

No. 1-14-1345

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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INCA MATERIALS, INC., INES GRZESLO,	)	Appeal from the
Individually, and as a shareholder of	)	Circuit Court of
INDIGO CONSTRUCTION SERVICES, INC.,	)	Cook County.
	)	
Plaintiffs, Cross-Appellants, Counterdefendants	)	
and Appellees,	)	
	)	
v.	)	No. 09 CH 16793
	)	
INDIGO CONSTRUCTION SERVICES, INC.,	)	
EVELYN DIFILIPPO, and KRISTIN OLTHOFF,	)	
	)	
Defendants, Cross-Appellees,	)	
Counterplaintiffs, Appellants,	)	
and Third-Party Plaintiffs,	)	
	)	
(Greg Grzeslo	)	The Honorable
	)	John C. Griffin
Third-Party Defendant).	)	Judge, presiding.

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JUSTICE LAVIN delivered the judgment of the court.  
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

**ORDER**

¶ 1 *Held:* The record supported the trial court's determination that appellants failed to prove their causes of action where appellants had not clearly established their specific damages. In addition, the court was entitled to find that appellants' unilateral acquisition of a shareholder's stock was improper where the reasons alleged for acquiring the stock were tenuous at best. Furthermore, cross-appellants failed to demonstrate that the trial court erred by finding a breach of fiduciary duty and by finding that they had not established that appellants were unjustly enriched. The record also supported the court's determination that appellants properly removed a corporate director. Finally, the trial court did not abuse its discretion by declining to dissolve the corporation or force it to redeem stock at a fair price.

¶ 2 This appeal arises from a falling out between three couples connected to the business of Indigo Construction Services, Inc. (Indigo). While Indigo was formed at the initiative of Greg Grzeslo, Kim DiFilippo and Dale Olthoff, Indigo's directors and shareholders were their wives, respectively, Ines Grzeslo, Evelyn DiFilippo and Kristin Olthoff. Initially, the Grzeslos ran Indigo's office with minimal oversight, if any, by the DiFilippos and the Olthoffs. Meanwhile, Ines incorporated a second corporation, Inca Materials, Inc. (Inca), and had Indigo procure construction materials through Inca at a markup. Essentially, Inca served as a middleman between Indigo and the supply vendors. Subsequently, disputes arose regarding multiple issues, including Ines' dual role, the Grzeslos' bookkeeping practices, Indigo's refusal to pay Inca's invoices, Indigo's removal of Ines as a director and finally, Indigo's attempt to acquire Ines' stock without her consent.

¶ 3 Following a bench trial, the lower court found Inca had not demonstrated unjust enrichment and Ines had not shown her removal as a director was improper. The trial court found that she had shown that there was no basis to redeem her stock, thus entitling her to a dividend. The court also found that Ines breached her fiduciary duty to Indigo and its shareholders but that Indigo, Evelyn and Kristin (the Indigo claimants) failed to competently prove any resulting damages. Similarly, the trial court found that Indigo failed to demonstrate fraud and unjust

enrichment. The Indigo claimants have appealed. Inca and Ines (the Inca claimants) have filed a cross-appeal. We affirm.

¶ 4

#### I. ILLINOIS SUPREME COURT RULES

¶ 5 We first address the insufficient fact sections provided in the parties' briefs as well as the incomplete record. Illinois Supreme Court Rule 341(h)(6) (eff. Feb. 6, 2013) requires that an appellant's brief include a statement of facts containing "the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment, and with appropriate reference to the pages of the record on appeal." Neither the Indigo claimants' appellants' brief nor the Inca claimants' cross-appellants' brief has provided a complete and fair recitation of the facts. Both have conveniently omitted pertinent facts that are less favorable to their respective positions. In addition, the consequences of such deficiencies are not to be taken lightly, as we have stricken argumentative fact sections that fail to convey a complete picture of the proceedings. See, e.g., *Board of Managers of Eleventh Street Loftominium Ass'n v. Wabash Loftominium, LLC*, 376 Ill. App. 3d 185, 187-88 (2007). While we decline to take that action here, we remind the parties' of their obligation.

¶ 6

Moreover, Illinois Supreme Court Rule 321 (Feb. 1, 1994) requires that "any documentary exhibits offered and filed by any party" be included in the record on appeal. Appellants and cross-appellants both bear the burden of providing a complete record and any uncertainty will be construed against them. *In re Marriage of Hagshenas*, 234 Ill. App. 3d 178, 183 (1992). Yet, the majority of the Indigo claimants' exhibits are not included in our record. Additionally, the Inca claimants improperly rely on a copy of their motion to reconsider contained only in the appendix to their brief, not the record. See *Estate of Prather v. Sherman*

*Hospital Systems*, 2015 IL App (2d) 140723, ¶¶ 31-32 (relying on the appendix rather than the record may result in forfeiture). We proceed with these deficiencies in mind.

¶ 7

## II. BACKGROUND

¶ 8

### A. Trial

¶ 9 The evidence presented at trial showed that Greg was formerly a project manager at Joslyn Construction (Joslyn). Joslyn was a general contracting company that worked with the Chicago Public Schools (CPS) and was involved in a joint venture with C.L.M. Materials, Inc. (CLM). Additionally, CLM was a materials company owned in part by Ines. Greg met Kim and Dale through Greg's employment. When the Joslyn/CLM joint venture decided to dissolve, the three men discussed forming their own business to service CPS, and possibly other clients.

¶ 10 Greg's role in the new company, Indigo, would be to oversee operations and management. Greg testified that although he could not do accounting work, Ines could. Ines testified that while she could do bookkeeping, reconciliation and use QuickBooks, she was not an accountant. In addition, Ines' salary with Indigo would be \$29,000. Furthermore, it appears that Indigo Construction, Inc., a similarly named corporation that was related to Indigo, may have paid Greg a salary of about \$50,000.<sup>1</sup> While the Grzeslos ran the office, Kim would do electrical work in the field. Dale was to provide financing. According to Dale, he never intended to provide more than \$350,000. The Grzeslos and the DiFilippos initially gave Dale a promissory note in exchange for \$170,000, but that amount was amended as additional funds were needed.

¶ 11 Ines did not participate in discussions regarding how Indigo would procure materials. According to Greg, he, Kim and Dale agreed that Indigo would obtain materials through CLM, which already had credit lines with vendors. Dale and Kim denied this. Kim also disagreed with

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<sup>1</sup> While testimony was at times unclear regarding whether Indigo or Indigo Construction, Inc. was being referred to, the latter entity is not a party to these proceedings.

Greg's testimony that Kim knew Ines owned CLM. Despite the arrangement described by Greg, Ines testified that Indigo could have bought materials directly from vendors and that it would have been better for Indigo to develop its own credit lines. In contrast, Greg testified that Indigo did not buy its materials directly because CPS did not permit contractors to mark up materials. Kim and Dale suggested that they had not been aware of this prohibition. Ultimately, Greg acknowledged that CPS permitted contractors to mark up "out of stock" materials, but the witnesses' opinions seemed to differ as to what that meant. Our record does not contain CPS's written policy regarding markups. Furthermore, Greg testified that the three men discussed keeping the status quo in terms of how CLM had priced material for Joslyn, which apparently involved markups. Greg believed markups were necessary because CLM would otherwise lose money while bearing the risk of slow payment from CPS. Kim, however, did not know whether CLM had marked up the cost of materials it supplied to the Joslyn/CLM joint venture and denied that he and Greg discussed keeping the status quo.

¶ 12 The Grzeslos filed Indigo's articles of incorporation and by-laws in November 2002. Ines, Evelyn and Kristin were the directors and shareholders, each holding one-third of the company's 100 shares of stock. In addition, the articles of incorporation provided that the par value per share was \$10. Furthermore, Ines was Indigo's registered agent, president, treasurer and secretary, while Evelyn and Kristin were Indigo's vice presidents. In order for Indigo to begin operations, the Grzeslos also located an office at 3759 North Ravenswood, which Indigo shared with CLM. Additionally, Ines' accountant set up QuickBooks. The other couples had access to both. Moreover, the Grzeslos purchased computers, trucks, fax machines and phones for Indigo.

¶ 13 Ines testified that from October to December 2002, she and Greg personally incurred over \$8,000 in setting up Indigo and she wrote checks from Indigo to reimburse themselves. Ines also

wrote checks to "cash" to purportedly reimburse herself for expenses that had not yet been incurred. At one point, she withdrew \$4,300 from Indigo's bank account to reimburse herself for \$4,300 that she had put into that account but she could not document that the entire deposit came from her own money. She admitted that as a bookkeeper, this was a poor practice. In December 2002, Indigo, through Ines, wrote \$23,000 in checks to CLM as well. According to the Grzeslos, Kim needed to finish jobs for the Joslyn/CLM joint venture before he could begin working for Indigo. Because CLM's accounts with vendors had reached their limits, Kim was unable to get needed materials. Thus, Indigo issued CLM checks to free up CLM's credit lines so that Kim could obtain the materials necessary to finish his work for the joint venture and begin working for Indigo. Ines acknowledged that lending CLM money caused Indigo to experience cash flow problems. With that said, the Grzeslos testified that CLM repaid Indigo.

¶ 14 Indigo commenced operations in January 2003. When Ines got behind in issuing CLM's invoices to Indigo, she caused Indigo to pay CLM for materials that CLM had not yet invoiced Indigo for. When CLM's credit line with one vendor reached its limit, Dale authorized Indigo to use the credit line of Dale's own company. Greg testified that CLM charged Indigo a markup for materials purchased on Dale's credit. At about the same time, Ines' partner at CLM wanted out of the business due to cash flow problems.<sup>2</sup> Accordingly, Ines incorporated Inca to supply Indigo with materials and became its sole shareholder. Both Ines and Greg worked for Inca. In addition, Inca began sharing Indigo's office space, in place of CLM, and set up credit lines with various vendors. At the request of one vendor, Kim and Dale signed personal guarantees for Inca's purchases. Despite signing a guarantee, Dale testified that he was against having Inca provide credit lines for Indigo because it was not advantageous.

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<sup>2</sup> We note that CLM, through Ines and Greg, later sued Indigo for unpaid invoices, but did not prevail in that action.

¶ 15 From Inca's inception through July 2005, Greg alone decided how much to mark up materials, without informing anyone. Markups could be as much as 30% and were not reflected on Inca's invoices. Backup documentation showing the prices at which Inca procured materials was not provided to Indigo. In addition, Kim and Dale testified they were not aware that Inca planned to mark up the price of materials. According to Dale, Greg explicitly represented that Inca would not mark up materials. In September 2003, however, Dale asked Greg whether he was "collecting the mark up for Inca yet." Dale testified that if the answer was yes, he would have told Greg that Indigo could not procure materials through Inca. Furthermore, Inca had no trucks, warehouses or delivery services. As a result, whenever Inca purchased materials, Indigo's employees had to pick it up and deliver it. Kim testified that essentially, Inca received the benefit of time and expenses incurred by Indigo and then charged Indigo back at a markup.

¶ 16 Indigo also made purchases on its own credit cards. When that happened, Inca would write a check to Indigo and then charge Indigo back at a markup. Ines testified that when Indigo obtained materials on Inca's account with Home Depot, it was possible that Indigo may have paid that bill itself with its own check, in which case Inca would charge Indigo with a markup. When Indigo's employees spent their own money on materials, Inca would reimburse them and then charge Indigo with a markup. Ines acknowledged that under those circumstances, she was using the credit of Indigo's individual employees for Inca's benefit and then charging a markup. Ines had not told anyone about these practices. Furthermore, Ines acknowledged that she was involved on both sides of transactions between Indigo and Inca, just as she had been in transactions between Indigo and CLM.

¶ 17 From January to March 2003, Indigo issued \$11,300 to Ines, but she essentially testified that this was to reimburse her for various things, such as depositing \$2,000 of her own funds into

Indigo's bank account. Additionally, Ines maintained a physical folder for all of Indigo's credit card statements and she would reconcile the hard copies of the bank statements with QuickBooks. Ines also testified that when Indigo's physical checks came back with corresponding bank statements she would file them in chronological order for reconciliation. Furthermore, when accountants audited Indigo's QuickBooks system in 2003 and 2004, Ines received a Grade B rating. Ines acknowledged making mistakes, however. Specifically, she included inaccurate notes on a check's memo line. For example, Ines testified that a check written to herself and marked "loan" was inaccurate because it should have been characterized as an advance on payroll. Ines testified that it was okay to put any note she wanted on the memo line so long as she could explain what it meant, but unfortunately, her testimony showed she was not always able to do so. In various situations, she used words such as "advance," "consulting," "other expenses," "draw" or "loan" for lack of a better word. Moreover, she required the assistance of an accountant to help her determine how to record certain expenditures but it is not clear from the record how frequently Ines met with an accountant for that purpose.

¶ 18 Greg kept track of Indigo's jobs. He also used QuickBooks to generate invoices. In addition, Indigo could not invoice CPS for a job without extensive paperwork, including a signed work order, a lien waiver, certified payroll, backup documentation for materials used and ultimately, a purchase order. Obtaining necessary signatures sometimes proved difficult. Greg further testified that tracking materials was difficult because construction workers did not always reference tracking numbers, requiring Greg to do further research. Moreover, opinions differed regarding the degree to which CPS' payment process contributed to Indigo's cash flow problems. Dale and Kim testified that the office was disorganized but Greg disagreed. As of August 8, 2004, Indigo's accounts receivable were in excess of \$500,000.



¶ 19 Meanwhile, in May 2004, Dale initiated a bond audit in anticipation of Indigo needing additional clients, most of whom would require a performance bond. The Grzeslos testified that they received no negative feedback. Dale testified, however, that the accountant “said she couldn’t make heads or tails out of the books.” We note that no accountant testified at trial regarding any of the financial or bookkeeping disputes between the parties. In addition, Ines resigned from her employment with Indigo in June 2004, allegedly due to being held responsible for things she had not done wrong. Ines testified that despite her resignation, she continued to do reconciliation and accounting work for Indigo. In contrast, Greg testified that he became involved with reconciliation after Ines resigned. By the end of 2004, minimal payment had been made toward Dale's note.

¶ 20 Dale testified that Indigo’s office was not near any of its worksites and that Greg was having difficulty procuring signatures necessary for Indigo to be paid. Thus, Dale decided that Indigo's office would be moved to Chicago's south side as of January 2005. In a letter to Indigo's Ravenswood landlord, Dale stated that he now owned two-thirds of Indigo and would not renew the lease. When asked about Dale’s representation that he owned stock, Kim testified he had seen that “something was concocted and put on there.” Dale explained that he had planned for Kim to sell his shares to Dale. We note that Kim did not own any shares; rather, his wife Evelyn did. In addition, Dale testified that he did not want Kim to be liable on Dale's note. Thus, if Dale obtained Kim's shares, Dale could call the note but release Kim from liability. Essentially, it appears that Dale wished to be reimbursed solely by the Grzeslos. Ultimately, Evelyn did not sell Dale her stock and his claim of ownership was a misrepresentation.

¶ 21 Greg testified that following the move, he was denied access to Indigo's new computer system and instead, was required to work on the old system. Kim testified that Indigo had not

obtained a new computer system; rather, Indigo put in a server. Kim testified that data from the Ravenswood office was integrated and Greg continued to have access to Indigo's records because everyone had the password. To clean up the bookkeeping, Greg would record old business while a new employee, Terry Blummer, recorded new business. Additionally, Kim spent more time at the office, having rarely gone there before. In between jobs, Kim tried to obtain necessary signatures. At some point, Dale told Kim to go through the books and records. In doing so, Kim found checks to Ines, Greg, CLM or cash and reported back to Dale.

¶ 22 In March 2005, Inca sent Indigo an invoice for \$184,269.26. In addition, Inca sent Indigo an updated invoice for \$151,915.73 in May. With respect to this credit, Ines explained that when Indigo's workers purchased material from vendors with whom Inca did not have an account, Inca would nonetheless invoice Indigo. Because there was no reason for Indigo to pay twice for those materials, Inca issued a credit in the amount charged on Indigo's credit card. Ines further explained that the credit included Inca's share of rent for Indigo's former office. Moreover, Ines suggested that those credits were always reflected in Inca's books, but she acknowledged that she would have demanded \$184,269.26 had Dale not inquired.

¶ 23 The Grzeslos identified 318 invoices from Inca that Indigo never paid. With that said, it appears that CPS had paid Indigo for the jobs corresponding to those invoices. Dale testified that it was fair for Indigo to keep the total payment from CPS, including the actual cost of materials incurred by Inca, because he, Kim and Greg were all one-third owners of Indigo. We again note that none of them were owners. Dale further testified that while he was not a shareholder or director, he was a creditor.

¶ 24 In July 2005, Evelyn and Kristin notified Ines that a special meeting would be held for the purpose of removing her as a director of Indigo. Ines did not attend, as she believed she was

unable to prevent her removal. Kim testified, however, that the meeting was an opportunity for Ines to offer an explanation. In any event, Ines was removed as a director and replaced by Dale. Evelyn would now serve as president and secretary, rather than vice president, and Dale became the treasurer. That same month, Indigo notified Inca that Indigo would make no further payments. Instead, Indigo stated that Inca should reimburse Indigo for payments to which Inca was not entitled. Indigo alleged that Ines personally enriched herself through Inca, invoiced Indigo for materials charged on Indigo's own credit cards and marked up prices. Indigo further alleged that the Grzeslos did insufficient work for their wages.

¶ 25 Greg was fired in August 2005. At that time, Indigo owed Dale more than \$400,000 and, according to Greg, Indigo had over \$200,000 in the bank. Dale testified that Greg was fired because he could not serve two masters. Kim added that Greg had not been doing his job. In contrast, Greg testified that he worked 40 hours a week at Indigo, notwithstanding that he also worked for Inca at night, and taught classes three days a week from 2 p.m. to 6 p.m. After Greg was fired, Kim, Kristin, Evelyn and Terry reviewed paperwork in the office. Kim subsequently discovered old invoices, missing documents, disorganized paperwork and markups as well as payments made to Ines and CLM. Inca ceased doing business in 2005.

¶ 26 Kim testified that by January 2006, over \$450,000 was due on Dale's note. That month, Indigo's directors adopted a resolution ordering Indigo to acquire Ines' shares. The meeting minutes essentially repeated the aforementioned charges against her and stated that "[i]n order to protect the interests of Indigo's creditors, the shares of Ines Grzeslo should be redeemed and purchased by the Corporation to prevent any further corporate waste." On March 6, 2006, Evelyn and Kristin notified Ines that the acquisition of her shares "was necessary to protect the creditors of Indigo Construction Services, Inc. and to prevent corporate waste." That letter also stated that

shares had been valued at \$10 per share and thus, a check for \$333.33 was enclosed. No valuation of Indigo had occurred at that time. With that said, Dale opined that in 2006, Indigo had more debt than profit and thus, Ines got a good deal.

¶ 27 By 2008, Indigo had repaid Dale in full. In 2009, years after the Grzeslos had last spoken to the DiFilippos or Olthoffs, Inca and Ines commenced the present action. The following year, Indigo voted to issue dividends in the amount of \$116,667. As of 2012, however, Indigo was no longer operating. Indigo had also recently settled its accounts receivable with CPS for about \$426,000 and there were receivables for which Indigo would never be paid. The testimony of both Kim and Dale indicated that Indigo had no prospect of operating again.

¶ 28 **B. Procedural Facts**

¶ 29 The Inca claimants' third-amended complaint alleged that Indigo was unjustly enriched when, after receiving payment from CPS, Indigo failed to pay Inca's invoices. In addition, Ines alleged that Evelyn and Kristin breached their fiduciary duties by removing her as a director and acquiring her shares. Finally, Ines sought an accounting against Evelyn and Kristin, as well as the dissolution of Indigo. We note that Ines did not specifically request that the court order Evelyn and Kristin to pay her a fair value for her shares should the court decline to dissolve Indigo.

¶ 30 Meanwhile, the Indigo claimants filed a counterclaim as well as a third-party complaint against Greg. The Indigo claimants alleged that Ines breached her fiduciary duty by charging Indigo for materials it had already paid for, by charging amounts beyond the costs of materials procured without Indigo's knowledge, by making unauthorized loans, and by imposing additional fees that Indigo could have avoided by procuring materials independently. The Indigo claimants also alleged that the Grzeslos engaged in fraud by misrepresenting certain facts and failing to

disclose others. Moreover, the Indigo claimants alleged that the Inca claimants were unjustly enriched by taking funds for their own benefit at Indigo's expense. Both the Inca and the Indigo claimants filed affirmative defenses as well.

¶ 31 Following trial, the court rejected Inca's unjust enrichment count seeking payment for the 318 unpaid invoices to Indigo because Inca failed to produce records or receipts sufficient to meet its burden of proof as to the materials Inca allegedly purchased. The court also rejected Ines' claim that Evelyn and Kristin breached their fiduciary duty to Ines and acted oppressively by removing her as a director. Specifically, Ines declined to attend the special meeting leading to her removal and in any event, she breached her fiduciary duty to the corporation by failing to fully disclose the nature of Inca's mark up and by failing to offer the same opportunity to Indigo. With that said, the court found there was no basis to involuntarily redeem Ines' stock, noting Indigo's proffered reason of protecting its creditors. Thus, Ines remained a shareholder. With respect to Ines' request for an accounting or other relief, the court found Ines was entitled to the same dividend that had been paid to Evelyn and Kristin, \$116,667, but no other damages were proven. Regarding the Indigo claimants' contentions, the court found Ines had breached her fiduciary duty but again, damages were not proven. Additionally, Indigo had not met its burden of proof regarding its claims of fraud, unjust enrichment against Ines, or unjust enrichment against Inca. Claims against Greg were barred by the statute of limitations.

¶ 32 The Inca claimants filed a motion to reconsider. As stated, that motion is not included in our record but the copy in the appendix states that the court ignored "Inca's undisputed evidence that it paid for all of those supplies for Indigo's benefit." The motion also argued that Indigo should be dissolved and Ines' shares should be purchased at fair value. Additionally, the motion

argued that the Indigo claimants had recently, and improperly, offered to pay the amount of judgment in her favor in exchange for her shares in Indigo.

¶ 33 The trial court denied the motion:

"I really had credibility problems with the testimony. I found that there was a lot of selective information. \*\*\* [T]he costs of things weren't available, and I just found it would be very difficult to calculate.

And I understand your theory, but I just found that the supporting documentation and there was confusing testimony about who paid for what, when it was paid for. \*\*\*

In addition, I found that the Plaintiff breached her fiduciary duty. I didn't award damages because I didn't think there was a prove-up of damages, but it would seem inconsistent to me to award somebody who breached their fiduciary duty for not sharing a corporate opportunity with the other members, then to award them damages on an unjust enrichment."

As for dissolution, Indigo's counsel represented that circumstances had changed in terms of Indigo ceasing operations and there was an issue regarding a windfall "to a party that did not materially participate and, in fact, because of the actions of my clients was not asked to materially participate in the operation of the company." In contrast, Ines argued that Indigo had done nothing since 2012 and her fellow shareholders had no intention of dealing with her. The court declined to dissolve Indigo, stating, "as a practical guy, I think it's a mistake. I think this is just going to go on. I think you're going to be in more litigation, but that's not my role here." Ines did not argue at this hearing that Indigo should be forced to buy her shares at a fair price.

¶ 34

### III. ANALYSIS

¶ 35 Given the state of the parties' fact sections, it should come as no surprise that their arguments suffer from deficiencies as well. The parties have presented us with an inaccurate quote, missing pin citations, incorrect citations and sparse legal citations that are insufficient to resolve the issues raised. See Ill. S. Ct. R. 341(h) (7) (eff. Feb. 6, 2013). Additionally, the Inca claimants have spent almost a page arguing against a contention that the Indigo parties have not raised. Once again, we urge the parties to review our supreme court's rules. We now address the parties' contentions in the order that is most logical.

¶ 36 A. Ines' Breach of Fiduciary Duty

¶ 37 First, we reject Ines' assertion that the trial court improperly found she breached her fiduciary duty by usurping a corporate opportunity. The trial court's factual determinations will be reversed only if against the manifest weight of the evidence. *Levy v. Markal Sales Corp.*, 268 Ill. App. 3d 355, 364 (1994). In addition, a trial court's factual findings are not against the manifest weight of the evidence merely because the record could support a contrary finding. *Id.* at 368. This standard of review reflects that the trial court is in a superior position to weigh the witnesses' credibility, observe their demeanor and resolve conflicting testimony. *Palm v. 2800 Lake Shore Drive Condominium Ass'n*, 2014 IL App (1st) 111290, ¶ 114.

¶ 38 The corporate opportunity doctrine prohibits fiduciaries from taking advantage of business opportunities that belong to the corporation. *Levy*, 268 Ill. App. 3d at 365. A corporate opportunity exists where the proposed activity is reasonably related to the corporation's present or prospective business and the corporation has the capacity to engage in such opportunity. *Dremco, Inc. v. South Chapel Hill Gardens, Inc.*, 274 Ill. App. 3d 534, 538 (1994). If a director of a corporation informs the corporation of a business opportunity and the corporation then declines to avail itself thereof, the director is free to pursue it for himself. *Kerrigan v. Unity*

*Savings Association*, 58 Ill. 2d 20, 27-28 (1974). The corporation must, however, be given pertinent facts and the opportunity to decide whether it wishes to enter into this business. *Id.* at 28. Fiduciaries have the burden of demonstrating that their transactions were fair and proper. *Levy*, 268 Ill. App. 3d at 365.

¶ 39 Ines asserts the record shows "CPS rules absolutely prohibited [Indigo] from charging a markup on materials incorporated into its work." This is hyperbolic at best. Greg testified that CPS prohibited contractors from charging markups and relied on an incomplete copy of CPS' written policies. In addition, opposing counsel refused to stipulate to the truncated document. Ultimately, the unauthenticated CPS document was not admitted into evidence. Furthermore, Greg subsequently acknowledged that CPS allowed contractors to mark up materials that were "out of stock," although evidence was conflicting as to what exactly that meant. Consequently, the trial court had a basis to question Greg's credibility.

¶ 40 Kim testified he had not been aware that CPS prohibited markups. When asked whether he was familiar with the truncated CPS document Kim answered, "Not really. I mean, I see it now and I saw it before." After reading aloud that the document stated "[n]o markups on materials will be paid," Kim testified that he was aware of that policy. No context for the isolated statement was provided, however. Furthermore, Dale testified that no one had previously explained to him that CPS prohibited markups, although he acknowledged testimony in this case indicating otherwise. We cannot say the trial court was required to find markups were unavailable to Indigo based on any of the aforementioned testimony. Furthermore, we note that at a minimum, Indigo could have taken advantage of the opportunity to buy materials at cost. We also note that in operating Inca, Ines benefitted from Indigo to the extent that its credit cards, employees, and trucks contributed to Inca's sale of materials. See *Id.* at 368 (finding that



corporate fiduciaries were estopped from arguing that an opportunity was not available to the corporation, where the fiduciaries used the corporation's assets in taking the opportunity for themselves).

¶ 41 Ines alternatively argues that Evelyn and Kristin were aware of the markup. Assuming that Kristin and Evelyn knew of Inca's existence through their husbands, who had signed guarantees on Inca's behalf, it does not follow that Ines' fellow shareholders knew that Inca marked up materials. Ines testified that she did not discuss it with them. In addition, Kim testified he was not aware that Inca would mark up materials. Furthermore, Dale testified that Greg explicitly told him that Inca would not mark up materials. While the trial court could have inferred from Dale's 2003 inquiry as to whether Greg was collecting markup "yet" that Dale knew of Inca's practice, the trial court was not required to make that factual finding. Assuming further still that Dale knew Inca was marking up materials, that alone does not amount to full disclosure, as there is no evidence that anyone knew that prices were marked up as much as 30%. We find no error.

¶ 42 **B. Indigo's Damages**

¶ 43 Notwithstanding our determination, we also reject the Indigo claimants' assertion that the trial court erroneously determined they had not proven damages ensuing from Ines' breach of fiduciary duty. Illinois law allows the complete forfeiture of salary paid by a corporation to its fiduciary while the fiduciary was breaching his duty. *Levy*, 268 Ill. App. 3d at 373. In addition, when a fiduciary breaches his duty by usurping corporate opportunities, the trial court can order the fiduciary to transfer the assets in question to a constructive trust for the plaintiff. *Id.*

Furthermore, the trial court can impose a constructive trust even when it more than compensates the plaintiff for its injuries because the right to recover from a fiduciary who has exploited his

position is triggered by the fiduciary's gain, rather than the principal's loss. *Hill v. Names & Addresses, Inc.*, 212 Ill. App. 3d 1065, 1083 (1991). It is well settled, however, that a party seeking damages must provide a reasonable basis for computing them. *Levy*, 268 Ill. App. 3d at 372.

¶ 44 The Indigo claimants' counterclaim against Ines stated only that they "have been damaged in an amount in excess of fifty thousand dollars." Although the Indigo claimants now state that Ines should be required to pay Indigo the salary she received from both Indigo and Inca, Indigo has not identified any place in the record on appeal specifying this form of damages. Ill. S. Ct. R. 341(h) (7) (eff. Feb. 6, 2013). We observe on our own initiative that at a hearing prior to the trial court's ruling following trial, Indigo's counsel stated that damages were based on "the claimed revenues of Inca in their tax returns and then the claimed earnings that [Ines claimed] in her ledger and then the claimed earnings in the CLM materials." This was the closest the Indigo claimants came to identifying a method for calculating damages and even then, they did not set forth a specific dollar amount they were seeking. After the trial court found the Indigo claimants had not proven damages, they did not file a motion to reconsider. Furthermore, Indigo contends that the trial court should have ordered Ines to return payments made by Indigo, through Ines, to CLM. The Indigo claimants have failed to address, however, the Grzeslos' testimony that CLM had returned those payments. No accountant testified in this matter and neither the trial court nor this court is obligated to act as one. We find no error.

¶ 45 C. Ines' Unjust Enrichment

¶ 46 For the same reason, we reject the Indigo claimants' challenge to the trial court's denial of their claim against Ines for unjust enrichment. To demonstrate unjust enrichment, a claimant must prove (1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and

impoverishment, (4) the lack of justification and (5) the lack of a legal remedy. *Sherman v. Ryan*, 392 Ill. App. 3d 712, 734 (2009). Yet, neither the Indigo claimants' counterclaim nor their post-trial brief identified any remedy in particular. As stated, the Indigo claimants' attempt to specify and/or prove damages in the form of salary and outstanding loans was insufficient. We also note that the Indigo claimants' reply brief improperly cites and relies on the appendix rather than the record. To the extent the Indigo claimants refer to Inca's unnecessary markups, the record does not show the difference between the costs incurred by Inca in procuring materials and the amount charged to Indigo. Thus, the trial court had no means of identifying the amount of markups to be returned to Indigo and Indigo provided the court with no alternative remedy. Once again, we find no error.

¶ 47

#### D. Indigo's Unjust Enrichment

¶ 48 Next, we reject Inca's challenge to the trial court's finding that it failed to prove Indigo was unjustly enriched by retaining the full payments made by CPS. Inca argues that CPS' payment included amounts that Inca had invoiced to Indigo for materials and thus, Indigo should be required to tender those amounts to Inca.

¶ 49 First, we note Dale's curious opinion that it was appropriate for Indigo to keep not only the markup, but the amount that Inca actually incurred as costs in procuring the materials from vendors. Indigo has cited no legal authority in support of that suggestion. With that said, Inca has cited no legal authority for the proposition that Indigo should be required to pay Inca for the markup. Furthermore, we reiterate that the record does not show how much of the sums charged by Inca represented markups as opposed to costs. Nonetheless, Inca asserts it was not required to provide the trial court with backup documentation showing the cost of materials. Inca, relying on a lien waiver executed by Indigo, argues that Indigo swore that each Inca invoice appended to

Indigo's invoices submitted to CPS "was the true cost of materials Indigo incurred to perform each of those 318 CPS jobs." Contrary to Inca's representation, the lien waiver actually states that the item and corresponding sum listed therein "include[s] all *labor and* material required to complete said work." (Emphasis added.) Thus, Indigo did not swear to the specific amount of material costs.

¶ 50 Additionally, Inca asserts that it paid more than \$270,000 for materials that Indigo used in CPS projects, citing a 10-page register containing numerous sums, not all of which represent materials used by Indigo. It is not the function of this court or the circuit court, however, to perform calculations on Inca's behalf. Furthermore, Inca notes that *some* backup documents were submitted. Absent complete documentation, however, Inca essentially asked the trial court to pull a dollar amount out of a hat. The record otherwise lacks clear testimony that would allow the circuit court to arrive at a meaningful figure, particularly considering that Inca did retain the markup on the invoices that Indigo had already paid. We find no error.

¶ 51 E. Ines' Removal from Directors

¶ 52 Ines also asserts the trial court erred in finding that Evelyn and Kristin did not breach their fiduciary duties by removing her as director. Section 12.56(a) of the Business Corporation Act of 1983 (the Act) gives the circuit court discretion to grant relief where a corporation has acted in "a manner that is illegal, oppressive, or fraudulent with respect to the petitioning shareholder whether in his or her capacity as a shareholder, director, or officer." 805 ILCS 5/12.56(a)(3) (West 2004). In addition, conduct that is "arbitrary, overbearing and heavy-handed" may be oppressive. *Compton v. Paul K. Harding Realty Co.*, 6 Ill. App. 3d 488, 499 (1972). With that said, actions that may be oppressive under one set of circumstances may not be under another. *Jaffe Commercial Finance Co. v. Harris*, 119 Ill. App. 3d 136, 145 (1983).

¶ 53 Here, Evelyn and Kristin notified Ines that a meeting would be held to remove her. They made no attempt to hide their intentions. In addition, Ines had been serving two masters. As her testimony shows, she made decisions, or adopted decisions made by Greg, that were beneficial to Inca but not ideal for Indigo. Absent any indication that Ines intended to relinquish her role in Inca, Evelyn and Kristin's determination that Ines could not continue to serve Indigo was neither arbitrary, overbearing nor heavy handed. We further note that Indigo's by-laws authorized removal of a director with or without cause. Moreover, Ines' arguments with respect to Dale are misplaced, as he was not a director or a shareholder, and had no fiduciary duty toward Ines.

¶ 54 Ines also argues that cumulative voting rights permitted her to block her removal. We note that Ines has not developed an argument articulating the application of cumulative voting to the facts of this case. In any event, Ines' forfeited her opportunity to exercise her right to vote when she declined to attend the meeting or vote via a proxy. Ines did not prove that Evelyn and Kristin breached their fiduciary duties in this regard.

¶ 55 E. Acquisition of Ines' Stock

¶ 56 Next, we reject the Indigo claimants' contention that the trial court erroneously determined they had no authority to acquire Ines' stock. First, we note that Indigo's articles of incorporation and by-laws do not explicitly provide for the forceful taking of a shareholder's stock. In addition, section 3.10(g) of the Act states, in pertinent part, that "[e]ach corporation shall have power" to "purchase, take, receive, or otherwise acquire, hold, own, pledge, transfer, or otherwise dispose of its own shares." 805 ILCS 5/3.10 (West 2006). Although parties have failed to set forth any principles of statutory construction, we will assume, without deciding, that "take," as used in the statute permits unilateral decisions of a corporation to reacquire stock. With that said, the Indigo claimants have cited no authority and developed no argument as to whether

the purpose of the taking must nonetheless be proper. Furthermore, the Indigo claimants have cited no authority for the proposition that shareholders can be forced to sell their stock at par value, rather than its actual value. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013).

¶ 57 The Indigo claimants also assert for the first time in their reply brief that section 12.56 of the Act authorizes the redemption of shares. That section states, however, that "the circuit court may order \*\*\* [t]he purchase by the corporation or one or more other shareholders of all, but not less than all, of the shares of the petitioning shareholder for their fair value and on the terms determined under subsection (e)." 805 ILCS 5/12.56(a), (b)(11) (West 2004). In addition, that statute further requires the court to "[d]etermine the fair value of the shares, with or without the assistance of appraisers, taking into account any impact on the value of the shares resulting from the actions giving rise to a petition under this Section." 805 ILCS 5/12.56(e) (West 2004). Furthermore, "fair value" refers to "the proportionate interest of the shareholder in the corporation[.]" *Id.*

¶ 58 The Indigo claimants' reliance on section 12.56 is entirely disingenuous. First, this rule appears to contemplate that the shareholder is the individual requesting that her shares be purchased. *Id.* In addition, Indigo unilaterally decided to acquire Ines' stock, without court order, and for par value, rather than fair value. Accordingly, we find no error on the trial court's part.

¶ 59 In reaching this decision, we also reject the Indigo claimants' contention that the business judgment rule shielded them from any impropriety in their attempt to take Ines' stock. Corporate directors owe a fiduciary duty not only to the corporation, but to its shareholders. *Stamp v. Touche Ross & Co.*, 263 Ill. App. 3d 1010, 1015 (1993). Pursuant to the business judgment rule, courts cannot interfere with corporate directors' exercise of business judgment absent bad faith, illegality, fraud or gross overreaching. *Goldberg v. Astor Plaza Condominium Ass'n*, 2012 IL

App (1st) 110620, ¶ 63. Under this rule, corporate directors enjoy a presumption that their decision was made in good faith and designed to promote the corporation's best interests. *Stamp*, 263 Ill. App. 3d at 1016.

¶ 60 In support of the decision to acquire Ines' shares, Indigo's meeting minutes state that Ines had, among other things, invoiced Indigo for items already charged on Indigo's credit card, marked up invoices, and issued CLM unauthorized loans. The minutes stated that "to protect the interests of Indigo's creditors, the shares of Ines Grzeslo should be redeemed and purchased by the Corporation to prevent any further corporate waste." The letter notifying Ines of the decision similarly stated that her shares were being acquired in order to protect Indigo's creditors and prevent corporate waste. By the time Indigo acquired Ines' stock, however, she was no longer an employee or a director. Any damaged caused by Ines' actions had been done and the remaining directors could have taken other measures to limit any further involvement of Ines in the office. Because acquiring her shares would not further the stated goals of protecting creditors, such as Dale, or prevent corporate waste, the trial court was entitled to find the Indigo claimants did not act in good faith, notwithstanding the absence of an express finding to that effect. Consequently, the business judgment rule does not apply.

¶ 61 Furthermore, the trial court was not required to find that the unclean hands doctrine prohibited Ines from seeking relief with respect to the taking of her stock. Unclean hands is an affirmative defense that bars equitable relief when the party seeking that relief is herself guilty of misconduct with respect to the subject matter at hand. *Thompson Learning, Inc. v. Olympia Properties, LLC*, 365 Ill. App. 3d 621, 634 (2001). For the unclean hands doctrine to apply, however, a party's misconduct must rise to the level of bad faith or fraud. *Gambino v. Boulevard Mortgage Corp.*, 398 Ill. App. 3d 21, 60 (2009). To make this determination, the court must

consider the party's intent. *Id.* Furthermore, we review the trial court's determination regarding whether this doctrine applies for an abuse of discretion. *Id.*

¶ 62 Kristin and Evelyn correctly state that the trial court found Ines breached her fiduciary duty. With that said, they have failed to cite any authority in support of their assumption that a breach of fiduciary duty automatically constitutes unclean hands. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). While a trier of fact would be entitled to find from this record that Ines intentionally, and in bad faith, failed to disclose the nature of Inca's markup, and failed to offer the same opportunity to Indigo, a trier of fact could have also determined that Ines' breach of fiduciary duty resulted from neglect rather than intent. More specifically, the record would allow an inference that she improperly delegated her duties to Greg. We find no abuse of discretion.

¶ 63 G. Dissolution or Acquisition

¶ 64 Finally, Ines asserts the trial court erred in not ordering that Indigo be dissolved or that it be forced to buy her shares for a fair price pursuant to section 12.56 of the Act. 805 ILCS 5/12.56 (West 2004). Specifically, Ines asserts the court ignored evidence that Indigo had not transacted business since 2012, had no prospect of ever transacting business again, and that the oppression of Ines would continue. Remedies under the Act are generally a discretionary matter. See *Schirmer v. Bear*, 174 Ill. 2d 63, 70-71 (1996). In addition, courts are reluctant to order dissolution, as it is an extreme remedy. *Id.* at 74. Furthermore, circuit courts *may*, but are not required to, order alternative relief. *Id.* at 75.

¶ 65 All proceedings leading up to the hearing on Ines' motion to reconsider indicated that Indigo's business was finished. At that hearing, however, counsel for Indigo asserted that circumstances had changed. Ines provides no argument regarding that assertion; rather, she categorically ignores its existence. Regardless of any alleged oppression of Ines leading to this



case, the record, as opposed to Ines' brief, points to no example of ongoing oppression. We also note the record does not reveal any negative consequence of Ines declining the Indigo claimants' questionable offer to pay Ines what she was already entitled to in exchange for relinquishing her interest in Indigo. Furthermore, mutual dislike is a far cry from oppression. Given the circuit court's discretion in this matter, we find no error in declining to dissolve Indigo, notwithstanding that another judge may have ruled differently.

¶ 66 We also reject Ines' contention with respect to her alternative request that Indigo be required to purchase her shares at fair value. Although the copy of her motion to reconsider included in the appendix requested a buyout of her shares, Ines' motion did not identify what she believed to be the specific value of her shares or otherwise identify how the court should proceed in that regard. Moreover, at the hearing on Ines' motion, Ines did not bring this particular request to the court's attention. Instead, the parties focused on whether dissolution was appropriate. Under these circumstances, we find no abuse of discretion.

¶ 67

#### IV. CONCLUSION

¶ 68 The case presented to the trial court involved a group of people who entered into a business arrangement without discussing the details, without considering their ensuing duties, without making a sufficient effort to keep themselves apprised of how the business was operating, and without asking questions when questions needed to be asked. In both the trial court and this court, the parties have ignored, rather than responded to, matters that seemingly favor their opponents. Furthermore, in a case riddled with testimony regarding financial sums, no one tied these sums together in a manner that would permit any reasonable trier of fact to arrive at a meaningful figure in damages. As the parties move forward in their business relationship,

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whether it be toward continued operation or dissolution, we urge them to take heed of these observations.

¶ 69 For the foregoing reasons, we affirm the trial court's judgment.

¶ 70 Affirmed.