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No. 71405-8

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,

Plaintiff-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,

Defendant-Respondents.

APPELLANTS' OPENING BRIEF (REDACTED)

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

When an officer or director breaches his fiduciary duty and acquires an advantage for himself, "the law charges the interest so acquired with a trust for the benefit of the corporation, ... [and] it denies to the betrayer all benefit and profit." *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939). That remedy has two components: disgorgement and restitution. "Disgorgement wrests ill-gotten gains from the hands of a wrongdoer." *Edmonson v. Lincoln Nat'l Life Ins. Co.*, 725 F.3d 406, 415 n.3 (3d Cir. 2013). Restitution compensates the victim. It is awarded "in the form of a constructive trust or an equitable lien, where ... property ... could clearly be traced to particular funds or property in the defendant's possession." *Great W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210, 122 S. Ct. 708, 151 L. Ed. 2d 635 (2002) (citations omitted).

Restitution is not defeated by transferring the property subject to a constructive trust to a third party. The transferee

> [t]akes the property subject to the trust, unless he has purchased the property for value and without notice of the fiduciary's breach of duty. The trustee or beneficiaries may then maintain an action for restitution of the property (if not already disposed of) or disgorgement of proceeds (if already disposed of), and disgorgement of the third person's profits derived therefrom.

Harris Trust & Sav. Bank v. Salomon Smith Barney Inc., 530 U.S. 238, 250, 120 S. Ct. 2180, 147 L. Ed. 2d 187 (2000) (citing *Restatement*

(Second) of Trusts §§ 284, 291, 294, 295, 297 (1959)). Appellants seek reversal of the trial court's failure to apply these well-settled principles. *Id.*

The predicate fiduciary breach was established by Judge Robert Alsdorf (ret.) in an arbitration between Ronald and Sally Worman and Dana Green: Green committed "constructive fraud" and "substantial violations of fiduciary duty" by wrongfully taking "a valuable business opportunity" that belonged to The Sage Group I, LLC ("The Sage Group"), a consulting firm owned by Green and the Wormans. CP 44, 59-60. The opportunity, which Ronald Worman and Erik Van Alstine helped create, was a new business called Sage|Kotter, LLC. CP 37-39. By taking that opportunity from The Sage Group and acquiring an ownership interest in Sage|Kotter for himself, Green became a trustee for the benefit of The Sage Group's other members. *See Guth*, 5 A.2d at 510 ("The rule ... inveterate and uncompromising ... extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation.").

The arbitrator, however, was unable to award a complete remedy for Green's breach. Green and the other two members of Sage|Kotter, John Kotter and his wife, Nancy Dearman (collectively, the "Kotters"),

shut down Sage|Kotter and moved all of its assets and ongoing business to Kotter Associates, Inc. (now called Kotter International, Inc.) for no consideration. Because the Kotters and Kotter International could not be joined in the arbitration, the transfer "prevent[ed] the formal imposition of a trust." CP 55; *see also* CP 59 (but for the transfer a "constructive trust could have been imposed").

The trial court ruled that the arbitrator's inability to impose a constructive trust in favor of the Wormans collaterally estopped all of the Appellants from obtaining any judicial remedy against the Kotters and Kotter International. This was error. Appellants are entitled to a complete remedy for Green's fiduciary breaches as a matter of law:

> [A] court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer, or in the hands of any subsequent holder.... [T]hat a transferee was not the original wrongdoer does not insulate him from liability for restitution.... The constructive trust is based on the property, not wrongs.

Harris Trust, 530 U.S. at 250-51 (citations and internal quotation marks omitted). The trial court's judgment should be reversed and the case remanded with instructions to impose a constructive trust in Appellants' favor based on the undisputed evidence more fully discussed below.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Appellants' motion for partial summary judgment for constructive trust. CP 1005-08, 1074-76.

2. The trial court erred in denying Appellants' motions for partial summary judgment on successor liability, alter ego, and piercing the corporate veil claims. CP 1077-79.

3. The trial court erred in denying, in part, Appellants' motion for partial summary judgment on Respondents' promissory estoppel and unjust enrichment claims and on Appellants' constructive trust claim. CP 1905-15, 1947-51.

4. The trial court erred in granting Respondents' motion for summary judgment. CP 1905-15, 1947-51.

5. The trial court erred in entering a final judgment dismissing Appellants' claims. CP 2093-96.

III. ISSUES PRESENTED

1. Whether an arbitrator's inability to impose a constructive trust over, or to determine the value of, property transferred outside of the arbitrator's jurisdiction collaterally estops parties and non-parties to the arbitration from pursuing claims against the transferees, none of whom could be joined in the arbitration? (Assignments of Error Nos. 4-5.)

2. Whether a person who receives property knowing that it is subject to a pending legal claim and paying no consideration for it holds that property subject to a constructive trust? (Assignments of Error Nos. 1, 3-5.)

3. Whether a business that acquires, without consideration, substantially all of the assets of another business and provides the same services, to the same clients, under the same contracts, through the same employees, in the same office space, and using the same equipment as the predecessor business should be held liable for the predecessor's obligations as its successor? (Assignments of Error Nos. 2, 4-5.)

IV. STATEMENT OF THE CASE

A. Factual Background

The Sage Group is a successful consulting firm that uses a proprietary methodology to help business owners identify their goals, develop a business strategy to reach those goals, and increase the value of their businesses. *See* CP 37-38, 49. Ron and Sally Worman have been members of The Sage Group since 2002. *See id.* Dana Green and his wife had an ownership interest in The Sage Group until 2010, when their interest was terminated in arbitration. *See* CP 37-38, 50.

John Kotter is a Harvard Business School professor and author of an eight-step process to achieve change in large organizations. CP 1152,

1629-30. With his wife and business partner, Nancy Dearman, Kotter operated Kotter Associates, a public-speaking and book-publishing business based on his eight-step process.[1] *See id.* In 2007, Kotter Associates had revenues of $2,800,000. CP 1122, 1629. However, Kotter had a more ambitious goal: to impact millions of leaders worldwide. CP 6, 1603-04 (¶ 3.1). Believing that The Sage Group could help Kotter reach that goal, Erik Van Alstine, the president of M3, Inc., on whose Board of Advisors Green sat, introduced Kotter to The Sage Group in fall 2007. CP 264.

On February 11, 2008, Kotter and The Sage Group entered into a written consulting agreement. CP 65-68. Soon, they began to consider a new basis for their work together. In June, Kotter proposed creating a new business with The Sage Group:

> Let's agree to create a business. That means a new relationship. No consultant and client. All new revenue from joint activities is split by some formula.

CP 259-61. Green, who was the "point person" responsible for Appellants' communications with the Kotters (*see* CP 264), agreed. CP 259-61. The parties memorialized their intent to create a new business

[1] Kotter operated that business under the unincorporated trade name Kotter Associates and as a corporation called Kotter Associates, Inc. *See* CP 1602. Unless the context requires otherwise, the business is collectively referred to as "Kotter Associates."

together in numerous conversations and emails. *See*, *e.g.*, CP 2071, 2076, 2079-82. That business became Sage|Kotter, LLC. *See* CP 39.

The Sage Group, Worman, and Van Alstine helped develop and structure Sage|Kotter. Van Alstine created business plans and pricing structures; analyzed the market and identified potential clients, such as Novell, Westinghouse, and the U.S. Army; designed branding and marketing materials; and prepared client proposals. CP 8-11, 37-38, 275, 356-59. Worman developed market strategy and business plans and helped Green identify and retain the executive team, including Dennis Goin, Randy Ottinger, and Kathy Gersch—all of whom were hired by Sage|Kotter. *See* CP 1017, 1038-39, 1131, 1133, 1606, 1613.

Sage|Kotter was registered as a Delaware limited liability company in late August 2008. CP 8, 1605 (¶ 3.12). In October, the Kotters proposed that they would own 51 percent of Sage|Kotter and "Dana and friends" (*i.e.*, Worman and Van Alstine) would own the remaining 49 percent. CP 2051; *see also* CP 2055-56 (Worman's ownership interest must come out of Green's share). But in December, Worman received a proposed final version of the Operating Agreement, which gave the Kotters and Green 96 percent of Sage|Kotter as well as all voting and management rights; Worman would receive a 4 percent non-voting

interest; and Van Alstine would be completely excluded. *See* CP 1608, 1635-36. Worman objected to these terms as inconsistent with The Sage Group's Operating Agreement and the parties' agreement. *See id.* Van Alstine also objected. CP 1264, 1636.

The Kotters and Green executed Sage|Kotter's Operating Agreement in January 2009, over Worman's and Van Alstine's objections. CP 1173-1220. Green and the Kotters received 38 percent and 62 percent of the ownership interests, respectively. CP 1214. Sage|Kotter was immediately successful, generating more than $7,000,000 in revenues in 2009—a threefold increase over the revenues the Kotters had generated independently a year earlier. CP 1122-23, 1600, 1638, 2449. Of that amount, approximately REDACTED REDACTED *See* CP 1966-67, 2449.

In April 2009, the Wormans commenced an arbitration against Green for breach of fiduciary duty pursuant to the arbitration provision in The Sage Group's Operating Agreement (the "Arbitration"). CP 271-312. They sought disgorgement of the salary Green received as Sage|Kotter's president and CEO as well as enforcement of a constructive trust over his 38 percent ownership interest in Sage|Kotter. *Id.* The Kotters, Kotter

Associates, and Sage|Kotter could not be joined to the Arbitration because they were not parties to The Sage Group's Operating Agreement.[2] *See* CP 312.

Unbeknownst to the Wormans, the Kotters actively assisted Green in the Arbitration. CP 320, 1610-11, 1877, 1892-94. The Kotters, Green, and their counsel discussed case background and strategy; the Kotters' counsel instructed Green's counsel about how to proceed in hearings before the Arbitrator; and Sage|Kotter paid more than $60,000 of Green's attorneys' fees and costs. *See* CP 1472-77, 1479-81, 2004-26, 2029-36, 2062-67, 2070; *see also* CP 1270-80, 1480 (recognizing a common interest agreement between Green and the Kotters).

In November, Green's counsel advised the Kotters and their counsel that "[o]nce an arbitrator is selected, then he or she will set forth the ground rules and deadlines for the dispute. It is at this point that ***we should be ready to spring into action with our strategies***." CP 327 (emphasis added). Soon after, Judge Robert Alsdorf (ret.) was named arbitrator and his first order, among other things, set a deadline to

[2] Van Alstine and M3 could not be joined to the Arbitration for that same reason. *See* CP 312. In December 2009, Van Alstine sued Green for breach of fiduciary duty. CP 335-410. Van Alstine's claims arose out of Green's agreement to serve on M3's Board of Advisors, fiduciary duties Green owed to Van Alstine and M3, and Green's agreement with Van Alstine and Worman to share equity equally. *See* CP 253, 256-57, 335-410. The action settled before trial in May 2011.

"complete lay-down discovery by December 23, 2009." CP 2029-36 (emphasis omitted). After receiving a copy of that order, the Kotters took the position that Green could not produce any documents related to Sage|Kotter or its formation and threatened to dissolve Sage|Kotter if Appellants did not settle their claims by December 21. CP 267, 474, 492, 552-53, 2029-36, 2074. Green, who was a manager of Sage|Kotter, then took the position that he had "an obligation to not disclose any Sage|Kotter information without the consent of Sage|Kotter's managers." CP 267, 741. He suggested to the Kotters dissolving Sage|Kotter to prevent a constructive trust:

> Section 9.5 [of Sage|Kotter's LLC Agreement] permits Class A and B members to purchase and transfer each others' units. However, doing this would not be in your clients' interests, because ***Mr. Worman or Mr. Van Alstine would surely join your clients in the arbitration/litigation to impose a constructive trust over Mr. Green's 38% ownership interest in Sage|Kotter.*** Ultimately, nothing in the LLC Agreement requires Mr. Green to forfeit his units absent dissolution of Sage|Kotter. For that reason, we believe the ***formal dissolution of Sage|Kotter ... is in the best interest of all of our clients.***

CP 2074 (emphasis added).

On December 22, 2009, the Kotters announced that they had "voted and ... desire[d] to dissolve and wind up the affairs of [Sage|Kotter], pursuant to Section 12.2(a)(ii) of the Operating Agreement." CP 432-33, 435, 1618-19. The Kotters and Green then

transferred "substantially all of the business assets of Sage|Kotter" to Kotter International effective as of December 31, 2009, under a Settlement Agreement and Mutual Releases (the "Settlement Agreement"). CP 1340-41, 1346-66. The transfer included all of Sage|Kotter's ongoing contracts under which more than $5,852,500 remained to be paid. CP 1293, 1363, 1366. It also included the proprietary process, intellectual property, and other assets that Sage|Kotter developed and used to perform those contracts. *See* CP 1968, 1979, 2474, 2479, 2487, 2508. And it included Sage|Kotter's physical assets, work force, business model, marketing plan, accounts receivable, goodwill, and "all other assets." CP 413-14, 417-19, 1341, 1366, 2474, 2487. The only asset not transferred was some of the cash-on-hand, which was distributed to the Kotters and Green. CP 1359.

The Kotters and Kotter International paid no consideration to Sage|Kotter for its ongoing contracts (or any other asset) even though the contracts were REDACTED REDACTED CP 1758, 1770, 1788, 2449. The same contracts became the "largest sources of revenue for Kotter International" (CP 1332, 1338)—increasing its revenue from REDACTED REDACTED CP 2536, 2539; *see also* CP 1994 (Kotter International was "dormant" before the

transfer). The Kotters and Kotter International paid no consideration for Green's 38 percent ownership interest, which was "lost" as a result of the transfer.[3] CP 1545, 1792. The transfer was designed for the sole purpose of hindering Appellants' claims for a constructive trust. CP 1121, 1126, 1223, 1363.

In August 2010, the Arbitrator found Green liable for "constructive fraud" and "substantial violations of fiduciary duty whose true nature was unduly obscured by spoliation of evidence and presentation incomplete and untrue testimony." CP 44, 60. Under section 12 of The Sage Group's Operating Agreement and Washington common law, the remedy for Green's breaches was enforcement of a constructive trust over "any property, profit, or benefit derived by [him]," including the 38 percent ownership interest in Sage|Kotter. CP 37.

However, the Arbitrator was unable to award this remedy to the Wormans. Sage|Kotter had been dissolved and stripped of all assets, and the Arbitrator had no jurisdiction over the Kotters or Kotter International. This "prevent[ed] the formal imposition of a trust" over Green's interest.

[3] Under the Settlement Agreement, Green received $31,250 in unpaid salary from Sage|Kotter (CP 1358); $129,639 for his share of some of Sage|Kotter's cash-on-hand (CP 1359); and $150,000 from the Kotters for a release of claims (CP 1349). There is no documentation showing that any of those amounts was for the 38 percent ownership interest. CP 1335-36, 1520. And there was no discussion of allocating any portion of those amounts as payment for the ownership interest. CP 1520.

CP 55; *see also* CP 59 (but for the transfer, a "constructive trust could have been imposed"). The transfer also prevented the Arbitrator from establishing the monetary value of Green's interest in Sage|Kotter, which was "speculative" based on the available evidence. CP 45-47, 59. The Arbitrator, however, ordered Green to disgorge one-half of the compensation he received as Sage|Kotter's president and CEO. CP 47-48. The Arbitration did ***not*** find that disgorgement provided the Wormans a complete remedy. *See generally* CP 36-52. Nor did the Arbitrator find that disgorgement and a constructive trust were mutually exclusive remedies. *See id.*

B. Procedural Background

In August 2011, the Wormans (and the other Appellants) filed the action below seeking the complete remedy they were prevented from obtaining in the Arbitration. CP 1-61, 538-43. Their claims against the Kotters and Kotter International were not, and could not have been, asserted in the Arbitration between the Wormans and Green. *Compare* CP 21-33 *with* CP 271-312; *see also* CP 56 (the claims in Arbitration "[a]ll focused on the conduct of Mr. Green").

In March 2013, Appellants moved for partial summary judgment on their claims for constructive trust, successor liability, and alter ego. CP 788-831, 962-74. Although the court correctly found that "[t]here is

no dispute of fact over Mr. Green's breaches of fiduciary duty" in acquiring the 38 percent interest in Sage|Kotter, it denied the constructive trust motion stating that "the value of the property, whether the Kotters paid fair value for the property, and whether they were unjustly enriched" were issues of fact. CP 1005-08, 1074-79. The trial court denied the successor liability and alter ego motions without comment. CP 1077-79.

Respondents cross-moved for summary judgment, arguing that all of Appellants' claims were barred by collateral estoppel. CP 956-59, 1547-76. On November 26, 2013, the trial court granted Respondents' motion and dismissed all of Appellants' claims. CP 1905-15, 1947-51. It reasoned that the "remedy issue to be decided here is identical to the issue that [the arbitrator] decided," and concluded that the Arbitrator's inability to impose a constructive trust in the Arbitration precluded a judicially imposed constructive trust over the ownership interest wrongfully transferred from Green to the Kotters. CP 1907-08. On January 21, 2014, the trial court entered a final judgment against Appellants, and this appeal followed. CP 2084-92, 2093-96.

V. ARGUMENT

A. Standard Of Review

The Court reviews orders on summary judgment de novo, treating all facts and reasonable inferences in the light most favorable to the

nonmoving party. *Enter. Leasing, Inc. v. City of Tacoma*, 139 Wn.2d 546, 551, 988 P.2d 961 (1999); *see also Eagle Pac. Ins. Co. v. Christensen Motor Yacht Corp.*, 135 Wn.2d 894, 910, 959 P.2d 1052 (1998) (imposing successor liability); *Venwest Yachts, Inc. v. Schweickert*, 142 Wn. App. 886, 176 P.3d 577 (2008) (enforcing constructive trust).

B. The Arbitrator's Inability To Impose A Constructive Trust Does Not Preclude That Remedy In This Case

Collateral estoppel prevents re-litigation of issues litigated and decided in a prior action. *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507-08, 745 P.2d 858 (1987). After initially correctly rejecting the argument that collateral estoppel barred Appellants' claims in this action, the trial court reversed course and dismissed all of their claims. CP 1905-15, 1947-51. This was error. The issues relevant to the constructive trust claim before the trial court were neither "identical in all respects" to issues determined in Arbitration, nor were they "necessarily determined" in the Arbitration. Moreover, not all of the Appellants were party to, or in privity with a party to, the Arbitration. Because "failure to establish any one element is fatal to [a collateral estoppel] claim," the trial court's application of collateral estoppel should be reversed. *LeMond v. Dep't of Licensing*, 143 Wn. App. 797, 805, 180 P.3d 829 (2008).

More fundamentally, the trial court erred in concluding that the Arbitrator's jurisdictional inability to award a complete remedy to the Wormans in the Arbitration precluded the Wormans and the other Appellants from asserting any claim against the Kotters and Kotter International in a court of general jurisdiction. The arbitrator's powers "are defined and limited by the agreement to arbitrate." *Boyd v. Davis*, 75 Wn. App. 23, 25, 876 P.2d 478 (1994). A party cannot be required to submit to arbitration, unless that party has agreed to do so. *Powell v. Sphere Drake Ins. P.L.C.*, 97 Wn. App. 890, 895-96, 988 P.2d 12 (1999). The Arbitrator was without jurisdiction to award the Wormans a complete remedy (by imposing a constructive trust) that involved the Kotters or Kotter International, over whom he had no jurisdiction. His inability to do so has no preclusive effect in further judicial proceedings that have no such limitations. *See Murray v. Dominick Corp. of Canada, Ltd.*, 631 F. Supp. 534, 537 (S.D.N.Y. 1986) (rejecting collateral estoppel defense based on prior arbitration award because the parties asserting the defense "were beyond the jurisdiction of the arbitration proceeding"); *Kurtin v. Elieff*, 155 Cal. Rptr. 3d 573, 583-84 (Cal. Ct. App. 2013) (prior arbitration that was limited to interpreting terms of settlement agreement did not preclude claims for damages for unpaid amounts under that

agreement against parties and non-parties in a later judicial action). For this reason alone, the trial court erred when it applied collateral estoppel to preclude Appellants' claims in this case.

1. The Issue Of Valuation Was Neither Identical To The Issues In The Arbitration, Nor Was It Necessarily Determined In The Arbitration

"Collateral estoppel is confined ... to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged." *Standlee v. Smith*, 83 Wn.2d 405, 408, 518 P.2d 721 (1974) (internal quotation marks and citation omitted). Collateral estoppel is further limited to issues that were "necessarily determined in the prior action." *Shoemaker*, 109 Wn.2d at 508. Findings made and facts proven in a prior action on which the judgment was not dependent are called "evidentiary facts" as opposed to "ultimate facts." Evidentiary facts, whether identical or not, are "not conclusive in a subsequent action." *Beagles v. Seattle-First Nat'l Bank*, 25 Wn. App. 925, 930-31, 610 P.2d 962 (1980). Instead, collateral estoppel applies only to identical "***ultimate facts*** directly at issue in the first controversy upon which the claim rests[.]" *Id.* (emphasis added) (citing *Restatement of Judgments* § 68, cmt. o (1942)); *see also Seattle-First Nat'l Bank v. Kawachi*, 91 Wn.2d 223, 229, 588 P.2d 725 (1978).

The trial court erred by concluding that "one of the central damages issue [sic] in each has been to determine ***the value*** of Green's interest in Sage|Kotter" and that Appellants "***presumably seek this value*** through a constructive trust remedy" in this case. CP 1907-08 (emphasis added). That is incorrect. Disgorgement—the remedy ordered by the arbitrator for Green's breaches of fiduciary duty (CP 47-49)—is measured by a wrongdoer's profits, not by the victim's loss. *Restatement (Third) of Restitution and Unjust Enrichment* § 51 cmt. a (2011). The value of Green's interest in Sage|Kotter was, therefore, not an element of, or necessary to, the disgorgement remedy awarded in the Arbitration. *See id.* § 43 cmt. d (a claim based on a breach of the duty of loyalty may be brought "without regard to economic injury"); *see also Eriks v. Denver*, 118 Wn.2d 451, 462, 824 P.2d 1207 (1992) (disgorgement does not require proof of damages); *S.E.C. v. Huffman*, 996 F.2d 800, 802 (5th Cir. 1993) ("Disgorgement wrests ill-gotten gains from the hands of a wrongdoer. It is an equitable remedy meant to prevent the wrongdoer from enriching himself by his wrongs. Disgorgement does not aim to compensate the victims of the wrongful acts, as restitution does.").

That the Arbitrator "considered" valuing Green's interest in Sage|Kotter or "attempted" to determine damages caused by his fiduciary

breaches is immaterial to collateral estoppel. *See* CP 1908. Because disgorgement does not depend on a finding of damages or proof of the value of Green's interest in Sage|Kotter, those findings were not "necessarily determined" and are, at most, evidentiary facts to which collateral estoppel does not apply. *See Seattle-First Nat'l Bank v. Cannon*, 26 Wn. App. 922, 927-28, 615 P.2d 1316 (1980). To be sure, the Arbitrator ordered disgorgement despite being unable to determine the value of Green's interest in Sage|Kotter. *See* CP 45-49. Collateral estoppel, thus, does not apply.

Moreover, "value" is not an element of a constructive trust, which Appellants sought in the trial court. A constructive trust is "imposed on particular assets, not on a value." *Estate of Cowling v. Estate of Cowling*, 847 N.E.2d 405, 412 (Ohio 2006) ("[I]f a party is inequitably deprived of 100 shares of stock that are valued at $10,000, a constructive trust should be imposed over 100 shares of stock, not $10,000."). Because a "constructive trust is based on property," *Harris Trust*, 530 U.S. at 250-51, it may be enforced without proof or quantification of damages. *See* 1 Dan D. Dobbs, *Law of Remedies* § 4.4, at 625 (2d ed. 1993) ("[W]henever the plaintiff is entitled to a constructive trust, he is by definition entitled to a specific thing."); *see also Walker v. Res. Dev. Co.*, 791 A.2d 799, 811-13

(Del. Ch. 2000) (enforcing constructive trust even though plaintiff "made no effort to prove the fair value of his 18% interest" in the business); *Butler v. Attwood*, 369 F.2d 811, 812 n.2 (6th Cir. 1966) (enforcing constructive trust even though "damages could not be adequately measured"); *Waller v. Blue Cross of Cal.*, 32 F.3d 1337, 1340 (9th Cir. 1994) (plaintiffs could pursue a constructive trust even though they lacked standing to seek damages); *Procom Energy, L.L.A. v. Roach*, 16 S.W.3d 377, 383-85 (Tex. App. 2000) (affirming constructive trust where jury found no actual damages).

Because the value of Green's interest in Sage|Kotter was not an element of either the disgorgement remedy awarded to the Wormans in Arbitration or the constructive trust that Appellants sought in this case, the trial court erred as a matter of law by assigning preclusive effect to the Arbitrator's inability to determine it.[4] At most, the Arbitrator's comment on value was an evidentiary fact to which collateral estoppel does not apply. The trial court's summary judgment order and final judgment, both

[4] The issues in the Arbitration and in this case were not identical for another reason: where property subject to a constructive trust is transferred from a breaching fiduciary to a third party transferee, a beneficiary may bring an action against the fiduciary and the transferee, either separately or jointly as co-defendants. *Alioto v. United States*, 593 F. Supp. 1402, 1412 (N.D. Cal. 1984); *see also Tucker v. Brown*, 20 Wn.2d 740, 777, 150 P.2d 604 (1944) (recognizing separate claims and separate remedies against wrongdoing fiduciary and third-party transferees where the former disposed of trust property); *Glasgow v. Nicholls*, 124 Wash. 281, 288, 214 P. 165 (1923) (same).

of which are based on the erroneous application of collateral estoppel, should be reversed.

2. Green's Spoliation Of Evidence In Arbitration Precludes Application Of Collateral Estoppel In This Case

Collateral estoppel requires that a party had an "unencumbered" opportunity to litigate his claim in the earlier action. *Rains v. State,* 100 Wn.2d 660, 666, 674 P.2d 165 (1983). When key evidence was omitted in the earlier action or where a party intends to offer evidence not previously offered, this element is not met and collateral estoppel does not apply. *See Frese v. Snohomish Cnty.*, 129 Wn. App. 659, 663-65, 120 P.3d 89 (2005); *Babcock v. State*, 112 Wn.2d 83, 93-94, 768 P.2d 481 (1989); *United Bus. Commc'ns, Inc. v. Racal-Milgo, Inc.*, 591 F. Supp. 1172, 1186-87 (D. Kan. 1984); *Dale v. Dale*, 78 Cal. Rptr. 2d 513 (Cal. Ct. App. 1998) (preclusion did not apply because community assets were concealed in prior action).

The Arbitrator explicitly found that the proceedings before him were marred by Green's "spoliation of hard copy and electronic records"; Green's incomplete and "strangely lacking" document production"; and Green's "knowingly incomplete and untrue [testimony]." CP 40, 57. That spoliation and untruthful testimony concerned, among other things, the "detailed handwritten notes [Green] regularly took and maintained in the ordinary course of business," emails that he sent and received, and

numerous other electronic and hard copy documents (CP 40-41, 56-57)—documents that Green began deleting within days of the commencement of the Arbitration with the help of Sage|Kotter's IT specialist. CP 1494, 1496, 1502, 1543-46.

Separate from and in addition to Green's spoliation, Respondents withheld discoverable evidence from the Arbitration. The Kotters instructed Green to not comply with the Arbitrator's discovery order by withholding all Sage|Kotter documents and then removed those documents from Green's control. CP 267, 441, 1543. More than 13,470 documents totaling almost 42,000 pages related to Sage|Kotter and its business were withheld. *See* CP 1341, 1821. Among them were Sage|Kotter's contracts with Westinghouse, NetApp, Inc., and the U.S. Army, *see* CP 1290-93, 1966-76, 2452-76, 2485-2518; Sage|Kotter's income statements, cash flow summaries, and projected financial statements, *see* CP 2133-2449; and proof that Sage|Kotter held an exclusive license to use all of Kotter's intellectual property, *see* CP 1530-39, 1954-63, 2528-30. Because this evidence was produced for the first time in this action, collateral estoppel does not apply. *See Babcock,* 112 Wn.2d at 93-94; *Frese*, 129 Wn. App. at 663-65.[5]

[5] *See also Khandhar v. Elfenbein*, 943 F.2d 244, 249 (2d Cir. 1991) (no full and fair opportunity to litigate where new evidence was obtained after the prior action);

The trial court erred by failing to follow this well-settled authority. Instead, it reasoned that none of the withheld documents "are related to damages" (CP 1911) and that "there is not a reasonable likelihood that this new evidence would have changed the result in the underlying Arbitration." CP 1914. This inquiry is irrelevant. Under *Frese*, collateral estoppel does not bar a subsequent action simply "due to the lack of evidence" in the prior action. 129 Wn. App. at 665. Having withheld discoverable evidence in the Arbitration—especially after the Arbitrator ordered Respondents to produce it (CP 1918)—Respondents cannot invoke collateral estoppel in this case. *Henderson v. Bardahl Int'l Corp.*, 72 Wn.2d 109, 119, 431 P.2d 961 (1967) (collateral estoppel "is not to be applied so rigidly as to defeat the ends of justice, or to work an injustice").

3. The Trial Court Erred In Finding That Van Alstine And M3 Were In Privity With The Wormans In The Arbitration

Collateral estoppel does not preclude a person from pursuing a claim unless that person was party to, or in privity with a party to, the prior action. *See Everett v. Abbey*, 108 Wn. App. 521, 532-33, 31 P.3d 721 (2001); *Ward v. Torjussen*, 52 Wn. App. 280, 286, 758 P.2d 1012

Charter Oak Fire Ins. Co. v. Electrolux Home Prods., Inc., 882 F. Supp. 2d 396, 398 (E.D.N.Y. 2012) (no full and fair opportunity to litigate where evidence responsive to discovery requests was not produced in prior action); *Sucher v. Kutscher's Country Club*, 113 A.D.2d 928, 930 (N.Y. App. Div. 1985) (declining to find a full and fair opportunity to litigate where plaintiff presented new evidence that was not prepared until after summary judgment in prior proceeding).

(1988). "Privity does not arise from the mere fact that persons as litigants are interested in the same question or in proving or disproving the same [set] of facts." *Owens v. Kuro*, 56 Wn.2d 564, 568, 354 P.2d 696 (1960). Rather, unless a non-party's right of action is derived from a party to a prior action or the non-party controlled and substantially participated in the prior action, privity is absent. *Ward*, 52 Wn. App. at 286; *Stevens Cnty. v. Futurewise*, 146 Wn. App. 493, 503-04, 192 P.3d 1 (2008).

Van Alstine's and M3's claims against Green arose out of a written agreement under which Green served as a member of M3's Board of Advisors. *See* CP 353, 368-69. Those claims were not subject to an agreement to arbitrate. Van Alstine and M3 could not have been joined in the Arbitration as parties. *See* CP 271-312. Accordingly, privity was absent. *See Everett*, 108 Wn. App. at 532 (privity absent where nonparties "were not, and could not have been, parties to the [prior action]"); *Paradise Orchards Gen. P'ship v. Fearing*, 122 Wn. App. 507, 515, 94 P.3d 372 (2004) (privity absent where nonparty was "not in a position to intervene as a party" even though he could have been called as a witness); *compare Garcia v. Wilson*, 63 Wn. App. 516, 520-23, 820 P.2d 964 (1991) (collateral estoppel precluded claims by non-party who declined to intervene in the prior action for "purely tactical" reasons).

That Appellants were represented by the same counsel and had an agreement to share proceeds (CP 1906-07) does not change this result. *See Benson & Ford, Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172, 1174 (5th Cir. 1987) ("[I]t is not enough the nonparty supplied an attorney or is represented by the same law firm; helped to finance the litigation; ... [or] testified as a witness."); *Collins v. E.I. DuPont de Nemours & Co.*, 34 F.3d 172, 178 (3d Cir. 1994) (absent actual control or virtual representation, "that plaintiffs in the second suit were represented by the same attorney as plaintiffs in the first suit and that one of the plaintiffs had testified in the first suit [is] not enough to establish privity"); *Stevens Cnty.*, 146 Wn. App. at 503-04 (although non-party provided advice to party in prior action, privity was absent because non-party did not substantially participate in prior action and party did not represent non-party's interests). The trial court's misapplication of collateral estoppel to Van Alstine's and M3's claims should be reversed.

C. Appellants Are Entitled To Summary Judgment On The Application Of Constructive Trust And Successor Liability

Rather than dismissal of their claims, the Arbitrator's findings regarding Green's breaches of fiduciary duty compelled summary judgment in favor of the Wormans on the remedy of constructive trust over Green's ownership interest in Sage|Kotter. The disgorgement of

Green's salary—the remedy within the Arbitrator's jurisdiction—did not make the Wormans whole. The trial court erred by failing to complete their remedy by imposing a constructive trust on Green's wrongfully acquired interest in Sage|Kotter, which the Kotters transferred out of the Arbitrator's jurisdiction and which is traceable beyond any dispute to Kotter International. *See Harris Trust*, 530 U.S. at 250.

1. The Kotters And Kotter International Hold The 38 Percent Ownership Interest Subject To A Constructive Trust As A Matter Of Law

The trial court correctly found that there was "no dispute of fact" that Green's breach of fiduciary duty in acquiring the 38 percent ownership interest in Sage|Kotter was established in Arbitration. CP 1007; *see also* CP 44-45, 59-60 (Green committed "substantial violations of fiduciary duty" in misappropriating a "valuable business opportunity"). The trial court also correctly recognized that under Washington law, when "breach of fiduciary duty is established, a trust may be imposed to follow the proceeds in a transfer to a third party under certain circumstances, including failure to pay full value or notice of the claims." CP 1007. The trial court, however, failed to do what the law authorizes. Because it is undisputed the Kotters had notice of the Wormans' claim to Green's ownership interest and that "full value" for

that interest was not paid, enforcement of a constructive trust was required as a matter of law.

The Arbitrator found that Green breached his fiduciary duty to The Sage Group by acquiring a valuable business opportunity—a 38 percent ownership interest in Sage|Kotter—for himself. CP 38, 43-44. A constructive trust "arises immediately with [the] acquisition of the proceeds of the fraud." *United States v. $4,224,958.57*, 392 F.3d 1002, 1004 (9th Cir. 2004) (*citing* 5 Austin W. Scott, *The Law of Trusts: Scott on Trusts* § 462.4 (4th ed. 1989)). Here, the constructive trust arose in January 2009, when Green executed the Sage|Kotter Operating Agreement. *See Huber v. Coast Inv. Co.*, 30 Wn. App. 804, 810, 638 P.2d 609 (1981).

Where property subject to a constructive trust is transferred to another person, the transferee holds the property subject to the constructive trust, unless he or she is a bona fide purchaser who paid valuable consideration for it *and* received it without actual or constructive notice of the beneficiary's claim. *Paysse v. Paysse*, 86 Wash. 349, 354-55, 150 P. 622 (1915); *Hesthagen v. Harby*, 78 Wn.2d 934, 945-46, 481 P.2d 438 (1971). Notice of a pending claim is *by itself* fatal to a purchaser's bona fide status. *See, e.g., Ryan v. Plath*, 18 Wn.2d 839, 863,

140 P.2d 968 (1943) (transferee-corporation was not a bona fide purchaser where its officers and stockholders knew of facts constituting breach of trust); *Fisher v. Trainor*, 242 F.3d 24, 32 n.7 (1st Cir. 2001) (lack of "notice of [beneficiary's] claim ... is required of a bona fide purchaser"); *In re Leitner*, 236 B.R. 420, 425-26 (Bankr. D. Kan. 1999) (constructive notice of pending constructive trust action precludes bona fide purchaser status as a matter of law).

The Kotters admit that they learned of the Wormans' claim to Green's ownership interest "in the spring of 2009," months before they acquired it, and that they discussed that claim with Green in several meetings throughout 2009. CP 54-61, 320, 1124-26, 1610-11, 1617, 1619-20, 1877, 2058-60. The Kotters also read the Wormans' Arbitration Demand and Statement of Claims in October 2009 (CP 1268, 1611, 1794), and received written notices of the Wormans' claims and their reservation of rights in December 2009 (CP 1611-12, 1618-19). The Kotters and Kotter International are, therefore, not bona fide purchasers of Green's ownership interest in Sage|Kotter. They hold this interest subject to a constructive trust as a matter of law.

None of the peripheral fact issues identified by the trial court—"the value of the property, whether the Kotters paid fair value for the

property, and whether they were unjustly enriched" (CP 1008)—preclude this result. As discussed, the value of Green's interest, even if "speculative," is not material to enforcement of the constructive trust.[6] *See supra* at Section V.B.1; *see also Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (only factual disputes that "might affect the outcome of the suit under the governing law will properly preclude ... summary judgment").

The dispute, if any, as to whether Green received value for his interest in Sage|Kotter in his settlement with the Kotters, is also irrelevant. "[A] person who takes with notice ... does not hold the property free of the trust, although he paid value for the transfer." *Restatement (Second) of Trusts* § 288. Washington law is consistent. Notice of a claim ***by itself*** deprives a transferee of bona fide purchaser protection even where the transferee paid some or all of the purchase price. *See, e.g., Peterson v. Paulson*, 24 Wn.2d 166, 180, 163 P.2d 830 (1945), *overruled on other grounds by Tomlinson v. Clarke*, 118 Wn.2d 498, 825 P.2d 706 (1992); *see also McVean v. Coe*, 12 Wn. App. 738, 743-44, 532 P.2d 629 (1975)

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[6] There is little doubt that Sage|Kotter's business had substantial value. It generated over $7 million in revenue in its first 11 months. CP 1600, 1638. After stepping in Sage|Kotter's shoes, Kotter International brought in revenues of REDACTED REDACTED. CP 1994, 2536. Before that Kotter International's business was "dormant," with total revenue of REDACTED CP 1334, 2539.

(purchasers, having inquiry notice of claim, were not bona fide purchasers); *Miles v. Craig*, 147 Wash. 530, 536, 266 P. 182 (1928) (purchaser, knowing of property boundary claim before payment, took property subject to that claim); *Metropulos v. Chicago Art Glass, Inc.*, 509 N.E.2d 1068 (Ill. App. Ct. 1987) (corporation and directors held stock subject to constructive trust because they had notice of claim to the stock before paying $60,000 for it).

Because they had notice of the Wormans' claims, the Kotters and Kotter International cannot be bona fide purchasers of Green's misappropriated interest in Sage|Kotter, even if Green did receive some value for it. But he did not. Kotter testified:

> Q. When the entity [Sage|Kotter] was dissolved, what was Mr. Green paid for his interest in the entity?
>
> A. You mean -- see if I understand what you mean by interest. Do you mean what was he paid for his whatever he had, X percent ownership in?
>
> Q. Correct.
>
> A. ***It is my understanding zero.***

CP 1792 (emphasis added).[7]

Finally, whether the Kotters were unjustly enriched is not an issue separate and distinct from whether they are bona fide purchasers. *See*

[7] Kotter, Dearman, and Green testified that they were unaware of ***any*** payment for "substantially all the operating business assets of Sage|Kotter" and its ongoing business operations. CP 1340-41, 1758, 1770, 1788.

Malone v. Hines, 822 S.W.2d 394, 398 (Ark. Ct. App. 1992) (there is "no merit" in such argument); *Fisher v. Trainor*, 242 F.3d 24, 31 (1st Cir. 2001) (the "only way" to defeat a constructive trust is to be a bona fide purchaser); *King v. Richardson*, 136 F.2d 849, 859 (4th Cir. 1943) ("That [the transferees] had no fraudulent intent and honestly believed that they were acting lawfully does not affect the matter."). Having acquired Green's 38 percent ownership interest in Sage|Kotter without consideration and with notice of the Wormans' pending claims, the Kotters and Kotter International took it subject to a constructive trust as a matter of law. *See Paysse*, 86 Wash. at 354; *see also In re Marriage of Allen*, 724 P.2d 651, 659 (Colo. 1986) (receipt of property under settlement agreement does not constitute value sufficient to establish bona fide purchaser status).

The Kotters' argument that they were not unjustly enriched because they had the right to dissolve Sage|Kotter does not change that reasoning or result. *See, e.g.*, CP 1558, 1569-74. Notwithstanding the fact that the Kotters had no such right,[8] courts enforce constructive trusts where a party is "at liberty" to cancel, dissolve, or terminate the property

[8] Under sections 5.6.3 and 5.6.5 of Sage|Kotter's Operating Agreement, the Kotters needed Green's vote as a co-manager and as a 38 percent member to dissolve Sage|Kotter and to transfer its assets. CP 728, 733, 736, 741-42 (requiring "unanimous" consent of all managers and 75 percent super-majority approval of all members).

over which a trust is sought. *See Butler*, 369 F.2d at 818-19 (enforcing constructive trust over stock even though defendants were "at liberty to mutually cancel" their stock purchase agreement because the action "was started while the contract was still executory and in force"); *In re H. King & Assocs.*, 295 B.R. 246, 262-65, 272-73 (Bankr. N.D. Ill. 2003) (enforcing constructive trust over assets held by separate entity notwithstanding liquidation of the debtor-entity through bankruptcy).

Watumull v. Ettinger, 39 Haw. 185 (Haw. 1952), is on point. After a dispute arose between two partners, one partner exercised his "right to terminate the partnership by giving forty-five days' notice," as set forth in the partnership agreement. *Id.* at 189-91. That partner and his wife then formed a separate entity, which received all of the partnership's assets and ongoing business as part of the dissolution process. *Id.* at 199-200, 206. The Hawaii Supreme Court imposed a constructive trust over the separate business and its assets, noting that during dissolution nothing was paid for the partnership's goodwill, business connections, trade name, and other intangible assets. *Id.* at 198, 206. In so holding, the court rejected the arguments that the partnership had no goodwill or other intangible assets of any value "with the [partners] known to be out of the partnership." *Id.* at 197.

The court in *Koffman v. Smith*, 682 A.2d 1282 (Pa. Super. Ct. 1996), imposed a constructive trust over assets and ownership interests notwithstanding the formality of dissolution. There, two partners dissolved their partnership after a complaint was filed, but before judgment was entered. *Id.* at 1285, 87. The partnership's assets and ownership interests were conveyed to one partner and his wife "for consideration in the sum of $1.00"; the other partner received a promissory note secured by a mortgage. *Id.* at 1285. Applying the same test adopted by Washington courts, the court in *Koffman* held that the partners were not bona fide purchasers as a matter of law. *Id.* at 1291. The court enforced a constructive trust over the partnership's assets and ownership interests, the note, and the mortgage and explained that to the extent the partners had received such property, "they have been unjustly enriched at the expense of [the claimant]." *Id.*

The dissolution of Sage|Kotter followed a similar pattern. After Appellants filed suit seeking a constructive trust, the Kotters dissolved Sage|Kotter and transferred its business to Kotter International, which they owned and controlled, for no payment. *See, e.g.*, CP 1340-41, 1346-66. The court in *Koffman* enforced a constructive trust in such circumstances, finding that the former partners had been "unjustly enriched at the expense

of [the claimant]." 682 A.2d at 1291. As the court in *Watumull* explained, the result would be no different even if the Kotters "had the right to terminate" and even if Kotter, personally, had been "the lifeblood of the business[.]" 39 Haw. at 189. Washington law requires the same result. *See Ashley v. Vance*, 80 Wn.2d 274, 277-79, 493 P.2d 1242 (1972) (rejecting defense that partners properly exercised right to dissolve partnership because the acts in question "occurred before that time"); *Green v. McAllister*, 103 Wn. App. 452, 465-66, 14 P.3d 795 (2000) (rejecting inevitable dissolution of partnership defense). This Court should vacate the trial court's judgment and enforce a constructive trust over the 38 percent ownership interest as a matter of law.

2. Kotter International Is The "Mere Continuation" Of Sage|Kotter And Is Liable As Its Successor As A Matter Of Law

The dissolution of Sage|Kotter and transfer of its assets is ineffective to defeat Appellants' claims for another reason. Washington courts recognize at least four exceptions to the general rule that an entity that receives assets from another entity does not become liable for the transferor's debts and obligations. *Martin v. Abbott Labs.*, 102 Wn.2d 581, 609, 689 P.2d 368 (1984) (noting further that the four exceptions were developed to protect creditors and minority shareholders). If an exception is met, the receiving entity is held liable for the transferor's

debts and obligations as its successor as if no transfer had occurred. *See id.*

One of those four exceptions—the "mere continuation" exception—prevents an entity from escaping liability by "changing hats." *Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc.*, 166 Wn.2d 475, 482, 209 P.3d 863 (2009); *see also* 15 William M. Fletcher, *Fletcher Cyclopedia Corporations* § 7124.10 (rev. ed. 2008) ("[I]f a corporation goes through a mere change in form without a significant change in substance, it should not be allowed to escape liability."). The factors relevant to the exception are (1) a common identity of officers, directors, and stockholders, and (2) the sufficiency of the consideration provided to the selling entity in light of the assets sold. *Cambridge Townhomes*, 166 Wn.2d at 482-83 (exception was met where same individual "was at the helm of both entities"); *see also Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.)*, 702 F.3d 553, 572 (9th Cir. 2012) (the fact that the same married couple owned both entities, employed the same employees, and operated the same business was "virtually dispositive" of mere continuation liability).

Here, undisputed facts in the record show that the first element of "mere continuation" is met. The Kotters owned 62 percent of Sage|Kotter

and own 100 percent of Kotter International. CP 768, 1145, 1167-68, 1888. Kotter served as one of Sage|Kotter's two managers and is Kotter International's sole director, and always "maintained ultimate control and responsibility" for business operations and "held full authority for all major corporate decisions." CP 741, 1153, 1159-60, 1167-68.[9] Kotter International provides the same services, to the same clients, under the same contracts, through the same employees, under the same leadership and supervision, in the same office space, using the same office equipment, supplies, and professional insurance as Sage|Kotter. CP 413-14, 417-19, 983-96, 1131, 1133, 1341. And all of Sage|Kotter's officers and executives—Kotter, Dearman, Goin, Ottinger, Gersch, and Tanya Kruger—hold identical positions with identical responsibilities at Kotter International. *See* CP 866, 874, 1131, 1133, 1169-70; *see also Culinary Workers & Bartenders Union, Local No. 596 v. Gateway Café, Inc.* (*Gateway Café*), 91 Wn.2d 353, 367, 588 P.2d 1334 (1979) (finding mere continuation and alter ego liability where successor operated the same

[9] Because complete identity of ownership is not required, Green's exclusion from Kotter International does not alter this result. *See, e.g., Cargill, Inc. v. Beaver Coal & Oil Co.*, 676 N.E.2d 815, 819 (Mass. 1997) (common-identity element satisfied where sole shareholder of predecessor acquired a 12.5 percent ownership interest in successor); *Park v. Townson & Alexander, Inc.*, 679 N.E.2d 107, 110 (Ill. App. Ct. 1997) (finding successor liability where husband and wife were each 50 percent shareholders in predecessor, but wife was sole shareholder of successor); *Pet Care Prof'l Ctr., Inc. v. Bellsouth Adver. & Publ'g Corp.*, 464 S.E.2d 249, 251 (Ga. Ct. App. 1995) (finding mere continuation where three of four partners in predecessor were stockholders in successor).

business, with the same employees, in the same location, and having received the assets of predecessor).

The second element is also met. It is undisputed that Kotter International paid Sage|Kotter nothing for all of its assets, including its intellectual property and its multi-year contracts on which more than $5,852,500 remained to be (and was) paid. *See* CP 1293, 1340-41, 1363-66, 1758, 1770, 1788, 1968, 2474, 2487. And there is no evidence that Kotter International paid anything for Sage|Kotter's work force and skilled employees, business model and structure, marketing plan, accounts receivable, goodwill, or any intangible asset. *See* CP 1363-66.

Respondents do not dispute these facts. Instead, they argue that they followed all of the corporate formalities in dissolving Sage|Kotter. *See*, *e.g.*, CP 1558, 1569-74. But successor liability may be imposed despite the fact that the "corporate restructuring meets the technical formalities of corporate form" (*Schmoll v. ACandS, Inc.*, 703 F. Supp. 868, 874 (D. Or. 1988)) and "[n]o matter how technically legal each step in that scheme may have been" (*Pepper v. Litton*, 308 U.S. 295, 312, 60 S. Ct. 238, 84 L. Ed. 281 (1939)). *See also Gateway Café*, 91 Wn.2d at 366-67 (ignoring formal dissolution of corporation and imposing successor liability and alter ego liability).

Respondents also argue that the value of Sage|Kotter was speculative because the Kotters could have withdrawn from it at any time and that, in any event, any value inhered to Kotter personally. *See, e.g.*, CP 1558, 1560, 1574. These arguments are also irrelevant. Successor liability does not require actual proof of the transferred assets' value precisely because they are easy to minimize. Indeed, a transferee cannot escape liability by arguing that "the tangible assets of the business were de minimis and the income stream was not touchable.... [I]mposing liability as a mere continuation is intended to avoid this very scenario." *Warne Invs., Ltd. v. Higgins*, 195 P.3d 645, 652 (Ariz. Ct. App. 2008); *see also Eagle Pac.*, 135 Wn.2d at 903 (imposing successor liability and alter ego liability as a matter of law and rejecting the argument that the predecessor's contracts "had no market value since any potential profit from completing the contracts was too speculative").

In *Warne,* the court imposed successor liability despite the fact that much of the "going concern" value was derived from the experience and knowledge of two key persons. It explained:

> Higgins and Janson could have taken jobs with unrelated companies, serving different clients, and it would be difficult for Warne to argue that IT's debts became those of the new employers. ***Nevertheless, that is not what occurred.*** Instead, IT's business, including its owners, key employees and services, was essentially reconstituted as

> Info Tech. Under these circumstances, Info Tech stepped into the shoes of IT.

195 P.3d at 653 (emphasis added); *see also Idearc Media, LLC v. Palmisano & Assocs., P.C.*, 929 F. Supp. 2d 939, 950-51 (D. Ariz. 2013) (imposing successor liability as a matter of law when the successor law firm was owned by the same lawyer and provided the same services, with the same key employee, using the same office as the predecessor, stating that "[n]o reasonable juror could conclude that [the successor] owed no consideration for the [predecessor's] intangible assets").

It is the same here. It is manifestly unreasonable that the Kotters and Kotter International paid nothing for Sage|Kotter's intangible assets.[10] *See Idearc Media*, 929 F. Supp. 2d at 950. And while the Kotters could have taken jobs with an unrelated company servicing new clients, that is not what occurred. Rather, Kotter International "stepped into the shoes

[10] The Kotters' actions—stripping Sage|Kotter of its assets and transferring them to a corporation they wholly owned in the face of Appellants' claims—also satisfy the elements of alter-ego and piercing-the-corporate-veil liability. *See Harrison v. Puga*, 4 Wn. App. 52, 64, 480 P.2d 247 (1971) (disregarding corporate form where officer stripped corporation of its assets and took them in his own name, noting the officer "could scarcely have disregarded the corporation more"); *Pottschmidt v. Klosterman*, 865 N.E.2d 111, 121 (Ohio Ct. App. 2006) (finding elements of alter-ego and piercing-the-corporate-veil claims satisfied where assets were transferred to avoid potential liability and without adequate consideration, leaving the original corporation an empty shell); *see also Eagle Pac.*, 135 Wn.2d at 906 ("[W]here the transfer of assets strips a debtor corporation of all its assets ... leaving creditors and holders of claims no resources to which they may look for the payment of their due, the net result is in legal effect a fraud." (brackets in original; internal quotation marks and citation omitted)); *In re B & L Labs., Inc.*, 62 B.R. 494, 505 n.27 (Bankr. M.D. Tenn. 1986) ("Stripping a corporation of assets to deprive a claimant of recovery, by the corporation's majority stockholder is a fraud justifying piercing the corporate veil.").

of" Sage|Kotter by continuing to provide the same services, to the same clients, under the same contracts, through the same employees, in the same office space. CP 413-14, 417-19, 983-96, 1131, 1133, 1341. *See Warne*, 195 P.3d at 653. The trial court erred in failing to recognize that Kotter International is the "mere continuation" of Sage|Kotter as a matter of law.

VI. CONCLUSION

For the foregoing reasons, this Court should (a) reverse the trial court's order granting summary judgment, and (b) direct the trial court to enter summary judgment in favor of Appellants on the constructive trust and successor liability claims.

RESPECTFULLY SUBMITTED this 18th day of June, 2014.

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