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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ARMAND MAASKAMP as Trustee etc., et al., Plaintiffs, Cross-defendants and Respondents, v. THEODORE WORTRICH as Trustee, etc., et al., Defendants, Cross-complainants, and Appellants.	G050962 (Super. Ct. No. 30-2012-00566392) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Hugh Michael Brenner, Judge. (Retired Judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Judgment affirmed.

Law Offices of George B. Piggott and George B. Piggott for Defendants, Cross-complainants and Appellants.

The Patel Law Firm, Natu J. Patel and Jason Chuan for Plaintiffs, Cross-defendants and Respondents.

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Armand Maaskamp and Theodore Wortrich were business partners who formed Surgin Surgical Instrumentation, Inc. (Surgin), which researched and developed products related to ophthalmic surgery. In 2004, Surgin collaborated with Alex Urich to develop a technology that helped maintain a consistent flow of liquid flowing out of the eye during a cataract surgery. That technology was patented and placed in a holding company, Data, LLC (Data). The members of Data were Urich, and Richkamp R/D, LLC (Richkamp). Richkamp, in turn, was owned by Maaskamp and Wortrich. The technology was successfully licensed. As part of the licensing negotiations, the individuals agreed that any improvements to the technology would be owned by Data and subject to the license agreement. In 2006 Maaskamp and Wortrich's relationship deteriorated and Maaskamp bought out Wortrich's share of Surgin. Wortrich, however, maintained his interest in Richkamp (which was not a subsidiary of Surgin).

Shortly afterwards, Maaskamp and Urich developed a new technology that, though it served a similar function as the old technology, worked in a different manner and was compatible with a different type of pump. The new technology was successfully patented and placed in a new holding company, Dana Associates, LLC (Dana). Efforts to license the technology, however, were unsuccessful. Meanwhile, Maaskamp and Wortrich's continued rocky relationship resulted in disputes about how Data should be distributing royalties — Wortrich thought the payments should be made to Richkamp, which, in turn, would make payments to Wortrich and Maaskamp. Maaskamp thought Data should pay the individuals directly and cut out the middle man, so to speak.

These disputes culminated in Maaskamp filing the present lawsuit against Wortrich for involuntary dissolution of Richkamp. Wortrich cross-claimed against Maaskamp and Urich for breach of contract and breach of fiduciary duty, arguing the new technology was an improvement to the old technology, as defined by the relevant agreements, and thus should have been given to Data. The court entered summary judgment dissolving Richkamp. After a bench trial, the court found in favor of Maaskamp and Urich on the claims for breach of contract and breach of fiduciary duty.

On appeal, Wortrich contends the court misinterpreted the relevant contracts, that the evidence required a finding of a breach of fiduciary duty, and that the court misapplied the involuntary dissolution statute. We disagree on all three fronts and affirm the judgment.

FACTS

The trial court issued a statement of decision in this case setting forth a thorough statement of facts. Because the procedural posture of this case requires us to defer to the court's factual findings, we quote extensively from the court's statement of decision.

In 1981, Maaskamp and Wortrich formed Surgin, which conducted research projects, developed ophthalmic products, and brought those products to market. The arrangement between the two individuals was they would bring products to market and share everything equally. In many instances, they formed holding companies to license products, but the products were developed by Surgin. The reason for forming the holding companies, according to the accountant for Surgin, was to protect Maaskamp and Wortrich from lawsuits.

In 2004, Surgin collaborated with an expert in the field, Alex Urich, to develop "aspiration surge flow technology," for use in cataract surgery. Here is how the trial court described the technology: "In [a cataract surgery], the lens is emulsified with an ultrasonic handpiece and aspirated from the eye. The emulsified lens is drawn out through an aspiration line by the use of a venturi pump or peristaltic pump. [Citation.] During this process, it is critical to limit the amount of fluid flowing out of the eye to ensure that the cornea does not move and cause injury to the eye. [Citation.] The two types of vacuum pumps operate in different ways. A venturi pump creates a vacuum by flowing air into the aspiration line at a high speed, providing a high constant rate of fluid flow. In comparison, a peristaltic pump uses a roller to squeeze liquid through a tube at a relatively low variable rate of fluid flow. Peristaltic pumps may be used at their maximum rate of fluid flow without risk of damage to the eye, unless there is an occlusion in the aspiration line that causes pressure build up and then a surge when the occlusion breaks. The surge can move the cornea and injure the eye." This type of cataract surgery is also known as phacoemulsification.

Urich had previously patented certain inventions to address the problem of surges in the use of peristaltic pumps. However, Bausch & Lomb (B&L), which used venturi-pump based systems, did not integrate Urich's prior inventions because they did not work well with venturi systems.

"In working to resolve the venturi pump problem, Urich discovered a better and safer idea. Urich and Maaskamp agreed to collaborate to develop the new idea through Surgin. Urich believed that using a tube of a specific length and diameter with an inline filter housing would safely limit the flow in a venturi system. Urich and Maaskamp filed a provisional patent application and four non-provisional patent applications for this technology. [Citations.] Two of the non-provisional applications were abandoned. [Citations.] The other two applications [citations] resulted in issued patents in 2012 and 2013, i.e., the '427 Patent and the '402 Patent, (collectively the 'Data Patents') . . . ."

The basic idea behind the Data Patents is that the tube is so narrow that it limits the amount of water that can possibly flow through it, such that if a surge occurs, the maximum flow rate through the tube is within safe parameters. The tube must be at least three feet in length and at most fifty-thousandths of an inch in diameter. In addition, an attached filter is necessary because any particles aspirated into such a narrow tube would clog the tube.

"To hold the Data Patents . . . , Maaskamp and Wortrich formed two limited liability companies: Richkamp and Data. As stated in Data's operating agreement, Richkamp, owned equally by Maaskamp and Wortrich, acted as the managing member of Data. Data's operating agreement identified Richkamp as the sole managing member of Data." Richkamp owned 50 percent of Data, and the other 50 percent was owned by Urich. Thus Maaskamp and Wortrich each effectively had 25 percent interests in Data.

"In January 2006, Data entered into a License Agreement with B&L [Bausch & Lomb] (the 'License Agreement'). [Citation.] The license consists of the Licensed Intellectual Property, which includes the Licensed Know-how and Licensed Patents. The Licensed Know-how refers in part to Know-How (as defined in Section 1.5), which relates to, or is necessary or useful to commercialize the Technology, and improvements and modifications to the Technology. Similarly, the Licensed Patents refers, in part, to patents that are necessary and useful to practice the Technology, and improvements and modifications to the Technology. Accordingly, both definitions tie back to "***<u>Technology</u>***", which is itself defined in Section 1.12 of the License Agreement as: 'All technology and inventions disclosed in the patents and patent applications set forth in <u>Exhibit A</u> hereto and any and all inventions, improvements or modifications thereto conceived, developed or acquired by Licensor, its employees, agents, consultants or contractors during the Term.' Finally, Section 2.2 of the License Agreement states that: 'In the event Licensor makes any improvements or modifications to the Technology, it shall promptly inform Licensee, and such improvements or modifications shall be subject to the license granted to Licensee and its Affiliates hereunder.'" (Fn. omitted.)

Execution of the License Agreement was contingent upon Wortrich, Maaskamp, and Urich signing identical Letter Agreements with Data. Each agreement provided that Data would own any improvements on the licensed technology: "This letter agreement contains the terms and conditions on which you, the undersigned, would agree that all technology, inventions, improvements, modifications, know-how, ideas, processes, operations, methods, designs, patents, patent applications or other intellectual property rights or other information created, obtained or developed by the undersigned, in whole or in part, individually or jointly with Data, through the undersigned's own efforts or those of any independent contractor, employee or affiliate of the undersigned, *based upon or derived from the Technology* ('Improvements'), would be owned solely by Data." (Italics added.)

"Although they remained in business from the 1980s, Maaskamp and Wortrich's business relationship later started to deteriorate. After being strained for years, by 2006 it was in such dire straits that they did not even talk to each other. Maaskamp suggested that one of them buy out the other. Also, Wortrich wanted to retire from the business. Accordingly, in May 2006, Wortrich sold all of his Surgin shares to Maaskamp, making Maaskamp the 100% owner of Surgin." Wortrich did not, however, sell his ownership interest in Data.

"In or about 2007, well after Wortrich sold his shares in Surgin to Maaskamp, Urich came up with an idea for a software controlled on/off device relating to ophthalmic surgery. Urich filed the provisional application with the United States Patent and Trademark Office (the 'USPTO') in June 2007 [citation] and discussed the idea with Maaskamp for the first time in January 2008. Later in April 2008, they filed the first non-provisional patent application [citations] for the invention and obtained two issued patents, i.e., the '482 Patent [citation] and the '038 Patent [citation]. As of the trial, there were still two patent applications pending, i.e., the '363 Application [citation] and the '370 Application [citation]. The issued patents and pending applications . . . are collectively referred to as the 'Dana Patents'" because they were held in Dana Associates, LLC, which was a holding company.

The technology in the Dana Patents differs from the Data Patents in that the primary aspiration tube allows for high rates of water flow — it is not a narrow tube designed to limit the flow rate. Instead, the Dana Patents disclose software to monitor pressure buildup, a solenoid to pinch the main line when pressure exceeds a given threshold, and a flow restrictor through which the flow is redirected that can limit the flow to a safe rate. The Dana Patents also allow for reflux — or reverse flow — to help clear occlusions.

The Dana Patents were marketed as "Second Generation Restricted Flow Technology," in comparison with the Data Technology, which was described as "First Generation." Marketing materials highlighted that the technology disclosed by the Dana Patents works on both venturi and peristaltic pumps and is capable of higher aspiration flow rates. The court ultimately concluded these marketing claims were more aspirational than accurate, however, and that, in reality, the technology in the Dana Patents could not work with a venturi pump. Maaskamp marketed the Dana Patents to several potential licensees, including B&L, Abbott Medical Optics, and Alcon. However, as of the time of trial, no company had invested in the Dana Technology.

Wortrich discovered the Dana Patents by accident in 2011 while searching the USPTO database. However, he did not make any claim to the Dana Patents until filing a counterclaim in the present lawsuit, which the trial court interpreted as "an afterthought and further evidence that Wortrich was perhaps not confident that the Dana Patents belonged to Data."

The present lawsuit was filed in May 2012 by Maaskamp as trustee of his family trust against Wortrich as trustee of his family trust for involuntary dissolution of Richkamp on the basis of internal dissension between Maaskamp and Wortrich. In July 2012, Wortrich filed a cross-complaint on behalf of his family trust and derivatively on behalf of Richkamp and Data. Maaskamp, Urich, and Dana were all named as cross-defendants. Wortrich alleged causes of action for breach of fiduciary duty, declaratory relief concerning ownership of the Dana Patents, imposition of a constructive trust on the Dana Patents, breach of contract, and declaratory relief concerning the dissolution of Richkamp.

In February 2013 Maaskamp moved for summary judgment on the involuntary dissolution of Richkamp. The court granted the motion under former Corporations Code section 17351, subdivision (a), on the ground that the management was "subject to internal dissension."[1] The court cited disagreements concerning the way in which royalties from the License Agreement were distributed, disagreements over the number of signatures to be required for Data's disbursement checks (recall, Richkamp was its managing member), disagreements over whether Data should have its own bank account, disagreements over the logistics of Wortrich examining Data's books and records, and a lack of communication between Maaskamp and Wortrich. Wortrich contended these disputes were all manufactured and not good faith disputes, but the court found there was no good faith requirement in Corporations Code section 17351, and that Wortrich's remedy was to exercise his right to buy Maaskamp's share of Richkamp and/or to sue for breach of fiduciary duty (which Wortrich had already done).

The court held a bench trial on the cross-complaint between April 2, 2014, and April 21, 2014. The court found that the Dana Patents were not an "Improvement" on the Data Technology, as that term is used in the License Agreement and Letter Agreements. In reaching this conclusion, the court relied heavily on Maaskamp's expert witness, finding him to be more persuasive than Wortrich's expert. It thus found Maaskamp had not breached a contract. The court also found no breach of fiduciary duty

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[1] Former Corporations Code section 17351 was repealed and replaced with Corporations Code section 17707.03, which, in relevant part, is identical. (Stats. 2012, ch. 419, §§19, 20, eff. Jan. 1, 2014.)

on the ground that Data was merely a holding company and thus to the extent the Dana Patents represented a corporate opportunity, that opportunity belonged to Surgin, not Data. Nor, due to Data's limited purpose, does Dana compete with Data. The court thus found against Wortrich on all causes of action. The court issued a 40-page statement of decision. Wortrich timely appealed from the judgment.

DISCUSSION

Wortrich contends the court erred in three ways. First, the court erred in finding no breach of contract because, properly interpreted, the Dana Patents represent an "improvement" or "modification" under the Letter Agreements between Maaskamp, Urich, and Data. Second, the court erred in finding no breach of fiduciary duty because the Dana Patents represent a corporate opportunity for Data, or, alternatively, Maaskamp improperly competed with Data. Finally, the court erred in ordering dissolution of Richkamp by holding there was no good-faith requirement in finding internal dissension.

Substantial Evidence Supports the Court's Finding No Breach of Contract

"When an appellant challenges a trial court's interpretation of a written contract, the substantial evidence standard of review applies when the contract is ambiguous and conflicting extrinsic evidence is admitted to assist the court in interpreting the contract. [Citation.] However, if interpretation of the contract does not turn on the credibility of conflicting extrinsic evidence, the trial court's interpretation of the contract is a question of law we review de novo, or independently." (*Tribeca Companies, LLC v. First American Title Ins. Co.* (2015) 239 Cal.App.4th 1088, 1110.)

"A contract must be interpreted so as to give effect to the mutual intent of the parties. [Citation.] The terms of a contract are determined by objective rather than subjective criteria. The question is what the parties' objective manifestations of agreement or objective expressions of intent would lead a reasonable person to believe." (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.) "The parties' undisclosed intent or understanding is irrelevant to contract interpretation." (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 956.) Objective manifestations of intent include "the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties." (*Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912.)

Here, the operative agreements are the identical Letter Agreements between Data and Maaskamp and Data and Urich. Recall that Bausch & Lomb required them to sign the Letter Agreements with Data in conjunction with executing the License Agreement between it and Data. Those agreements state, "This letter agreement contains the terms and conditions on which you, the undersigned, would agree that all technology, inventions, improvements, modifications, know-how, ideas, processes, operations, methods, designs, patents, patent applications or other intellectual property rights or other information created, obtained or developed by the undersigned, in whole or in part, individually or jointly with Data, through the undersigned's own efforts or those of any independent contractor, employee or affiliate of the undersigned, *based upon or derived from the Technology* ('Improvements'), would be owned solely by Data." (Italics added.)

The Letter Agreements reference the License Agreement to define capitalized terms, including the key term "Technology." The License Agreement defines "Technology" as "all technology and inventions disclosed in the patents and patent applications set forth in Exhibit A hereto and any and all inventions, improvements or modifications thereto conceived, developed or acquired by Licensor, its employees, agents, consultants or contractors during the Term."

The question, therefore, is whether the Dana Patents are an Improvement to the Technology disclosed in the Data Patents. Wortrich contends "any technological change over 'prior art' in the field of flow restriction for phacoemulsification that accomplishes the same purpose as other inventions in the field, including the Data Technology," constitutes an Improvement. Wortrich arrives at this interpretation by focusing on "disclosed" in the definition of Technology. He argues the patents disclose all the prior art pertaining to flow restriction technology for phacoemulsification, and thus any improvement in that field constitutes an Improvement under the agreement.

The court found otherwise: "Based on the Cross-Defendants' experts' testimonies, the Court finds that the 'inventions and technology' disclosed in Exhibit A of the License Agreement refer to that which is new and novel in view of the prior art, and does not include the prior art. The Court accepted Mr. Walbrink's testimony that prior art discussed in the patent applications is intended to educate the examiner on the field and scope of the invention, and that prior art, although relevant, is not the novelty that would fall under the term 'disclosed.' In this regard, the Court found the testimony of Cross-Defendants' legal expert, Mr. Sheldon, to be more persuasive than that of Cross-Complainant's legal expert, Mr. Summers. The Court accepted Mr. Sheldon's testimony that the word 'disclosed' meant that which was novel and not known before to the public." (Fn. omitted.)

We must first determine whether to apply a substantial evidence or de novo standard of review. We note at the outset that, looking solely at the language, the term "disclosed" is susceptible to either Wortrich's or the court's interpretation. Merriam-Webster defines "disclose" alternately as either "to expose to view," which is consistent with Wortrich's argument that anything mentioned in the application was disclosed, or "to make known or public," which is consistent with the court's interpretation that the material disclosed was that which was not previously known to the public. (Merriam-Webster's Collegiate Dict. (10th ed. 2001) p. 330.) Not only is the term ambiguous, but the court relied on extrinsic evidence to resolve that ambiguity. Thus, the substantial evidence standard of review applies.

Wortrich's response is that the court erred in relying on expert testimony to define the term "disclosed" because the meaning of contract terms is "fundamentally a legal issue." Wortrich relies on several areas in the record where Maaskamp's expert relied on case law to interpret terms of the agreement, but none of those record citations involve the crucial term "disclose." And when Maaskamp's expert did discuss the term "disclose," his testimony was in the nature of trade usage, which is proper. He stated, "disclosed means this is what I've come up with, this is what's new. This is not the prior art, this is what I think my invention is. [¶] That's how it's used . . . in the patent office, in terms of the manual patent examining procedure." He went on to discuss two different dictionary definitions as well as "McCarthy's Desk Encyclopedia of Intellectual Property" and the "Manual of Patent Examining Procedure" to support his understanding of the word "disclose" as used in the realm of patents.

This testimony was admissible as trade usage. "The correct rule with reference to the admissibility of evidence as to trade usage under the circumstances here presented is that while words in a contract are ordinarily to be construed according to their plain, ordinary, popular or legal meaning, as the case may be, yet if in reference to the subject matter of the contract, particular expressions have by trade usage acquired a different meaning, and both parties are engaged in that trade, the parties to the contract are deemed to have used them according to their different and peculiar sense as shown by such trade usage. Parol evidence is admissible to establish the trade usage, and that is true even though the words are in their ordinary or legal meaning entirely unambiguous, inasmuch as by reason of the usage the words are used by the parties in a different sense. [Citations.] The basis of this rule is that to accomplish a purpose of paramount importance in interpretation of documents, namely, to ascertain the true intent of the parties, it may well be said that the usage evidence does not alter the contract of the parties, but on the contrary gives the effect to the words there used as intended by the parties. The usage becomes a part of the contract in aid of its correct interpretation." (*Ermolieff v. R.K.O. Radio Pictures* (1942) 19 Cal.2d 543, 550.)

Wortrich's expert testified, to the contrary, that "disclosed" has a broader meaning that includes "a description of the field of the invention, the background of the invention, the summary. All that other disclosure is what is disclosed in a patent application." This contrary testimony created a factual dispute. Because the court's interpretation of an ambiguous term relied on admissible and disputed extrinsic evidence, we defer to the court's interpretation that the Technology includes only the novel aspects of the Data Patents.

With a properly narrow definition of "Technology" in mind, we now examine whether the Dana Patents are Improvements "based upon or derived from" the Data Technology. "Improvements" is exhaustively defined in the Letter Agreement as "technology, inventions, improvements, modifications, know-how, ideas, processes, operations, methods, designs, patents, patent applications or other intellectual property rights or other information created, obtained or developed by the undersigned, in whole or in part, individually or jointly with Data, through the undersigned's own efforts or those of any independent contractor, employee or affiliate of the undersigned, *based upon or derived from the Technology* . . . ." (Italics added.)

We need not engage in a searching analysis of "based upon or derived from" because under any reasonable interpretation of those terms, the court's factual findings — which Wortrich does not challenge on appeal — support the judgment. Listing the fundamental differences between the two systems, the court stated, "One, I find that Data is a passive system; where Dana is an active system. Two, that the components are not interchangeable in a practical commercial manner. That is, the tube and filter will not work with the Dana devices. That they use different pumps. That the Data device uses a venturi pump, where the Dana device uses a peristaltic pump. [¶] The

Data device will not reverse, go backward, where the Dana device will. And at least in some of the Dana patented devices there's an electrical component, at least one, maybe two of them. There's this issue of whether it will go in a cassette. The problems are much more complicated, there's FDA approval. [¶] It just seems to me that these are — these are certainly not what even a lay person would say is an improvement or a modification." And having said that, the court hastened to add that it relied heavily on Maaskamp's expert in reaching its conclusion. Elsewhere the court noted the Dana Patents' technology functions using "prior art components that existed before the Data Patents' technology was invented." Wortrich does not challenge these findings. They support the court's conclusion that the Dana Patents are not Improvements "based upon or derived from" the *novel* aspects of the Data Patents.

Substantial Evidence Supports the Court's Finding of No Breach of Fiduciary Duty

We turn next to Wortrich's contention that the court erred in finding no breach of fiduciary duty. Wortrich argues the evidence established a breach of fiduciary duty in three ways: Maaskamp took a corporate opportunity; Maaskamp took an interest adverse to Data; and Maaskamp competed with Data.

While the court addressed each argument separately, the analysis was largely the same as to each argument. The court concluded that because Data was merely a holding company, and because the real business operation was Surgin (which Wortrich had already left), Maaskamp's fiduciary duties were limited by the fact that Data did not have any real business operations. The court explained that Maaskamp's duty is "limited to the operations and activities of Data. Based on the evidence presented at trial, the Court found that Data had no line of business. It was Surgin that conducted research and development — not Data." "Maaskamp and Wortrich typically formed companies, at the advice of their accountant, Hank Oliver ('Oliver'), to hold the intellectual property arising from the research projects (i.e. holding companies)." "Oliver informed them, and they believed, that by putting the projects into holding companies, they would be protected from any liability arising from those projects." "They pursued this same strategy when creating Data, due to concerns about liability from a prior existing patent (the 'Easley Patent') [citation]." "Additionally, Data had no capacity to engage in research and development. Data did not have any assets, other than a lone bank account that had less than $5,000. Data had no operations, employees, equipment, or office space. Data merely existed as a file in a filing drawer, akin to a box holding the Data Patents. No evidence was presented to contradict this." "Royalties from B&L flowed through Data directly to Maaskamp, Urich, and Wortrich. The only actions that Data took were to pay the state fees, accountant's fees, and taxes. Maaskamp's fiduciary duty to Data was thus limited to what Data was doing." Wortrich does not challenge any of these factual findings.

As we explain below, we agree with the court's analysis. When Wortrich sold his interest in Surgin, the price presumably included the present value of future anticipated earnings. To that extent, Wortrich has already been paid on income from future products such as any future earnings from the Dana Patents. Now, Wortrich wants to eat his cake and have it too. He would have us hold that Maaskamp and Urich are required to conduct any further product development in the field of aspiration flow restriction under the Data umbrella rather than the Surgin umbrella. He is, in a sense, trying to get back into Surgin — for free — by turning Data into the new Surgin. We decline to give Wortrich that windfall.

Corporations Code section 17704.09, subdivision (b), provides that a member's duty of loyalty to a limited liability company is limited to (1) acting as a trustee in the use of company assets, including company opportunities; (2) refraining from taking an adverse interest to the company; and (3) refraining from competing with the company.[2] "Whether a fiduciary duty has been breached is a question of fact." (*Agam v. Gavra* (2015) 236 Cal.App.4th 91, 113.) We review the court's finding for substantial evidence. (*Ibid.*)

"'The law has long recognized the doctrine of corporate opportunity which prohibits one who occupies a fiduciary relationship to a corporation from acquiring, in opposition to the corporation, property in which the corporation has an interest or tangible expectancy or which is essential to its existence. [¶] . . . [¶] Three tests have been recognized as standards for identifying a corporate opportunity: the 'line of business' test, the 'interest or expectancy' test, and the 'fairness' test. Under any test, a corporate opportunity exists when a proposed activity is reasonably incident to the corporation's present or prospective business and is one in which the corporation has the capacity to engage. *Whether or not a given opportunity meets the requisite relationship is largely a question of fact to be determined from the objective facts and surrounding circumstances existing at the time the opportunity arises. Whether or not an officer has misappropriated a corporate opportunity does not depend on any single factor.*'" (*Kelegian v. Mgrdichian* (1995) 33 Cal.App.4th 982, 988-989.)

The corporate opportunity doctrine has no application here. The court found Data has no line of business and thus no prospective business. It has no assets, no resources, was deliberately setup as merely a holding company, and thus has no capacity to engage in any sort of business. Wortrich responds that Data *could* take advantage of other opportunities if Maaskamp and Urich would only choose to do so. In other words,

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[2] Technically, because this section was enacted in 2014, the applicable law is former Corporations Code sections 17150 and 17153, which stated that a member's fiduciary duties are the same as that of a partner in a partnership. However, the fiduciary duties of a partner spelled out in Corporations Code section 16404 are the exact same duties set forth in Corporations Code section 17704.09. In the interests of clarity we cite the current section applicable to limited liability companies.

they could turn Data into a completely different sort of company if they chose to. While that is true, Wortrich has cited no law that would compel Maaskamp and Urich to do so.

Nor have Maaskamp and Urich taken an interest adverse to Data. Data exists to do only two things: act as a legal shield, and act as a conduit for royalty payments. So long as Maaskamp and Urich do not lower the shield or obstruct the conduit, they are not adverse to Data. And we hasten to add that Data does not exist to maximize royalty payments, only to pass along any payments received. Data is not a marketing company; it is not in the business of promoting ophthalmic devices. It is a holding company.

Finally, it is meaningless to talk about competing with Data since Data has no line of business. Data is a legal structure, not a business. It does not have any activities in a competitive marketplace. Thus Maaskamp and Urich cannot, in any meaningful sense, compete with Data. Accordingly, the court did not err in finding no breach of fiduciary duty.

The Court Properly Dissolved Richkamp

Prior to trial, the court granted Maaskamp's motion for summary judgment to dissolve Richkamp. Former Corporations Code section 17351, subdivision (a)(4), provided that any member of a limited liability company can sue for dissolution if "[t]he management of the limited liability company is deadlocked or subject to internal dissention." The court found no deadlock. But, the court described a litany of internal disputes. In the court's words: "Wortrich confirms that he objects to the way in which royalties from the License Agreement are currently being distributed to Richkamp by Data, at Maaskamp's direction. [Citation.] He confirms that the parties could not agree as to the number of signatures required for Data's disbursement checks. [Citation.] He does not dispute that he found Maaskamp uncooperative in keeping him informed about Data's royalty payments. He confirms that the parties disagreed about whether

Richkamp should have its own bank account, and that he opened an account without Maaskamp's consent. [Citation.] He confirms that the parties even disagreed about the location for his inspection of Data's books and records. [Citation.] Though he purports to dispute that the parties have not communicated in person or over the telephone for the past several years, he seems to sidestep giving a clear answer to what should be an easy question. [Citation ('Undispute that Wotrich and Maaskamp have disagreed about certain issues related to Richkamp and Data. Disputed that Maaskamp has acted in good faith with respect to these disagreements . . .').] And the court cannot ignore the fact that Wortrich has filed a cross-complaint accusing Maaskamp of breaching his fiduciary duty. The emerging picture is one of two individuals who find it difficult to agree on basic issues of management, and who are scarcely able to communicate with one another. Surely, this state of affairs meets the standard of 'subject to internal dissension.'

"Wotrich claims that the dissension is 'manufactured,' or that the disputes are not '*bona fide*.' First, the court is unaware of any authority requiring it to determine that internal dissension is *bona fide* in order to grant dissolution. Second, and more importantly, Wortrich himself does not dispute that the disagreements between the parties persist on very basic issues. At least some of the disputes may arise out of breaches of protocols provided in Richkamp's Operating Agreement. But that does not mean that the disputes do not exist." The court went on to note that there was a legitimate concern Maaskamp was breaching his fiduciary duties, but that this concern is properly addressed by the cross-complaint and/or by exercising Wortrich's statutory right to buy out Maaskamp's interest to avoid dissolution.

"We review a grant of summary judgment de novo; we must decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law." (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.)

Wortrich contends the court erred in finding no requirement that the dissension be in good faith, and that there were factual disputes concerning whether the dissension was in good faith. In our independent review of the record, we have come to the same conclusion as the trial court: Even assuming a good faith requirement exists, the evidence indisputably shows legitimate dissension.

It is undisputed, for example, that the parties cannot agree on how Data should distribute royalty payments: directly to the individuals, or first through Richkamp and then onto the individuals. Maaskamp's position is that royalties have always been paid directly from Data to the individuals. Wortrich acknowledges that to be true, but contends an amendment to Data's Operating Agreement in 2005 requires the payments to be made to Richkamp rather than the individuals. It is undisputed that the parties cannot agree on whether Data's disbursement checks must bear the signatures of both members of Richkamp, or if Maaskamp's signature alone is enough. It is undisputed that the parties cannot even agree whether Richkamp should continue to exist — i.e., whether any benefits associated with maintaining Richkamp justify the expenses. It is undisputed that when Wortrich demanded to inspect the books and records of Data, the parties could not even agree on where the inspection would take place. It is undisputed that Maaskamp believes Wortrich is "a control freak and a constant meddler," and undisputed that Wortrich testified that Maaskamp was "unreasonable, belligerent, and short tempered . . . ." Finally, it was undisputed that Wortrich accused Maaskamp of breaching his fiduciary duty, and we cannot close our eyes to the fact that we have found those accusations to be unfounded.

The picture that emerges from these undisputed facts is that Maaskamp and Wortrich cannot agree on even the most basic aspects of Richkamp's limited activities. And while Wortrich asserts that these disputes are in bad faith, he presents no substantial evidence of bad faith. At the summary judgment stage, the responding party cannot rely on mere allegations. (Code Civ. Proc., § 437c, subd. (p)(1) ["The defendant or cross-defendant shall not rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to the cause of action or a defense thereto"].) Accordingly, the evidence established that the members of Richkamp were "subject to internal dissension" (former Corp. Code, § 17351, subd. (a)(4)), and Wortrich failed to present any evidence to rebut that conclusion. Thus the court properly entered a judgment of dissolution.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs incurred on appeal.

IKOLA, J.

WE CONCUR:

MOORE, ACTING P. J.

ARONSON, J.