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IN THE SUPREME COURT OF THE STATE OF DELAWARE

JERRY NEAL, Defendant/Counterclaim Plaintiff/ Third-Party Plaintiff Below, Appellant, v. TRIPLE H FAMILY LIMITED PARTNERSHIP, a Delaware limited partnership, Plaintiff/Counterclaim Defendant Below, Appellee, and JEFFREY A. HOOPS, Third-Party Defendant Below, Appellee,	)	No. 447, 2018 Court Below: Court of Chancery of the State of Delaware C. A. No. 12294-VCMR

APPELLANT'S AMENDED OPENING BRIEF

November 19, 2018

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NATURE OF PROCEEDINGS

On October 20, 2016, plaintiff below, appellee Triple H Family Limited Partnership ("Triple H") filed an Amended Verified Complaint for Damages and Other Equitable Relief and for Judicial Dissolution Pursuant to 6 *Del. C.* § 18-802 (the "Amended Complaint") against Jerry Neal, defendant / counterclaim plaintiff / third-party plaintiff below, appellant ("Neal") (A044-A057)[1]. Triple H alleged that it and Neal were each 50% owners of Omni Insurance Group, LLC ("Omni") and that Neal violated his fiduciary duties to Omni and sought damages, removal of Neal as manager of Omni, dissolution of Omni pursuant to 6 *Del. C.* § 18-802, and a judicial direction to Triple H that it wind up Omni in accordance with 6 *Del. C.* §§ 18-803 and 804. (*Id.*).

On November 3, 2016, Neal filed an Answer to the Amended Complaint and Counterclaim (1) denying that he breached any fiduciary duties; (2) admitting that the parties were at an impasse and seeking to have the Court appoint Neal to wind up Omni pursuant to 6 *Del. C.* § 18-804(b); (3) seeking dissolution of Omni pursuant to 6 *Del. C.* § 18-802; and (4) seeking damages, individually and derivatively on behalf of Omni, against Triple H and counterclaim defendant Jeffrey Hoops ("Hoops") (as a manager of Omni and as controller of Triple H) for their breaches of fiduciary duties by diverting business from Omni to Black

[1] "A___" references are to the Appendix to Appellant's Opening Brief filed contemporaneously with this brief.

Diamond Insurance Group ("Black Diamond"), a new insurance agency they formed, thereby expropriating Omni's business opportunities (A058-A097).

A three-day trial was held before the Court of Chancery beginning November 6, 2017. The parties filed opening and answering post-trial briefs. Post-trial argument was held on April 19, 2018.

The Court of Chancery issued a Memorandum Opinion (the "Opinion" or "Op.")[2] on July 31, 2018, (1) deciding that Neal breached fiduciary duties; (2) awarding Triple H nominal damages for Neal's breach of fiduciary duties; (3) ordering that Omni be wound up pursuant to 6 *Del. C.* § 18-803; (4) appointing Triple H liquidating trustee to wind up Omni's affairs; and (5) denying all other requested relief. In this appeal, Neal argues as follows regarding certain rulings of the Court:

1. The Court ruled that Neal and Hoops did not agree that Omni would place, in perpetuity, the insurance policies of Revelation Energy, LLC ("Revelation"), a coal mining company that Hoops controlled. (Op. at 31). Neal did not make such an argument and specifically disclaimed the argument. Moreover, the argument is unnecessary to Neal's claim that, by

[2] Copies of the Opinion (Ex. A), the August 7, 2018 Final Order and Judgment ("Order") (Ex. B), and the September 21, 2018 Order of Dissolution of Omni Insurance Group, LLC ("Dissolution Order") (Ex. C) are attached hereto.

starting Black Diamond Insurance Group, Hoops and Triple H appropriated Omni's business opportunities.

2. The Court ruled that Hoops owed fiduciary duties to Omni as a *de facto* manager of Omni. (Op. at 39-43). Neal agrees with this finding.

3. The Court found that Neal and Hoops, as Triple H's representative, agreed to dissolve Omni on October 15, 2014 and memorialized that agreement at 12:14 p.m. on October 27, 2014. (Op. at 34, 38 n.134). On the basis of that finding, the Court ruled:

a. As a result of the agreement to dissolve Omni, reached at 12:14 p.m. on October 27, Hoops' statement to Neal that he was getting out of the insurance business and returning to his prior broker, made one hour and thirteen minutes later, was not a false representation that affects the validity of Neal's purported consent to dissolve Omni. (*Id.*).

b. For the same reason, Hoops' starting Black Diamond three days later, without Neal's knowledge or consent, was not a wrongful appropriation of Omni's business. (Op. at 38 n.134, 43-45).

The trial court made additional findings that are not subjects of this appeal.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred, as a matter of fact and law, in concluding that Neal and Hoops agreed to dissolve Omni:

   a. before Hoops told Neal that Hoops was getting out of the insurance business (resulting in the Court's denying Neal's claim that any alleged consent to dissolution was ineffective due to Hoops' misrepresentations); and

   b. before Hoops arranged and formed Black Diamond, thereby permitting Hoops to form Black Diamond and engage in the same business as Omni (resulting in the Court's denying Neal's claim that Hoops and Triple H wrongfully appropriated Omni's business opportunity).

2. The Court erred as a matter of law in holding that Neal's claim for appropriation of Omni's business opportunities, by Hoops' forming Black Diamond, fails because the parties never agreed that Omni would place Revelation's insurance policies in perpetuity. Neal did not make such an argument and specifically disclaimed the argument. Neal's business opportunity claim is not premised upon such an assumption, but instead, upon the corporate or business opportunity doctrine.

STATEMENT OF FACTS

I. Facts not at issue in this appeal.

Neal is an insurance agent residing in West Virginia. He has worked in the insurance business for almost thirty years and formed his own insurance business, Neal Insurance, in 2011. (Op. at 3).

Triple H is 99% owned by Hoops Family Dynasty Trust, which is controlled by the three adult sons of Hoops, and 1% owned by its general partner, Milton Management. (Op. at 2). Triple H is a holding company for investments made by Milton Management, which is owned and controlled by Hoops. (*Id.*; A350 at 44:14-17 (Hoops)). Hoops controls Triple H's investments. (A350 at 44:7-21 (Hoops)).

Hoops has worked in coal mining for more than forty years and currently runs Revelation, which he started in 2008. (Op. at 2).

Omni, an insurance agency, is a Delaware LLC organized by Hoops on August 25, 2014. Triple H and Neal each own 50% of Omni. (Op. at 3).

In August 2014, Neal and Hoops attended their fortieth high school reunion, where they discussed a shared acquaintance in the coal business who had started an insurance agency and thereby recouped commissions on policies purchased by the business that otherwise would go to an unaffiliated insurance agency. The idea appealed to Hoops as a way of recouping some of the money he spent on insurance

premiums each year. From Neal's perspective, Hoops' business and personal insurance would generate very lucrative commissions. Forming an insurance agency together would be a mutually beneficial endeavor, and the two men left the reunion feeling excited about the prospect. (Op. at 5).

On August 25, 2014, Hoops, as organizer, executed the Certificate of Formation for Omni, which was filed on August 26, 2014. (Op. at 10; A304).

Insurance agents make commissions, which are a percentage of the premium paid by the customer. (Op. at 10.). Revelation's insurance policies were yearlong policies that ran from October 5 to October 5. In order to receive commissions for Revelation's 2014-2015 policies, Omni would need to be the agent of record and place those policies before October 5. (*Id.*).

Normally, an insurance agent would start to look for renewal policies three months in advance of the renewal date, or in July for policies renewing in October. (Op. at 11). Since Omni was created on August 26, 2014, it was understood that having Omni handle the renewal of the Revelation policies before October 5 would be challenging. (*Id*.).

During the seven weeks following the formation of Omni, various issues arose between Neal and Hoops.

First, Neal requested that that his company, Neal Insurance, keep expected consulting fees instead of their going into Omni. (Op. at 12-13). Hoops objected, stating that if Neal did not agree, "that is fine and need to know now so we can go in another direction." (Op. at 14). Neal quickly backed off, stating: "I am 100% committed to growing Omni. I will roll Neal Insurance beginning in October. Maybe a short term perspective on my part." (*Id.*).

Second, Neal did not get along with Heather Hammond (Op. at 17), an employee of Jacobs Risk Management ("JRM"), which was owned by Joe Jacobs. JRM had serviced Revelation's and Hoops' insurance policies since 2009, during which time Revelation and Hoops used Van Meter Insurance Group as their insurance broker. (Op. at 15-16). Hammond and Jacobs were recruited to work with Omni. (Op. at 16).

Third, Neal failed to obtain D&O insurance for Revelation until at least three days after the October 5, 2014 expiration of the existing policy. The new policy was written with an effective date of October 5, 2014. (Op. at 17-20). The trial court found:

> [Neal's] failure to secure coverage, and the failure to truthfully and fully inform his client of that failure, exposed Omni to a significant risk of monetary and reputational harm. At the very least, this behavior was not in the best interest of Omni and constitutes a breach of Neal's fiduciary duties.
>
> Thankfully no tragedy occurred during the time Revelation was uninsured and Neal eventually procured a D&O policy effective

> October 5, averting disaster. Plaintiff does not request any damages for Neal's breach of fiduciary duty. It appears that Hoops is content not to seek a remedy for this breach but instead just to be done with Neal and Omni. Therefore, I award nominal damages for Neal's breach of his fiduciary duty.

(Op. at 55-56).

II. The trial court's factual findings challenged in this appeal.

Neal's arguments at trial included:

1. Neal did not consent to dissolve Omni;
2. Any alleged consent by Neal was vitiated by Hoops' false representation that he was getting out of the insurance business and returning to Van Meter to obtain insurance for himself and his businesses; and
3. Hoops and Triple H breached their fiduciary duties of loyalty to Omni and Neal by starting Black Diamond and diverting Omni's business opportunities to Black Diamond.

The trial court rejected these arguments, holding that "[t]he members [of Omni, Neal and Triple H], with Hoops as Triple H's agent, agreed to dissolve Omni on October 15, 2014, and memorialized that agreement in writing on October 27, 2014." (Op. at 34). The trial court's explanation of the basis for its conclusions concerning what occurred on October 27, 2014 appear at pages 26-27 and 36-39 of the Opinion, and especially in footnote 134 on page 38. The trial

court there stated its conclusions that: (1) Neal did not show that Hoops represented to Neal, in an email on October 27, that Hoops was "getting out of the insurance business" until one hour and thirteen minutes after Neal agreed, in a 12:14 p.m. email on the same date, to dissolve Omni; and (2) Hoops was free to start Black Diamond three days later, on October 30, because "Omni was dissolved" as a result of the same 12:14 p.m. email from Neal on October 27.

A. Facts regarding the question of whether, as the trial court held, Hoops and Neal agreed to dissolve Omni on October 15, 2014.

The trial court found that Hoops and Neal agreed on October 15, 2014 to dissolve Omni. (Op. at 34, 44-45).

Neal knew that Hoops was unhappy. Neal testified that he "agreed in context" (A468 at 414:8), "agreed, again, in principle that if [Hoops] wasn't going to be behind [Omni], we needed to possibly figure out a way at some point in time, but I could never figure out a way with the options presented to get out of [Omni]." (A468 at 414:16-20). Neal testified at trial:

> I agreed on the 50/50. I agreed in concept that Omni – I could see that we weren't going to – based on what Jeff was saying, we weren't going to go forward with it. But how we were going to split it and so forth and when we were going to do it, I had no concept.

(A468 at 415:15-20). Neal's main concern was that Omni operated under his insurance agent's license and could not operate without that license. (A440 at 302:4-303:3).

Neal challenges the trial court's finding that Hoops and Neal reached such an agreement on October 15, because the written communications over the following two weeks prove that no such agreement was reached. While Hoops was secretly planning to replace Neal with Hammond and Jacobs, his written proposal to Neal was clearly only that, a proposal, and not a confirmation of any verbal agreement to dissolve Omni.

On October 16, 2014, Neal sent Hoops an email concerning the distribution of the proceeds of the financing of Revelation's policies. (A305). Such financing proceeds generally are used to pay the agent's commission at the beginning of the policy year. In this case, Revelation, the policyholder, paid 25% of the premium immediately, and, from that, Omni would receive all of its commission on the policy. (A467 at 409:23–410:14 (Neal)). The trial court concluded that Neal's email was "consistent with [Hoops'] testimony [that he and Neal had agreed on October 15 to dissolve Omni], and with Neal's pattern of behavior." (Op. at 34).

The Court's statement is curious. The only statement by Neal in that email that could arguably refer to an agreement to dissolve Omni is: "Regardless of how *or whether* we change our Omni concept. We are in agreement on a 50/50 split for this year. Correct?" (A305 (emphasis added)). Hoops replied, "Lisa has been waiting to give you a check for nearly 2 weeks. Believe I want to go direction I laid out yesterday." (*Id.*). Neither email indicates that an agreement had been

made the day before to dissolve Omni or that any agreement had been reached with respect to the terms of any such dissolution.

Within minutes of a brief meeting on October 17 to discuss distribution of the proceeds of a financing agreement to finance certain insurance premiums, discussed at pages 22-23 of the Opinion, Hoops sent two detailed emails. Those emails strongly indicate that Hoops had already decided that, instead of *dissolving* Omni, as Hoops testified and the trial court found, Hoops planned to continue Omni, to continue to own 50% of Omni, through Triple H, and to replace Neal with Hammond and Jacobs. At 8:55 a.m., Hoops sent an email to Hammond (copying Jacobs and Lisa Henson, a Revelation employee):

> I told him [Neal] this morning we are done and guess this will probably work out for the best as if you guys are interested, then my plan is as follows:
>
> 1) Agree to give Jerry 50% of the commission for this year on Revelation Energy less expenses including the 10% to you.
> 2) He will sign over his 50% ownership in Omni
> 3) Then assuming this goes as planned I would envision you guys taking 50% ownership in Omni and we will work together to grow this business.

(A308-A309). At most, Hoops is discussing his "plan" of what will occur in the future. Nothing in that email indicates that Neal had agreed to anything.

Jacobs testified that this was not the first time that he, Hoops and Hammond had talked about cutting Neal out of the business. (A538 at 575:4–576:3).

The trial court made its next erroneous findings in the italicized portions of the first and last paragraphs of the following statement at pages 35-36 of the Opinion:

> At 9:15 a.m. the same day [October 17, 2014], Hoops emailed Neal and Henson, consistent with their pattern of behavior, *a summary of what Neal and Hoops agreed to*:
>
> > As you know on September 1, 2014 we agreed to the following structure for Omni:
> >
> > 1) Omni owned 50/50 by you and Triple H family LP
> > 2) You would be paid a salary of $100K per year plus benefits to manage Omni
> > 3) All commissions including what you projected from Neal Insurance deals in place of $65,000 would go to Omni
> > 4) Jacobs will receive 10% of commissions on Revelation deal and 33% on any new business they bring.
> > 5) Then as cash built up in Omni we would periodically distribute the earnings on a 50/50 basis
> >
> > Given the recent turn of events it appears the best path forward would be to unwind Omni and *I would like for you* to surrender your 50% interest for the following consideration:
> >
> > 1) You keep all income from Neal Insurance
> > 2) I will eat the expense of remodeling the main floor for $65,000 to accommodate the offices
> > 3) You will receive the following
> > - 50% of the commissions after the following expenses are deducted
> > - Any salary paid to you to date

- Any expense incurred to ate [*sic*] for benefits or 401-K match
- Half of the 10% commission we agreed to pay Jacobs

4) This will be paid to you by Omni as the commissions flow into the company.

Lisa will provide a complete accounting and will make those payments wherever you direct. *If you are in agreement* I will have Eddie [Cunningham] prepare the documents to take you off of Omni, then Lisa can pay you any amounts that are available at that time. [A306].

Neither party submitted an email response to this October 17 email into evidence, *but Hoops and Neal exchanged emails on October 27, 2014, which constitute written consent of the members to dissolve Omni.*

(Op. at 35-36) (emphasis added).

Nowhere in the quoted email does Hoops state that his proposed terms confirmed an agreement reached two days earlier, on October 15. In the first paragraph of the quoted email, Hoops stated the original agreement between Hoops and Neal when they established Omni, using the words, "we agreed." (A306). In contrast, Hoops' *proposal* of terms of a separation, in the second and third paragraphs, and his use of conditional phrases, "*I would like for you"* and *"[i]f you are in agreement*" (A306), contradict Hoops' testimony and the trial court's finding (Op. at 34, 35-36, 44-45) that Hoops and Neal had agreed on October 15 to dissolve Omni.

B. Facts regarding the question of whether, as the trial court held, on October 27, 2014, Hoops and Neal "memorialized in writing" the October 15, 2014 agreement to dissolve Omni.

The trial court found that an alleged October 15, 2014 agreement to dissolve Omni, discussed immediately *supra*, was memorialized in writing by Hoops' and Neal's exchange of emails on October 27, 2014. (Op. at 34). Neal also challenges that conclusion. Indeed, the trial record, including the October 27-28 exchange of emails, proves that:

- Neal and Hoops never agreed on the terms of dissolving Omni, which is why this case was filed; and
- Hoops acted to mislead and deceive Neal concerning Hoops' plans for purchasing insurance for Revelation in the future, telling Neal that he, (Hoops), was getting out of the insurance business, thereby vitiating any alleged agreement by Neal to dissolve Omni.

The crux of the issue regarding the trial court's ruling regarding the October 27-28 emails appears in footnote 134 on page 38 of the Opinion. In that footnote, the trial court rejected Neal's arguments that the parties did not agree to dissolve Omni on October 27 and that any alleged consent by Neal was vitiated by Hoops' misrepresentations, made prior to that consent, that Hoops was getting out of the insurance business. (Op. at 38 n.134). To explain that rejection, the trial court relied upon its conclusions that the agreement to dissolve was made in an email at

12:14 p.m. on October 27, and that Hoops' statements that Neal claims were misrepresentations (that Hoops would return to his prior broker, Van Meter, to buy insurance) were made at 1:27 p.m., one hour and 13 minutes later. (The trial court does not specify 1:27 p.m. in the footnote, but quotes an email that Hoops sent at that time.). The trial court's rationale: "Neither these emails, nor any other evidence pointed to by [Neal], show that Hoops represented that he was 'getting out of the insurance business' *prior to Neal agreeing to dissolve Omni.*" (Op. at 38 n.134 (emphasis added)). Neal challenges that conclusion, because Hoops and Neal never reached agreement concerning the terms of dissolving Omni, and certainly did not do so prior to Hoops' false statements in his 1:27 p.m. email.

A review of several emails between Neal and Hoops on October 27, 2014 refutes the trial court's conclusion that "[Neal] agree[d] to dissolve Omni [in an email sent] at 12:14 p.m." (Op. at 38 n.134). This is crucial, because, based on its conclusion that the agreement to dissolve was reached at that instant, the trial court found that the following two statements in Hoops' 1:27 p.m. email are irrelevant because they were sent after the 12:14 p.m. email:

> I am going to do what I said, which is keep Revelation with Omni until October 5th [2015], then most likely will go back to VM [Van Meter][;]. . . If you want to turn it over to lawyers and let them deal with it, I am happy to do that as well and in the meantime I will move everything back to [Van Meter]. . . .

(Op. at 38 n.134; A326)[3].

The following are the relevant emails on October 27 and 28, 2014:

11:11 a.m. – Hoops email to Neal:

> I am really concerned *about whether we are going to be able to make this work* with Lisa and Heather as I spoke with both of them and it is not good.
>
> *In the event we cannot get this worked out*, I would propose we just unwind what we were going to do with Omni and you will get 50% of the commissions and keep everything you earn from Neal Insurance and *just let our deal die when it comes up for renewal*…It is clear you do not think much of Heather and I know little about insurance, but she has done a great job for us the past 6 years and with all she and Joe are involved in for us, I cannot cut her loose.
>
> My gut is to just work this out with you and give you the 50% and let you keep Neal and go back to the way it was for you before.

(Op. at 26; A323 (emphasis added)). On October 27, Hoops is proposing, "[i]n the event we cannot get this worked out," to pay Neal 50% of the commissions. This contradicts the Court's finding that agreement had been reached on October 15 to dissolve Omni. (A323; Op. at 34-36).

11:59 a.m. – Neal email to Hoops:

The relevant portions of the email are:

> I am downstairs if you want to talk.
> I will agree to what needs to be done but it is a real shame. I don't see all that much need for communication between Lisa, Heather and I on

[3] JX72 (A320-A324) and JX73 (A325-A330) include the same email string, however JX73 is more inclusive. The Opinion and some of the briefing reference both exhibits. We have included both in our appendix and will reference each appropriately in the context of the citation.

> Revelation for the policy year and maybe none on the other business we might look at. I would have to have information when I need it.

(A328).

> **12:04 p.m. – Hoops email to Neal**:
>
> I am heading into a meeting with guys from Switzerland that are going to be marketing our coal and will be tied up for a while.
>
> I have no problem with anything you done as it was amazing you were able to get coverage in place in that short time frame. I think this could have been a nice business, but it has created a lot of tension among everyone and I really like to keep things peaceful. Hopefully it worked out okay for you and you got a nice payday out of it… *I have my plate so full trying to keep this company* [Revelation] *afloat, I just do not have the bandwidth to take on anything else.*
>
> Really do appreciate all you have done……Thanks…Jeff

(A328 (emphasis added)). In that email, Hoops told Neal that Hoops was getting out of the insurance business to concentrate on running Revelation, which statement was false.

> **12:14 pm. – Neal email to Hoops:**
>
> OK. 50% is fine. Paid through audit which might extend past 10-5-15. Might mean I have to return some money but that would be fair. Feels like I lost here which is never good for me. I was really excited about the new opportunities. Developed a couple of really nice markets for Omni to use elsewhere. Tell me how I can get out of the way. *Several questions need to be cleared up.* Thanks.

(A327 (emphasis added)). The trial court held that the email exchange to this point "constitutes the written consent of the members to dissolve Omni. (Op. at 37, 38 n.134). We challenge that conclusion.

12:19 p.m. – Hoops email to Neal:

Jerry:

Not sure how you lost. As you are going to make a nice sum of money for 30 days work putting this together, what I am getting will cover my cost downstairs, plus you are keeping all of your Neal Insurance Income.

I too was excited about this, but not used to so much controversy, as I have 12-15 different businesses going and never had this much conflict in all of them put together over the past 16 years.

Tell me what your questions are and I will try to answer them, then *I will have Eddie [Cunningham, Hoops' attorney] draft up an agreement* that assures you that you get all of your money. I have no hard feelings and appreciate all of your efforts to put this together……Thanks….Jeff

(A327 (emphasis added)).

12:59 p.m. – Neal email to Hoops:

30 days is not accurate for the work time. The average time for placing coverages for an account would start from July as VM did. Keep in mind they had all the information they needed in hand. The forming of the Omni agency, securing the proper company appointments was a separate undertaking of its own.

Are you wanting to buy me out of Omni?

When you say you are going back to how you were, what does that mean right now? Back to VM? Someone else?

If you are going forward with Omni, then you need to research the normal costs associated with acquiring an agency. Half of one year commissions is not the purchase price. You are in position to make money for many years with Omni.

(A326-A327 (emphasis added)). Thus, 45 minutes after 12:14, the time that the trial court held that Neal and Hoops agreed to dissolve Omni (Op. at 38 n.134), Neal asks Hoops whether Hoops is buying Neal out of Omni and if so, is beginning to negotiate a purchase price.

> **1:27 p.m. – Hoops email to Neal:**
>
> Jerry:
>
> Right now Omni really does not exist, but *if it has value, what will you give me for my half.* Thought the only thing we had was my commission for one year. I am going to do what I said, which is keep Revelation with Omni until October 5th[4], *then most likely will go back to VM [Van Meter] as they stepped up and done my personal at the last minute.*
>
> The reference to 30 days was what you spent on it, not trying to debate you over this.
>
> Tell me what you want to do, as I do not want to continue and will pay you 50% of the commissions and let you keep Neal Insurance and I will eat the cost downstairs. If you want to turn it over to lawyers and let them deal with it, I am happy to do that as well and in the meantime *I will move everything back to VM [Van Meter]* and you can keep the $75,000……Thanks…Jeff

(A326 (emphasis added)). In that email from Hoops, sent after the 12:14 p.m. email that the Court decided that Neal and Hoops agreed to dissolve Omni (Op. at 38 n.134), Hoops asks Neal whether Neal wanted to buy Hoops' interest in Omni.

Also in that email, Hoops stated that he intended to move Revelation's insurance business back to Van Meter, when in reality he was planning to start a

[4] October 5, 2015 was the renewal date for the Revelation policies then in effect.

new agency, Black Diamond, with Hammond and Jacobs. This issue is discussed at page 23, *infra.*

3:52 p.m. – Neal email to Hoops:

> You say you want to continue with Omni until Oct 5. Then you say that you do not want to continue and will pay 50% etc. I can understand that I would not develop any more business for Omni nor move in to your office space. My license is attached to Omni and all of your policies and the appointments.
> Explain how the service would work and when it would be effected.

(A326). In that email, Neal discusses, as he does in other emails in the same string, the fact that Omni operated under his insurance license, and could not operate without that license.

5:15 p.m. – Hoops email to Neal:

> Jerry
>
> It [Omni] has to continue to exist until then so we will have coverage. It would just exist and the commissions from Revelation would be split 50/50 if we can agree on everything.
>
> You are the one that said 50% of the business was worth something and if that is the case tell me what you think the business is worth and you can probably buy it for that.
>
> I understand you are the agent and that is what 50% of the commissions would cover through October 5th.
>
> You would not have to do anything else for the balance of your commissions. If you are agreeable I will have Eddie draft a release and a guarantee you will get your commissions.
>
> If you are not agreeable then I can just move everything and we can let Omni go out of business. I am fine either way just let me know your preference…Jeff

Jeff Hoops
Revelation Energy, LLC

(A325-A326).

Oct. 28, 2014 – 9:50 a.m. – Neal email to Hoops:

I am not trying to be difficult and not trying to fight you on this. I think I can get comfortable with 50%, however, I don't think any release Eddie [Cunningham] could prepare could keep me clear of breaking the law as it regards the contracts with the carriers as well as with the Omni E&O carrier/policy. For me to step away all together would be a serious Code of Ethics violation relating to insurance licensing in addition to [Breach] of Contract, Misrepresentation and Fraud.
All above would be true if you were asking me to move out for the "Doctor of Insurance" or the like which we both know is not the case here.
You are asking me to break the law, but in absence of insurance law workings.

I have communicated to you several times already that Insurance Companies have polices that do not move commissions mid term due to a change of agent or move of the account. The new agent gets the work of servicing without any commission until the renew.
It might be more difficult to get another agent on board when all the commissions are going to Omni.

I have some concerns about Rebating if we can't clearly show your ownership [of Omni] or if Omni does not really exist legally.

E [sic] will work it out. Talk to you on the 19th hole.

(A325).

The email string on October 27 and 28, discussed at pages 14-21, *supra*, shows that a fundamental issue remained unresolved between Hoops and Neal

regarding Omni: Was Omni going to continue? In the course of the email exchange, Hoops and Neal discussed several possibilities on this question:

1. Unwinding Omni, with Neal keeping 50% of the commissions (this was Hoops' "gut"). If that occurred, Neal insisted that "[s]everal questions need to be cleared up." (A327, A329).

2. Continuing Omni, with Hoops buying Neal's interest. Neal argued that if that were the outcome, "[h]alf of one year commissions is not the purchase price. You [Hoops] are in a position to make money for many years with Omni." (A327).

3. Continuing Omni, with Neal buying Hoops' interest. Hoops asked Neal, "[W]hat will you give me for my half[?]" (A326).

4. As Hoops stated to Neal: "If you want to turn it over to lawyers and let them deal with it, I am happy to do that as well in the meantime I will move everything back to [Van Meter] and you can keep the $75,000." (*Id*.).

While the Court concluded that the email exchange "constitutes the written consent of the members to dissolve Omni," (Op. at 37), the Opinion nowhere states what the terms of the dissolution were. Nor do the emails.

Indeed, none of the open issues discussed in the email string, quoted above, were resolved, which led to Hoops' filing this lawsuit. The situation was not merely, as the trial court stated, "[a]fter the parties consented to dissolve Omni,

they could not agree on the next steps that needed to take place during the winding up process." (Op. at 37). The parties failed to agree on the terms required to reach consent to dissolve Omni.

In his Amended Complaint, Triple H sought judicial dissolution pursuant to 6 *Del. C.* § 18-802 (A044-A057), and did not seek a declaration that Omni had already been dissolved by agreement pursuant to 6 *Del. C.* § 18-801.

C. Facts regarding the question of whether Hoops appropriated Omni's business opportunities when he started Black Diamond Insurance to engage in the identical business as Omni, selling insurance to the same target clients.

Hoops' 1:27 p.m. email to Neal on October 27, quoted *supra*, page 19, is significant not only because he stated that he planned to return to Van Meter for his insurance purchases, but also because he so stated three days before starting Black Diamond, to engage in the same business as Omni, with the same targeted clients – largely Hoops' businesses. Again, this was before the resolution of several open issues between Hoops and Neal.

On October 17, Hoops stated that he planned to replace Neal with Hammond and Jacobs as owners of 50% of Omni. Apparently he changed his plan. Instead of buying out Neal's interest in Omni and transferring that interest to Hammond and Jacobs, Hoops decided to open a new agency, Black Diamond, to conduct the same business as Omni and solicit the same clients.

While the trial court found it dispositive that "Black Diamond [was] not formed until after Hoops and Neal confirm[ed] their October 15 agreement in writing on October 27[,]" (Op. at 45 n.164), the evidence establishes that Hoops had decided to form Black Diamond at least as early as October 24, 2014, three days before October 27, the date on which the Court held that Hoops and Neal confirmed their agreement to dissolve Omni. Because Omni operated on Neal's insurance licenses, Black Diamond needed another agent licensed in West Virginia. West Virginia issued to Hammond her insurance producer licenses for casualty and property policies on October 24, 2014 (A339), which Hammond testified that she obtained "[b]ecause [she] was going to start working for Black Diamond Insurance Group." (A485 at 482:21-483:18 (Hammond)).

On October 30, Edward Cunningham, Hoops' attorney, signed the application for Black Diamond to organize as a Kentucky limited liability company. (A331). The original managers of Black Diamond were Jacobs and Hammond. (A332-A334). Triple H holds a 50% membership interest in Black Diamond, and Jacobs Risk Management and Hammond each own a 25% interest. (*Id.*).

It is undisputed that Hoops did not tell Neal that he was going to start another insurance agency, Black Diamond, to engage in the same business as Omni. Hoops testified at trial that he "was under no obligation to share with

[Neal] what [his] plans were" despite the fact that Hoops (through Triple H) and Neal remained 50/50 owners of Omni (A385 at 182:8-183:8 (Hoops); A224 at 39:2-40:12), and "it [Black Diamond] was going to be in the same business [as Omni]."") (A224 at 40:7-12).

Hoops testified that "there was nothing that prohibited [him] from investing in another insurance agent [sic]." (*Id.* at 40:4-6). Hoops, through Triple H, a 50% owner of Omni, diverted Omni's insurance business, including the insurance policies of Hoops and his businesses, to Black Diamond, where they are also 50% owners. The list of Triple H entities whose insurance business has been diverted to Black Diamond includes Revelation, Republic Industries, John B. Long Sampling Company, Triple H Real Estate, Lexington Coal Company, Genesis Trucking, and Triple H Aviation, all affiliated with Hoops. (A390 at 201:19-204:13 (Hoops)).

Because the Revelation insurance policies written through Omni were in effect until October 2015, Hoops, Jacobs and Hammond bemoaned the fact that, when Revelation decided to acquire assets of James River in December 2014, certain of those assets had to be added to the existing policies, for which Omni would receive commissions, instead of being written through Black Diamond. Hoops stated: "I am not sure what the best approach is on insurance as I hate to see Jerry [Neal] making anything off this at all, but other than Workers Comp, I am not

sure we can move anything else at this time and get any commissions." (A335-A336). Hammond emailed Hoops, in relevant part:

> Jeff,
>
> As we've discussed previously, we all agree it's not the best scenario to send new business Jerry's direction. For this reason, Black Diamond will be quoting the new James River Workers Compensation & Inland Marine.

(A337).

ARGUMENT

I. The trial court erred in concluding that Neal and Hoops agreed to dissolve Omni (a) before Hoops told Neal that Hoops was getting out of the insurance business and returning to Van Meter for insurance for his businesses; and (b) before Hoops arranged and formed Black Diamond, thereby permitting Hoops to engage in the same business as Omni.

A. Question Presented

Did the Court of Chancery err in concluding that Neal and Hoops agreed to dissolve Omni (a) before Hoops told Neal that Hoops was getting out of the insurance business and returning to Van Meter for insurance for his businesses; and (b) before Hoops arranged and formed Black Diamond, thereby permitting Hoops to engage in the same business as Omni?

Neal preserved the question in the trial court in his pre-trial briefs (A135-A136, A207-A209), post-trial briefs (A679-A689 and A711-A712, A733-A736), and during post-trial argument (A912-A915).[5]

B. Scope of Review

In reviewing the trial court's factual conclusion that an agreement had been reached to dissolve Omni, the Court should apply a "clearly erroneous" standard of review. *See Bank of N.Y. Mellon Trust Co., N.A. v. Liberty Media Corp.*, 29 A.3d 225, 236 (Del. 2011). In reviewing the legal question of whether, if any such

[5] On November 5, 2018, Neal filed an Amended Motion for Extension of Time to File Transcript of Post-Trial Argument (Trans. ID 62628280). Our reference to that transcript is conditional upon this Court's granting that motion.

agreement was made, it was *sufficient* to dissolve Omni, the Court should review *de novo. Id.; See Eagle Force Holdings, LLC v. Campbell*, 187 A.3d 1209, 1232 (Del. 2018).

C. Merits of the Argument

Neal challenges the following conclusions of the trial court:

1. The factual conclusions that "[t]he Parties first agreed to the terms of dissolution on October 15…." (Op. at 44-45); and "Omni was dissolved in writing on October 27, 2014 by emails exchanged between 11:11 a.m. and 12:14 p.m., which "constitute[d] the written consent of the members to dissolve Omni." (Op. at 37); and

2. The legal conclusion that, if any such agreement was made, it was sufficient, as a matter of law, to dissolve Omni.

If either of those conclusions is wrong, then there is no basis for the trial court's holdings that:

A. Because Neal and Hoops agreed to dissolve Omni one hour and 13 minutes before Hoops told Neal that he was getting out of the insurance business and returning to Van Meter for insurance for his businesses, Neal has no claim with respect to those misrepresentations by Hoops; and

B. Because Omni was dissolved before Black Diamond was formed, it was impossible for Black Diamond to usurp Omni's business opportunity. (Op. at 38 n.134, 43-45).

1. The trial court erred in finding that Hoops and Neal agreed to the terms of dissolution on October 15, 2014.[6]

The Statement of Facts includes a detailed discussion of several emails. (*Supra* pp. 16-21). To avoid repetition in the Argument, we discussed in the Statement of Facts the reasons why we submit that the trial court erred in concluding that Hoops and Neal agreed to dissolve Omni on October 15, 2014.

While the Court believed Hoops' testimony that *he* wanted to dissolve Omni on October 15, there was no basis to conclude that *Neal agreed* to the terms of a dissolution; Neal's testimony was that he "had no concept" concerning the details of a termination. (A468 at 415:19-20).

[6] In its Amended Complaint (A044-A057), Triple H did not mention dissolution by consent pursuant to 6 *Del. C.* § 18-801. It sought judicial dissolution pursuant to 6 *Del. C.* § 18-802, which contradicts any claim that Omni was dissolved in October 2014. There was no request for a finding that the parties had dissolved Omni pursuant to 6 *Del. C.* § 18-801 until plaintiffs' answering post-trial brief. (A817).

2. The trial court erred in holding that "Omni was dissolved in writing on October 27, 2014" by emails exchanged between 11:11 a.m. and 12:14 p.m., which "constitute[d] the written consent of the members to dissolve Omni"

The trial court's conclusion was based upon its finding that, during the period October 15 through October 27, the parties agreed to dissolve Omni, which was achieved by written consent in an exchange of emails on October 27, 2014.

As stated in detail at pages 16-22, *supra*, the emails exchanged on that date contradict such a finding. Instead, they prove that many material issues remained unresolved after 12:14 p.m. According to the trial court, that was the time that Neal agreed to dissolve Omni, thereby removing any prohibition against Hoops' (1) misrepresenting to Neal his intentions concerning his future insurance purchases (Op. at 38 n.134), or (2) starting Black Diamond to appropriate Omni's business opportunities (Op. at 38 n.134, and 43-45):

(a) In Hoops' 12:04 p.m. email, he states that his plate is so full running Revelation, "I just do not have the bandwidth to take on anything else." (A328). However, three days earlier, Hammond was issued West Virginia insurance licenses that she applied for in order to work for Black Diamond. (A339).

(b) In Neal's 12:14 p.m. email, which the Court found constituted Neal's agreement to dissolve Omni, Neal states, "Several questions need to be cleared up." (A327).

(c) In Hoops' 12:19 p.m. email, Hoops states that he will have his attorney draft an agreement. (A327).

(d) In Neal's 12:59 p.m. email*, after the 12:14 p.m. email that the trial court held was the time Neal agreed to dissolve Omni*, (1) Neal asks Hoops, "Are you wanting to buy me out of Omni?" and (2) "When you say you are going back to how you were, what does that mean? Back to [Van Meter]? Someone else?" (A327).

(e) In Hoops' 1:27 p.m., email, (1) Hoops asks Neal, "[W]hat will you give me for my half [of Omni]?" and (2) states, falsely, that he was going to move his insurance business back to Van Meter, when he was in the process of forming Black Diamond to appropriate Omni's business opportunities. (A326). *See* discussion at *supra* pp. 14-15.

(f) In Neal's 3:52 p.m. email, he repeats that Omni is operating under his insurance license and requests an explanation of how Omni will continue to operate. (A326).

(g) In Hoops' 5:15 p.m. email, he offers two alternatives of Omni's continuing for another year, or moving the policies out of Omni "and we can let Omni go out of business. I am fine either way just let me know your preference." (A325-A326).

(h) In Neal's 9:50 a.m. email the following day, October 28, he explains that he cannot step away from Omni, and "[no] release Eddie [Cunningham, Hoops' attorney] could prepare could keep me clear of breaking the law as it regards the contracts with the [insurance] carriers as well as with the Omni E&O carrier/policy. For me to step away all together would be a serious Code of Ethics violation relating to insurance licensing in addition to Breach of Contract, Misrepresentation and Fraud." He also explained why insurers do not move policies mid-term, and it would be difficult to change agents, resulting in the new agent doing the work of servicing the policies without receiving and commission until the renewal. (A325).

None of the statements by the parties through October 27, 2014, cited by the trial court or discussed in this brief, provide the consent by both parties to all material terms, which is necessary for a court to hold that parties agreed to dissolve Omni.

Limited liability companies are creatures of contract and limited liability company agreements are interpreted using general contract principles. *Feeley v. NHAOCG, LLC*, 2012 WL 4859132, at *6 (Del. Ch. Oct. 12, 2012). As a result, dissolution should be analyzed under contract principles. Dissolution of a limited

liability company requires the parties' mutual rescission or discharge of their contract to form, own and operate such a company.

> To effect a rescission by subsequent mutual agreement, it is necessary that the agreement should receive the free and understanding consent of both parties to the original contract. Just as in the making of a contract, so in the negotiation for its abrogation or termination, there must be a meeting of the minds of the parties in respect to the proposition that it shall be cancelled, and also in respect to any terms or conditions upon which the rescission is to be predicated, and it is inconsistent with such a mutual understanding if one of the parties expressly avers his willingness or desire to continue acting under the contract or to perform his part of it. Black on Rescission and Cancellation, § 525.
>
> There can be no cancellation of a contract unless it is clearly shown that such was the intention of both parties.

Josloff v. Falbourn, 125 A. 349, 350 (Del. 1924).

> The discharge of a contract by the parol agreement of the parties would seem on principle to require the same elements of mutual assent and consideration that are necessary for the formation of informal contracts; and, certainly, this is the general rule. Thus, the validity of an agreement to rescind a contract is controlled by the same rules as in the case of other contracts; there must exist an offer by one party and an unconditional acceptance of that precise offer by the other, prior to withdrawal by the offeror, before a binding agreement is born. A mutual rescission requires that both parties agree to mutually release one another from their respective obligations under the contract, fully settling all rights between them.
>
> Mutual rescission of a contract occurs only where the acts of one party are fully acquiesced in or agreed to by the other.
>
> In determining whether a rescission has taken place, the courts look not only to the language of the parties, but to all of the surrounding circumstances.

29 WILLISTON ON CONTRACTS § 73:15 (4th ed.) (May 2018 Update) (footnotes omitted).

Since an agreement to dissolve Omni would require the same elements of mutual assent that are necessary for its formation, two of the dispositive issues are: (1) "[A]ll essential or material terms must be agreed upon before a court can find that the parties intended to be bound by it and, thus, enforce an agreement as a binding contract[,]" and (2) "the putative contract's material terms [must be] sufficiently definite." *Eagle Force Holdings*, 187 A.3d at 1230 and 1232 (citation omitted). The test of what qualifies as "sufficiently definite" is provided by the Restatement (Second) of Contracts § 33(2),

> which suggests that terms are sufficiently definite if they "provide a basis for determining the existence of a breach and for giving an appropriate remedy." We adopt this test. A contract is sufficiently definite and certain to be enforceable if the court can—based upon the agreement's terms and applying proper rules of construction and principles of equity—ascertain what the parties have agreed to do.

Id. at 1232 (footnote omitted). In view of the number and substance of the unresolved terms of a dissolution in this case, listed at pp. 21-23 and 30-32, *supra*, several essential and material terms had not been agreed upon and a court could not ascertain what the parties had agreed to.

The facts of this case establish, at most, that Hoops decided that *he* wanted to end Omni as of October 15. There is no evidence that Hoops and Neal *ever* reached agreement on the many terms regarding how Omni was to be dissolved,

including terms as basic as whether one party was buying out the other, and, if so, who was buying out whom, (1) before Hoops misled Neal by telling him that he was returning to Van Meter to buy insurance, or (2) before Hoops started Black Diamond to appropriate Omni's business.

3. If the trial court erred in finding that Neal and Hoops agreed to dissolve Omni before Hoops (a) told Neal, falsely, that he was getting out of the insurance business and returning to Van Meter, and (b) before Hoops decided to form Black Diamond to appropriate Omni's business opportunities, then both of those actions by Hoops were breaches of fiduciary duties.

As a factual and legal matter, Hoops and Neal did not reach an agreement to dissolve Omni on October 27, 2014. The fact that fundamental issues, discussed at pages 21-23 and 30-32, *supra*, remained unresolved, precludes a finding that any agreement was reached (a) before Hoops misrepresented to Neal, on October 27, 2014 at 1:27 p.m., that Hoops would return to Van Meter to purchase insurance policies for his various companies; understandably, this was Neal's dominant consideration, because Omni was formed primarily to sell policies to Revelation and to Hoops' other businesses; and (b) before Hoops decided to form Black Diamond to appropriate Omni's business opportunities. For the reasons stated at page 24, *supra*, Hoops had been planning to open Black Diamond at least as early as October 24, 2014. This refutes the trial court's conclusion that the only relevant

date is October 30, 2014, the date that the Black Diamond formation papers were signed. (*See* Op. at 45 & 45 n.164).

If Hoops had told Neal, truthfully, that he intended to return to Van Meter to buy his business and personal insurance, Neal would not have a claim. As explained at pages 38-41, *infra*, contrary to the trial court's holding, we do not argue that Neal had the right to assume that Hoops would use Omni indefinitely to buy insurance for himself or for the companies he controlled. Hoops could have switched to Van Meter or to any other insurance agency in which he had no interest. It is only in a case such as this one, where Hoops established an agency in which he had an indirect 50% interest (through Triple H), to appropriate Omni's business, that Hoops can be held liable to Omni (on whose behalf Neal who sued derivatively.

The trial court's conclusion that "Omni was dissolved when the alleged competition took place" (Op. at 38 n.134) is the only ground stated in the Opinion explaining why Hoops (a) could mislead Neal by telling Neal that he, Hoops, was getting out of the insurance business and returning to Van Meter for his insurance needs, and (b) did not need Neal's permission or consent to compete with Omni. If dissolution had not yet occurred, both were prohibited by the rules stated in *Dweck v. Nasser*, 2012 WL 161590, *12 (Del. Ch. Jan. 18, 2012):

> "The essence of a duty of loyalty claim is the assertion that a corporate officer or director has misused power over corporate

property or processes in order to benefit himself rather than advance corporate purposes." *Steiner v. Meyerson,* 1995 WL 441999, at *2 (Del. Ch. July 19, 1995) (Allen, C). "At the core of the fiduciary duty is the notion of loyalty—the equitable requirement that, with respect to the property subject to the duty, a fiduciary always must act in a good faith effort to advance the interests of his beneficiary." *US W., Inc. v. Time Warner Inc.,* 1996 WL 307445, at *21 (Del. Ch. June 6, 1996) (Allen, C). "Most basically, the duty of loyalty proscribes a fiduciary from any means of misappropriation of assets entrusted to his management and supervision." *Id.* "The doctrine of corporate opportunity represents ... one species of the broad fiduciary duties assumed by a corporate director or officer." *Broz v. Cellular Info. Sys., Inc.,* 673 A.2d 148, 154 (Del. 1996). The doctrine "holds that a corporate officer or director may not take a business opportunity for his own if: (1) the corporation is financially able to exploit the opportunity; (2) the opportunity is within the corporation's line of business; (3) the corporation has an interest or expectancy in the opportunity; and (4) by taking the opportunity for his own, the corporate fiduciary will thereby be placed in a position inimicable to his duties to the corporation." *Id.* at 154–55.

II. The trial court erred in finding that the evidence did not show that the parties agreed that Revelation's insurance business was Omni's in perpetuity, because Neal neither made such a contention nor was he required to make such a showing to prove his claims.

A. Question Presented

Did the trial court err in finding that Neal was required to prove that the parties agreed that Omni would place Revelation's policies in perpetuity to prove his claims?

Neal argued in his Answering Pre-Trial Brief (A197-A198) and during post-trial argument (A915), that he did not need to prove that Hoops' personal insurance and Revelation's insurance were Omni's business in perpetuity to prove that Hoops/Triple H usurped Omni's business opportunities.

B. Scope of Review

"Appellate courts review a trial court's legal conclusions *de novo.*" *Bank of N.Y. Mellon Trust Co.*, 29 A.3d at 236.

C. Merits of Argument

The trial court erred in holding that Neal contended, or was required to prove as part of his claim, that "Omni would place Revelation's insurance policies in perpetuity." (Op. at 31-32). This perpetuity argument was a red herring inserted into the case by Hoops/Triple H and not advanced by Neal. Hoops/Triple H argued that Neal's usurpation claim rested on the "single false premise [that] Hoops's personal insurance policies and Revelation's insurance policies were

Omni's exclusive business opportunity in perpetuity." (A165). Neither Hoops/Triple H nor the trial court explained why a finding that Revelation's business belonged to Omni permanently is necessary for Neal to prove his claim.

The inquiry into whether the business belonged to Omni in perpetuity is irrelevant to Neal's claims.[7] As evidenced by an absence of any case citation by the Court or by Hoops/Triple H on this issue, Neal was not required to prove that the usurped business belonged to Omni in perpetuity in order to prove liability as a result of a breach of loyalty by Hoops/Triple H. Such a holding is contrary to the consistent and longstanding line of cases that establish and define the business opportunity doctrine. *See Dweck v. Nasser* and the cases discussed therein.

The analysis is straightforward. Hoops/Triple H breached their fiduciary duties by creating Black Diamond (an insurance agency in the same business as Omni and in which Triple H/Hoops hold a 50% interest) and diverting numerous business opportunities that would have gone to Omni. These opportunities include the insurance sales to the various businesses, including Revelation, that Hoops controlled.

The purpose of forming Omni was so that Hoops could recoup the commissions he was paying to other insurance companies to insure Revelation and

[7] We acknowledge that, on cross-examination at trial, Neal testified that he understood that Omni would write insurance for Revelation forever. (A448). However, this was never argued to the Court and, as stated at page 38, *supra*, was specifically disclaimed by Neal.

the other companies controlled by Hoops. However, if, in his capacity as a fiduciary for Revelation or the other companies, or, indeed, simply as a business decision, Hoops grew dissatisfied with the performance of Neal or of Omni, he had several options. Hoops could have taken the insurance business of Revelation and the other companies back to Van Meter, as he told Neal he would do. He could have taken the insurance business to any other insurance agency or broker in which Hoops had no interest. If he had done so, Neal would have no claim.

Hoops also could have petitioned the Court of Chancery to dissolve Omni in 2014 (as he eventually did, in filing this case in 2016), and, after such dissolution, formed another insurance company to procure insurance for Revelation. What he was prohibited from doing, and what he did, is form Black Diamond to engage in the identical business as Omni and appropriate Omni's business opportunities, including selling insurance to Revelation and the other companies he controlled.

By forming Black Diamond to compete with Omni, Hoops/Triple H breached their fiduciary duties. This Court addressed the proper scope of damages in *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939), reasoning:

> If an officer or director of a corporation, in violation of his duty as such, acquires gain or advantage for himself, the law charges the interest so acquired with a trust for the benefit of the corporation, at its election, while it denies to the betrayer all benefit and profit. The rule, inveterate and uncompromising in its rigidity, does not rest upon the narrow ground of injury or damage to the corporation resulting from a betrayal of confidence, but upon a broader foundation of a 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.

The issue of the time period of commissions to which Omni is entitled as damages is just that – a question of damages, not one of liability.

The trial court's error in holding that Neal's claim fails because the parties did not agree that Omni would place Revelation's policies in perpetuity is demonstrated by the holding that follows it, at pages 32-33 of the Opinion, that Neal's timely placement of Revelations' policies was not a material condition to the formation of Omni. If the business of a limited liability company, owned 50% each by two parties, does not work out, the parties are free to petition the Court of Chancery to dissolve the business pursuant to 6 *Del. C.* § 18-802 or petition the Court of Chancery to wind up the affairs of the limited liability company pursuant to 6 *Del. C.* § 18-803. Just as success cannot be a material condition to formation of a limited liability company, nor can a member of such a company assume a source of business in perpetuity.

What a member *should* be able to assume is that another member will not take for his own a business opportunity of the company, as Hoops did here.

CONCLUSION

For the reasons stated herein, this Court should reverse the holding of the Court of Chancery and remand to that Court for further proceedings.

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