Assoc.</i> , 58 Ill. 2d 20 (1974) .....	30
CONCLUSION.....	31

### **NATURE OF THE ACTION**

After they resigned in November 2014, Defendants, Christopher M. DePodesta (“Mr. DePodesta”) and Karl G. Dahlstrom (“Mr. Dahlstrom”), were sued by their former employer, Indeck Energy Services, Inc. (“Indeck”) for, among other claims not at issue in this appeal, usurping two corporate opportunities (the so-called “Turbine Opportunity” and the “Funding Opportunity”).

Merced Capital (“Merced”) was a privately held registered investment advisor. Merced Partners III, L.P. (“MPIII”) was a Merced affiliate. After leaving Indeck, Defendants, as members of Halyard Energy Ventures, LLC (“HEV”), entered into an agreement with MPIII, in which MPIII and HEV formed Merced Halyard Ventures, LLC (“MHV”). As defined in the Management Agreement, HEV was to consult for MHV and to manage its new energy development projects in Texas. Indeck was also working on energy developments in Texas prior to Defendants’ resignation. Indeck claims that Defendants usurped this “Funding Opportunity” because they should have introduced Merced to Indeck, since Defendants met Merced’s principals through their work at Indeck. Yet, MPIII’s agreement with HEV did not preclude Merced or any of its affiliates from also working with Indeck.

After Indeck presented its case-in-chief, the trial court entered a directed finding in Defendants’ favor on the “Funding Opportunity” claim because the alleged opportunity “to develop projects with Merced” remained equally available to Indeck after Defendants’ resignations. The trial court also found in favor of Defendants on Indeck’s other usurpation claim (the Turbine Opportunity), which Indeck did not appeal. Over one-year later, Indeck sought reconsideration of the directed finding only as to the “Funding Opportunity,” which the trial court denied.

Indeck appealed to the Second Judicial District. On December 30, 2019, the Second District reversed the trial court's decision on the corporate usurpation claim despite acknowledging that Indeck was never deprived of the "Funding Opportunity." On March 25, 2020, this Court allowed Defendants' timely Petition for Leave to Appeal.

No questions are raised on the pleadings.

### **ISSUES PRESENTED FOR REVIEW**

1. Whether an employee usurps a corporate opportunity when the employee's conduct does not actually deprive the former employer of the alleged opportunity.
2. Whether an appellate court must apply a manifest weight of the evidence standard of review, and not a *de novo* standard of review, in considering a trial court's directed finding based upon its consideration of the totality of the evidence.
3. Whether an employee or officer with no authority or control over the employer's business can be held liable under the corporate opportunity doctrine for usurping a corporate opportunity.

### **STATEMENT OF JURISDICTION**

On March 21, 2017, following Indeck's case-in-chief, the Circuit Court of Lake County (the "trial court") entered a directed finding in favor of Defendants on Indeck's corporate usurpation claim, contained in count V of Indeck's Complaint. (A39; R. 3675) On January 10, 2019, after the completion of the bench trial, the trial court entered an Order finding no just reason to delay enforcement or appeal of all final orders and judgments culminating in a December 13, 2018 judgment order. (R. C12245-46) On January 11, 2019, Indeck filed a Notice of Appeal. (R. C12250-52) The Second Judicial District had jurisdiction pursuant to Illinois Supreme Court Rule 304(a). On December 30, 2019, the appellate court reversed the trial court on the corporate opportunity doctrine count at issue



in this appeal and remanded for further proceedings. (A33) On February 3, 2020, Defendants filed their Petition for Leave to Appeal, and on March 25, 2020, this Court allowed the Petition. This Court has jurisdiction pursuant to Illinois Supreme Court Rule 315.

## **STATEMENT OF FACTS<sup>1</sup>**

### **I. BACKGROUND FACTS**

#### **A. Mr. DePodesta and Mr. Dahlstrom's work for Indeck**

Indeck is in the business of owning, operating and developing independent power projects. (R. C6790 ¶ 1; R. 8398) In 2011, Indeck's board provisionally approved the development of natural gas power plant projects in a region of Texas known as the Electrical Reliability Council of Texas ("ERCOT"). (R. C6797 ¶¶ 44-45; R. 8401-02)

Mr. DePodesta and Mr. Dahlstrom have been working in the energy power development field since 1990 and 2002, respectively. (R. C6292, 6294 ¶ 1, 20-21; R. 8412-13) Mr. Dahlstrom began his employment at Indeck in September 2011 as a director of business development working on development of gas, solar and wind energy developments. (R. 394-95) Mr. Dahlstrom reported to Mr. DePodesta while he worked for Indeck. (R. C6793 ¶ 24; R. 8400) Indeck never alleged that Mr. Dahlstrom was either an officer of Indeck or had authority to make company decisions.

Mr. DePodesta was first hired at Indeck as a project engineer. (R. C6297 ¶ 36; R. 8414) In 2007, his title changed to manager of business development, and in 2011 to Vice President of business development. *Id.* Despite this change in title, Mr. DePodesta's

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<sup>1</sup> The Statement of Facts is drawn either from findings of fact entered by the trial court or from evidence that was not disputed at trial. References that include "¶" refer to findings of fact entered by the trial court and are followed by citation to the Record where the trial court adopted each finding of fact.

authority and job duties did not change (and no one from Indeck told him that they had). (R. C6297 ¶ 37; R. 8484) While technically an “officer,” given his title, no one from Indeck ever reviewed with him what it meant to be an officer. (R. C6297 ¶ 39; R. 8484)

Mr. DePodesta had no substantive authority to make decisions for Indeck.<sup>2</sup> (R. C6297 ¶ 40; R. 8484) His limited authority only included the ability to sign certain contracts and to spend up to \$10,000. (R. C6299 ¶ 51; R. 8415) Mr. DePodesta could not approve development opportunities that required individual expenditures of more than \$10,000. (R. C6297 ¶ 41; R. 8414) With respect to hiring development consultants, Mr. DePodesta could obtain proposals and make recommendations, but Indeck’s President, Larry Lagowski, decided which consultants to use if an expenditure of more than \$10,000 was required. (R. C6297 ¶ 42; R. 8414) Mr. DePodesta could only make recommendations for services and products. (R. C6298 ¶ 44; R. 8415) He could only travel for work if Mr. Lagowski pre-approved it. (R. C6300 ¶ 62; R. 8416) Mr. DePodesta had no authority to hire or fire employees who would be paid more than \$10,000. (R. C6297 ¶ 43; R. 8415) Mr. DePodesta could not execute any contracts for Indeck’s ERCOT power generation project without Mr. Lagowski’s prior approval. (R. E3219; R. C6299-300 ¶ 51, 56-58; R. 8415-16) Specifically, on February 20, 2013, Mr. Lagowski sent an email stating, “I don’t want anyone signing any contracts on the [ERCOT] projects until I’ve released them.” (R. E3219) Mr. Lagowski made clear to Mr. DePodesta that he wanted to be informed before

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<sup>2</sup> While the appellate court states that Mr. DePodesta “had overall responsibility for Indeck’s electrical-generation-project development” (A3 at ¶ 10), the evidence adduced at trial (and detailed in the appellate court opinion at A4 at ¶ 11) proved that Mr. Lagowski, not Mr. DePodesta, had ultimate responsibility for, and authority over Indeck’s projects. For example, Mr. DePodesta could research and make recommendations about properties on which to develop, but the ultimate decision whether to purchase or option land came from Mr. Lagowski or Indeck’s owner, Gerald Forsythe. (R. C3600 ¶61; R. 8416)

any contracts were signed. (R. C6300 ¶ 58; R. 8416) Mr. DePodesta had authority to sign confidentiality agreements on Indeck's behalf, but he could only change the background section and party names unless he first obtained approval from Indeck's legal department. (R. C6299 ¶ 55; R. 8416)

**B. Mr. DePodesta and Mr. Dahlstrom work for Merced Halyard Ventures**

In August 2013, Mr. DePodesta and Mr. Dahlstrom sought new jobs because they were unhappy at Indeck. (R. C6303; ¶ 92; R. 8418) They met representatives of an affiliate of Merced in spring 2013, while working at Indeck. (R. C6307 ¶ 124; R. 8419) While they took no corporate opportunities, the trial court found that Mr. DePodesta and Mr. Dahlstrom breached their duty of loyalty from March 2013 to November 2013 and ordered them to disgorge their Indeck salaries for that time period. (R. 8464-65)

In August 2013, Mr. DePodesta and Mr. Dahlstrom interviewed with Merced to become consultants and to manage natural gas development projects. (R. C6303 ¶¶ 90, 94; R. 8418, R. C9588) Merced was a privately held registered investment advisor. (R. C6797 ¶ 47; R. 8401) MPIII was a Merced affiliate. (R. C6797 ¶ 48; R. 8401) Mr. DePodesta and Mr. Dahlstrom resigned from Indeck on November 4, 2013 and November 1, 2013, respectively. (R. C6327 ¶¶ 297-98; R. 8426)

Mr. DePodesta and Mr. Dahlstrom were members of HEV. (R. C6790 ¶ 6; R. 8398) MPIII and HEV formed MHV. (R. E533) MPIII owned MHV. (R. C6307 ¶ 130; R. 8419) MHV was formed as a development enterprise to develop, construct and operate electric power generation projects. (R. E538 at ¶ 2.8) The MHV Operating Agreement stated that MHV was neither a partnership nor a joint venture, and that no member was a partner or joint venturer of any other member. (R. E538 at ¶ 2.12) It further provided that HEV would

be responsible for, and manage, the day-to-day operation of MHV's business pursuant to a management agreement ("MHV Management Agreement"). (R. E541 at ¶ 5.1 (b); R. C6306 ¶ 117; R. 8419) HEV was compensated for its services at a gross rate of \$500,000 per year, payable bi-weekly. (R. E563) The MHV Operating Agreement and MHV Management Agreement were executed on November 6, 2013, after Mr. DePodesta and Mr. Dahlstrom resigned from Indeck. (R. E533, 561, 567; R. C6305, 6328 ¶¶ 111-12, 307-308; R. 8419, 8427)

MPIII exclusively controlled MHV. (R. E541 at ¶ 5.1(a)) HEV had no voting interest in MHV. (R. E545; R. C6306 ¶ 114; R. 8419) Pursuant to the MHV Management Agreement, HEV worked exclusively on MHV's behalf, and did so starting on November 6, 2013. (R. E563; R. C6306 ¶ 115; R. 8419) HEV devoted substantially all of its activities to the advancement of MHV's natural gas power generation projects. (R. E 563; R. C6306 ¶ 116; R. 8419) MHV or HEV could terminate the MHV Management Agreement at any time, upon ninety days' written notice. (R. E564)

### **C. The alleged corporate opportunities**

Indeck alleged that Mr. DePodesta and Mr. Dahlstrom wrongfully usurped two opportunities from it: (1) the contribution of two grey market turbines owned by Carson Bay Energy Holdings, LLC (owned and controlled by MPIII) in exchange for equity in Indeck's natural gas development (the "Turbine Opportunity"); and (2) a partnership with Merced to develop natural gas power developments (the "Funding Opportunity") in Texas' ERCOT region. (A36-37; R. 3672-74; R. C10428)

As to the Turbine Opportunity, the turbines owned by Carson Bay were still on the market in 2017 and available to third parties, including Indeck. (A37; R. 3673)

Before the trial court, the Funding Opportunity was defined as the opportunity to develop projects with Merced and its affiliates, or stated otherwise, a partnership with Merced to develop natural gas power developments. (R. C6816 ¶¶ 121-22; R. 8408) Other than Mr. Lagowski's reference to his getting on an airplane to "meet with these guys [Merced]," if Indeck had been introduced to Merced (R. 1794), Indeck presented no evidence defining the alleged opportunity to develop projects with Merced or its affiliates. Nor did Indeck offer evidence as to what this opportunity looked like, what it would entail for Indeck, and how Merced or its affiliates would develop projects or partner with Indeck.

As to the Funding Opportunity, the MHV Operating Agreement did not prevent any member of MHV, or any of their respective affiliates, from engaging in whatever activities they choose, even if that activity competed with MHV. (R. E542 at ¶ 5.3) Merced retained the right to partner with any other entity it chose, including Indeck, to pursue any opportunity available in the ERCOT region or elsewhere. (R. 3674-75) Indeck's President, Mr. Lagowski, testified that after Mr. DePodesta and Mr. Dahlstrom resigned, although nothing prevented Indeck from doing so, Indeck never contacted Merced to arrange to partner on any project, or to seek development funding from Merced. (R. 2013, 2015) Similarly, Indeck never presented a business plan to Merced to seek development funding from Merced. (R. 2015)

**D. Influx of energy developers in the ERCOT region**

In 2013, it was known to businesses in the power generation development industry that Texas, and specifically, the ERCOT region, was an optimal area to develop a power generation project. (R. C158) In spring 2013, analysis showed that the ERCOT region was going to be well short of power, indicating an opportunity for energy developers. (R.1758) Many developers considered developing power generation projects in the ERCOT region to support an increasing demand for power in that area. (R. C6330 ¶ 322; R. 8427) As of July 2013, roughly fifty energy developers were pursuing projects in the ERCOT region, including Indeck. (R. E3950-52; R. 6335-37, 6355)

**E. Energy development is speculative and risky**

The energy market was dynamic and speculative, and the ERCOT region, in particular, was a very speculative market. (R. C6330, C6332 ¶¶ 319, 321, 340; R. 8427-28) The volatile ERCOT energy market continually changed the likelihood of developing a profitable power plant. (R. C6333 ¶ 345; R. 8428) There were a number of obstacles that had to be overcome before a project could begin generating revenue. (R. C6332 ¶ 343; R. 8428)

**F. Mr. DePodesta and Mr. Dahlstrom have not received, and may never receive, any additional pecuniary benefit from MHV**

As part of the MHV Operating Agreement, HEV had the potential to earn, in addition to bi-weekly compensation for its management work, a profits interest equal to 20% of the profits from MHV's operations. But, HEV would only receive a profits interest after MPIII recouped its capital outlay plus a 10% preferred annual rate of return, compounded annually. (R. E545, 556; R. C6306 ¶ 113, R. 8419) Through the time of the

trial, which was completed five years after Mr. DePodesta and Mr. Dahlstrom resigned from Indeck, MHV received no profits, thus, HEV received no profits interest.

Indeck's expert witness, Mark Kubow, admitted that MHV (and thereby HEV, Mr. DePodesta and Mr. Dahlstrom) was not guaranteed a development fee, upon which MHV's profits would be based (R. C6333 ¶ 347; R. 8428) Any opinion as to what they might earn (as they had not earned any profits through trial) was too speculative. (R. C6333-35 ¶¶ 346, 361-62; R. 8428)

Mr. Kubow similarly admitted that he could not opine, to a reasonable degree of certainty, what an operational development in ERCOT would sell for in the marketplace. (R. C6335 ¶ 362; R. 8428) Mr. Kubow admitted that there have been projects where there is no development fee paid to the developers. (R. C6333 ¶¶ 348-49; R. 8428) To know what benefits Mr. DePodesta and Mr. Dahlstrom would have received, if any, MHV had to have sold one or both of its construction ready projects. (R. C6334 ¶¶ 355-56; R. 8428) Even if a sale happened, and MHV received a development fee, there was no guarantee that Mr. DePodesta and Mr. Dahlstrom would have shared any of it after the fee flowed through the MHV Operating Agreement's distribution structure. (R. E545, 556; R. C6334 ¶ 358; R. 8428)

## **II. PROCEDURAL HISTORY**

### **A. The trial court's entry of directed finding in Defendants' favor**

Indeck brought this action against Defendants for injunctive relief seeking to enforce their confidentiality and non-competition agreement (the "Confidentiality Agreement") (count I); for injunctive relief seeking to enjoin Defendants from using or disclosing seven of Indeck's claimed trade secrets pursuant to the Illinois Trade Secrets

Act (count II); for conspiracy (count III); and, for breach of fiduciary duty (count IV). Indeck amended its complaint to include a claim for usurpation of the two corporate opportunities (count V).

After the close of Indeck's case-in-chief at the bench trial, pursuant to 735 ILCS 5/2-1110, the trial court directed a finding in Defendants' favor on count I, holding that (i) the Confidentiality Agreement is void and unenforceable, (ii) Indeck did not prove that it would be irreparably harmed if an injunction did not issue, and (iii) Indeck did not prove it was damaged. Indeck appealed the trial court's ruling that the Confidentiality Agreement is void and unenforceable, but did not appeal the remaining rulings on count I.

The trial court also directed a partial finding in Defendants' favor on count II, ruling that Indeck did not prove that three of the seven claimed trade secrets were entitled to trade secret protection. This holding was not appealed.

The trial court entered a directed finding in Defendants' favor on count V, holding that Indeck did not prove that Defendants took either of the two alleged corporate opportunities. Indeck only appealed the trial court's ruling on this count V as to the Funding Opportunity.

The bench trial continued as to the remaining four trade secrets (count II), conspiracy (count III), and breach of fiduciary duty (count IV).

At the close of Defendants' case, the trial court entered judgment in Indeck's favor on count II and entered a permanent injunction enjoining Defendants from using or disclosing certain trade secrets. This ruling was not appealed.

The trial court also entered judgment in Indeck's favor on count IV by finding that Mr. DePodesta and Mr. Dahlstrom breached their duty of loyalty. The trial court ordered



Mr. DePodesta and Mr. Dahlstrom to disgorge their Indeck salaries for the period of disloyalty and Defendants did so. This ruling was not appealed.

The trial court denied Indeck's request for: (1) a constructive trust on the profits interest that Mr. DePodesta and Mr. Dahlstrom might someday earn; (2) prejudgment interest; (3) disgorgement of compensation earned by Mr. DePodesta and Mr. Dahlstrom after they resigned from Indeck; and, (4) punitive damages. Indeck appealed the denial of a constructive trust and the denial of Mr. DePodesta and Mr. Dahlstrom's compensation earned after their resignations.

The trial court dismissed count III as duplicative of count IV. This dismissal was not on appeal.

One year after closing its case, Indeck sought reconsideration of the trial court's count V directed finding. The trial court denied the motion on substantive grounds and because it was untimely filed. Indeck appealed the denial of the Motion to Reconsider.

**B. The appellate court's decision affirming the trial court, in part, and reversing judgment in Defendants' favor**

The appellate court affirmed the trial court's denial of Indeck's request for a constructive trust on Mr. DePodesta and Mr. Dahlstrom future profits and for disgorgement of compensation they earned after they resigned from Indeck as it relates to count IV. (A30 & 32 at ¶¶ 80, 85) No review of this decision has been requested. The appellate court declined to review the trial court's directed finding that the Confidentiality Agreement is void and unenforceable because its review of the issue was not essential. (A33 at ¶ 87) Defendants do not seek review of this decision.

Without identifying which standard of review it applied, the appellate court reversed and remanded the trial court's directed finding in Defendants' favor as to the usurpation claim. This Court granted Defendants petition for leave to review this holding.

### **STANDARD OF REVIEW**

When deciding a motion for directed finding, pursuant to 735 ILCS 5/2-1110, a trial court performs a two-step analysis. *Prodromos v. Everen Securities*, 389 Ill. App. 3d 157, 170 (1st Dist. 2009). First, the trial court determines whether, as a matter of law, the plaintiff presented a *prima facie* case by presenting at least some evidence on every element essential to the underlying cause of action. *Id.* A trial court's holding that a plaintiff failed to present a *prima facie* case is reviewed *de novo*. *Id.*; *People ex Rel. Sherman v. Cryns*, 203 Ill. 2d 264, 275 (2003).

If the trial court determines that a plaintiff presented a *prima facie* case, then it proceeds to the second step and considers the totality of the evidence presented. *Prodromos*, 389 Ill. App. 3d at 170. The trial court does not view the evidence in the light most favorable to the plaintiff; rather, it weighs the evidence, considering the credibility of the witnesses and the weight and quality of the evidence. *Id.* After weighing the evidence presented, the court then decides whether sufficient evidence remains to establish plaintiff's *prima facie* case. *Id.* A reviewing court reviews this "second step" under a manifest weight of the evidence standard. *Id.*; *Sherman*, 203 Ill. 2d at 276; *Greater Pleasant Valley Church*, 2012 IL App (1st) 111853, ¶ 23; *River Forest State Bank & Trust Co. v. Rosemary Joyce Enters.*, 294 Ill. App. 3d 173, 183-84 (1st Dist. 1997).

## ARGUMENT

### **I. SUMMARY OF ARGUMENT**

Defendants are not liable for usurping a corporate opportunity because they did not take anything from Indeck. After weighing all of the evidence, the trial court found that the alleged opportunity was not taken because it was equally available to Indeck. In other words, Indeck was not deprived of the opportunity.

Despite the trial court ruling based on all of the evidence, the appellate court failed to apply the manifest weight of the evidence standard as required under Illinois law. The evidence showed that, at any time, Indeck could have sought a partnership, funding, or any other arrangement with Merced that made economic sense to Indeck. Indeck never disputed this at trial, focusing simply on the fact that Defendants did not tell it about their plans to develop power generation projects with Merced after they resigned.

This Court's decision in *Kerrigan v. Unity Savings Assoc*, 58 Ill. 2d 20, 28 (1974), and other appellate court cases analyzing the corporate opportunity doctrine, have consistently found that, to hold a fiduciary liable for usurping a corporate opportunity, he or she must exercise substantial authority and control over the business. In addition, the fiduciary must take a concrete, defined opportunity, such that the business is deprived of that opportunity. Stated differently, these cases follow a characteristic, narrow fact pattern: (1) an identifiable, concrete deal in the employer's line of business; (2) "the deal is a 'zero-sum' game in the sense that only the corporate employer or its fiduciary – but not both – can seize it, leaving the loser permanently shut out;" and, (3) the employee/fiduciary duty takes the deal for himself or herself. (A26 at ¶ 70 citing William Lynch Schaller, *Corporate Opportunities and Corporate Competition in Illinois: A Comparative Discussion of Fiduciary Duties*, 46 J. Marshall L Rev. 1, 18 (2012)). See, e.g., *Cooper Linse Hallman*

*Capital Mgmt. v. Hallman*, 368 Ill. App. 3d 353, 359 (1st Dist. 2006) (defendants did not usurp a corporate opportunity because the opportunity was equally available to the plaintiff); *Kerrigan*, 58 Ill. 2d at 28 (controlling officers and directors took the opportunity to sell insurance policies to mortgage clients); *Anest v. Audino*, 332 Ill. App. 3d 468, 477 (2nd Dist. 2002) (member, 40% shareholder and company manager took an exclusive distributorship offer); *Comedy Cottage, Inc. v. Berk*, 145 Ill. App. 3d 355, 360-61 (1st Dist. 1986) (Vice President and general manager in charge of day-to-day operations took a store lease after employer's lease was terminated); *Levy v. Markal Sales Corp.*, 268 Ill. App. 3d 355, 359-60 (1st Dist. 1994) (stockholders and corporate directors took agreement to represent Apple computer in the Midwest); and, *Lindenhurst Drugs, Inc. v. Becker*, 154 Ill. App. 3d 61, 70 (2nd Dist. 1987) (store manager, who also received 15% of employer's profits, took store franchise).

Contrary to the well settled Illinois case law interpreting the corporate opportunity doctrine, the appellate court here did not require any of the critical elements found in *Kerrigan* and its progeny. In particular, there was not: (1) a concrete, identifiable opportunity, (2) which was actually taken, depriving Indeck of the opportunity, (3) by a fiduciary with authority and control over Indeck's business. The appellate court failed to address whether the alleged opportunity was concrete and identifiable, or whether the Defendants had authority and control over Indeck's business. Without indicating a standard of review, the appellate court reversed the trial court, explicitly disregarding whether an opportunity was actually taken, and instead, applying a myopic interpretation of Illinois law.

The appellate court committed reversible error by holding that this Court's *Kerrigan* decision stands for the proposition that a fiduciary with no authority or control can be held liable for usurping a vague, undefined opportunity that was not actually taken from his employer (and, in fact, remained available to the employer). The appellate court not only misinterpreted *Kerrigan*, but also its holding puts the Second District squarely at odds with the First District and creates between them an irreconcilable conflict.

On its facts and legal analysis, the appellate court applied *Kerrigan* too narrowly. The appellate court took the corporate opportunity doctrine too far. The ruling allows an Illinois employee to be held liable, as a matter of law, for “usurping a corporate opportunity” simply because he or she takes a position with a new employer that is in the former employer's line of business and the employee fails to disclose that fact. There is no dispute that Indeck was never deprived of any opportunity to do business with Merced (or its affiliates) in any form that the two businesses deemed appropriate. Defendants respectfully submit that this “strict liability” standard was not one this Court ever intended by *Kerrigan*.

The Court should reverse the Second District and reaffirm that, to be liable under the corporate opportunity doctrine: (1) the alleged opportunity must be concrete and identifiable; (2) the alleged opportunity must no longer be available to the former employer; and, (3) the fiduciary must have authority and control. As evidenced by the appellate court's holding, this misapplication of *Kerrigan* leaves former employees at risk of being found liable any time they leave their employment to pursue an opportunity that falls within the former employer's line of business. That is not, and should not be, the law of this State.

**II. THE APPELLATE COURT MISSAPPLIED *KERRIGAN* AND USED THE WRONG STANDARD OF REVIEW WHEN IT IGNORED THE TRIAL COURT’S FINDING THAT THE UNDEFINED AND NON-SPECIFIC OPPORTUNITY WAS AVAILABLE TO INDECK**

**A. If the Funding Opportunity is still available to Indeck, then it cannot be taken as that term is understood under the Illinois corporate opportunity doctrine**

The appellate court’s decision is inconsistent with the application of corporate opportunity law by this Court and every other appellate court. The appellate court agreed that corporate opportunity doctrine cases typically involve an opportunity that is available to one party or the other, but not both. (A25-26 at ¶ 69) But, purporting to rely on *Kerrigan*, it then held that it was immaterial that Indeck was not shut out of the Funding Opportunity. (A26 at ¶ 70)

The appellate court misapplied the *Kerrigan* decision in finding liability for corporate usurpation without an actual usurpation. *Kerrigan* addresses whether the opportunity is within the former employer’s line of business, and whether the former employee disclosed and tendered the opportunity to the former employer, but that is not the beginning and the end of the analysis.

In *Kerrigan*, unlike here, the opportunity to sell insurance policies to the plaintiff’s mortgage clients *was actually taken* – once the defendants sold a policy, the plaintiff was shut out from doing the same. 58 Ill. 2d at 28. And, every Illinois appellate court interpreting *Kerrigan* (except *Cooper Linse*, 368 Ill. App. 3d at 59, discussed *infra*.) involves an opportunity that, once taken, is no longer available to the former employer. See, e.g., *Anest*, 332 Ill. App. 3d at 477 (member, 40% shareholder and company manager took an exclusive distributorship offer); *Comedy Cottage*, 145 Ill. App. 3d at 360-61 (Vice President and general manager in charge of day-to-day operations took a store lease after

employer's lease was terminated); *Levy*, 268 Ill. App. 3d at 359-60 (stockholders and corporate directors took agreement to represent Apple computer in the Midwest); *Kerrigan*, 58 Ill. 2d at 28 (bank's shareholders, who controlled the bank, took a deal to sell insurance policies to mortgage clients); and, *Lindenhurst Drugs*, 154 Ill. App. 3d at 70 (store manager, who also received 15% of employer's profits, took store franchise). Compare *Cooper Linse*, 368 Ill. App. 3d at 359 (defendants did not usurp a corporate opportunity because the opportunity was equally available to the plaintiff).

The appellate court missed the fact that, under *Kerrigan*, something must be *taken* as a prerequisite to whether the corporate opportunity doctrine applies. The appellate court's recognition that the Funding Opportunity was available to Indeck after Defendants resigned, but deemed it immaterial, highlights its misunderstanding of *Kerrigan*.

**B. The trial court and the First District in *Cooper Linse* followed Illinois law and correctly recognized that it is material under the corporate opportunity doctrine whether the alleged opportunity was (and still is) available to the former employer**

In contrast to the appellate court, the trial court properly applied the corporate opportunity doctrine in requiring that an opportunity must be taken before triggering liability. Its finding is amply supported by the fact that Merced never promised HEV an exclusive development agreement. (R. 3674; R. E542 at ¶ 5.3) The terms of the MHV Operating Agreement allowed Merced to enter into any agreement it deemed appropriate, with any party, including Indeck. It was uncontroverted that Merced could have worked with and/or funded Indeck's developments, even if doing so competed with MHV. (R. E542 at ¶ 5.3)

In denying Indeck's motion for reconsideration, the trial court aptly stated,

[If y]ou can infer anything, it is that *the opportunity must no longer be available*, not that the opportunity must 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*. (Emphasis added.) (A45-46; R. 7638-39)

Indeck neither challenged this evidence nor the fact that the Funding Opportunity is, and always was, available to it. (A45; R. 7638)

Notably, the trial court utilized the same logic when it granted a directed finding in Defendants' favor as to the Turbine Opportunity. As the trial court stated,

Absent any indication of any attempt by Indeck to engage in negotiations with Carson Bay with respect to the turbines, Indeck has not seriously challenged Defendants' position that any turbine opportunity that existed in 2013 was not taken by the Defendants because it is still available today. (A38; R. 3674)

Indeck accepted the trial court's logic and reasoning and did not appeal this ruling.

The First District's *Cooper Linse* decision supports Defendants' interpretation of *Kerrigan*. In that case, the appellate court held that a fiduciary cannot be liable for usurping an opportunity that was equally available to the employer. 368 Ill. App. 3d at 359. The plaintiff in *Cooper Linse*, an investment advisor specializing in "market timing" investments, filed an action against the defendants (one officer and one employee) alleging that they breached fiduciary duties when they formed a competing firm and usurped a corporate opportunity. *Id.* at 356. While the defendants worked for the plaintiff, the plaintiff began researching the effectiveness of a new market timing methodology known as a "sector fund" with a firm called Rydex. *Id.* at 355. After they resigned, the defendants sent announcements to the plaintiff's clients detailing their personal success with the Rydex fund. *Id.* at 356. The plaintiff alleged that the defendants usurped its corporate opportunity



to exploit its success with the Rydex fund. *Id.* at 358. The appellate court ruled that defendants did not usurp a corporate opportunity to capitalize on its success with the Rydex fund because more than one corporation may offer that form of investment, and there was no evidence that the plaintiff could not also capitalize on its own success with the fund. *Id.* at 359.

Just as the Rydex fund opportunity was not exclusive to the defendants in *Cooper Linse*, the Funding Opportunity here was not exclusive to Defendants. Just as more than one corporation could offer and capitalize on its success with the Rydex fund, so too could more than one entity pursue and obtain a relationship (in any form) with Merced. Like the employer in *Cooper Linse*, Indeck always had the opportunity to pursue a business arrangement with Merced; it simply did not do so.

The appellate court failed to meaningfully distinguish *Cooper Linse*. (A24 at ¶¶ 67-68) The appellate court stated that it was distinguishable, but then never explained *how* or *why* the case is distinguishable. Despite acknowledging that the Funding Opportunity was equally available to Indeck, the appellate court relied on separate and nondeterminative facts: that the Funding Opportunity was within Indeck's line of business and that Defendants failed to disclose it to Indeck. (A25 at ¶ 68) Even if an opportunity is within the employer's line of business and the fiduciary fails to disclose the opportunity to the employer, *Cooper Linse* provides that a fiduciary cannot be held liable for taking something that remains equally available to the employer. The fact that nothing was taken here cannot be ignored and the appellate court erred in doing so.

This Court should reaffirm that an opportunity may be in the former employer's line of business and not disclosed and tendered, but still not violate the corporate

opportunity doctrine if nothing was taken from the employer – if it is still available. The very phrase “corporate *usurpation*” begs the answer. If nothing is usurped or taken, then the doctrine cannot apply. The conflict between the districts should be resolved in favor of the First District’s interpretation of the doctrine. The appellate court should be reversed and the trial court should be affirmed.

**C. The appellate court erred in finding that the prophylactic purpose of fiduciary law prohibited Defendants from exploiting an opportunity even though nothing was taken by Defendants**

In Illinois, a breach of fiduciary claim is separate and distinct from a corporate usurpation claim. The elements of proof are different. Although the appellate court acknowledged that Defendants took no opportunity from Indeck, it still found that Defendants’ actions constituted a wrongful usurpation. The appellate court said:

[U]nder these facts \*\*\* it is immaterial whether additional opportunities were (or still are) available for Indeck to partner with Merced or its affiliates. To hold otherwise would *not* be consistent with the prophylactic purpose of the fiduciary rules to allow DePodesta and Dahlstrom to exploit an opportunity (even if it is one of many) consistent with Indeck’s business, without first disclosing and tendering the opportunity to Indeck and obtaining its consent. (Emphasis in original.) (A27 at ¶ 70)

The appellate court failed to recognize the important fact that the trial court found that Defendants violated their duty of loyalty to Indeck and ordered to disgorge their entire Indeck salary for the period of their disloyalty. Thus, Indeck received a remedy and its employees were “punished” for that wrong – the prophylactic purpose of the “fiduciary rules” was served. In the same vein, it is not enough under *Kerrigan* and its progeny to find that Defendants wrongfully usurped a corporate opportunity simply because they breached their fiduciary duty in failing to inform Indeck that they were leaving to manage MHV. Defendants’ failure to tell Mr. Lagowski what they were doing, even where their

next job was “in Indeck’s line of business” cannot, by itself, justify a finding of usurpation. The law does and must require more – that an opportunity actually be taken. Since it is undisputed that Defendants’ actions did *not* deprive Indeck of any opportunity, the appellate court’s ruling should be reversed and the trial court should be affirmed.

**D. Alternatively, even if this Court declines to confirm that an opportunity was not taken, the appellate court should be reversed, and trial court affirmed, because the “Funding Opportunity” is not a concrete, identifiable opportunity necessary to qualify as an actionable corporate opportunity**

The appellate court held that the Funding Opportunity was within Indeck’s line of business, but it erred when it failed to analyze whether it was a concrete, identifiable opportunity. Though not grounds for either the trial court’s ruling or the appellate court’s reversal, this Court can affirm the trial court on any basis of record. *In re Marriage of Rife*, 376 Ill. App. 3d 1050, 1053 (2nd Dist. 2007). An additional reason for this Court to affirm the trial court’s ruling is that Indeck did not prove a concrete, identifiable opportunity.

Indeck failed to present evidence of anything more than a vague concept of what this “Funding Opportunity” was – a general concept to develop power plants with Merced – in some undefined fashion. This is neither identifiable nor concrete and cannot form the basis for a corporate usurpation claim.

The characteristic fact pattern followed in Illinois corporate opportunity doctrine cases includes an identifiable, concrete opportunity that an agent takes for themselves. (A26 at ¶ 70 citing Schaller, *supra* at 13). Indeck did not meet its burden to prove the existence of an identifiable, concrete opportunity that was taken by Defendants. Mr. Lagowski testified that Indeck was deprived of the ability to get on an airplane to “meet with these guys [Merced],” if Indeck had been introduced to Merced. (R. 1794) Defendants

are not aware of any case in Illinois where an amorphous concept or idea – especially the potential to meet with a third party – constitutes a corporate opportunity. Rather, Illinois corporate opportunity cases involve identifiable, concrete opportunities. See, e.g., *Anest*, 332 Ill. App. 3d at 477 (exclusive distributorship); *Comedy Cottage*, 145 Ill. App. 3d at 360-61 (store lease); *Levy*, 268 Ill. App. 3d at 359-60 (agreement to represent Apple computer in the Midwest); *Kerrigan*, 58 Ill. 2d at 28 (insurance policies); and, *Lindenhurst Drugs*, 154 Ill. App. 3d at 70 (store franchise).

The “opportunity” found by the appellate court was “the potential to develop projects with Merced and its affiliates in Texas.” (A24 at ¶ 65) The appellate court erred when it concluded that the “potential to develop projects” was a corporate opportunity for purposes of applying the corporate opportunity doctrine. (A24 at ¶ 65) Indeck presented no evidence in its case-in-chief about this “opportunity.” Indeck offered no evidence about what this opportunity looked like, what it would entail for Indeck, and how “affiliates of Merced” would develop projects with Indeck.<sup>3</sup>

This case presents the ideal fact pattern for this Court to reaffirm that, in analyzing whether the corporate opportunity doctrine applies, a trial court must first determine whether the opportunity is both identifiable and concrete. To be clear, this is what lower courts have done since *Kerrigan*. The appellate court’s decision here should be reversed, and the trial court’s directed finding affirmed, because the appellate court’s decision fails

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<sup>3</sup> The appellate court erred when it stated that the March 5, 2013 Mutual Confidentiality Agreement (“MCA”) with Carson Bay was about **both** the Funding Opportunity and the Turbine Opportunity. (A23 at ¶ 65) The evidence at trial proved that the MCA was only about the Turbine Opportunity.

to recognize that Indeck could not identify the Funding Opportunity as anything more than an introduction.

**E. The appellate court erred by applying the wrong standard of review**

The appellate court should have applied the manifest weight of the evidence standard because the trial court ruled in Defendants' favor after considering the totality of the evidence. The trial judge directed a verdict in Defendants' favor after Indeck's case-in-chief. After reviewing the totality of the evidence, the trial court found that Indeck did not prove that a "funding opportunity was usurped." (A39, 45-46; R. 3675, 7638-39) The trial court concluded that the evidence showed that nothing was taken because the opportunity to develop with Merced is (and always was) available to Indeck. *Id.*

The appellate court appears to have reviewed the trial court's decision *de novo*. The appellate court gave no weight to the trial court's factual finding that the Funding Opportunity was not taken. The trial court specified that its ruling was based on a review of all of the evidence presented in Indeck's case at trial. There was no finding that Indeck failed to prove any one element of its usurpation of a corporate opportunity claim. Because the trial court considered evidence, the appellate court's review should have been under the manifest weight of the evidence standard. *Prodromos*, 389 Ill. App. 3d at 170.

A reviewing court may only conclude that the trial court's determination was against the manifest weight of the evidence where, upon review of the evidence in the light most favorable to the prevailing party, an opposite conclusion is clearly apparent, or the finding is palpably erroneous and wholly unwarranted, is clearly the result of passion or prejudice, or appears to be arbitrary or unsubstantiated by the evidence. *Bernstein & Grazian, P.C. v. Grazian & Volpe, P.C.*, 402 Ill. App. 3d 961, 976 (1st Dist. 2010). As the

trier of fact, the trial court is responsible for resolving factual disputes, judging the credibility of the witnesses, determining the weight to afford their testimony and deciphering contradicting evidence. *Id.* A trial court's finding of fact is not against the manifest weight of the evidence merely because the record might support a contrary decision. *Id.* A reviewing court should not overturn a trial court's decision simply because it disagrees with it. *Id.*

The manifest weight of the evidence standard assigns primary responsibility for resolving factual disputes to the trial court, a court in a superior position to evaluate and to weigh the evidence, thus minimizing the risk of judicial error. *Joel R. Salazar v. Board of Educ.*, 292 Ill. App. 3d 607, 613 (1st Dist. 1997). A reviewing court need only determine, under the manifest weight of the evidence standard, whether the trial court's decision was not an unreasonable one. *Id.* This relieves the reviewing court of the burden of a full-scale independent review and evaluation of the evidence. *Id.*

Based on the lack of exclusivity in the MHV Operating Agreement, the trial court correctly found that Defendants did not take anything from Indeck because the same alleged opportunity was available to Indeck in 2013 and was still available as of the last day of trial. (A39; R. 3675; E542 at ¶ 5.3) Under a manifest weight of the evidence standard, the appellate court should have recognized that Indeck did not challenge (and never challenged) the sufficiency of the evidence, thus the trial court should have easily been affirmed. (A45; R. 7638) The appellate court reversed simply because it disagreed with the trial court's ruling, and without an explanation of the standard it chose to apply. In its Opinion, the appellate court failed to mention why it substituted its judgment over that of the trial court.

This Court should find that, under the circumstances, the proper standard of review is manifest weight of the evidence, and not *de novo*. It should further reverse and vacate the appellate court on the ground that the trial court's conclusion that Defendants did not deprive Indeck of a corporate opportunity was not against the manifest weight of the evidence.

### **III. THE CORPORATE OPPORTUNITY DOCTRINE DOES NOT APPLY TO FIDUCIARIES WITH NO AUTHORITY AND CONTROL**

The corporate opportunity doctrine applies to fiduciaries with authority and control who are subject to the *heightened fiduciary duties*, typically associated with a corporate officer or member of the board of directors, because of a position of their power and influence. Although neither the trial court nor the appellate court addressed this issue, an additional reason for this Court to reverse the appellate court and to affirm the trial court is that the corporate opportunity doctrine does not apply to Mr. DePodesta or Mr. Dahlstrom.

Fiduciaries subject to the doctrine are generally considered gatekeepers, distinct from rank-and-file or mid-level management employees. Eric Tally, *Turning Servile Opportunities to Gold: A Strategic Analysis of the Corporate Opportunities Doctrine*, 108 Yale L.J. 277, 286 (Nov. 1998). The corporate opportunity doctrine applies nearly exclusively to corporate directors and officers, but not to other agents, employees, or stakeholders. *Id.* To meet the criteria for this gatekeeping role, the corporate agent must have the power to make business decisions. *Id.* at 286-87 n.19. The corporate opportunity doctrine can also apply to other agency relationships, such as dominant shareholders where the shareholders actively participate in management decisions. *Id.* at 286 n.18 citing *Teixeira & Co. v. Teixeira*, 699 A.2d 1383, 1387 (R.I. 1997).

Here, the evidence at trial proved that the only qualifying gatekeepers and decision makers at Indeck were Mr. Lagowski and Mr. Forsythe. For example Mr. DePodesta could research and make recommendations about properties on which to develop, but the ultimate decision whether to purchase or option land came from Mr. Lagowski or Indeck's owner, Mr. Forsythe. (R. C3600 ¶¶61; R. 8416) Neither Defendant made major business decisions on behalf of, or had authority to exercise control over Indeck even close to the requisite level. (R. C6297 ¶ 40; R. 8484) Mr. Lagowski ensured that Mr. DePodesta had no authority to make decisions for Indeck by expressly limiting Mr. DePodesta's power and authority. (See, *e.g.*, R. C6297-6300 ¶¶ 40-43; 56-58, 61-62; R. 8414-16, 8484)

**A. The degree and nature of the duty of loyalty controls**

The appellate court should not have held that Defendants were subject to the corporate opportunity doctrine because they had no authority and control over Indeck's substantial business decisions. Consistent with this Court's rulings and the appellate courts' interpretations of them in this area, this Court should impose a heightened fiduciary duty standard to ensure that only true decision makers with authority and control over the company's business decisions are subject to the corporate opportunity doctrine.

Since this Court's decision in *Kerrigan*, appellate courts have applied the corporate opportunity doctrine only to employees with authority and control over the employer's company, without specifically delineating this as a requirement. This Court should make clear that a party cannot pursue a usurpation claim against fiduciaries without sufficient authority and control over the plaintiff's business.

In *Kerrigan*, the individual defendants were officers and directors who controlled the business affairs of Unity Savings Association. 58 Ill. 2d at 23. While employed by



Unity, the individual defendants created Plaza Insurance Agency. *Id.* The individual defendants funneled their Unity borrowers to Plaza for their home and mortgage insurance needs. *Id.* at 29. Unity, however, also had the capacity to sell insurance to its borrowers. *Id.* at 27. This Court held that the officers and director defendants usurped Unity's corporate opportunity to sell insurance to its borrowers. *Id.* at 29. Then, shortly thereafter, in *Vendo v. Stoner*, this Court applied the doctrine to the president and controlling owner of the former employer, the Vendo Company. 58 Ill. 2d 289, 293 (1974).

Six years later, this Court applied the corporate opportunity doctrine in *Mullaney, Wells & Co. v. Savage*, 78 Ill. 2d 534 (1980). The defendant in that case was neither an officer nor director, but he was also much more than a rank-and-file employee. Savage established and directed an entire division of the company and shared in 50% of the net profits. *Id.* at 537-38. Because he was neither an officer nor a director, this Court applied the corporate opportunity doctrine to the defendant utilizing standard fiduciary duty law. *Id.* at 546. In *Mullaney*, this Court did not explicitly discuss the *degree and nature* of the defendant's duty of loyalty, though his significant authority and control was well documented in the opinion. *Id.* at 537-38.

Subsequent appellate court opinions relied on the degree and nature of a defendant's duty of loyalty in deciding whether to apply corporate usurpation principles. For example, in *Advantage Mktg. Grp. v. Keane*, the First District specifically discussed the degree and nature of the duty of loyalty in connection with the applicability of the corporate opportunity doctrine. 2019 IL App (1st) 181126. The First District applied the doctrine to an employee who, although not an officer, exercised authority and control over the plaintiff company. In that case, the defendant formerly served as director, officer, and

employee of plaintiff. *Id.* ¶ 3. He was an original founder of the company and maintained a 35% shareholding stake in the company. *Id.* Prior to his resignation, the defendant was a principal employee with responsibilities equivalent to those of an officer. *Id.* ¶ 4. He often held himself out to third parties as an owner of the company and received a bonus equal to that of the company's director and majority shareholder. *Id.* The defendant argued that the corporate opportunity doctrine did not apply to him because he was not an officer or director of the company. *Id.* ¶ 30. The First District disagreed. Following *E.J. McKernan v. Gregory*, 252 Ill. App. 3d 514 (2d Dist. 1993), the court held that an employee need not be an officer or a director to be accountable as a fiduciary. *Id.* ¶ 27.

The First District then held that the corporate opportunity doctrine applied to the defendant after analyzing the precise nature and intensity of his duty of loyalty, even though he was not an officer or a director.<sup>4</sup> *Id.* ¶¶ 27-29. Taking into account defendant's considerable duties and responsibilities as an employee, his compensation, and his status as a minority shareholder, the court rejected defendant's argument that the corporate opportunity doctrine should be limited to officers and directors. *Id.* ¶ 29. This analysis is consistent with other appellate courts. See, e.g., *Patient Care Services, S.C. v. Segal*, 32 Ill. App. 3d 1021 (1st Dist. 1975) (defendant was President, one of two shareholders of the corporation and shared in 50% of the corporation's profits); *Valiquet v. First Federal Sav. & Loan Assoc.*, 87 Ill. App. 3d 195 (1st Dist. 1979) (defendants were president and former directors and/or officers of the plaintiff); *Graham v. Mimms*, 111 Ill. App. 3d 751, 755 (1st Dist. 1982) (defendant was a majority shareholder); *Comedy Cottage*, 145 Ill. App. 3d at

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<sup>4</sup> Mr. DePodesta and Mr. Dahlstrom never disputed that they were fiduciaries to Indeck.

355 (defendant was Vice President, general manager, 10% shareholder and in charge of the daily affairs of the business); *Lindenhurst Drugs*, 154 Ill. App. 3d at 61 (defendant was an officer, director, received 15% of the profits of the store, was in charge of general store operations, including hiring and firing employees, purchasing for the store, running sales and negotiating with vendors); and, *Nordhem v. Harry's Café, Inc.*, 175 Ill. App. 3d 392 (1st Dist. 1988) (counter defendants were board members of the counter plaintiff).

Appellate 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 of whether they were formally elected corporate officer. See, e.g., *Hay Group, Inc. v. Bassick*, 2005 U.S. Dist. LEXIS 22095 \*29-30 (N.D. Ill. 2005); *Superior Envtl. Corp. v. Mangan*, 247 F. Supp. 2d 1001, 1002-03 (N.D. Ill. 2003) (Vice President defendant's title did not determine whether he was an officer for the purpose of applying the heightened fiduciary duty); *Graham*, 111 Ill. App. 3d at 761 (precise nature and intensity of the duty of loyalty depends upon the degree of independent authority exercised by the fiduciary and the reasonable expectations of the parties at the beginning of the relationship); *MPC Containment Sys. v. Moreland*, 2008 U.S. Dist. LEXIS 60546 \*35-36 (N.D. Ill. 2008) (courts look at managerial responsibilities, the extent of corporate oversight and guidance and whether he exercised powers of an officer or agent with approval and recognition of the corporation before determining degree of duty of loyalty).

**B. The appellate court failed to analyze the Defendants' degree of authority and control as a predicate to whether the corporate opportunity doctrine applies**

In this case, Mr. DePodesta was an officer in title only and had insufficient authority and control to support the application of the *Kerrigan* standard to him. The same is true for Mr. Dahlstrom, who never held the title as officer at Indeck. Yet, unlike the First District and other Illinois appellate courts, the appellate court here engaged in no analysis of the Defendants' authority and control as a predicate to whether the corporate opportunity doctrine applied to them. The appellate court engaged in no analysis of Mr. Dahlstrom's authority and control—of which he had none. As for Mr. DePodesta, the appellate court referenced his lack of authority and control, but then failed to recognize that this absence prohibited it from applying the corporate opportunity doctrine to him. (A4-5 at ¶¶ 11, 14)

This Court should 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. No Illinois opinions apply this doctrine to rank-and-file employees or mid-level management, who lack authority and control similar to that provided to a typical officer or director. While *Kerrigan* and those cases interpreting it do not explicitly state as much, as a practical matter, after *Kerrigan*, the corporate opportunity doctrine has only been applied to employees who possess the requisite authority and control over their companies' operations. The appellate court should be reversed and the trial court should be affirmed.

**CONCLUSION**

Defendants, Christopher M. DePodesta, Karl G. Dahlstrom, and Halyard Energy Ventures, LLC, respectfully request that this Court reverse the appellate court's judgment and affirm the trial court's directed finding in Defendants' favor.

Respectfully submitted,

Defendants-Appellants,  
CHRISTOPHER M. DEPODESTA, KARL G.  
DAHLSTROM and HALYARD ENERGY VENTURES,  
LLC

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**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 contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 31 pages.

/s/ Stuart P. Krauskopf  
Stuart P. Krauskopf

# APPENDIX

**TABLE OF CONTENTS TO APPENDIX**

December 30, 2019 Opinion .....	A-1
Partial March 21, 2017 Transcript – Court’s Oral Ruling .....	A-35
March 21, 2017 Order .....	A-40
Partial July 17, 2018 Transcript – Court’s Oral Ruling .....	A-42
July 17, 2018 Order .....	A-49
Table of Contents to Record on Appeal .....	A-50



2019 IL App (2d) 190043  
 No. 2-19-0043  
 Opinion filed December 30, 2019

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IN THE  
 APPELLATE COURT OF ILLINOIS  
 SECOND DISTRICT

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INDECK ENERGY SERVICES, INC.,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 14-CH-602
	)	
CHRISTOPHER M. DePODESTA, KARL	)	
G. DAHLSTROM, and HALYARD ENERGY	)	
VENTURES, LLC,	)	Honorable
	)	Margaret A. Marcouiller,
Defendants-Appellees.	)	Judge, Presiding.

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JUSTICE JORGENSEN delivered the judgment of the court, with opinion.  
 Justice Bridges concurred in the judgment and opinion.  
 Justice McLaren specially concurred with opinion.

**OPINION**

¶ 1 Plaintiff, Indeck Energy Services, Inc. (Indeck), sued defendants, Christopher M. DePodesta; Karl G. Dahlstrom; Halyard Energy Ventures, LLC (HEV); and Halyard Energy Wharton, LLC.<sup>1</sup> Indeck alleged breach of contract and sought injunctive relief to enforce its confidentiality and noncompetition agreement (Confidentiality Agreement) against DePodesta and Dahlstrom (count I) and to enjoin them from using or disclosing seven of Indeck's claimed

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<sup>1</sup> Halyard Energy Wharton, LLC, was dismissed as a party and does not participate in this appeal.

2019 IL App (2d) 190043

trade secrets (765 ILCS 1065/1 *et seq.* (West 2014)) (count II). Indeck also alleged conspiracy (count III), breach of fiduciary duty (count IV), and usurpation of two corporate opportunities (count V).

¶ 2 During a bench trial, at the close of Indeck's case-in-chief, the trial court directed a finding in defendants' favor on count I, finding that (1) the Confidentiality Agreement was void and unenforceable, (2) Indeck did not prove that it would be irreparably harmed if an injunction did not issue, and (3) Indeck did not prove that it was damaged. Indeck appeals the court's finding that the Confidentiality Agreement was void and unenforceable, but it does not appeal the remaining findings on count I.

¶ 3 As to the count II, the trade-secrets claim, the trial court directed a partial finding in defendants' favor, determining that Indeck did not prove that three of the seven claimed trade secrets were entitled to trade-secret protection. Indeck does not appeal this ruling.

¶ 4 The trial court also directed a finding in defendants' favor on count V, the usurpation claim, finding that Indeck did not prove that defendants could be held liable for allegedly usurping either of the two corporate opportunities. Indeck appeals the court's finding as to one of the opportunities.

¶ 5 The trial continued on the remaining counts. At the end of defendants' case-in-chief and before the trial court entered its rulings, Indeck moved to reconsider the directed finding on count V. The trial court denied the motion as untimely, finding that, because the motion was filed over one year after the entry of the directed finding, granting it would prejudice defendants. The court also denied the motion on the merits, finding that the opportunity at issue was still available to Indeck in 2013 and at the time of trial. Indeck appeals the denial of its motion to reconsider.

2019 IL App (2d) 190043

¶ 6 At the end of the trial, the trial court entered judgment in Indeck's favor on count II's remaining four trade-secret claims, entering a permanent injunction enjoining defendants from using or disclosing those trade secrets for three years. Indeck does not appeal this ruling. The court dismissed count III as duplicative of count IV. Indeck does not appeal the dismissal.

¶ 7 The trial court also entered judgment in Indeck's favor on count IV, for breach of fiduciary duty, finding that Dahlstrom and DePodesta breached their duties of loyalty to Indeck from March 13, 2013, until their resignations from Indeck in November 2013. It ordered them to disgorge their Indeck salaries for that period. This ruling is not at issue on appeal. The trial court also denied Indeck's request for a constructive trust on the profits that DePodesta and Dahlstrom might earn from their new enterprise and denied Indeck prejudgment interest and disgorgement of any compensation they earned *after* they resigned from Indeck. Indeck appeals only the denial of a constructive trust and of postresignation compensation.

¶ 8 We reverse the trial court's directed finding on the usurpation claim, affirm in all other respects, and remand the case for further proceedings.

¶ 9 I. BACKGROUND

¶ 10 Indeck, based in Buffalo Grove, owns, operates, and develops independent power-generation projects. DePodesta, who resides in Elmhurst, was one of the company's officers and its vice president of business development. He had overall responsibility for Indeck's electrical-generation-project development, and his duties were to find new business opportunities and partners and to develop business for Indeck. DePodesta had been an energy developer since 1990. When he started working at Indeck in 2000, he was a project manager. DePodesta left Indeck in 2005 and worked as a mechanical engineer. He returned to Indeck in 2007 as the company's manager of business development, and, in 2011, he became vice president of business

2019 IL App (2d) 190043

development. DePodesta supervised Dahlstrom and Kelly Inns, an engineer. (The three comprised Indeck's business-development group.) DePodesta resigned from Indeck on November 1, 2013.

¶ 11 When DePodesta became Indeck's vice president of business development, he was not told what it meant to be an officer or given a copy of the company's bylaws. He had no authority to make decisions for Indeck. He could obtain proposals from consultants and make recommendations, but the decisions on whom to use were made by Larry Lagowski, Indeck's president. DePodesta had the authority to sign contracts, to spend up to \$10,000, and to make recommendations for services and products. DePodesta could sign confidentiality agreements on Indeck's behalf but could change only the background section and party names without approval from the company's legal department. Indeck's bylaws provided that only the company's chairman and Lagowski could execute bonds, mortgages, and other contracts, except where the board of directors delegated that power to another officer or agent, including vice presidents.

¶ 12 Dahlstrom, who resides in Winnetka, had been an energy developer since 2002. He began working for Indeck in 2011 as its director of business development and reported to DePodesta. Dahlstrom worked on gas, solar, and wind energy developments. His "job was to find opportunities and bring them back" to Indeck, including those involving "development of turbines" and "potential partners." Dahlstrom resigned from Indeck on November 4, 2013.

¶ 13 In 2010, Dahlstrom formed HEV, to consult and provide management and administration services for the development of electric-power-generation projects. HEV is a Delaware limited liability company that was registered on February 22, 2010. Prior to November 4, 2013, the company operated out of Dahlstrom's residence in Winnetka. DePodesta and Dahlstrom are members of HEV. When DePodesta left Indeck, he went to work for HEV.

2019 IL App (2d) 190043

¶ 14 In 2011, Lagowski directed DePodesta and Dahlstrom to determine “whether or not it made sense to develop natural gas and, if so, where to go to develop.” DePodesta and Dahlstrom prepared a confidential and proprietary natural-gas development plan. Indeck’s board approved the development of natural-gas-power-plant projects in the Electrical Reliability Council of Texas (ERCOT),<sup>2</sup> and DePodesta and Dahlstrom identified a site in Wharton County, Texas, for development. (They identified four other sites for development in ERCOT. In 2013, Indeck submitted initial screening studies to ERCOT for seven potential sites.) DePodesta could not sign contracts without Lagowski’s prior approval, including for the ERCOT projects. On February 20, 2013, Lagowski sent an e-mail stating, “I don’t want anyone signing any contracts on the Texas projects until I’ve released them.”

¶ 15 In August 2013, DePodesta and Dahlstrom were looking for new jobs because they were unhappy at Indeck. That month, they interviewed with Merced Capital Partners, L.P. (Merced), to become consultants and to manage natural-gas-power-plant projects. Again, they resigned from Indeck in November 2013.

¶ 16 A. The Alleged Corporate Opportunities

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<sup>2</sup> “Texas operates an independent and self-contained electric production and transmission grid; its system operator is [ERCOT]. ERCOT is charged with ensuring system reliability, nondiscriminatory access to the transmission and distribution system, access to market information, and clearance of all market transactions.” *BP Chemicals, Inc. v. AEP Texas Central Co.*, 198 S.W.3d 449, 451-52 (Tex. App. 2006). “ERCOT is also a term used to refer to the transmission system which provides power to roughly 85 percent of [Texas].” *TXU Generation Co. v. Public Utility Comm’n of Texas*, 165 S.W.3d 821, 827 n.3 (Tex. App. 2005).

2019 IL App (2d) 190043

¶ 17 Merced is a privately held registered investment adviser that specializes in alternative investment strategies and manages about \$2 billion in assets. (It was previously known as EBF & Associates, L.P.) Merced Partners III, L.P. (Merced III), one of Merced's investment funds, owns Carson Bay Energy Ventures IV, LLC (Carson Bay).

¶ 18 Indeck alleged that DePodesta and Dahlstrom took from it two opportunities: (1) the contribution of two grey-market (*i.e.*, manufactured but not yet installed or operated) General Electric simple-cycle turbines owned by Carson Bay (Carson Bay turbines) in exchange for equity in Indeck's natural-gas-power-plant development (Turbine Opportunity), and (2) a partnership with Merced to develop natural-gas power plants in ERCOT (Funding Opportunity).

¶ 19 Carson Bay purchased the turbines for \$19 million each in 2010, hoping to resell them. By 2013, the cost of purchasing, storing, and maintaining the turbines required that Carson Bay sell them for more than \$50 million. Merced and Carson Bay had received no offers and were eager to find a purchaser.

¶ 20 On March 5, 2013, Indeck and Carson Bay entered into a mutual confidentiality agreement (MCA). DePodesta signed it on Indeck's behalf. The MCA provided that the parties would enter into discussions concerning both the Funding Opportunity and the Turbine Opportunity. The agreement's initial term was two years, and it precluded the parties from hiring or soliciting each other's employees. On March 8, 2013, Hendrik Vroege, the Merced partner in charge of the Carson Bay turbines, conducted a call in which only DePodesta and Dahlstrom participated for Indeck.

¶ 21 In its complaint, Indeck alleged that DePodesta and Dahlstrom planned to usurp both opportunities, which were within Indeck's line of business. As part of their plan, DePodesta and Dahlstrom pursued Vroege and others at Carson Bay to discuss working with them. Although

2019 IL App (2d) 190043

aware that Carson Bay would consider contributing its turbines to an Indeck project, DePodesta and Dahlstrom provided false information on the subject to Lagowski and senior management. Specifically, they represented to Lagowski that Carson Bay would consider only *selling* its turbines to Indeck and that it required a substantial, nonrefundable down payment on them before it would take the turbines off the market and commit them to a specific Indeck project. DePodesta and Dahlstrom knew that, as they represented it, Carson Bay's position would be unacceptable and would not make business sense to Indeck, as it would require Indeck to pay out millions without knowing if the project was viable. Indeck further alleged that, had this opportunity been fully and fairly presented, it would have agreed to accept the turbines *as equity* in the Wharton project, because it would have secured needed turbines much faster than by ordering new ones from a manufacturer and would have significantly reduced uncertainty concerning financing.

¶ 22 Lagowski planned to attend a conference in Las Vegas during the week of April 8, 2013. Correspondence between Lagowski and DePodesta in March 2013 reflected that Lagowski wanted DePodesta to arrange meetings at the conference with people who could help Indeck sell power or become development partners. On a list he provided to Lagowski, DePodesta listed Carson Bay as a private equity firm and a grey-market opportunity provider, and not as a potential developer.

¶ 23 On March 13, 2013, Daniel Barpal, a Carson Bay manager, e-mailed Dahlstrom asking what the next steps were. In subsequent e-mails, DePodesta and Dahlstrom scheduled a meeting with Barpal, Vroege, and Eric Werwie, another Merced employee, in Houston on April 9, 2013. DePodesta and Dahlstrom knew that Lagowski would be in Las Vegas at that time and unable to attend. They did not advise Lagowski that they had scheduled the meeting. (The trial court

2019 IL App (2d) 190043

discredited DePodesta's and Dahlstrom's testimony that they did not steer Lagowski toward the Las Vegas conference so that they could meet with Carson Bay in Houston and without him.) Later that month, Indeck's board approved development of a "peaking plant"<sup>3</sup> at the Wharton site as a "proof of concept," under which Indeck would develop other peaking projects in ERCOT only *after* it developed Wharton. (DePodesta and Dahlstrom had tried to convince Indeck to develop more than one site at a time in ERCOT.)

¶ 24 During the Houston meeting, DePodesta and Dahlstrom told Vroege that Indeck wanted a "free option" to purchase the Carson Bay turbines. Neither DePodesta nor Dahlstrom was authorized to state this position, and Lagowski testified that such a position was unreasonable and would kill a potential deal.

¶ 25 In addition to selling the Carson Bay turbines, Merced was interested in contributing them as equity in an Indeck project. They were worth about \$60 million; thus, contributing them would provide an important financing component in any power-plant project. DePodesta testified that he told Lagowski that Merced was willing to contribute the turbines, but the trial court credited Lagowski's testimony that DePodesta did not tell him this. DePodesta also testified that he told Lagowski that Carson Bay would agree to commit the turbines to an Indeck project only if Indeck made a nonrefundable, undefined multimillion-dollar down payment. Lagowski testified that this would not make sense, because Indeck did not have a project yet. The trial court determined that both DePodesta and Dahlstrom wanted Indeck and Merced to believe that the other was unreasonable, so that they would not do business together. The trial

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<sup>3</sup> A peaking, or "peaker" power plant does not run constantly; it runs when there is a greater need for energy or electricity. In Texas, it runs on very hot or very cold days.



2019 IL App (2d) 190043

court found that Carson Bay had consistently required a 10 to 20% nonrefundable deposit to take the turbines off the market for 30 to 60 days.

¶ 26 On July 22, 2013, Dahlstrom asked William Garth, Indeck’s director of finance, to send him Indeck’s “most up to date *pro forma*” for the Wharton project. The *pro forma* was a financial model that forecasted project economics, measured potential returns, and served as a preliminary determination of a project’s success. Indeck’s *pro forma* was central to its business strategy. Garth sent the *pro forma* to Dahlstrom that day. Later that same day, Dahlstrom e-mailed Vroege from his Indeck e-mail address on his Indeck laptop, asking if Vroege had time to catch up about the “GE equipment.” Vroege called Dahlstrom at his Indeck office that afternoon. Dahlstrom testified that they spoke about a “request for proposal” that allegedly came out of Duke Power, but the trial court found this testimony incredible and determined that Dahlstrom called Vroege to catch up on the Carson Bay turbines. It further found that Dahlstrom’s ultimate goal was to gauge Merced’s interest in partnering with DePodesta and Dahlstrom on the development of bigger power plants.

¶ 27 DePodesta testified that, at a July 24, 2013, meeting with Lagowski, DePodesta did not ask whether Indeck would be open to working with Carson Bay and Vroege. He did not mention Carson Bay at all, and he did not include it on the agenda. DePodesta and Dahlstrom confirmed at the meeting that Indeck would adhere to its proof of concept and develop the Wharton project before developing other ERCOT sites it had identified.

¶ 28 On July 24, 2013, Dahlstrom e-mailed Vroege from Indeck, using his HEV e-mail account (and copying DePodesta). He stated that HEV looked forward to presenting its ERCOT development plan and attached a mutual nondisclosure/confidentiality agreement (between EBF and HEV and signed on HEV’s behalf by DePodesta and Dahlstrom as HEV’s managing

2019 IL App (2d) 190043

directors). The document stated that the parties desired “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.” (The trial court found that DePodesta and Dahlstrom supplied this language, despite Dahlstrom’s testimony that it came from EBF/Merced.) DePodesta and Dahlstrom agreed to present their plan to Vroege in Minnesota in August. The trial court determined that the document showed that, before DePodesta and Dahlstrom attended a meeting with Lagowski and Garth on July 24, 2013, DePodesta and Dahlstrom understood that Merced was interested in discussing a partnership to develop power plants in ERCOT.

¶ 29 Between July 24 and August 5, 2013, Dahlstrom put together HEV’s power-development strategy. The trial court found that he used Indeck’s data and information to do so. For example, from his work at Indeck, Dahlstrom knew of recent negotiations with landowners in Texas concerning option prices for confidential and proprietary sites that he referenced in his budget estimates. Dahlstrom agreed that, on Indeck time, he used Indeck’s equipment, material, and facilities to put together the power-development strategy.

¶ 30 On August 6, 2013, DePodesta and Dahlstrom traveled to Minnesota. The following day, Dahlstrom e-mailed Vroege from his HEV e-mail address, stating that they wanted to move forward regarding a potential partnership and that the next step was for EBF/Merced to draft a proposed agreement. Dahlstrom testified that the opportunity to develop ERCOT projects with Merced and its affiliates was a “proposed activity which Indeck had the capacity to engage.” The trial court found that Dahlstrom thus judicially admitted that developing such projects was incident to Indeck’s present or prospective business. In the following weeks (through October),

2019 IL App (2d) 190043

using Indeck's time and equipment, DePodesta and Dahlstrom negotiated terms of a letter of intent with Merced III, negotiated with Vroege, and began HEV's operations.

¶ 31 On August 30, 2013, DePodesta, Dahlstrom, and HEV signed a letter of intent with Merced III to form a limited liability company to develop three simple-cycle gas-turbine power-plant projects in Texas. The letter of intent required DePodesta, Dahlstrom, and HEV to deal exclusively with Merced III as they negotiated a limited-liability-company operating agreement (Operating Agreement) and a management agreement providing for HEV to manage the company (Management Agreement). They also agreed not to disclose their negotiations to Indeck. Between August 30, 2013, and their departures from Indeck, DePodesta and Dahlstrom negotiated the agreements.

¶ 32 During the week of October 7, 2013, Dahlstrom, along with Lagowski, Garth, and Indeck investment bankers, attended confidential meetings in New York concerning the Wharton project. While in New York, Dahlstrom e-mailed Vroege from his HEV e-mail address, confirming his and DePodesta's intent to move forward with Merced in the near future and reporting on discussions with the investment bankers. The trial court found that Dahlstrom had disclosed to Vroege confidential information obtained from these meetings, against Indeck's best interests. On October 15, 2013, Dahlstrom accessed Indeck's electronic database and copied thousands of business-development documents onto an external hard drive, which he removed from Indeck's premises. The documents included Indeck's *pro forma*; a confidential conceptual-design report; documents about site locations, prospective land sellers, and the prices of their properties; Indeck's competition tracker; and its development budget. Dahlstrom's explanation for copying the documents was that "it was an emotional time." DePodesta also copied thousands of Indeck documents onto an external hard drive.

2019 IL App (2d) 190043

¶ 33 DePodesta’s resignation from Indeck on November 1, 2013, was effective that day and without prior notice. On that day, he copied his personal storage table (PST), which contained e-mails he sent and received, and he ran a “cleaner” on his Indeck computer. The trial court found incredible DePodesta’s testimony that he did not decide to resign until the prior evening. It also determined that documentary evidence—specifically, a draft of the Operating Agreement that DePodesta received on October 30, 2013, containing terms identical to those in the Operating Agreement that he and Dahlstrom ultimately signed—contradicted DePodesta’s testimony that the negotiations for the agreement were not completed prior to his resignation. The court further found incredible DePodesta’s statements to Lagowski during his exit interview that he was leaving Indeck to spend more time at his restaurant. The trial court determined that he “fully intended to develop peaker plants in ERCOT with HEV and EBF/Merced.” The court found incredible DePodesta’s testimony that “it did not dawn on [him] to tell Mr. Lagowski” that he would be working with an entity that had entered into an MCA with Indeck. The court determined that any disclosure to Lagowski would have violated the confidentiality provisions of the letter of intent and might have caused Indeck to investigate DePodesta’s computer.

¶ 34 On November 4, 2013, when Dahlstrom resigned from Indeck, he also copied his PST to an external hard drive and ran a cleaner on his Indeck computer. The trial court found incredible Dahlstrom’s explanations for his resignation.

¶ 35 Neither DePodesta nor Dahlstrom disclosed to Indeck their plans to form a limited liability company to develop gas-fired simple-cycle plants in Texas with any affiliate of EBF/Merced, Merced, Merced III, or Carson Bay.

¶ 36 B. MHV

2019 IL App (2d) 190043

¶ 37 On November 6, 2013, Merced III and HEV formed Merced Halyard Ventures, LLC (MHV), with Merced III owning MHV. MHV was formed to develop, construct, and operate electric-power-generation projects. HEV became a member of MHV and obtained a 20% profit interest in the entity (but no voting interest). The agreement provided its members with defense and indemnification rights in the event of litigation.

¶ 38 That same day, DePodesta and Dahlstrom signed the Management Agreement, under which HEV, as an independent contractor, became the general manager of MHV's development, construction, and operation of electric-power-generation projects. HEV agreed to devote substantially all of its activities to the advancement of MHV projects. HEV would receive a \$500,000 annual management fee, payable biweekly. The initial two-year term of the agreement was extended to December 31, 2018. As of December 31, 2017, HEV received \$2.075 million (and \$2.5 million as of November 6, 2018) in fees, which were split equally between DePodesta and Dahlstrom. When asked about negotiations between HEV and Merced III from August 2013 through DePodesta's resignation from Indeck, DePodesta testified that they were negotiating the Management Agreement and the Operating Agreement.

¶ 39 The Operating Agreement did not prevent any member or affiliate from engaging in any activities, whether or not they were competitive with MHV. Merced, thus, could partner with any entity, including Indeck, to pursue any opportunity, in the ERCOT region or elsewhere. Lagowski testified that, after DePodesta and Dahlstrom resigned, Indeck never contacted Merced about partnering on any project, including one for which Merced would provide development funding. Also, Indeck never presented to Merced a business plan seeking development funding.

¶ 40 HEV, DePodesta, and Dahlstrom developed two construction-ready peaker projects in Texas: (1) the Halyard Wharton Energy Center (HWEC) and (2) the Halyard Henderson Energy

2019 IL App (2d) 190043

Center. Dahlstrom believed that there was funding available to build such projects. In late January 2018, HEV issued a confidential memorandum to qualified parties interested in acquiring equity interests in HWEC through Scotiabank, an investment bank. The trial court found that DePodesta and Dahlstrom would likely receive at least \$4.67 million for their 20% profit interest in MHV if the projects were sold, given the developer fee budgeted in the memorandum. Dahlstrom testified that he expected to obtain a power purchase agreement for the projects. The trial court determined that projects sold with these agreements would be valued at about \$35 million, with DePodesta and Dahlstrom likely receiving in excess of \$13 million (\$6.5 million each) for their 20% profit interest.

¶ 41 At the time of trial, MHV had not earned any profits. If it ever does earn a profit, HEV will not participate in that profit until after Merced III receives all of its initial investment (*i.e.*, its \$1 million capital contribution) plus a 10% preferred annual rate of return, compounded annually. Mark Kubow, Indeck's expert witness, testified that he could not opine, to a reasonable degree of certainty, what an operational development in ERCOT would sell for or what profits DePodesta and Dahlstrom would receive from any future development. He testified that there have been projects where no development fee is paid to the developers. To know what DePodesta and Dahlstrom would receive, if anything, MHV would have to have sold one or both of its construction-ready projects to determine whether any sale proceeds were earmarked for a development fee. Further, even if a sale happened and MHV received a development fee, there is no guarantee that DePodesta and Dahlstrom would share any of it after the fee flowed through the Operating Agreement's distribution structure.

¶ 42 There is no certainty, Dahlstrom testified, that MHV's projects will be financed and built. There are a number of obstacles to overcome before a project can generate revenue, including

2019 IL App (2d) 190043

securing a power-purchase agreement to sell power, obtaining financing, and addressing potential construction and operation risks.

¶ 43 The trial court found that ERCOT is a very speculative market. Market conditions in the spring of 2017 were poor. However, the trial court found, Dahlstrom credibly testified in February 2018 that ERCOT was approaching the summer of 2018 with a reserve margin below 10%, when ERCOT shoots for a 13.75% margin.

¶ 44 C. Indeck's Complaint and the Trial Court Proceedings

¶ 45 On March 25, 2014, Indeck sued defendants. In count I, it alleged breach of contract and sought injunctive relief to enforce its Confidentiality Agreement as to DePodesta and Dahlstrom. In count II, Indeck sought to enjoin defendants from using or disclosing seven of Indeck's claimed trade secrets. In count III, it alleged conspiracy and sought injunctive relief. In count IV, Indeck alleged breach of fiduciary duty, seeking disgorgement of all benefits defendants had and would obtain from breaching their duties of loyalty to the company. Finally, in count V, filed later, Indeck alleged usurpation of the Funding Opportunity the Turbine Opportunity.

¶ 46 Trial commenced on January 25, 2016. After Indeck's case-in-chief, defendants moved for a directed finding on count I (735 ILCS 5/2-1110 (West 2016)), arguing that the Confidentiality Agreement was unenforceable. The trial court granted the motion, finding that the Confidentiality Agreement was unenforceable because it covered information of any nature or form related to Indeck's business, was not limited to protecting information that gave Indeck an advantage over its competitors, and was unreasonable as to duration.

¶ 47 Defendants also moved for a directed finding on count V, arguing in part that the Funding Opportunity was equally available to Indeck. They cited the Operating Agreement, arguing that it did not expressly prohibit Merced III from investing in other development companies. The

2019 IL App (2d) 190043

trial court granted defendants' motion, finding that, with respect to the Funding Opportunity, there was no evidence that Merced promised HEV an exclusive agreement or that Indeck made any attempt to partner with Merced after DePodesta and Dahlstrom resigned from Indeck. The Funding Opportunity that Indeck had in 2013, the court found, was still available to Indeck in 2017. Indeck assumed that there was only one partnership opportunity with Merced, but it presented no evidence of that.

¶ 48 At the close of evidence, Indeck moved to reconsider the directed finding on count V. The trial court denied the motion as untimely, because it was not brought until after defendants' case-in-chief, and, on the merits, because the opportunity was always available to Indeck and could not be deemed to have been taken from it.

¶ 49 On December 10, 2018, at the conclusion of the trial, the trial court ruled on 249 findings of fact proposed by Indeck and 540 findings of fact proposed by defendants. It also ruled on the remaining counts. On count II, the trade-secrets count, the court ruled in Indeck's favor and entered a permanent injunction enjoining defendants for three years from using or disclosing the remaining four trade secrets, specifically regarding the locations of four potential development sites in ERCOT, a report containing cost estimates for the Wharton project, and the *pro forma*. This ruling is not at issue on appeal.

¶ 50 On count IV, the trial court found that DePodesta and Dahlstrom breached their fiduciary duties to Indeck. It found that they violated their duties of loyalty in 2013, with the earliest violation occurring on March 13, 2013. They also violated their duties when they set up the meeting with Vroege when Lagowski could not attend and then (1) told Vroege that Indeck wanted a free option on the turbines, when they lacked the authority to make such a representation and knew that it would discourage further discussion with Indeck, and (2)



2019 IL App (2d) 190043

discussed Merced's potential investment in HEV but never disclosed the discussions to Indeck. The court also determined that DePodesta and Dahlstrom violated their duties to Indeck when they contacted Vroege from Indeck's office on July 23, 2013, to tell him that they were starting their own company and discussed with him the following day (using Indeck's phone service) the possibility of Merced funding defendants' enterprise. They further violated their duties by accessing Indeck's materials to prepare for the HEV meeting with Vroege and by preparing HEV's power-development strategy using Indeck's forms, time, and equipment. They also downloaded thousands of documents and took the records with them, intending to use them to support their new enterprise. DePodesta and Dahlstrom then attempted to destroy the evidence of their downloading activity. They also violated their duties when, on Indeck's time, they traveled to Minnesota to present the HEV power-development strategy to Merced and entered into an agreement to exchange proprietary information with Merced. Defendants also, on Indeck's time and using its equipment and phone service, negotiated a letter of intent in which "they agree[d] not to disclose their negotiations to Indeck even though their jobs at Indeck required them to bring development opportunities to Indeck's attention." The court further found that DePodesta and Dahlstrom violated their duties when they negotiated the Operating Agreement and the Management Agreement, again using Indeck's time and equipment. It also found that Dahlstrom violated his duty when he encouraged Inns to look for a new job when he knew that he and DePodesta were going to leave Indeck and that, if all three left, there would be greater damage to Indeck.

¶ 51 The court ordered DePodesta and Dahlstrom to disgorge their Indeck salaries for the period of disloyalty (\$111,868 for DePodesta and \$93,106 for Dahlstrom). This ruling is not at issue on appeal. The court denied Indeck's requests for a constructive trust on the profits that

2019 IL App (2d) 190043

DePodesta and Dahlstrom might earn from MHV's business, prejudgment interest, and disgorgement of any compensation they earned *after* they resigned from Indeck. The court found "speculative at best," and not proven at trial, Indeck's argument that "every penny Defendants received from Merced[ ] was due to their disloyalty to Indeck. Their breaches, it further found, ended with their employment at Indeck. As to disgorgement and a constructive trust on potential future benefits, the court determined that it could not issue such an order on hypothetical future benefits where ERCOT is a volatile and speculative market and no one knows if DePodesta and Dahlstrom will obtain any future benefits. Any such damages are speculative and uncertain and "hypothetical future benefits [are] not \*\*\* identifiable fund[s] traceable to a breach such that [they] can become the *res* of a proposed trust." Indeck appeals the denial of postresignation compensation and a constructive trust.

¶ 52 The trial court dismissed count III as duplicative of count IV. The dismissal is not at issue on appeal.

¶ 53 The court generally noted that it found that DePodesta intentionally withheld from Lagowski the fact that he and Dahlstrom had laid the groundwork for HEV's relationship with Vroege and Merced and had done so using Indeck's resources. The trial court explained that its findings concerning DePodesta's and Dahlstrom's credibility were reinforced by their discovery violations. It also noted that it found that Lagowski, Inns, and Garth were more credible than DePodesta and Dahlstrom and that any conflicts were resolved in Indeck's witnesses' favor. Indeck appeals.

¶ 54

## II. ANALYSIS

¶ 55

### A. Count V (Usurpation of Corporate Opportunity)

2019 IL App (2d) 190043

¶ 56 Indeck first challenges aspects of the trial court’s ruling on count V, which alleged usurpation of corporate opportunities. Indeck argues that the court (1) misapplied the relevant standard in granting defendants’ motion for a directed finding, (2) erred in finding that DePodesta and Dahlstrom did not usurp the Funding Opportunity, and (3) erred in denying Indeck’s motion to reconsider the directed finding. For the following reasons, we conclude that the trial court erred in determining that Indeck did not present sufficient evidence in its case-in-chief to show that there was a usurpation.

¶ 57 Section 2-1110 of the Code of Civil Procedure (735 ILCS 5/2-1110 (West 2018)) allows a defendant to move for a directed finding at the close of the plaintiff’s case in a bench trial. To rule on such a motion, the trial court must engage in a two-step analysis. *Edward Atkins, M.D., S.C. v. Robbins, Salomon & Patt, Ltd.*, 2018 IL App (1st) 161961, ¶ 53. First, it must decide whether the plaintiff has presented a *prima facie* case as a matter of law by producing some evidence on every element necessary to its cause of action. *Id.* If not, the trial court must grant the motion and enter judgment in the defendant’s favor. *Id.* If the plaintiff has established the elements of a *prima facie* case, then the trial court must consider the credibility of the witnesses, draw reasonable inferences therefrom, and generally consider the weight and quality of the evidence. *Id.* ¶ 54. If sufficient evidence exists for the plaintiff’s *prima facie* case to survive, the trial court should deny the defendant’s motion and continue the trial. *Id.* Where the evidence is not sufficient, the trial court should grant the motion and enter judgment in the defendant’s favor. *Id.*

¶ 58 “Generally, if the court grants the motion at the first step of the section 2-1110 analysis, our standard of review is *de novo*, whereas if the court grants the motion at the second step, our standard of review is the manifest-weight standard.” (Citations omitted.) *Id.* ¶ 54.

2019 IL App (2d) 190043

¶ 59 “It is undisputed that the individuals who control corporations owe a fiduciary duty to their corporation and its shareholders.” *Graham v. Mimms*, 111 Ill. App. 3d 751, 761 (1982). Indeed, “[e]mployees as well as officers and directors owe a duty of loyalty to their employer.” *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 69 (citing *Mullaney, Wells & Co. v. Savage*, 78 Ill. 2d 534, 546-47 (1980), and *E.J. McKernan Co. v. Gregory*, 252 Ill. App. 3d 514, 529 (1993)). “[A] fiduciary cannot act inconsistently with his [or her] agency or trust and cannot solicit his [or her] employer’s customers for himself [or herself].” *Id.* To state a claim for breach of a fiduciary duty, a plaintiff must allege the existence of a fiduciary duty, the breach of that duty, and damages proximately caused therefrom. *Neade v. Portes*, 193 Ill. 2d 433, 444 (2000).

¶ 60 Usurpation of corporate opportunity is a claim based in equity. *Tarin v. Pellonari*, 253 Ill. App. 3d 542, 550-51 (1993). The corporate-opportunity doctrine is “a subspecies of the fiduciary duty of loyalty.” Eric Tally, *Turning Servile Opportunities to Gold: A Strategic Analysis of the Corporate Opportunities Doctrine*, 108 Yale L.J. 277, 279 (Nov. 1998). The doctrine prohibits a corporation’s fiduciary from misappropriating corporate property and from taking advantage of business opportunities that belong to the corporation. *Graham*, 111 Ill. App. 3d at 762. The general rule is that

“when a corporation’s fiduciary wants to take advantage of a business opportunity which is in the corporation’s line of business, \*\*\* the fiduciary must first disclose and tender the opportunity to the corporation, notwithstanding the fact that the fiduciary may have believed that the corporation was legally or financially incapable of taking advantage of the opportunity.” *Id.* at 765.

2019 IL App (2d) 190043

Furthermore, 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. *Mullaney*, 78 Ill. 2d at 549; *Advantage Marketing Group, Inc. v. Keane*, 2019 IL App (1st) 181126, ¶¶ 40-42.

¶ 61 In determining whether there was a breach of fiduciary duty *under the corporate-opportunity doctrine*, we begin by assessing whether there was a corporate opportunity and, if so, whether there was a misappropriation of the opportunity. *Advantage Marketing Group*, 2019 IL App (1st) 181126, ¶ 34. “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.” *Lindenhurst Drugs, Inc. v. Becker*, 154 Ill. App. 3d 61, 67 (1987).

¶ 62 In *Kerrigan v. Unity Savings Ass’n*, 58 Ill. 2d 20 (1974), the key supreme court case in this area, a bank shareholder brought a derivative suit, alleging that several bank directors opened an insurance agency to take advantage of insurance business from bank customers without first offering that business to the bank. The defendants admitted that they did not offer the business to the bank, but they argued that the banking statute prohibited a bank from selling insurance. The supreme court upheld the reversal of summary judgment for the defendants. *Id.* at 31-32. It first held that the bank could have sold insurance and that it therefore did not have to address the defendants’ duties if the bank could not have sold insurance. *Id.* at 27. However, the court then stated that the defendants’ incorrect belief that the bank could not sell insurance “cannot operate as a substitute for defendants’ duty to present the question to [the bank] for [the bank’s] independent evaluation.” *Id.* at 28. The court continued:

“[I]f 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

2019 IL App (2d) 190043

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.” *Id.*

¶ 63 Here, the trial court entered a directed finding in defendants’ favor on the usurpation claim, finding that Indeck did not prove that defendants could be held liable for allegedly taking either of two corporate opportunities. As to the Funding Opportunity, which is at issue on appeal, the court found that there was “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.” The court noted that Indeck “may have assumed that there was only one partnership opportunity with Merced, but [Indeck] presented no evidence of that fact in its case in chief.” It found persuasive defendants’ argument that “no funding opportunity was usurped and that any funding opportunity that Indeck might [have] had in 2013 is still available to Indeck today.”

¶ 64 Indeck argues that the trial court erred in directing a finding on the usurpation claim, as the evidence presented during its case-in-chief established that DePodesta and Dahlstrom usurped Indeck’s corporate opportunity to partner with Merced and its affiliates to develop projects in ERCOT, *i.e.*, the Funding Opportunity. This evidence, they note (and the trial court found), included DePodesta’s 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.” Further, Indeck’s interest in developing peaker plants in ERCOT with Carson Bay and its affiliates was the very reason Indeck signed the MCA. As the trial court found, DePodesta and Dahlstrom developed this opportunity for themselves by using Indeck’s corporate assets. Thus, Indeck argues, defendants are estopped from denying that this

2019 IL App (2d) 190043

opportunity was in Indeck's line of business or that Indeck had the capacity to engage in the same. Furthermore, Indeck contends, as a result, it needed to prove only that DePodesta and Dahlstrom were employees who *failed to disclose* the Funding Opportunity before they exploited it. DePodesta and Dahlstrom, they note, both admitted that they did not disclose the opportunity to Lagowski at the July 24, 2013, meeting that DePodesta scheduled, even though they had spoken with Vroege about it that very morning. They also admitted (and the trial court found) that they *never* disclosed it at *any* time, before or after they resigned. Indeck further notes that the trial court found that DePodesta and Dahlstrom never disclosed to Lagowski that they had executed a letter of intent with Merced III and that they planned to form a limited liability company (ultimately MHV) to develop simple-cycle gas-turbine projects in Texas with Merced or any of its affiliates. "Since they did not disclose it, they did not tender any such opportunities to Indeck or obtain its consent to their taking the same."

¶ 65 We conclude that the trial court erred in granting defendants' motion for a directed finding on Indeck's usurpation claim. Indeck owns, operates, and develops independent power-generation projects. In 2013, it sought to access the ERCOT market and initiated activities toward achieving this end. For example, Indeck submitted to ERCOT initial screening studies for seven potential sites where it could develop natural-gas-power-plant projects. DePodesta and Dahlstrom identified a site in Wharton County. On March 5, 2013, Indeck and Carson Bay entered into the MCA, which provided that the parties would enter into discussions concerning both the Funding Opportunity and the Turbine Opportunity. (The Turbine Opportunity is not an issue on appeal.) In April 2013, Indeck's board approved the development of the Wharton site as a "proof of concept," under which Indeck would develop other peaking projects in ERCOT only *after* it developed Wharton. DePodesta and Dahlstrom admitted that the opportunities that

2019 IL App (2d) 190043

Carson Bay presented to Indeck to develop projects were within Indeck's line of business. As noted, "[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." *Lindenhurst Drugs*, 154 Ill. App. 3d at 67. Based on the foregoing, 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.

¶ 66 The remaining question is whether Indeck presented sufficient evidence in its case-in-chief that DePodesta and Dahlstrom usurped that opportunity. We conclude that it did and that the trial court erred in finding otherwise and directing a finding in defendants' favor. In November 2013, DePodesta and Dahlstrom and Merced III formed MHV to *develop, construct, and operate electric-power-generation projects in ERCOT*, an activity identical to the ultimate goal of the Funding Opportunity, which was the *development of simple-cycle gas-turbine projects in ERCOT*. DePodesta and Dahlstrom did not disclose and tender this opportunity to Indeck or seek its consent to pursue it. This answers in the affirmative the corporate-usurpation question. We reject defendants' argument that DePodesta and Dahlstrom merely obtained new jobs. They clearly entered into a business venture that is reasonably incident to Indeck's present or prospective line of business. *Kerrigan*, 58 Ill. 2d at 28; *Lindenhurst Drugs*, 154 Ill. App. 3d at 67-68.

¶ 67 *Cooper Linse Hallman Capital Management, Inc. v. Hallman*, 368 Ill. App. 3d 353 (2006), upon which defendants rely, is distinguishable. There, the reviewing court found no usurpation of corporate opportunity. *Id.* at 359. The plaintiff, an investment corporation, established a sector fund with another firm, and several of its principals and the defendants, an officer and an office manager, each also opened a personal sector fund with the outside firm.



2019 IL App (2d) 190043

The defendants later incorporated a competing business, typed a business plan on the plaintiff's computer, and did not inform the plaintiff of their plan to start a competing business. The reviewing court upheld the trial court's judgment for the defendants, holding that they did *not* usurp a corporate opportunity to capitalize on the plaintiff's sector funds. *Id.* While the defendants might have advertised their personal sector funds' successes to lure potential customers to their new corporation, the "plaintiff offered no evidence that it cannot *also* capitalize on its success with its Rydex sector fund." (Emphasis added.) *Id.* That is, there was no reason that only one corporation could offer this form of investment. *Id.*

¶ 68 We disagree with defendants that *Hallman* supports a finding that the opportunity to develop simple-cycle gas-turbine projects in ERCOT, a market that encompasses over 85% of Texas, where Merced and its affiliates—the potential partners in such an enterprise—are not exclusively bound to a particular partner, does not constitute usurpation of a corporate opportunity. In our view, 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.

¶ 69 At the conclusion of Indeck's case-in-chief, the trial court found that DePodesta and Dahlstrom did not hinder or preclude Indeck from pursuing corporate opportunities with Merced or its affiliates (which Indeck had already been pursuing when it entered into the MCA with Carson Bay) or any other entity in ERCOT. It determined, "It appears that [Indeck] may have assumed that there was only one partnership opportunity with Merced, but [Indeck] presented no evidence of that fact in its case in chief." The court found "persuasive" defendants' argument that no funding opportunity was usurped and that "any funding opportunity that Indeck might have had in 2013 is still available to Indeck today." We hold that the trial court erroneously

2019 IL App (2d) 190043

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).

¶ 70 This case presents unusual facts. As defendants note, corporate-opportunity cases typically involve an opportunity that is available to one party or the other, but not both. See, e.g., *Kerrigan*, 58 Ill. 2d at 29 (the defendants caused the plaintiff to “ ‘refer’ ” its borrowers to the defendants' entity, “whose office was strategically located in the same building”); *Lindenhurst Drugs*, 154 Ill. App. 3d at 70 (former director of the plaintiff corporation purchased for himself a franchise in which the plaintiff was interested that was in the same shopping center as the plaintiff's store); *Comedy Cottage, Inc. v. Berk*, 145 Ill. App. 3d 355, 360-61 (1986) (after the plaintiff's lease had been terminated, the defendant acquired a lease to the plaintiff's premises and established a rival business there); see also William Lynch-Schaller, *Corporate Opportunities and Corporate Competition in Illinois: A Comparative Discussion of Fiduciary Duties*, 46 J. Marshall L. Rev. 1, 18 (Fall 2012) (“Strictly speaking, corporate opportunity cases are characterized by a particular and narrow fact pattern: (1) a third party presents an identifiable, concrete deal relating to the corporate employer's business, such as the chance to purchase the building housing the employer's business; (2) *the deal is a ‘zero-sum’ game in the sense that only the corporate employer or its fiduciary—but not both—can seize it, leaving the loser permanently shut out*; and (3) the fiduciary diverts the deal to himself [or herself], whether before or after his [or her] resignation.” (Emphasis added.)). However, the facts here lead to a clear conclusion that Indeck presented sufficient evidence in its case-in-chief that DePodesta and Dahlstrom breached their duties to Indeck. Because there is sufficient evidence that defendants

2019 IL App (2d) 190043

usurped a corporate opportunity, we find, under these facts, that it is immaterial whether additional opportunities were (or still are) available for Indeck to partner with Merced or its affiliates. To hold otherwise would *not* be consistent with the prophylactic purpose of the fiduciary rules to allow DePodesta and Dahlstrom to exploit an opportunity (even if it is one of many) consistent with Indeck's business, without first disclosing and tendering the opportunity to Indeck and obtaining its consent. *Kerrigan*, 58 Ill. 2d at 28; *Advantage Marketing*, 2019 IL App (1st) 181126, ¶¶ 40-42.

¶ 71 In summary, the trial court erred in granting defendants' motion for a directed finding. Indeck argues that, if we reverse the trial court, we should remand this case with directions that judgment be entered against defendants. Defendants respond that they did not present any evidence in their defense and should be allowed to do so on remand. They further argue that, even if we conclude that defendants usurped a corporate opportunity, we must remand on the issues of proximate cause and damages. Where a trial court erroneously enters a directed finding, the remedy is to remand for the court to proceed with the trial as if the motion had been denied or waived. *Anest v. Audino*, 332 Ill. App. 3d 468, 480 (2002). Accordingly, we reverse and remand for the court to proceed with the trial on count V, including defendants' presentation of their case on all elements of the usurpation claim.<sup>4</sup>

¶ 72 B. Count IV—Breach of Fiduciary Duty

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<sup>4</sup> We note that the measure of damages on the usurpation claim—the benefit to defendants—differs from the measure of damages on the breach-of-fiduciary-duty claim—the loss to Indeck—that we address below. Nothing in our analysis of the fiduciary-duty claim should be construed on remand to affect or limit Indeck's damages on the usurpation claim.

2019 IL App (2d) 190043

¶ 73 Next, Indeck challenges two aspects of the trial court's assessment of their breach-of-fiduciary-duty claim. First, it argues that, after finding defendants liable on this count, the court erred in denying disgorgement of any compensation defendants received under the Management Agreement. Next, it contends that the court erred in declining to order a constructive trust over defendants' 20% profit interest in MHV. For the following reasons, we reject Indeck's arguments.

¶ 74 Again, to state a claim for breach of fiduciary duty, a plaintiff must allege the existence of a fiduciary duty, the breach of that duty, and damages proximately caused therefrom. *Neade*, 193 Ill. 2d at 444. It lies within the equitable discretion of the trial court to determine the appropriate remedy for a breach. *LID Associates v. Dolan*, 324 Ill. App. 3d 1047, 1071 (2001).

¶ 75 The trial court entered judgment in Indeck's favor on its breach-of-fiduciary-duty claim. The court found that both DePodesta and Dahlstrom owed Indeck a duty of loyalty during their periods of employment with Indeck and that both breached their duties in 2013, with the earliest violation occurring on March 13, 2013. The breaches that the trial court found included setting up the meeting with Vroege to ensure that Lagowski would not attend; telling Vroege, without authority, that Indeck wanted a free option on the Carson Bay turbines and knowing that this representation would discourage further discussion with Indeck; discussing Merced's potential investment in HEV but not disclosing the discussions to Indeck; contacting Vroege from Indeck's offices on July 23, 2013, to tell him that they were starting their own company; discussing with him the following day, using Indeck's phone service, the possibility of Merced funding defendants' enterprise; accessing Indeck's materials to prepare for the HEV meeting with Vroege; preparing HEV's power-development strategy using Indeck's forms, time, and equipment; downloading and taking thousands of Indeck records, intending to use them to

2019 IL App (2d) 190043

support their new enterprise; attempting to destroy the evidence of their downloading activity; traveling to Minnesota on Indeck's time to present the HEV power-development strategy to Merced; entering into an agreement with Merced to exchange proprietary and sensitive information; negotiating, on Indeck's time and using its equipment and phone service, a letter of intent (wherein they agreed not to disclose their negotiations to Indeck, even though their positions at Indeck required them to bring development opportunities to Indeck's attention); negotiating the Operating Agreement and the Management Agreement, again using Indeck's time and equipment; and, as to Dahlstrom only, encouraging Inns to look for a new job when DePodesta and Dahlstrom were preparing to leave Indeck and knew that if all three left there would be greater damage to Indeck.

¶ 76 The trial court ordered DePodesta and Dahlstrom to disgorge their Indeck salaries for the period of disloyalty (\$111,868 for DePodesta and \$93,106 for Dahlstrom). This ruling is not at issue on appeal. Further, the court denied Indeck's request for disgorgement of the compensation (*i.e.*, the management fees) they earned *after* they resigned from Indeck, and it denied a constructive trust on the profits that DePodesta and Dahlstrom might earn from MHV's business.<sup>5</sup> Their breaches, the trial court found, ended with their employment at Indeck. The court also found "speculative at best," and not proven at trial, Indeck's argument that all money DePodesta and Dahlstrom received from Merced/HEV was due to their disloyalty to Indeck. As to disgorgement and a constructive trust on potential future benefits, the court determined that it could not issue such an order on hypothetical future benefits where ERCOT is a volatile and speculative market and no one knows if DePodesta and Dahlstrom will obtain any future benefits. The court reiterated that any such damages are speculative and uncertain and

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<sup>5</sup> Indeck disclaimed damages.

2019 IL App (2d) 190043

“hypothetical future benefits [are] not \*\*\* identifiable fund[s] traceable to a breach such that [they] can become the *res* of a proposed trust.”

¶ 77 1. Disgorgement of Management Fees

¶ 78 Indeck argues that the trial court’s finding that no fees paid to DePodesta and Dahlstrom under the Management Agreement resulted from their disloyalty was against the manifest weight of the evidence. Indeck contends that, although the court found that DePodesta and Dahlstrom breached their fiduciary duties, it erred in ruling that their breaches *ended* when DePodesta and Dahlstrom *resigned* from Indeck. As of November 6, 2018, it notes, \$2.5 million in fees were paid to HEV, which were split equally between DePodesta and Dahlstrom. Indeck claims that these fees were a benefit that they received *as a result of* breaching their duties.

¶ 79 “An employer may recover an employee’s total compensation paid during the time period that an employee was breaching fiduciary duties owed the employer.” *Veco Corp. v. Babcock*, 243 Ill. App. 3d 153, 165 (1993) (at a minimum, the plaintiff was entitled to the compensation it paid former employees before they resigned or were terminated, when they were soliciting customers and other employees); see also *Smith-Schrader Co. v. Smith*, 136 Ill. App. 3d 571, 578 (1985) (court’s finding of officer’s liability for solicitation of employees was based on the principle that an officer will be liable for transactions *completed* after termination of relationship with the corporation if they were founded on information acquired during the relationship; since the officer’s relationship with the employees was established before he resigned, the officer was liable).

¶ 80 We conclude that the trial court did not err in denying disgorgement of DePodesta’s and Dahlstrom’s postresignation compensation. It reasonably found that any breach ended when DePodesta and Dahlstrom resigned from Indeck. The court noted that Indeck had not cited any

2019 IL App (2d) 190043

case law for the proposition that a former employee can be compelled to disgorge any compensation he or she receives *after* the breach of a fiduciary duty to his or her former employer. It reasonably found speculative Indeck's argument that all money DePodesta and Dahlstrom received from Merced/HEV was due to their disloyalty to Indeck. Clearly, the activities noted above that the court determined constituted breaches of DePodesta's and Dahlstrom's fiduciary duties to Indeck occurred *during* their employment with the company. Although those activities related to a new enterprise, none continued after they resigned from Indeck.

¶ 81

## 2. Constructive Trust

¶ 82 Next, Indeck argues that the trial court erred in declining to enter a constructive trust on DePodesta's and Dahlstrom's profits from MHV. Indeck disagrees with the trial court's assessment that such profits were speculative and argues that they would stem from DePodesta's and Dahlstrom's acts of disloyalty. We reject Indeck's arguments.

¶ 83 A constructive trust may be imposed even when it more than compensates the plaintiff for damages resulting from an employee's breach of loyalty, because the right to recover from one who exploits his or her fiduciary position for his or her personal benefit is triggered by the gain to the agent rather than by the loss to the principal. *City of Chicago ex rel. Cohen v. Keane*, 64 Ill. 2d 559, 565-66, (1976). The imposition of a constructive trust in such circumstances reflects the "wise public policy that, for the purpose of removing all temptation, extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation." (Internal quotation marks omitted.) *Graham*, 111 Ill. App. 3d at 762-63. Furthermore, although "[a] constructive trust is an equitable remedy that may be imposed to redress unjust enrichment caused by a party's wrongful conduct," "[t]he proceeds of the alleged wrongful conduct must

2019 IL App (2d) 190043

exist as an *identifiable* fund traceable to that conduct, such that it can become the *res* of the proposed trust.” (Emphasis added.) *Eychaner v. Gross*, 202 Ill. 2d 228, 274 (2002). Indeed, evidence as to damages that is “speculative, remote or based upon mere probability is improper.” *Diaz v. Legat Architects, Inc.*, 397 Ill. App. 3d 13, 45 (2009).

¶ 84 The trial court determined that it could not order “disgorgement of a hypothetical future benefit.” It found that ERCOT is a “volatile and speculative market and no one knows whether Defendants will obtain any future benefits.” Benefits in this case, it further determined, were “uncertain,” and “purely speculative.” The court also found that “hypothetical future benefit[s] [are] not \*\*\* identifiable fund[s] traceable to a breach such that [they] can become the *res* of a proposed trust.” It noted that Indeck had failed to prove that DePodesta and Dahlstrom “will profit handsomely” after trial.

¶ 85 Kubow, Indeck’s expert witness, testified that he could not opine, to a reasonable degree of certainty, what profits DePodesta and Dahlstrom would receive from any future development. To know what DePodesta and Dahlstrom would receive, if anything, MHV would have to have sold one or both of its construction-ready projects to determine whether any sale proceeds were earmarked for a development fee. He testified that there have been projects where no development fee is paid to the developers. Further, even if a sale happened and MHV received a development fee, there is no guarantee that DePodesta and Dahlstrom would share any of it after the fee flowed through the Operating Agreement’s distribution structure. Given this evidence, the speculative nature of any profits from MHV formed a reasonable basis for the trial court’s order declining to impose a constructive trust on those profits. The evidence showed that developments in ERCOT are speculative and uncertain in many respects.

¶ 86 C. Count I—Breach of Confidentiality Agreement



2019 IL App (2d) 190043

¶ 87 Next, Indeck argues that the trial court erred in granting defendants a directed finding on its breach-of-contract claim, which sought injunctive relief to enforce its Confidentiality Agreement. Defendants respond that we need not review the trial court’s ruling that the Confidentiality Agreement was unenforceable, because the disposition of the issue is not essential and will not affect the trial court’s decision to decline to enter a permanent injunction. We agree with defendants.

¶ 88 “The party seeking an injunction must demonstrate: ‘(1) a clear and ascertainable right in need of protection; (2) irreparable harm if injunctive relief is not granted; (3) no adequate remedy at law; and (4) success on the merits.’ ” *Alpha School Bus Co. v. Wagner*, 391 Ill. App. 3d 722, 743-44 (2009) (quoting *Hasco, Inc. v. Roche*, 299 Ill. App. 3d 118, 126 (1998)). To show a breach of contract, a plaintiff must prove (1) the existence of a valid and enforceable contract, (2) performance by the plaintiff, (3) breach by the defendant, and (4) resultant injury to the plaintiff. *Pepper Construction Co. v. Palmolive Tower Condominiums, LLC*, 2016 IL App (1st) 142754, ¶ 85.

¶ 89 The trial court found the Confidentiality Agreement overbroad but *also* determined that Indeck did *not* prove that (1) it would be irreparably harmed if the injunction did not issue and (2) it sustained injury on the underlying breach-of-contract claim. As defendants note, Indeck does not challenge these two rulings. Thus, they are forfeited and, regardless of whether the Confidentiality Agreement is enforceable, the trial court’s directed finding in defendants’ favor stands on these other grounds

¶ 90

### III. CONCLUSION

¶ 91 For the reasons stated, the judgment of the circuit court of Lake County is affirmed in part and reversed in part, and the cause is remanded for further proceedings.

2019 IL App (2d) 190043

¶ 92 Affirmed in part and reversed in part.

¶ 93 Cause remanded.

¶ 94 JUSTICE McLAREN, specially concurring:

¶ 95 I wish to emphasize a point addressed to the trial court. In a similar case, where the trial judge retired and was replaced with a successor judge, this district said, “the trial court violated their due process rights when, over their objection, the court relied on a transcript of their case-in-chief from a prior trial on their complaint rather than let them present their case-in-chief anew before the court. We reverse and remand.” *Anderson v. Kohler*, 376 Ill. App. 3d 714, 714-15 (2007). “A stitch in time may save nine.” Thomas Fuller, *Gnomologia: Adagies and Proverbs; Wise Sentences and Witty Sayings, Ancient and Modern, Foreign and British* (1732).

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ERIN CARTWRIGHT WEINSTEIN  
Clerk of the Circuit Court  
Lake County, Illinois

1 STATE OF ILLINOIS )  
2 ) SS.  
3 COUNTY OF L A K E )  
4  
5 IN THE CIRCUIT COURT OF THE 19TH JUDICIAL CIRCUIT  
6 LAKE COUNTY, ILLINOIS  
7  
8 INDECK ENERGY SERVICES, INC., )  
9 Plaintiffs, )  
10 v. ) NC. 14 CH 602 ,  
11 CHRISTOPHER M. DePODESTA, KARL )  
12 G. DAHLSTROM, HALYARD ENERGY )  
13 VENTURES, LLC AND HALYARD )  
14 ENERGY WHARTON, LLC,  
15 Defendants.

16 REPORT OF PROCEEDINGS had at the  
17 hearing of the above-entitled cause before the  
18 HONORABLE MARGARET A. MARCOUILLER, Judge of said  
19 Court, on the 21st day of March, 2017.

20 APPEARANCES:

21 MR. STEVEN J. ROEDER and  
22 MS. SARAH ISAACSON,  
23 on behalf of the Plaintiffs;

24 MR. STUART P. KRAUSKOPF and  
MS. JAMIE S. RITCHIE,  
on behalf of the Defendants.

25 GIOVANNA PERRI MEIER, CSR, RPR  
26 Official Court Reporter  
27 18 N. County Street  
28 Waukegan, Illinois 60085  
29 License Number 084-001353

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1           In fact, Mr. DePodesta told  
2 Mr. Lagowski that after he resigned he might do  
3 some consulting work.

4           He did not raise in any way the idea  
5 that he was going to be involved in the  
6 development of peaker projects in ERCOT.

7           The evidence gives rise to a prima  
8 facie case of breach of fiduciary duty by  
9 Defendant DePodesta that is sufficient to  
10 withstand the Defendants' Motion for Directed  
11 Finding on Count 4.

12           In Count 5 titled, Usurpation of  
13 Corporate Opportunity, Indeck alleges that  
14 Defendants DePodesta and Dahlstrom had a duty to  
15 disclose all material facts involving  
16 opportunities to obtain or acquire turbines that  
17 could be used in the development of Indeck  
18 Energy's proposed projects, including  
19 opportunities involving grey market turbines that  
20 are available more quickly than those ordered  
21 directly from the manufacturer.

22           Plaintiff also alleges that  
23 Defendants Dahlstrom and DePodesta did not share  
24 with Indeck the opportunity to negotiate the

1 contribution of two Carson Bay turbines in  
2 exchange for equity in one of Indeck's  
3 developments.

4 The opportunity was alleged in the  
5 complaint to be the equivalent of contributing 60  
6 million dollars in equity.

7 Also, according to the complaint, the  
8 Defendants allegedly represented to Indeck's  
9 President, Mr. Lagowski, that Carson Bay would  
10 only sell the turbines to Indeck and only upon  
11 receipt of a substantial downpayment.

12 Indeck, according to the complaint,  
13 would have accepted the turbines as equity  
14 proposal.

15 Defendant DePodesta and Mr. Lagowski  
16 disagree about the contents of their conversation  
17 about the Carson Bay turbines and, in particular,  
18 whether turbines for equity was discussed, but it  
19 is undisputed that the turbines are still on the  
20 market more than three years after the Defendants  
21 resigned.

22 Further, there is evidence that  
23 Carson Bay consistently required a 10 to  
24 20 percent non-refundable deposit to take those

1 turbines off the market for 30 to 60 days.

2 And there is no evidence that Indeck  
3 has ever offered to buy the turbines or to make  
4 any deposits to take the turbines off the market  
5 for any length of time.

6 Absent any indication of any attempt  
7 by Indeck to engage in negotiations with Carson  
8 Bay with respect to the turbines, Indeck has not  
9 seriously challenged Defendants' position that  
10 any turbine opportunity that existed in 2013 was  
11 not taken by the Defendants because it is still  
12 available today.

13 Plaintiff has not set forth a prima  
14 facie case for usurpation of any corporate  
15 opportunity involving the turbines.

16 Therefore, Defendants' Motion for  
17 Directed Finding on Count 5 with respect to the  
18 alleged turbine opportunity will be granted.

19 With respect to funding  
20 opportunities, there is no evidence that Merced  
21 promised HEV an exclusive development agreement  
22 for projects in ERCOT or that Indeck made any  
23 attempt to partner with Merced after Defendants  
24 resigned from Indeck.

1           It appears that the Plaintiff may  
2     have assumed that there was only one partnership  
3     opportunity with Merced, but Plaintiff presented  
4     no evidence of that fact in its case in chief.

5           Defendants argument that no funding  
6     opportunity was usurped and that any funding  
7     opportunity that Indeck might had in 2013 is  
8     still available to Indeck today is persuasive on  
9     this record.

10          Defendants Motion for Directed  
11     Finding on Count 5 with respect to the alleged  
12     funding opportunity is also granted.

13          Defendants Motion for Directed  
14     Finding on Count 5 is granted in its entirety.

15          The Court will also address the  
16     matter of punitive damages.

17          There is argument with respect to  
18     punitive damages generally in Defendants' Motion  
19     for Directed Finding and Plaintiffs' Motion to  
20     Amend Paragraph 9 filed on September 1st, 2016  
21     remains pending.

22          The Court has already ruled on  
23     Count 2, the trade secret claim, that the  
24     question of whether there was willful and

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT  
LAKE COUNTY, ILLINOIS

FILED

MAR 21 2017

Indeck Energy Services, Inc.

vs.

Case No. 14 CH 602

*Ann Catherine Weinstein*  
CIRCUIT CLERK

De Podesta, et al.

## ORDER

continued

This cause coming to be heard for ruling on Defendants' motion for Directed Findings, Plaintiff's motion for leave to Amend Paragraph 9 of its Complaint and Plaintiff's motion for leave to Add HEV as a party to Counts IV and V, and status on Plaintiff's motion to Compel Rule 214 affidavit, counsel for the parties <sup>and the parties</sup> being present, and the Court being fully informed in the premises,

IT IS HEREBY ORDERED THAT:

1. Defendants' motion for Directed Findings ~~is~~ regarding:
  - (a) Count III is granted in part and denied in part;
  - (b) Count IV is denied; and (c) Count V is granted for the reasons stated on the record.
2. Plaintiff's motion to Amend Par. 9 of its Complaint is denied for the reasons stated on the record.
3. Plaintiff's motion to Add HEV as a party to Counts IV and V is granted as to Count IV and denied as to Count V for the reasons stated on the record.
4. The parties reached agreement on the terms of the Rule 214 affidavit.

ENTER:

JUDGE

Dated this 21<sup>st</sup> day of March, 20 17.

Prepared by:

Attorney's Name: Sarah J. IsaacsonAddress: 77 W. Washington St., #2100City: Chicago State: ILPhone: 312-667-6002 Zip Code: 60602Fax: 708-843-0618ARDC: 6273833

A022

171-94 (Rev. 10/11)

C 3979 V2



IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT  
LAKE COUNTY, ILLINOIS

Indeck Energy Services, Inc.  
vs.

Case No. 14 CH 602

DePodesta, et al.

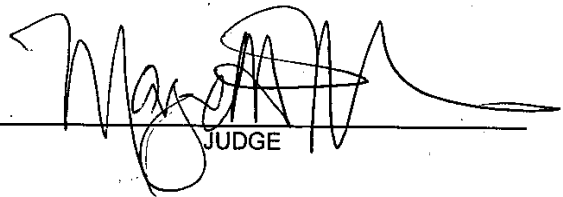
ORDER

The Court hereby sets <sup>and confirms</sup> the following trial  
schedule: April 11, 2017 (all day);  
April 18, 2017 (all day);  
May 3, 2017 (all day);  
May 4, 2017 (all day);  
May 5, 2017 (all day); and  
May 9, 2017 (all day).

The previously scheduled trial date for  
April 17, 2017 is hereby stricken.

All further proceedings after March 27,  
2017 will be heard in Room C-406.

ENTER:

  
JUDGE

Dated this 21<sup>st</sup> day of March, 2017.

Prepared by:

Attorney's Name: Sarah J. Isaacson

Address: 77 W. Washington St. #2100

City: Chicago State: IL

Phone: 312-667-6002 Zip Code: 60602

Fax: 708-843-0618

ARDC: 6273833

A023

171-94 (Rev. 10/11)

C 3980 V2

DLC

FILED

7/19/2018 4:13 PM

ERIN CARTWRIGHT WEINSTEIN

Clerk of the Circuit Court

Lake County, Illinois

1       STATE OF ILLINOIS       )  
       )       SS.  
 2       COUNTY OF LAKE       )  
 3       IN THE CIRCUIT COURT OF THE 19th JUDICIAL CIRCUIT  
       LAKE COUNTY, ILLINOIS  
 4  
 5       INDECK ENERGY SERVICES, INC.       )  
       )         
 6       )       Plaintiff,       )  
 7       V.       ) 14 CH 602  
       CHRISTOPHER M. DePODESTA, KARL G.       )  
 8       DAHLSTROM, HALYARD ENERGY VENTURES,       )  
       LLC, and HALYARD ENERGY WHARTON, LLC       )  
 9       Defendants.       )

10  
 11       EXCERPT REPORT OF PROCEEDINGS had in  
 12       the above-entitled cause before the HONORABLE  
 13       MARGARET A. MARCOUILLER, on the 17th day of July,  
 14       A.D., 2018 p.m.

15       APPEARANCES:  
 16       MR. STEVEN J. ROEDER and  
 17       MR. THOMAS GIPSON,  
       Roeder Law Offices, LLC  
 18       appeared on behalf of the Plaintiffs;  
 19       MR. STUART P. KRAUSKOPF and MS. JAIMIE RITCHIE,  
       Krauskopf Kauffman, P.C.  
 20       appeared on behalf of the Defendants.

21  
 22       Reported By:  
 23       Marie Crissie-Shaykin, CSR  
       Lake County Official Court Reporter  
 24

1

A043

R 7635 V2

A-42

1 (WHEREUPON, proceedings were had  
2 not herein transcribed.)

3 THE COURT: Back on the record. The other  
4 matter that is before the Court today is the Court's  
5 ruling on the Motion to Reconsider the Directed  
6 Finding that was entered in favor of the Defendants  
7 on Count 5. I should say since we have switched  
8 court reporters that Counsel remain present;  
9 Mr. Roeder, Mr. Gipson, Mr. Krauskopf, and  
10 Ms. Ritchie are still present in open court. We had  
11 begun today with hearing on another motion that was  
12 transcribed by another reporter.

13 Now with respect to the trial ruling  
14 on the Motion to Reconsider, more than a year after  
15 the Court had entered a directed finding on Count 5,  
16 after the presentation of the Defendant's case in  
17 chief, Plaintiff moved the Court to reconsider its  
18 ruling on the corporate usurpation claim. While the  
19 Court recognizes that it has the inherent authority  
20 to reconsider its interlocutory orders, the Court  
21 elects not to exercise its discretion to do so in a  
22 situation where the Court believes that  
23 reconsideration would cause undue harm to the  
24 parties who benefited from the order and here the

1 order benefited the Defendants. The Court found no  
2 reasonable explanation offered for the Plaintiff's  
3 delay until after the close of evidence to move to  
4 reconsider entry of the directed finding. As the  
5 Defendants argued, granting the motion to vacate the  
6 directed finding would lead the Court to reopen  
7 proofs in this exceedingly long trial.

8           The Court acknowledges that Plaintiff  
9 had argued that it wouldn't be necessary to allow  
10 the Defendants to put on evidence with respect to  
11 Count 5, if the Court were to vacate the directed  
12 finding. The Court disagrees and the Court finds  
13 that if the finding were vacated it would be  
14 incumbent on the Court to reopen proofs to allow the  
15 Defendants an opportunity to put on their evidence  
16 with respect to Count 5.

17           Both the Plaintiff and the  
18 Defendants, really everyone associated with this  
19 case, has at some point in time lamented the fact  
20 that it has taken so long to try this case.

21           The Court finds that reopening proofs  
22 at this point in time would cause undue prejudice to  
23 the Defendants under all of the circumstances of  
24 this case. It need not have taken a year to make

1 the arguments that the Plaintiff made in its motion  
2 to reconsider. I acknowledge Plaintiff's argument  
3 that they could raise these arguments even later but  
4 the Court is not going to vacate the order and  
5 reopen proofs. I think the record is clear with  
6 respect to the legal arguments that have been made  
7 and that is essentially the type of argument on  
8 which the Plaintiff based their motion.

9           Additionally, at the time of the  
10 directed finding the Court recognized that the  
11 evidence showed that any opportunity, any corporate  
12 opportunity that was called "funding opportunity"  
13 throughout the direct, and the Court found that any  
14 funding opportunity that was available to Indeck in  
15 2013 was still available to Indeck at the time that  
16 the Court granted the motion for directed finding.  
17 Now, Plaintiff never challenged the Court's finding  
18 that opportunity was still available to Indeck at  
19 the time of the directed finding. Essentially, what  
20 the Court found was that the Defendants didn't take  
21 any opportunity from Indeck because the opportunity  
22 was still there to be had.

23           In the motion to reconsider Indeck  
24 extrapolates from the Court's finding that the

1 Court, in fact, ruled that any corporate opportunity  
2 must be exclusive before there can be a user-patient  
3 claim. The Court's ruling did not state that the  
4 opportunity must be exclusive. I don't think you  
5 can even infer reasonably that the opportunity must  
6 be exclusive. You can infer anything, it is that  
7 the opportunity must no longer be available, not  
8 that the opportunity must be exclusive.

9 At the core of the Court's ruling was  
10 the fact that an opportunity must be usurped, it  
11 must be taken and that when an opportunity is still  
12 available to a plaintiff, that opportunity has not  
13 been usurped or taken by the defendant. There is  
14 case law that clearly states that a director may  
15 embrace an opportunity without liability if the  
16 corporation sought without success to obtain it.

17 Indeck's argument is tantamount to an  
18 argument that a corporation may consciously elect to  
19 forego an opportunity perhaps because it lacks the  
20 resources to acquire the opportunity, perhaps for  
21 some other reason but that after foregoing, after  
22 electing to forego the opportunity, the corporation  
23 may still prevail on a claim that the opportunity  
24 was usurped. I think that the Plaintiff brought no

1 case to the Court's attention that holds that an  
2 opportunity that is available to the Plaintiff at  
3 the time of trial can be found to have been usurped  
4 even though it is currently available to the  
5 Plaintiff.. Frankly, the argument is not persuasive  
6 to the Court.

7               So, the Motion to Reconsider Entry of  
8 the Directed Finding on Count 5 is denied. It is  
9 denied due to the delay in bringing the motion until  
10 after Defendants' case and also it is denied because  
11 the argument raised in the motion is not persuasive  
12 to the Court. That is the Court's ruling on the  
13 Motion to Reconsider.

14               We will reconvene next Wednesday,  
15 July 25th, 9:00 o'clock, in the morning with respect  
16 to the Motion for Sanctions and that motion is  
17 really not apart of the trial testimony or ruling  
18 with respect to the trial so my expectation would be  
19 that next Wednesday there would be a private court  
20 reporter provided. Is that what you are planning,  
21 Counsel?

22               MR. ROEDER: I am sure we will share court  
23 reporters.

24               MS. RITCHIE: Of course.

1 THE COURT: Then the Court will not arrange  
2 for an Official Court Reporter to be here next  
3 Wednesday, the 25th. Is there anything else we need  
4 to do on the record before we conclude today?

5 MR. ROEDER: I don't think so, Judge. We can  
6 do this off the record. I just want to make sure  
7 your Honor has all of the briefs for next week.

8 THE COURT: Sure. We can go off the record  
9 for that. Thank you, Madam Court Reporter.

10

11 (WHICH WERE ALL THE PROCEEDINGS HAD  
12 IN THE ABOVE-ENTITLED CAUSE.)

13

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22

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IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT  
LAKE COUNTY, ILLINOIS

FILED

JUL 17 2018

Indeck

vs.

Case No. 14 CH 602Eva Caron Wright  
CIRCUIT CLERKDePodesta, et al.

## ORDER

This cause coming to be heard on Defendants' Motion to Conduct additional Forensics and to Modify briefing schedule and Plaintiff's Motion to Reconsider Court's Ruling on Court V, all Parties given due notice and the Court fully advised in the premises;

It is hereby Ordered that:

- ① Defendants' Motion is granted. Elijah shall have until July 27, 2018 to complete the forensic exams outlined by the Parties on July 5, 2018;
- ② Defendants' Response to Plaintiff's Motion for Sanctions is due on August 3, 2018;
- ③ Plaintiff's Reply in Support of its Motion for Sanctions is due on August 20, 2018;
- ④ The Court will hear oral argument on the Motion for Sanctions on August 29, 2018 at 1:30 p.m. in Room C-406;
- ⑤ The Court will hear argument on Plaintiff's Petition <sup>and Motions to</sup> ~~Strike~~ (not yet filed) on July 25, 2018 at 9:00 a.m. in Room C-406;
- ⑥ Plaintiff's Motion to Reconsider Court V is denied for the reasons stated on the record. ENTER:

 JUDGE

Dated this 17<sup>th</sup> day of July, 2018.

Prepared by:

Attorney's Name: ~~Robert~~ KrawkopfAddress: 414 N. Orleans St 210City: Chicago State: ILPhone: 312-377-9592 Zip Code: 60654Fax: 312-264-5618ARDC: 6190716

A042

171-94 (Rev. 10/11)

C 7561 V3

## **TABLE OF CONTENTS**

### **COMMON LAW RECORD**

<b><u>Date Filed</u></b>	<b><u>Title/Description</u></b>	<b><u>Page No.</u></b>
03/25/2014	VERIFIED COMPLAINT FOR INJUNCTIVE AND OTHER RELIEF	C 39-C 88
03/25/2014	CERTIFICATE OF ATTORNEY-CIVIL DIVISION	C 89
03/25/2014	NOTICE OF MOTION	C 90-C 92
03/25/2014	INDECK ENERGY'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION	C 93-C 100
03/25/2014	INDECK ENERGY'S EMERGENCY MOTION TO APPOINT SPECIAL PROCESS SERVER	C 101-C 104
03/25/2014	INDECK ENERGY'S MOTION FOR LEAVE TO FILE CONFIDENTIAL TRADE SECRET STATEMENT UNDER SEAL	C 105-C 107
03/25/2014	PLAINTIFFS' MOTION FOR EXPEDITED DISCOVERY	C 108-C 113
03/25/2014	INDECK ENERGY'S MOTION FOR ORDER TO PRESERVE EVIDENCE	C 114-C 118
03/25/2014	MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION	C 119-C 135

<u>Date Filed</u>	<u>Title/Description</u>	<u>Page No.</u>
03/26/2014	APPEARANCE	C 136
03/26/2014	ORDER	C 137
03/26/2014	ORDER_0002	C 138
03/26/2014	AGREED ORDER	C 139-C 141
03/26/2014	ORDER_0003	C 142-C 143
04/08/2014	APPEARANCE	C 144
04/08/2014	DEFENDANTS' VERIFIED ANSWER TO PLAINTIFF'S VERIFIED COMPLAINT FOR INJUNCTIVE AND OTHER RELIEF	C 145-C 185
04/17/2014	ORDER	C 186-C 187
04/21/2014	CERTIFICATE OF SERVICE	C 188
04/25/2014	NOTICE OF FILING	C 189
04/25/2014	RESPONSE TO INDECK ENERGY'S MOTION TO APPROVE ITS PROTOCOL FOR THE FORENSIC SEARCH OF ELECTRONIC STORAGE DEVICES	C 190-C 224
04/25/2014	AGREED PROTECTIVE ORDER	C 225-C 235
04/30/2014	APPEARANCE	C 236
04/30/2014	NOTICE OF MOTION	C 237-C 239
04/30/2014	INDECK ENERGY'S MOTION FOR ENTRY OF AGREED PROTECTIVE ORDER	C 240-C 252
04/30/2014	NOTICE OF MOTION_0002	C 253-C 255
04/30/2014	INDECK ENERGY'S MOTION TO APPROVE ITS PROTOCOL FOR THE FORENSIC SEARCH OF DEFENDANT'S ELECTRONIC STORAGE DEVICES	C 256-C 266
05/02/2014	NOTICE OF FILING	C 267-C 268
05/02/2014	INDECK ENERGY'S REPLY IN SUPPORT OF ITS MOTION TO APPROVE ITS PROTOCOL FOR THE FORENSIC SEARCH OF ELECTRONIC STORAGE DEVICES	C 269-C 304
05/14/2014	NOTICE OF CHANGES	C 305
05/14/2014	NOTICE OF CHANGES_0002	C 306
05/15/2014	ORDER	C 307-C 309
06/09/2014	NOTICE OF MOTION	C 310-C 312

<u>Date Filed</u>	<u>Title/Description</u>	<u>Page No.</u>
06/09/2014	PETITION FOR RULE TO SHOW CAUSE WHY DEFENDANTS SHOULD NOT BE HELD IN CONTEMPT FOR FAILING TO COMPLY WITH THE AGREED TRO	C 313-C 318
06/12/2014	ORDER	C 319
06/16/2014	MEMORANDUM IN SUPPORT OF PETITION FOR RULE TO SHOW CAUSE WHY DEFENDANTS SHOULD NOT BE HELD IN CONTEMPT FOR FAILING TO COMPLY (Secured)	C 320
06/16/2014	INDECK ENERGY'S MOTION FOR LEAVE TO FILE MEMORANDUM IN SUPPORT OF PLAINTIFF'S PETITION TO SHOW CAUSE AND ATTACHED DOCUMENTS UNDER SEAL	C 321-C 323
06/27/2014	NOTICE OF MOTION	C 324-C 325
06/27/2014	DEFENDANTS' MOTION TO SET 213(F) (3) EXPERT DISCLOSURE SCHEDULE	C 326-C 336
06/27/2014	NOTICE OF MOTION_0002	C 337-C 338
06/27/2014	DEFENDANTS' MOTION FOR LEAVE TO FILE RESPONSE TO PLAINTIFF'S PETITION FOR RULE TO SHOW CAUSE AND EXHIBITS UNDER SEAL	C 339-C 352
06/30/2014	NOTICE OF MOTION	C 353-C 354
06/30/2014	DEFENDANTS' MOTION TO COMPEL	C 355-C 446
07/03/2014	ORDER	C 447-C 448
07/07/2014	NOTICE OF FILING	C 449-C 450
07/07/2014	RESPONSE TO DEFENDANTS' MOTION TO COMPEL	C 451-C 459
07/09/2014	NOTICE OF MOTION	C 460-C 461
07/09/2014	DEFENDANTS' MOTION TO DISMISS PETITION FOR RULE TO SHOW CAUSE	C 462-C 470
07/09/2014	NOTICE OF MOTION_0002	C 471-C 472
07/09/2014	DEFENDANTS' MOTION TO CONTINUE PRELIMINARY INJUNCTION HEARING	C 473-C 479
07/09/2014	NOTICE OF FIING	C 480

<u>Date Filed</u>	<u>Title/Description</u>	<u>Page No.</u>
07/09/2014	DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO STRIKE THE AFFIDAVITS OF TYBURK, DEPODESTA AND DAHLSTROM	C 481-C 490
07/10/2014	ORDER	C 491
07/11/2014	NOTICE OF FILING	C 492-C 493
07/11/2014	RESPONSE TO MOTION TO DISMISS PETITION FOR RULE TO SHOW CAUSE	C 494-C 558
07/14/2014	ORDER	C 559
07/17/2014	DEFENDANTS' HIGHLY CONFIDENTIAL RESPONSE TO PLAINTIFF'S PETITION FOR RULE TO SHOW CAUSE (Secured)	C 560
07/17/2014	ORDER	C 561
07/18/2014	AMENDED AGREED TEMPORARY RESTRAINING ORDER	C 562-C 576
07/18/2014	ORDER	C 577
07/21/2014	AGREED AMENDED TEMPORARY RESTRAINING ORDER WITH ATTACHMENTS (Secured)	C 578
07/31/2014	SUPREME COURT RULE 218 CASE MANAGEMENT ORDER	C 579
08/13/2014	NOTICE OF MOTION	C 580-C 582
08/13/2014	INDECK ENERGY'S MOTION FOR COMMISSIONS TO TAKE DEPOSITIONS OUTSIDE ILLINOIS	C 583-C 626
08/14/2014	AGREED ORDER	C 627-C 629
09/04/2014	AGREED ORDER	C 630
09/08/2014	NOTICE OF FILING	C 631-C 633
09/08/2014	COUNT V TO VERIFIED COMPLAINT FOR INJUNCTIVE AND OTHER RELIEF	C 634-C 666
09/29/2014	CERTIFICATE OF SERVICE	C 667
10/14/2014	NOTICE OF MOTION	C 668-C 669
10/14/2014	DEFENDANTS' MOTION FOR LEAVE TO SERVE ADDITIONAL INTERROGATORIES	C 670-C 725
10/15/2014	NOTICE OF FILING	C 726-C 727

P

<u>Date Filed</u>	<u>Title/Description</u>	<u>Page No.</u>
10/15/2014	DEFENDANTS' VERIFIED ANSWER TO PLAINTIFF'S COUNT V TO VERIFIED COMPLAINT FOR INJUNCTIVE AND OTHER RELIEF	C 728-C 750
10/21/2014	NOTICE OF FILING	C 751-C 752
10/21/2014	PLAINTIFF'S OBJECTIONS TO MOTION FOR LEAVE TO SERVE ADDITIONAL INTERROGATORIES	C 753-C 756
10/22/2014	NOTICE OF MOTION	C 757-C 758
10/22/2014	DEFENDANTS' MOTION TO COMPEL	C 759-C 818
10/23/2014	ORDER	C 819
11/03/2014	NOTICE OF FILING	C 820-C 821
11/03/2014	PLAINTIFF'S RESPONSE TO MOTION TO COMPEL	C 822-C 871
11/12/2014	NOTICE OF FILING	C 872-C 873
11/12/2014	DEFENDANTS' REPLY IN SUPPORT OF MOTION TO COMPEL	C 874-C 881
12/22/2014	ORDER	C 882-C 884
01/22/2015	NOTICE OF MOTION	C 885-C 886
01/22/2015	DEFENDANTS' MOTION TO CONTINUE DISCOVERY CLOSURE AND TRIAL	C 887-C 890
01/22/2015	ORDER	C 891
01/22/2015	TRIAL CONTINUANCE ORDER	C 892
01/23/2015	NOTICE OF MOTION	C 893-C 895
01/23/2015	MOTION TO COMPEL PRODUCTION OF DOCUMENT OBTAINED THROUGH FORENSIC EXAMINATION	C 896-C 902
01/28/2015	NOTICE OF FILING	C 903-C 904
01/28/2015	DEFENDANTS' RESPONSE TO INDECK ENERGY'S MOTION TO COMPEL PRODUCTION OF DOCUMENT OBTAINED THROUGH FORENSIC EXAMINATION	C 905-C 1049
02/02/2015	NOTICE OF MOTION	C 1050-C 1053
02/02/2015	NOTICE OF FILING	C 1054-C 1055
02/02/2015	SUBPOENA FOR DOCUMENTS	C 1056

<u>Date Filed</u>	<u>Title/Description</u>	<u>Page No.</u>
02/02/2015	RIDER FOR DOCUMENTS	C 1057-C 1060
02/03/2015	NOTICE OF FILING	C 1061-C 1062
02/03/2015	REPLY IN SUPPORT OF MOTION TO COMPEL PRODUCTION OF DOCUMENT OBTAINED THROUGH FORENSIC EXAMINATION	C 1063-C 1068
02/03/2015	NOTICE OF MOTION	C 1069-C 1070
02/03/2015	MOTION TO STRIKE NEW ARGUMENTS AND AFFIDAVIT OF JOHN MCCASH CONTAINED IN PLAINTIFF'S REPLY IN SUPPORT OF MOTION TO COMPEL	C 1071-C 1073
02/05/2015	ORDER	C 1074
02/05/2015	TRIAL CONTINUANCE ORDER	C 1075
02/06/2015	NOTICE OF FILING	C 1076-C 1077
02/06/2015	RESPONSE TO DEFENDANTS' MOTION TO STRIKE NEW ARGUMENTS AND AFFIDAVIT OF JOHN MCCASH	C 1078-C 1081
02/13/2015	APPEARANCE	C 1082
02/13/2015	OBJECTIONS AND RESPONSES TO SUBPOENA FOR DOCUMENTS SERVED UPON NON-PARTY LITTLER MENDELSON, P.C.	C 1083-C 1085
02/23/2015	NOTICE OF MOTION	C 1086-C 1087
02/23/2015	DEFENDANTS' MOTION TO COMPEL AND TO EXTEND TIME TO SUBMIT SUPREME COURT RULE 213(F) (3) EXPERT DISCLOSURES	C 1088-C 1210
02/23/2015	NOTICE OF MOTION_0002	C 1211-C 1212
02/23/2015	DEFENDANTS' MOTION FOR LEAVE TO FILE CERTAIN EXHIBITS TO MOTION TO COMPEL AND TO EXTEND TIME TO SUBMIT EXPERT DISCLOSURES UNDER SEAL	C 1213-C 1226
02/26/2015	ORDER	C 1227
03/04/2015	NOTICE OF FILING	C 1228-C 1229
03/04/2015	INDECK ENERGY SERVICES, INC.'S RESPONSE TO DEFENDANTS' MOTION TO COMPEL AND EXTEND TIME TO SUBMIT RULE 213(F) (3) DISCLOSURES	C 1230-C 1245

<u>Date Filed</u>	<u>Title/Description</u>	<u>Page No.</u>
03/05/2015	NOTICE OF FILING	C 1246-C 1247
03/05/2015	INDECK ENERGY SERVICES, INC.'S AMENDED RESPONSE TO DEFENDANTS' MOTION TO COMPEL AND EXTEND TIME TO SUBMIT RULE 213 DISLCOSURES	C 1248-C 1263
03/05/2015	ORDER	C 1264
03/09/2015	NOTICE OF FILING	C 1265-C 1266
03/09/2015	DEFENDANTS' REPLY IN SUPPORT OF MOTION TO COMPEL AND TO EXTEND TIME TO SUBMIT RULE 213(F)(3) DISCLOSURES	C 1267-C 1271
03/12/2015	ORDER	C 1272-C 1273
03/18/2015	NOTICE OF MOTION	C 1274-C 1275
03/18/2015	DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT	C 1276-C 1508
03/18/2015	NOTICE OF MOTION	C 1509-C 1510
03/18/2015	DEFENDANTS' MOTION FOR LEAVE TO FILE CERTAIN EXHIBITS TO MOTION FOR PARTIAL SUMMARY JUDGMENT UNDER SEAL	C 1511-C 1524
03/18/2015	NOTICE OF FILING	C 1525-C 1526
03/18/2015	RESPONSE TO MOTION TO COMPEL REPRESENTATIVE OF DEFENDANT, HALYARD ENERGY VENTURES, LLC, TO ANSWER QUESTIONS AT HIS DEPOSITION	C 1527-C 1556
03/18/2015	NOTICE OF FILING	C 1557-C 1558
03/18/2015	RESPONSE TO MOTION TO COMPEL CHRISTOPHER M. DEPODESTA TO ANSWER DEPOSITION QUESTIONS REGARDING THIS COURT'S PRESERVATION ORDER	C 1559-C 1571
03/19/2015	NOTICE OF FILING	C 1572-C 1573
03/19/2015	NOTICE OF FILING_0002	C 1574-C 1575
03/19/2015	PLAINTIFF INDECK ENERGY SERVICES, INC.'S STATEMENT OF MATERIAL FACTS OVER WHICH THERE IS NO GENUINE DISPUTE	C 1576-C 1592



<u>Date Filed</u>	<u>Title/Description</u>	<u>Page No.</u>
03/19/2015	INDECK ENERGY SERVICES, INC.'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT	C 1593-C 1607
03/19/2015	ORDER	C 1608
03/19/2015	TRIAL CONTINUANCE ORDER	C 1609
03/20/2015	NOTICE OF MOTION	C 1610-C 1612
03/20/2015	MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY ON COUNT V FOR USURPATION OF CORPORATE OPPORTUNITIES	C 1613-C 1620
03/20/2015	PLAINTIFF INDECK ENERGY SERVICES, INC.'S MOTION TO CLARIFY ORDER OF MARCH 12, 2015	C 1621-C 1624
03/23/2015	NOTICE OF FILING	C 1625-C 1627
03/23/2015	INDECK ENERGY SERVICES, INC.'S REPLY IN SUPPORT OF ITS MOTION TO COMPEL CHRISTOPHER M. DEPODESTA TO ANSWER DEPOSITION QUESTIONS	C 1628-C 1632
03/23/2015	REPLY IN SUPPORT OF ITS MOTION TO COMPEL REPRESENTATIVE OF HALYARD ENERGY VENTURES, LLC TO ANSWER QUESTIONS	C 1633-C 1638
03/26/2015	ORDER	C 1639
03/26/2015	TRIAL SETTING ORDER	C 1640
04/16/2015	NOTICE OF MOTION	C 1641-C 1642
04/16/2015	MOTION FOR LEAVE TO FILE CERTAIN EXHIBITS TO RESPONSE TO MOTION FOR SUMMARY JUDGMENT UNDER SEAL	C 1643-C 1656
04/16/2015	NOTICE OF FILING	C 1657-C 1658
04/16/2015	RESPONSE TO MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY ON COUNT V FOR USURPATION OF CORPORATE OPPORTUNITIES	C 1659-C 1717
05/01/2015	NOTICE OF FILING	C 1718-C 1719
05/01/2015	REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT	C 1720-C 1752

<u>Date Filed</u>	<u>Title/Description</u>	<u>Page No.</u>
05/01/2015	NOTICE OF MOTION	C 1753-C 1754
05/01/2015	MOTION FOR LEAVE TO FILE CERTAIN EXHIBITS TO REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT UNDER SEAL	C 1755-C 1768
05/04/2015	AMENDED NOTICE OF FILING	C 1769-C 1770
05/04/2015	AMENDED REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT	C 1771-C 1804
05/04/2015	NOTICE OF FILING	C 1805-C 1807
05/13/2015	NOTICE OF MOTION	C 1808-C 1809
05/13/2015	MOTION TO STRIKE NEW DOCUMENTS PRODUCED IN AMENDED RESPONSE TO STATEMENT OF ADDITIONAL MATERIAL FACTS	C 1810-C 1846
05/14/2015	TRIAL CONTINUANCE ORDER	C 1847
05/18/2015	NOTICE OF FILING	C 1848-C 1849
05/18/2015	INDECK ENERGY SERVICES, INC.'S RESPONSE TO DEFENDANTS' MOTION TO STRIKE	C 1850-C 1853
05/28/2015	RETURNED MAIL LETTER	C 1854-C 1855
06/04/2015	NOTICE OF MOTION	C 1856-C 1858
06/04/2015	MOTION TO COMPEL UPDATE OF PRODUCTION OF DOCUMENTS	C 1859-C 1923
06/04/2015	MOTION TO CORRECT MISSTATEMENTS MADE BY DEFENDANTS' COUNSEL AT ORAL ARGUMENT	C 1924-C 1967
06/04/2015	MOTION TO SUPPLEMENT RULE 2.04 STATEMENTS WITH NEWLY DISCOVERED EVIDENCE THAT DEFENDANTS INTEND TO USE THE CARSON BAY TURBINES SOON	C 1968-C 1988
06/04/2015	DEFENDANTS' SUPREME COURT RULE 137 MOTION FOR SANCTIONS AGAINST PLAINTIFF	C 1989-C 2089
06/04/2015	NOTICE OF MOTION 0002	C 2090-C 2091
06/04/2015	NOTICE OF MOTION_0003	C 2092-C 2094

<u>Date Filed</u>	<u>Title/Description</u>	<u>Page No.</u>
06/04/2015	INDECK ENERGY'S MOTION TO STRIKE PARAGRAPH 13 OF THE AFFIDAVIT OF HENDRIK VROEGE	C 2095-C 2102
06/04/2015	NOTICE OF FILING	C 2103-C 2104
06/04/2015	PLAINTIFF INDECK ENERGY SERVICES, INC.'S MOTION TO TAKE EVIDENCE DEPOSITION OF DANIEL BARPAL OR FOR OTHER RELIEF	C 2105-C 2106
06/04/2015	RESPONSE TO MOTION TO SUPPLEMENT STATEMENT, MOTION TO STRIKE PARAGRAPH 13 OF AFFIDAVIT OF VROEGE, MOTION TO CORRECT MISSTATEMENTS	C 2107-C 2151
06/04/2015	ORDER	C 2152-C 2153
06/15/2015	NOTICE OF FILING	C 2154-C 2155
06/15/2015	DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO COMPEL UPDATE OF PRODUCTION OF DOCUMENTS	C 2156-C 2221
06/15/2015	NOTICE OF FILING 0002	C 2222-C 2223
06/15/2015	DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO TAKE EVIDENCE DEPOSITION OF DANIEL BARPAL OR FOR OTHER RELIEF	C 2224-C 2260
06/15/2015	NOTICE OF FILING	C 2261-C 2262
06/15/2015	INDECK ENERGY SERVICES, INC.'S RESPONSE TO DEFENDANTS' RULE 137 MOTION FOR SANCTIONS	C 2263-C 2291
06/15/2015	NOTICE OF MOTION	C 2292-C 2294
06/15/2015	INDECK ENERGY SERVICES, INC.'S MOTION FOR SANCTIONS	C 2295-C 2297
06/15/2015	MEMORANDUM IN SUPPORT OF PLAINTIFF INDECK ENERGY SERVICES, INC.'S MOTION FOR SANCTIONS	C 2298-C 2333
06/22/2015	NOTICE OF FILING	C 2334-C 2335
06/22/2015	DEFENDANTS' REPLY IN SUPPORT OF SUPREME COURT RULE 137 MOTION FOR SANCTIONS AGAINST PLAINTIFF	C 2336-C 2344

<u>Date Filed</u>	<u>Title/Description</u>	<u>Page No.</u>
06/22/2015	NOTICE OF FILING	C 2345-C 2346
06/22/2015	INDECK ENERGY SERVICES, INC.'S REPLY IN SUPPORT OF ITS MOTION TO CORRECT MISSTATEMENTS MADE BY DEFENDANTS' COUNSEL AT ORAL ARGUMENT	C 2347-C 2349
06/22/2015	INDECK ENERGY SERVICES, INC.'S REPLY IN SUPPORT OF ITS MOTION TO STRIKE PARAGRAPH 13 OF THE AFFIDAVIT OF HENDRIK VROEGE	C 2350-C 2351
06/22/2015	REPLY IN SUPPORT OF MOTION TO SUPPLEMENT RULE 2.04 STATEMENT WITH NEWLY DISCOVERED EVIDENCE	C 2352-C 2412
06/22/2015	INDECK ENERGY SERVICES, INC.'S REPLY IN SUPPORT OF ITS MOTION TO COMPEL UPDATE OF PRODUCTION OF DOCUMENTS	C 2413-C 2417
06/22/2015	INDECK ENERGY SERVICES, INC.'S REPLY IN SUPPORT OF ITS MOTION TO TAKE EVIDENCE DEPOSITION OF DANIEL BARPAL OR FOR OTHER RELIEF	C 2418-C 2420
06/29/2015	AGREED ORDER	C 2421
07/16/2015	ORDER	C 2422
07/27/2015	ORDER	C 2423
08/11/2015	NOTICE OF FILING	C 2424-C 2425
08/11/2015	DEFENDANTS' SUPPLEMENTAL RESPONSE TO PLAINTIFF'S MOTION TO SUPPLEMENT RULE 2.04 STATEMENT OF FACTS	C 2426-C 2429
08/11/2015	NOTICE OF FILING	C 2430-C 2431
08/11/2015	DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR SANCTIONS	C 2432-C 2437
08/11/2015	NOTICE OF FILING	C 2438-C 2439
08/11/2015	DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER	C 2440-C 2449
08/19/2015	NOTICE OF FILING	C 2450
08/19/2015	INDECK ENERGY SERVICES, INC.'S REPLY IN SUPPORT OF ITS MOTION FOR SANCTIONS	C 2451-C 2527

<u>Date Filed</u>	<u>Title/Description</u>	<u>Page No.</u>
08/19/2015	INDECK ENERGY'S REPLY IN SUPPORT OF ITS REVISED SUPPLEMENT RULE 2.04 STATEMENT OF FACTS	C 2528-C 2532
08/27/2015	ORDER	C 2533
09/04/2015	ORDER	C 2534-C 2537
09/04/2015	SUPREME COURT RULE 214 CASE MANAGEMENT ORDER	C 2538
10/01/2015	ORDER	C 2539
10/09/2015	NOTICE OF MOTION	C 2540-C 2541
10/09/2015	DEFENDANTS' MOTION FOR COMMISSIONS TO TAKE DEPOSITIONS OUTSIDE ILLINOIS	C 2542-C 2552
10/29/2015	ORDER	C 2553
10/29/2015	ORDER 0002	C 2554
11/30/2015	NOTICE OF MOTION	C 2555-C 2556
11/30/2015	DEFENDANTS' MOTION FOR PROTECTIVE ORDER AND TO QUASH NOTICE OF EVIDENCE DEPOSITIONS	C 2557-C 2594
11/30/2015	NOTICE OF CHANGE OF ADDRESS	C 2595-C 2596
12/03/2015	ORDER	C 2597
12/14/2015	DEFENDANTS' RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT	C 2598-C 3167
12/14/2015	NOTICE OF FILING	C 3168-C 3169
12/28/2015	NOTICE OF MOTION	C 3170-C 3171
12/28/2015	DEFENDANTS' MOTION TO WITHDRAW PREVIOUSLY FILED REVIEWED MOTION FOR PARTIAL SUMMARY JUDGMENT	C 3172-C 3173
01/04/2016	NOTICE OF FILING	C 3174-C 3175
01/04/2016	PLAINTIFF INDECK ENERGY SERVICES, INC.'S SUPREME COURT RULE 237(B) NOTICE TO PRODUCE AT TRIAL	C 3176-C 3178
01/07/2016	NOTICE OF FILING	C 3179-C 3180
01/07/2016	DEFENDANTS' NOTICE TO PLAINTIFF TO PRODUCE AT THE TIME OF TRIAL AND OR HEARING	C 3181-C 3182
01/07/2016	NOTICE OF FILING_	C 3183-C 3184

<u>Date Filed</u>	<u>Title/Description</u>	<u>Page No.</u>
01/07/2016	DEFENDANTS' RESPONSE TO PLAINTIFF INDECK ENERGY SERVICES, INC.'S SUPREME COURT RULE 237(B) NOTICE TO PRODUCE AT TRIAL	C 3185-C 3186
01/07/2016	ORDER	C 3187
01/08/2016	NOTICE OF FILING	C 3188-C 3189
01/08/2016	RESPONSE AND OBJECTION TO NOTICE TO PLAINTIFF TO PRODUCE AT THE TIME OF TRIAL AND OR HEARING	C 3190-C 3192
01/11/2016	DEFENDANTS' RESPONSE TO INDECK ENERGY SERVICES, INC.'S MOTION IN LIMINE TO BAR THIRD PARTY'S REFUSAL TO DEAL WITH PLAINTIFF	C 3193-C 3195
01/11/2016	ORDER	C 3196
01/20/2016	NOTICE OF FILING	C 3197-C 3198
01/20/2016	PLAINTIFF INDECK ENERGY SERVICES, INC.'S AMENDED RESPONSE TO DEFENDANTS' MOTION IN LIMINE #3	C 3199-C 3212
01/20/2016	NOTICE OF MOTION	C 3213-C 3214
01/20/2016	MOTION IN LIMINE TO BAR EVIDENCE THAT CHRISTOPHER DEPODESTA WAS NOT AN OFFICER OF INDECK ENERGY SERVICES, INC.	C 3215-C 3230
01/20/2016	NOTICE OF MOTION_0002	C 3231-C 3232
01/20/2016	PLAINTIFF INDECK ENERGY SERVICES, INC.'S MOTION IN LIMINE TO BAR EVIDENCE REGARDING THIRD PARTY'S REFUSAL TO DEAL WITH PLAINTIFF	C 3270 V2-C 3274 V2
01/20/2016	NOTICE OF FILING_0002	C 3275 V2-C 3276 V2
01/20/2016	REPLY IN SUPPORT OF MOTION IN LIMINE TO BAR EVIDENCE REGARDING THIRD PARTY'S REFUSAL TO DEAL WITH PLAINTIFF	C 3277 V2-C 3282 V2
01/25/2016	ORDER	C 3283 V2
02/03/2016	NOTICE OF FILING	C 3284 V2

<u>Date Filed</u>	<u>Title/Description</u>	<u>Page No.</u>
02/03/2016	DEFENDANTS' MOTION FOR LEAVE TO FILE CERTAIN TRIAL EXHIBITS UNDER SEAL	C 3285 V2-C 3303 V2
02/08/2016	ORDER	C 3304 V2
03/02/2016	NOTICE OF MOTION	C 3305 V2-C 3306 V2
03/02/2016	DEFENDANTS' MOTION TO MODIFY COURT'S SEPTEMBER 4, 2015 ORDER REGARDING SUPPLEMENTAL PRODUCTION OF DOCUMENTS	C 3307 V2-C 3368 V2
03/09/2016	NOTICE OF FILING	C 3369 V2-C 3370 V2
03/09/2016	INDECK ENERGY'S RESPONSE TO DEFENDANTS' MOTION TO MODIFY THE COURT'S SEPTEMBER 4, 2015 ORDER	C 3371 V2-C 3427 V2
03/09/2016	BENCH BRIEF REGARDING DEFENDANTS' ASSERTION OF THE ATTORNEY-CLIENT PRIVILEGE TO INFORMATION DISCLOSED ON THE RECORD AND TO THE COURT	C 3428 V2-C 3462 V2
03/09/2016	ORDER	C 3463 V2
03/17/2016	BENCH BRIEF REGARDING EXCLUSION OF EVIDENCE IN SUPPORT OF PUNITIVE DAMAGES	C 3464 V2-C 3475 V2
03/18/2016	ORDER	C 3476 V2
04/22/2016	ORDER	C 3477 V2
05/06/2016	ORDER	C 3478 V2
06/03/2016	EXHIBIT RECEIPT	C 3479 V2
06/03/2016	ORDER	C 3480 V2
06/21/2016	ORDER	C 3481 V2
06/30/2016	ORDER	C 3482 V2
07/08/2016	ORDER	C 3483 V2
07/22/2016	NOTICE OF MOTION	C 3484 V2-C 3485 V2
07/22/2016	DEFENDANTS' MOTION TO AMEND PROTECTIVE ORDER	C 3486 V2-C 3541 V2
07/22/2016	ORDER	C 3542 V2
07/28/2016	ORDER	C 3543 V2
07/28/2016	NOTICE OF MOTION	C 3544 V2-C 3545 V2
07/28/2016	MOTION FOR ADMISSION OF COUNSEL PRO HAC VICE	C 3546 V2-C 3550 V2

<u>Date Filed</u>	<u>Title/Description</u>	<u>Page No.</u>
07/28/2016	NOTICE OF MOTION_	C 3551 V2-C 3552 V2
07/28/2016	MOTION FOR LEAVE TO FILE APPEARANCE OF ADDITIONAL COUNSEL, TERRENCE J. FLEMING, INSTANTER	C 3553 V2-C 3556 V2
07/28/2016	NOTICE OF FILING	C 3557 V2-C 3558 V2
07/28/2016	OBJECTIONS TO DEFENDANTS' MOTION TO AMEND PROTECTIVE ORDER	C 3559 V2-C 3577 V2
08/01/2016	ORDER	C 3578 V2
08/05/2015	ORDER	C 3579 V2-C 3598 V2
08/15/2016	NOTICE OF FILING CERTIFICATE OF SERVICE	C 3599 V2-C 3600 V2
08/15/2016	CERTIFICATE OF SERVICE	C 3601 V2
08/18/2016	AGREED ORDER	C 3602 V2
08/22/2016	NOTICE OF MOTION	C 3603 V2-C 3604 V2
08/22/2016	MOTION TO STRIKE RENEWED MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY ON COUNT V AND MOTION TO LIMIT EVIDENCE	C 3605 V2-C 3610 V2
08/24/2016	NOTICE OF MOTION	C 3611 V2-C 3612 V2
08/24/2016	DEFENDANTS' RENEWED MOTION TO MODIFY COURT'S SEPTEMBER 4, 2015 ORDER REGARDING SUPPLEMENTAL PRODUCTION OF DOCUMENTS	C 3613 V2-C 3727 V2
08/24/2016	ORDER	C 3728 V2
09/01/2016	NOTICE OF FILING	C 3729 V2-C 3730 V2
09/01/2016	OPPOSITION TO MOTION TO STRIKE RENEWED MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY ON COUNT V	C 3731 V2-C 3746 V2
09/01/2016	NOTICE OF FILING_0002	C 3747 V2-C 3748 V2
09/01/2016	RENEWED MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY ON COUNT V FOR USURPATION OF CORPORATE OPPORTUNITIES, ET AL	C 3749 V2-C 3751 V2
09/01/2016	NOTICE OF FILING_0003	C 3752 V2-C 3753 V2



<u>Date Filed</u>	<u>Title/Description</u>	<u>Page No.</u>
09/01/2016	MOTION FOR LEAVE TO AMEND PARAGRAPH 9 AND PRAYERS FOR RELIEF TO PLAINTIFF'S VERIFIED COMPLAINT FOR INJUNCTIVE AND OTHER RELIEF	C 3754 V2-C 3762 V2
09/01/2016	ORDER	C 3763 V2
09/08/2018	NOTICE OF FILING	C 3764 V2-C 3765 V2
09/08/2016	REPLY IN SUPPORT OF MOTION TO STRIKE RENEWED MOTION FOR SUMMARY JUDGMENT AND TO LIMIT EVIDENCE, PROOF OR OTHER PROCEEDINGS ON COUNT V	C 3766 V2-C 3769 V2
09/09/2016	NOTICE OF MOTION	C 3770 V2-C 3771 V2
09/09/2016	MOTION FOR LEAVE TO FILE SURREPLY IN OPPOSITION TO DEFENDANTS' MOTION TO STRIKE	C 3772 V2-C 3776 V2
09/09/2016	SURREPLY IN OPPOSITION TO DEFENDANTS' MOTION TO STRIKE	C 3777 V2-C 3780 V2
09/09/2016	ORDER	C 3781 V2
09/15/2016	NOTICE OF MOTION	C 3782 V2-C 3783 V2
09/15/2016	REVISED MOTION FOR LEAVE TO FILE CERTAIN TRIAL EXHIBITS UNDER SEAL AND TO REDACT CERTAIN PORTIONS OF TRIAL EXHIBITS AND TRIAL TESTIMONY	C 3784 V2-C 3862 V2
09/15/2016	NOTICE OF MOTION 0002	C 3863 V2-C 3864 V2
09/15/2016	SEALING REQUEST STATEMENT TO BE FILED UNDER SEAL IN CONNECTION WITH REVISED MOTION FOR LEAVE TO FILE CERTAIN TRIAL EXHIBITS UNDER SEAL	C 3865 V2-C 3866 V2
09/15/2016	DEFENDANTS' MOTION FOR LEAVE TO FILE EXHIBITS TO DEFENDANTS' SEALING REQUEST STATEMENT UNDER SEAL	C 3867 V2-C 3880 V2
09/21/2016	NOTICE OF FILING	C 3881 V2-C 3882 V2
09/21/2016	RESPONSE TO MOTION FOR LEAVE TO AMEND PARAGRAPH 9 AND PRAYERS FOR RELIEF TO VERIFIED COMPLAINT FOR INJUNCTIVE	C 3883 V2-C 3890 V2

<u>Date Filed</u>	<u>Title/Description</u>	<u>Page No.</u>
09/22/2016	DEFENDANTS' NOTICE OF FILING CORRECTED MOTION FOR LEAVE TO FILE EXHIBITS TO DEFENDANT'S SEALING REQUEST STATEMENT UNDER SEAL	C 3891 V2-C 3892 V2
09/22/2016	DEFENDANTS' MOTION FOR LEAVE TO FILE EXHIBITS TO DEFENDANTS' SEALING REQUEST STATEMENT UNDER SEAL	C 3893 V2-C 3894 V2
09/22/2016	ORDER	C 3895 V2
09/29/2016	ORDER	C 3896 V2
09/30/2016	NOTICE OF FILING	C 3897 V2-C 3898 V2
09/30/2016	DEFENDANTS' REPLY IN SUPPORT OF RENEWED MOTION TO MODIFY COURT'S SEPTEMBER 4, 2015 ORDER REGARDING SUPPLEMENTAL PRODUCTION OF DOCUMENTS	C 3899 V2-C 3904 V2
10/06/2016	NOTICE OF MOTION	C 3905 V2-C 3906 V2
10/06/2016	PLAINTIFF'S MOTION FOR LEAVE TO SERVE PLAINTIFF'S AMENDED RESPONSE TO DEFENDANTS' STATEMENT OF TESTIMONY OFFERED AT TRIAL	C 3907 V2
10/06/2016	ORDER	C 3908 V2
10/20/2016	ORDER	C 3909 V2
10/31/2016	ORDER	C 3910 V2
11/14/2016	NOTICE OF FILING	C 3911 V2-C 3912 V2
11/14/2016	DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR LEAVE TO ADD HALYARD ENERGY VENTURES, LLC AS PARTY DEFENDANT TO COUNTS IV AND V	C 3913 V2-C 3918 V2
11/21/2016	NOTICE OF CHANGES	C 3919 V2
11/21/2016	NOTICE OF CHANGES 0002	C 3920 V2
11/23/2016	NOTICE OF FILING	C 3921 V2-C 3922 V2
11/23/2016	UNOPPOSED MOTION TO SEAL CERTAIN PARTS OF THE RECORD AND TO ENTER AGREED ORDER REGARDING THE SAME	C 3923 V2-C 3928 V2
11/28/2016	AGREED ORDER	C 3929 V2-C 3935 V2
11/29/2016	NOTICE OF ENTRY OF ORDER	C 3936 V2

<u>Date Filed</u>	<u>Title/Description</u>	<u>Page No.</u>
11/29/2016	NOTICE OF ENTRY OF ORDER 0002	C 3937 V2
12/02/2016	NOTICE OF FILING	C 3938 V2-C 3939 V2
12/02/2016	PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION TO ADD DEFENDANT HALYARD ENERGY VENTURES, LLC AS A PARTY DEFENDANT TO COUNTS IV AND V	C 3940 V2-C 3945 V2
12/16/2016	ORDER	C 3946 V2
12/16/2016	ORDER PLACING CASE UNDER ADVISEMENT	C 3947 V2
01/26/2017	AGREED ORDER	C 3948 V2
02/17/2017	ORDER	C 3949 V2-C 3954 V2
02/17/2017	ORDER 0002	C 3955 V2-C 3957 V2
02/17/2017	ORDER 0003	C 3958 V2
02/24/2017	ORDER	C 3959 V2-C 3975 V2
02/24/2017	ATTACHMENT TO 2-24-17 ORDER (Secured)	C 3976 V2
03/09/2017	ORDER	C 3977 V2
03/14/2017	ORDER	C 3978 V2
03/21/2017	ORDER	C 3979 V2-C 3980 V2
03/30/2017	NOTICE OF FILING UNDER SEAL	C 3981 V2-C 3983 V2
04/05/2017	NOTICE OF MOTION	C 3984 V2-C 3985 V2
04/05/2017	MOTION TO REDACT CERTAIN PARTS OF THE PARTIES' BRIEFING AND HEARING TRANSCRIPTS REGARDING DEFENDANTS' MOTION FOR DIRECTED FINDINGS	C 3986 V2-C 4002 V2
04/10/2017	ORDER	C 4003 V2
04/18/2017	ORDER	C 4004 V2
05/05/2017	ORDER	C 4005 V2-C 4006 V2
05/25/2017	NOTICE OF FILING	C 4007 V2-C 4008 V2
05/25/2017	DEFENDANTS' RESPONSE TO PLAINTIFF'S RULE 219(C) MOTION FOR SANCTIONS	C 4009 V2-C 4113 V2
05/31/2017	RE-NOTICE OF FILING	C 4114 V2-C 4115 V2
05/31/2017	DEFENDANTS' RESPONSE TO PLAINTIFF'S RULE 219(C) MOTION FOR SANCTIONS	C 4116 V2-C 4343 V2
06/09/2017	NOTICE OF FILING UNDER SEAL	C 4344 V2-C 4346 V2

<u>Date Filed</u>	<u>Title/Description</u>	<u>Page No.</u>
06/09/2017	MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR DIRECTED FINDINGS ON COUNTS I, II AND III (Secured)	C 4347 V2
06/09/2017	MEMORANDUM IN OPPOSITION TO MOTION FOR DIRECTED FINDINGS ON COUNTS IV AND V, ON CLAIM FOR PUNITIVE DAMAGES, AND ON CLAIMS AGAINST (Secured)	C 4348 V2
06/09/2017	PLAINTIFF'S AMENDED RESPONSE TO DEFENDANTS' STATEMENT OF TESTIMONY OFFERED AT TRIAL (Secured)	C 4349 V2
06/09/2017	NOTICE OF FILING	C 4350 V2-C 4351 V2
06/09/2017	NOTICE OF FILING UNDER SEAL 0002	C 4352 V2-C 4353 V2
06/09/2017	REDACTED INDECK ENERGY SERVICES, INC.'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTIO FOR DIRECTED FINDINGS ON COUNTS I, II AND III	C 4354 V2-C 4417 V2
06/09/2017	REDACTED MEMORANDUM IN OPPOSITION TO MOTION FOR DIRECTED FINDINGS ON COUNTS IV AND V, ON CLAIM FOR PUNITIVE DAMAGES, ET AL	C 4418 V2-C 4517 V2
06/09/2017	REDACTED PLAINTIFF'S AMENDED RESPONSE TO DEFENDANTS' STATEMENT OF TESTIMONY OFFERED AT TRIAL	C 4518 V2-C 4590 V2
06/20/2017	ORDER	C 4591 V2
06/22/2017	ORDER	C 4592 V2
06/26/2017	AGREED ORDER	C 4593 V2-C 4606 V2
07/11/2017	NOTICE OF MOTION	C 4607 V2-C 4608 V2
07/11/2017	MOTION TO ADMIT DOCUMENTS IN EVIDENCE	C 4609 V2-C 4782 V2
07/13/2017	ORDER	C 4783 V2
07/12/2017	ORDER	C 4784 V2
07/19/2017	DEFENDANTS' DESIGNATION OF WITNESS GEORGE H. WANG	C 4785 V2-C 4789 V2
07/19/2017	DEFENDANTS' DESIGNATION OF WITNESS HUGO E. MENA	C 4790 V2-C 4792 V2

<u>Date Filed</u>	<u>Title/Description</u>	<u>Page No.</u>
07/19/2017	DEFENDANTS' DESIGNATION OF WITNESS ROHIT OGRA	C 4793 V2-C 4795 V2
07/19/2017	DEFENDANTS' DESIGNATION OF WITNESS RAGHU SOULE	C 4796 V2-C 4797 V2
07/19/2017	ORDER	C 4798 V2
07/19/2017	ORDER 0002	C 4799 V2
07/24/2017	ORDER	C 4800 V2
07/26/2017	DATA COLLECTION AND SEARCHING PROTOCOL ORDER	C 4801 V2-C 4810 V2
08/01/2017	NOTICE OF MOTION	C 4811 V2-C 4812 V2
08/01/2017	MOTION IN LIMINE #14 TO BAR MARK KUBOW'S REBUTTAL TESTIMONY AND TO BAR PORTIONS OF MCCASH, LAGOWSKI, GARTH AND INNS' REBUTTAL TESTIMONY	C 4813 V2-C 4900 V2
08/01/2017	ORDER	C 4901 V2-C 4902 V2
08/30/2017	RE-NOTICE OF MOTION	C 4903 V2-C 4904 V2
08/30/2017	DEFENDANTS' MOTION TO MODIFY DATA COLLECTION AND SEARCHING PROTOCOL ORDER	C 4905 V2-C 4918 V2
08/31/2017	ORDER	C 4919 V2
09/05/2017	ORDER	C 4920 V2-C 4922 V2
09/13/2017	NOTICE OF MOTION	C 4923 V2-C 4924 V2
09/13/2017	DEFENDANTS' MOTION TO MODIFY DATA COLLECTION AND SEARCHING PROTOCOL ORDER	C 4925 V2-C 4940 V2
09/14/2017	ORDER	C 4941 V2
09/18/2017	NOTICE OF FILING	C 4942 V2-C 4943 V2
09/18/2017	REPLY IN SUPPORT OF MOTION IN LIMINE TO BAR KUBOW'S REBUTTAL TESTIMONY AND TO BAR PORTIONS OF MCCASH, LAGOWSKI, GARTH, AND INNS REBUTTAL	C 4944 V2-C 4998 V2
09/21/2017	NOTICE OF MOTION	C 4999 V2-C 5000 V2
09/21/2017	DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S UPDATED 213(F) DISCLOSURES	C 5001 V2-C 5037 V2
09/22/2017	NOTICE OF FILING	C 5038 V2-C 5040 V2

<u>Date Filed</u>	<u>Title/Description</u>	<u>Page No.</u>
09/22/2017	PLAINTIFF'S OBJECTIONS TO DEFENDANTS' MOTION TO MODIFY DATA COLLECTION AND SEARCHING PROTOCOL ORDER	C 5041 V2-C 5055 V2
09/22/2017	NOTICE OF MOTION	C 5056 V2-C 5057 V2
09/22/2017	MOTION TO ENTER AN ORDER REGARDING THE AGREEMENT TO DISCLOSE FOUR RECENTLY PRODUCED DOCUMENTS TO COUNSEL IN THE RELATED NEW YORK MATTER	C 5058 V2-C 5067 V2
09/22/2017	AGREED ORDER	C 5068 V2-C 5069 V2
09/22/2017	ORDER	C 5070 V2-C 5074 V2
09/26/2017	ORDER	C 5075 V2-C 5076 V2
10/02/2017	NOTICE OF FILING	C 5077 V2-C 5078 V2
10/02/2017	DEFENDANTS' RESPONSE TO MOTION TO ADMIT DOCUMENTS IN EVIDENCE	C 5079 V2-C 5081 V2
10/10/2017	NOTICE OF FILING	C 5082 V2-C 5083 V2
10/10/2017	DEFENDANTS' REPLY IN SUPPORT OF MOTION TO STRIKE UPDATED RULE 213 DISCLOSURES	C 5084 V2-C 5088 V2
10/13/2017	ORDER	C 5089 V2-C 5090 V2
10/20/2017	ORDER	C 5091 V2-C 5092 V2
11/14/2017	ORDER	C 5093 V2-C 5094 V2
11/16/2017	ORDER	C 5095 V2
11/16/2017	ORDER 0002	C 5096 V2-C 5097 V2
11/16/2017	AGREED ORDER	C 5098 V2-C 5117 V2
11/16/2017	AGREED ORDER 0002	C 5118 V2-C 5206 V2
11/30/2017	ORDER	C 5207 V2
12/14/2017	ORDER	C 5208 V2
12/26/2017	ORDER	C 5209 V2
01/04/2018	ORDER	C 5210 V2
01/16/2018	ORDER	C 5211 V2
01/23/2018	ORDER	C 5212 V2
01/25/2018	ORDER	C 5213 V2-C 5214 V2
01/25/2018	ORDER 0002	C 5215 V2
02/15/2018	ORDER	C 5216 V2-C 5217 V2
02/16/2018	NOTICE OF MOTION	C 5218 V2-C 5219 V2

<u>Date Filed</u>	<u>Title/Description</u>	<u>Page No.</u>
02/16/2018	MOTION TO CONTINUE TRIAL DATE OF FEBRUARY 20, 2018, FOR SANCTIONS FOR DEFENDANTS' FURTHER VIOLATIONS OF THE UPDATE ORDER	C 5220 V2-C 5240 V2
02/20/2018	ORDER	C 5241 V2-C 5242 V2
02/20/2018	ORDER 0002	C 5243 V2
02/21/2018	APPEARANCE	C 5244 V2
02/21/2018	NOTICE OF FILING	C 5245 V2-C 5246 V2
02/21/2018	ADDITIONAL AUTHORITY REGARDING USE OF INDICATIVE BIDS	C 5247 V2-C 5257 V2
02/21/2018	ADDITIONAL AUTHORITY REGARDING USE OF INDICATIVE BIDS 0002 (Secured)	C 5258 V2
02/21/2018	NOTICE OF FILING UNDER SEAL	C 5259 V2-C 5260 V2
02/21/2018	DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO CONTINUE TRIAL AND FOR SANCTIONS	C 5261 V2-C 5290 V2
02/22/2018	NOTICE OF FILING	C 5291 V2-C 5292 V2
03/05/2018	NOTICE OF MOTION	C 5293 V2-C 5294 V2
03/05/2018	PLAINTIFF'S MOTION FOR LEAVE TO FILE RULE 219(C) MOTION FOR SANCTIONS UNDER SEAL	C 5295 V2-C 5296 V2
03/05/2018	RULE 219(C) MOTION FOR SANCTIONS	C 5297 V2-C 5354 V2
03/06/2018	NOTICE OF FILING	C 5355 V2-C 5356 V2
03/06/2018	PLAINTIFF INDECK ENERGY SERVICES, INC.'S FIFTH SUPREME COURT RULE 237(B) NOTICE TO PRODUCE AT TRIAL	C 5357 V2-C 5359 V2
03/06/2018	PLAINTIFF INDECK ENERGY SERVICES, INC.'S FIFTH SUPREME COURT RULE 237(B) NOTICE TO PRODUCE AT TRIAL 0002	C 5360 V2-C 5362 V2
03/07/2018	NOTICE OF FILING	C 5363 V2-C 5364 V2
03/07/2018	AMENDED RULE 219(C) MOTION FOR SANCTIONS	C 5365 V2-C 5428 V2
03/08/2018	ORDER	C 5429 V2-C 5431 V2
03/15/2018	ORDER	C 5432 V2
03/22/2018	NOTICE OF FILING	C 5433 V2-C 5434 V2

<u>Date Filed</u>	<u>Title/Description</u>	<u>Page No.</u>
03/23/2018	ORDER	C 5435 V2-C 5436 V2
03/28/2018	NOTICE OF FILING	C 5437 V2-C 5438 V2
03/28/2018	PLAINTIFF INDECK ENERGY SERVICES, INC.'S INITIAL CLOSING BRIEF	C 5439 V2-C 5464 V2
03/28/2018	NOTICE OF FILING 0002	C 5465 V2-C 5466 V2
03/28/2018	DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION AND FOR SANCTIONS	C 5467 V2-C 5484 V2
04/06/2018	NOTICE OF FILING	C 5485 V2-C 5487 V2
04/06/2018	PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW	C 5488 V2-C 5573 V2
04/18/2018	RE-NOTICE OF MOTIONS	C 5574 V2-C 5575 V2
04/17/2018	PLAINTIFF INDECK ENERGY SERVICES, INC.'S PETITION FOR ATTORNEYS' FEES AND COSTS PURSUANT TO THIS COURT'S ORDER OF REBRUARY 20, 2018	C 5576 V2-C 5619 V2
04/17/2018	MOTION TO RECONSIDER RULING ON COUNT V	C 5620 V2-C 5627 V2
04/18/2018	NOTICE OF FILING	C 5628 V2-C 5629 V2
04/18/2018	DEFENDANTS' CLOSING TRIAL BRIEF	C 5630 V2-C 5654 V2
04/18/2018	NOTICE OF FILING 0002	C 5655 V2-C 5656 V2
04/18/2018	REPLY IN SUPPORT OF AMENDED RULE 219(C) MOTION FOR SANCTIONS	C 5657 V2-C 5662 V2
04/19/2018	ORDER	C 5663 V2
04/24/2018	NOTICE OF FILING	C 5664 V2-C 5665 V2
04/24/2018	PLAINTIFF INDECK ENERGY SERVICES, INC.'S SIXTH SUPREME COURT RULE 237(B) NOTICE TO PRODUCE	C 5666 V2-C 5668 V2
04/24/2018	NOTICE OF FILING 0002	C 5669 V2-C 5670 V2
04/24/2018	PLAINTIFF INDECK ENERGY SERVICES, INC.'S SIXTH SUPREME COURT RULE 237(B) NOTICE TO PRODUCE 0002	C 5671 V2-C 5673 V2
04/24/2018	NOTICE OF MOTION	C 5674 V2-C 5675 V2
04/24/2018	MOTION TO STRIKE AFFIDAVIT OF SETH KELLER AND OR TO REQUIRE HIS ATTENDANCE AT THIS COURT'S HEARING ON SANCTIONS	C 5676 V2-C 5680 V2



<u>Date Filed</u>	<u>Title/Description</u>	<u>Page No.</u>
04/27/2018	NOTICE OF MOTION	C 5681 V2-C 5682 V2
04/27/2018	MOTION FOR LEAVE TO REDACT CERTAIN PARTS OF THE RECORD, INCLUDING TRIAL TESTIMONY AND TRIAL EXHIBITS	C 5683 V2-C 5712 V2
04/27/2018	NOTICE OF MOTION 0002	C 5713 V2-C 5714 V2
04/27/2018	MOTION FOR EXTENSION OF TIME TO FILE CLOSING REPLY BRIEF, RESPONSE AND REPLY TO FINDINGS OF FACT AND CONCLUSIONS OF LAW, ET AL	C 5715 V2-C 5717 V2
04/27/2018	NOTICE OF MOTION 0003	C 5718 V2-C 5719 V2
04/27/2018	DEFENDANTS' MOTION FOR LEAVE TO REDACT CERTAIN PORTIONS OF TRIAL EXHIBITS AND TRIAL TESTIMONY	C 5720 V2-C 5737 V2
05/04/2018	ORDER	C 5738 V2-C 5739 V2
05/08/2018	NOTICE OF MOTION	C 5740 V2-C 5741 V2
05/08/2018	MOTION TO STRIKE SUPREME COURT RULE 237(B) NOTICE	C 5742 V2-C 5765 V2
05/09/2018	NOTICE OF FILING	C 5766 V2-C 5767 V2
05/09/2018	PLAINTIFF INDECK ENERGY SERVICES, INC.'S CLOSING REPLY BRIEF	C 5768 V2-C 5783 V2
05/11/2018	ORDER	C 5784 V2
05/17/2018	NOTICE OF FILING	C 5785 V2-C 5786 V2
05/17/2018	LIMITED OBJECTION TO MOTION TO STRIKE AFFIDAVIT OF SETH KELLER AND OR TO REQUIRE HIS ATTENDANCE AT THIS COURT'S HEARING ON SANCTIONS	C 5787 V2-C 5790 V2
05/17/2018	NOTICE OF FILING 0002	C 5791 V2-C 5792 V2
05/17/2018	DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO RECONSIDER RULING ON COUNT V AND MOTION TO STRIKE	C 5793 V2-C 5801 V2
05/17/2018	NOTICE OF FILING 0003	C 5802 V2-C 5803 V2
05/17/2018	NOTICE OF FILING 0004	C 5804 V2-C 5805 V2
05/17/2018	DEFENDANTS' RESPONSE TO PLAINTIFF'S PETITION FOR ATTORNEYS' FEES AND COSTS	C 5806 V2-C 5821 V2
05/18/2018	NOTICE OF FILING	C 5822 V2-C 5823 V2

<u>Date Filed</u>	<u>Title/Description</u>	<u>Page No.</u>
05/18/2018	PLAINTIFF INDECK ENERGY SERVICES, INC.'S RESPONSE TO MOTION TO STRIKE SUPREME COURT RULE 237(B) NOTICE	C 5824 V2-C 5834 V2
05/23/2018	NOTICE OF FILING	C 5835 V2-C 5836 V2
05/23/2018	PLAINTIFF INDECK ENERGY SERVICES, INC.'S PETITION FOR ATTORNEYS' FEES AND COSTS PURSUANT TO THIS COURT'S ORDER OF JULY 19, 2017	C 5837 V2-C 6105 V2
05/24/2018	NOTICE OF FILING	C 6106 V2-C 6107 V2
05/24/2018	REPLY IN SUPPORT OF MOTION TO STRIKE SUPREME COURT RULE 237(B) NOTICE	C 6108 V2-C 6127 V2
05/24/2018	PLAINTIFF INDECK ENERGY SERVICES, INC.'S PETITION FOR ATTORNEYS' FEES AND COSTS PURSUANT TO THIS COURT'S ORDER OF JULY 19, 2017	C 6128 V2-C 6141 V2
05/29/2018	ORDER	C 6142 V2
05/29/2018	ORDER 0002	C 6143 V2
05/30/2018	AGREED ORDER	C 6144 V2-C 6145 V2
05/30/2018	ORDER	C 6146 V2-C 6148 V2
05/30/2018	ORDER 0002	C 6149 V2-C 6150 V2
05/31/2018	NOTICE OF FILING	C 6151 V2-C 6152 V2
05/31/2018	REPLY IN SUPPORT OF MOTION TO RECONSIDER RULING ON COUNT V AND OPPOSITION TO DEFENDANTS' MOTION TO STRIKE MOTION FROM RECORD	C 6153 V2-C 6161 V2
05/31/2018	NOTICE OF FILING 0002	C 6162 V2-C 6163 V2
05/31/2018	REPLY IN SUPPORT OF MOTION TO STRIKE AFFIDAVIT OF SETH KELLER AND OR TO REQUIRE HIS ATTENDANCE AT THIS COURT'S HEARING ON SANCTIONS	C 6164 V2-C 6167 V2
05/31/2018	NOTICE OF FILING 0003	C 6168 V2-C 6169 V2
05/31/2018	REPLY IN SUPPORT OF PLAINTIFF'S PETITION FOR ATTORNEYS' FEES AND COSTS PURSUANT TO THIS COURT'S ORDER OF FEBRUARY 20, 2018	C 6170 V2-C 6179 V2

<u>Date Filed</u>	<u>Title/Description</u>	<u>Page No.</u>
06/01/2018	NOTICE OF FILING	C 6180 V2-C 6185 V2
06/08/2018	NOTICE OF FILING	C 6186 V2-C 6187 V2
06/08/2018	DEFENDANTS' RESPONSE TO PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW	C 6188 V2-C 6282 V2
06/08/2018	NOTICE OF FILING CERTIFICATE OF SERVICE	C 6283 V2-C 6284 V2
06/08/2018	CERTIFICATE OF SEDRVCE	C 6285 V2
06/08/2018	NOTICE OF FILING_0002	C 6286 V2-C 6287 V2
06/08/2018	PLAINTIFF'S RULE 219(C) MOTION FOR SANCTIONS RESULTING FROM THE COURT ORDERED FORENSIC REVIEW	C 6288 V2
06/08/2018	NOTICE OF FILING_0003	C 6289 V2-C 6290 V2
06/08/2018	DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW	C 6291 V2-C 6376 V2
06/11/2018	NOTICE OF FILING	C 6377 V2-C 6378 V2
06/11/2018	PLAINTIFF'S RESPONSE TO DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW	C 6416 V3-C 6633 V3
06/11/2018	PLAINTIFF'S REPLY IN SUPPORT OF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW	C 6634 V3-C 6781 V3
06/12/2018	ORDER	C 6782 V3-C 6786 V3
06/13/2018	NOTICE OF FILING	C 6787 V3-C 6788 V3
06/13/2018	PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW	C 6789 V3-C 6874 V3
06/22/2018	ORDER	C 6875 V3-C 6876 V3
07/02/2018	DEFENDANTS' MOTION TO COMPEL ADDITIONAL FORENSICS AND TO MODIFY BRIEFING SCHEDULE	C 6877 V3-C 6884 V3
07/03/2018	NOTICE OF MOTION	C 6885 V3-C 6886 V3
07/05/2018	ORDER	C 6887 V3
07/05/2018	NOTICE OF FILING	C 6888 V3-C 6889 V3

<u>Date Filed</u>	<u>Title/Description</u>	<u>Page No.</u>
07/05/2018	PLAINTIFF'S MEMORANDUM IN SUPPORT OF RULE 219(C) MOTION FOR SANCTIONS RESULTING FROM THE COURT ORDERED FORENSIC REVIEW	C 6890 V3-C 7075 V3
07/05/2018	NOTICE OF FILING 0002	C 7076 V3-C 7077 V3
07/05/2018	PLAINTIFF'S INITIAL OBJECTIONS TO DEFENDANTS' MOTION TO CONDUCT ADDITIONAL FORENSICS AND MODIFY BRIEFING SCHEDULE	C 7078 V3-C 7118 V3
07/06/2018	NOTICE OF FILING	C 7119 V3-C 7120 V3
07/06/2018	DEFENDANTS' RESPONSE TO PLAINTIFF'S PETITION FOR ATTORNEYS' FEES AND COSTS PURSUANT TO THIS COURT'S ORDER OF JULY 19, 2017	C 7121 V3-C 7233 V3
07/09/2018	NOTICE OF MOTION	C 7234 V3-C 7236 V3
07/09/2018	PLAINTIFF INDECK ENERGY SERVICES, INC.'S MOTION FOR LEAVE TO FILE UNREDACTED BRIEFS AND EXHIBITS THERETO IN THE PUBLIC RECORD	C 7237 V3-C 7251 V3
07/11/2018	NOTICE OF FILING	C 7252 V3-C 7349 V3
07/11/2018	NOTICE OF FILING 0002	C 7350 V3-C 7352 V3
07/11/2018	PLAINTIFF'S MEMORANDUM IN SUPPORT OF RULE 219(C) MOTION FOR SANCTIONS RESULTING FROM THE COURT ORDERED FORENSIC REVIEW	C 7353 V3-C 7509 V3
07/11/2018	NOTICE OF FILING 0003	C 7510 V3-C 7512 V3
07/11/2018	PLAINTIFF'S INITIAL OBJECTIONS TO DEFENDANTS' MOTION TO CONDUCT ADDITIONAL FORENSICS AND MODIFY BRIEFING SCHEDULE	C 7513 V3-C 7558 V3
07/12/2018	AGREED ORDER	C 7559 V3-C 7560 V3
07/17/2018	ORDER	C 7561 V3
07/18/2018	NOTICE OF MOTION	C 7562 V3-C 7564 V3

<u>Date Filed</u>	<u>Title/Description</u>	<u>Page No.</u>
07/18/2018	PLAINTIFF'S MOTION TO STRIKE JULY 6, 2018 AFFIDAVIT OF KARL DAHLSTROM AND FOR OTHER RELIEF	C 7565 V3-C 7575 V3
07/18/2018	PLAINTIFF'S MOTION TO STRIKE JULY 6, 2018 AFFIDAVIT OF CHRIS DEPODESTA AND FOR OTHER RELIEF	C 7576 V3-C 7582 V3
07/18/2018	NOTICE OF FILING	C 7583 V3-C 7585 V3
07/18/2018	REPLY IN SUPPORT OF PLAINTIFF'S PETITION FOR ATTORNEYS' FEES AND COSTS PURSUANT TO THIS COURT'S ORDER OF JULY 19, 2017	C 7586 V3-C 7633 V3
07/25/2018	ORDER	C 7634 V3
08/02/2018	ORDER	C 7635 V3-C 7642 V3
08/03/2018	NOTICE OF FILING	C 7643 V3-C 7644 V3
08/03/2018	DEFENDANTS' RESPONSE TO PLAINTIFF'S RULE 219(C) MOTION FOR SANCTIONS RESULTING FROM THE COURT ORDERED FORENSIC REVIEW	C 7645 V3-C 7875 V3
08/07/2018	NOTICE OF MOTION	C 7876 V3-C 7878 V3
08/07/2018	PLAINTIFF'S MOTION FOR LEAVE TO EXCEED FIVE PAGES FOR ITS REPLY IN SUPPORT OF RULE 219(C) MOTION FOR SANCTIONS	C 7879 V3-C 7881 V3
08/08/2018	NOTICE OF FILING	C 7882 V3-C 7883 V3
08/08/2018	AMENDED EXHIBIT 5	C 7884 V3-C 8047 V3
08/09/2018	ORDER	C 8048 V3
08/20/2018	NOTICE OF FILING	C 8049 V3-C 8051 V3
08/20/2018	NOTICE OF FILING 0002	C 8052 V3-C 8054 V3
08/20/2018	REPLY IN SUPPORT OF PLAINTIFF'S RULE 219(C) MOTION FOR SANCTIONS RESULTING FROM THE COURT ORDERED FORENSIC REVIEW	C 8055 V3-C 8245 V3
08/21/2018	NOTICE OF MOTION	C 8246 V3-C 8248 V3
09/21/2018	PLAINTIFF'S MOTION TO STRIKE PARAGRAPHS 25, 33, 34, 38 AND 39 OF THE AFFIDAVIT OF CHAD GOUGH	C 8249 V3-C 8262 V3
08/27/2018	NOTICE OF MOTION	C 8263 V3-C 8264 V3

<u>Date Filed</u>	<u>Title/Description</u>	<u>Page No.</u>
08/27/2018	DEFENDANTS' MOTION TO STRIKE AFFIDAVIT OF DAVID KALAT	C 8265 V3-C 8407 V3
08/27/2018	NOTICE OF MOTION 0002	C 8408 V3-C 8410 V3
08/27/2018	PLAINTIFF'S MOTION FOR LEAVE TO FILE WRITTEN RESPONSE TO MOTION TO STRIKE AFFIDAVIT OF DAVID KALAT	C 8411 V3-C 8418 V3
08/27/2018	NOTICE OF MOTION 0003	C 8419 V3-C 8420 V3
08/27/2018	DEFENDANTS' MOTION TO STRIKE PORTIONS OF PLAINTIFF'S REPLY IN SUPPORT OF ITS RULE 219(C) MOTION FOR SANCTIONS	C 8421 V3-C 8462 V3
08/27/2018	NOTICE OF FILING	C 8463 V3-C 8465 V3
08/29/2018	ORDER	C 8466 V3-C 8470 V3
09/04/2018	NOTICE OF MOTION	C 8471 V3-C 8473 V3
09/04/2018	AGREED MOTION FOR EXTENSION OF TIME TO FILE RESPONSES TO VARIOUS MOTIONS TO STRIKE	C 8474 V3-C 8477 V3
09/06/2018	ORDER	C 8478 V3
09/13/2018	NOTICE OF FILING	C 8479 V3-C 8480 V3
09/13/2018	DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO STRIKE PARAGRAPHS 25, 33, 34, 38 AND 39 OF THE AFFIDAVIT OF CHAD GOUGH	C 8481 V3-C 8494 V3
09/14/2018	NOTICE OF FILINGS	C 8495 V3-C 8497 V3
09/14/2018	PLAINTIFF'S RESPONSE TO MOTION TGO STRIKE AFFIDAVIT OF DAVID KALAT	C 8498 V3-C 8517 V3
09/14/2018	PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO STRIKE PORTIONS OF PLAINTIFF'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SANCTIONS	C 8518 V3-C 8540 V3
09/18/2018	ORDER	C 8541 V3-C 8542 V3
10/01/2018	ORDER	C 8543 V3
10/02/2018	ORDER	C 8544 V3-C 8545 V3
10/22/2018	ORDER	C 8546 V3-C 8547 V3
10/22/2018	ORDER 0002	C 8548 V3
11/19/2018	AGREED ORDER	C 8549 V3-C 8622 V3

<u>Date Filed</u>	<u>Title/Description</u>	<u>Page No.</u>
11/29/2018	NOTICE OF MOTION	C 8623 V3-C 8625 V3
11/29/2018	PLAINTIFF'S MOTION FOR LEAVE TO REDACT CERTAIN PARTS OF THE RECORD FROM THE PUBLIC RECORD AND OTHER RELIEF	C 8626 V3-C 8657 V3
12/03/2018	ORDER	C 8658 V3-C 8659 V3
12/05/2018	NOTICE OF FILING	C 8660 V3-C 8662 V3
12/06/2018	NOTICE OF MOTION	C 8663 V3-C 8664 V3
12/06/2018	DEFENDANTS' MOTION TO CLARIFY DECEMBER 3, 2018 ORDER	C 8665 V3-C 8678 V3
12/06/2018	NOTICE OF MOTION 0002	C 8679 V3-C 8681 V3
12/06/2018	PLAINTIFF'S SUPPLEMENTAL MOTION FOR LEAVE TO REDACT CERTAIN PARTS OF THE RECORD FROM THE PUBLIC RECORD AND OTHER RELIEF	C 8682 V3-C 8687 V3
12/07/2018	NOTICE OF FILINGS	C 8688 V3-C 8690 V3
12/07/2018	PLAINTIFF'S OBJECTIONS TO DEFENDANTS' MOTION TO CLARIFY DECEMBER 3, 2018 ORDER	C 8691 V3-C 8699 V3
12/07/2018	MOTION TO STRIKE DECEMBER 6TH, 2018 AFFIDAVIT OF KARL DAHLSTROM	C 8700 V3-C 8706 V3
12/07/2018	MOTION TO STRIKE DECEMBER 6TH, 2018 AFFIDAVIT OF CHRIS DEPODESTA	C 8707 V3-C 8713 V3
12/10/2018	NOTICE OF MOTION	C 8714 V3-C 8716 V3
12/10/2018	EMERGENCY MOTION TO REOPEN PROOFS AND FOR OTHER RELIEF	C 8717 V3-C 8725 V3
12/10/2018	AGREED ORDER	C 8726 V3-C 8731 V3
12/10/2018	ORDER	C 8732 V3
12/12/2018	NOTICE OF FILINGS - UNDER SEAL	C 8733 V3-C 8735 V3
12/12/2018	UNREDACTED PLAINTIFF'S AMENDED RULE 219C) MOTION FOR SANCTIONS FILED UNDER SEAL (Secured)	C 8736 V3
12/12/2018	UNREDACTED PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FILED UNDER SEAL (Secured)	C 8737 V3

<u>Date Filed</u>	<u>Title/Description</u>	<u>Page No.</u>
12/12/2018	UNREDACTED PLAINTIFF'S REPLY IN SUPPORT OF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FILED UNDER SEAL (Secured)	C 8738 V3
12/12/2018	UNREDACTED PLAINTIFF'S RESPONSE TO DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FILED UNDER SEAL (Secured)	C 8739 V3
12/12/2018	NOTICE OF FILINGS	C 8740 V3-C 8742 V3
12/12/2018	NOTICE OF FILING	C 8743 V3-C 8745 V3
12/12/2018	NOTICE OF FILINGS 0002	C 8746 V3-C 8748 V3
12/12/2018	INDECK ENERGY SERVICES, INC.'S OBJECTIONS TO DEFENDANTS' DESIGNATIONS OF HENDRICK VROEGE'S EVIDENCE DEPOSITION TAKEN DECEMBER 14, 2018	C 8749 V3-C 8750 V3
12/12/2018	INDECK ENERGY SERVICES, INC.'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT	C 8751 V3-C 8766 V3
12/12/2018	REPLY IN SUPPORT OF MOTION TO COMPEL COMPLIANCE WITH UPDATE ORDER AND OTHER RELIEF	C 8767 V3-C 8800 V3
12/12/2018	PLAINTIFF INDECK ENERGY SERVICES, INC.'S RESPONSE TO DEFENDANTS' MOTION IN LIMINE #5	C 8801 V3-C 8850 V3
12/12/2018	PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO STRIKE UPDATED RULE 213(F) DISCLOSURES	C 8851 V3-C 8924 V3
12/12/2018	RESPONSE TO MOTION IN LIMINE NO. 14	C 8925 V3-C 9078 V3
12/12/2018	MEMORANDUM IN SUPPORT OF RENEWED MOTION FOR SUMMARY JUDGMENT AND MOTION TO LIMIT EVIDENCE, PROOF OR OTHER PROCEEDINGS	C 9079 V3-C 9102 V3



<u>Date Filed</u>	<u>Title/Description</u>	<u>Page No.</u>
12/12/2018	PLAINTIFF INDECK ENERGY SERVICES, INC.'S RULE 2.04 STATEMENT OF MATERIAL FACTS OVER WHICH THERE IS NO GENUINE DISPUTE	C 9103 V3-C 9118 V3
12/12/2018	REPLY IN SUPPORT OF INDECK'S MOTION FOR LEAVE TO AMEND PARAGRAPH 9 AND PRAYERS FOR RELIEF	C 9119 V3-C 9125 V3
12/12/2018	CERTIFICATE OF SERVICE	C 9126 V3
12/12/2018	CERTIFICATE OF SERVICE 0002	C 9127 V3
12/12/2018	CERTIFICATE OF SERVICE 0003	C 9128 V3
12/12/2018	CERTIFICATE OF SERVICE 0004	C 9129 V3
12/12/2018	PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR RULE 219 SANCTIONS AND FOR OTHER RELIEF	C 9130 V3-C 9141 V3
12/12/2018	RESPONSE TO DEFENDANTS' OBJECTIONS TO USE DOCUMENTS FROM DAHLSTROM'S 1TB DRIVE, IDENTIFIED AS PLAINTIFF'S EXHIBITS 350 TO 370	C 9142 V3-C 9158 V3
12/12/2018	INDECK ENERGY'S RESPONSE TO DEFENDANTS' MOTION TO MODIFY COURT'S SEPTEMBER 4, 2015 ORDER	C 9196 V4-C 9256 V4
12/12/2018	PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO ADMIT DOCUMENTS IN EVIDENCE	C 9257 V4-C 9283 V4
12/13/2018	TABLE OF PHYSICAL COPIES OF PLAINTIFF'S EXHIBITS FILED	C 9284 V4-C 9285 V4
12/13/2018	NOTICE OF FILING	C 9286 V4-C 9288 V4
12/13/2018	EMERGENCY MOTION TO REOPEN PROOFS AND FOR OTHER RELIEF	C 9289 V4-C 9301 V4
12/13/2018	RE-NOTICE OF FILINGS	C 9302 V4-C 9304 V4
12/13/2018	NOTICE OF MOTION	C 9305 V4-C 9306 V4
12/13/2018	MOTION TO COMPEL COMPLIANCE WITH UPDATE ORDER AND OTHER RELIEF	C 9307 V4-C 9328 V4
12/13/2018	NOTICE OF MOTION 0002	C 9329 V4-C 9330 V4
12/13/2018	MOTION TO ENTER PARTIALLY AGREED ORDER AND TO SET OTHER DATES	C 9331 V4-C 9334 V4

<u>Date Filed</u>	<u>Title/Description</u>	<u>Page No.</u>
12/13/2018	NOTICE OF MOTION 0003	C 9335 V4-C 9336 V4
12/13/2018	PLAINTIFF'S MOTION TO ADD DEFENDANT HALYARD ENERGY VENTURES, LLC AS PARTY DEFENDANT TO COUNTS IV AND V	C 9337 V4-C 9341 V4
12/13/2018	NOTICE OF EMERGENCY MOTION	C 9342 V4-C 9343 V4
12/13/2018	PLAINTIFF'S EMERGENCY MOTION TO CONTINUE TRIAL DATE OF APRIL 11, 2017	C 9344 V4-C 9357 V4
12/13/2018	NOTICE OF MOTION 0004	C 9358 V4-C 9359 V4
12/13/2018	PLAINTIFF'S MOTION FOR RULE 219 SANCTIONS AND FOR OTHER RELIEF	C 9360 V4-C 9445 V4
12/13/2018	NOTICE OF MOTION 0005	C 9446 V4-C 9447 V4
12/13/2018	PLAINTIFF'S MOTION TO ADMIT DOCUMENTS IN EVIDENCE	C 9448 V4-C 9559 V4
12/13/2018	NOTICE OF MOTION 0006	C 9560 V4-C 9561 V4
12/13/2018	PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF UNREDACTED COPY OF DOCUMENT	C 9562 V4-C 9573 V4
12/13/2018	NOTICE OF MOTION 0007	C 9574 V4-C 9575 V4
12/13/2018	MOTION TO ADMIT PLAINTIFF'S EXHIBITS 374, 375, 376, 377, 378, 379 AND 380 IN EVIDENCE	C 9576 V4-C 9586 V4
12/13/2018	ORDER	C 9587 V4-C 9590 V4
12/13/2018	EXHIBIT A TO PARAGRAPH 7(A) OF ORDER OF DECEMBER 13, 2018 (FILED UNDER SEAL) (Secured)	C 9591 V4
12/13/2018	AGREED ORDER	C 9592 V4-C 9612 V4
12/13/2018	ORDER 0002	C 9613 V4
12/13/2018	EXHIBIT RECEIPT	C 9614 V4
12/14/2018	RE-NOTICE OF FILING	C 9615 V4-C 9617 V4
12/14/2018	MOTION TO COMPEL UPDATED RULE 214 AFFIDAVIT; TO COMPEL FULL COMPLIANCE WITH THE UPDATE ORDER, ET AL	C 9618 V4-C 9662 V4
12/14/2018	RE-NOTICE OF FILINGS	C 9663 V4-C 9665 V4

<u>Date Filed</u>	<u>Title/Description</u>	<u>Page No.</u>
12/14/2018	PETITION FOR RULE TO SHOW CAUSE WHY DEFENDANTS SHOULD NOT BE HELD IN CONTEMPT FOR FAILING TO COMPLY WITH THE ORDER	C 9666 V4-C 9739 V4
12/19/2018	NOTICE OF MOTION	C 9740 V4-C 9741 V4
12/20/2018	NOTICE OF FILING	C 9742 V4-C 9744 V4
12/20/2018	REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT	C 9745 V4-C 9987 V4
12/20/2018	DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO COMPEL AND FOR SANCTIONS	C 9988 V4-C 10234 V4
12/20/2018	REPLY IN SUPPORT OF MOTION IN LIMINE #14 TO BAR REBUTTAL TESTIMONY	C 10235 V4-C 10370 V4
12/20/2018	DEFENDANTS' REPLY IN SUPPORT OF MOTION TO MODIFY DATA COLLECTION AND SEARCHING PROTOCOL ORDER	C 10371 V4-C 10380 V4
12/20/2018	MEMORANDUM OF JUDGMENT	C 10381 V4
12/20/2018	MEMORANDUM OF JUDGMENT 0002	C 10382 V4
12/21/2018	CITATION NOTICE	C 10383 V4
12/21/2018	CITATION NOTICE 0002	C 10384 V4
12/21/2018	NOTICE OF FILING	C 10385 V4-C 10387 V4
12/21/2018	REDACTED DEFENDANTS' MOTION FOR DIRECTED FINDINGS	C 10388 V4-C 10483 V4
12/21/2018	REDACTED DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR DIRECTED FINDINGS	C 10484 V4-C 10606 V4
12/21/2018	REDACTED DEFENDANTS' REPLY IN SUPPORT OF THEIR STATEMENT OF TESTIMONY OFFERED AT TRIAL	C 10607 V4-C 10624 V4
12/21/2018	REDACTED DEFENDANTS' MOTION TO COMPEL AND EXTEND TIME TO SUBMIT EXPERT DISCLOSURES	C 10625 V4-C 10874 V4
12/21/2018	REDACTED DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT	C 10875 V4-C 11874 V4

<u>Date Filed</u>	<u>Title/Description</u>	<u>Page No.</u>
12/21/2018	REDACTED DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY ON COUNT V	C 11875 V4-C 12039 V4
12/21/2018	NOTICE OF FILING-UNDER SEAL (Secured)	C 12040 V4
12/21/2018	DEFENDANTS' MOTION FOR DIRECTED FINDINGS FILED UNDER SEAL (Secured)	C 12041 V4
12/21/2018	DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR DIRECTED FINDINGS FILED UNDER SEAL (Secured)	C 12042 V4
12/21/2018	DEFENDANTS' REPLY IN SUPPORT OF THEIR STATEMENT OF TESTIMONY OFFERED AT TRIAL FILED UNDER SEAL (Secured)	C 12043 V4
12/21/2018	DEFENDANTS' MOTION TO COMPEL AND EXTEND TIME TO SUBMIT EXPERT DISCLOSURES FILED UNDER SEAL (Secured)	C 12044 V4
12/21/2019	DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT FILED UNDER SEAL (Secured)	C 12045 V4
12/21/2018	DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY ON COUNT V FILED UNDER SEAL (Secured)	C 12046 V4
12/28/2018	EXHIBIT RECEIPT	C 12047 V4-C 12065 V4
12/31/2018	NOTICE OF MOTION	C 12066 V4-C 12068 V4
12/31/2018	PLAINTIFF INDECK ENERGY SERVICES, INC.'S PETITION FOR ATTORNEYS' FEES PURSUANT TO THIS COURT'S ORDER OF DECEMBER 3, 2018	C 12069 V4-C 12152 V4
01/07/2019	NOTICE OF MOTION	C 12153 V4-C 12155 V4
01/07/2019	PLAINTIFF'S BILL OF COSTS	C 12156 V4-C 12233 V4
01/08/2019	NOTICE OF MOTION	C 12234 V4-C 12236 V4
01/08/2019	PLAINTIFF'S MOTION TO AMEND BILL OF COSTS	C 12237 V4-C 12244 V4
01/10/2019	ORDER	C 12245 V4-C 12246 V4
01/11/2019	NOTICE OF FILING	C 12247 V4-C 12249 V4

<u>Date Filed</u>	<u>Title/Description</u>	<u>Page No.</u>
01/11/2019	NOTICE OF APPEAL	C 12250 V4-C 12252 V4
01/14/2019	NOTICE OF FILING	C 12253 V4-C 12255 V4
01/14/2019	PLAINTIFF'S AMENDED BILL OF COSTS	C 12293 V5-C 12372 V5
01/16/2019	NOTICE OF FILING	C 12373 V5-C 12374 V5
01/16/2019	NOTICE OF APPEAL	C 12375 V5-C 12381 V5
01/18/2019	LETTER OF REQUEST	C 12382 V5
01/22/2019	NOTICE OF MOTION	C 12383 V5-C 12385 V5
01/22/2019	PLAINTIFF'S MOTION TO APPROVE SUMMARY OF COURT'S FINDINGS OF FACT	C 12386 V5-C 12523 V5
01/22/2019	ORDER	C 12524 V5
01/22/2019	APPELLATE COURT ORDER	C 12525 V5
01/24/2019	ORDER	C 12526 V5
01/25/2019	NONWAGE GARNISHMENT NOTICE	C 12527 V5-C 12529 V5
01/25/2019	AFFIDAVIT FOR GARNISHMENT (NONWAGE)	C 12530 V5-C 12531 V5
01/29/2019	NOTICE OF CHANGES	C 12532 V5
01/25/2019	NOTICE OF CHANGES 0002	C 12533 V5
02/05/2019	AGREED ORDER	C 12534 V5-C 12535 V5
02/07/2019	RESPONSE	C 12536 V5-C 12537 V5
02/08/2019	NOTICE OF MOTION	C 12538 V5-C 12540 V5
02/08/2019	PLAINTIFF'S MOTION FOR CHARGING ORDER AGAINST CHRISTOPHER M. DEPODESTA'S MEMBERSHIP INTEREST IN HALYARD ENERGY VENTURES, LLC (Secured)	C 12541 V5
02/11/2019	EXHIBIT RECEIPT	C 12542 V5
02/13/2019	NOTICE OF FILING	C 12543 V5-C 12545 V5
02/13/2019	PLAINTIFF'S ADDITIONAL AUTHORITY REGARDING FILING COURT'S FINDINGS OF FACT	C 12546 V5-C 12724 V5
02/13/2019	AGREED ORDER	C 12725 V5-C 12726 V5
02/13/2019	ORDER	C 12727 V5-C 12728 V5
02/13/2019	AGREED ORDER 0002	C 12729 V5-C 12731 V5
02/14/2019	AGREED ORDER	C 12732 V5-C 12733 V5
02/14/2019	ORDER	C 12734 V5
02/14/2019	EXHIBIT RECEIPT	C 12735 V5
02/27/2019	NOTICE OF FILING	C 12736 V5-C 12737 V5

<u>Date Filed</u>	<u>Title/Description</u>	<u>Page No.</u>
02/27/2019	DEFENDANTS' RESPONSE TO PLAINTIFF'S PETITION FOR ATTORNEYS' FEES PURSUANT TO THIS COURT'S ORDER OF DECEMBER 3, 2018	C 12738 V5-C 12834 V5
02/28/2019	NOTICE OF FILING	C 12835 V5-C 12837 V5
03/01/2019	INVOICE FOR RECORD ON APPEAL	C 12838 V5
03/05/2019	LETTER	C 12839 V5-C 12840 V5
03/07/2019	ORDER	C 12841 V5
03/07/2019	AGREED ORDER	C 12842 V5-C 12843 V5
03/04/2019	NOTICE OF MOTION	C 12844 V5-C 12846 V5
03/04/2019	MOTION TO ENTER AGREED ORDER	C 12847 V5-C 12853 V5
03/11/2019	NOTICE OF FILINGS	C 12854 V5-C 12856 V5
03/11/2019	PLAINTIFF INDECK ENERGY SERVICES, INC.'S REPLY IN SUPPORT OF AMENDED BILL OF COSTS	C 12857 V5-C 12877 V5
03/11/2019	PLAINTIFF INDECK ENERGY SERVICES, INC'S REPLY IN SUPPORT OF PETITION FOR ATTORNEYS' FEES PURSUANT TO ORDER OF DECEMBER 3, 2018	C 12878 V5-C 12943 V5

## TABLE OF CONTENTS

### EXHIBITS

<u>Party</u>	<u>Exhibit #</u>	<u>Description/Possession</u>	<u>Page No.</u>
		Evidence Dep CD	E 18
PLAINTIFF	150	MHV BUDGET PROFORMAS (2-26-15) DISK	E 19
PLAINTIFF	152	REDACTED DAHLSTROM HARD DRIVE DISK	E 20
PLAINTIFF	152	UNREDACTED DAHLSTROM HARD DRIVE DISK (Secured)	E 21
PLAINTIFF	153	DEPODESTA'S HARD DRIVE DISK	E 22
PLAINTIFF	NEW 465	PROJECT GRARNOW DOWNLOAD DISK - NOT ADMITTED	E 23
PLAINTIFF	1	CONFIDENTIALITY AGREEMENT	E 24-E31
DEFENDANT	1	CONFIDENTIAL EMAIL_0003	E 32-E33
PLAINTIFF	2	EXHIBIT D	E 34-E37
DEFENDANT	2	LETTER_0010	E 38-E39
PLAINTIFF	3	CONFIDENTIALITY AGREEMENT_0002	E 40-E47
DEFENDANT	3	REDACTED EMAIL	E 48-E50
DEFENDANT	3	UNREDACTED HIGHLY CONFIDENTIAL EMAIL (Secured)	E 51
PLAINTIFF	4	EXHIBIT C	E 52-E57
DEFENDANT	4	CONFIDENTIAL EMAIL_0004	E 58-E59

PLAINTIFF	5	EXHIBIT VROEGE 3	E 60-E74
DEFENDANT	5	REDACTED EMAIL_0002	E 75-E76
DEFENDANT	5	UNREDACTED HIGHLY CONFIDENTIAL EMAIL_0002 (Secured)	E 77
PLAINTIFF	6	MUTUAL CONFIDENTIALITY AGREEMENT	E 78-E85
DEFENDANT	6	CONFIDENTIAL EMAIL_0005	E 86-E87
PLAINTIFF	7	EXHIBIT VROEGE 5	E 88-E89
PLAINTIFF	8	MERCED0000090	E 90-E91
PLAINTIFF	9	EMAIL MERCED0000087	E 92-E95
PLAINTIFF	10	MERCED0000091	E 96-E97
PLAINTIFF	11	CONFIDENTIAL AT&T	E 98-E114
PLAINTIFF	12	DEPOSITION EXHIBIT DAHLSTROM HIGHLY CONFIDENTIAL	E 115-E118
PLAINTIFF	13	EXHIBIT VROEGE 7	E 119-E123
PLAINTIFF	14	INDECK EBG CARSON BAY CATCH UP MEETING	E 124-E125
PLAINTIFF	15	DEPOSITION EXHIBIT DAHLSTROM 12 HIGHLY CONFIDENTIAL	E 126-E127
PLAINTIFF	16	REDACTED FILED PURSUANT TO ORDER ENTERED 2-17-17	E 128-E189
PLAINTIFF	16	UNREDACTED ERCOT SCARCITY PRICE ANALYSIS (Secured)	E 190
PLAINTIFF	17	EMAIL KARL DAHLSTROM ATT EX 1 VROEGE	E 191-E192
DEFENDANT	17	EMAIL_0058	E 193-E203
PLAINTIFF	18	EMAIL KARL DAHLSTROM ATT EX 2 VROEGE	E 204-E205



PLAINTIFF	19	EMAIL DANIEL BARPAL MERCED00000147	E	206-E209
PLAINTIFF	20	EMAIL DANIEL BARPAL MERCED00000161	E	210-E211
PLAINTIFF	21	EMAIL CHRIS DEPODESTA HIGHLY CONFIDENTIAL	E	212-E215
PLAINTIFF	22	CONFIDENTIAL AT&T INDECK	E	216-E232
PLAINTIFF	23	CATCH UP CALL CONFERENCE CALL	E	233-E235
PLAINTIFF	24	EMAIL CHRIS DEPODESTA HIGHLY CONFIDENTIAL 042049	E	236-E237
PLAINTIFF	25	TEXAS ENERGY MARKETS CONFERENCE INDECK 041672	E	238-E242
PLAINTIFF	26	EMAIL CHRIS DEPDESTA CONFIDENTIAL 004599	E	243-E245
DEFENDANT	26	POWER POINT PRINTOUT	E	246-E256
PLAINTIFF	27	EMAIL CHRIS DEPODESTA EX 12 (2-6-15)	E	257-E259
DEFENDANT	27	POWER POINT PRINTOUT_0002	E	260-E282
PLAINTIFF	28	CONFIDENTIAL INDECK 066995	E	283-E285
DEFENDANT	28	POWER POINT PRINTOUT_0004	E	286-E296
PLAINTIFF	29	EMAIL DANIEL BARPAL MERCED00000187	E	294-E295
DEFENDANT	29	CONFIDENTIAL EMAIL_0006	E	296-E298
DEFENDANT	30	CONFIDENTIAL EMAIL_0007	E	299-E300
PLAINTIFF	31	EMAIL CHRIS DEPODESTA HIGHLY CONFIDENTIAL 043117	E	301-E302
DEFENDANT	31	CONFIDENTIAL EMAIL_0008	E	303-E304
PLAINTIFF	32	EMAIL KARL DAHLSTROM CONFIDENTIAL DEPOSITION DAHLSTROM	E	305-E307

DEFENDANT	32	CONFIDENTIAL EMAIL_0009	E 308-E309
PLAINTIFF	33	CALLS BY EXTENSION CONFIDENTIAL EBF 301619	E 310-E311
DEFENDANT	33	CONFIDENTIAL EMAIL_0010	E 312-E313
PLAINTIFF	34	EMAIL KARL DAHLSTROM EX 11 2-6-15	E 314-E316
PLAINTIFF	35	EMAIL BILL GARTH HIGHLY CONFIDENTIAL INDECK 011714	E 317-E318
PLAINTIFF	36	REDACTED EMAIL CHRIS DEPODESTA HIGHLY CONFIDENTIAL	E 319-E321
PLAINTIFF	36	UNREDACTED EMAIL CHRIS DEPODESTA (Secured)	E 322
PLAINTIFF	37	REDACTED EMAIL KARL DAHLSTROM 068927	E 323-E326
PLAINTIFF	37	UNREDACTED EMAIL KARL DAHLSTROM 068927 (Secured)	E 327
PLAINTIFF	38	EMAIL KARL DAHLSTROM EX 1 5-23-14	E 328-E330
PLAINTIFF	39	REDACTED CHRIS DEPODESTA	E 331-E334
PLAINTIFF	39	UNREDACTED CHRIS DEPODESTA INDECK002777 (Secured)	E 335
PLAINTIFF	40	EMAIL KARL DAHLSTROM 004184	E 336-E339
PLAINTIFF	41	MUTUAL CONFIDENTIALITY AGREEMENT DEPODESTA #6	E 340-E344
PLAINTIFF	42	CONFIDENTIAL TEXT INDECK 060968	E 345-E347
PLAINTIFF	43	REDACTED HALYARD ENERGY VENTURE'S ATT EX 5	E 348-E366
PLAINTIFF	43	UNREDACTED HALYARD ENERGY VENTURES ERCOT (Secured)	E 367
PLAINTIFF	44	EMAIL KARL DAHLSTROM ATT EX 6	E 368-E371
PLAINTIFF	45	CONFIDENTIAL MERCED PARTNERS III LP ATT EX 7	E 372-E80

PLAINTIFF	46	REDACTED EMAIL CONFIDENTIAL CHRIS DEPODESTA	E	381-E392
DEFENDANT	46	CONFIDENTIAL EMAIL_0011	E	393-E396
PLAINTIFF	46	UNREDACTED CHRIS DEPODESTA INDECK004869 (Secured)	E	397
PLAINTIFF	47	EMAIL KARL DAHLSTROM ATT EX 8	E	398-E406
PLAINTIFF	48	HALYARD ENERGY VENTURES LLC CONFIDENTIAL	E	407-E413
PLAINTIFF	49	EMAIL KARL DAHLSTROM 004205	E	414-E415
DEFENDANT	49	COST ANALYSIS	E	416-E417
DEFENDANT	49	UNREDACTED HIGHLY CONFIDENTIAL SPREADSHEET (Secured)	E	418
PLAINTIFF	50	EMAIL	E	419-E422
DEFENDANT	50	EMAIL_0059	E	423-E424
PLAINTIFF	51	LETTER	E	425-E431
DEFENDANT	51	CONFIDENTIAL EMAIL_0012	E	432-E435
PLAINTIFF	52	EMAIL_0002	E	436-E441
PLAINTIFF	52	UNREDACTED ERIC WERWIE RE HALYARD MERCER0000317 (Secured)	E	E 442
PLAINTIFF	54	EMAIL_0003	E	443-E459
DEFENDANT	54	EMAIL_0060	E	460-E461
PLAINTIFF	55	EMAIL_0004	E	462-E463
DEFENDANT	55	EMAIL_0061	E	464-E466
PLAINTIFF	56	SPREAD SHEET	E	467-E468

DEFENDANT	56	CONFIDENTIAL EMAIL_0013	E	469-E476
PLAINTIFF	57	EMAIL_0005	E	477-E478
DEFENDANT	57	CONFIDENTIAL LETTER_0005	E	479-E485
PLAINTIFF	58	EMAIL_0006	E	486-E489
DEFENDANT	58	POWER POINT_0002	E	490-E507
PLAINTIFF	59	EMAIL_0007	E	508-E525
PLAINTIFF	59	UNREDACTED KELLY INNS INDECK005203 (Secured)	E	526
PLAINTIFF	60	EMAIL_0008	E	527-E529
PLAINTIFF	61	EMAIL_0009	E	530-E531
PLAINTIFF	62	LLC AGREEMENT	E	532-E559
PLAINTIFF	63	MANAGEMENT AGREEMENT	E	560-E570
DEFENDANT	63	EMAIL_0062	E	571-E572
PLAINTIFF	64	EMAIL_0010	E	573-E574
PLAINTIFF	65	EMAIL_0011	E	575-E576
DEFENDANT	65	HIGHLY CONFIDENTIAL EMAIL_0006	E	577-E581
PLAINTIFF	66	EMAIL_0012	E	582-E583
PLAINTIFF	67	EMAIL_0013	E	584-E593
PLAINTIFF	68	EMAIL_0014	E	594-E596
PLAINTIFF	69	ORDER	E	597-E599

PLAINTIFF	70	REPORT OF PROCEEDINGS	E	600-E612
PLAINTIFF	71	AGREED ORDER	E	613-E616
PLAINTIFF	73	LETTER_0002	E	617-E644
PLAINTIFF	76	EMAIL_0015	E	645-E646
PLAINTIFF	77	CORPORATE OVERVIEW	E	647-E655
PLAINTIFF	78	EMAIL DISCUSSION MATERIALS	E	656-E698
PLAINTIFF	79	EMAIL_0016	E	699-E700
DEFENDANT	79	HIGHLY CONFIDENTIAL EMAIL_0007	E	701-E705
DEFENDANT	79	UNREDACTED EMAIL (Secured)	E	706
PLAINTIFF	80	EMAIL_0017	E	707-E710
DEFENDANT	80	HIGHLY CONFIDENTIAL EMAIL_0008	E	711-E715
DEFENDANT	80	UNREDACTED SPREADSHEET (Secured)	E	716
PLAINTIFF	80	UNREDACTED EMAIL CHRIS DEPODESTA HAL143358 (Secured)	E	717
PLAINTIFF	81	EMAIL_0018	E	718-E720
DEFENDANT	81	HIGHLY CONFIDENTIAL EMAIL_0009	E	721-E725
PLAINTIFF	82	TAX ABATEMENT AGREEMENT	E	726-E741
PLAINTIFF	83	TAX ABATEMENT AGREEMENT_0002	E	742-E767
PLAINTIFF	84	EMAIL_0019	E	768-E771
PLAINTIFF	85	EMAIL_0020	E	772-E 774

PLAINTIFF	87	EMAIL_0021	E	775-E777
DEFENDANT	87	CATCH UP CALL EMAIL	E	778-E779
PLAINTIFF	88	INVESTMENT OPPORTUNITY	E	780-E792
DEFENDANT	89	INDECK HENDRIK DRINKS EMAIL	E	793-E794
PLAINTIFF	90	EMAIL_0022	E	795-E798
DEFENDANT	90	KARL DAHLSTROM EMAIL	E	799-E800
PLAINTIFF	90	UNREDACTED EMAIL K DAHLSTROM HAL205621 (Secured)	E	801
PLAINTIFF	91	EMAIL_0023	E	802-E805
DEFENDANT	91	HENDRIK VROEGE EMAIL	E	810
DEFENDANT	91	UNREDACTED SPREADSHEET_0002 (Secured)	E	811
PLAINTIFF	91	UNREDACTED EMAIL K DAHLSTROM HAL206525 (Secured)	E	812
PLAINTIFF	92	EMAIL_0024	E	813-E817
DEFENDANT	92	HIGHLY CONFIDENTIAL EMAIL_0010	E	818-E 820
DEFENDANT	93	HIGHLY CONFIDENTIAL EMAIL_0011	E	821-E822
PLAINTIFF	94	EMPLOYEE HANDBOOK	E	823-E923
DEFENDANT	94	MUTUAL CONFIDENTIALITY AGREEMENT_0002	E	924-E931
PLAINTIFF	95	POWER POINT	E	932-E963
DEFENDANT	95	CONFIDENTIAL EMAIL_0014	E	964-E966
PLAINTIFF	96	PAY STATEMENT	E	967-E971

DEFENDANT	96	CONFIDENTIAL EMAIL_0015	E	972-E989
PLAINTIFF	97	EDUCATION REIMBURSEMENT	E	990-E996
DEFENDANT	97	HIGHLY CONFIDENTIAL EMAIL_0012	E	997-E999
DEFENDANT	98	HIGHLY CONFIDENTIAL EMAIL_0013	E	1000-E1004
DEFENDANT	99	WEEKLY TIME SHEET	E	1005-E1073
PLAINTIFF	99	CHART (FILED UNDER SEAL) (Secured)	E	1074
PLAINTIFF	100	UNREDACTED SHELLBAGS FORENSIC ANALYSIS (Secured)	E	1075
PLAINTIFF	100- C	FORENSIC ANALYSIS	E	1076-E1118
DEFENDANT	103	CHRIS DEPODESTA EMAIL	E	1119-E1120
DEFENDANT	104	HIGHLY CONFIDENTIAL EMAIL_0014	E	1121-E1122
PLAINTIFF	105	LETTER_0003	E	1123-E1183
PLAINTIFF	106	COMPLEMENTARY RESOURCES	E	1184-E1189
PLAINTIFF	107	MEET THE LEADERSHIP TEAM	E	1190-E1193
PLAINTIFF	108	EMAIL_0026	E	1194-E1197
DEFENDANT	108	CHAD GOUGH, CISSP, ENCE	E	1198-E1202
PLAINTIFF	109	EMAIL_0025	E	1203-E1204
DEFENDANT	109	COMPUTER PRINTOUT	E	1205-E1235
PLAINTIFF	110	EMAIL KARL DAHLSTROM HIGHLY CONFIDENTIAL HAL206469	E	1236-E1237

DEFENDANT	110	COMPUTER PRINTOUT_0002	E	1238-E1267
PLAINTIFF	111	EMAIL KARL DAHLSTROM HIGHLY CONFIDENTIAL HAL206805	E	1268-E1269
DEFENDANT	111	CHAIN OF CUSTODY FORM	E	1270-E1272
PLAINTIFF	112	EMAIL KARL DAHLSTROM HIGHLY CONFIDENTIAL HAL206881	E	1273-E1274
DEFENDANT	112	COMPUTER PRINTOUT_0003	E	1275-E1367
DEFENDANT	114	USB STORES_0003	E	1368-E1369
PLAINTIFF	115	EMAIL KARL DAHLSTROM HIGHLY CONFIDENTIAL HAL207670	E	1370-E1372
PLAINTIFF	118	REDACTED EMAIL CHRIS DEPODESTA HAL137838	E	1373-E1375
PLAINTIFF	118	UNREDACTED EMAIL CHRIS DEPODESTA HAL137838 (Secured)	E	1376
PLAINTIFF	121	REDACTED EMAIL CHRIS DEPODESTA HAL136025	E	1377- E1384
PLAINTIFF	121	UNREDACTED EMAIL CHRIS DEPODESTA HAL136025 (Secured)	E	1385
PLAINTIFF	122	EMAIL KARL DAHLSTROM HAL136431	E	1386-E1389
PLAINTIFF	126	EMAIL KARL DAHLSTROM HAL137413	E	1390-E1392
PLAINTIFF	127	EMAIL KARL DAHLSTROM HAL137424	E	1393-E1394
PLAINTIFF	128	EMAIL CHRIS DEPODESTA HAL137698	E	1395-E1396
PLAINTIFF	131	REDACTED EMAIL CHRIS DEPODESTA HAL 137838	E	1397-E1399
PLAINTIFF	131	UNREDACTED EMAIL CHRIS DEPODESTA HAL137838_0002 (Secured)	E	1400
PLAINTIFF	132	EMAIL KARL DAHLSTROM HAL138193	E	1401-E1404



PLAINTIFF	133	EMAIL KARL DAHLSTROM HIGH CONFIDENTIAL HAL138196	E	1405-E1408
PLAINTIFF	135	EMAIL CHRIS DEPODESTA HIGH CONFIDENTIAL HAL139259	E	1409-E1410
PLAINTIFF	136	REDACTED HALYARD WHARTON ENERGY CENTER	E	1411-E1458
PLAINTIFF	136	UNREDACTED HALYARD WHARTON ENERGY CHART (Secured)	E	1459
PLAINTIFF	137	MERCED HALYARD VENTURES INTRO OVERVIEW KIAMCO	E	1460-E1482
PLAINTIFF	138	REDACTED HALYARD WHARTON ENERGY COSTS	E	1483-E1485
PLAINTIFF	138	UNREDACTED HALYARD WHARTON ENERGY COSTS CHART (Secured)	E	1486
PLAINTIFF	139	REDACTED HALYARD WHARTON ENERGY COSTS_0002	E	1487-E1489
PLAINTIFF	139	UNREDACTED HALYARD WHARTON ENERGY COSTS CHART_0002 (Secured)	E	1490
PLAINTIFF	141	HEV DATA ROOM CONTENTS	E	1491-E1497

PLAINTIFF	143	HALYARD ERCOT POWER DEVELOPMENT STRATEGY 8-6-13	E	1498-E1514
PLAINTIFF	145	FILED UNDER SEAL PURSUANT TO ORDER 2-17-17	E	1515-E 1516
DEFENDANT	145	GRAPH	E	1517-E 1518
PLAINTIFF	145	NATURAL GAS DEVELOPMENT INDECK 002785 (FILED UNDER SEAL) (Secured)	E	1519
PLAINTIFF	146	TEXAS COMMISSION OF ENVIRONMENT QUALITY	E	1520-E 1542
DEFENDANT	150	MANAGEMENT AGREEMENT_0002	E	1543-E 1553
DEFENDANT	151	LLC AGREEMENT_0002	E	1554-E 1581
PLAINTIFF	154	EMAIL TRIPP BALLARD HIGH CONFIDENTIAL EX 3 DAHLSTROM	E	1582-E 1584

DEFENDANT	154	LLC CERTIFICATE OF FORMATION	E	1585-E 1590
PLAINTIFF	155	EMAIL HENDRIK VROEGE EX VROEGE 21	E	1591-E 1596
PLAINTIFF	158	EMAIL MIKE THUILLEZ (GE POWER) HAL210037	E	1597-E 1599
PLAINTIFF	160	FEDERAL ENERGY REGULATORY COMMISSION ANNUAL REPORT	E	1600-E 1618
PLAINTIFF	161	HALYARD WHARTON ENERGY CENTER HAL210200	E	1619-E 1631
PLAINTIFF	164	REDACTED EMAIL HENDRIK VROEGE HAL210510	E	1632-E 1635
PLAINTIFF	164	UNREDACTED EMAIL HENDRIK VROEGE HAL210510 (Secured)	E	1636
PLAINTIFF	169	MUTUAL CONFIDENTIALITY AGREEMENT HAL212965	E	1637-E 1642
PLAINTIFF	173	REDACTED EMAIL KARL DAHLSTROM HAL212890	E	1643-E 1648
PLAINTIFF	173	UNREDACTED EMAIL KARL DAHLSTROM HAL212870 (Secured)	E	1649
PLAINTIFF	174	EMAIL KARL DAHLSTROM HAL212729	E	1650-E 1709
PLAINTIFF	175	EMAIL HENDRIK VROEGE HAL212799	E	1710-E 1713
PLAINTIFF	176	EMAIL BARBARA PREVOST HAL212788	E	1714-E 1719

PLAINTIFF	177	REDACTED EMAIL KARL DAHLSTROM HAL211673	E	1720-E 1724
PLAINTIFF	177	UNREDACTED EMAIL KARL DAHLSTROM HAL211673 (Secured)	E	1725
PLAINTIFF	178	EMAIL TRIPP BALLARD HAL212930	E	1726-E 1751
DEFENDANT	178	POWER POINT_0003	E	1752-E 1781
DEFENDANT	178	UNREDACTED POWER POINT (Secured)	E	1782
DEFENDANT	179	LETTER AND POWER POINT	E	1783-E 1793
PLAINTIFF	180	EMAIL KARL DAHLSTROM HAL212973	E	1794-E 1796
DEFENDANT	180	POWER POINT_0004	E	1797-E 1826
PLAINTIFF	181	EMAIL CHRIS DEPODESTA HAL212972	E	1827-E 1828
DEFENDANT	181	POWER POINT_0005	E	1829-E 1839
PLAINTIFF	182	EMAIL KARL DAHLSTROM HAL213095	E	1840-E 1841
DEFENDANT	182	POWER POINT_0006	E	1842-E 1864
PLAINTIFF	183	EMAIL KARL DAHLSTROM HAL213189	E	1865-E 1866
DEFENDANT	183	POWER POINT_0007	E	1867-E 1874
PLAINTIFF	185	ERCOT STANDARD GENERATION INTECONNECTION AGREEMENT	E	1875-E 1927
PLAINTIFF	186	SECRETARY OF STATE JESSE WHITE CORP ANNUAL REPORT	E	1928-E 1931
PLAINTIFF	189	EMAIL CHRIS DEPODESTA INDECK 038218	E	1932-E 1936
PLAINTIFF	190	AT&T MONTHLY STATEMENT 3-29-4-28 2013	E	1937-E 1951
PLAINTIFF	191	AT&T MONTHLY STATEMENT 4-29-5-28 2013	E	1952-E 1964
PLAINTIFF	192	FEDERAL REGISTER VOL 71	E	1965-E 1967

PLAINTIFF	193	EMAIL ROGER BARTAKOVITTS (GE POWER AND WATER) 061391	E	1968-E 1969
PLAINTIFF	194	EMAIL ROGER BARTAKOVITTS (GE POWER AND WATER) 061650	E	1970-E 1974
PLAINTIFF	195	EMAIL ROGER BARTAKOVITTS (GE POWER AND WATER) 061664	E	1975-E 1976
PLAINTIFF	196	EMAIL_0027	E	1977-E 1985
PLAINTIFF	197	MONTHLY STATEMENT	E	1986-E 1998

PLAINTIFF	198	MONTHLY STATEMENT_0002	E	1999-E	2011		
PLAINTIFF	199	MONTHLY STATEMENT_0003	E	2012-E	2024		
PLAINTIFF	200	MONTHLY STATEMENT_0004	E	2025-E	2037		
PLAINTIFF	201	MONTHLY STATEMENT_0005	E	2038-E	2050		
DEFENDANT	201	POWER POINT_0008	E	2051-E	2067		
PLAINTIFF	202	MONTHLY STATEMENT_0006	E	2068-E	2080		
PLAINTIFF	203	MONTHLY STATEMENT_0007	E	2081-E	2093		
DEFENDANT	203	EMAIL_0063	E	2094-E	2095		
PLAINTIFF	204	MONTHLY STATEMENT_0008	E	2096-E	2106		
DEFENDANT	204	EMAIL_0064	E	2107-E	2122		
PLAINTIFF	205	WIRELESS STATEMENT	E	2123-E	2141		
PLAINTIFF	206	WIRELESS STATEMENT_0002	E	2142-E	2166		
DEFENDANT	206	EXECUTIVE SUMMARY	E	2184	V2-E	2268	V2
PLAINTIFF	207	WIRELESS STATEMENT_0003	E	2269	V2-E	2304	V2
DEFENDANT	207	EMAIL_0065	E	2305	V2-E	2350	V2
PLAINTIFF	208	WIRELESS STATEMENT_0004	E	2351	V2-E	2374	V2
DEFENDANT	208	EMAIL_0066	E	2375	V2-E	2376	V2
PLAINTIFF	209	WIRELESS STATEMENT_0005	E	2377	V2-E	2404	V2
DEFENDANT	209	EMAIL_0067	E	2405	V2-E	2407	V2
PLAINTIFF	210	WIRELESS STATEMENT_0006	E	2408	V2-E	2430	V2

DEFENDANT	210	EMAIL_0068	E	2431	V2-E	2435	V2
PLAINTIFF	211	WIRELESS STATEMENT_0007	E	2436	V2-E	2460	V2
PLAINTIFF	212	STATE OF ILLINOIS SECRETARY OF STATE	E	2461	V2-E	2465	V2
DEFENDANT	212	EMAIL_0069	E	2466	V2-E	2492	V2
PLAINTIFF	213	EMPLOYEE ACKNOWLEDGEMENT FORM	E	2493	V2-E	2495	V2
DEFENDANT	213	EMAIL_0070	E	2496	V2-E	2501	V2
PLAINTIFF	214	PHOTOS OF OFFICE	E	2502	V2-E	2505	V2
DEFENDANT	214	EMAIL_0071	E	2506	V2-E	2509	V2
PLAINTIFF	215	3RD FLOOR FLOOR PLAN	E	2510	V2-E	2511	V2
DEFENDANT	215	EMAIL_0072	E	2512	V2-E	2513	V2
DEFENDANT	215	UNREDACTED HIGHLY CONFIDENTIAL EMAIL_0003 (Secured)	E	2514	V2		
DEFENDANT	216	EMAIL_0073	E	2515	V2-E	2523	V2
PLAINTIFF	217	EMAIL_0028	E	2524	V2-E	2525	V2

DEFENDANT	217	HIGHLY CONFIDENTIAL EMAIL_0015	E	2526	V2-E	2527	V2
PLAINTIFF	218	OUTLOOK TRASH	E	2528	V2-E	2529	V2
PLAINTIFF	219	COMPUTER SCREENSHOT	E	2530	V2-E	2531	V2
PLAINTIFF	220	USB STORES	E	2532	V2-E	2533	V2
PLAINTIFF	220A	USB STORES_0002	E	2534	V2-E	2535	V2
PLAINTIFF	221	DEPODESTA HARD DRIVE DELETION	E	2536	V2-E	2537	V2
PLAINTIFF	222	EMAIL_0031	E	2538	V2-E	2540	V2
PLAINTIFF	223	CONFIDENTIAL LETTER	E	2541	V2-E	2544	V2
PLAINTIFF	223	UNREDACTED LETTER HALYARD ENERGY HAL222497 (Secured)	E	2545	V2		
PLAINTIFF	224	CONFIDENTIAL EMAIL	E	2546	V2-E	2548	V2
PLAINTIFF	225	CONFIDENTIAL EMAIL_0002	E	2549	V2-E	2551	V2
PLAINTIFF	226	CONFIDENTIAL LETTER_0002	E	2552	V2-E	2563	V2
PLAINTIFF	227	CONFIDENTIAL LETTER_0003	E	2564	V2-E	2575	V2
DEFENDANT	227	HIGHLY CONFIDENTIAL POWER POINT	E	2576	V2-E	2664	V2
PLAINTIFF	228	CONFIDENTIAL AGREEMENT	E	2665	V2-E	2682	V2
PLAINTIFF	228	UNREDACTED MASTER FRAMEWORK AGREEMENT MERCED (Secured)	E	2683	V2		
PLAINTIFF	229	SPREADSHEET	E	2684	V2-E	2685	V2
PLAINTIFF	230	CASH FLOW OPERATIONS	E	2686	V2-E	2687	V2
PLAINTIFF	231	SPREADSHEET_0002	E	2688	V2-E	2689	V2



PLAINTIFF	232	CONFIDENTIAL LETTER_0004	E	2690	V2-E	2692	V2
PLAINTIFF	233	AFFIDAVIT OF RECORDS	E	2693	V2-E	2695	V2
PLAINTIFF	234	CONFIDENTIAL PORTIONS DEPOSITION OF ERIC WERWIE	E	2696	V2-E	2785	V2
PLAINTIFF	234	UNREDACTED VIDEOTAPED DEPOSITION ERIC WERWIE (Secured)	E	2786	V2		
PLAINTIFF	235	CONFIDENTIAL PORTIONS DEPOSITION OF DANIEL BARPAL	E	2787	V2-E	2875	V2
DEFENDANT	235	MERCED HALYARD VENTURES, LLC	E	2876	V2-E	2901	V2
PLAINTIFF	236	NOTICE	E	2902	V2-E	2924	V2
DEFENDANT	236	HALYARD ENERGY VENTURES	E	2925	V2-E	2934	V2
PLAINTIFF	237	EMAIL_0032	E	2935	V2-E	2938	V2
DEFENDANT	237	MERCED HALYARD VENTURES, LLC_0002	E	2939	V2-E	2950	V2
PLAINTIFF	238	LETTER_0004	E	2951	V2-E	2953	V2
PLAINTIFF	239	LETTER_0005	E	2954	V2-E	2955	V2
PLAINTIFF	240	LETTER_0006	E	2956	V2-E	2957	V2
PLAINTIFF	241	EMAIL_0033	E	2958	V2-E	2971	V2
PLAINTIFF	242	EMAIL_0034	E	2972	V2-E	2973	V2
DEFENDANT	242	ELECTRIC POWER ENGINEERS	E	2974	V2-E	2998	V2
PLAINTIFF	243	EMAIL_0035	E	2999	V2-E	3001	V2
DEFENDANT	243	CONFIDENTIAL EMAIL_0016	E	3002	V2-E	3010	V2
PLAINTIFF	244	NOTEBOOK AJ BORI GEORGE H WANG	E	3011	V2-E	3016	V2

DEFENDANT	244	LIMITED LIABILITY COMPANY AGREEMENT	E	3017	V2-E	3023	V2
PLAINTIFF	245	NOTES-CON. CALL 12-15 730	E	3024	V2-E	3033	V2
DEFENDANT	245	LIMITED LIABILITY COMPANY AGREEMENT 0002	E	3034	V2-E	3040	V2
PLAINTIFF	246	EMAIL 2 ADRIAN GARCIA FROM GEORGE WANG	E	3041	V2-E	3043	V2
PLAINTIFF	247	NOTES 12-15 (4-28-17) GW0621	E	3044	V2-E	3046	V2
PLAINTIFF	248	EMAIL ADRIAN GARCIA GEORGE WANG GW0180	E	3047	V2-E	3082	V2
PLAINTIFF	249	EMAIL ADRIAN GARCIA GEORGE WANG GW0270	E	3083	V2-E	3085	V2
PLAINTIFF	250	EMAIL ADRIAN GARCIA GEORGE WANG GW0274	E	3086	V2-E	3088	V2
PLAINTIFF	251	EMAIL ADRIAN GARCIA GEORGE WANG GW0318	E	3089	V2-E	3091	V2
PLAINTIFF	252	EMAIL ADRIAN GARCIA KARL DAHLSTROM GW0332	E	3092	V2-E	3095	V2
PLAINTIFF	253	EMAIL ADRIAN GARCIA GEORGE WANG GW0343	E	3096	V2-E	3098	V2
PLAINTIFF	254	EMAIL_0030	E	3099	V2-E	3100	V2
PLAINTIFF	255	EMAIL ADRIAN GARCIA GEORGE WANG GW0347	E	3101	V2-E	3102	V2
DEFENDANT	255	HIGHLY CONFIDENTIAL TEXAS PERMIT APPLICATION	E	3103	V2-E	3106	V2

PLAINTIFF	256	EMAIL ADRIAN GARCIA KARL DAHLSTROM GW0348	E	3107	V2-E	3113	V2
PLAINTIFF	257	EMAIL ADRIAN GARCIA GEORGE WANG GW0360	E	3114	V2-E	3116	V2
DEFENDANT	257	CONFIDENTIAL INVOICE	E	3117	V2-E	3118	V2
PLAINTIFF	258	NOTES 3-21 GW0624	E	3119	V2-E	3122	V2
PLAINTIFF	260	EMAIL ADRIAN GARCIA GEORGE WANG GW0531	E	3123	V2-E	3125	V2
PLAINTIFF	261	EMAIL ADRIAN GARCIA SMART ROOM SUPPORT GW0533	E	3126	V2-E	3128	V2
DEFENDANT	261	HIGHLY CONFIDENTIAL EMAIL_0016	E	3129	V2-E	3135	V2
PLAINTIFF	262	EMAIL ADRIAN GARCIA GEORGE WANG GW0536	E	3136	V2-E	3138	V2
DEFENDANT	262	HIGHLY CONFIDENTIAL EMAIL_0017	E	3139	V2-E	3142	V2
PLAINTIFF	263	CONFIDENTIAL SPREADSHEET 4-28-17	E	3143	V2-E	3150	V2
PLAINTIFF	264	EMAIL ADRIAN GARCIA KARL DAHLSTROM GW0549	E	3151	V2-E	3155	V2
PLAINTIFF	265	EMAIL ADRIAN GARCIA KARL DAHLSTROM GW0571	E	3156	V2-E	3157	V2
PLAINTIFF	266	EMAIL ADRIAN GARCIA KARL DAHLSTROM GW0573	E	3158	V2-E	3160	V2
PLAINTIFF	267	EMAIL FROM AD. TO GEORGE WANG GW0683	E	3161	V2-E	3163	V2
PLAINTIFF	268	EMAIL ADRIAN GARCIA KARL DAHLSTROM GW0579	E	3164	V2-E	3167	V2
PLAINTIFF	269	EMAIL_0029	E	3168	V2-E	3170	V2
PLAINTIFF	270	EMAIL_0036	E	3171	V2-E	3172	V2
PLAINTIFF	271	EMAIL_0037	E	3173	V2-E	3175	V2

PLAINTIFF	272	EMAIL_0038	E	3176	V2-E	3178	V2
PLAINTIFF	273	EMAIL_0039	E	3179	V2-E	3180	V2
PLAINTIFF	274	EMAIL_0040	E	3181	V2-E	3183	V2
PLAINTIFF	275	EMAIL_0041	E	3184	V2-E	3185	V2
PLAINTIFF	276	GEORGE H. WANG BIO	E	3186	V2-E	3189	V2
PLAINTIFF	282	EMAIL_0042	E	3190	V2-E	3191	V2
PLAINTIFF	283	EMAIL_0043	E	3192	V2-E	3193	V2
PLAINTIFF	284	EMAIL_0044	E	3194	V2-E	3195	V2
PLAINTIFF	285	EMAIL_0045	E	3196	V2-E	3197	V2

PLAINTIFF	286	EMAIL_0046	E	3198	V2-E	3200	V2
PLAINTIFF	287	EMAIL_0047	E	3201	V2-E	3202	V2
DEFENDANT	288	BY-LAWS OF INDECK ENERGY SERVICES	E	3203	V2-E	3217	V2
DEFENDANT	289	CONFIDENTIAL EMAIL_0017	E	3218	V2-E	3220	V2
PLAINTIFF	291	EMAIL_0048	E	3221	V2-E	3223	V2
PLAINTIFF	292	EMAIL_0049	E	3224	V2-E	3229	V2
DEFENDANT	292	DEPOSITION GEORGE WANG	E	3230	V2-E	3439	V2
		Direct		3237			
		Cross		3425			
PLAINTIFF	293	EMAIL_0050	E	3440	V2-E	3443	V2
DEFENDANT	293	DEPOSITION ROHIT OGRA	E	3444	V2-E	3515	V2
		Direct		3449			
		Cross		3491			
		Redirect		3497			
		Recross		3501			
DEFENDANT	294	DEPOSITION RAGHU SOULE	E	3516	V2-E	3577	V2
		Direct		3521			
		Cross		3540			
		Redirect		3565			
DEFENDANT	295	DEPOSITION HUGO MENA	E	3578	V2-E	3618	V2
		Direct		3579			
		Cross		3594			
		Redirect		3600			
DEFENDANT	296	COURT RECORD GRAYSON COUNTY TEXAS	E	3619	V2-E	3634	V2
		(PETITION) - NOT ADMITTED					
DEFENDANT	297	COURT RECORD GRAYSON COUNTY TEXAS	E	3635	V2-E	3656	V2
		(PETITION)_0002 - NOT ADMITTED					
DEFENDANT	298	LETTER - NOT ADMITTED	E	3657	V2-E	3659	V2

DEFENDANT	299	INVOICE	E	3660	V2-E	3661	V2
DEFENDANT	300	INVOICE_0002	E	3662	V2-E	3663	V2
PLAINTIFF	301	EMAIL LLC AGREEMENT	E	3664	V2-E	3691	V2
PLAINTIFF	302	EMAIL LLC AGREEMENT_0002	E	3692	V2-E	3763	V2
DEFENDANT	303	DEPOSITION STEPHEN GARDINER	E	3764	V2-E	3841	V2
		Direct		3770			
		Cross		3782			
		Redirect		3826			
		Recross		3837			
PLAINTIFF	320	EMAIL_0051	E	3842	V2-E	3845	V2
PLAINTIFF	324	PROPOSAL FOR SERVICES	E	3846	V2-E	3898	V2
PLAINTIFF	326	EMAIL_0052	E	3899	V2-E	3905	V2
PLAINTIFF	330	DAHLSTROMS RECENT DOCS - NOT ADMITTED	E	3906	V2-E	3907	V2
PLAINTIFF	331	DEPODESTAS RECENT DOCS - NOT ADMITTED	E	3908	V2-E	3909	V2
PLAINTIFF	342	EMAIL_0053	E	3910	V2-E	3912	V2
PLAINTIFF	348	EMAIL_0054	E	3913	V2-E	3915	V2
PLAINTIFF	353	ESA DECISION	E	3916	V2-E	3924	V2
PLAINTIFF	353	UNREDACTED INDECK DHARTON ENERGY PROJECT 13-1580 (Secured)	E	3925	V2		
PLAINTIFF	357	PROJECT PRESENTATION - NOT ADMITTED	E	3926	V2-E	3927	V2

PLAINTIFF	358	POWER DEVELOPMENT STRATEGY - NOT ADMITTED	E	3928	V2-E	3944	V2
PLAINTIFF	359	180 DAY BUDGET	E	3945	V2-E	3946	V2
PLAINTIFF	359A	180 DAY OPERATING AGREEMENT	E	3947	V2-E	3948	V2
PLAINTIFF	364	COMPETITION TEACHER	E	3949	V2-E	3952	V2
PLAINTIFF	369	LETTER_0007	E	3953	V2-E	3958	V2
PLAINTIFF	370	LETTER_0008	E	3959	V2-E	3964	V2
PLAINTIFF	374	MEMBER CORPORATE BYLAWS - NOT ADMITTED	E	3965	V2-E	3973	V2
PLAINTIFF	375	ATTESTATION - NOT ADMITTED	E	3974	V2-E	4047	V2
PLAINTIFF	376	ATTESTATION_0002 - NOT ADMITTED	E	4048	V2-E	4102	V2
PLAINTIFF	377	ATTESTATION_0003 - NOT ADMITTED	E	4103	V2-E	4126	V2
PLAINTIFF	378	ATTESTATION_0004 - NOT ADMITTED	E	4127	V2-E	4155	V2
PLAINTIFF	379	ATTESTATION_0005 - NOT ADMITTED	E	4156	V2-E	4194	V2
PLAINTIFF	380	ATTESTATION_0006 - NOT ADMITTED	E	4195	V2-E	4228	V2
PLAINTIFF	381	WEB HISTORY	E	4229	V2-E	4232	V2
PLAINTIFF	383	TRUST RECORDS	E	4233	V2-E	4238	V2
PLAINTIFF	404	EMAIL_0055	E	4239	V2-E	4245	V2
PLAINTIFF	411	EMAIL_0056	E	4246	V2-E	4247	V2
PLAINTIFF	412	EMAIL_0057	E	4248	V2-E	4249	V2

PLAINTIFF	413	EMAIL SUMMARY PRESENTATION	E	4250	V2-E	4297	V2
PLAINTIFF	415	STIPULATIONS	E	4298	V2-E	4307	V2
PLAINTIFF	415	UNREDACTED STPULATIONS AS TO PLA EXHIBITS (Secured)	E	4308	V2		
PLAINTIFF	417	EMAIL WRITTEN ACTION	E	4309	V2-E	4312	V2
PLAINTIFF	418	HIGHLY CONFIDENTIAL EMAIL	E	4313	V2-E	4325	V2
PLAINTIFF	418	UNREDACTED EMAIL LETTER GERREN HONG SCOTIABANK HAL279664 (Secured)	E	4326	V2		
PLAINTIFF	434	HIGHLY CONFIDENTIAL EMAIL_0002	E	4327	V2-E	4328	V2
PLAINTIFF	454A	HIGHLY CONFIDENTIAL EMAIL_0003	E	4329	V2-E	4395	V2
PLAINTIFF	454A	UNREDACTED EMAIL MERCED HAL332724 (Secured)	E	4396	V2		
PLAINTIFF	458	HIGHLY CONFIDENTIAL EMAIL_0004	E	4397	V2-E	4408	V2
PLAINTIFF	459	HIGHLY CONFIDENTIAL EMAIL_0005	E	4409	V2-E	4412	V2



PLAINTIFF	479	LETTER_0009	E	4413	V2-E	4416	V2
PLAINTIFF	480	DEPOSITION OF TOM BOCK	E	4417	V2-E	4430	V2
PLAINTIFF	481	DEPOSITION OF HENDRIK VROEGE	E	4431	V2-E	4450	V2
		EXHIBIT A TO PARAGRAPH 7(A) OF ORDER OF DECEMBER 13 (Secured)	E	4451	V2		
PLAINTIFF	129	EMAIL	E	4452	V2-E	4455	V2
PLAINTIFF	99	FILED UNDER SEAL PURSUANT TO 2-17-17 AND 4-25-14	E	4456	V2-E	4457	V2
DEFENDANT	218	EMAIL FROM KELLY INNS	E	4458	V2-E	4460	V2
PLAINTIFF	259	4 PAGE LETTER WITH 3-29 ON TOP	E	4461	V2-E	4465	V2
PLAINTIFF	295	EMAIL TO TOM FROM KARL	E	4466	V2-E	4467	V2
PLAINTIFF	296	EMAIL FROM HENDRIK VROEGE	E	4468	V2-E	4469	V2

## **TABLE OF CONTENTS**

### **REPORT OF PROCEEDINGS**

<b><u>Date of Proceeding</u></b>	<b><u>Title/Description</u></b>	<b><u>Page No.</u></b>
03/26/2014	REPORT OF PROCEEDINGS	R 6-R 33
04/17/2014	REPORT OF PROCEEDINGS	R 34-R 43
06/12/2014	REPORT OF PROCEEDINGS	R 44-R 53
07/03/2014	REPORT OF PROCEEDINGS	R 54-R 81
01/22/2015	REPORT OF PROCEEDINGS	R 82-R 88
03/12/2015	REPORT OF PROCEEDINGS	R 89-R 108
03/26/2015	REPORT OF PROCEEDINGS	R 109-R 122
05/14/2015	REPORT OF PROCEEDINGS	R 123-R 160
08/27/2015	REPORT OF PROCEEDINGS	R 161-R 284
01/07/2016	REPORT OF PROCEEDINGS	R 285-R 321
01/25/2016	REDACTED REPORT OF PROCEEDINGS	R 322-R 547
01/25/2016	REPORT OF PROCEEDINGS FILED UNDER SEAL (Secured)	R 548
02/08/2016	REDACTED REPORT OF PROCEEDINGS	R 549-R 672
02/08/2016	REPORT OF PROCEEDINGS FILED UNDER SEAL (Secured)	R 673
02/08/2016	REDACTED REPORT OF PROCEEDINGS_0002	R 674-R 785
02/08/2016	REPORT OF PROCEEDINGS FILED UNDER SEAL (Secured)	R 786

<u>Date of Proceeding</u>	<u>Title/Description</u>	<u>Page No.</u>
02/11/2016	REDACTED REPORT OF PROCEEDINGS	R 787-R 919
02/11/2016	REPORT OF PROCEEDINGS FILED UNDER SEAL (Secured)	R 920
03/09/2016	REPORT OF PROCEEDINGS	R 921-R 973
03/14/2016	REPORT OF PROCEEDINGS	R 974-R 1112
03/14/2016	REPORT OF PROCEEDINGS_0002	R 1113-R1220
03/17/2016	REDACTED REPORT OF PROCEEDINGS	R 1221-R1340
03/17/2016	REPORT OF PROCEEDINGS FILED UNDER SEAL (Secured)	R 1341
03/18/2016	REDACTED REPORT OF PROCEEDINGS	R 1342-R1414
03/18/2016	REPORT OF PROCEEDINGS FILED UNDER SEAL (Secured)	R 1415
03/28/2016	REPORT OF PROCEEDINGS	R 1416-R1525
03/28/2016	REPORT OF PROCEEDINGS_0002	R 1526-R1624
04/04/2016	REPORT OF PROCEEDINGS	R 1625-R1692
04/04/2016	REDACTED REPORT OF PROCEEDINGS	R 1693-R1840
04/04/2016	REPORT OF PROCEEDINGS FILED UNDER SEAL (Secured)	R 1841
04/07/2016	REPORT OF PROCEEDINGS	R 1842-R1963
04/22/2016	REPORT OF PROCEEDINGS	R 1964-R2104
04/26/2016	REDACTED REPORT OF PROCEEDINGS	R 2105-R2236
04/26/2016	REPORT OF PROCEEDINGS FILED UNDER SEAL (Secured)	R 2237
05/06/2016	REPORT OF PROCEEDINGS	R 2238-R2351
06/03/2016	REPORT OF PROCEEDINGS	R 2352-R 2472
06/21/2016	REPORT OF PROCEEDINGS	R 2473-R 2585
07/08/2016	REPORT OF PROCEEDINGS	R 2586-R 2724
07/22/2016	REPORT OF PROCEEDINGS	R 2725-R 2876
08/01/2016	REDACTED REPORT OF PROCEEDINGS	R 2877-R 2969
08/01/2016	REPORT OF PROCEEDINGS FILED UNDER SEAL (Secured)	R 2970
08/01/2016	REPORT OF PROCEEDINGS_0002	R 2971-R 3116
08/05/2016	REPORT OF PROCEEDINGS	R 3117-R 3138
09/01/2016	REPORT OF PROCEEDINGS	R 3139-R 3148
09/09/2016	REPORT OF PROCEEDINGS	R 3149-R 3183

<u>Date of Proceeding</u>	<u>Title/Description</u>	<u>Page No.</u>
09/22/2016	REPORT OF PROCEEDINGS	R 3184-R 3195
09/29/2016	REPORT OF PROCEEDINGS	R 3196-R 3206
10/06/2016	REPORT OF PROCEEDINGS	R 3207-R 3249
10/31/2016	REDACTED REPORT OF PROCEEDINGS	R 3250-R 3343
10/31/2016	REPORT OF PROCEEDINGS FILED UNDER SEAL (Secured)	R 3344
10/31/2016	REDACTED REPORT OF PROCEEDINGS_0002	R 3345-R 3472
10/31/2016	REPORT OF PROCEEDINGS FILED UNDER SEAL (Secured)	R 3473
12/16/2016	REDACTED REPORT OF PROCEEDINGS	R 3474-R 3562
12/16/2016	REPORT OF PROCEEDINGS FILED UNDER SEAL (Secured)	R 3563
02/17/2017	REPORT OF PROCEEDINGS	R 3564-R 3590
03/09/2017	REPORT OF PROCEEDINGS	R 3591-R 3613
03/14/2017	REPORT OF PROCEEDINGS	R 3614-R 3659
03/21/2017	REPORT OF PROCEEDINGS	R 3660-R 3706
04/10/2017	REPORT OF PROCEEDINGS	R 3707-R 3726
04/18/2017	REPORT OF PROCEEDINGS	R 3727-R 3843
04/18/2017	REPORT OF PROCEEDINGS_0002	R 3844-R 3911
04/18/2017	REPORT OF PROCEEDINGS FILED UNDER SEAL (Secured)	R 3912
05/03/2017	REPORT OF PROCEEDINGS	R 3913-R 4022
05/03/2017	REPORT OF PROCEEDINGS FILED UNDER SEAL (Secured)	R 4023
05/03/2017	REPORT OF PROCEEDINGS_0002	R 4024-R 4166
05/04/2017	REPORT OF PROCEEDINGS	R 4167-R 4301
05/04/2017	REPORT OF PROCEEDINGS_0002	R 4302-R 4456
05/05/2017	REPORT OF PROCEEDINGS	R 4457-R 4535
05/09/2017	REPORT OF PROCEEDINGS	R 4536-R 4627
05/09/2017	REPORT OF PROCEEDINGS_0002	R 4628-R 4723
06/09/2017	REPORT OF PROCEEDINGS	R 4724-R 4876
06/12/2017	REPORT OF PROCEEDINGS	R 4877-R 4949
06/20/2017	REPORT OF PROCEEDINGS	R 4955 V2-R 5055 V2
06/22/2017	REPORT OF PROCEEDINGS	R 5056 V2-R 5069 V2
07/13/2017	REPORT OF PROCEEDINGS	R 5070 V2-R 5119 V2

<u>Date of Proceeding</u>	<u>Title/Description</u>	<u>Page No.</u>
07/19/2017	REPORT OF PROCEEDINGS	R 5120 V2-R 5163 V2
07/24/2017	REPORT OF PROCEEDINGS	R 5164 V2-R 5206 V2
08/01/2017	REPORT OF PROCEEDINGS	R 5207 V2-R 5234 V2
08/31/2017	REPORT OF PROCEEDINGS	R 5235 V2-R 5258 V2
09/05/2017	REPORT OF PROCEEDINGS	R 5259 V2-R 5309 V2
09/14/2017	REPORT OF PROCEEDINGS	R 5310 V2-R 5348 V2
09/22/2017	REPORT OF PROCEEDINGS	R 5349 V2-R 5462 V2
09/26/2017	REPORT OF PROCEEDINGS	R 5463 V2-R 5518 V2
10/13/2017	REPORT OF PROCEEDINGS	R 5519 V2-R 5674 V2
10/20/2017	REPORT OF PROCEEDINGS	R 5675 V2-R 5810 V2
11/14/2017	REPORT OF PROCEEDINGS	R 5811 V2-R 5912 V2
11/16/2017	REPORT OF PROCEEDINGS	R 5913 V2-R 5956 V2
11/30/2017	REPORT OF PROCEEDINGS	R 5957 V2-R 6053 V2
01/04/2018	REPORT OF PROCEEDINGS	R 6054 V2-R 6066 V2
01/16/2018	REPORT OF PROCEEDINGS	R 6067 V2-R 6093 V2
01/16/2018	REPORT OF PROCEEDINGS_0002	R 6094 V2-R 6108 V2
01/23/2018	REPORT OF PROCEEDINGS	R 6109 V2-R 6249 V2
01/23/2018	REPORT OF PROCEEDINGS FILED UNDER SEAL (Secured)	R 6250 V2
01/23/2018	REPORT OF PROCEEDINGS_0002	R 6251 V2-R 6394 V2
01/23/2018	REPORT OF PROCEEDINGS FILED UNDER SEAL (Secured)	R 6395 V2
01/25/2018	REPORT OF PROCEEDINGS	R 6396 V2-R 6464 V2
02/15/2018	REPORT OF PROCEEDINGS	R 6465 V2-R 6582 V2
02/15/2018	REPORT OF PROCEEDINGS FILED UNDER SEAL (Secured)	R 6583 V2
02/20/2018	REPORT OF PROCEEDINGS	R 6584 V2-R 6693 V2
02/20/2018	REPORT OF PROCEEDINGS FILED UNDER SEAL (Secured)	R 6694 V2
02/28/2018	REPORT OF PROCEEDINGS	R 6695 V2-R 6880 V2
03/07/2018	REPORT OF PROCEEDINGS	R 6881 V2-R 6987 V2
03/08/2018	REPORT OF PROCEEDINGS	R 6988 V2-R 6997 V2
03/15/2018	REPORT OF PROCEEDINGS	R 6998 V2-R 7038 V2
03/23/2018	REPORT OF PROCEEDINGS	R 7039 V2-R 7078 V2
04/19/2018	REPORT OF PROCEEDINGS	R 7079 V2-R 7094 V2

<u>Date of Proceeding</u>	<u>Title/Description</u>	<u>Page No.</u>
05/11/2018	REPORT OF PROCEEDINGS	R 7095 V2-R 7221 V2
05/25/2018	REPORT OF PROCEEDINGS	R 7222 V2-R 7354 V2
05/29/2018	REPORT OF PROCEEDINGS	R 7355 V2-R 7394 V2
06/12/2018	REPORT OF PROCEEDINGS	R 7395 V2-R 7515 V2
06/22/2018	REPORT OF PROCEEDINGS	R 7516 V2-R 7569 V2
07/05/2018	REPORT OF PROCEEDINGS	R 7570 V2-R 7594 V2
07/17/2018	REPORT OF PROCEEDINGS	R 7595 V2-R 7634 V2
07/17/2018	EXCERPT REPORT OF PROCEEDINGS	R 7635 V2-R 7642 V2
07/25/2018	REPORT OF PROCEEDINGS	R 7643 V2-R 7661 V2
08/02/2018	REPORT OF PROCEEDINGS	R 7662 V2-R 7773 V2
08/09/2018	REPORT OF PROCEEDINGS	R 7774 V2-R 7784 V2
09/18/2018	REPORT OF PROCEEDINGS	R 7785 V2-R 7876 V2
10/01/2018	REPORT OF PROCEEDINGS	R 7877 V2-R 8111 V2
10/02/2018	REPORT OF PROCEEDINGS	R 8112 V2-R 8137 V2
10/16/2018	REPORT OF PROCEEDINGS	R 8138 V2-R 8172 V2
10/22/2018	REPORT OF PROCEEDINGS	R 8173 V2-R 8335 V2
12/03/2018	REPORT OF PROCEEDINGS	R 8336 V2-R 8374 V2
12/10/2018	REPORT OF PROCEEDINGS	R 8375 V2-R 8502 V2
12/13/2018	REPORT OF PROCEEDINGS	R 8504 V2-R 8518 V2
01/10/2019	REPORT OF PROCEEDINGS	R 8519 V2-R 8528 V2
01/24/2019	REPORT OF PROCEEDINGS	R 8529 V2-R 8542 V2
02/14/2019	REPORT OF PROCEEDINGS	R 8543 V2-R 8562 V2

**NOTICE OF FILING and PROOF OF SERVICE**

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In the Supreme Court of Illinois

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INDECK ENERGY SERVICES, INC.,	)	
	)	
<i>Plaintiff-Appellee,</i>	)	
	)	
v.	)	No. 125733
	)	
CHRISTOPHER M. DEPODESTA, et al.,	)	
	)	
<i>Defendants-Appellants.</i>	)	

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The undersigned, being first duly sworn, deposes and states that on July 1, 2020, the Brief and Appendix of Defendants-Appellants was electronically filed and served upon the Clerk of the above court. Service of the Brief will be accomplished by email as well as electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

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Within five days of acceptance by the Court, the undersigned states that 13 paper copies of the Brief bearing the court's file-stamp will be sent to the above court.

/s/ Stuart P. Krauskopf  
 Stuart P. Krauskopf

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Stuart P. Krauskopf  
 Stuart P. Krauskopf