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No. 71405-8

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

THE SAGE GROUP I, LLC, a Washington limited liability company; M3, INC., a Washington corporation; RONALD WORMAN and SALLY WORMAN, individually and the marital community composed thereof; ERIK VAN ALSTINE, individually and his marital community,

Plaintiffs-Appellants,

v.

JOHN KOTTER and NANCY DEARMAN, individually and the marital community composed thereof; KOTTER ASSOCIATES, INC., a Massachusetts corporation; KOTTER INTERNATIONAL, INC., a Massachusetts corporation; SAGE | KOTTER, LLC, an inactive Delaware limited liability company,

Defendants-Respondents.

DEFENDANTS-RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The trial court correctly dismissed this action on collateral estoppel grounds, concluding that the dispositive factual issue underling Appellants' entire case was fully, fairly, and finally resolved against them in a prior proceeding. The Court of Appeals affirmed. Those rulings turned upon undisputed and indisputable findings of fact, and do not warrant Supreme Court review.

Appellants now argue – as they must – that the decisions below actually proceeded from fundamental errors of law, asserting that the lower courts "abandoned more than a century of Washington law" in concluding that a party is not allowed to continue litigating issues previously resolved against it. Petition ("Pet.") at 8. Appellants are wrong: The lower courts did not make any determination that conflicts with Washington law, the public interest, or the accepted and usual course of judicial proceedings, RAP 13.4(b), but instead applied well-settled Washington law to the dispositive, undisputed, and indisputable facts before them.

As the lower courts determined, this is precisely the type of case the collateral estoppel doctrine is intended to foreclose. This Court should deny Appellants' request to engage in yet further litigation regarding the underlying facts, and finally bring this misguided case to an end.

II. STATEMENT OF THE CASE

The factual background underlying this matter has been extensively recited in the opinions entered by the courts below. *See* App.[1] at 2-10 and CP 1905-15. For that reason, Respondents provide only an abbreviated summary of relevant events in the sub-sections that follow, and otherwise respectfully direct the Court to the "Fact" sections contained in the lower court rulings. *Id.*

A. Formation and Dissolution of Sage|Kotter, Along With Appellants' Commencement of the Alsdorf Arbitration

Dr. John Kotter is a tenured professor at Harvard Business School and also a successful author. App. at 2. In January 2009, Dr. Kotter and non-party Dana Green agreed to form a joint venture called Sage|Kotter, a consulting business based entirely around Dr. Kotter and his pre-existing body of work. App. 5. Although Green and Appellants secretly "agreed that they would share equity interests in [Sage|Kotter] equally," they "did not tell the Kotters about this arrangement." *Id.* at 4.[2]

Kotter and Green formalized their relationship by entering into an Operating Agreement, which "allocated to Green and the Kotters 38 percent and 62 percent ownership interests, respectfully," and "made

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[1] References to "App." are to the Appendix attached to Appellants' petition.

[2] In fact, Green falsely represented to Kotter – with Appellants' knowledge – that he had no such agreements with any third-parties. CP 1688 §§ 14.1, 14.4(e).

no provision for [Appellants Ronald] Worman or [Erik] Van Alstine." *Id.* at 5. After Sage|Kotter had been in business for a number of months, Appellants became upset that Green did not share his interest in the company with them, and therefore commenced multiple lawsuits against Green on the basis that he usurped a business opportunity (that proceeding is hereinafter referred to as the "Alsdorf Arbitration"). *Id.* at 6.

Because Sage|Kotter was to be based entirely around Dr. Kotter and his pre-existing intellectual property, Kotter secured what five judges[3] have all described as "absolute control" over Sage|Kotter and its assets. *Id.* at 5, 8, 32; CP 1914.

Thus, for example, "[t]he Sage|Kotter operating agreement provided that the Kotters could unilaterally dissolve the LLC at any time during the five-year 'initial period,'" *id.*, and Dr. Kotter also personally retained absolute and exclusive control over his intellectual property at all times, *id.* at 16. Whereas Kotter maintained "absolute control" over Sage|Kotter and personally owned all of its assets, Green held a mere minority interest and did not own or control any assets.

When he learned of the Alsdorf Arbitration and the secret agreement between Appellants and Green, Dr. Kotter exercised his

[3] Those five judges are the arbitrator in the Alsdorf Arbitration, the trial court below, and the three intermediate appellate court judges.

absolute right to terminate Green, to dissolve Sage|Kotter, and to put his intellectual property to other uses. App. at 6-7.

To facilitate the dissolution, Kotter and Green entered into a mutual release and settlement agreement (the "Settlement Agreement"), the stated purpose of which was to effect "the orderly liquidation of Sage|Kotter and settling all actual and potential claims between the Kotters and Green." App. at 7-8; CP 1348-49 §§ 1.1, 1.4; CP 1358-59.

Although Green had procured his interest in Sage|Kotter by means of fraud, App. at 4 & n.1, Kotter nevertheless paid him $310,889 as part of the settlement and dissolution. *Id.* at 7-8. That payment consisted of two parts: a "settlement payment" in the amount of $150,000, together with a "liquidating distribution" in the amount of $160,889. *Id.*

B. Appellants Obtain Robust Discovery in the Alsdorf Arbitration

While the business of Sage|Kotter was in the process of being wound-up, the Alsdorf Arbitration forged ahead. In that arbitration, Appellants were afforded robust discovery governed by the Federal Rules of Civil Procedure and Washington's Civil Rules. CP 3270-71; CP 1909-10.

Appellants took full advantage of those liberal discovery tools, obtaining a massive amount of discovery from Green, Sage|Kotter, and numerous other parties, including document and deposition discovery

from almost every member of the Kotter organization (including Dr. Kotter himself). CP 1909-10.

And while Appellants now claim that Kotter "concealed" documents and information during the Alsdorf Arbitration, they fail to mention that they filed multiple motions asking Judge Alsdorf to compel production of the documents at issue. *Id.* Those motions were denied. App. at 16; CP 3366-70. Although Judge Alsdorf indicated that he would be willing to reconsider those discovery rulings in the event Appellants came forward with a showing of good cause, *id.*,[4] Appellants never attempted to make such a showing, but instead made a strategic decision to proceed to the hearing without the documents in question. *Id.*

C. Appellants Recover From Green in the Alsdorf Arbitration

The Alsdorf Arbitration went to hearing in July of 2010. App. at 8. At the hearing, Appellants requested (1) that Green be made to disgorge half of all compensation he received in connection with Sage|Kotter, including any amounts paid under the Settlement Agreement, and (2) that the arbitrator enter a separate damages award of almost $5 million based

[4] Judge Alsdorf specifically ruled as follows: "The undersigned Arbitrator previously declined to require the production of documents and information that would reasonably be likely to lead to the identification of individual clients of Sage|Kotter even after redaction of the clients names, and ruled that production of such documents and information would be required only if claimant hereafter demonstrated good cause therefor upon motion after review of the production ordered and allowed herein." CP 3369 ¶ 2.

upon the alleged value of Green's equity interest (the "Equity Damages"). App. at 6, 8.

At the conclusion of the case, the arbitrator ordered Green to disgorge half of all benefits received in connection with Sage|Kotter, including payments he received under the Settlement Agreement, App. at 9, but declined to award any separate Equity Damages. App. at 8-9. The Court of Appeals later summarized that portion of the arbitrator's ruling as follows:

> Judge Alsdorf concluded that because the Kotters' contractual authority to unilaterally dissolve Sage|Kotter and Kotter's absolute control over his intellectual property, Green's interest in the company was essentially 'terminable at will,' and a reasonable buyer would have been 'extremely unlikely to pay more than a nominal premium' for it.

App. at 8-9; *see also* App. at 18-19, 32.

In light of that ruling, "[t]he arbitrator concluded that 'the only reasonable measure of damages is not a business valuation *per se* but a requirement that [Green] disgorge 50% of the value he in fact received in 2009 for the business opportunity that he had wrongfully taken at the end of 2008." App. at 8-9.

D. The Trial Court Proceedings

Appellants subsequently commenced the instant action, CP 1-34, seeking to recover from Kotter the exact same seven-figure recovery they

unsuccessfully attempted to obtain in the Alsdorf Arbitration. Proceeding from the already-discredited premise that Green's equity was actually worth millions of dollars, Appellants specifically sought to impose a constructive trust over a 38 percent interest in Kotter International (*i.e.*, what they incorrectly described as "Green's" equity in the company), along with a finding that Kotter International is liable as a "successor" for Sage|Kotter's alleged (and unidentified) "debts." App. at 9-10.

On November 26, 2013, the trial court granted summary judgment to Respondents on collateral estoppel grounds, ruling that Appellants are foreclosed from continuing to argue that there is property over which a constructive trust could be imposed. App. at 10; CP 1905-15. In so doing, the trial court made a number of observations that Appellants continue to ignore or attempt to obscure on appeal. Among other things, the trial court noted:

- That "[t]he Arbitration was procedurally fair," CP 1914;
- That the dispositive issue in this action was conclusively resolved by Judge Alsdorf, CP 1907-08;
- That "J. Alsdorf decided, for three reasons, Green's business interest was nominal, at best," CP 1908; and
- That "[t]he remedy to be decided here is identical to the issue that Judge Alsdorf decided," CP 1907.

E. The Appellate Court Proceedings

Appellants filed an appeal. In an order entered on August 24, 2015, the Court of Appeals affirmed the trial court ruling, App. at 1-21, finding that "no property existed over which [the arbitrator or trial court] could justly impose a constructive trust," and that "collateral estoppel bars Sage Group's claims for constructive trust." App. at 2.

In reaching that conclusion, the Court of Appeals made a number of its own observations as to the undisputed facts that directly support its ruling. Some of the more notable observations are set forth below:

- "The Sage|Kotter operating agreement provided that the Kotters could unilaterally dissolve the LLC at any time during a five-year 'initial period.'" *Id.* at 5.
- "[A] member services agreement executed by Green and Kotter memorialized Kotter's absolute control over his intellectual property." *Id.*
- The Settlement Agreement "liquidated and terminated Green's interest [in Sage|Kotter], whether identified in specie or in dollars." *Id.* at 20.
- "[T]he Kotters did not 'transfer' any continuing business interest of Green's," but instead "terminated and liquidated his interested in consideration of $150,000 . . . plus a liquidated distribution of Sage|Kotter assets proportionate to Green's interest." *Id.* at 18.
- "Green's compensation and benefits from [Sage|Kotter], settlement payment, and liquidated distributions were the only property to which [Appellants] had a claim, and they received the value of that property at arbitration and in settlement." *Id.* at 19.

- "[T]he Kotters did nothing improper by exercising their authority to dissolve Sage|Kotter." *Id.* at 18.

- "The remedy issue to be decided here is identical to the issue that Judge Alsdorf decided." *Id.* at 13.

Appellants now petition this Court to review that ruling.

III. ARGUMENT

A. Legal Standard Regarding Petitions for Discretionary Review

A petition for review will be accepted by the Supreme Court only:

(1) If the decision of the superior court is in conflict with a decision of the Court of Appeals or the Supreme Court; or

(2) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(3) If the decision involves an issue of public interest which should be determined by an appellate court; or

(4) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the court of limited jurisdiction, as to call for review by the appellate court.

RAP 13.4(b). Appellants do not contend that discretionary review is appropriate under RAP 13.4(b)(3). Because Appellants fail to demonstrate that discretionary review is appropriate under any other subsection of RAP 13.4(b), the Court should decline to review this matter.

B. Through Their Petition, Appellants Ask This Court to Reverse Findings of Fact Made by Judge Alsdorf, Which is Not an Appropriate Basis for Seeking Discretionary Review

In bringing the instant petition, Appellants are not really seeking to correct any alleged error of law, as required under RAP 13.4(b), but are instead asking this Court to reverse two key *findings of fact* resolved against them in the Alsdorf Arbitration: (1) that Green's equity interest has been liquidated, and (2) that Appellants received their *pro rata* share of the liquidation proceeds. Nothing in the Rules of Appellate Procedure permits discretionary review of such *factual* findings, and even if the rules did permit such review, it would not be necessary or appropriate in light of the undisputed and indisputable nature of the evidence at issue. *Id.*

Indeed, Judge Alsdorf explicitly recognized that Green's equity in Sage|Kotter was liquidated in connection with the dissolution, App. at 35, as evidenced by the fact that he awarded Appellants, among other relief, their *pro rata* share of the six-figure "liquidating distribution" paid to Green. App. at 19, 35.[5]

And while Judge Alsdorf was willing to grant Appellants that significant relief, he made clear that Green's equity actually had *no value*

[5] Appellants' own expert acknowledged, and represented to Judge Alsdorf, that the payment made to Green "may reflect the offsetting of amounts due to Green for his equity interest against a settlement of claims or abeyance of threatened litigation by Kotter, Dearman, and/or Sage|Kotter." CP 206-07. Of course: That is precisely what the Settlement Agreement and its broadly-worded mutual release explicitly say. CP 1349 § 1.4; CP 1350-52 § 3.1.

in light of Dr. Kotter's "absolute control" over both Sage|Kotter and its assets. On the basis of that finding, Judge Alsdorf concluded that "any reasonable buyer of ["Green's" minority interest would] be extremely unlikely to pay more than a nominal premium." App. at 8-9.

Appellants now contend that the lower courts erred in refusing to impose a constructive trust over Green's equity interest because, according to them, "'constructive trust is based on property,' not its value." Pet. At 15. In other words, Appellants argue that even if Green's interest was worthless, a worthless piece of property may still be impressed with a constructive trust. *Id.*

Setting aside the fact that Appellants cite no Washington authority in support of that position, their argument fails for a more fundamental reason: Green's equity interest does not exist. It was liquidated for a substantial sum of money, and Judge Alsdorf was aware of that fact. Indeed, Judge Alsdorf awarded Appellants their *pro rata* share of the six-figure "liquidating distribution" Green received in exchange for his worthless equity interest. App. at 35.

Even if a constructive trust could be imposed upon a worthless piece of property, as Appellants contend, it is beyond reasonable dispute that the alleged "property" in question does not exist.[6]

In pursuing the instant petition, Appellants implicitly ask this Court to conclude, contrary to the findings made by Judge Alsdorf, (1) that Green's equity interest was *not*, in fact, liquidated, (2) that Green did *not*, in fact, receive a six-figure liquidating distribution as part of the dissolution, (3) that Judge Alsdorf did *not*, in fact, award Appellants their *pro rata* share of the six-figure liquidating distribution, (4) that Green's equity interest *does*, in fact, continue to exist, and (5) that it *is*, in fact, possible to impose a constructive trust over that alleged "property."

Indisputably, none of those things is true. Indisputably, each of those factual propositions was resolved against Appellants long ago, as both of the courts below correctly recognized. Indisputably, RAP 13.4(b) does not contemplate that this Court can or should exercise discretionary review in order to review findings of fact entered as part of an arbitration

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[6] Appellants cite a case decided more than 30 years ago by an intermediate appellate court in Indiana for the proposition that a constructive trust may be imposed "[s]o long as either the original or substituted property can be traced or followed." Pet. at 12 (*quoting Fall v. Miller*, 462 N.E.2d 1059, 1062 (Ind. Ct. App. 1984)). If one were to "trace or follow" Green's equity interest, however, they would be led to Appellants' own bank accounts, as *they* are the ones who ultimately received what Judge Alsdorf determined to be their *pro rata* share of the "liquidating distribution" paid to Green in exchange for that interest. App. at 19, 35.

in a separate proceeding that has long concluded, let alone findings of fact such as the ones here that are beyond any reasonable dispute.

Indeed, as Judge Alsdorf determined, and as the Court of Appeals subsequently recited in its ruling:

> Green's compensation and benefits from [Sage|Kotter], settlement payment, and liquidated distributions were the only property to which [Appellants] had a claim, and they received the value of that property at arbitration and in settlement.

App. at 19. Following Appellants' receipt of those significant funds, "[n]o property of Green's remained by which the Kotters could be unjustly enriched" or over which a constructive trust could even theoretically be imposed. App. at 19.

That ruling, which is based entirely upon undisputed and indisputable findings of fact, does not amount to an error of law, does not represent a departure from the accepted and usual course of judicial proceedings, and does not warrant discretionary review. RAP 13.4(b).

C. There is no Basis to Review the Lower Court Rulings That the Alsdorf Arbitration Was Procedurally Fair

Appellants next contend that the Alsdorf Arbitration was procedurally unfair, arguing that it would be inappropriate to apply collateral estoppel in light of "the Kotters' calculated withholding of evidence in the Arbitration." Pet. at 16. Aside from turning upon a

demonstrably inaccurate premise, the conclusion Appellants ask this Court to draw is fundamentally wrong. As set forth below, Kotter fully complied with his discovery obligations in the Alsdorf Arbitration, and the lower courts correctly concluded that the Alsdorf Arbitration was procedurally fair.

In order for collateral estoppel to apply, the party seeking application of the doctrine must establish, among other things, that the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in question during the earlier proceeding. *See, e.g., Nielson v. Spanaway Gen. Med. Clinic, Inc.,* 135 Wn.2d 255, 264–65, 956 P.2d 312, 317 (1998).

In determining whether a prior proceeding was full and fair, Washington courts look to whether the *procedures available* in that action afforded the litigants an opportunity to discover and present relevant evidence. *See, e.g., Thompson v. State, Dept. of Licensing*, 138 Wn.2d 783, 795-96, 982 P.2d 601, 610 (1999) (en banc). Indeed, as this Court has made clear: "[T]he injustice prong of the collateral estoppel doctrine calls for an examination primarily of procedural regularity." *Id.*

Here, based upon the undisputed and indisputable evidence before it, the trial court determined that the Alsdorf Arbitration was procedurally fair, CP 1914, and the Court of Appeals agreed with that ruling.

App. at 16. That conclusion is amply supported by the record. For example, although Appellants argue that Kotter wrongfully withheld documents in discovery, they fail to mention that Judge Alsdorf entertained two motions to compel Sage|Kotter into producing the documents in question. CP 1910, CP 3289 ¶ 2(f); CP 3369 ¶ 2.

Appellants also fail to mention that Judge Alsdorf *denied* both of those motions, subject to reconsideration upon a showing of good cause. *Id.* Appellants also fail to mention that they never followed-up with Judge Alsdorf regarding the issue, never attempted to make a showing of good cause, and never asked Judge Alsdorf to reconsider his prior discovery rulings. *Id.* Instead, Appellants made a strategic decision to proceed to the hearing without pursuing the documents they now conveniently claim were so critical to their case. App. at 16.

Because the "full and fair hearing" analysis concerns the availability of adequate *procedures* in the prior proceeding, *Thompson*, 138 Wn.2d at 795-96, and because Judge Alsdorf unquestionably provided Appellants with adequate discovery procedures – including a written invitation for Appellants to revisit his rulings regarding the documents in question, should they decide to do so – Kotter's alleged "discovery violations" make no difference to the collateral estoppel analysis. *Id.*

Indeed, as the lower courts correctly determined, "[t]he Arbitration was procedurally fair," CP 1914; App. at 16, and Appellants' decision not to revisit certain discovery rulings with Judge Alsdorf is not evidence that the Alsdorf Arbitration was somehow procedurally unfair.

Although not necessary to the argument presented here, it should be noted that Judge Alsdorf's explicit praise for Kotter —and particularly what he found to be his high level of credibility—makes clear that he did not believe Kotter contributed to Green's spoliation of evidence in any way, or that he somehow frustrated the arbitration. App. at 26.

Moreover, Appellants concede that Kotter *produced* the information they claim Green withheld from discovery. CP 1046. Appellants do not explain how actions that had the purpose and effect of *preserving* Green's documents somehow had the effect of stymying discovery. In fact, Appellants concede that they were able to uncover Green's spoliation in the Alsdorf Arbitration *only because* Kotter took steps to preserve and produce the documents in question. *See, e.g.*, CP 3243; CP 1046 (referring to "one of the many documents obtained only from Sage|Kotter, not Mr. Green").

Lastly, although also unnecessary to the argument set forth here, it is noteworthy that both the trial and appellate courts below found that the document Appellants accuse Kotter of wrongfully withholding from

the Alsdorf Arbitration actually supports *Respondents' position*, not Appellants'. *See, e.g.*, App. at 16 ("[T]he member services agreement supports the conclusion Judge Alsdorf reached without it."); CP 1914.

D. There is no Basis For This Court to Review the Lower Courts' Rulings Regarding Appellants' Successor Liability Claim

Finally, Appellants argue that, in rejecting their claim for imposition of a constructive trust, the "Court of Appeals created a roadmap for avoiding successor liability." Pet. at 18. Appellants are wrong, and once again simply misstate the facts.

Appellants' argument is based upon the following erroneous characterization of the Settlement Agreement: "And the Kotters and Kotter International paid Sage|Kotter nothing for its assets, including its long-term contracts, intellectual property and proprietary processes, skilled employees, business model and structure, marketing plan, accounts receivable, goodwill, or any intangible asset." Pet. at 19-20.

The undisputed and indisputable evidence in the record demonstrates that Appellants are just plain wrong. By its express terms, the Settlement Agreement effected "an orderly liquidation of Sage|Kotter." App. at 7. Pursuant to that Settlement Agreement, each party thereto, including Green, received a substantial "liquidating distribution." Under the "plan of liquidation," Green received total compensation of $310,889, consisting of a six-figure settlement payment and an additional

six-figure "liquidated distribution in proportion to his 38 percent interest." *Id.* Appellants received their *pro rata* share of those funds. *Id.* at 33-35.

Based on these facts, the Court of Appeals correctly determined that "the settlement and mutual release liquidated and terminated Green's interest, whether identified in specie or in dollars. Sage Group could and did rightfully assert claims against the property Green received at dissolution, but Kotter International assumed no liability based on those claims." *Id.* at 20. On the contrary, following dissolution, "[n]o property of Green's remained by which the Kotter's could be unjustly enriched," *Id.* at 19, and Appellants "were not co-members of Sage|Kotter to whom Kotter owed a fiduciary duty . . ., [n]or were they judgment creditors whose claims Kotter deliberately avoided in conveying the assets of Sage|Kotter to Kotter Associates Inc." *Id.*

Appellants cite no legal authority undermining that well-reasoned analysis, and there is nothing about the Settlement Agreement that even arguably serves as "a roadmap for avoiding successor liability." On the contrary, by entering into the Settlement Agreement, Kotter paid Green (and by extension, Appellants) hundreds of thousands of dollars in exchange for an interest Judge Alsdorf conclusively determined had no value.

Dr. Kotter did not "evade" or attempt to "evade" anything, but instead paid a considerable amount of money he did not owe – ultimately allocated to individuals with whom he had no relationship and owed no duty – in order to be done with Dana Green and move on with his life. If one is tempted to use that course of dealing as a "roadmap" for "evading" liability, they would be well served to find a different map.

IV. CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that the Court deny Appellants' petition for discretionary review.

DATED this 4th day of November, 2015.

McNAUL EBEL NAWROT & HELGREN PLLC

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on November 4, 2015, I caused a copy of the foregoing **Defendants-Respondents' Answer to Petition for Review** to be served by electronic mail to:

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DATED this 4th day of November, 2015, at Seattle, Washington.

By: _____
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Importance: High

Ladies and Gentlemen,

Respectfully submitted for filing in the above-referenced matter is **Defendants-Respondents' Answer to Petition for Review**.

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Counsel, please note: a hard copy will not follow.

Thank you.

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