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.

APPELLANTS' REPLY BRIEF AND RESPONSE TO REQUEST FOR CROSS-RELIEF

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ORAL ARGUMENT REQUESTED

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INTRODUCTION

Mr. DePodesta and Mr. Dahlstrom[1] are not liable for usurping a corporate opportunity because they did not take anything from Indeck, as the trial court ruled. The appellate court, in reversing, erred in its application of *Kerrigan v. Unity Savings Assoc.* by interpreting this Court's ruling far too narrowly. 58 Ill.2d 20 (1974). Because Indeck has not disputed the fact that it could have developed – and still can develop – power generation projects with Merced in the ERCOT region of Texas, there has been no usurpation. Indeck fails to cite any Illinois law in support of the proposition that there need not be a usurpation before finding liability in a corporate usurpation case. The trial court correctly found that Indeck failed to prove that any opportunity was actually taken from it.

Kerrigan does not excuse a plaintiff from proving that an actual corporate opportunity exists and from proving that the opportunity was actually taken in order to recover damages under that doctrine. Indeck and the appellate court failed to recognize that all fiduciary duty cases are *not* also corporate opportunity doctrine cases. Indeck blurs the line between fiduciary duty law and the corporate opportunity doctrine. The trial court found that Mr. DePodesta and Mr. Dahlstrom breached certain fiduciary duties and entered judgment against them. The trial court correctly engaged in a factual analysis of Indeck's separate corporate opportunity claim and entered a directed finding against Indeck.

Every employee owes a duty of loyalty to their employer. But, to prove usurpation of a corporate opportunity, the employer must show more than just disloyalty. Indeck proved that certain of Mr. DePodesta's and Mr. Dahlstrom's pre-resignation activities breached their duties of loyalty. But Indeck did not prove that they usurped an opportunity.

[1] Defendants incorporate and utilize the same defined terms in this joint reply as they used in their opening brief.

For the reasons raised in Defendants' opening brief and those explained below, this Court should affirm the trial court's directed finding in Defendants' favor on the corporate opportunity doctrine.[2]

ARGUMENT

I WHETHER AN EMPLOYEE DISCLOSED AND TENDERED AN OPPORTUNITY IS NOT THE BEGINNING AND END OF THE CORPORATE USURPATION ANALYSIS

A. The trial court followed controlling precedent in finding that no corporate opportunity was taken

Under *Kerrigan* and its progeny, it is not sufficient for a plaintiff merely to prove that the defendant failed to disclose and to tender an opportunity. 58 Ill. 2d at 20. The appellate court erred in adopting Indeck's limited interpretation, disregarding the additional required elements (1) that a definable opportunity (2) actually must be taken. In *Kerrigan*, this Court was presented with a set of facts where a defined opportunity was actually taken. 58 Ill. 2d at 20. Naturally, therefore, there was no need to address these issues. Simply stated, a plaintiff in a corporate usurpation case must prove that the alleged opportunity (1) is concrete and identifiable, and (2) is not equally available to both parties. Indeck failed to prove either element. In addition, since *Kerrigan*, Illinois courts consistently analyze the fiduciary's level of authority and control over the company's

[2] The vast majority of Indeck's Statement of Facts go far beyond what is needed to decide the relevant issues, such as those detailing Mr. DePodesta and Mr. Dahlstrom's pre-resignation activities. (AE Br. at 1-18) Indeck did not appeal the ruling on its breach of fiduciary duty count (Count IV). Rather than refute Indeck's mischaracterizations and misstatements of the facts, Defendants simply note that, by focusing on this extraneous information, Indeck seeks to distract this Court from the deficiencies in Indeck's arguments on the issues that this appeal actually addresses.

meaningful business decisions. Indeck likewise failed to prove that either Mr. DePodesta or Mr. Dahlstrom had any authority and control.

It is not true, as Indeck argues, that appellate courts uniformly hold that failing to disclose and tender a corporate opportunity is the beginning and end of the liability analysis. (AE Br. at 31-33)[3] Each of Indeck's cited cases involves a fiduciary who usurped a concrete and identifiable opportunity, which was available to one party or the other, but not both. These cases include:

- *Patient Care Services, S.C. v. Segal,* 32 Ill. App. 3d 1021 (1st Dist. 1975). Defendant was the President of the company, one of two shareholders, and shared in 50% of the profits. *Id.* at 1024. Defendant usurped the opportunity to provide medical services to the hospital. *Id.* at 1030. Defendant's contract to provide medical services foreclosed plaintiff from also providing medical services to a hospital. *Id.* at 1027.
- *Lindenhurst Drugs, Inc. v. Becker,* 154 Ill. App. 3d 61 (2d Dist. 1987). Defendant was an officer and director who received 15% of the store profits, was in charge of general store operations, including hiring and firing employees, purchasing for the store, running sales and negotiating with vendors. *Id.* at 63. He usurped an opportunity to purchase a store franchise, foreclosing plaintiff from purchasing it. *Id.* at 68.

[3] This Joint Reply brief refers to Defendants' opening brief as "AT Br. at __," Defendants' appendix as "A __," Indeck's response brief as "AE Br. at __," the Illinois Chamber of Commerce's amicus brief as "ICC Br. at ___," Indeck's appellate court brief as "IES App. Br. at __," Indeck's appellate court reply brief as "IES Reply Br. at __," and Defendants' appellate court brief as "HEV App Br. at ___."

- *Levy v. Markal Sales Corp.*, 268 Ill. App. 3d 355 (1st Dist. 1994). Two defendants were corporate officers and directors of the company, each owning 40% and 20% of the company stock, respectively. *Id.* at 358. They usurped an opportunity to represent Apple computer in the Midwest. Defendants' representation of Apple foreclosed the plaintiff from doing so. *Id.* at 359-360.
- *Anest v. Audino*, 332 Ill. App. 3d 468 (2d Dist. 2002). Counter defendant (Anest) held a 12½% membership interest in the company, was a creditor of the company, and had management responsibilities in the company. *Id.* at 477. He usurped an exclusive distributorship opportunity in the United States and Canada, foreclosing plaintiff from distributing there. *Id.* at 473.[4]
- *Advantage Marketing Group, Inc. v. Keane*, 2019 IL App (1st) 181126. Defendant formerly served as director, officer, and employee. *Id.* at ¶ 3. He was an original founder of the company and maintained a 35% shareholding stake in the company. *Id.* Prior to his resignation, he was a principal employee with responsibilities equivalent to those of an officer. *Id.* Plaintiff adequately plead that he allegedly usurped an opportunity to purchase a competing business, foreclosing it from doing so. *Id.* at ¶ 42.

[4] Notably, the trial court in *Anest* granted counter defendant's motion for directed finding because, among other reasons, he did not have control over the daily operations of the company or otherwise have management-like responsibilities. 332 Ill. App. 3d at 474. As argued below, defendant's level of authority and control also factors into the liability analysis. The appellate court disagreed and held that he had management responsibilities akin to that of an officer or director in a corporation. *Id.* at 477.

Far from ignoring the *Kerrigan* holding, the trial court's ruling is consistent with *Kerrigan* and its progeny. (AE Br. at 37) The trial court did not need to point to corporate usurpation jurisprudence because it found, based on the facts adduced at trial, that nothing was taken from Indeck. (A38-39; A45-47) Indeck cites no law to suggest that the trial court was required to detail its analysis of the corporate opportunity doctrine before applying the facts to the law. Likewise, Indeck cites no case for the proposition that a trial court does not follow the law if it does not specifically cite to all aspects of the law. For the same reason Indeck's *stare decisis* argument fails – the trial court did not cite the law on "disclosure, tender and consent" because, having found that nothing was taken, this analysis was unnecessary. (AE Br. at 36-37) The appellate court erroneously disregarded the trial court's factual findings and failed to give any deference to the trial court's ruling. (AT Br. 23-25) This Court should reverse the appellate court and affirm the trial court.

B. Regardless of Indeck's shifting definition of the Funding Opportunity, Indeck has not been deprived of it because it was always available

The appellate court agreed with Defendants that Illinois corporate opportunity doctrine cases typically involve an opportunity that is available to one party or the other, but not both. (A26 at ¶ 70; AT Br. at 16-17) However, the converse is also true – if an opportunity is available to both parties, then there has been no usurpation. In *Kerrigan*, the opportunity was *actually taken*, thus, there was no need for this Court to engage in that analysis. (AT Br. at 17)

Before this Court, Indeck now attempts to change the definition of the Funding Opportunity. In its Proposed Findings of Fact in the trial court, Indeck defined the Funding Opportunity as "the opportunity to develop projects in the ERCOT region of Texas with affiliates of Merced." (R C6816 at ¶ 122; R 8408) The trial court utilized this same

definition when it found "no evidence that *** Indeck made any attempt to partner with Merced after Defendants resigned from Indeck. It appears that [Indeck] may have assumed that there was only one partnership opportunity with Merced, but Plaintiff presented no evidence of that in its case in chief." (A38-39; A45-47) Similarly, the appellate court defined the Funding Opportunity as the potential to develop projects (or to partner) with Merced and its affiliates in the ERCOT region of Texas. (A6 at ¶ 18; A24 at ¶ 65) Indeck did not dispute or seek to further refine this definition before either the trial court or the appellate court.

Indeck never disputed that, at any time, it too could seek a partnership, funding or any other business arrangement that made sense to Indeck and to Merced. Instead, Indeck argued to the trial court that Defendants offered no evidence to prove that the Funding Opportunity was equally available to it. (R. C4497) Before the appellate court, Indeck argued that the trial court never actually made a factual finding in support of its ruling (IES App. Br. at 33-34; AE Br. at 38) and, alternatively, that the evidence did not prove that the Funding Opportunity was still available. (IES App. Br. at 33) To be clear, Indeck's alternative argument did not dispute that the opportunity to develop projects with Merced was always available to it; rather, Indeck disputed that the lack of exclusivity in the MHV Operating Agreement supported the trial court's finding of fact. (IES App. Br. at 34)

Indeck now nonsensically argues that, "since no finding was made when the motion was granted, there was no finding for Indeck to challenge on reconsideration." (AE Br. at

38)[5] This argument lacks merit and the trial court rejected it in denying Indeck's Motion to Reconsider. (A45) As the trial court reiterated,

> "What the Court found was that the Defendants didn't take any opportunity from Indeck because the opportunity was still there to be had. ******* At the core of the Court's ruling was that 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." *Id.* at A45-46.

Indeck could have challenged this finding, but it did not, and can no longer do so on this appeal.

Unsurprisingly, for the first time before any court, Indeck now argues that the Funding Opportunity was not equally available to it. (AE Br. at 27, 35-36) Before the lower courts, Indeck never directly responded to Defendants' argument. Instead, Indeck only disputed the *sufficiency* and *quality* of the evidence, not the *truth* of the evidence. Because Indeck raises an argument based on the truth of the evidence for the first time before this Court, the argument is waived. *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 412-13 (2002).

Even if this new argument is not waived, it can be easily rejected. Indeck now argues that "an additional, *equivalent* opportunity" is not equally available to Indeck. (AE Br. at 39) (Emphasis added.) In support of this new argument, Indeck offers a new definition of the Funding Opportunity. According to Indeck, the Funding Opportunity is

[5] Indeck also argues that Defendants admitted that there is no evidence in this case that there was ever a funding opportunity available to Indeck. (AE Br. at 39) To the contrary, before the trial court, Defendants alternatively argued that the Funding Opportunity was simply a job, not something that they took from Indeck (R. C10434-36), and that the Funding Opportunity was equally available to Indeck. (R. C10436-37) Defendants consistently argued, and the trial court found, that Indeck never disputed the evidence that the Funding Opportunity was available to Indeck in 2013 and remained available through the directed finding ruling in 2017. (A45-46)

now "the opportunity to develop projects with Merced and its affiliates *in 2013 when DePodesta and Dahlstrom were Indeck employees and Indeck's business development group was intact*." (AE Br. at 27, 35-36) (Emphasis added.) This definition was never proffered before the trial court or the appellate court and now is not the time for new theories.[6] This argument is, therefore, waived. *Robinson,* 201 Ill. 2d at 412-13. Regardless of how Indeck frames the Funding Opportunity, an "equivalent opportunity" to develop or partner with Merced has always been available to it.[7]

Indeck was not foreclosed from the opportunity, as it argues. (AE Br. 35-36) Essentially, Indeck's argument is that Mr. DePodesta and Mr. Dahlstrom ran off with Merced's funding and foreclosed it from working with Merced in the future. But, Indeck never investigated whether working with Merced was still available to it before they filed this lawsuit. (R. 2013-15) If this Court accepts Indeck's argument, then the law would recognize Indeck's corporate usurpation action without it ever exploring whether anything was actually taken. Illinois law does not intend such a result.

C. The Funding Opportunity is not a concrete, identifiable opportunity necessary to qualify as an actionable corporate opportunity

In its response, Indeck finally concedes that there must be an "actual corporate opportunity." (AE Br. at 33, 47) Indeck argues that *Cooper Linse Hallman Capital Mgmt. v. Hallman* is distinguishable because it does not involve "an actual corporate opportunity." (AE Br. at 47) 368 Ill. App. 3d 353 (1st Dist. 2006). Yet, on the other hand, Indeck argues

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[6] At trial, Indeck's President, Larry Lagowski attempted to frame what the Funding Opportunity meant; namely, an introduction to meet with Merced. (R. 1794) He never offered the definition that Indeck now proffers.

[7] As argued herein, this very lack of specificity around the alleged opportunity throughout these proceedings is another reason why Indeck did not present evidence to support the imposition of the corporate opportunity doctrine in this case.

that there is no requirement that it must prove that an actual corporate opportunity exists. (AE Br. 43-44) This internal inconsistency exposes an obvious weakness in Indeck's logic.

Indeck does not meaningfully distinguish *Cooper Linse*. Indeck contends that *Cooper Linse,* does not involve an "actual corporate opportunity" as that term is defined under controlling case law or the alleged "new" definition that Defendants would impose. (AE Br. at 47) Indeck stumbles over itself trying to prove that *Cooper Linse* did not involve a claim under the corporate usurpation doctrine. It is undeniable, however, that the *Cooper Linse* court concluded that the plaintiff's corporate opportunity claim failed because it was equally available to it after the defendants resigned. 359 Ill. App. 3d at 359. In its struggle to align the instant case with the ruling in *Cooper Linse,* Indeck now offers its own crafted definition of a "corporate opportunity" as: one that is something new and would occur in the future. (AE Br. at 48) Once again, this definition has never been proffered by Indeck before any court and is therefore waived. *Robinson,* 201 Ill. 2d at 412-413. And, to be clear, Indeck disputes that it must prove the existence of a concrete definable opportunity because it is not specifically enunciated in case law; yet, it now offers its own new requirement that is not found in any Illinois case.

Indeck suggests, without support, that the *Cooper Linse* ruling makes sense because defendants had no restrictive covenants so plaintiff "attempted to fashion a corporate opportunity claim that did not exist." (AE Br. at 48) The reported opinion contains no information about the plaintiff's motivation in pursuing its usurpation claim. In any event, it does not matter to a corporate usurpation analysis whether the defendant has a non-compete or confidentiality agreement with the plaintiff.

At trial, Indeck failed to present evidence of anything more than a vague concept of the Funding Opportunity. Its President, Mr. Lagowski, only testified that Indeck was deprived of an introduction to "meet with these guys [Merced]." (R. 1794) He offered no testimony about how Indeck would work with Merced or what a partnership between Indeck and Merced would look like. The "potential to develop projects with Merced and its affiliates in Texas" is neither concrete nor identifiable. Illinois corporate opportunity cases involve concrete, identifiable opportunities. (AT Br. at 21-22) There are no Illinois cases that find liability for usurping a vague, undefined corporate opportunity of the type Indeck offered at trial. *Id.*

Indeck's argument that the "possibility" or "intention" that a fiduciary may exploit an opportunity triggers disclosure and tender obligations does not relieve Indeck of proving that an actual opportunity exists. (AE Br. at 44) Indeck's suggestion that Illinois courts have held that a corporate opportunity need only be a "proposed activity" does not mean that this proposed activity can be an undefined, vague idea. (AE Br. at 44) *Kerrigan* and *Mullaney Wells & Co. v. Savage* do not relieve the plaintiff from defining the proposed activity. 78 Ill. 2d 534 (1980). *Lindenhurst* does not say this either. 154 Ill. App. 3d at 61. In fact, in *Lindenhurst*, the court detailed the exact opportunity that was taken, a Ben Franklin store franchise, which plaintiff was precluded from pursuing after the defendant took it. *Id.* at 69-70.

The same is true in *Advantage Marketing.* 2019 IL App (1st) 181126. In that case, the appellate court found that the plaintiff plead a sufficient action for breach of fiduciary duty where the defendant officer purchased a competitor's business without first telling the company that the business was for sale. 2019 IL App (1st) 181126, ¶¶ 10-11. The proposed

activities in *Lindenhurst* and *Advantage Marketing* were defined opportunities, which, after having been taken, foreclosed the plaintiffs from obtaining them. These well-defined opportunities are a far cry from the vague Funding Opportunity here. A plaintiff must prove that a concrete, identifiable opportunity exists as an essential element of the corporate opportunity doctrine in Illinois.

Even after the briefing before the trial court, the appellate court, and now before this Court, Indeck still cannot identify the opportunity on which its usurpation claim is founded. Indeck includes a timeline of events around Defendants' execution of the MHV Operating Agreement and MHV Management Agreement, but it never squares those events with its President's vague testimony. (AE Br. at 45-47) For clarity, Indeck relied solely on its President, Mr. Lagowski, at trial to describe its alleged Funding Opportunity. Instead of focusing on what the opportunity entailed, and how Merced or its affiliates would develop projects or partner with it, Indeck focuses on Mr. DePodesta and Mr. Dahlstrom's actions, which were a part of Indeck's breach of fiduciary duty claim. (AT Br. at 7) Mr. Lagowski testified that Indeck was deprived of an introduction "to meet with these guys." (R. 1794) There has been no decision of this Court (including *Kerrigan*) or any lower court where the corporate opportunity doctrine was applied to something as vague as an introduction. The Funding Opportunity was always defined as the opportunity or potential to develop projects with Merced and its affiliates in the ERCOT region of Texas. (R. C6818 ¶ 121-22; R 8408; A24 at ¶ 65) This Court should reject Indeck's belated attempt to redefine a term that has never been previously in dispute. (AE Br. at 45-47)

D. The appellate court and Indeck confuse the different elements of proof required in a claim for breach of fiduciary duty versus a claim for usurpation of a corporate opportunity

The appellate court's decision and Indeck inappropriately conflate Indeck's breach of fiduciary duty claim with its corporate usurpation claim. According to Indeck, "when it is the defendants who breached its duties, it is inappropriate and unfair to prove or disprove whether opportunities other than 'that opportunity' which *Kerrigan* foreclosed them from exploiting, exist and were available in some form." (AE Br. at 39) But, when a plaintiff sues a former employee for usurping a corporate opportunity, it is inappropriate and unfair to the defendant if the plaintiff is not required to prove that it was foreclosed from pursuing the opportunity it claims was taken from it. Indeck believes that the trial court required a "new rule" and allowed disloyal fiduciaries to breach their duties without consequence. (AE Br. at 39-40) The trial court, however, entered a judgment against Mr. DePodesta and Mr. Dahlstrom on Count IV, where Indeck pursued its breach of fiduciary duty claim. (R. 8464) By its very title, "Usurpation of a Corporate Opportunity," Indeck's separate Count V required that Mr. DePodesta and Mr. Dahlstrom usurped or took something. (R. C634) And, that was not done and never proven here.

Cooper Linse is also instructive because the court in that case recognized the difference between a claim for breach of fiduciary duty and a claim for corporate usurpation. In *Cooper Linse*, the court recognized that there are different standards to analyze when considering these two separate causes of action, as did the trial court in this case. 368 Ill. App. 3d at 357.

Indeck demonstrates its lack of understanding of this difference when it discusses how the defendants in *Cooper Linse* did not engage in "monkey business." 359 Ill. App.

3d at 362. (AE Br. at 49) Indeck argues that the defendants in *Cooper Linse* did not participate in the same type of activities as Mr. DePodesta and Mr. Dahlstrom. (AE Br. at 49) These activities highlighted by Indeck relate to its claim for breach of fiduciary duty. Indeck's claim that defendants usurped a corporate opportunity requires a separate analysis, which the appellate court did not do in this case.

E. The corporate opportunity doctrine does not apply to an employee or officer with no authority or control over the employer's meaningful business decisions

As set forth in Defendants' opening brief, this Court should reaffirm that the corporate opportunity doctrine applies to fiduciaries with authority and control who are subject to heightened fiduciary duties. (AT Br. at 25) The corporate opportunity doctrine should 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 the employer's meaningful business decisions. (AT Br. at 25-30)

1. Courts routinely engage in a factual, case-by-case, analysis to determine whether a fiduciary is held to a heightened fiduciary duty

In six years of litigation and appeals, Indeck has never acknowledged the existence of a heightened fiduciary duty. As much as Indeck and its amicus attempt to characterize heightened fiduciary duties as a novel concept invented by Defendants, Illinois courts have long recognized that corporate officers stand on different footing than other employees. Officers owe a heightened fiduciary duty of loyalty to their corporate employer not to (1) actively exploit their positions within the corporation for their own benefit, or (2) hinder the ability of a corporation to continue the business for which it was developed. *Veco Corp. v. Babcock*, 243 Ill. App. 3d 153, 160-61 (1st Dist. 1993); *E.J. McKernan v. Gregory*, 252 Ill. App. 3d 514, 529-30 (2d Dist. 1993). The *E.J. McKernan* court noted the difference

between a general employee's duty of loyalty, which allows the employee to plan and outfit a competing corporation, but not begin operations, from that of a corporate officer, who may not hinder the corporation's business. 252 Ill. App. 3d at 259-30. Even cases that purport to base a fiduciary relationship on standard agency principles recognize that there are varying degrees of the duty of loyalty. (AT Br. at 26-29) Despite this well-settled law, Indeck and its amicus argue that Defendants' framework is "variable, unworkable *** [and] would require a case-by-case analysis whether each employee had substantial authority and control over significant business decisions." (AE Br. at 53) See also ICC Br. at 10-12 (arguing that Defendants' "proposed rule" is too open-ended and unclear). Defendants agree that requiring an analysis of authority and control before applying the corporate usurpation doctrine requires a case-by-case analysis of the specific facts at hand. The instant case provides an opportunity for this Court to make clear that the same "authority and control" analysis required in any other breach of fiduciary duty context should also be required as a predicate to whether the corporate usurpation doctrine applies. The analysis is no more complex, unworkable, open-ended or unclear than the analysis applied in every other breach of fiduciary duty context.

Indeck's citation to *Advantage Marketing* misleads this Court by omitting the key words in the quoted phrase. 2019 IL App (1st) 181126. (AE Br. at 53) In that case, the First District held that the plaintiff plead that the defendant, "both as a mere 'employee' *and more importantly, in his duties similar to that of an officer or director*, owed a fiduciary duty to AMG." *Id.* at ¶33 (Emphasis added.) Indeck conveniently omitted the italicized language because it does not fit its narrative.

In every Illinois case, regardless of whether the individual is an employee, officer or director, a fiduciary held liable for usurping a corporate opportunity had authority and control over the business decisions of the employer. Although Indeck quibbles with the level of authority and control in its cited cases, the defendants in each of those cases were not mere employees. Similarly, in the cases cited by its amicus, the fiduciaries were agents with authority and control over the company and its business decisions.[8]

Indeck is also incorrect that *Lawlor* reaffirmed the basis for imposing corporate opportunity liability on an employee. 2012 IL 112530. (AE Br. at 52) *Lawlor* reaffirms that employees, as well as officers and directors, owe a duty of loyalty to their employer. 2012 IL 112530 ¶ 69. But, since it is not a corporate opportunity doctrine case, it does not stand for the proposition that an ordinary duty of loyalty is enough to impose corporate opportunity liability on that fiduciary.

There has never been a dispute, as the appellate court recognized, that Mr. DePodesta had no authority to make decisions for Indeck. (AT Br. at 3-5 and n.2; A4 at ¶ 11) And, Indeck made no allegation that Mr. Dahlstrom had authority to make decisions for Indeck, whatsoever. This Court should expressly require what other Illinois courts already recognize – that the corporate opportunity doctrine only applies to those fiduciaries

[8] Like Indeck's cited cases, the fiduciaries in the cases amicus cites involve agents with authority and control over the company and its business decisions. See, *e.g.*, *Foodcom Int'l v. Barry,* 328 F. 3d 300, 304 (7th Cir. 2003) (fiduciaries were two of the highest paid employees, compensated based on the company's net profits, had exclusive charge over all of the purchasing of a line of business, and had significant autonomy and discretion) and *Regal-Beloit Corp. v. Drecoll,* 955 F. Supp. 849 (N.D. Ill. 1996) (One fiduciary had total profit and loss responsibility for a division of the company, set strategy for another division, was highest paid vice president and fifth highest paid employee of the company. *Id.* at 852; other fiduciaries had positions of authority and also conspired with officer fiduciary. *Id.* at 858).

(employee, officer, or director) with a heightened fiduciary duty based on control over the company's management and business making decisions.

2. Mr. DePodesta and Mr. Dahlstrom owed fiduciary duties, but not heightened fiduciary duties, to Indeck

Although Illinois courts have analyzed the nature of the authority of the defendant in corporate usurpation cases, Indeck believes that once a title is given to the employee that automatically confers authority and control. (AE Br. at 55) Indeck does not distinguish the case law cited by Defendants in their opening brief, nor does it explain why courts engage in the exercise of determining the level of defendant's authority and control in usurpation cases. (AT Br. at 29)[9]

3. While the prophylactic purpose of fiduciary duty law should serve as a deterrent to those with heightened duties, it does not mean that corporate usurpation cases apply to employees without heightened duties

There is no need to unnecessarily expand the corporate opportunity doctrine to those without authority and control when there are adequate remedies available under general fiduciary duty law. Indeck's continued reliance on the language in *Kerrigan,* that the prophylactic purpose of fiduciary law forecloses directors from exploiting an opportunity on their own behalf, is misplaced. 58 Ill. 2d at 28. (AE Br. at 28-29, 40-43, 56, 58-59, 70, 72-74) In its repeated use of this language, Indeck fails to acknowledge that there are other remedies available to employers where an agent, without heightened duties, breaches their duty of loyalty.

[9] Indeck also incorrectly claims that two of the cases are unpublished. All of the cases cited by Defendants are published opinions. Specifically, the three district court cases cited at AT Br. at 29 are available on Lexis, and have not been designated "unpublished," "not for publication," "non-precedential," "not precedent," or anything of the like.

There are clear rules that impose liability when a fiduciary violates the duty of loyalty. (AE Br. at 56)[10] The corporate opportunity doctrine is a subset of general fiduciary duty law. It should be (and already is) more narrowly applied to those with authority and control; it was never meant to impose liability when a fiduciary violates the duty of loyalty, in general.

4. Indeck should be foreclosed from arguing that either Mr. DePodesta or Mr. Dahlstrom owed it heightened fiduciary duties

Indeck is foreclosed from arguing that a heightened duty applies to either Mr. DePodesta or Mr. Dahlstrom. *Robinson,* 201 Ill. 2d at 412-413. Indeck spent six years in this case denying the very existence of a heightened fiduciary duty. Instead, it consistently argued that both Mr. DePodesta and Mr. Dahlstrom should be held liable for usurping the Funding Opportunity under an ordinary duty of loyalty applicable to all employees.

A careful review of the proceedings below reveals that Indeck never alleged or argued that either Mr. DePodesta or Mr. Dahlstrom owed Indeck heightened fiduciary duties. (See, *e.g.*, R. C10420-10425; R. C4475-77; IES Reply Br. at 10-11) Indeed, at every turn, it argued against the concept of varying degrees of the duty of loyalty; arguing only that employees and officers owe the *same* degree of the duty of loyalty. Indeck was given ample opportunity to allege or to argue in the alternative, but it chose to wait until its response before this Court to even acknowledge a heightened fiduciary duty and to argue that either Mr. DePodesta or Mr. Dahlstrom exercised *any* level of authority and control. Now, for the first time, Indeck argues that Mr. DePodesta and Mr. Dahlstrom exercised

[10] Indeck cites *Blackman Kallick Bartelstein v. Sorkin* in support of its argument. 214 Ill. App. 3d 663 (1st Dist. 1991) (AE Br. at 56-57) The plaintiff in *Blackman Kallick,* however, conceded that it was not a corporate opportunity case. *Id.* at 673.

substantial authority and control. (AE Br. at 57-59) Any argument that either Defendant exercised substantial authority and control by which to apply a heightened fiduciary duty, is therefore, waived. *Robinson,* 201 Ill. 2d at 412-413.

Even if Indeck is allowed to raise this new argument before this tribunal, the facts demonstrate that Mr. DePodesta and Mr. Dahlstrom had no authority and control over Indeck's business decisions. *Cooper Linse*, 368 Ill. App. 3d at 3570. The standard is whether the employee has authority and control over business decisions, not "business opportunities." (AE Br. at 57) *Cooper Linse*, 368 Ill. App. 3d at 357. Indeck's reframing of the standard is not the law in Illinois and is a distinction with a meaningful difference. Indeck argues that Mr. DePodesta and Mr. Dahlstrom are quintessential gatekeepers because their job was to find new opportunities. (AE Br. at 58) That is not the analysis either under Illinois law or the commentary cited by Indeck. *Id.* The "gatekeeper" role described by the legal commentator is one with the power to make business decisions. Eric Tally, *Turning Service Opportunities to Gold: A Strategic Analysis of the Corporate Opportunities Doctrine*, 108 Yale L.J. 277, 286 (Nov. 1998) (AT Br. at 25) A gatekeeper is more than a rank-and-file employee (Mr. Dahlstrom) or mid-level management (Mr. DePodesta). As proven at trial, and expressly acknowledged by the appellate court, Mr. Lagowski expressly limited Mr. DePodesta's authority. (AT Br. at 25; A4-5 at ¶¶ 11, 14) Only Mr. Lagowski and Mr. Forsythe qualify as decision makers at Indeck. (AT Br. at 25)

F. The appellate court applied the wrong standard of review to the trial court's factual finding regarding the Funding Opportunity

The appellate court gave no weight to the trial court's factual finding that the Funding Opportunity was not taken, applying the wrong standard of review. The appellate court should have applied the manifest weight of the evidence standard. In its ruling, the

appellate court failed to recognize that Indeck never challenged the sufficiency of this evidence at the trial level. With no evidence that Indeck was foreclosed from pursuing an opportunity with Merced, the trial court's directed finding should have easily been affirmed.

Indeck's reliance on *People v. Dominguez*, 366 Ill. App. 3d 468, 373 (2d Dist. 2006) and *Shibata v. Naperville*, 1 Ill. App. 3d 402, 406 (2d Dist. 1971) is misplaced because these cases affirmed, not reversed, the trial court. (AE Br. at 60) While a reviewing court may *affirm* on any basis in the record, the converse is not true; a reviewing court may not *reverse* on any grounds found in the record. *People ex rel. Dep't of Human Rights v. Oakridge Healthcare Ctr. LLC*, 2020 IL 124753, ¶36. As Defendants argued in their opening brief, the appellate court should have applied a manifest weight of the evidence standard and afforded the trial court the deference it was due. (AT Br. at 24) This Court can remedy that error by applying the proper standard and reversing and vacating the appellate court on the ground that the trial court's conclusion that the Defendants did not deprive Indeck of a corporate opportunity was not against the manifest weight of the evidence.

Defendants have not waived this argument. (AE Br. at 59) Illinois Supreme Court Rule 341(h)(7) says that "points not argued" are waived, but Defendants properly raised the point that the appellate court employed the wrong standard and asked this Court to, "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." (AT Br. At 25) Defendants specifically sought review and reversal of the appellate court's failure to apply the proper standard of review.

G. Alternatively, if this Court affirms the appellate court, then, contrary to Indeck's baseless arguments, the Court should also affirm the appellate court's remand of the case for further proceedings

Indeck wants to deprive Defendants of the right to defend Indeck's corporate usurpation claim in the unlikely event that this Court affirms the appellate court. Indeck argues that, because this Court in *Kerrigan* remanded the case with direction to enter judgment in plaintiff's favor, it should do the same in this case. (AE Br. at 30-31) In *Kerrigan,* however, this Court remanded without requiring a trial on liability because liability was established on the basis of the pleadings. 58 Ill. 2d at 32. The same is not true here. Indeck incorrectly believes that *Kerrigan* is a strict liability case, which deprives Defendants from putting on a defense.

Indeck falsely claims that, based on *Kerrigan,* the appellate court here held that Defendants "exploited this opportunity and thus are liable to Indeck for the benefits they obtained." (AE Br. at 41) The appellate court made no such holding. Instead, the appellate court ruled that Defendants must be afforded the opportunity to present a defense on issues such as proximate cause and damages. (A27 at ¶ 71) The appellate court reversed the trial court's directed finding and remanded for further proceedings to proceed "as if the motion had been denied or waived." *Id.*

Indeck makes the unsubstantiated and unproven argument that Defendants "both received millions in fees and other benefits from breaching their duties of loyalty." (AE Br. at 43) This is precisely the proximate cause defense that Defendants should be allowed to present if the appellate court is affirmed. Indeck did not present evidence at trial that these alleged "millions in fees and other benefits" were derived from Mr. DePodesta and Mr. Dahlstrom's alleged usurpation. Defendants should be permitted to make the same argument on the corporate opportunity doctrine claim.

If this Court affirms the appellate court (which it should not), then liability will be determined by the trial court after Mr. DePodesta and Mr. Dahlstrom present their evidence.

CONCLUSION

For each of the foregoing reasons, as well as those detailed in their opening brief, Defendants, Christopher M. DePodesta, Karl G. Dahlstrom and Halyard Energy Ventures, LLC pray that this Court reverse the Illinois Appellate Court, Second District's decision and affirm the decision of the Circuit Court of Lake County, Illinois, granting directed finding in Defendants' favor on Count V of the Amended Complaint.

RESPONSE TO INDECK'S REQUEST FOR CROSS-RELIEF

Indeck's request for cross-relief seeks (1) reversal of the trial and appellate courts' rejection of Indeck's demand for disgorgement of Mr. DePodesta and Mr. Dahlstrom's post-resignation compensation and imposition of a constructive trust, and (2) reversal of the trial and appellate courts' rulings that Indeck's Confidentiality Agreement is overbroad and unenforceable. As to Indeck's demand for disgorgement of post-resignation compensation, the appellate court was correct to affirm the trial court because Indeck failed to prove proximate cause, and Mr. DePodesta's and Mr. Dahlstrom's breaches ended with their employment at Indeck. Moreover, the appellate court's decision to affirm the trial court's denial of a constructive trust should be affirmed because the fact of profits is speculative and there is no identifiable fund traceable to Mr. DePodesta and Mr. Dahlstrom's conduct that can become the *res* of the proposed trust. Finally, the appellate court correctly declined to review whether the Confidentiality Agreement is overbroad and unenforceable because the outcome of a review would not change the trial court's finding that Indeck was not entitled to an injunction. Thus, for the reasons stated below, as well as those identified by the appellate court in rejecting those claims, this Court should deny all aspects of the request for cross-relief.

I THE TRIAL COURT'S FACTUAL RULING THAT INDECK IS NOT ENTITLED TO DISGORGEMENT OF ITS FORMER EMPLOYEES' POST-RESIGNATION COMPENSATION SHOULD BE AFFIRMED

As members of HEV, Mr. DePodesta and Mr. Dahlstrom worked exclusively on MHV's behalf for a fee of $500,000 per year, payable on a bi-weekly basis, and terminable by either party, with ninety days' notice. (R. E563-64) Analogizing these management fees to a salary, the trial court ruled, and appellate court affirmed, that Mr. DePodesta and Mr. Dahlstrom were not required to disgorge future salary earned from a subsequent

employer with whom they negotiated during a period of disloyalty. (R. 8466) Indeck cites no Illinois case to the contrary before either the trial court or the appellate court.[11]

The trial court found Mr. DePodesta and Mr. Dahlstrom liable for breaching their duty of loyalty and ordered them to disgorge their Indeck salary during the period of disloyalty (roughly eight months). (R. 8464) Mr. Dahlstrom disgorged $93,106, and Mr. DePodesta disgorged $111,868. *Id.* Within its equitable discretion, however, the trial court also found that they were not required to disgorge their MHV compensation (management fees), which they received after they left Indeck. (R. 8466) The trial court refused to require disgorgement of Defendants' MHV Compensation based on Indeck's failure to prove proximate cause, and because Mr. DePodesta and Mr. Dahlstrom's breaches ended with their employment at Indeck. (R. 8466)

A. The trial court ruled that Mr. DePodesta and Mr. Dahlstrom's *breach* of their fiduciary duties (not their fiduciary duties themselves) ended with their employment at Indeck

Indeck's request for cross-relief rests on a faulty premise – namely, that the trial court ruled that Mr. DePodesta and Mr. Dahlstrom's *fiduciary duties* ended with their employment at Indeck. (AE Br. at 61, 63-70) This premise is inaccurate because the trial court ruled that Mr. DePodesta and Mr. Dahlstrom's "*breach* of fiduciary duty ended with [their] employment at Indeck." (R. 8466) (Emphasis added.) This misstatement of the trial court's ruling is particularly egregious because Indeck correctly stated the trial court's ruling before the appellate court. (IES App. Br. at 39, 42) (******* it erred in ruling their

[11] That they are not technically "employees" of MHV is of no consequence and does not warrant reversal of the lower courts. The trial court's analogy is supported by the record and the appellate court properly affirmed the ruling denying disgorgement of Defendants' management fees.

breaches ended when they resigned.") (Emphasis added.) The trial court did not make a "legal determination that [Mr.] DePodesta's fiduciary duty as an officer of Indeck ended when he resigned." (AE Br. at 66) Nor did the trial court rule that Mr. Dahlstrom's fiduciary duty ended when he resigned without notice. (AE Br. at 67) And, Indeck did not dispute the trial court's findings of fact regarding Mr. DePodesta and Mr. Dahlstrom's breaches of fiduciary duty.

Because Indeck's cross-relief arguments do not address the lower courts' *actual* rulings, and blatantly mischaracterize what happened below, each of Indeck's arguments regarding whether and when Mr. DePodesta and Mr. Dahlstrom's *duties of loyalty* ended need not be addressed and are easily rejected. (AE Br. at 61-70)[12]

The trial court found that Mr. DePodesta and Mr. Dahlstrom's breaches of fiduciary duty ended when they resigned. (R. 8466) For example, they used Indeck's form to develop HEV's power development strategy; used Indeck's computers and phones; traveled to Minnesota to meet with Merced while "on Indeck's time" (R. 8462); negotiated a Letter of Intent, Operating Agreement, and Management Agreement while still employed at Indeck; (R. 8463); and, signed a Letter of Intent with Merced while employed with Indeck. (R. 8465) None of these breaches continued after their employment, and each of these breaches occurred in connection with their *negotiations* with Merced, not in connection with the

[12] For the first time, Indeck proffers a "continuation theory" based on collusion. (AE Br. at 68) Other than a passing reference to collusion in its Response to Defendants' Motion for Directed Finding, (R. C4487), Indeck did not plead collusion in its Complaint. (R. C634) Indeck never argued collusion at any time before the lower courts either. Thus, any theory of liability for so-called "collusion" is waived. *Robinson*, 201 Ill. 2d at 412-413. There was no collusion found by the trial court or the appellate court.

execution of the MHV Operating Agreement or the MHV Management Agreement. As the trial court stated,

> "Plaintiff argues essentially that Defendants must disgorge anything they received or receive from Merced's [sic]/HEV in perpetuity as a result of a violation of fiduciary duty that occurred when Defendants were *negotiating* with Merced in violation of their duty of loyalty to Indeck. ******* Indeck has not brought a case to the Court's attention that holds that after a breach of fiduciary duty has ended, a Plaintiff is entitled to compel a Defendant to disgorge any future salary earned from a subsequent employer *as a result of the fact that the Defendant negotiated* with the subsequent employer during a period of disloyalty." (R. 8466) (Emphasis added.)

It follows that the trial court did not find that either Mr. DePodesta or Mr. Dahlstrom breached their fiduciary duty in connection with "the Merced transaction." (AE Br. at 63-70) Notably, the term "Merced transaction" is conspicuously vague and undefined – likely designed to foment confusion. Until the cross-relief request now before this Court, Indeck never claimed that "the Merced transaction" was a breach of Mr. DePodesta and Mr. Dahlstrom's fiduciary duties in Count IV of the Complaint. (R. C66-68)

The appellate court correctly affirmed the trial court's ruling that any *breach* ended when Mr. DePodesta and Mr. Dahlstrom resigned from Indeck. (A30-31 at ¶ 80) The appellate court wrote, "the activities ******* that the court determined constituted breaches of DePodesta's and Dahlstrom's fiduciary duties to Indeck occurred *during* their employment with the company." *Id.* (Emphasis in original.) The appellate court agreed with the trial court that each of the breaches the trial court found occurred during their employment with Indeck. (A31 at ¶ 80) The appellate court rejected Indeck's attempt to bootstrap Mr. DePodesta and Mr. Dahlstrom's work for MHV into the breaches of fiduciary duty found by the trial court. (A30-31 at ¶ 80) The appellate court noted that, "although those activities related to a new enterprise, none continued after they resigned from Indeck." *Id.*

B. Indeck did not prove that Mr. DePodesta and Mr. Dahlstrom's MHV Compensation was caused by their disloyalty

It lies within the trial court's equitable discretion to determine the appropriate remedy for a breach of fiduciary duty. *Tully v. McLean,* 409 Ill. App. 3d 659, 681 (1st Dist. 2011). A trial judge's assessment of damages will not be set aside unless it is manifestly erroneous. *Levy,* 268 Ill. App. 3d at 372. Here, the trial court fashioned an appropriate remedy for Mr. DePodesta's and Mr. Dahlstrom's breaches of their duty of loyalty by disgorging their wages earned during the period of disloyalty.

The trial court rejected, as inappropriately speculative, Indeck's claim that it is entitled to every penny Mr. DePodesta and Mr. Dahlstrom received (or might someday receive) after they stopped working for Indeck. (R. 8466) Thus, the trial court's finding that Indeck failed to prove that Mr. DePodesta and Mr. Dahlstrom's post-resignation earnings from MHV were proximately caused by their disloyalty was not against the manifest weight of the evidence. The appellate court correctly affirmed the trial court. (R. 8466; A31 at ¶ 80)

To prevail on a breach of fiduciary duty claim, a plaintiff must prove proximate cause. *Martin v. Heinold Commodities,* 163 Ill. 2d 33, 53 (1994). "Disgorgement does not impose a general forfeiture: defendant's liability in restitution is not the whole of the gain from a tainted transaction, but the amount of the gain that is attributable to the underlying wrong." Restatement (third) of Restitution & Unfair Competition §51 cmt. i. A claimed benefit will be deemed "remote" if the causal connection is unduly attenuated. *Id.* at cmt. f. When a court finds the profits are "the product of legitimate contributions by the defendant that should not, in justice, be awarded to the claimant, then it may deny them as "too remote" to warrant disgorgement. *Id.* at §51(5) and cmt. f.

Rather than address its lack of proximate cause predicament, Indeck cites case law about constructive trusts as a well-recognized remedy. (AE Br. at 72) As argued below (§II), the trial court properly refused to impose a constructive trust and the appellate court correctly affirmed that ruling. Indeck's constructive trust cases do not apply to the question of the propriety of denying Indeck's request to disgorge Mr. DePodesta and Mr. Dahlstrom's post-resignation compensation.

Moreover, Indeck argues, without citation to authority, that proof of proximate cause is not its burden. (AE Br. at 72-73) Under Illinois law, proof of proximate cause is Indeck's burden. *Prodromos v. Everen Securities*, 389 Ill. App. 3d 157, 171 (1st Dist. 2009) (plaintiff's burden to prove that defendant's actions were the proximate cause of the alleged injuries even for intentional torts where fiduciaries are involved); *Martin*, 163 Ill. 2d at 53.

Simply stated, Mr. DePodesta and Mr. Dahlstrom's MHV compensation was not a "benefit" of their disloyalty. (AE Br. at 71, 73) The trial court rejected this very argument when it directed a finding in Mr. DePodesta and Mr. Dahlstrom's favor on Indeck's corporate usurpation claim. (A38-39) After hearing the evidence, the trial court fashioned an appropriate remedy by ordering them to disgorge their Indeck salaries for the period of disloyalty and the appellate court properly affirmed the trial court.

The trial court and the appellate aptly declined to disgorge future post-resignation compensation and they should be affirmed.

II WHERE DEFENDANTS' FUTURE PROFITS WERE SPECULATIVE AND MAY NEVER BE REALIZED, THE TRIAL COURT DID NOT ERR WHEN IT DECLINED TO IMPOSE A CONSTRUCTIVE TRUST

The trial court found that ERCOT is a volatile and speculative market and it was impossible to ascertain whether Mr. DePodesta and Mr. Dahlstrom would obtain any future benefits. (R. 8467) The trial court found that the fact of benefits[13] is uncertain, that Indeck's theory was purely speculative, and that Indeck did not prove that Mr. DePodesta and Mr. Dahlstrom will "profit handsomely" after the trial ended. *Id.* The trial court found that MHV (and thereby HEV, Mr. Dahlstrom and Mr. DePodesta) was not guaranteed to receive any development fees at all. (R. C6333 ¶ 347; R. 8428) And, even if a sale of MHV's projects came to fruition, and MHV received a development fee, it remained speculative whether Mr. DePodesta and Mr. Dahlstrom would share any of it after the fee flowed through the MHV Operating Agreement's distribution structure. (R. E545, 556; R. C6334 ¶ 358; R. 8428) Indeck's own expert could not say, to a reasonable degree of certainty, what profits Mr. DePodesta and Mr. Dahlstrom would receive in the future, or even whether a profit would actually be earned by them. (R. C6333-35 ¶¶ 346, 361-62; R. 8428)

The lower courts' decisions not to impose a constructive trust is supported by Illinois law, which holds that a constructive trust only arises when "the defendant (i) has been unjustly enriched (ii) *by acquiring legal title to specifically identifiable property* (iii) at the expense of the claimant or in violation of the claimant's rights *******" Restatement

[13] Because Indeck specifically disclaimed damages, this case was only about disgorgement of Dahlstrom and DePodesta's benefits. In its ruling, the trial court stated that "the fact of damages is uncertain," and "damages are purely speculative." (R. 8467) When the trial court refers to "damages" in its findings, it can only be referring to "benefits," as used in its ruling on Count IV because there were no damages at issue in this case. Dahlstrom and DePodesta refer to "benefits," not "damages," to avoid confusion.

(Third) of Restitution & Unjust Enrichment § 55 cmt. a (2011) (Emphasis added.) In *Eychaner v. Gross*, this Court rejected plaintiffs' request for a constructive trust to ensure that funds would be donated to the public and not diverted. 202 Ill. 2d 228, 274 (2002). This Court found that, "the 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." *Id.* (Emphasis added.) No identifiable fund existed in this case.

Whether benefits that Indeck seeks to disgorge could ever be worth anything is dependent on future events and circumstances that may never happen. While no Illinois case law directly addresses the question of speculative disgorgement, the established law on speculative damages is instructive. Illinois law does not allow recovery for future, speculative events. *Professional Exec. Ctr. v. LaSalle Nat'l Bank*, 211 Ill. App. 3d 368, 378 (1st Dist. 1991). Even if injury and a cause of action have accrued as of a date certain, future damages that might arise from the conduct are unrecoverable if the fact of their accrual is speculative. *Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 339 (1971). Disgorgement of potential future benefits that may never accrue is as speculative as future damages that may never accrue. *Professional Exec. Ctr.*, 211 Ill. App. 3d at 378; *Beerman v. Graff*, 250 Ill. App. 3d 632, 639 (1st Dist. 1993); *Moede v. Pochter*, 701 F. Supp. 2d 997, 1003 (N.D. Ill. 2009); *Healy v. CTP, Inc.*, 1994 U.S. Dist. LEXIS 13662, *9-10 (N.D. Ill. 1994). See also *Winston Research Corp. v. Minnesota Mining & Mfg. Co.*, 350 F.2d 134 (9th Cir. 1965) (refusing to allow disgorgement of future profits because evidence of possible future profits was highly speculative, at best).

"Profit" includes any form of value, proceeds or consequential gain that is *identifiable* and *measurable* and *not unduly remote*. Restatement (Third) of Restitution

and Unjust Enrichment §51(5)(a) (2011) (Emphasis added.) Profits are unduly remote if they are impossible to measure with sufficient accuracy. *Id.* at cmt. f. Neither this Court nor any Illinois appellate court (nor any trial court to our knowledge) has held that it is appropriate to disgorge profits that were unearned at the time of trial.

There is no dispute that, as of the close of evidence, Mr. Dahlstrom and Mr. DePodesta earned no profits to disgorge. (R. 8467) And, Indeck does not (and cannot) dispute the trial court's factual findings about the volatile and speculative ERCOT market. Indeck's constructive trust claim is based on HEV's speculative future benefit received from MHV. As the trial court aptly found, a constructive trust was not available to Indeck because the proposed *res* was not identified. (R. 8467) As the appellate court found, the trial court's factual findings are not against the manifest weight of the evidence. (A32 at ¶¶ 84-85)

Ignoring the settled law, Indeck falls back on the "policy" argument that Mr. DePodesta and Mr. Dahlstrom may not benefit from their breaches and that this Court must extinguish all possibility of profit flowing from Mr. DePodesta and Mr. Dahlstrom's breaches. (AE Br. at 73-74) These policy arguments do not override well-settled Illinois law (including constructive trust cases cited by Indeck) that the fact of profits may not be speculative and therefore must be an identifiable *res* before a court can impose a constructive trust.

The trial court correctly declined to impose a constructive trust and the appellate court properly affirmed that ruling. (A31-32 at ¶¶ 82-85)

III THE APPELLATE COURT CORRECTLY DECLINED TO REVIEW THE RULING THAT THE CONFIDENTIALITY AGREEMENT IS UNENFORCEABLE BECAUSE IT HAD NO BEARING ON THE TRIAL COURT'S DECISION TO DECLINE TO ENTER A PERMANENT INJUNCTION

The trial court directed a finding in Mr. DePodesta and Mr. Dahlstrom's favor on Indeck's request for a permanent injunction on Count I, finding that Indeck failed to prove each of the elements in support of the issuance of the injunction that it sought. (R. 3586-87) Specifically, the trial court found that Indeck did not prove (1) that it would be irreparably harmed if an injunction did not issue, and (2) that it was damaged.[14] (R. 3584-86) Denial of a permanent injunction is reviewed under a manifest weight of the evidence standard. *Vaughn v. City of Carbondale*, 2016 IL 119181, ¶22.

Separate and apart from failing to prove each required element, the trial court held that the Confidentiality Agreement is void and unenforceable. (R. 3582-84) This is a question of law that is reviewed *de novo*. *Vaughn*, 2016 IL 119181, ¶22.

Indeck only appealed one aspect of the trial court's ruling – the trial court's determination that the Confidentiality Agreement is overbroad and unenforceable as a matter of law. Indeck did not appeal (and, therefore waived any challenge to) any other trial court rulings on Count I. *Robinson*, 201 Ill. 2d at 412-413. Regardless of whether the Confidentiality Agreement is enforceable, the trial court's directed finding in Mr. DePodesta and Mr. Dahlstrom's favor stands on these other grounds.

The appellate court properly declined to review Indeck's claimed error – the overbreadth of the Confidentiality Agreement - because it is by definition not a "reversible error" because no ruling will change the outcome below. (A33 at ¶¶ 87-89) Alternatively,

[14] During the litigation, Indeck specifically disclaimed monetary damages and limited its claims solely to disgorgement. (R. C1272; R. 93 at p. 14)

if this Court reviews the alleged error, then it should still affirm the trial court because, as a matter of law, the Confidentiality Agreement is unenforceable.

A. Whether the Confidentiality Agreement is enforceable was not essential to the trial court's decision to deny Indeck a permanent injunction

The appellate court correctly declined to review the trial court's ruling that the Confidentiality Agreement is overbroad and unenforceable because resolution of the issue would not affect the outcome reached by the trial court. (A33 at ¶¶ 87-89) In other words, disposition of the claimed error on appeal was not essential. See *Chicago v. Cohen,* 49 Ill. App. 3d 342, 344 (1st Dist. 1977) (appellate court declined to decide an issue raised on appeal because the issue was not essential to the final disposition of the case before it, and because the result was the same no matter how the issue was decided); *Yale Dev. Co. v. Andermann,* 37 Ill. App. 3d 33, 39 (2d Dist. 1976) (appellate court declined to consider whether the relationship between the parties was a joint venture because determination of the issue was not essential to the determination of the case before it).

Berlin v. Sarah Bush Lincoln Health Center, upon which Indeck relies, is inapplicable. 179 Ill. 2d 1 (1997). (AE Br. at 75) In *Berlin*, this Court rejected the plaintiff's claim that the defendant's appeal was moot because the restrictive covenants lapsed by the time the case came up on appeal. *Id.* at 7. The defendant argued (1) that the action is not moot because if it is determined that the contract is enforceable, then it has a viable cause of action against the plaintiff and, alternatively, (2) that the case falls within the public policy exception to the mootness doctrine. *Id.* This Court agreed that its decision "could have a direct impact on the rights and duties of the parties" and had "important consequences" for the parties before the court, thus the appeal was not moot. *Id.* at 8.

Unlike *Berlin*, the mootness doctrine does not apply here. The appellate court ruled that an analysis of the Confidentiality Agreement was unnecessary because it would not change the outcome below. (A33 at ¶¶ 87-89) The problem for Indeck is not that the appellate court could not enter effectual relief; the problem is that Indeck failed to prove the essential elements to obtain injunctive relief regardless of the enforceability of the Confidentiality Agreement. (R. 3576-77, 3583-84, 3587)

B. Alternatively, the Confidentiality Agreement is overbroad and unenforceable and the trial court should be affirmed on that issue

A restrictive covenant is reasonable only if (1) it is no greater than required to protect a legitimate business interest (2) it does not impose undue hardship on the employee and (3) it does not injure the public. *AssuredPartners, Inc. v. Schmitt*, 2015 IL App (1st) 141863, ¶ 32, citing *Reliable Fire Equip. Co. v. Arredondo,* 2011 IL 111871, ¶ 17. Whether a legitimate business interest exists is based on the totality of the facts and circumstances of each case. *Id.*

1. The trial court properly found that the Confidentiality Agreement is overbroad and unenforceable

In *AssuredPartners,* the appellate court affirmed the trial court's finding that the confidentiality provision at issue in that case was unenforceable. 2015 IL App (1st) 141863. The confidentiality provision in *Assured Partners* prohibited the use or disclosure of "any information, observations and data (including trade secrets) obtained by [Schmitt] during the course of [his] employment with [Jamison/ProAccess] concerning the business or affairs of [plaintiffs] and their respective Subsidiaries and Affiliates." *Id.* at ¶ 44. The appellate court found the confidentiality provision to be patently overbroad because it went far beyond any possible legitimate protectable interest by prohibiting disclosure of

information without regard to whether such information was in any way proprietary or confidential in nature, or whether the employee in fact obtained the information through a source outside of his work. *Id.* at ¶¶ 45-46 See also *North American Paper Co. v. Unterberger*, 172 Ill. App. 3d 410, 416 (1st Dist. 1988) (confidentiality agreement was unreasonable and unenforceable because it purported to protect virtually every kind of information learned during employment, even if not confidential, and it went far beyond any possible legitimate protectable interest of the employer).

The language of Indeck's Confidentiality Agreement, which contains the information that Indeck sought to protect as "confidential," is likewise overbroad and unenforceable under Illinois law because it goes far beyond any possible legitimate protectable business interest. For example, paragraph 1(c), which defines what information is secret or confidential, does not identify what information it seeks to protect. The provision merely provides that everything not known to the public, or persons engaged in research, development and education similar to Indeck's business enterprises, without specifics, is confidential. This type of covenant is unreasonable and is not enforceable. *Service Centers of Chicago, Inc., v. Minogue*, 180 Ill. App. 3d 447, 455 (1st Dist. 1989) (a confidentiality agreement that defines confidential information as essentially all information provided by plaintiff or "concerning or in any way relating" to plaintiff's services "amounts in effect to a post-employment covenant not to compete" and will not be enforced).

Indeck's claim that the trial court failed to give meaning to all terms in Paragraph 1 of the Confidentiality Agreement is unpersuasive. (AE Br. at 75-76) The trial court, expressly looked at the definition of "Information" in paragraph 1 in conjunction with the

language in section 1(c). (R. 3580) There was no error in the trial court's analysis, because the court specifically (and properly) found that the Confidentiality Agreement, by prohibiting disclosure of information of any nature, and in any form related to Indeck's business, with only limited exceptions, is overbroad. (R. 3580-81)

2. The Confidentiality Agreement is not narrowly tailored to protect only against those activities that threaten Indeck's interest

The trial court correctly found the covenant overbroad because it covered information of any nature or form related to Indeck's business, and is not limited to protecting information that gives Indeck an advantage over its competitors. (R. 3582) A "legitimate business interest" requires that the employee acquire the confidential information through his employment and later attempts to use it for his own gain. *Lifetec Inc. v. Edwards,* 377 Ill. App. 3d 260, 269 (4th Dist. 2007). As the trial court and the *Lifetec* court found, "confidential information" is "particularized information disclosed [to the employee] during the time the employer-employee relationship existed which is unknown to others in the industry and which gives the employer advantage over his competitors." 377 Ill. App. 3d at 270. (R. 3581) The Confidentiality Agreement does not protect information that protects a legitimate business interest. The trial court properly found the Confidentiality Agreement unenforceable.

Indeck argues that the trial court erred by applying *Lifetec*. (AE Br. at 77-78) Contrary to Indeck's argument, the *Lifetec* court analyzed whether the employer had a legitimate business interest in the material sought to be protected, which is the same analysis required for any restrictive covenant. That *Lifetec* involved a different type of restrictive covenant is irrelevant. *Coady v. Harpo,* upon which Indeck relies, does not stand for the proposition that sensitive and private information is also entitled to protection, even

if the information does not provide a competitive advantage. 308 Ill. App. 3d 153 (1st Dist. 1999) (AE Br. at 77) At issue in *Coady* was the duration and scope of the agreement, not the protectable business interest. 308 Ill. App. 3d at 162.

3. The requested injunction tied to the Confidentiality Agreement is vague and unreasonable as to time

The trial court did not rule that the Confidentiality Agreement was invalid because it did not have a time duration. (AE Br. at 78) In declining to enter the permanent injunction, the trial court stated that, "when drafting a restrictive covenant, or an injunction prohibiting any violation of a restrictive covenant, it is essential that the employee or former employee understand what activity is prohibited and for what period of time." (R. 3582-83) After finding the Confidentiality Agreement unenforceable, the trial court then ruled that the *requested injunction* could not be granted because the injunction was "unenforceably vague and unreasonable as to time." (R. C3583) (Emphasis added.) Because the trial court did not rely on vagueness or lack of time limitation as grounds for finding the *restrictive covenant* unenforceable, Indeck's argument is easily rejected. (AE Br. at 78)

The trial court's ruling that the Confidentiality Agreement is facially overbroad and, therefore, unenforceable is consistent with Illinois law concerning restrictive covenants. This Court should affirm the trial court's ruling on that issue. Regardless, the decision to decline the requested permanent injunction cannot be overturned because Indeck waived any argument by not raising them on appeal.

CONCLUSION

For each of the foregoing reasons, as well as those expressed by the appellate court in its ruling, this Court should deny Indeck's Request for Cross-Relief in its entirety.

Respectfully submitted,

Defendants-Appellants,
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CERTIFICATE OF COMPLIANCE

I certify that this Appellants' Reply and Response to Request for Cross-Relief 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(c) certificate of compliance and the certificate of service, is 37 pages.

/s/ Stuart P. Krauskopf
Stuart P. Krauskopf

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 November 18, 2020, the Reply Brief and Response for Cross-Relief 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
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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
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