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No. 71405-8

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

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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.

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# APPELLANTS' REPLY BRIEF

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## I. INTRODUCTION

The legal principles at issue in this case have long been settled. Any property obtained by a fiduciary breach is subject to a constructive trust. When property so obtained is transferred to a third party, the transferee, like the breaching fiduciary, takes the property subject to constructive trust and is liable for restitution of the property ***and*** for disgorgement of the 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). The law "plainly countenances" this dual relief because the "'constructive trust is based on property, not wrongs.'" *Id.* at 250-51 (quoting 1 D. Dobbs, *Law of Remedies* § 4.7(1), at 660-61 (2d ed. 1993)).

The trial court erred by failing to apply these settled principles to the undisputed facts. Respondents admit that Dana Green breached fiduciary duties owed to Ron and Sally Worman by securing a 38 percent ownership interest in Sage|Kotter, LLC for himself. Respondents also admit that they knew of Appellants' pending claims against Green when they acquired that interest from him. It follows, as a matter of law, that Respondents are not bona fide purchasers of Green's 38 percent ownership interest and have no defense against the constructive trust claim.

If Respondents had not worked with Green to remove that interest from the jurisdiction of the *Worman v. Green* arbitration, the Arbitrator would have imposed the constructive trust for Appellants' benefit and the action below would have been unnecessary. CP 55. Having done so, however, Respondents cannot invoke collateral estoppel to benefit from the limits of the Arbitrator's jurisdiction. Nor can they benefit from the Arbitrator's inability to determine the value of the ownership interest without the key financial information that they withheld from discovery. More fundamentally, because a constructive trust is imposed on "a specific thing" and not on its value, *see* Dobbs, *supra,* § 4.4, at 625, the Arbitrator's inability to determine value is not preclusive of Appellants' constructive trust claim below.

The trial court misapplied collateral estoppel and erred in failing to impose a constructive trust in Appellants' favor and should be reversed.

## II. ARGUMENT

### A. The Trial Court's Orders Are Reviewed De Novo.

Respondents incorrectly state that the trial court's decision "'is entitled to every presumption necessary to sustain it ....'" Brief of Respondents ("Resp. Br.") at 25 (quoting *Wilkeson v. Rector, Wardens of Vestry of St. Luke's Parish of Tacoma*, 176 Wash. 377, 379-80, 29 P.2d

748 (1934)). *Wilkeson* concerned a decree in equity entered after trial. *Wilkeson*, 176 Wash. at 378-79, 383. Here, because the trial court relied on collateral estoppel to bar Appellants' claims as a matter of law, its order is reviewed de novo. *See Christensen v. Grant Cnty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 305, 96 P.3d 957 (2004) ("Whether collateral estoppel applies to bar relitigation of an issue is reviewed de novo."). So is the trial court's order denying Appellants' motion for summary judgment on the constructive trust claim. *See Venwest Yachts, Inc. v. Schweickert*, 142 Wn. App. 886, 893, 176 P.3d 577 (2008) (entry of summary judgment imposing a constructive trust is reviewed de novo); *In re Marriage of Lutz*, 74 Wn. App. 356, 372, 873 P.2d 566 (1994) (whether a constructive trust exists is a conclusion of law reviewed de novo).

### B. Appellants Are Entitled To Enforcement Of A Constructive Trust As A Matter Of Law.

A constructive trust is both a cause of action and a remedy for restitution of property being wrongfully withheld. *See Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939); *In re Harold*, 979 N.Y.S.2d 334, 337 (N.Y. App. Div. 2013) (recognizing "a cause of action to impose a constructive trust"); *Neurauter v. Reiner*, 254 N.E.2d 66, 69-70 (Ill. App. Ct. 1969) (allegations that property was acquired through a breach of a confidential relationship and that such property is in the hands of defendants stated a

cause of action for constructive trust); *Bogert's Trusts and Trustees, The Law of Trusts and Trustees* § 953 (2014) ("If the reason that equity decrees a constructive trust is that the title to property has been wrongfully acquired, then a cause of action for its recovery immediately accrues ...." (emphasis omitted)).[1]

The constructive trust allows the plaintiff "to recover the asset ***in specie***" rather than "a money substitute." Dobbs, *supra,* § 4.3(2), at 589, 595 (emphasis added). To illustrate, the plaintiff may recover

> the legal rights to Blackacre itself, or a particular bank account, or rights in an intangible asset, not merely a money judgment equal to the value of such assets. If the asset has increased in value, the plaintiff gets the increase.

*Id.* at 589; *see also 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.").

Washington courts have followed these principles for more than a century. They have held, "without exception," that where property subject to a constructive trust is transferred to a third party, the transferee holds

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[1] Courts permit an independent cause of action for a constructive trust where—as here—there is fraud, breach of a duty, or any other act that entitles a plaintiff to such relief. *See Michaelian v. State Comp. Ins. Fund*, 58 Cal. Rptr. 2d 133, 146 (Cal. Ct. App. 1996); *see also Clifford v. Concord Music Grp., Inc.*, No. C-11-2519, 2012 WL 380744, at *4 (N.D. Cal. Feb. 6, 2012) (rejecting argument that a constructive trust is only a remedy and not a cause of action).

the property subject to the constructive trust, unless he is a bona fide purchaser. *Rozell v. Vansyckle*, 11 Wash. 79, 84, 39 P. 270 (1895); *see also Huber v. Coast Inv. Co.*, 30 Wn. App. 804, 810, 638 P.2d 609 (1981) ("The right of a trust beneficiary to reclaim the trust property or interest is cut off by a bona fide purchaser who acquires such interest for value in good faith, and without actual or constructive notice of any breach of trust.").

Respondents do not dispute that Green breached fiduciary duties owed to the Wormans by acquiring a 38 percent ownership interest in Sage|Kotter for himself. CP 38, 43-44. Nor do they dispute that Appellants' constructive trust claim over that interest arose, as a matter of law, when Green acquired it in January 2009. *See Huber*, 30 Wn. App. at 810. Instead, they insist, without any supporting authority, that by changing the form of Sage|Kotter's business from a limited liability company to a corporation, they took the ownership interest free of a constructive trust. *See, e.g.*, Resp. Br. at 15, 40-43. This is not the law.

The constructive trust "follow[s] the property ... into its product," and cannot be defeated by a change in corporate form. *See* Dobbs, *supra*, § 4.3(2), at 592. It is an "ancient rule of the common law" that a person wrongfully deprived of his property "may follow it, and recover it, no

matter what changes and transmutations it may have undergone"; thus, "if logs be sawed into lumber, and the lumber be made into an article of furniture, the owner of the logs may recover the article of furniture." *Winstandley v. Second Nat'l Bank of Louisville*, 41 N.E. 956, 957 (Ind. Ct. App. 1895). As another court explained, the change in form is irrelevant because the property "rightfully belongs" to the constructive trust:

> So long as either the original or substituted property can be traced or followed ***equity will always attribute the ownership to the beneficiary*** and will not allow the right to be defeated by the wrongful act of the fiduciary, no matter what form it may assume.
>
> The true owner of property has the right to have his property restored to him, not as a debt due and owing, but because it is his property wrongfully withheld. As between cestuis que trust and the trustee and all parties claiming under the trustee, except purchasers for value and without notice, ***all the property belonging to the trust, however much it may have been changed in its form or its nature or character, and all the fruits of such property, whether in its original or altered state, continue to be subject to and affected by the trust.***

*Fall v. Miller*, 462 N.E.2d 1059, 1062 (Ind. Ct. App. 1984) (internal quotation marks and citation omitted; emphasis added).

Where, as here, the property obtained by fiduciary breach can be traced to a third party,[2] the "only way" a transferee can defeat a

[2] The documents effecting the transfer of Sage|Kotter's business to Kotter International are in the record. *See, e.g.*, CP 1341, 1346-66. Respondents' unsupported argument that the ownership interest was "not 'transferred' ... it was liquidated," Resp.

constructive trust is by establishing a bona fide purchaser status. *Fisher v. Trainor*, 242 F.3d 24, 31 (1st Cir. 2001); *see also* Restatement (Third) of Restitution and Unjust Enrichment § 55 cmt. e (2011) ("[T]he rights of the claimant are paramount to the rights of defendant's successors in interest, so long as the latter do not qualify as bona fide purchasers."); 1 Joseph Story, *Commentaries on Equity Jurisprudence: As Administered in England and America* § 1257, at 872 (13th ed. 1886) ("[t]he only thing to be inquired [into]" is bona fide purchaser status of transferee). Because Respondents admittedly knew of Appellants' pending claims to the 38 percent ownership interest, *see*, *e.g.*, CP 1620, 1877, they are not bona fide purchasers as a matter of law.[3] *See Paysse v. Paysse*, 86 Wash. 349, 354, 150 P. 622 (1915). They offer no authority for the implied argument that a bona fide purchaser status can be regained, or value given, through artificial means after the fact. *See* Resp. Br. at 15, 41-42.

It cannot. "After the transferee receives notice ... he cannot improve his position by paying value." Restatement (Second) of Trusts

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Br. at 40, does not prevent tracing of the ownership interest into Respondents' hands or preclude enforcement of a constructive trust. *See* Appellants' Opening Brief ("Op. Br.") at 31-34 (citing cases). Respondents offer no authority to the contrary.

[3] On appeal, Respondents blame the Appellants for "not saying anything to Kotter" (as opposed to Green) about the Sage|Kotter Operating Agreement. *See* Resp. Br. at 11. But Respondents admitted below that Appellants had objected to the Sage|Kotter Operating Agreement to Respondents and their counsel at least twice. CP 683 (¶ 3.30), 709-10 (¶¶ 38, 39).

§ 301 cmt. a (1959); *see also id.* § 304(1) ("[I]f the trustee transfers trust property in consideration of the extinguishment of a pre-existing debt or other obligation, the transfer is not for value."). Respondents' collusive "global settlement" with Green, *see* Resp. Br. at 17, 19-20, 27, does not transform them into bona fide purchasers. For similar reasons, the "negotiated dissolution" of Sage|Kotter, *see id.* at 41, fails to turn the Respondents into bona fide purchasers. *See Coleman v. Golkin, Bomback & Co.*, 562 F.2d 166, 169 (2d Cir. 1977) ("A distribution of assets by a corporation is not a sale, and the stockholders receiving the assets are not bona fide purchasers ... whether the stockholders have notice or not." (footnote omitted)); *Plastic Contact Lens Co. v. Frontier of Ne., Inc.*, 324 F. Supp. 213 (W.D.N.Y. 1969) (stockholders hold assets received through dissolution in trust).

Respondents insist (again, without authority) that John Kotter had "unbridled authority" and "absolute control" over Sage|Kotter and was free to dissolve it any time. *See, e.g.*, Resp. Br. at 10, 23, 42-43. But control over the property obtained by fiduciary breach does not transform the transferee into a bona fide purchaser. In fact, "[t]he constructive trust is ***only*** used when the defendant has a legally recognized right in a particular asset" and has some degree of control over it. Dobbs, *supra*,

§ 4.3(2), at 591 (emphasis added). Yet it does not prevent the imposition of constructive trust. *See Watumull v. Ettinger*, 39 Haw. 185, 189 (Haw. 1952) (enforcing constructive trust notwithstanding "the right to terminate"); *Meister v. Mensinger*, 178 Cal. Rptr. 3d 604, 612, 618-19 (Cal. Ct. App. 2014) (remanding for consideration of constructive trust in favor of minority investor of defunct business whose assets, including intellectual property, customers, brand, and employees, were transferred to new business under an asset purchase agreement and plan of dissolution); *Hooper v. Yoder*, 737 P.2d 852, 860-61 (Colo. 1987) (rejecting the argument that "all the correct procedures were followed" and plaintiffs' participation in the business was properly terminated, and enforcing constructive trust).

In any event, the Kotters did not employ their control over Sage|Kotter for legitimate business reasons. They dissolved Sage|Kotter and transferred its ongoing business—unchanged—to Kotter International for the sole purpose of avoiding Appellants' pending constructive trust claims. CP 1121, 1126. While this strategy was effective in Arbitration, where the Arbitrator had no jurisdiction over Respondents or the property at issue, it is not effective in this action. *See, e.g., In re Reeves*, 65 F.3d 670, 672-73 (8th Cir. 1995) (imposing constructive trust over stock of

corporation formed and owned by third party who paid no value for those shares or for the "substantial assets" received from debtor partnership); *Voest-Alpine Trading USA Corp. v. Vantage Steel Corp.*, 919 F.2d 206, 208-09, 215-18 (3d Cir. 1990) (imposing constructive trust over stock in new corporation pursuing the same business where the assets were acquired with knowledge of claims for less than fair value).

In sum, the only defense to Appellants' constructive trust claim is not available to Respondents. A "purchaser is not 'bona fide' at all if he has knowledge or even notice of the equities in favor of the plaintiff and in that case cannot claim the defense." Dobbs, *supra*, § 4.7(1), at 661. There is no dispute that Respondents knew of Appellants' claims by spring 2009, CP 320, or that the disputed ownership interest can be traced into their hands. No authority supports Respondents' attempt to avoid this result by changing corporate form or by entering into a settlement with Green, the breaching fiduciary. The trial court erred in failing to enforce a constructive trust for Appellants' benefit, and should be reversed.

**C. Collateral Estoppel Does Not Apply.**

Collateral estoppel requires identity of issues. It also requires that an issue in a subsequent action be "necessarily determined" in a prior action. *See Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 508, 745

P.2d 858 (1987). Respondents fail their burden of showing that either of these prongs is met. Their bald assertion that the monetary value of the 38 percent ownership interest "lies at the center" of this case, *see* Resp. Br. at 28, is plainly wrong.

A constructive trust claim allows a plaintiff "to recover the asset in specie," and may be imposed upon a specific property (or its traceable substitute) without any regard to its monetary value. *See* Dobbs, *supra*, § 4.3(2), at 589-90. The property at issue here is not the assets of "Kotter personally," as Respondents erroneously claim, *see* Resp. Br. at 1, but a 38 percent ownership in Sage|Kotter—an interest in which the Kotters had no ownership rights. A limited liability company is a "separate legal entity," RCW 25.15.070(2)(c), and its members "[have] no interest in specific limited liability company property," RCW 25.15.245(1).

Sage|Kotter—not Kotter personally—owned its business model and sales process, trained management team and workforce, marketing plan and branding, proprietary processes and other intellectual property, and goodwill. *See* Op. Br. at 11. None of these assets was identified on the "Liquidation of Sage|Kotter, LLC" spreadsheet, *see* CP 1358-59, and Sage|Kotter received nothing for them when it was dissolved and its entire business was restarted as Kotter International. CP 1758, 1770, 1788. The

same is true for Sage|Kotter's ongoing contracts with three major clients under which more than $5,852,500 remained to be paid. CP 1293 (¶ 18). Those three contracts comprised approximately 75 percent of Sage|Kotter's annual revenue and became Kotter International's largest revenue sources. CP 1332, 1338. Those amounts were not identified on the "Liquidation of Sage|Kotter, LLC" spreadsheet and Sage|Kotter received nothing for those contracts. CP 1358-59. And despite the Arbitrator's order to produce "[q]uarterly and annual financial documents ... reflecting or otherwise relating to facts pertaining to the valuation of Sage|Kotter and of equity and membership interest(s) therein," the Kotters produced none of the financial documents evidencing these receivables. CP 3366 (¶ 2(c)), 1290-97.

The lack of evidence about Sage|Kotter's actual financial performance in 2009 and 2010 left the Arbitrator only with projections, which were by necessity "speculative" and insufficient to support a "real" valuation. CP 46, 59. Even if value were relevant to Appellants' constructive trust claim below, which it is not, Respondents cannot now invoke collateral estoppel to benefit from their own wrongdoing and preclude the trial court from fact-finding on the merits of all available evidence. *See United Bus. Commc'ns, Inc. v. Racal-Milgo, Inc.*, 591 F.

Supp. 1172, 1186-87 (D. Kan. 1984) (a party may not benefit from a judgment procured by withholding information that prevented the court from making a fair and well-informed decision).

Putting aside Respondents' unclean hands in discovery, the constructive trust claim is about the property itself, not its value. *See Harris Trust*, 530 U.S. at 251 ("'constructive trust is based on property'" (citation omitted)). The Arbitrator recognized this by stating that if he had the jurisdiction over the necessary parties and the disputed property, a constructive trust in the Wormans' favor would have been imposed despite the lack of evidence bearing on value. CP 55.[4] Thus, the Arbitrator's inability to determine the value of the 38 percent interest in Sage|Kotter for the purposes of the Wormans' damage claim against Green has no bearing on Appellants' constructive trust claim against the Respondents below. *See Evergreen W. Bus. Ctr., LLC v. Emmert*, 323 P.3d 250 (Or. 2014). In *Emmert*, the Oregon Supreme Court rejected the argument that the jury's finding that the interest in real property obtained by defendant through a breach of fiduciary duty was worth $1 precluded the plaintiff's claim for a constructive trust. The court held:

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[4] After Sage|Kotter was dissolved, the constructive trust claim was no longer within the Arbitrator's jurisdiction and the "only remedy [left for the Wormans] for the value of Sage|Kotter is an award of damages ...." CP 3089-90; *see also* CP 3216 ("Green ... has nothing to share or to be compelled to transfer to Worman.").

> [T]he jury's damage finding was based on its determination of the value of the property when defendant acquired it at the foreclosure sale. In contrast, ***in the constructive trust claim, plaintiff sought specific relief that did not require a determination of the value of the property at that point in time.*** Instead, that relief assigned to plaintiff the potential benefit—as well as the risk of loss—associated with holding the property for a court-ordered sale .... [P]laintiff was entitled to pursue that relief, even though the jury had determined that plaintiff's actual money damages were a mere dollar.

*Id.* at 258 (emphasis added); *see also In re Estate of Cain*, 382 N.W.2d 829, 832-33 (Mich. Ct. App. 1985) (prior judgment determining legal title to money was not collateral estoppel to subsequent action seeking a constructive trust).

As in *Emmert*, Appellants' constructive trust claim "focused on ... the benefit of owning the property itself," and the finding that it lacked value was "not material" to their claim. *Emmert*, 323 P.3d at 258. Nor was value material to Appellants' additional claims, such as aiding and abetting breach of fiduciary duty and fraudulent transfer. CP 21-34. Erik Van Alstine's and M3, Inc.'s claims are not precluded for the additional and independent reason that they were not party to, or in privity with a party to, the Arbitration. The only case Respondents cite to support collateral estoppel against them, *see* Resp. Br. at 30-31, confirms the opposite: a party is not estopped "merely because [the non-party] contributed some money toward the defense of the [prior] suit [and]

gather[ed] testimony for [a party] ...." *Carson Inv. Co. v. Anaconda Copper Mining Co.*, 26 F.2d 651, 657 (9th Cir. 1928).

The trial court erred as a matter of law by precluding the Appellants' constructive trust claim based on the Arbitrator's inability to value a 38 percent ownership in Sage|Kotter and should be reversed.

## D. Respondents' Other Arguments Lack Merit.

### 1. Appellants Did Not Receive A Complete Remedy In Arbitration

Respondents argue that the Wormans have already received a complete remedy for Green's fiduciary breaches. Resp. Br. at 20. Their argument is contrary to the law and the record. A complete remedy for the breach of fiduciary duty includes: (1) restitution of the property itself (if not disposed of) *or* disgorgement of the proceeds of that property (if disposed of), ***and*** (2) disgorgement of "all the fruits of such property." *Harris Trust*, 530 U.S. at 250; *Fall*, 462 N.E.2d at 1062. The Arbitrator lacked jurisdiction to address the first prong of this dual remedy. CP 55.

The Arbitrator had jurisdiction over the "fruits" of Green's breach and ordered disgorgement of one-half of the salary and employment benefits received by Green as Sage|Kotter's president in 2009, including one-half of Green's share of the cash on hand as of December 31, 2009. *See* CP 47-49, 51. These amounts had nothing to do with Green's

ownership interest in Sage|Kotter. CP 1792 (Green received "zero" for the ownership interest); *see also SEC v. Huffman*, 996 F.2d 800, 802 (5th Cir. 1993) ("Disgorgement wrests ill-gotten gains from the hands of a wrongdoer.... Disgorgement does not aim to compensate the victims of the wrongful acts, as restitution does." (citations omitted)). Appellants therefore have not yet obtained a complete remedy. *See Hooper*, 737 P.2d at 861 (enforcing constructive trust over ownership interests in business and salary received from that business).

### 2. Appellants Are Entitled To Summary Judgment On Their Successor Liability Claim.

On pages 34-40 of their Opening Brief, Appellants argued that the trial court erred in failing to recognize that Kotter International is the "mere continuation" of Sage|Kotter as a matter of law because it is undisputed that: (1) Sage|Kotter and Kotter International share a common identity of officers, directors, and stockholders, and (2) Kotter International paid Sage|Kotter nothing for its assets. *Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc.*, 166 Wn.2d 475, 482-83, 209 P.3d 863 (2009). Respondents do not dispute these dispositive facts. They insist instead that Appellants are collaterally estopped from asserting this claim because the Arbitrator found that the dissolution of Sage|Kotter

was not fraudulent and that Appellants are not creditors of Sage|Kotter. Resp. Br. at 46-47.

But the Arbitrator made no such findings. *See* CP 36-52, 54-61. Moreover, proof of fraud is not one of the elements of the mere continuation exception, *see Cambridge Townhomes*, 166 Wn.2d at 482, and the protection afforded by successor liability is not confined to creditors, *see Martin v. Abbott Labs.*, 102 Wn.2d 581, 609, 689 P.2d 368 (1984). Collateral estoppel plainly does not apply. *See Beagles v. Seattle-First Nat'l Bank*, 25 Wn. App. 925, 930-31, 610 P.2d 962 (1980).

### 3. The Doctrine Of Unclean Hands Does Not Prevent Enforcement Of A Constructive Trust.

Respondents claim, without authority, that the doctrine of unclean hands prevents the enforcement of a constructive trust. *See* Resp. Br. at 7, 42, 44-45. Not so. "A party is not barred from relief because of misconduct not connected with the matter in controversy, although directly connected with subject-matter of suit." *J. L. Cooper & Co. v. Anchor Sec. Co.*, 9 Wn.2d 45, 73, 113 P.2d 845 (1941); *see also Langley v. Devlin*, 95 Wash. 171, 187, 163 P. 395 (1917) (illustrating narrowness of doctrine). Nor is a party barred from relief "based upon technical theories of agency." *Associated Press v. Int'l News Serv.*, 240 F. 983, 989 (S.D.N.Y. 1917); *see also Wash. Capitols Basketball Club, Inc. v. Barry*,

304 F. Supp. 1193, 1200 (N.D. Cal. 1969) (conduct "must touch and taint the plaintiff personally ... [and] the acts of his agents, though imputed to him legally, do not impugn his conscience vicariously" (internal quotation marks and citation omitted)).

The alleged misconduct by Van Alstine has nothing to do with the dispute before the Arbitrator (to which Van Alstine was not a party) or the dispute in the case below. The doctrine of unclean hands therefore does not "relate directly to the very transaction" at issue. *See J. L. Cooper*, 9 Wn.2d at 74 (internal quotation marks and citation omitted). And although Van Alstine had no obligation to disclose the existence of the Consent Order, *see Mitchell v. Straith*, 40 Wn. App. 405, 409-10, 698 P.2d 609 (1985), he volunteered this information. CP 3018-19. The trial court correctly dismissed Respondents' claims for unjust enrichment and promissory estoppel, which were based on the alleged non-disclosure. CP 1905, 2090-91. Because Respondents did not cross-appeal the dismissal, their unclean hands argument is not properly before this Court on appeal. *See* RAP 10.3(b).

#### 4. Green's Settlement With Respondents Did Not Release *Appellants*' Claims.

Respondents argue that ***Appellants*** released all of their claims when ***Green***, acting as their "undisclosed agent," executed the Settlement

Agreement with Respondents. Resp. Br. at 11, 17, 36-37, 44. This is a frivolous argument. Green was Appellants' fiduciary. He had no authority to bind them to any settlement or release their claims. *See In re Jean F. Gardner Amended Blind Trust*, 117 Wn. App. 235, 239, 70 P.3d 168 (2003) ("[A] trustee is not an agent of the beneficiary, and therefore cannot bind the beneficiary under agency principles.").

Appellants never gave Green authority to release their claims and they never told anyone that he had such authority. CP 1855-56, 1858-59. The Settlement Agreement does not mention Appellants or any alleged "principals." CP 1349-51 (¶¶ 1.4, 3.1). Far from empowering Green to act as their agent, Appellants sued Green for breach of fiduciary duty and reserved the right to assert claims against Respondents. CP 3267-68. Under these circumstances, Respondents could not have possibly believed that Green was acting as Appellants' agent. *See D.L.S. v. Maybin*, 130 Wn. App. 94, 99, 121 P.3d 1210 (2005) (existence of authority is a quintessential issue of fact); *see also King v. Riveland*, 125 Wn.2d 500, 507, 886 P.2d 160 (1994) (requiring an objectively reasonable, subjective belief that agent has authority).

### 5. Appellants Did Not Settle Their Claims Against Respondents With Green.

Respondents' argument that "[p]rior to formation of Sage|Kotter, [Appellants] settled any Kotter-related claims directly with Green," Resp. Br. at 37, is equally frivolous. If there had been such a settlement as Respondents speculate, there would have been no need for the Wormans to bring claims against Green in Arbitration.[5] The fact of the Arbitration and the award speak for themselves. The Arbitrator found Green liable to the Wormans for breach of fiduciary duty and constructive fraud for usurping a business opportunity related to Kotter and Sage|Kotter, and "terminated immediately" Green's interest in The Sage Group. CP 37-38, 43-44, 49-50. But the Arbitrator could not grant the Wormans a complete remedy, which necessitated the action below. *See* Restatement (Second) of Trusts § 295 (to obtain a complete remedy, "the beneficiary can have remedies for the breach of trust against the [fiduciary] and against the transferee").

## III. CONCLUSION

For reasons stated here and in Appellants' Opening Brief, the trial court's order granting summary judgment should be reversed, and the trial

[5] The same is true for Van Alstine: had there been such a settlement, there would have been no need for Van Alstine to file suit against Green. CP 335-410. Van Alstine, moreover, was first told that he would not receive an ownership interest in Sage|Kotter in December 2008, not before. CP 2577, 3235.

court should be ordered to enter summary judgment in favor of Appellants on the constructive trust and successor liability claims.

RESPECTFULLY SUBMITTED this 4th day of December, 2014.

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I certify that on December 4, 2014, I caused a copy of the foregoing **Appellants' Reply Brief** to be served by hand delivery upon following counsel of record:

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