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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

ANSWERING BRIEF OF APPELLEES TRIPLE H FAMILY LIMITED PARTNERSHIP AND JEFFERY A. HOOPS

BERGER HARRIS LLP

David B. Anthony (DE ID # 5452)
Sean A. Meluney (DE ID # 5514)
1105 N. Market St., 11th Floor
Wilmington, DE 19801
Tel: (302) 655-1140
Fax: (302) 655-1131
danthony@bergerharris.com
smeluney@bergerharris.com

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NATURE OF PROCEEDINGS

On May 4, 2016, appellee and plaintiff/counterclaim defendant-below Triple H Family Limited Partnership ("Triple H") filed the Verified Complaint (as amended, the "Complaint") against appellant and defendant/counterclaim plaintiff-below Jerry Neal ("Neal"). Triple H is controlled by appellee and third-party defendant-below, Jeffery Hoops ("Hoops" and together with Triple H, the "Triple H Parties"). The Complaint sought, *inter alia*, the dissolution of Omni Insurance Group, LLC ("Omni"), an insurance agency formed by Hoops and Neal. Although Hoops and Neal were longtime friends, the two men agreed to dissolve Omni less than two turbulent months after its formation. Triple H was forced to file the Complaint because Neal continuously threatened to sue Hoops and tried to re-trade on the terms of winding up Omni.

At trial, Triple H asserted three claims of relief: (i) breach of fiduciary duty against Neal; (ii) breach of contract against Neal; and (iii) and the dissolution and winding up of Omni. For his part, Neal asserted four claims of relief against the Triple H Parties: (i) breach of contract against Hoops and Triple H; (ii) breach of fiduciary duty against Hoops and Triple H; (iii) breach of fiduciary duty against Hoops; and (iv) fraud against Hoops.

A three-day trial occurred before The Honorable Tamika Montgomery-Reeves on November 6-8, 2017. The parties submitted over 300 trial exhibits and

the trial court heard testimony from six lives witnesses at trial. Full post-trial briefing and post-trial oral argument followed.

On July 31, 2018, the trial court issued a 62-page, 224-footnote Memorandum Opinion (the "Opinion") that meticulously explains the reasoning and evidentiary support for each of the trial court's factual findings. The trial court found in favor of the Triple H Parties in all material respects. The Opinion detailed that Hoops and Neal verbally agreed to dissolve Omni on October 15, 2014 and that they provided written consent of dissolution as required by 6 *Del. C.* § 18-801(a) on October 27, 2014. The trial court also held that Neal breached his contractual and fiduciary obligations owed to Triple H and awarded nominal damages.

The trial court denied all of Neal's claims for relief, and the Opinion states that neither Triple H nor Hoops breached any contractual or fiduciary duties owed to Neal. Likewise, the trial court held that Hoops did not make any material misstatements to Neal and denied Neal's fraud claim.

On August 7, 2018, the trial court entered a Final Order and Judgment. Under that Order, Triple H was appointed as the liquidating trustee to wind up Omni's affairs. On September 21, 2018, the trial court entered an Order of Dissolution of Omni ("Dissolution Order"). The Triple H Parties have complied with the Dissolution Order. The Triple H Parties also filed a certificate of cancellation of Omni with the Delaware Secretary of State.

SUMMARY OF ARGUMENT

1(a). Denied. The trial court's finding that Hoops and Neal consented to dissolve Omni in writing before any discussion concerning whether Hoops was getting out of the insurance business was not clearly erroneous.

1(b). Denied. The trial court's finding that Hoops and Neal consented in writing to dissolve Omni before Black Diamond was formed was not clearly erroneous.

2. Denied. The trial court correctly applied settled Delaware law in holding that Hoops did not usurp corporate opportunities belonging to Omni.

STATEMENT OF FACTS[1]

Neal contends that this case is about corporate usurpation. The voluminous record below, including the Opinion, demonstrates that it is not about usurpation of corporate opportunities, but rather a "failed venture" that unraveled because Neal "breached the contract and breached his fiduciary duties…" and was guilty of "potentially catastrophic failures to secure insurance for Omni's only real customers…."[2] Following a three-day trial, depositions, hundreds of exhibits, and extensive briefing, the trial court rightly observed that, unlike Neal, the Triple H Parties had abided by their contractual and fiduciary duties and that the parties agreed, on multiple occasions, to dissolve Omni and end their partnership.[3]

I. UNDISPUTED FINDINGS OF FACT

A. Credibility of the Parties.

The trial court weighed the documents and live witness testimony and noted that "[t]here are several conflicts between the contemporaneous documents and the live witness testimony given three years after the fact. I tend to give more weight to

[1] "A__" refers to the Appendix to Appellant's Opening Brief. "C__" refers to the Counter Appendix to Appellees' Answering Brief.

[2] *Triple H Family Ltd. P'Ship v. Neal*, 2018 WL 3650242, at *1, *16 (Del. Ch. July 31, 2018) (herein cited, "*Triple H*").

[3] *Id.* at *1.

the contemporaneous evidence as it is free from the realities of litigation and closer in time to the events that transpired."[4] The trial court also made a determination that Hoops was more credible than Neal.[5] Hoops was described as a "seasoned businessman who seems to move with breakneck speed…[b]ut also has a strong personal code of ethics and believes a man's word is his bond."[6] Neal, on the other hand, was described as a "perpetual salesman who will say whatever he needs to, regardless of veracity, in order to secure the deal and who continuously tries to renegotiate deals to get more favorable terms for himself."[7] Thus, "when contemporaneous written evidence is lacking and Neal's and Hoops's testimony conflicts, [the trial court] …[gave] Hoops's testimony more weight."[8]

The credibility determination made by the trial court was based upon objective evidence presented at trial. At footnote 11 of the Opinion, the trial court explained

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[4] *Id.* at *2.

[5] Neal's credibility was a hotly litigated issue. In their Post-Trial Answering Brief, the Triple H Parties included a four-page chart of Neal's most troubling misrepresentations prior to, and during, this litigation. *See* A780-A784. The Opinion largely adopted the arguments set forth in that chart at footnote 11 of the Opinion. *See Id.* at *1, n. 11.

[6] *Id.*

[7] *Id.*

[8] *Triple H*, 2018 WL at *2.

its basis for giving Hoops's testimony more weight by examining a number of Neal's misrepresentations:

> *See, e.g.*, JX 23 (attempting to renegotiate the terms of Omni to keep Neal Insurance bond and consulting income exclusively for himself); JX 54 (telling Hoops less than twenty-four hours before his personal policies lapsed, despite multiple assurances to the contrary, that Neal did not succeed in getting Hoops's assets covered); JX 72 (attempting to renegotiate the terms of Omni's dissolution); JX 222 (opening a JP Morgan Bank account without Hoops's knowledge to redirect Omni's biggest commissions). *Compare* JX 90 (representing to West Virginia Offices of the Insurance Commissioner that he is the sole managing member of Omni in order to report Hoops and Black Diamond to the Insurance Commissioner) *with* Tr. 454 (Neal) (testifying after suing Hoops for breach of fiduciary duty that, "I don't think that as it was unfolded and what we truly ended up doing, I was the sole manager, no."); *compare* JX 25 (representing on September 1, 2014, that Neal did not have "a single Neal Insurance policy renewing" until after December 31, 2014) *with* JX 326 (invoicing November 18, 2014 renewals); *compare* JX 47 (telling Hoops that "[a]ll coverages are bound, went into effect at midnight on Sunday morning") *with* JX 310 (emailing an insurance broker minutes after JX 47 was sent asking if the policy is bound and saying he is "[v]ery concerned we are exposed").[9]

The importance of these credibility findings are paramount, as the parties differed "on pretty much everything pertaining to this litigation…."[10] The trial court

[9] *Id.* at *1, n. 11.

[10] *Id.* at *1.

was, therefore, required to make a number of fact-intensive, credibility-driven determinations, one of which is the subject of this appeal, but many of which are undisputed for the purposes of the appeal.

B. The Formation of Omni.

Hoops and Neal met almost fifty years ago in elementary school in Bluefield, West Virginia.[11] Hoops began his career in the coal mining industry right out of high school as an entry level miner. Hoops continued to work in the coal mining industry over the next 40 years, while also attending college at night. Hoops was quickly promoted into management within a large coal company; and, ultimately, started several coal mining businesses.[12] In 2008, Hoops started Revelation Energy LLC ("Revelation"), a coal mining business he currently runs.[13]

Neal has been in the insurance business for almost 30 years.[14] In 2011, Neal formed Neal Insurance, an insurance agency he owns and operates.[15]

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[11] *Id.* at *3.

[12] *Id.*

[13] *Id.* at *1.

[14] *Triple H*, 2018 WL at *3. For years, Hoops sent his companies' insurance business to Neal. In total, Hoops sent roughly $70 to $100 million worth of insurance premiums to Neal. A345 at 21:19-24.

[15] *Id.*

Neal and Hoops reconnected with each other at their 40th high school reunion in mid-August 2014. At the reunion, Hoops and Neal discussed starting an insurance agency, similar to a shared acquaintance in the coal industry.[16]

From August 18, 2014 to August 25, 2014, Hoops and Neal exchanged emails discussing the preliminary plans for starting an insurance agency together. The parties' concept was that Triple H would own 50% of the agency with Neal owning the other 50%.[17] Triple H, through Hoops, would provide start-up capital and the agency's initial customers would include Revelation and Hoops personally.[18] For his part, Neal was to roll Neal Insurance into the agency, serve as the agency's President, and grow the business.[19]

The parties agreed to call their agency Omni Insurance Group, LLC. Omni was formed when its Certificate of Formation, which Hoops signed, was filed with the Delaware Secretary of State on August 25, 2014.[20]

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[16] *Id.*

[17] *Id.*; *see also* C106-C108.

[18] *Id.* at *3, 4 (Hoops's personal insurance policies secured "$15 million in assets" and were "up for renewal on October 15….").

[19] *Id.*; *see also* C104-C108.

[20] *Triple H*, 2018 WL at *4.

C. The Terms of the Contract.

"In the insurance world, agents make commissions, which are a percentage of the premium paid by the customer."[21] For Omni, securing those commissions "came with a hitch," as Revelation's policies were yearlong policies that ran from October 5 to October 5.[22] Immediately upon Omni's formation, Neal was supposed to start the process of procuring new insurance policies for Revelation and Hoops, which had to be placed by October 5 and October 15, respectively.[23] Instead, as will be discussed below, Neal began re-trading key aspects of the parties' agreement.

The trial court found that Omni does not have a written operating agreement.[24] This is because Neal refused to sign, revise, or otherwise pay any attention to a draft written operating agreement that Hoops paid his counsel to prepare.[25] Accordingly, the trial court held that the parties have an oral operating agreement, the terms of which were reflected in the parties' email communications (the "Contract").[26]

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[21] *Id.*

[22] *Id.*

[23] *Id.* at *12.

[24] *Id.* at *11.

[25] *Id.* at *7.

[26] *Triple H*, 2018 WL at *11.

The trial court found, and neither party disputes on appeal, that the Contract had four terms. Those terms are:

> (1) Triple H and Neal each own 50% of Omni and have equal voting rights; (2) Neal would roll all of Neal's Insurance's insurance, consulting and bond business into Omni starting on October 1; (3) Neal will be provided a Base Salary plus Benefits starting October 1; and (4) Jacobs Risk Management would assist in placing Revelation's insurance policies and receive ten percent of the commissions received for any existing business and thirty percent of the commissions for new business.[27]

Jacobs Risk Management assists small and large coal companies with regulatory affairs and insurance needs, and it had serviced Revelation since 2009.[28] Jacobs Risk Management was run by Joseph Jacobs ("Jacobs") and Heather Hammonds ("Hammonds"), who primarily handled Revelation's account. When Hoops and Neal first decided to form Omni, they met with Jacobs and Hammonds.[29] They all agreed that "Jacobs Risk Management would receive a commission on current business of Revelation as well as commission on any new business that's brought to the table"[30] and Hammond continued to assist Neal through September.

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[27] *Id.*; *see also* C072, C085-C089 at ¶¶2, 10, 32; C109-C111.

[28] *Id.* at *6.

[29] *Id.*

[30] *Id.*

"Adding further strain" to the work required to place Revelation's and Hoops's insurance policies, "Neal kept attempting to renegotiate the structure and operation of Omni."[31] On September 1, 2014, shortly after the formation of Omni, Neal informed Hoops that he had not rolled Neal Insurance into Omni and intended to keep Neal Insurance's bond consulting fees, which amounted to "75 to 80 percent"[32] of Neal Insurance's profits, for himself.[33] Hoops, however, responded that he "wanted to maintain their original agreement…;" and while "Neal quickly backed off"[34] in a subsequent email and said he was "100% committed to growing Omni,"[35] Neal failed to roll Neal Insurance into Omni.

D. Neal Breached the Contract.

The trial evidence proved, and the trial court agreed, that Neal breached the Contract by failing to "roll all of Neal Insurance's insurance, consulting and bond business into Omni starting on October 1."[36] Prior to forming Omni, Neal

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[31] *Id.* at *5.

[32] *See, e.g.*, A397 at 232:17-19 ("Q. So the bonding business was 75 to 80 percent of Neal Insurance's income? A. Yes.").

[33] *Triple H*, 2018 WL at *5.

[34] *Id.* at *5-6.

[35] *Id.*; C112.

[36] *Id.* at *17.

represented to Hoops that he would immediately transfer Neal Insurance's "base of business" to Omni.[37] Neal failed to do so and engaged in multiple transactions through Neal Insurance.[38] From August 26 (the date of Omni's formation) through October 2014, Neal Insurance engaged in, at least, 15 separate transactions.[39] The trial court held that the "[t]he parties stipulated that Neal did not roll any of Neal Insurance's business into Omni. Therefore, Neal breached the Contract."[40]

E. Neal Failed to Secure Insurance for Omni's Only Real Customers and Lied to Hoops About Procuring D&O Insurance.

On October 1, 2014, Neal emailed Hoops saying, "We did it. I have everything done."[41] Neal then walked through the particulars of a number of different insurance policies, including workers' compensation, director and officer ("D&O"), crime, and excess insurances, that he had allegedly procured for Revelation.[42] Hoops replied, "Amazing you got all of this pulled together in such a

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[37] *Id.* at *3; *see also* C104.

[38] *See, e.g.*, A457-A459 at pp. 369-378; C112-C116; C132-C134; C160-C161; C181-C182, C186-C187; C188-C190; *see also* C29-C33 at pp. 18-22.

[39] *Id.*

[40] *Triple H*, 2018 WL at *17; *see also* C085-C089 at ¶¶2, 10, 32.

[41] *Id.* at *7; *see also* C117-C121.

[42] *Id.*

short time, great job."[43] But the celebrations were short lived. On October 4, a Saturday, Neal emailed Hoops at 6:02 p.m., "I was not able to get the policy number on the D&O from the wholesaler representing Westchester. The wholesaler said there was a concern with the questions on Friday."[44] Hoops replied at 6:20 p.m., "Are we going to be without insurance for some period of time now? Having coverage is more important than anything else as I would not Want to e itch out insurance for one minute as we have people on our jobs 24/7."[45] While Neal tried to reassure Hoops that "everything was likely fine,"[46] Hoops remained concerned and advised Neal that if policies were not bound he would consider shutting down operations, which would cost Revelation "$1.1mm per day" in losses.[47]

At 8:18 a.m. on Monday, October 6, Neal assured Hoops again that, "All coverages are bound, went into effect at midnight Sunday morning. I have the policy numbers for them except the D&O."[48] At 8:20 a.m., two minutes later, Neal emailed

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[43] *Id.*

[44] *Id.*; *see also* C123-C124.

[45] *Id.* Similar to the Opinion, quotes from trial testimony and exhibits are presented in their original form except where indicated. *Sic* is not used as it would make some of the evidence unreadable.

[46] *Triple H*, 2018 WL at *7.

[47] *Id.*; *see also* C122.

[48] *Id.*; *see also* C122.

the D&O insurance intermediary asking, "Are we bound? No policy number or word Friday. Very concerned that we are exposed. Please advise asap. Customer is not happy with me about this."[49] The intermediary responded at 10:13 a.m. that the underwriter and carrier both had additional questions.[50] On October 6 at 9:37 a.m., Neal emailed a different intermediary to see if they could give him a quote for D&O insurance.[51] On October 8 at 9:58 a.m., Neal emailed yet another underwriter, "I have a pressing need to get D&O in place on [Revelation]. Westchester is stalling and have not bound…."[52] At some point after this October 8 email, Westchester bound D&O insurance.[53]

The trial court found that "Revelation did not have D&O insurance" from October 5 until at least October 8.[54] This was a "potentially catastrophic failure…," as Revelation is a coal mining business, which is commonly known as a high-risk industry dealing in inherently dangerous conditions.[55] The trial court found that:

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[49] *Id.*; *see also* C183-C184.

[50] *Id.*

[51] *Id.*; C128.

[52] *Triple H*, 2018 WL at *7; C148-C149.

[53] *Id.*

[54] *Id.* at *19.

[55] *Id.*

> The 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.[56]

Less than ten days later, on October 14 at 9:20 a.m., Neal emailed Hoops, "Your [Hoops'] personal policies come due tomorrow, so we need to bind today. I was not successful in getting all policies…replaced with my agent here as I had hoped to do…."[57] Neal later wrote that he could get the policies bound "…effective 10-15. However it might be trouble getting a claim paid in the window of midnight to whenever we send order to bind."[58] At 4:38 p.m., Hoops replied "24 hours of exposure is unacceptable this is no way to do business."[59] Ultimately, the policies were placed by Hammonds.

The trial court's holding that Neal violated his fiduciary duties by failing to procure insurance, and then failing to be truthful, is not contested by Neal.

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[56] *Id.*

[57] *Triple H*, 2018 WL at *8; *see also* C135.

[58] *Id.*

[59] *Id.*

F. Triple H Performed as Required by the Contract.

The trial court held, and Neal does not challenge on appeal, that Hoops "did not breach the contract…."[60] In the end, for 30 days of work – during which Neal actively ran a competing insurance agency (*i.e.* Neal Insurance) for a profit, which he kept all of – Neal received roughly $155,000 in commissions and a pro-rated salary of $100,000 per year, which was paid out of Hoops's own pocket.[61]

G. Neal Covertly Opens an Omni Bank Account and Redirects Commissions.

The largest policy that Omni procured for Revelation was a workers' compensation policy for surface mining employees with Kentucky Employers' Mutual Insurance ("KEMI").[62] The KEMI policy was not financed, and Omni's commission was paid on a monthly basis.[63] On January 27, Hoops emailed Neal to inquire as to why Omni had not received any commissions from KEMI.[64] Neal responded by confessing to have secretly redirected the KEMI commissions to an

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[60] *Id.* at *1.

[61] *See* C001-C005 at ¶¶1, 3 (Showing a distribution of $79,148.46 to Neal); *Triple H*, 2018 WL 3650242, at *19-*20 (showing a distribution of $75,000 to Neal).

[62] A366 at 107:21-108:4.

[63] *Id.*

[64] C162.

account that only he controlled.[65] Neal's covert attempt to control Omni's largest source of commissions was one factor the trial court considered in making its credibility determinations.[66]

II. DISPUTED FINDINGS OF FACT

A. The Parties Agreed to Dissolve Omni on October 15, 2014.

On October 15, 2014, Hoops and Neal met and jointly decided to end their partnership and go their separate ways.[67] As the trial court noted in the Opinion, there was very little in the way of "written evidence that illuminates the events of October 15-17…;" therefore, the Court had to make a determination based, in part, on credibility.[68]

Hoops testified that on October 15, he and Neal agreed "Omni would be dissolved and that we would go our separate ways and that we would split the commissions for the next year 50-50."[69] Hoops then proposed – and Neal agreed – the parties should dissolve Omni. In exchange for dissolving Omni, Neal agreed

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[65] A367 at 109:1-8.

[66] *Triple H*, 2018 WL at *1, n. 11.

[67] *Id.* at *12 ("The members, 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."); A359 at 78:12-16; *see also* C150.

[68] *Id.* at *8.

[69] *Id.*; *see also* A359 at p. 78.

that Hoops would pay for the renovations to Omni's office, and that Neal would receive half of Omni's remaining commissions and all of Neal Insurance's profits.[70]

Neal sent a confirmation email the following day, in which he wrote "[r]egardless, of how or whether we change our Omni concept. (*sic*) We are in agreement on a 50/50 split for this year. Correct?"[71] As if that were not enough, Neal admitted at trial that on October 15, he and Hoops agreed to dissolve Omni.[72] Based on the evidence and live witness testimony, the trial court ruled that "[t]he members…agreed to dissolve Omni on October 15, 2014, and memorialized that agreement in writing on October 27, 2014."[73]

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[70] *Id.* at *8, 17; *see also* A359 at 79:16-23.

[71] A305.

[72] *See, e.g.*, A468 at 414:2-8 ("Q. And on 10/15, isn't it true that you and Jeff talked about unwinding Omni and going your separate ways? A. Yes. Q. And you agreed to it. Isn't that correct? A. Agreed in context."); A446 at 324:1-7 (Neal further admitted that he agreed to end the parties' partnership because, in part, Omni "wasn't going to work" without Triple H); A468 at 415:11-24 ("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."); A439 at 299:3-5 (At trial, when asked about the events on October 17, Neal testified "No way. I never -- I mean, it's in here a million different places. I always accepted the 50 percent.").

[73] *Triple H*, 2018 WL at *12.

B. The October 17, 2016 Meeting.

Revelation financed its policy premiums for the 2014-2015 policy year,[74] which required a down payment of roughly $412,000 that had to be delivered by October 17, 2014.[75] In order to execute the finance agreement, a representative of Revelation and Neal had to sign the document.[76] Because of the importance of timely returning the executed finance agreement, Neal asked Revelation's CFO, Lisa Henson, to expedite Revelation's processing of the agreement and down payment, and set up a face-to-face meeting at Revelation's headquarters on the morning of October 17th.[77]

Hoops and Neal met in the morning on October 17.[78] Neal told Hoops that he refused to sign the finance agreement, unless Hoops wrote "him a check for the full commissions…which were $200,000."[79] Hoops and Neal engaged in a "fairly heated discussion," in which Hoops argued that "emptying the checking account"

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[74] A358-A359 at 76:23-77:14.

[75] *Id.*

[76] A359 at 77:15-18.

[77] C151-C159; *see also* A359-A360 at 80:24-81:15.

[78] A360 at pp. 81-82.

[79] *Id.* at 81:12-15.

was unwise prior to hiring someone to produce the insurance cards and prior to the carrier's policy audits.[80] Neal eventually agreed that the parties "would distribute $150,000…$75,000 was given to Jerry Neal and 75,000 was given to Triple H…."[81]

Throughout this litigation, Neal has denied Hoops's account of the October 17th meeting.[82] Neal continued to push this false narrative at trial denying that he ever made such an ultimatum to Hoops.[83]

Neal's personal notes, however, state that: "I arranged a Premium Finance Agreement for about half of the Revelation Premiums which generate about $200,000 of commission immediately. I demanded to get paid before I signed the Finance Agreement and Jeff and I took $75,000 each much to his objection. No reason not to take the money."[84] When asked if he drafted this synopsis containing this admission, Neal testified as follows:

> A. I wrote that…But my testimony is that I didn't demand the money….

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[80] *Id.* at pp. 81-82.

[81] *Id.* at 82:13-17.

[82] C170 (Neal's verified interrogatory responses, in which he states that "Hoops suggested that Hoops and Neal each received a distribution of $75,000. Neal agreed.").

[83] A469 at 417:17-420:2 (When asked if he demanded a distribution in order to sign the finance agreement, Neal responded "Absolutely not.").

[84] C179-C180.

> Q. So then why did you write here that you went in and you demanded to get paid before I sign the finance agreement? Why were those words that you wrote?
>
> A. They were just a group of words that I put together….[85]

Neal's contemporaneous notes demonstrate that he used his knowledge of Hoops's fear of being uninsured along with Hoops's statement that he would rather lose $1.1 million a day rather than go uninsured for a minute, to pressure Hoops into making a $75,000 distribution.

Within an hour of the October 17th meeting, Hoops emailed Neal the terms that the parties had discussed during their face-to-face meeting.[86] The trial court found that "consistent with their pattern of behavior,"[87] at 9:15 a.m. that same day, Hoops emailed Neal 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 would receive 10% commissions on Revelation deal and 33% on any new business they bring

[85] A470 at 422:21-423:1.

[86] A440 at 302:6-8.

[87] *Triple H*, 2018 WL at *12.

5) Then as cash built up in Omni we would periodically distribute 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 expense incurred to ate 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.[88]

Neal ultimately kept all of Neal Insurance's income, Hoops paid for the renovations, and Neal has received his 50% of Omni commissions.[89]

With the business relationship concluded, Hoops contacted Hammond and Jacobs asking whether they were interested in acquiring Neal's 50% interest in

[88] *Triple H*, 2018 WL at *12-13; *see also* A306-A307.

[89] *Id.* at *17-18; *see also* A360-A361 at 84:14-85:3; C001-C005 at ¶¶1, 3 (Showing a distribution of $79,148.46 to Neal).

Omni.[90] This was the first time that Hoops discussed owning an insurance agency with Jacobs and Hammond.[91]

C. The Parties Provide Written Confirmation of Their Agreement to Dissolve Omni on October 27, 2014.

On October 27, 2014, Neal emailed Hoops about Omni hiring a person to help with administrative work part time.[92] At 11:11 a.m. Hoops responded, in part:

> 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. Lisa is involved as CFO with all of my entities and she is an integral part of everything I am doing. 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 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. I will eat the remodeling downstairs as I can probably use that space sometime in the future. If you are in agreement, I will get Eddie to draft up something that

[90] A308-A309.

[91] *Triple H*, 2018 WL at *15, n. 164.

[92] *Triple H*, 2018 WL at *10.

> commits me to get you the 50% of commissions until October 5th, 2015 so you will have something in writing.[93]

Neal responded: "I will agree to what needs to be done…I don't see all that much need for communication between Lisa, Heather and I…for the rest of the policy year…."[94] Leaving no doubt, moments later Neal wrote another email confirming his agreement: "OK. 50% is fine…Tell me how I can get out of the way. Several questions need to be cleared up."[95] Hoops and Neal then discussed minor details regarding how they would go about winding up Omni on October 27 and 28.[96]

After Neal agreed to terms for dissolution on October 15th, then again on October 17th, then two times on October 27th, Neal – in line with his *modus operandi* – tried to renegotiate the deal.[97] Now, twelve days after agreeing to end their partnership and 45 minutes after providing written confirmation of his willingness to accept "50%", Neal said "you need to research normal costs associated with acquiring an agency."[98]

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[93] *Id.*; *see also* A323.

[94] *Id.*; *see also* A322-A323.

[95] *Id.*; *see also* A322.

[96] *Id.*; *see also* A320-A321.

[97] *Id.*; *see also* A325-A330.

[98] *Triple H*, 2018 WL at *10; *see also* A327.

In response to Neal's attempted renegotiations, Hoops reminded Neal that the parties had already reached an agreement to go their separate ways.[99] Neal then asked Hoops, for the first time, where Hoops intended to move Revelation's 2015 policies.[100] Hoops responded, truthfully, that he would "most likely go back to V[an] M[eter]."[101] Hoops's response was noncommittal and "certainly left the door open…for other options."[102] At the time of the statement, Hoops, Hammond, and Jacobs had not even discussed forming their own insurance agency.[103] The trial court, after hearing the live witness testimony of Hoops, Neal, Hammonds, and Jacobs, found that: "Hoops does not discuss replacing Neal until after they had agreed to dissolve Omni…Black Diamond is not formed until after Hoops and Neal confirm their October 15 agreement in writing on October 27. Moreover, the

[99] *Id.*; *see also* A326.

[100] *Id.*; *see also* A327.

[101] A326.

[102] A363 at 95:15-20.

[103] *Triple H*, 2018 WL at *15, n. 164; *see also* A493 at 512:20-23. In the Opening Brief, Neal relies on a quote from Hammond regarding getting certain licenses for Black Diamond. This was a misstatement that was rightly disregarded by the trial court. Hammond made clear that the "first time" her and Hoops discussed forming Black Diamond was after Hoops and Neal agreed in writing to dissolve Omni. A493; *see also* A331 (The first document in evidence discussing Black Diamond is dated October 30, 2014).

timeline on which Black Diamond was established is in line with the timeline on which Omni was formed."[104]

[104] *Id.*

ARGUMENT

I. It Was Not Clearly Erroneous For The Trial Court To Rely On Trial Evidence Showing That Hoops And Neal Gave Their Written Consent To Dissolve Omni.

A. Questions Presented.

Was the trial court's finding that the parties agreed on October 15, 2014 to dissolve Omni and then gave written consent to dissolve Omni on October 27, 2014 clearly erroneous?[105]

Was the trial court's finding that the parties agreed and gave written consent to dissolve Omni before Hoops discussed his future plans with Neal and before forming Black Diamond clearly erroneous?[106]

Was the trial court's holding that the parties gave their written consent to dissolve Omni a misapprehension of Delaware law?[107]

B. Scope and Standard of Review.

"After a trial, findings of historical fact are subject to the deferential 'clearly erroneous' standard of review."[108] "That deferential standard applies not only to

[105] A180-A182; A821; C068

[106] A180-182; A821; C068

[107] A180-182; A821; C068.

[108] *Bank of N.Y. Mellon Trust Co., N.A. v. Liberty Media Corp*., 29 A.3d 225, 236 (Del.2011).

historical facts that are based upon credibility determinations but also to findings of historical fact that are based on physical or documentary evidence or inferences from other facts. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."[109]

"When factual findings are based on determinations regarding the credibility of witnesses, however, the deference already required by the clearly erroneous standard of appellate review is enhanced."[110] This is because the Supreme Court "respects and gives deference to findings of fact by trial courts when supported by the record, and when they are the product of an orderly and logical deductive reasoning process, especially when those findings are based in part on testimony of live witnesses whose demeanor and credibility the trial judge has had the opportunity to evaluate."[111]

[109] *Id*.

[110] *Cede & Co. v. Technicolor, Inc*., 758 A.2d 485, 491 (Del.2000).

[111] *OptimisCorp v. Waite*, 137 A.3d 970, 971 n.2 (Del. 2016); *Stegemeier v. Magness*, 728 A.2d 557, 561 (Del. 1999).

C. Merits of the Argument.

1. The Trial Court's Finding of Facts Should Not Be Reversed.

a. Neal consented to dissolution.

Under the applicable standard of review, the Court must affirm the trial court's findings of fact if they are the product of a reasoned and logical fact-finding process that is grounded in the evidence presented at trial. Neal testified at trial that he and Hoops agreed to dissolve Omni during the October 15 meeting.[112] Neal testified that he "always accepted the 50 percent."[113] Neal further testified that he "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."[114]

Neal's testimony provides the context and his emails provide clear written confirmation that he agreed to dissolve Omni. On October 27, in response to Hoops writing that he wants to "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," Neal wrote "I will agree with what needs to be done but it is a real shame."[115] A few moments later, Neal wrote,

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[112] A468 at 414:2-8.

[113] A439 at 299:3-5.

[114] A468 at 415:11-24.

[115] *Triple H*, 2018 WL 3650242, at *13.

"OK. 50% is fine . . . Tell me how I can get out of the way. Several questions need to be cleared up."[116]

Even accepting Neal's argument that there are two ways to read his emails, under the clearly erroneous standard of review the trial court's finding that Neal's writings provide written consent to dissolve Omni cannot be overturned on appeal.[117] This is particularly so here because the trial court made its finding concerning the meaning of Neal's emails against the context of his trial testimony. Neal's myopic focus on particular snippets of his emails to the exclusion of all his other statements and the context of the parties' discussions is misplaced. The trial court's finding of fact was based on a totality of all the evidence and a product of an orderly and logical deductive process in interpreting the parties' communications. Accordingly, the trial court's finding of fact was not clearly erroneous.

b. Hoops did not make material misrepresentations to Neal.

Neal argues that the trial court erroneously found that he consented to dissolve Omni because, according to Neal, Hoops misrepresented his future plans. Neal is

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[116] *Id.*

[117] *Siga Techs., Inc. v. PharmAthene, Inc.*, 132 A.3d 1108, 1130 (Del. 2015), as corrected (Dec. 28, 2015) ("Where there is more than one permissible determination to be drawn from the evidence, and the trial court chooses one, its finding cannot be clearly erroneous.").

wrong. The trial court considered the same argument Neal advances on appeal and denied it because it is "not supported by the evidence."[118]

The trial court found that no party elicited any evidence that "Hoops's plans after Omni were discussed at either the October 15 or 17 meetings."[119] Neal does not appear to challenge this finding. Next, the trial court found that at 11:11 a.m. on October 27, Hoops wrote to Neal that "My gut is to just worth 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."[120] Then, at 12:59 p.m., after Neal gave written consent to dissolve Omni at 12:14 p.m., Neal asked Hoops, for the first time, what his plans were. Neal wrote "When you say you are going back to how you were, what does that mean right now? Back to [Van Meter]? Someone else?"[121] Hoops responded at 1:27 p.m., stating, in part: "I am going to do what I said, which is keep Revelation with Omni until October 5th, then most likely will go back to [Van Meter] as they stepped up and done my personal at the last minute . . . ."[122] Neal's Opening Brief does not, because it cannot, point to any evidence where he asked, or Hoops volunteered, information

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[118] *Triple H*, 2018 WL 3650242, at *13, n.134.

[119] *Id*.

[120] *Triple H*, 2018 WL 3650242, at *13, n.134 (JX 73; A326-328).

[121] *Id*.

[122] *Id*.

about Hoops's future plans before Neal's 11:59 a.m. and 12:14 p.m. emails in which he consents to dissolve Omni.

Similarly, Neal has not offered any evidence to show that Black Diamond was formed before Neal's October 27 written consent to dissolve Omni. At most, Neal points to Hammond's license application dated October 24. But this is not surprising given that after Hoops's meeting with Neal on October 17, which was two days after Hoops and Neal verbally agreed to dissolve Omni, Hoops emailed Hammond to discuss potential future plans together.[123] But Neal cannot point to any evidence that Black Diamond was formed before October 30.[124] The trial court was not concerned about the speed with which Black Diamond was formed. In fact, the trial court found that "the timeline on which Black Diamond was established is in line with the timeline on which Omni was formed."[125]

The trial court considered all of the evidence Neal relies on in his Opening Brief. The trial court was not persuaded by Neal's arguments because Neal refuses to consider the totality of evidence and the context underlying the parties' emails. Neal has not offered any reason why the trial court committed clear error when it

[123] *Triple H*, 2018 WL 3650242, at *15, n.164 (citing JX 69; A308).

[124] A331.

[125] *Triple H*, 2018 WL 3650242, at *15, n.164.

considered the same evidence Neal now relies on and rejected Neal's arguments. Accordingly, the trial court's factual finding that Hoops did not misrepresent material facts to Neal should be affirmed.

2. The Trial Court Correctly Applied 6 *Del. C.* § 18-801(a).

a. Only written consent is required.

Neal's appellate arguments are simply a continuation of his endless effort "to renegotiate the terms of the dissolution and winding up, including during the course of this litigation."[126] Neal contends that the trial court's holding that the parties gave their written consent to dissolve Omni constitutes reversible error under "general contract principals" because he did not agree to "all material terms."[127] Neal's argument is not only factually erroneous, it is also legally flawed.

Neal does not dispute the trial court's holding that because "[t]he Contract does not address dissolution [] the LLC Act controls."[128] Yet Neal nevertheless argues that because Delaware limited liability companies are creatures of contract, he should be able to read material contractual terms into the Contract that did not

[126] *Triple H*, 2018 WL 3650242, at *14.

[127] C043 at p. 32.

[128] *Triple H*, 2018 WL 3650242, at *12.

exist.[129] Neal completely ignores the requirements of the controlling Delaware Limited Liability Company Act ("LLC Act").

The trial court held that the Contract contained four terms, none of which addressed dissolution.[130] Accordingly, whether the parties' consent to Omni's dissolution was provided in writing was correctly analyzed by the trial court under the LLC Act, because the LLC Act controls where a limited liability company agreement is silent on dissolution.[131] The controlling provisions of the then-applicable Section 18-801(a) require nothing more to dissolve a company than the "affirmative vote or written consent of the members of the limited liability company."[132] The trial court correctly held that Neal's October 27 emails, when read in context of the parties' verbal and written communications of the preceding two weeks, constitute "written consent of the members" to dissolve Omni.[133] Neal's

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[129] C045-C046 at pp. 34-35.

[130] *Triple H*, 2018 WL 3650242, at *11.

[131] *Id.* at *12; *See also Grove v. Brown*, 2013 WL 4041495, at *7 n.74 (Del. Ch. Aug. 8, 2013) (holding that "because the Operating Agreement is silent as to dissolution, the LLC Act controls" and citing 6 *Del. C.* § 18-801(a)(3)).

[132] Neal does not dispute the trial court's application of the prior version of 6 *Del. C.* § 18-801(a)(3) (1999). *Triple H*, 2018 WL 3650242, at *11, n.121. Even if the amended version of 18-801(a)(3) applied, the trial court's analysis was correct because the amended version requires the "vote or consent" of at least 2/3 of the membership interests.

[133] *Triple H*, 2018 WL 3650242, at *13.

argument that Omni cannot be dissolved because he did not agree to all of the material terms of dissolution misapplies the LLC Act. Neal changes a "written consent" statutory standard to an "all material terms" common law contractual standard on terms more favorable to him.

Neal's argument also fails even if "general contract principles" govern the terms of Omni's dissolution and not the LLC Act, as he conflates the legal distinction between dissolution and winding up. Neal argues that the trial court erred in holding that the parties agreed to dissolve Omni under Section 18-801(a) because he had questions about how Omni would continue to serve as agent of the 2014-2015 Revelation policies under "his insurance license," "how Omni would be dissolved," and "whether one party was buying out the other."[134] At best for Neal, however, these are issues related to winding up a limited liability company under Section 18-803, not dissolution under Section 18-801(a). Thus, the issues Neal contends he never agreed to cannot constitute "material terms" of an agreement to dissolve a company.

[134] C042-C046 at pp. 31, 34, 35. Neal's argument that there was not an agreement concerning "whether one party was buying out the other" is factually incorrect. Neal and Hoops repeatedly agreed to split Omni's profits 50/50. *Triple H*, 2018 WL 3650242, at *12-*13.

The trial court correctly held that "dissolution of an entity causes any new business to cease."[135] Accordingly, at bottom, consent to dissolve a limited liability company is an agreement to stop engaging in new business and begin the process of winding up the company's affairs. Neal's emails on October 27, when read in context of the parties' preceding two weeks of communications, show that Neal agreed and consented that Omni would not engage in new business and the parties would go their separate ways. The trial court's reading of Neal's communications was not clearly erroneous and its application the LLC Act was correct. The trial court, therefore, should be affirmed.

b. Hoops did not misrepresent material facts in obtaining Neal's consent to dissolve Omni.

Neal argues that he could not have consented to dissolve Omni because Hoops misrepresented his future plans to Neal. But the trial court soundly rejected this contention as both factually and legally flawed. Neal contends that this case is analogous to *Dweck v. Nasser*.[136] The trial court correctly held that Neal's reliance

[135] *Triple H*, 2018 WL 3650242, at *15. *See also Pearson v. Rash*, 1985 WL 149634, at *3 (Del. Ch. Feb. 13, 1985) (holding that "Following dissolution, a partnership continues to exist for the purpose of winding up its affairs. As a general rule, during this winding up phase no new business is undertaken" and citing *Paciaroni v. Crane*, 408 A.2d 946 (Del. Ch. 1979)).

[136] C047-C048 at pp. 36-37 (citing *Dweck v. Nasser*, 2012 WL 161590 (Del. Ch. Jan. 18, 2012).

on *Dweck* is "misplaced" because *Dweck* is "far from on point."[137] The trial court correctly held that *Dweck* involved a different situation where the parties did not agree to dissolve the company and where one member began competing against the company without the consent of the other party.[138] Neal's Opening Brief offers no reason to question the trial court's holding that *Dweck* is inapposite.

Neal's argument strains credulity. It would not make sense for a member of a limited liability company to condition his consent to dissolve the company upon the future plans of other members. The only purpose one would have in placing such a condition on his consent would be if his aim was to frustrate and impede the other member's future plans. The trial court correctly found that the trial evidence showed that after Neal failed to timely procure Revelation's and Hoops's policies, as well as other things, Neal and Hoops agreed to go their separate ways and dissolve Omni. The trial court also correctly found that Neal gave such consent before ever asking Hoops about Hoops's future plans and, in any event, Hoops did not make any material misrepresentations to Neal. Accordingly, the trial court's judgment should be affirmed.

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[137] *Triple H*, 2018 WL 3650242, at *13, n.134.

[138] *Id*.

II. The Trial Court Correctly Applied Settled Delaware Law In Holding That Hoops Did Not Usurp Omni's Opportunities.

A. Questions Presented.

Did the trial court misapply Delaware law when it held that Hoops did not usurp Omni's business opportunities?[139]

B. Scope and Standard of Review.

This Court's standard of review of the trial court's legal conclusions is *de novo*.[140]

C. Merits of the Argument.

1. Neal Argued Below That He Was Entitled To 50% Of Commissions Generated From Revelation's And Hoops's Policies In Perpetuity.

Neal's Opening Brief contradicts itself. Although Neal's Opening Brief argues that he never claimed that Hoops and Triple H owed he and Omni a perpetual obligation to place Revelation's and Hoops's insurance policies, Neal's Opening Brief makes that very same argument. Neal contends that Hoops "diverted Omni's insurance business, including the insurance policies of Hoops and his businesses, to Black Diamond, where they are also 50% owners."[141] This is factually wrong.

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[139] A165-A173; A807-A815; C065-C067.

[140] *DV Realty Advisors LLC v. Policemen's Annuity & Ben. Fund of Chicago*, 75 A.3d 101, 109 (Del. 2013).

[141] C036 at p. 25.

Omni's only business was Revelation's 2014-2015 renewal policies. Neal received 50% of the profits generated from the commissions earned on the Revelation 2014-2015 renewal policy. Hoops always agreed that Omni's profits would be split 50/50,[142] and Triple H, as liquidating trustee of Omni, has complied with the trial court's Dissolution Order and distributed Omni's funds to Neal as directed by the trial court.

Thus, the only way Neal can argue that Hoops "diverted Omni's insurance business" is if Neal also contends that Hoops had a perpetual obligation to send Revelation's and his personal insurance policies to Omni for renewal. Absent such perpetual obligation, there is no conceivable way that Hoops could have "diverted Omni's insurance business" because Revelation's 2014-2015 renewal policies stayed with Omni until October 2015, and Neal received his share of the commissions from those policies.

Neal made the same argument concerning his alleged perpetual rights both before trial and at trial. For example, Neal's Amended Counterclaim alleges that "Hoops and/or Triple H have directed Omni's insurance business, including the insurance policies of Hoops and his businesses, to Black Diamond, causing Omni to lose commissions on millions of dollars in premiums that Hoops promised Neal

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[142] *Triple H*, 2018 WL 3650242, at *12-*13.

would be paid to Omni in the future."[143] Likewise, in the Pre-Trial Stipulation, Neal asserted that an issue of fact and law to be tried was "Did Hoops and/or Triple H breach their contract with Neal by terminating Omni's business and appropriating and directing the present and future insurance business of Omni to Black Diamond, including, but not limited to, policies sold to Hoops, his family and his businesses and businesses owned or controlled by Triple H, Hoops, and Revelation?"[144]

At trial Neal also said he thought Revelation and Hoops would send Omni their insurance policies forever.

> Q: But yes or no, is there a writing in which Mr. Hoops promises you Revelation's and his own insurance business forever?
>
> A: And my answer would be in maybe no direct terms, but to my knowledge of business of this−when we had the LLC and when we shook hands and we talked about this, I understood that I would write that forever.
>
> Q: Is it your positions that you cannot respond to my question with a yes or no? Because I'm asking if there is a writing that actually says that.
>
> A: I – I don't know of a writing. Is that fair?[145]

[143] A092 at ¶ 111.

[144] *Id*. at Section III(B), p. 23.

[145] A448 at p. 332:10-22 (emphasis added).

Based on Neal's contentions, his expert opined at trial that Neal's damages exceeded $3,000,000.[146] Neal's expert so opined because he speculated an approximate amount of revenues Omni could receive if every business Hoops invested in and Hoops personally used Omni to place their insurance policies in perpetuity.[147] Accordingly, Neal's entire damages theory was based on his contention that he was entitled to 50% of the profits generated from Hoops's and Revelation's insurance policies into perpetuity.

Neal now claims that the trial court committed reversible error in holding that the parties had no agreement under which Hoops and Triple H were required to perpetually send Revelation's and Hoops's insurance policies to Omni.[148] But Neal goes even further and argues that "[t]his perpetuity argument was a red herring inserted into the case by Hoops/Triple H and not advanced by Neal."[149] Neal's pre-trial positions and trial testimony demonstrably show that Neal's contention is incorrect. This is yet one more example of Neal being "the perpetual salesman who will say whatever he needs to, regardless of veracity, in order to secure the deal."[150]

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[146] A826-A829 at pp. 54-57.

[147] A562 at 671; A571-72 at 707-711.

[148] C006-C072 at pp. 4, 38-39.

[149] *Id*. at 38.

[150] *Triple H*, 2018 WL 3650242, at *2.

2. Neal Cannot Satisfy The Elements Of A Usurpation Claim.

The trial court found that "Neal does not point to any evidence in the record, however, that supports his assertion that the parties agreed that Omni would place Revelation's insurance policies in perpetuity."[151] In fact, the trial court found that "the evidence directly contradicts" Neal's contention that he and Hoops agreed that Omni would place Revelation's policies in perpetuity.[152] And Neal's post-trial concession – that there was no requirement that Triple H and Hoops send Omni Revelation's and Hoops's insurance policies in perpetuity – highlights the fatal flaws in his corporate usurpation claim.

In order to prove a corporate usurpation claim, the company must have "an interest or expectancy in the opportunity."[153] Conversely, if the company "holds no interest or expectancy in the opportunity," the "officer or director may take [the] opportunity."[154] An "interest or expectancy" must be concrete and specific, such as an "articulated business plan" that involves the opportunity,[155] a commitment of

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[151] *Triple H*, 2018 WL 3650242, at *11.

[152] *Id*.

[153] *Id.*, at *15, n. 161 (quoting *Broz v. Cellular Info. Sys., Inc.*, 673 A.2d 148, 154-55 (Del. 1996)).

[154] *Id*.

[155] *Broz*, 673 A.2d at 156.

"significant time and resources to the development of a business model" that could encompass the opportunity,[156] or a right of first refusal to provide such services.[157] Accordingly, where potential opportunities are "subject to change" there cannot be a "reasonable expectancy of being awarded the [opportunity]."[158]

Here, because the trial court found, and Neal now agrees, that the parties never agreed that Omni would place Revelation's and Hoops's policies in perpetuity, Neal could not have had a reasonable expectation that Omni would engage in such perpetual business. This is further buttressed by the fact that the trial court held that as customers or potential customers of Omni, Revelation and Hoops had a right to place their insurance policies with any agent they choose.[159] The trial court further found that Neal's performance as an agent was substandard and put Omni at risk of liability. Neal failed to timely place Revelation's and Hoops's policies, which the

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[156] *In re Riverstone Nat'l, Inc. Stockholder Litig*., 2016 WL 4045411, at *12 (Del. Ch. July 28, 2016).

[157] *Yiannatsis v. Stephanis ex rel. Sterianou*, 653 A.2d 275, 277, 279 (Del. 1995).

[158] *Sustainable Energy Generation Group, LLC v. Photon Energy Projects B.V.*, 2014 WL 2433096, at *16 (Del. Ch. May 30, 2014).

[159] *Triple H*, 2018 WL 3650242, at *16 ("As the client, Hoops is free to hire whomever he pleases, whenever he pleases.").

trial court found to be "potentially catastrophic failures to secure insurance for Omni's only real customers."[160]

Accordingly, the trial court found that "it is more probable than not that Hoops decided to terminate his relationship with Neal due to Neal's performance as an insurance agent . . ."[161] For all these reasons, Neal could not have had a reasonable expectation that Omni would place Revelation's and Hoops's policies after the 2014-2015 policy year. Thus, even assuming, *arguendo*, that the trial court's finding that the parties consented to dissolve Omni is clearly erroneous, it was harmless error because Neal cannot satisfy the elements of a corporate opportunity usurpation claim.[162]

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[160] *Id*.

[161] *Triple H*, 2018 WL at *16.

[162] There is another independent reason why any error in the trial court's fact-finding with respect to the parties' consent to dissolve Omni was harmless. The trial court held that Neal breached his contractual obligations to Triple H by failing to roll Neal Insurance into Omni and keeping Neal Insurance's profits for himself. *Triple H*, 2018 WL 3650242, at *17. This material breach of the Contract by Neal excused Triple H's future performance as the non-breaching party. *See In re Mobileactive Media, LLC*, 2013 WL 297950, at *13 (Del. Ch. Jan. 25, 2013). Although the trial court held that Triple H was not damaged by Neal's breach, the trial court did not reach the issue of whether Neal's prior material breach excused Triple H from any future performance under the Contract. A795-96.

CONCLUSION

Wherefore, for all the foregoing reasons, the Triple H Parties respectfully request that the Court affirm the judgment below.

BERGER HARRIS LLP

By: */s/ David B. Anthony*

David B. Anthony, Esq. (I.D. # 5452)
Sean A. Meluney, Esq. (I.D. # 5514)
1105 N. Market Street, Suite 1100
Wilmington, DE 19801
Telephone: (302) 655-1140
Facsimile: (302) 655-1131
danthony@bergerharris.com
smeluney@bergerharris.com

Attorneys for Triple H Family Limited Partnership and Jeffery A. Hoops

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