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,

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.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

The trial court correctly dismissed this action on collateral estoppel grounds, concluding that the dispositive issue underling Appellants' entire case was fully, fairly, and finally resolved against them in a prior proceeding. Lacking any legitimate basis to attack that conclusion, Appellants once again resort to mischaracterizing the facts.

The trial court had no problem seeing through that charade, denying not one, not two, not three, not four, but all five of Appellants' dispositive motions before dismissing their case in its entirety. Although Appellants now ask this Court to reverse those rulings, there is no basis for doing so. The *actual* undisputed facts demonstrate that the trial court's rulings were correct.

Non-party Dana Green established a working relationship with Dr. John Kotter, a best-selling author and professor at Harvard Business School. Green and Kotter agreed to create a joint venture, called Sage|Kotter, around Kotter's name and reputation.

Because Kotter personally owned all assets used by the company, he insisted upon and received what two tribunals have now described as "absolute control." Green, by contrast, received a minority interest in the company. Although Kotter maintained exclusive control of his intellectual property, he permitted Sage|Kotter to make use of it subject to a freely-

revocable license. Kotter also had a contractual right to dissolve Sage|Kotter at any time.

Although Green had secretly promised to share any Kotter-related opportunities with Appellants Ronald Worman and Erik Van Alstine, he did not do so. When Appellants commenced arbitration against Green for taking a personal interest in Sage|Kotter, Kotter responded by terminating Green, dissolving the company, and putting his intellectual property to other uses, all of which he had an absolute right to do.

Green received over $300,000 in dissolution. Later, in their litigation against Green, the arbitrator awarded Appellants their *pro rata* share of all money received by Green in connection with Sage|Kotter, including the amounts received in dissolution.

In so ruling, the arbitrator concluded that Green's minority interest had nothing more than "nominal" value due to Kotter's "absolute control" over the company. That Green received more than $300,000 for such an interest led the arbitrator to one inescapable conclusion: There was no remaining property over which a constructive trust could have been imposed, or for which an award of additional damages could even be assessed.

Unwilling to live with that ruling, Appellants have now commenced a separate action against *Kotter*, arguing that *he* is somehow

liable to account for the alleged additional "property" the arbitrator already conclusively determined does not exist.

Because the issues Appellants press in this action have been conclusively resolved against them in a prior proceeding, the trial court correctly dismissed their claims on collateral estoppel grounds. That ruling should be upheld on appeal.

Although there are other compelling reasons for dismissal, the trial court had no need to reach them. Should the Court determine that Appellants are entitled to revisit an issue they aggressively litigated and lost during the prior arbitration—and it should not—these alternative grounds for affirmance equally support summary judgment and are addressed below.

II. ISSUES PRESENTED

1. Did the trial court correctly conclude that Appellants are collaterally estopped from asserting the claims at issue here?

2. Are Appellants' claims subject to dismissal where they have made multiple judicial admissions that they released Kotter from any and all liability relating to Sage|Kotter "as a matter of law"?

3. May Appellants pursue a claim against Kotter where they settled any Kotter-related claims directly with Green?

4. Did the trial court correctly deny Appellants' motions for summary imposition of a constructive trust and successor liability?

III. STATEMENT OF THE CASE

A. Factual Background

1. Dr. John Kotter and Nancy Dearman

Dr. John Kotter is a best-selling author and tenured professor at the Harvard Business School. CP 336; CP 1152; CP 1629-30. During the course of his career, Kotter has become a preeminent authority on a variety of subjects, and has been a particularly prominent voice on the subjects of leadership and change. *Id.*; CP 1030. Nancy Dearman is Kotter's long-time business partner and spouse. CP 1152. Kotter and Dearman reside in Cambridge, Massachusetts. *Id.*

2. The Sage Group, Ronald Worman, Erik Van Alstine, and Dana Green

In 2002, Worman and Green formed The Sage Group, a small consulting firm based in Bellevue, Washington. CP 37. Although Van Alstine has never had any ownership interest in The Sage Group, he has occasionally worked as a consultant to the company. CP 273; CP 2876-77.

In April of 2007, Van Alstine emailed Kotter out of the blue and engaged him in online conversation. CP 336. Worman, Van Alstine, and

Green subsequently concluded that Kotter represented a potentially valuable business opportunity. CP 1031. However, Kotter did not know Worman, Van Alstine, or Green, and obviously would not be willing to do business with people he did not know and trust. CP 38; CP 337.

So Worman, Van Alstine, and Green came up with a plan: Green would serve as the group's "point person" for all things Kotter-related, and would (1) travel back-and-fourth from Seattle to Boston in order to build a relationship with Kotter, (2) gain Kotter's trust, and (3) hopefully build a business relationship with him. CP 337. Worman and Van Alstine were to remain behind the scenes in Seattle. *Id.*; CP 38.

Worman, Van Alstine, and Green further agreed that any business opportunities Green might be able to develop with Kotter would belong to all of them equally, and not just to Green. CP 338. Kotter knew nothing of that arrangement because no one ever told him about it. *See, e.g.*, CP 38; CP 273; CP 1043.

3. Preliminary discussion between Kotter and Green

Green managed to establish a rapport with Kotter, and eventually succeeded in gaining his trust. Having done so, Green proposed that he and Kotter enter into a consulting relationship through which Green would provide advice regarding the growth of Kotter's existing business. CP 1032. Green represented that any such consulting work would be

provided by The Sage Group, an entity he claimed to personally own and control, and for which he held himself out as the "Managing Principal." CP 68; CP 1703.[1]

While Kotter and Green were discussing the terms of that proposed consulting agreement, Worman and Van Alstine slowly began to emerge from behind the scenes. Green advised Kotter that Worman and Van Alstine were his employees back in Seattle, and that they would be assisting him in connection with any future consulting services. CP 1703. As Appellants concede: "Mr. Green did not convey any sense of what Mr. Worman and others were doing to Dr. Kotter and Ms. Dearman." CP 1043. Notwithstanding that fact, Kotter had some limited interaction with Worman and Van Alstine during this time (through Green), almost none of it in-person. *See* CP 7 § 3.6; CP 273; CP 1306; CP 1403.

In the months leading up to execution of the Consulting Agreement, Kotter advised Green, Worman, and Van Alstine regarding one of the most important aspects of his personal and professional life –

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[1] Appellants repeatedly misconstrue Kotter's communications with Green or The Sage Group as if they constituted communications with or references to Worman and Van Alstine. *See, e.g.*, CP 259-61; CP 2071; CP 2076; CP 2079-82; App. Br. at 6. They do not. Kotter was told – and therefore believed – that The Sage Group was wholly owned and controlled by Green. The record is saturated with evidence that Green did not inform Kotter of his relationship with Worman or Van Alstine, or of Worman's or Van Alstine's relationship to The Sage Group. *See, e.g.*, CP 1043; CP 1703. Indeed, Appellants admit that fact. *See* CP 1043.

namely, that his reputation must remain "as pure as snow white" and that he therefore "won't work with anybody of questionable ethics." CP 2581-2; CP 2592.

4. Appellants intentionally conceal their securities fraud

Having been so advised, Worman, Van Alstine, and Green made a conscious decision to continue concealing a fact that, if disclosed to Kotter, would have summarily ended any opportunity of working with him—namely, that the State of Washington found Van Alstine and a company directed by Worman to be liable on multiple counts of securities fraud. CP 2641-50; CP 2999-3002; CP 2573 at 23:25-24:6.

5. The Consulting Agreement and discussions regarding a potential joint venture

Unaware of the securities fraud or Worman's and Van Alstine's role in The Sage Group, Kotter entered into a Consulting Agreement with The Sage Group on February 11, 2008, under which Kotter agreed to pay $20,000 per month in exchange for certain advice. CP 65-68. Under that agreement, Green promised to propose "suitable structures" for Kotter's future business operations. *Id.* [2]

[2] The only signatories to the Consulting Agreement are Kotter and Green, who is identified therein as The Sage Group's Managing Principal. CP 68. The Consulting Agreement makes no reference to Worman or Van Alstine. The Consulting Agreement (1) expressly disclaimed the existence of a joint venture, partnership, or similar relationship, (2) made clear that Kotter maintained exclusive control over his intellectual property at all times, and (3) contained a merger clause. CP 65-68; CP 264.

In June of 2008, having considered and rejected innumerable other business structures proposed by Green, CP 39 and CP 266, Kotter and Dearman finally settled on one—a limited liability company to be called Sage|Kotter. CP 39.[3] Kotter and Dearman were to own 62 percent of the company, and Green would own the remaining 38 percent minority interest. CP 1173-1220.

In passing, Green floated the idea that Worman would also be given a small interest in Sage|Kotter. CP 2055-56. Because Kotter and Dearman did not know Worman and had no interest in sharing any portion of the company with him, they told Green that he could allocate a small portion of *his own interest* to Worman if he saw fit to do so, provided any such shares conveyed no voting rights. CP 1018; CP 2055-56. There is no evidence that anyone ever suggested an ownership interest for Van Alstine. In fact, in June of 2008, some six months prior to the creation of Sage|Kotter, *Worman and Green* advised Van Alstine that he would not be

[3] Citing a snippet from an email drafted by Kotter, Appellants assert that, in October of 2008, "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." App. Br. at 7 (emphasis added). The email in question, CP 2051, does not stand for the cited proposition. In fact, it does not make any reference to Worman or Van Alstine at all, but instead reflects one of the many structures proposed by Green (and rejected by Kotter) in which *Sage|Kotter employees* would be given equity in the company.

receiving any interest in the company under any set of circumstances. CP 2877.[4]

6. The Sage|Kotter Operating Agreement

a. Kotter retains "absolute control"

Kotter, Dearman, and Green executed the Sage|Kotter Operating Agreement in January of 2009, effective as of August 28, 2008 (the "Operating Agreement"). CP 1173-1220. Although Green caused initial drafts of the Operating Agreement to show Worman holding a four percent non-voting interest, CP 1012, he unilaterally removed Worman from the Operating Agreement at the eleventh hour. CP 41-42. Sage|Kotter began rolling out its business operations shortly thereafter.

Because Sage|Kotter was based entirely around Kotter and his intellectual property, the Operating Agreement and related documents made clear that he would have absolute control over the company. CP 1914. Under Section 12.2 of the Operating Agreement, for example, Kotter had unbridled authority to dissolve the company for any reason or

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[4] Worman felt the need to memorialize that discussion in writing, stating: (1) "Erik will not be in the operating agreement of Newco or SAGE," (2) "Erik is not promised any equity in any company of which SAGE or SAGE partners are involved with [sic]," and (3) "Erik acknowledges that all past discussions have been hypothetical in nature." CP 2877.

no reason during the first five years of Sage|Kotter's existence. CP 103; CP 1913.[5]

Kotter also maintained absolute control over his intellectual property, on which Sage|Kotter's entire business depended. Although Kotter agreed that Sage|Kotter could use his intellectual property pursuant to the terms of a Member Services Agreement ("MSA"), Kotter had unbridled authority to terminate the MSA at any time, for any reason (or no reason), and in any manner (including orally). CP 1957 § 6(a)(ii).[6] For those reasons, the parties referred to their intellectual property arrangement as a freely-revocable "oral agreement." *See*, *e.g.*, CP 1347.

Reviewing the foregoing evidence, the trial court summarized Kotter's relationship with Sage|Kotter in two words: "absolute control." CP 1914. The arbitrator in the underlying litigation used the same description. CP 46.

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[5] Appellants continue to erroneously assert that, under Section 5.6.3 of the Operating Agreement, Kotter "needed Green's vote as a co-manager and as a 38 percent member to dissolve Sage|Kotter." App. Br. at 31 & n.8. That assertion is incorrect. As the trial court found, Section 12.2 of the Operating Agreement "clearly allowed Dr. Kotter to terminate the LLC for any reason and at any time up to December 31, 2013, the so-called 'initial period.'" CP 103; CP 1913.

[6] The MSA also states that "[Kotter] is expressly granted the authority to claim the copyright or the sharing of copyright for all ideas, products or services based substantially on his work on behalf of himself, on behalf of Sage|Kotter or on behalf of some combination of individuals and Sage|Kotter, ***as he deems fair and appropriate in his sole and absolute discretion***." CP 1960 (emphasis added).

b. Green's false representations and warranties

There is no dispute that Green procured his interest in Sage|Kotter by fraudulent means. In the Operating Agreement, Green made the following false representations and warranties to Kotter: (1) that Green had full authority to take a personal interest in Sage|Kotter, and (2) that doing so did not conflict with "any other agreement or arrangement" to which he was bound. CP 1688 §§ 14.1, 14.4(e).

Appellants knew that Green intended to make those false representations and warranties. Indeed, Green began sending Appellants initial drafts of the Operating Agreement months before it was executed, CP 2952–2995, and Appellants reviewed those drafts among themselves and with their professional advisors, CP 1037. And yet, Appellants made a strategic decision not to say anything to Kotter.

Appellants now assert (without elaboration) that Worman and Van Alstine "objected to the[ ] terms" of the Operating Agreement. App. Br. at 8. What Appellants carefully avoid saying is that they objected *to Green*, their own undisclosed agent—not Kotter. In fact, five months after execution of the Operating Agreement, Worman was still telling Green

that "we should be concentrating on getting [our issues] resolved so that we can keep this private." CP 2873-74; *see also* CP 1043.[7]

7. Appellants commence coordinated litigation against Green

Months after Sage|Kotter opened for business, Appellants filed coordinated lawsuits against Green, alleging that he usurped a business opportunity by taking a personal interest in Sage|Kotter without their consent. CP 1906-07. Worman commenced an arbitration before the Honorable Robert H. Alsdorf (Ret.) (the "Alsdorf Arbitration"), CP 271-312, and Van Alstine commenced a separate civil action in King County Superior Court (the "State Court Action"). CP 335-410.

Appellants agreed to share the costs and proceeds of the two actions, were represented by the same counsel (who represents them once again in this action), and conducted robust and coordinated discovery across both matters. CP 1906-07. To remedy Green's alleged misconduct, Appellants sought damages, disgorgement, and/or imposition of a constructive trust. CP 278-79; CP 346.

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[7] That same month, Worman was still unsure as to whether Green had advised Kotter of the dispute, and asked Green to convey that Worman had no objection to Kotter's conduct. *See, e.g.*, CP 2741 ("I really need to know that you are communicating with the Kotters on this. Specifically, that I am not suing you or them; that I am pursuing my rights under the [Sage Group] LLC agreement to honorably settle a disagreement I have with you [Green]; that I am not targeting them and only wish them well."); *see also* CP 1043 (conceding "Dr. Kotter's lack of understanding of Mr. Worman's role").

8. Kotter learns of the Alsdorf arbitration and attempts to gather information

Although Green made passing reference to a dispute with Worman during the second half of 2009, he downplayed the significance of that matter and provided only limited details about it. CP 1793-94. Because Green assured Kotter and Dearman that the dispute would be resolved during a mediation that was to occur in October of 2009, they did not feel the need to press for additional information. *Id.*

On the evening of October 28, 2009, however, after the mediation failed, Green disclosed for the first time that Worman was actually seeking to recover millions of dollars, and that the litigation would be a significant distraction not only for Green, but also for the business of Sage|Kotter. *Id.*

Kotter and Dearman responded by asking their own attorney to gather additional information, including from Green's counsel. Appellants point to a handful of emails created during the course of that investigation—all drafted by Green's counsel—as "evidence" that "the Kotters actively assisted Green in the Arbitration." App. Br. at 9. None of those emails demonstrate that Kotter or his counsel assisted Green in any way, or that they even agreed with Green's positions.

There is no need to take Kotter's word for it: Reviewing the exact same argument, based upon the exact same evidence, Judge Alsdorf concluded that Appellants' position "is supported by substantially less

than a preponderance of the evidence." CP 45; CP 59. As with other aspects of their case, Appellants simply pretend that this issue was not conclusively resolved against them in a prior proceeding.[8]

9. Kotter advises Green that Sage|Kotter will be dissolved unless the dispute is promptly resolved

On December 7, 2009, having completed his investigation, Kotter advised Appellants and Green that he would exercise his absolute right to dissolve Sage|Kotter and to put his intellectual property to different uses unless their disputes were resolved within two weeks. CP 432-33. Four days later, on December 11, 2009, Appellants' counsel responded by taking the exact opposite position of the one they now take in this litigation – namely, that Kotter's "letter of December 7 is a step in the right direction" and that "[w]hether your clients take steps to wind up the affairs of Sage|Kotter is entirely up to them." CP 3256-57.

Appellants then took the position that dissolution of Sage|Kotter would have no impact upon their ability to recover from Green, as nothing

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[8] Appellants also imply wrongdoing based upon the fact that Sage|Kotter briefly indemnified a portion of Green's legal fees pursuant to the Operating Agreement, another argument considered and rejected by Judge Alsdorf. App. Br. at 9. Sage|Kotter's decision to honor that contractual provision while investigating the claims against Green only demonstrates a careful effort to follow the law – not an effort to break it. CP 1686-87. Ironically, although Appellants argue that they were somehow harmed by the indemnity payments to Green, they fail to mention that *they* are the recipients of half the funds in question. *See* CP 1060; CP 1311-12 (of the $827,125 in compensation earned by Green from Sage|Kotter, $60,103 constituted "personal legal fees," of which Appellants recovered their *pro rata* share in arbitration).

about the proposed dissolution prevented Appellants from seeking *damages* based upon the alleged value of Green's equity interest, which is exactly what they did. CP 3262-63; CP 1057-59; CP 1907-08.

When Appellants and Green failed to timely resolve their disputes as per the December 7 letter, Kotter advised them that he would begin the dissolution process. CP 435-36.

10. The Sage|Kotter dissolution and global settlement

In connection with the dissolution, Sage|Kotter, Kotter Associates, Inc. ("Kotter International"), Kotter, Dearman, and Green[9] entered into a Settlement Agreement and Mutual Release on January 6, 2010 (the "Settlement Agreement"). CP 1346-66. Green was represented by his own counsel in connection with the Settlement Agreement, CP 1351-52, the stated purposes of which were (1) to settle all actual and potential claims between the parties thereto, and (2) to effect an orderly liquidation and distribution of Sage|Kotter's assets, CP 1346-66.

a. All claims released

Although Appellants now quibble with the amount Green received under the Settlement Agreement, their own expert acknowledges that the payment made to Green "may reflect the offsetting of amounts due to

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[9] Kotter Associates, Inc. changed its name to Kotter International, Inc. Dana Green's spouse, Melissa Green, was also a party to the Settlement Agreement.

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. As Appellants concede, that mutual release "applies equally to [Appellants] as a matter of law." CP 1001-02.

b. All Sage|Kotter assets included

Under the Settlement Agreement and its "plan of liquidation," Green received $310,889 in exchange for "his" interest. CP 1348-49 §§ 1.1, 1.4; CP 1358-59. Kotter and Dearman received certain liquidating distributions, CP 1358-59, and Kotter International, an existing legal entity owned by Kotter, received the remaining assets and liabilities. CP 1348 § 1.1; CP 1363-66.

Appellants now argue that, in agreeing to accept $310,889 in exchange for the interest he procured by fraud, Green left money on the table. App. Br. at 11. Appellants specifically argue that Green "failed to assert his right to the value of his 38 percent equity interest in Sage|Kotter." CP 1021.

As an initial matter, Green testified that his 38 percent interest had no value upon dissolution, CP 3309, and two tribunals have now agreed with him, CP 45-47; CP 1908. But even if Green's interest did have

value, Appellants never explain why Kotter would even theoretically be liable to Appellants in the event Green, their own undisclosed agent, "failed to assert his rights." Indeed, Appellants admit that in the event Green failed to procure the full value of his interest—and the record is clear that Green obtained substantially *more* than the full value of his interest—such a scenario would present a potential dispute between Appellants and Green, but not a dispute between Appellants and Kotter. CP 3012.

Setting that fact aside, the idea that Kotter and Green somehow failed to account for assets is demonstrably false. By its express terms, the Settlement Agreement reflects a global "compromise" encompassing "***all*** issues, interests, claims, differences and potential disputes" between Kotter and Green. CP 1347 (emphasis added); *see also* CP 3659-60; CP 3706; CP 3714-15.

Appellants assert that Kotter "paid no consideration" for Sage|Kotter's "ongoing contracts (or any other asset) even though the contracts were Sage|Kotter's principal income." App. Br. at 11.[10] Appellants are wrong. The contracts at issue are expressly identified by

[10] Appellants rely upon deposition snippets in support of this erroneous proposition. *See, e.g.*, App. Br. at 30. On the very same page of the referenced deposition transcript, however, Kotter testified regarding the six-figure "liquidating distribution" made to Green. Appellants repeatedly ignore that testimony and the plain language of the Settlement Agreement itself. CP 1792.

name in the Settlement Agreement, CP 1366, and were included in the parties' global "compromise" and "plan of liquidation." CP 1348 § 1.1; CP 1350 § 2.0.[11]

Appellants' assertion that Kotter International paid "no consideration" for those assets flies in the face of the unambiguous language of the Settlement Agreement, which describes the consideration as follows: "One Dollar ($1.00) ***and other good and valuable consideration, pursuant to a plan of liquidation***," CP 1363 (emphasis added), both of which are spelled out in the Settlement Agreement itself.

Undaunted by this reality, Appellants simply ignore everything other than the term "One Dollar" in the foregoing sentence, and pretend that the specific assets and liabilities at issue (1) were *not* expressly included in the parties' global compromise, (2) were *not* fully accounted for, and (3) were *not* included in the plan of liquidation. Each of those assertions is demonstrably incorrect.

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[11] Moreover, the money that Appellants claim remained to be paid under the contracts at issue related solely to work that *had not yet been performed* and that *could not have been performed by Sage|Kotter* in light of the dissolution. Because Sage|Kotter was obviously incapable of servicing contracts following its dissolution, each of the contracts in question represented a potentially massive *liability* to Sage|Kotter. CP 1348 § 1.2.

11. The Alsdorf arbitration

a. Judge Alsdorf concludes that "Green's" equity interest has no value

While the dissolution and global settlement of Sage|Kotter played out, the Alsdorf Arbitration forged ahead. Appellants asked Judge Alsdorf to award them nearly $5 million based upon the alleged value of Green's equity interest (the "Equity Damages"). CP 1057. Judge Alsdorf categorically rejected that request. CP 45-47. That determination was based upon two threshold findings of fact regarding the *inherent structure* of Sage|Kotter that are centrally relevant here – namely (1) that Kotter was free to dissolve Sage|Kotter at any time and for any reason, and (2) that Kotter was always free to use his own intellectual property however he saw fit. CP 46.

Based upon those findings, Judge Alsdorf concluded (a) that Sage|Kotter was "terminable at will," (b) that "the parties' jointly hoped-for valuable business opportunity had always been more illusory than real," and (c) that, in light of the foregoing, "any reasonable buyer of ["Green's" interest would] be extremely unlikely to pay more than a nominal premium." CP 46; CP 59. Judge Alsdorf made clear that, "under slightly different circumstances (*e.g.*, a long-term or other enforceable interest in fact in Dr. Kotter's claimed intellectual property)," Green's

interest "could fairly have been found to have had substantial value." CP 59. But under the *actual circumstances* at hand, Judge Alsdorf concluded that Green's interest was merely "illusory" and never had anything more than "nominal" value. CP 46.

b. Judge Alsdorf orders Green to disgorge half of everything he actually received in connection with Sage|Kotter

Judge Alsdorf did conclude that Green failed to obtain Appellants' consent before taking a personal interest in Sage|Kotter, and therefore ordered him to disgorge half of everything he *actually received* in connection with the company, including Appellants' *pro rata* share of the $310,889 paid in dissolution and global settlement. CP 45-49.

Because Judge Alsdorf concluded that the Equity Damages sought by Appellants could not have been "measurably in excess" of the amount Green was ordered to disgorge (as Green's equity interest had no value), he described disgorgement as "parallel or comparable" to the constructive trust Appellants initially sought. CP 55-56. Judge Alsdorf went on to describe his disgorgement award as "the only reasonable measure of damages." CP 47.[12]

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[12] Appellants argue that "[t]he Arbitration did ***not*** find that disgorgement provided the Wormans a complete remedy." App. Br. at 13. Appellants are wrong – that is precisely what Judge Alsdorf concluded. CP 47; CP 55-56.

c. Appellants obtain robust discovery

Judge Alsdorf afforded Appellants robust discovery governed by the Federal Rules of Civil Procedure. CP 3270-71; CP 1909-10. Appellants then consolidated their discovery in the Alsdorf Arbitration with discovery in the State Court Action, *see*, *e.g.*, CP 3275 at 10:14-18, which allowed them to simultaneously operate under *both* the Federal Rules of Civil Procedure *and* Washington's Civil Rules. CP 1909-10 ("Worman and Van Alstine conducted extensive discovery in two legal proceedings through the same lawyers.").

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 (Kotter and Dearman included). CP 1909-10.

And while Appellants now claim that Kotter "concealed" documents and information during the arbitration, they fail to tell the Court that they filed multiple motions asking Judge Alsdorf to compel production of the very documents at issue. *Id.* Those motions were denied. *Id.*; CP 3366-70. Although Judge Alsdorf indicated that he would be willing to reconsider those rulings in the event Appellants came

forward with a showing of good cause, CP 3369 ¶ 2,[13] Appellants fail to mention that they never even attempted to make such a showing. CP 1910.

B. Procedural Background

Appellants filed an amended complaint in this matter in August of 2011, CP 1-34, seeking to recover from Kotter the exact same relief unsuccessfully pursued from Green in the Alsdorf Arbitration.

1. Appellants' five unsuccessful dispositive motions

Appellants filed four successive (and unsuccessful) motions for summary judgment, along with an unsuccessful motion to dismiss. CP 811-31; CP 788-810; CP 962-74; CP 1579-94; CP 3529-40. Through those motions, Appellants sought, among other things, imposition of a constructive trust over a 38 percent interest in Kotter International and a finding that Kotter International is liable as a "successor" for Sage|Kotter's alleged (and unidentified) "debts."

Each of these motions turned upon the same threshold questions previously resolved by Judge Alsdorf and presented again here—namely,

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[13] 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.

whether Green's equity interest in Sage|Kotter had any value given Kotter's "absolute control" over Sage|Kotter, and whether Green maintained any property interest over which a constructive trust could be imposed. CP 1908 (Appellants' claims "all revolve around the main damages issue, tried to J. Alsdorf: did Green's business interest in Sage|Kotter have a non-speculative value?"). The trial court denied each of Appellants' motions. CP 1005-08; CP 1074-76; CP 1077-79; CP 1947-51; CP 3541-42.[14] Appellants now assign error to those decisions. App. Br. at 4.

2. Kotter's motion for summary judgment

On October 11, 2013, Kotter filed a summary judgment motion of his own, asking the trial court to dismiss Appellants' case in its entirety on three grounds: (1) that Appellants are collaterally estopped from pursuing the claims at issue, (2) that Appellants have released Kotter from any and all claims, and (3) that Kotter never owed Appellants any duty. CP 1457-1578. On November 26, 2013, the trial court granted Kotter's motion on collateral estoppel grounds, and did not reach the other arguments.

[14] A portion of Appellants' fourth motion for summary judgment concerned two of Kotter's counterclaims, neither of which is at issue here. CP 1579-94. The trial court granted that limited portion of Appellants' fourth motion for summary judgment, and otherwise denied it. CP 1947-51.

CP 1905-15 (the "Order"). Appellants assign error to that decision as well. App. Br. at 4.

In the Order, the trial court reached several conclusions that Appellants either continue to ignore or attempt to obscure. Among other things, the trial court concluded:

- 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.
- That "[t]he Arbitration was procedurally fair" and that "the documents later discovered would not reasonably have changed the outcome." CP 1914.
- That Appellants were in privity for purposes of the Alsdorf Arbitration. CP 1906.
- That, to the extent Appellants believed there was some unfairness with the Alsdorf Arbitration, their "remedy would be a CR 60(b) motion to Judge Alsdorf," not a separate action against Kotter. CP 1909 & n.1.

IV. ARGUMENT

A. Standard of Review

An appellate court "reviews a motion for summary judgment de novo, construing all facts and reasonable inferences from those facts in the light most favorable to the nonmoving party." *Blue Diamond Grp., Inc. v. KB Seattle 1, Inc.*, 163 Wn. App. 449, 453, 266 P.3d 881, 883 (2011). The "court may affirm summary judgment on any grounds supported by

the record." *Id.* Here, although the trial court did not need to go beyond Kotter's collateral estoppel arguments in dismissing Appellants' case, the record supports dismissal on the additional grounds discussed below.

When it comes to decrees in equity, such as denial of a party's request for imposition of a constructive trust, "this court starts with the presumption that the decree is correct; that it is entitled to every presumption necessary to sustain it, in the absence of an affirmative showing in the finding itself that the necessary facts to sustain it did not exist." *Wilkeson v. Rector, etc., of St. Luke's Parish of Tacoma*, 176 Wash. 377, 379-80, 29 P.2d 748, 749 (1934). For obvious reasons, Appellants simply ignore this standard in their brief.

B. The Trial Court Correctly Ruled That Appellants are Collaterally Estopped From Continuing to Litigate the Alleged Value of Green's Equity Interest

1. Collateral estoppel standard

In order for collateral estoppel to apply, the party seeking application of the doctrine must establish: (1) that the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding, (2) that the earlier proceeding ended in a judgment on the merits, (3) that the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding, and (4) that application of collateral estoppel does not work an injustice on the party

against whom it is applied. *Christensen v. Grant Cnty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 307, 96 P.3d 957, 961 (2004). The doctrine precludes re-litigation of issues that have been actually litigated and necessarily and finally determined in the earlier proceeding, "'even though a different claim or cause of action is asserted.'" *Id.* at 306.

"The requirement of collateral estoppel that the issue be actually litigated does not require that the issue be thoroughly litigated." *Gambino v. Koonce*, No. 11 C 7379, Adv. No. 10A129, Bankr. Case No. 09 B 39244, 2013 WL 3716654, *4 (N.D. Ill. July 12, 2013). Indeed, collateral estoppel "may apply no matter how slight was the evidence on which a determination was made, in the first suit, of the issue to be collaterally estopped. This requirement is generally satisfied if the parties to the original action disputed the issue and the trier of fact resolved it." *Id.*; *accord Harper v. U.S.*, 987 F. Supp. 1025, 1029 (E.D. Tenn. 1996); *In re Limbaugh*, 155 B.R. 952, 959 (N.D. Tex. 1993); *In re Holzman*, 62 B.R. 218, 220 (S.D. Fla. 1986).

Additionally, the party against whom collateral estoppel is asserted must have had a full and fair opportunity to litigate the issue in question during the earlier proceeding. *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) ("[T]he injustice prong of the collateral estoppel doctrine calls for an examination primarily of procedural regularity.").

Collateral estoppel is applied on an issue-by-issue basis. *See, e.g.*, *Clark v. Baines*, 150 Wn.2d 905, 913, 84 P.3d 245, 249 (2004). As such, even if a hearing was not "full and fair" as to one issue, collateral estoppel may still be applied with respect to other issues for which there was a full and fair hearing. *Id.*

Finally, "[i]n deciding whether the resolution of an issue in the first proceeding should be binding on the second proceeding, the court in the second proceeding does not concern itself with whether the issue was or was not resolved correctly." Karl B. Tegland, Wash. Prac.: Civil Procedure, § 35:32 (2012 Supp.).

2. All elements of collateral estoppel are satisfied here

All of the claims asserted by Appellants turn upon the threshold assertions that Green's equity interest had something other than "nominal" value at the time of the dissolution and global settlement, and that there was some property interest over which a constructive trust should have

been imposed.[15] Because Judge Alsdorf fully, fairly and finally resolved those issues against Appellants, the trial court concluded that all elements of collateral estoppel are present here. That ruling was correct.

a. Identical issues

In the Alsdorf Arbitration, the parties aggressively litigated the question that now lies at the center of this action. Indeed, the alleged "value" of Green's equity interest was the *central question* litigated in the Alsdorf Arbitration, as it represented the single largest source of recovery sought by Appellants, CP 1056-62, and was the very first issue addressed in Judge Alsdorf's discussion of remedies, CP 1039-11.

Green made the following argument regarding this issue in his final pre-hearing brief: "Kotter's unilateral dissolution of Sage|Kotter provided the risk that Sage|Kotter's 'future cash flows' were far from certain and could evaporate whenever Kotter so decided." CP 3216-17. In other words, Green argued that the inherent structure of Sage|Kotter rendered his interest worthless, a fact to which he testified again in this action. CP 3309. Appellants responded by making the exact same arguments they now repeat in this action. CP 1011.

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[15] As the trial court correctly ruled in denying Appellants' third motion for summary judgment, imposition of a constructive trust "necessarily implies that there is property to protect." CP 1007. The same fact holds true with respect to Appellants' claims for successor, alter ego, and veil piercing liability, all of which turn upon the proposition that Appellants constitute "creditors" of Sage|Kotter for the value of Green's interest.

Judge Alsdorf fully, finally, and necessarily resolved the issue. Indeed, while acknowledging "the time that was spent on an ultimately unsuccessful attempt to obtain a seven-figure award for a 50% share of [Green's] interest in Sage|Kotter," CP 1324,[16] Judge Alsdorf determined that, due to the *inherent structure* (or "terminability") of the company, Green's "illusory" interest never had anything more than "nominal" value, CP 1310-11; CP 1323. On the basis of that finding, Judge Alsdorf categorically refused to award Appellants *any* amount of Equity Damages. CP 1309-11.

Unable to refute these facts, Appellants fall back to arguing that Judge Alsdorf's ruling as to the value of Green's equity is a mere "evidentiary fact," not an "ultimate fact" giving rise to collateral estoppel. Appellants are wrong. An "ultimate fact" is one "directly at issue in the first controversy upon which the claim rests." *Beagles v. Seattle-First Nat'l Bank*, 25 Wn. App. 925, 930-31, 610 P.2d 962 (1980). The value of Green's equity interest was *the* central issue in the Alsdorf Arbitration and Appellants' claim for Equity Damages rested squarely upon it. *Id.*

Because the trial court correctly concluded that the value of

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[16] Judge Alsdorf's written order reflects that "perhaps ten percent or slightly more, was actually occupied in proof or counter-proof as to the specific seven-figure valuation range [Appellants] sought for their lost interest in Sage|Kotter." CP 1323-24.

Green's equity interest was actually litigated and finally and necessarily decided by Judge Alsdorf, the first element of collateral estoppel is easily satisfied.

b. Judgment on the merits

As the trial court noted in the Order, the parties "do not dispute that there was a judgment on the merits in the arbitration." CP 1906. As such, trial court's conclusion that the second element of collateral estoppel is satisfied is likewise correct.

c. Privity

Although only certain Appellants were named parties to the Alsdorf Arbitration, all Appellants agreed to share the costs and proceeds of their respective actions, were represented by the same counsel (who represents them once again in this action), and conducted robust and coordinated discovery across both matters. CP 3229-30. As the trial court noted, "[d]iscovery from one case was used in the other and pleadings in each referenced the other proceeding. In fact, Judge Alsdorf referenced the [State Court Action] discovery proceedings in his pretrial Arbitration Orders." CP 1907.

Appellants cannot seriously dispute that they were either party to the Alsdorf Arbitration or in privity with parties to the Alsdorf Arbitration. *See, e.g., Carson Inv. Co. v. Anaconda Copper Mining Co.*, 26 F.2d 651,

657 (9th Cir. 1928). The trial court's conclusion that the third element of collateral estoppel is satisfied is likewise correct.

d. Full and fair hearing

Finally, application of collateral estoppel will not work injustice upon anyone. It will merely give effect to conclusive findings of fact made years ago regarding an issue that Appellants aggressively litigated and lost – an outcome that resulted from proceedings in which they were afforded every procedural protection. While Appellants float several arguments as to why the Alsdorf Arbitration was not really full and fair, the trial court correctly rejected those arguments. This Court should do the same.

(1) Green's alleged spoliation of evidence

Appellants first argue that Green's alleged spoliation of evidence defeats application of collateral estoppel in this action. The trial court correctly rejected that argument, concluding that none of the evidence in question had anything to do with the conclusive findings of fact at issue here. CP 1911 ("[T]here is no argument that these documents are related to damages."). As the trial court recognized, Appellants cannot point to anything that would even arguably undermine Judge Alsdorf's findings regarding the *inherent structure* (or "terminability") of Sage|Kotter.

Id.; CP 1310-11. Indeed, the facts underlying those findings were undisputed then and remain undisputed now.

Because collateral estoppel is applied on an *issue-by-issue* basis, *Clark*, 150 Wn.2d at 913, and because the doctrine applies so long as there is a full and fair hearing "on the issue in question," *id.*, Green's alleged spoliation of evidence regarding issues wholly unrelated to the *inherent structure* (or "terminability") of Sage|Kotter makes no difference to the Court's collateral estoppel analysis. *Id.*

Appellants nevertheless argue that "[w]hen key evidence was omitted in the earlier action or where a party intends to offer evidence not previously offered . . . , collateral estoppel does not apply." App. Br. at 21. That argument turns the relevant case law squarely on its head. *See supra* at 25-27. A party does not get another bite at the apple simply because it "intends to offer evidence not previously offered." Such an approach would defeat the entire purpose of collateral estoppel, which is intended to prevent "the endless relitigation of issues already actually litigated by the parties and decided by a competent tribunal." *Hadley v. Maxwell*, 144 Wn.2d 306, 311, 27 P.3d 600, 602 (2001).

But on a more fundamental level, the argument misses the central point of the trial court's ruling: Green's equity interest had no value due to the *inherent structure* (or "terminability") of Sage|Kotter. The trial

court explicitly found that none of the allegedly "new" evidence on which Appellants rely has anything to do with that issue, CP 1911, and even if it had, collateral estoppel would still apply because "[t]he Arbitration was procedurally fair," CP 1914.

(2) Kotter's alleged effort to stymie discovery

Appellants next claim that collateral estoppel cannot be applied because Kotter allegedly attempted to stymie discovery in the Alsdorf Arbitration. App. Br. at 22-23. That theory is, in a word, nonsense. Judge Alsdorf's explicit praise for Kotter and Dearman—and particularly what he found to be their high level of credibility—makes clear that he did not believe they contributed to Green's spoliation of evidence in any way, or that they somehow frustrated the arbitration. CP 1304.

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").

Moreover, as the trial court noted, Appellants filed two motions to compel Sage|Kotter into producing the documents in question. CP 1910, CP 3289 ¶ 2(f); CP 3369 ¶ 2. Those motions were denied, subject to reconsideration upon a showing of good cause, *id.*—a showing Appellants never even attempted to make.

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 Appellants could have—and, in fact, did—move to compel documents they claimed to need from Sage|Kotter, their arguments regarding Kotter's alleged effort to stymie discovery make no difference to this Court's collateral estoppel analysis. *Id.* Indeed, as the trial court correctly determined, "[t]he Arbitration was procedurally fair." CP 1914.

Moreover, as the trial court noted, to the extent Appellants believe they did not receive a full and fair hearing before Judge Alsdorf, their "remedy would be a CR 60(b) motion" to Judge Alsdorf. CP 1901, n.1; *see also* CP 3314-29; CP 3526-28. Of course, Appellants made no such motion. Appellants' failure to do so is not a basis for continuing to litigate the exact same issues in a new action against a new set of defendants years after the fact.

(3) "The arbitrator's inability to impose a constructive trust remedy"

Finally, Appellants repeatedly mischaracterize the trial court's collateral estoppel analysis as being based upon "the arbitrator's inability to impose a constructive trust in favor of the Wormans." App. Br. at 3-4, 15. The trial court's collateral estoppel analysis, however, had nothing to do with Judge Alsdorf's "inability to impose a constructive trust remedy." Instead, the trial court based its analysis upon "Judge Alsdorf's decision that the valuation of Green's business opportunity would have been no more than nominal." CP 1914.

In other words, Judge Alsdorf concluded that there was no economic interest over which a constructive trust could have been imposed, or even upon which an award of damages could have been based. Appellants' problem was not Judge Alsdorf's alleged "inability to impose a constructive trust," but the fact that there was simply nothing to recover.

* * * *

Because the trial court correctly determined that all of the elements of collateral estoppel are satisfied, and because Appellants have done nothing to suggest otherwise, the trial court's dismissal of this action must be upheld.

C. Appellants Have Released Kotter From All of the Claims Asserted in This Action

Although the trial court had no need to look beyond the collateral estoppel doctrine in dismissing this action, it easily could have reached the same conclusion on another equally compelling basis—namely, that Appellants have released Kotter from any and all claims. In the event the Court disagrees with the trial court's conclusion as to collateral estoppel (and it should not), this is an alternative ground for affirmance of the trial court's order.

In connection with the dissolution of Sage|Kotter, Kotter and Green entered into a settlement agreement that not only paid Green $310,889 in exchange for "his" interest, but that also contains a broadly worded "mutual release" that indisputably covers the claims that Appellants now assert here. CP 1350-51. As Appellants conceded during the trial court proceedings, "[t]hat release applies equally to Plaintiffs as a matter of law." CP 1001-02.[17]

Because the mutual release indisputably covers any and all claims relating to Sage|Kotter, and because it "applies equally to Plaintiffs as a matter of law," Appellants have indisputably released all of the "claims"

[17] By its express terms, the mutual release applies with respect to Green and his "predecessors, successors, parents, subsidiaries, affiliates, assigns, heirs, agents, attorneys, directors, officers, employees, and shareholders." CP 1350 ¶ 3.1.

they now attempt to assert in this action. As such, Appellants' case must be dismissed in its entirety. *See Vanderpool v. Grange Ins. Ass'n*, 110 Wn.2d 483, 488, 756 P.2d 111, 113 (1988) ("Releases are contracts and their construction is governed by the legal principles applicable to contracts.").

There is no reason why the Court should not enforce the terms of the mutual release. Having recovered their entire *pro rata* share of all money received in exchange for that mutual release, Appellants must abide by the terms thereof. Appellants' judicial admission that they are bound by the mutual release leaves no room for doubt.

D. Worman and Van Alstine Settled Any Sage|Kotter-Related Claims Directly With Green

Not only do Appellants admit that they are bound by the mutual release contained in the Settlement Agreement, but they are also foreclosed from suing Kotter for another reason: Prior to formation of Sage|Kotter, they settled any Kotter-related claims directly with Green.

Indeed, Worman complained to Green that, by offering him "only" a four percent non-voting interest in the company, Green was improperly cutting him out of the deal. CP 2867 ¶ 2. Rather than accepting the four percent interest offered to him by Green, Worman used the opportunity to negotiate an entirely different deal—namely, that Green would keep "his"

full 38 percent interest in Sage|Kotter in exchange for Worman assuming sole ownership of The Sage Group. *Id.*

Worman and Green agreed to that deal in December of 2008—prior to execution of the Operating Agreement—and Worman later memorialized it in writing. CP 2873 ¶ 3.

In fact, Worman was so eager to consummate the "value exchange" that he took the extraordinary step of drafting Green's resignation from The Sage Group for him, urging Green to sign and return the resignation letter immediately. CP 3022. Green did as requested, formally tendering his resignation to The Sage Group later that same day. CP 2870-71; CP 3295-97 ¶¶ 16-22.[18] Having "exchanged" any Kotter-related claims for sole ownership of The Sage Group, Worman cannot maintain that he has indirect rights to Green's interest in Sage|Kotter.

Claiming to have performed various Kotter-related services with the expectation that he too would be receiving a portion of Green's equity, Van Alstine likewise asked Green (not Kotter) to compensate him in some

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[18] When asked about this transaction under oath, Worman claimed that, after tendering his resignation from The Sage Group, Green asked to be compensated for his interest therein, which in turn caused Worman to commence the arbitration against Green. CP 3028 at 217:2-22. But if Green breached a settlement agreement he reached with Worman, there is no set of circumstances under which *Kotter* would even arguably be liable for that alleged breach. That indisputable fact underscores the reality that Kotter never owed Appellants any duty. Appellants' complaints are, and always have been, against Green, their own agent.

other way. Green did so by arranging for Sage|Kotter to pay him a $30,000 retroactive consulting fee, which Van Alstine accepted without objection. CP 3013-14. Because Van Alstine settled any Kotter-related issues directly with Green, he too is foreclosed from claiming an indirect interest in Sage|Kotter.

E. The Trial Court Correctly Denied Appellants' Motions for Summary Imposition of a Constructive Trust and Successor Liability

Appellants not only ask this Court to reverse the trial court's collateral estoppel ruling, but also ask it to go one gigantic step further by summarily imposing a constructive trust (of apparently perpetual duration) over a 38 percent interest in Kotter International, and by summarily ruling that Kotter International is liable as a "successor" with respect to Sage|Kotter's alleged (and unidentified) "debts." The trial court correctly (and repeatedly) denied those requests, and this Court should do the same.

1. Constructive trust

This is Appellants' third request for summary imposition of a constructive trust. That request should be denied yet again because, as the trial court found, (a) disposition of Green's interest was the subject of a global settlement and dissolution that expressly took account of all assets, (b) Green received far more than "fair value" for his interest, (c) Kotter had an absolute right to dissolve Sage|Kotter and to use his intellectual

property as he saw fit, and (d) a constructive trust is not a cause of action, but an equitable remedy that can be summarily imposed only upon a showing of liability, and then only to those parties with clean hands.

a. Green's interest in Sage|Kotter was liquidated for hundreds of thousands of dollars

Contrary to Appellants' assertion, "Green's" interest in Sage|Kotter was not "transferred" to Kotter International—it was liquidated in accordance with the Settlement Agreement. In addition to a release of the significant claims against him, Green received several hundred thousand dollars for his interest, CP 1349; CP 1358-59, and Appellants subsequently recovered their *pro rata* share of those funds from Green, together with all other benefits that Green received in connection with Sage|Kotter, CP 1348-49; CP 1358-59.

As such, unlike every case cited in Appellants' opening brief, the transaction at issue here was not intended to *evade* creditors, but instead had the effect of conveying an enormous *windfall* upon parties who could not, in any sense of the word, be considered "creditors" of Sage|Kotter.

The primary case on which Appellants rely—*Watumull v. Ettinger*, 39 Haw. 185 (1952), cited for the first time on appeal—only serves to underscore the point. *Watumull* involved a liquidating partner who, unlike Kotter, made "no effort" to account for "ninety-eight percent of the goods

of the partnership" and simply "transferred to himself and to his wife tangible assets without the knowledge or approval of" his partner, and without making any payment for those assets. *Id.* at 204-06. The misconduct at issue in *Watumull* was so overwhelming that it inspired the following observation from the court: "To enumerate the many derelictions of duty, concealment and false testimony of the respondents would be piling Pelion on Ossa." *Id.* at 206.

The facts here are exactly the opposite. Indeed, after Appellants accused Kotter of wrongfully dissolving Sage|Kotter, Judge Alsdorf concluded that those accusations were "supported by substantially less than a preponderance of the evidence." CP 45; CP 59. In so ruling, Judge Alsdorf went out of his way to note that "Mr. Green's lack of credibility is in distinct contrast to that of Prof. Kotter and his wife, Nancy Dearman. Their testimony was credible." CP 40.

Moreover, the disposition of Sage|Kotter's assets resulted from a negotiated dissolution and global settlement that not only paid Green over $300,000 while simultaneously releasing him from all claims, but that also expressly encompassed *all* assets of the company. CP 1346-66.

And, unlike the situation in *Watumull*, Kotter not only gave Green advance notice of the dissolution, but also provided notice to Appellants. CP 432-36. Although Appellants now conveniently claim that there was

something improper about the dissolution, they took the exact opposite position in response to the dissolution notice. CP 3256-57; CP 3262-63.

Moreover, there can be no serious dispute that the amount Green received in dissolution and global settlement was far more than "adequate." That conclusion follows not only from Green's admission that his interest had no value upon dissolution, CP 3309, but also from the fact that a party may not enforce an agreement that he or she procures by fraud. *See, e.g., Nationwide Mut. Fire Ins. Co. v. Watson,* 120 Wn.2d 178, 187, 840 P.2d 851 (1992) (contracts are voidable if induced by fraud). Because Appellants and Green fraudulently induced Kotter into forming Sage|Kotter, they never had *any* right to recover *anything* in connection with that entity. *Id.*

Watumull and the other cases on which Appellants rely are clearly distinguishable from the case at bar.[19]

b. Kotter had an absolute right to dissolve Sage|Kotter

Appellants also simply ignore that, unlike the cases cited in their

[19] The other case on which Appellants reply—*Koffman v. Smith*, 453 Pa. Super. 15 (1996)—is even less on point. In that case, the owners of a furniture store dissolved their business and conveyed its assets for $1.00 in order to evade a "judgment creditor," and one of the defendants admitted under oath that they "deliberately avoided reserving any assets from the dissolution to satisfy" that creditor's claim. *Id.* at 26. Here, by contrast, Green (and Appellants, in turn) received over $300,000 and a release of claims in exchange for an interest he procured by fraud.

brief, Kotter had an absolute right to unilaterally dissolve Sage|Kotter for any reason or no reason, and to use his own intellectual property however he saw fit. CP 46; CP 1207-08 § 12.2(a); CP 1957 § 6(a)(ii). Thus, unlike every one of the cases on which Appellants rely, the property over which they seek now to impose a constructive trust indisputably belongs to Kotter alone.

c. Constructive trust is a remedy, not a cause of action, and requires a showing of clean hands

"A constructive trust arises where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it." *Baker v. Leonard*, 120 Wn.2d 538, 547-48, 843 P.2d 1050, 1055 (1993). The trial court recognized this principle, correctly observing that "[a] constructive trust is an equitable remedy," not a freestanding claim. CP 1007. Appellants recognized that principle too, predicating their request for a constructive trust upon the assertion that Kotter has been "unjustly enriched." CP 0026.

Because they have been categorically unable to develop any evidence supporting that assertion, however, Appellants now shift to arguing that a constructive trust may be imposed *even without* a showing

of unjust enrichment. That assertion is incorrect. *Baker*, 120 Wn.2d at 547-48.

Kotter has not, in any event, been unjustly enriched. Indeed, Kotter paid $310,889 in exchange for an equity interest in which Green held no enforceable interest whatsoever—one that Judge Alsdorf conclusively determined (1) had no value at all, (2) should not be subject to a constructive trust, and (3) could not even support an award of damages. CP 45-47; CP 59.

If anything, Green is the one who was unjustly enriched. Further, because Green was subsequently ordered to share the proceeds of the dissolution with Appellants, they benefited from Green's unjust enrichment. Their position that Kotter must now pay them *even more money* for the interest their undisclosed agent procured by fraud is baseless.

Indeed, constructive trusts have always served the salutary purpose of *redressing* wrongful conduct, not the untenable purpose of *furthering* it. *See, e.g., Ryan v. Plath*, 18 Wn.2d 839, 868, 140 P.2d 968, 981-82 (1943) ("The rights to the respective parties in case of a constructive trust are matters of equitable cognizance and are to be determined in the light of the familiar maxim that he who seeks equity must do equity."). Imposing a constructive trust here would not serve the interests of equity, but would

undeniably serve to frustrate them. At a minimum, there are genuine issues of material fact regarding the issue. CR 56.

Moreover, and for the same reasons, Appellants' request for a constructive trust necessarily requires an examination of their unclean hands. *Ryan*, 18 Wn.2d at 868. Having concealed their securities fraud from Kotter, and having silently acquiesced in the false representations and warranties through which Green obtained "his" interest in Sage|Kotter, Appellants are categorically unable to satisfy that burden. For this reason too, the trial court properly denied Appellants' "claim" for summary imposition of a constructive trust.

2. Successor liability

Appellants' request for summary imposition of successor liability fares no better. "The general rule is that there is no corporate successor liability. Thus, where a company sells its assets to another company, the purchaser is not liable for the debts of the selling company, including those arising out of the seller's tortious conduct." *Payne v. Saberhagen Holdings, Inc.*, 147 Wn. App. 17, 25, 190 P.3d 102, 107 (2008). That general rule is subject to three "narrow exceptions," *id.*, only one of which Appellants raise here—namely, the "mere continuation" doctrine. As Appellants concede, that exception is "designed to preclude (or remedy) fraudulent transfers and corporate machinations used to avoid

obligations of a transferring entity 'to the detriment of creditors and minority shareholders.'" CP 796.

But Judge Alsdorf has already considered and rejected the argument that the dissolution of Sage|Kotter was somehow improper or "fraudulent." Indeed, after considering Appellants' argument that "the wind-up or termination [of Sage|Kotter] was a ruse managed or manipulated by Mr. Green," along with their claim that "the dissolution of Sage|Kotter may in fact have been engineered by [Green] acting either alone or in collusion with the Kotters," Judge Alsdorf concluded that those allegations are "supported by substantially less than a preponderance of the evidence." CP 1235, 1248-49. Appellants are now collaterally estopped from continuing to litigate the issue.

Moreover, as the trial court correctly recognized, Judge Alsdorf also necessarily concluded that Appellants are not "creditors" of Sage|Kotter. Green paid Appellants half of everything he actually received from Sage|Kotter, including the $310,889 he received through the dissolution and global settlement. Although Appellants claim that Green did not obtain *enough* for his 38 percent interest, there is nothing even arguably due and owing from *Sage|Kotter* to Appellants or Green. If Appellants believe that Green entered into a bad deal with Kotter on

their behalf, or if they believe that Green left money on the table, that is an issue between Appellants and Green. CP 3012.

V. CONCLUSION

For all of the foregoing reasons, Kotter respectfully requests that the instant Appeal be denied.

DATED this 18th day of September, 2014.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on September 18, 2014, I caused a copy of the foregoing **Brief of Respondents** to be served by electronic mail and hand delivery to:

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DATED this 18th day of September, 2014, at Seattle, Washington.

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