No. 125733

In the

Supreme Court of Illinois

INDECK ENERGY SERVICES, INC.,

Plaintiff-Appellee,

v.

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

Defendants-Appellants.

On Appeal from the Appellate Court of Illinois,
Second Judicial District, No. 2-19-0043.
There Heard on Appeal from the Circuit Court of the Nineteenth Judicial Circuit,
Lake County, Illinois, No. 14 CH 602.
The Honorable **Margaret A. Marcouiller**, Judge Presiding.

BRIEF AND APPENDIX OF APPELLANTS

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ORAL ARGUMENT REQUESTED

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POINTS AND AUTHORITIES

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[1]

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

[1] 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.[2] (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

[2] 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 MISSAPLIED *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.[3]

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

[3] 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.[4] *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

[4] 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

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

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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.

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.[1] 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

[1] Halyard Energy Wharton, LLC, was dismissed as a party and does not participate in this appeal.

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.

¶ 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

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.

¶ 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),[2] 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

[2] "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).

¶ 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

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

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"[3] 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

[3] 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.

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

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),

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.

¶ 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

¶ 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

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

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

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)

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

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)

¶ 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.

¶ 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.

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

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

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

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.

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

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

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.[4]

¶ 72 B. Count IV—Breach of Fiduciary Duty

[4] 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.

¶ 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

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.[5] 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

[5] Indeck disclaimed damages.

"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

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

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

¶ 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.

¶ 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).

STATE OF ILLINOIS)
) SS.
COUNTY OF L A K E)

IN THE CIRCUIT COURT OF THE 19TH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS

INDECK ENERGY SERVICES, INC.,

Plaintiffs,

v. NC. 14 CH 602

CHRISTOPHER M. DePODESTA, KARL G. DAHLSTROM, HALYARD ENERGY VENTURES, LLC AND HALYARD ENERGY WHARTON, LLC,

Defendants.

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

APPEARANCES:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

turbines off the market for 30 to 60 days.

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

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.

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

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

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

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

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

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

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

The Court will also address the matter of punitive damages.

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

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

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

FILED
MAR 21 2017
Erin Cartwright Weinstein
CIRCUIT CLERK

Indeck Energy Services, Inc.
vs.
DePodesta, et al.

Case No. 14 CH 602

ORDER

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 states on Plaintiff's motion to Compel Rule 214 affidavit, counsel for the parties being present, and the Court being fully informed in the premises,

IT IS HEREBY ORDERED THAT:

1. Defendants' motion for Directed Findings 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 21st 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
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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.
DePodesta, et al.

Case No. 14 CH 602

ORDER

The Court hereby sets and confirms 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 21st day of March, 2017.

Prepared by:
Attorney's Name: Sarah J. Isaacson
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Fax: 708-843-0618
ARDC: 6273833

A023

171-94 (Rev. 10/11)

C 3980 V2

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

IN THE CIRCUIT COURT OF THE 19th JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS

INDECK ENERGY SERVICES, INC.
Plaintiff,
V.
CHRISTOPHER M. DePODESTA, KARL G. DAHLSTROM, HALYARD ENERGY VENTURES, LLC, and HALYARD ENERGY WHARTON, LLC
Defendants.
14 CH 602

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

APPEARANCES:

MR. STEVEN J. ROEDER and
MR. THOMAS GIPSON,
Roeder Law Offices, LLC
appeared on behalf of the Plaintiffs;

MR. STUART P. KRAUSKOPF and MS. JAIMIE RITCHIE,
Krauskopf Kauffman, P.C.
appeared on behalf of the Defendants.

Reported By:

Marie Crissie-Shaykin, CSR
Lake County Official Court Reporter

(WHEREUPON, proceedings were had not herein transcribed.)

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

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

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

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

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

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

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

Additionally, at the time of the directed finding the Court recognized that the evidence showed that any opportunity, any corporate opportunity that was called "funding opportunity" throughout the direct, and the Court found that any funding opportunity that was available to Indeck in 2013 was still available to Indeck at the time that the Court granted the motion for directed finding. Now, Plaintiff never challenged the Court's finding that opportunity was still available to Indeck at the time of the directed finding. Essentially, what the Court found was that the Defendants didn't take any opportunity from Indeck because the opportunity was still there to be had.

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

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

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

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

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

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

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

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

MS. RITCHIE: Of course.

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

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

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

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

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

FILED
JUL 17 2018
Erin Cartwright Weinstein
CIRCUIT CLERK

Indeck
vs.
DeRoderla, et al.

Case No. 14 CH 602

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 Count 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 exam as Lined 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 Re Petition for and Motions to Strike (not yet filed) July 25, 2018 at 9:00 a.m. in Room C-406;
6. Plaintiff's Motion to Reconsider Count V is denied for the reasons stated on the record.

ENTER:

JUDGE

Dated this 17th day of July, 2018.

Prepared by:
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REPORT OF PROCEEDINGS

NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

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

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