

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

2015 APR -3 PM 1:51

No. 72053-8-I

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

DBM CONSULTING ENGINEERS, INC., a Washington corporation,

Respondent,

vs.

JOSEPH D. SANDERS, and the marital community composed of Joseph
D. Sanders and "Jane Doe" Sanders; SOOS CREEK VISTA, INC., a
Washington corporation,

Appellants.

REPLY BRIEF OF APPELLANTS SANDERS AND
SOOS CREEK VISTA, INC.

Walter H. Olsen, Jr., WSBA #24462
Olsen Law Firm PLLC
205 S. Meridian
Puyallup, WA 98371-5915
(253) 200-2288

Philip A. Talmadge, WSBA #6973
Sidney Tribe, WSBA #33160
Talmadge/Fitzpatrick/Tribe
2775 Harbor Ave. SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Attorneys for Appellants Joseph Sanders and Soos Creek Vista, Inc.

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	iii-iv
A. INTRODUCTION	1
B. REPLY ON STATEMENT OF THE CASE	2
C. ARGUMENT	6
(1) <u>DBM’s Claim that Sanders Acted Fraudulently and Did Not Want DBM’s Claim Paid Because It Was “Illegitimate” Ignores the Undisputed Fact of the Lien Bond</u>	6
(2) <u>Sanders Did Not Violate the UFTA in Transferring Property Secured by a Valid Deed of Trust</u>	8
(a) <u>The Deed of Trust Is a Security Agreement that Secures Sanders’ Interest in After-Acquired Property, Including “Proceeds”</u>	9
(b) <u>Sanders’ Security Interest in the After-Acquired Promissory Notes of Soos Creek Was Not Released When Some Real Property Was Partially Reconveyed for the Purpose of Sale</u>	12
(c) <u>Sanders Was Not Required to Take Additional Action to Perfect His Interest in the Notes or Cash</u>	13
(3) <u>An Equitable Remedy Is Inappropriate on these Facts, Particularly When the Trial Court Has Not Considered It</u>	16

(4)	<u>DBM’s Action Is Extinguished as to Sanders Because It Failed to Comply with the UFTA’s One-Year Statute of Limitations on Remand</u>	20
D.	CONCLUSION.....	24

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>Table of Cases</u>	
 <u>Washington Cases</u>	
<i>CHD, Inc. v. Taggart</i> , 153 Wn. App. 94, 220 P.3d 229 (2009).....	23
<i>DBM Consulting Engineers, Inc. v. U.S. Fid. & Guar. Co.</i> , 142 Wn. App. 35, 170 P.3d 592 (2007).....	<i>passim</i>
<i>DBM Consulting Engineers, Inc. v. Sanders</i> , 157 Wn. App. 1051 at *3 (2010)	21, 22
<i>Fed. Signal Corp. v. Safety Factors, Inc.</i> , 125 Wn.2d 413, 886 P.2d 172 (1994).....	11
<i>Freitag v. McGhie</i> , 133 Wn.2d 816, 947 P.2d 1186 (1997), <i>as amended</i> (Dec. 18, 1997)	23
<i>Hough v. Stockbridge</i> , 150 Wn.2d 234, 76 P.3d 216 (2003)	19
<i>In re Freeborn</i> , 94 Wn.2d 336, 617 P.2d 424 (1980)	14-15
<i>Parker Roofing Co. v. Pac. First Fed. Sav. Bank</i> , 59 Wn. App. 151, 796 P.2d 732 (1990).....	10, 11
<i>Perrin v. Stensland</i> , 158 Wn. App. 185, 240 P.3d 1189 (2010), <i>as amended</i> (Nov. 10, 2010)	23
<i>P.H.T.S., LLC v. Vantage Capital, LLC</i> , No. 71591-7-I, 2015 WL 1033278 at *5 (Mar. 9, 2015), citing <i>Fidelity Mutual Savings Bank v. Mark</i> , 112 Wn.2d 47, 767 P.2d 1382 (1989).....	17
<i>Roberson v. Perez</i> , 119 Wn. App. 928, 83 P.3d 1026 (2004), <i>aff'd</i> , 156 Wn.2d 33, 123 P.3d 844 (2005).....	20, 22
<i>Saviano v. Westport Amusements, Inc.</i> , 144 Wn. App. 72, 180 P.3d 874 (2008).....	16
<i>U.S. Bank Nat. Ass'n v. Oliverio</i> , 109 Wn. App. 68, 33 P.3d 1104 (2001).....	12, 13
<i>Wakefield v. Wakefield</i> , 59 Wn.2d 550, 368 P.2d 909 (1962)	19
 <u>Federal Cases</u>	
<i>Gaff v. Fed. Deposit Ins. Corp.</i> , 919 F.2d 384 (6th Cir. 1990), <i>opinion modified on reh'g</i> , 933 F.2d 400 (6th Cir. 1991).....	17
<i>In re Filtercorp, Inc.</i> , 163 F.3d 570 (9th Cir. 1998)	11

<i>In re Trimble Co.</i> , 479 F.2d 103 (3d Cir. 1973).....	17
<i>In re V. Loewer's Gambrinus Brewery Co.</i> , 167 F.2d 318 (2d Cir. 1948).....	17
<i>Pepper v. Litton</i> , 308 U.S. 295, 60 S. Ct. 238, 84 L. Ed. 281 (1939).....	17

Other Cases

<i>Jecker v. Hidden Valley, Inc.</i> , 422 N.J. Super. 155, 27 A.3d 964 (App. Div. 2011).....	15
--	----

Constitutions

Wash. Const. art. IV, § 6.....	19
--------------------------------	----

Statutes

RCW 19.40.011(2)(a)	8
RCW 62A.9A-203(f)	14
RCW 62A.9A-204	11
RCW 62A.9A-204(a).....	10, 14
RCW 62A.9A-204(c).....	11
RCW 62A.9A-309	14

Codes, Rules and Regulations

CR 15	23
CR 15(c).....	21, 23

A. INTRODUCTION

DBM attempts to paint Sanders as a devious insider who, after deciding DBM's contract claim was "illegitimate," used his status to "jump the creditor queue" ahead of DBM. However, DBM's portrait of Sanders only rings true through the deliberate omission of a number of facts, both undisputed and disputed.

Sanders established and publicly recorded his rights as a creditor of Soos Creek in 1997, years before there was any contract dispute with DBM. Sanders acted properly and in good faith with respect to the establishment of his own rights, and did not deprive DBM of any available assets of Soos Creek

Even after a dispute arose and DBM filed a mechanic's lien, Sanders acted in good faith with respect to his handling that dispute. A lien bond was posted well in excess of DBM's claimed lien. Sanders personally guaranteed the lien bond, even though there was no claim against him in his personal capacity. DBM's failure to execute on that lien bond is entirely the fault of its lawyers. If Sanders wanted to deprive DBM of any ability to collect on its claim, then Sanders could have simply exercised his rights under the 1997 deed of trust and promissory note in advance of any ruling on DBM's claim, rather than filing a lien bond.

Attempting to make Sanders into a villain will not cure the legal and logical defects in DBM's action. DBM's fraudulent transfer claim against Sanders was without merit and was also untimely. It should have been dismissed.

B. REPLY ON STATEMENT OF THE CASE

DBM's statement of the case is largely an attempt to paint Sanders' and Soos Creeks' normal business activities as nefarious undertakings designed from the outset to defraud creditors. For example, DBM criticizes Sanders for protecting his rights as Soos Creeks' creditor by securing his loan to Soos Creek with a *recorded* deed of trust and promissory note. Br. of Resp't at 2-4. DBM suggests that it was inappropriate for Sanders to retain a security interest in DBM's assets because, in the event of bankruptcy, other creditors would have a junior interest to Sanders. *Id.*

Sanders' security interest in Soos Creek's property was the subject of a recorded deed of trust/UCC security agreement stating the nature of the interest. CP 300-18. Regardless of whether the loan was owed to Sanders or to a third party, anyone doing business with Soos Creek was on notice of the superior security interest. *Id.* There was nothing improper or illegal about this security arrangement, and DBM does not so allege.

DBM suggests that Sanders should somehow be faulted for stating

that in his capacity as President of Soos Creek, he would pay all legitimate debts. Br. of Resp't at 5. DBM does acknowledge that, despite Sanders' security interest, he would subordinate that interest to the junior creditors of Soos Creek. However, DBM criticizes Sanders' acknowledgement that Soos Creek would only pay those debts if they were legitimate. *Id.* DBM does not explain why Soos Creek should pay illegitimate debts.

If DBM's purpose is to suggest that Sanders and/or Soos Creek never intended to pay DBM's debt because they deemed it "illegitimate," this characterization overlooks a critical fact: the lien bond Soos Creek posted that far exceeded DBM's mechanic's lien. *DBM Consulting Engineers, Inc. v. U.S. Fid. & Guar. Co.*, 142 Wn. App. 35, 37, 170 P.3d 592 (2007) ("*DBM I*"). If Sanders considered DBM's claim to be "illegitimate" and planned to simply raid Soos Creek's assets to avoid paying it, then protecting DBM's claim with the lien bond which he *personally guaranteed* was a major flaw in that nefarious strategy.

DBM does not acknowledge *anything* about the lien bond – including the 2007 opinion of this Court finding DBM at fault in failing to execute on it – in its statement of the case. DBM does not offer any response to Sanders/Soos Creek's discussion of that bond. The lien bond secured DBM's mechanic's lien, the amount of which was *identical* to its claimed damages on breach of contract claim. In other words, DBM

sought the same remedy with two claims: breach of contract and foreclosure on the mechanic's lien. DBM would not have been able to recover twice for the same damages.

DBM's failure to acknowledge the lien bond also calls into question its statement that Sanders' actions in 2005 rendered Soos Creek "unable to pay DBM." Br. of Resp't at 9 (emphasis added). Soos Creek may have been insolvent as to other creditors, but DBM had a remedy. The lien bond, which Sanders personally guaranteed, secured DBM's judgment on the mechanic's lien in 2005, and the bond was available to pay all of DBM's \$38,070.22 in damages, and most of DBM's \$85,000 in attorney fees, if Soos Creek defaulted.¹ Thus, Sanders' actions in exercising his creditor's rights did not leave DBM without remedy. *DBM I*, 142 Wn. App. at 37.

In their opening brief, Sanders/Soos Creek noted this Court's 2010 opinion holding that DBM erred in refusing to make Sanders a party to the supplemental proceedings, and that the failure deprived the trial court of authority over him. Br. of Appellants at 8. They also noted the undisputed fact that DBM failed to make Sanders a party until *February 2014*, three years later. *Id.* at 9.

¹ The fact that DBM botched its attempt to foreclose on the lien bond is not Soos Creek's or Sanders' doing.

In response, DBM recites what it describes as its “rocky” three-year failure to serve Sanders with the show cause order and make him a party to this proceeding. Br. of Resp’t at 12-13. Most of the events DBM lists do not explain its failure to serve Sanders. For example, DBM cites the regrettable death of its president, and litigation between Sanders and Soos Creek in 2013, as part of its timeline of why it delayed service. *Id.* Citing to these events does not shed light on why DBM failed to serve Sanders.

As it relates to the untimely service, the only potentially relevant assertion is DBM’s claim that Sanders “avoid[ed] service” in March 2012. Br. of Resp’t at 13.²

DBM appears to have newly discovered the assertion that Sanders “avoided service” for the first time on appeal. *Nowhere* in the trial court record is there any evidence that Sanders “avoided” service, and DBM made no such assertion below. In its reply in support of the 2014 show cause order, DBM stated that Sanders could not be served because he was out-of-state, with no mention of avoidance. CP 152. In its summary judgment motion, when DBM described this same “timeline” below, DBM stated that it “could not successfully serve it on Sanders,” with no

² This assertion is relevant because Sanders has argued that DBM’s failure to timely serve Sanders and make him a party to this action means the UFTA statute of limitations has run as to Sanders.

reference to avoiding service. CP 1009.

In fact, DBM admits that its decision not to serve Sanders in 2011, the year after this Court's ruling, was for purely strategic reasons: DBM was busy suing its own lawyers for malpractice. Br. of Resp't at 12. DBM explained that it had strategic reasons for pursuing that malpractice action instead of serving Sanders and making him a party to the UTFA action. CP 171-72.

Ultimately, however, DBM's assertion that Sanders avoided service is irrelevant to DBM's failure to serve him within a year after this Court's mandate. DBM did not even obtain the first show cause order until March 19, 2012. CP 69. One year from the date of this Court's mandate was March 4, 2012. CP 1.

C. ARGUMENT

(1) DBM's Claim that Sanders Acted Fraudulently and Did Not Want DBM's Claim Paid Because It Was "Illegitimate" Ignores the Undisputed Fact of the Lien Bond

In its opening brief, Soos Creek and Sanders explained that DBM's 2005 judgment was secured by a lien bond upon which DBM failed to properly foreclose. Br. of Appellants at 6-7. They also argued that Sanders did not commit fraud because he was a senior secured creditor of Soos Creek, and thus did not deprive DBM of any "assets" under the

UFTA. Br. of Appellants at 11-21.

DBM first responds that the transfer of the promissory notes was “constructively fraudulent as a matter of law,” or is a disputed issue of material fact, because Sanders purposefully rendered Soos Creek “unable” to pay DBM’s claim. Br. of Resp’t at 16, 32-33. DBM claims that Soos Creek had “only \$69 available to pay DBM” and that it is undisputed Sanders had cause to believe Soos Creek only had this amount available. *Id.* (emphasis added). DBM also claims that Sanders considered DBM’s debt “illegitimate” and intended to render DBM insolvent so that DBM would not be paid. *Id.*

DBM’s argument about Sanders’ motive and state of mind stands in direct contradiction to the undisputed facts, which DBM fails to acknowledge. As early as 2002, the lien bond was in place as security for DBM’s judgment. *DBM I*, 142 Wn. App. at 37. As soon as Sanders was aware of DBM’s claim in 2002, he acted responsibly in posting the lien bond to secure the claim. *Id.* He personally guaranteed the bond. It was only after DBM’s lawyers committed malpractice in failing to foreclose on the bond that DBM was left without that remedy. *Id.* The nearly \$100,000 lien bond would have paid *all* of DBM’s mechanic’s lien, and most of DBM’s attorney fees. *Id.*

Sanders could not have predicted in 2005 that this Court would

rule in 2007 that DBM failed to foreclose on the lien bond, leaving it without that remedy. Sanders acted responsibly and in the normal course of business to ensure payment of DBM's lien. DBM, not Sanders, forfeited the bond. The assertion that Sanders acted intentionally to deprive DBM of a way to collect on its claim because he thought it "illegitimate" is incorrect.

(2) Sanders Did Not Violate the UFTA in Transferring Property Secured by a Valid Deed of Trust

Sanders/Soos Creek argued in their opening brief that the 2005 transfer was not subject to the UFTA because the promissory notes were not assets of Soos Creek under RCW 19.40.011(2)(a). Br. of Appellants at 11-15. They explained that Sanders was a secured senior lienholder of any Soos Creek property by virtue of a valid 1997 deed of trust and promissory note. *Id.* They contended that because of that security interest, the promissory notes were not available to junior creditors and were not assets under the statute. *Id.* at 16-20. They also argued in the alternative that the question of Sanders' security interest was a disputed issue of material fact that should not have been resolved on summary judgment. *Id.* at 20-21.

DBM does not argue that the 1997 deed of trust is invalid or failed to make Sanders a senior lienholder. Instead, it argues that the promissory

notes are not subject to the security interest created by the deed of trust. DBM's three arguments about Sanders' security interest in the promissory notes all fail.

(a) The Deed of Trust Is a Security Agreement that Secures Sanders' Interest in After-Acquired Property, Including "Proceeds"

First, DBM responds that the promissory notes and proceeds, including the funds in Soos Creeks' bank account,³ are not secured by the 1997 deed of trust under the terms of that security agreement. Br. of Resp't at 18-19. DBM argues that the phrase "items specified as part of the Property" in Paragraph 15 the deed of trust does not encompass property such as promissory notes or cash proceeds by its express language, but only covers physical items that were on the property in 1997 such as "washing machines." *Id.* DBM claims that any reading of the deed of trust to suggest that future proceeds of the property are encompassed by it is "absurd." *Id.* at 19.

A careful reading of the deed of trust reveals DBM's error. The first page clearly states what "items" encompass "the Property" referred to in Paragraph 15 of the deed of trust. CP 301. It is a long list, but it states in relevant part that it is the real property, "[t]ogether with all buildings,

³ All of the arguments in this section apply with equal force to the promissory notes and funds that were in Soos Creek's bank account, which DBM claims were not part of the 1997 security agreement. Br. of Resp't at 22-23.

improvements, and tenements...and *all proceeds of any of the foregoing....*” CP 301. The promissory notes and payments made subject to them are proceeds from the real property, and thus are “specified as part of the above Property” under Paragraph 15 and are subject to the deed of trust by its plain language.

DBM contends that even if the 1997 deed did create an interest in property such as promissory notes, it was only a valid security instrument as to property Soos Creek actually possessed in 1997. *Id.* at 19-20. DBM claims that because the promissory notes were issued in 2003, they “could not possibly” be property subject of the 1997 deed of trust. DBM cites no authority for this proposition, only stating that it is “absurd” to think that property acquired after a security agreement is made could be subject to it. *Id.*

Again, DBM is mistaken. A UCC security agreement can secure an interest in after-acquired property, including proceeds and promissory notes:

After-acquired collateral. Except as otherwise provided in subsection (b) of this section, a security agreement may create or provide for a security interest in after-acquired collateral.

RCW 62A.9A-204(a); *Parker Roofing Co. v. Pac. First Fed. Sav. Bank*, 59 Wn. App. 151, 157, 796 P.2d 732 (1990). A security agreement can

create an interest even in intangibles such as legal actions not contemplated at the time of filing. *Parker Roofing*, 59 Wn. App. at 157.

Even when a security agreement does not expressly state that it secures after-acquired property, the law presumes that it does unless evidence is presented to rebut that presumption. *In re Filtercorp, Inc.*, 163 F.3d 570, 582 (9th Cir. 1998).⁴

Comment 5 to RCW 62A.9A-204 clarifies that a secured interest in after-acquired property is solely the function of what the security agreement states, and not a function of what property is owned at the time the instrument is created:

...Indeed, the parties are free to agree that a security interest secures any obligation whatsoever. Determining the obligations secured by collateral is solely a matter of construing the parties' agreement under applicable law.

RCW 62A.9A-204(c) comment 5.

According to the security agreement, the promissory notes are after-acquired property subject to Sanders' security interest.

⁴ The Ninth Circuit in *Filtercorp* was interpreting Washington law in conformity with the majority of jurisdictions looking at this issue. *Filtercorp*, 163 F.3d at 578. In the 17 years since the case was decided, our Supreme Court has not spoken on the matter. However, our Court has stated that the goal of the UCC is to achieve uniformity across jurisdictions. *Fed. Signal Corp. v. Safety Factors, Inc.*, 125 Wn.2d 413, 432, 886 P.2d 172 (1994).

(b) Sanders' Security Interest in the After-Acquired Promissory Notes of Soos Creek Was Not Released When Some Real Property Was Partially Reconveyed for the Purpose of Sale

DBM argues that even if the promissory notes were properly secured by the deed of trust, Sanders relinquished his security interest in the notes by partially reconveying his interest in the real property secured by the deed of trust so that the real property would be unencumbered for sale. Br. of Resp't at 20-21.

Again, DBM ignores the plain language of the security agreement and the nature of Sanders' security interest in the after-acquired property. The deed of trust states that it secures the real property *and* after-acquired property. CP 301. The real property and proceeds are separate items of property under that agreement. CP 301. Paragraph 12 of the agreement makes clear that Sanders may "release from the lien of this instrument any part of the Property" and that such action would not affect the obligation of Soos Creek to pay the sums secured by the agreement. CP 304.

DBM's reliance on *U.S. Bank Nat. Ass'n v. Oliverio*, 109 Wn. App. 68, 33 P.3d 1104 (2001) and related cases is misplaced. Br. of Resp't at 20. First, that case states that a security interest *in real property* is released when a deed of trust relating to that property is reconveyed. *Oliverio*, 109 Wn. App. at 70. Sanders is not claiming a security interest

in real property. If he were, the UCC would not apply anyway. *Id.* at 72. He is claiming a security interest in after-acquired promissory notes that are proceeds from that real property, for which the deed of trust acts as a UCC security agreement. Second, the reconveyance of the deed of trust was only partial as to the collateral identified in the security agreement, not a total reconveyance as in *Oliviero*. Sanders' interest was still secured by other real and after-acquired property.

There is no question that Sanders released his security interest in part of the real property subject to the deed of trust, and has *no* creditor's claim against that real property as a result. However, Sanders did not release his security interest in other property, such as the remaining real property and the promissory notes, which are separate after-acquired property.

(c) Sanders Was Not Required to Take Additional Action to Perfect His Interest in the Notes or Cash

DBM argues that even if the deed of trust secured Sanders' interest, and even if that interest persisted after sale of the subject properties in 2003 and 2004, Sanders was required to file a UCC financing statement in order to perfect his interest in the promissory notes.

A creditor with a secured interest in after-acquired property has a continuing lien against that property, and is not required to file a financing

statement or take *any other action* to perfect the interest in the property. RCW 62A.9A-204(a). Comment 2 to RCW 62A.9A-204(a) makes clear that if the security instrument creates a security interest in after-acquired property, no additional steps need to be taken to validate the interest:

After-Acquired Property; Continuing General Lien. Subsection (a) makes clear that a security interest arising by virtue of an after-acquired property clause is no less valid than a security interest in collateral in which the debtor has rights at the time value is given. A security interest in after-acquired property is not merely an “equitable” interest; no further action by the secured party—such as a supplemental agreement covering the new collateral—is required. This section adopts the principle of a “continuing general lien” or “floating lien.” It validates a security interest in the debtor's existing and (upon acquisition) future assets, even though the debtor has liberty to use or dispose of collateral without being required to account for proceeds or substitute new collateral. See Section 9-205. Subsection (a), together with subsection (c), also validates “cross-collateral” clauses under which collateral acquired at any time secures advances whenever made.

The attachment of a security interest in collateral gives the secured party the rights to proceeds and a security interest in a “supporting obligation for the collateral.” RCW 62A.9A-203(f). A security interest in a promissory note is perfected when it attaches. RCW 62A.9A-309. No financing statement is required.

DBM also argues that Sanders was required to file a separate UCC financing statement in order to perfect his interest in the notes, citing *In re*

Freeborn, 94 Wn.2d 336, 340, 617 P.2d 424 (1980).

Freeborn is inapposite. The question in that case was whether an assignment of the right to receive contract payments for the sale of real property had to be separately perfected by filing a financing statement. There was no issue of after-acquired property, it was instead an issue of a new party obtaining a security interest in personal property.

Also, DBM makes no attempt to distinguish or even mention *Jecker v. Hidden Valley, Inc.*, 422 N.J. Super. 155, 166, 27 A.3d 964, 971 (App. Div. 2011), the most factually analogous and recent case Sanders and Soos Creek cite. Br. of Appellants at 13. *Jecker* presents the same factual and legal questions presented here, and the court concluded that the insider's security interest meant that a corporation's property was not an "asset" for UFTA purposes. *Jecker*, 422 N.J. Super. at 733-34.

The purpose of the UCC filing rules is to put on notice subsequent lienholders of a senior lienholder. That notice was provided to the world and to DBM when the deed of trust was recorded. Nothing in the UCC requires a creditor to file a separate financing statement for each piece of after-acquired property subject to that agreement.

Sanders was the senior lienholder of all after-acquired property of Soos Creek, and all junior lienholders were on notice of that interest by virtue of the deed of trust that Soos Creek and Sanders recorded.

(3) An Equitable Remedy Is Inappropriate on these Facts, Particularly When the Trial Court Has Not Considered It

DBM argues that even if Sanders met all of the requirements to create a valid security interest, and properly notified all subsequent creditors of that existing interest by publicly recording it, this Court should sit in equity and affirm on equitable grounds.⁵ Br. of Resp't at 24-32. DBM cites numerous cases that stand for the proposition that corporate insiders should not abuse their position of knowledge and fiduciary duty to “jump the queue” of creditors when a corporation is failing or has become insolvent. *Id.*

The first difficulty with DBM's argument is that none of the cases he cites involve a corporate founder who, as Sanders did, properly secures his interest at the outset of the venture, so that all would-be creditors are properly aware of his senior lienhold. Instead, the cases all involve insiders who *ex post facto* manufacture ostensibly senior security interests *after* creditors claims arise and/or try to create senior interests in secret without disclosure to other creditors. *Saviano v. Westport Amusements, Inc.*, 144 Wn. App. 72, 75, 180 P.3d 874 (2008) (after business failing, insider executes promissory note for unsecured “loan” to corporation);

⁵ Because the trial court ruled on summary judgment and equitable remedies were not at issue, this Court would be the first to consider whether the facts support the application of equitable principles even if DBM's legal arguments fail.

Pepper v. Litton, 308 U.S. 295, 297, 60 S. Ct. 238, 240, 84 L. Ed. 281 (1939) (scheme to defraud creditor after suit was filed by causing corporation to confess judgment for five years of “accumulated salary claims”); *In re Trimble Co.*, 479 F.2d 103, 114 (3d Cir. 1973) (insider *ex post facto* characterized stock purchase as a loan without notice to other creditors).⁶

The crux of DBM’s argument is that Sanders’ secured loan to Soos Creek in 1997 was unfair, and that equity demands it should be disregarded in favor of DBM, regardless of its validity. Br. of Resp’t at 29. However, DBM admits that equity allows this Court to consider whether the transaction was inherently fair. *Id.* at 30.

This Court has very recently reaffirmed that when a statute confers a substantive right, that right may not be set aside in the name of equity. *P.H.T.S., LLC v. Vantage Capital, LLC*, No. 71591-7-I, 2015 WL 1033278 at *5 (Mar. 9, 2015), citing *Fidelity Mutual Savings Bank v. Mark*, 112 Wn.2d 47, 767 P.2d 1382 (1989). Courts may apply equitable considerations to a statute that creates a procedure by which a substantive

⁶ *Gaff v. Fed. Deposit Ins. Corp.*, 919 F.2d 384 (6th Cir. 1990), *opinion modified on reh’g*, 933 F.2d 400 (6th Cir. 1991) involves a personal action for damages by a shareholder against officers of the corporation, and no mention of secured transactions. *In re V. Loewer’s Gambrinus Brewery Co.*, 167 F.2d 318, 319 (2d Cir. 1948), was a case where shareholders made loans “in amounts directly proportionate to their stockholdings, and the question was not secured transactions, but subordination in bankruptcy.

right is enforced: “A statute is remedial when it relates to practice, procedure, or remedies and does not affect a substantive or vested right.”

Id.

Sanders’ UCC security interest in Soos Creek’s real property and proceeds was in exchange for value and was properly established and recorded *at the outset* of Soos Creek’s creation under applicable statutes. It created a substantive right that should not be discarded in the name of “equity.” DBM’s claim arose long after Sanders’ rights were established. This was not some scheme hatched secretly after questions arose about creditor’s claims. It was not predicated on a phantom “salary” claim or any other shady dealing as in other cases.

Also, the notion that Sanders did not act in good faith with respect to DBM is belied by many facts. First, Sanders paid DBM over \$400,000 for its work on behalf of Soos Creek. CP 530. The dispute arose over another \$60,000 that Sanders believed was overbilled. *Id.* Even so, Sanders, acting for Soos Creek, promptly filed and personally guaranteed a lien bond that secured DBM’s mechanic’s lien from the very outset of the dispute, in 2002. *DBM I*, 142 Wn. App. at 37. Sanders acted in good

faith by filing a bond in an amount *well in excess of DBM's claim*.⁷ Sanders acted in both the best interests of the corporation and the best interests of DBM in filing that lien bond and personally guaranteeing it. These are not the actions of a scheming insider who was trying to avoid paying legitimate claims.⁸

Finally, the crafting an equitable remedy is a matter for the trial court, not this Court. *Hough v. Stockbridge*, 150 Wn.2d 234, 236, 76 P.3d 216 (2003). While this Court may review whether the trial court acted appropriately in equity, this Court does not have original jurisdiction to undertake such a proceeding. Wash. Const. art. IV, § 6. DBM's request is particularly problematic where, as here, the application of equity is necessarily a fact-driven inquiry for the trial court. *See Wakefield v. Wakefield*, 59 Wn.2d 550, 368 P.2d 909 (1962).

Sanders did not engage in shady, secretive, or fraudulent dealing. He acted at the inception of Soos Creek to protect his rights and to notify all of his senior interest. That interest should not be ignored on "equitable" grounds by DBM, which by no means has clean hands in this

⁷ DBM's damages, which the jury concluded were \$38,070.00, exceeded the \$94,255.00 amount of the lien bond purely by the imposition of attorney fees. *DBM I*, 142 Wn. App. at 37.

⁸ DBM's argument that the UFTA provides a "specific statutory exception" to the laws of secured transactions is a statement that begs the question. Sanders' argument is that the UFTA does not apply to assets subject to a valid security agreement.

case. Even if this Court believes that DBM's legal arguments fail but an equitable proceeding might be appropriate to balance alleged injustices, the appropriate forum for that proceeding is the trial court.

(4) DBM's Action Is Extinguished as to Sanders Because It Failed to Comply with the UFTA's One-Year Statute of Limitations on Remand

In his opening brief, Sanders argued that DBM's three-year failure to serve him with an order to show cause after this Court's 2011 decision forecloses DBM's claim against Sanders under the UFTA's one-year extinguishment provision. Br. of Appellants at 21-24.

DBM first responds that Sanders should have raised this argument in the prior appeal. Br. of Resp't at 34-35.

DBM's first argument is confusing. The facts supporting this argument arose after this Court's remand in the prior appeal. Sanders could not have raised the argument based on facts that had not yet occurred. The discretionary "law of the case" doctrine only applies when there has been "no substantial change in the evidence at the remanded trial." *Roberson v. Perez*, 119 Wn. App. 928, 931, 83 P.3d 1026 (2004), *aff'd*, 156 Wn.2d 33, 123 P.3d 844 (2005).

Even if Sanders had raised the issue in the first appeal regarding DBM's failure to serve Sanders in 2005, DBM would have had a colorable argument that the neglect was due to its confusion over the need to serve

Sanders and make him a party. This Court resolved DBM's question in its 2010 opinion, holding that Sanders was a necessary party to the proceeding, and must be served under the statute applicable to supplemental proceedings. *DBM Consulting Engineers, Inc. v. Sanders*, 157 Wn. App. 1051 at *3 (2010) ("*DBM II*"). Thus, the UFTA statute of limitations was arguably tolled as to Sanders through 2010.

DBM's argument on the merits of the statute of limitations issue largely relies on the CR 15(c) amendment and "relation back" doctrine. Br. of Resp't at 36-43. DBM makes several arguments regarding CR 15(c), beginning with the rule allowing the amendment of pleadings to add a "claim or defense" applies. *Id.*

DBM first argues that Sanders actually has been a party all along, and thus service of the show cause order on him is irrelevant to the UFTA statute of limitations issue. *Id.* at 36-39. DBM repeatedly states that Sanders was an "existing party" in 2005, and claims: "There is no question here that the [sic] Sanders was and always has been a party." *Id.* at 37. DBM claims that its 2005 show cause order was really akin to an amendment to its original contract complaint to "set forth a new fraudulent conveyance claim." *Id.*

DBM's claim that Sanders has always been a party, and thus DBM's failure to timely serve him is irrelevant, directly contradicts this

Court's 2010 ruling in this case. *DBM II*, 157 Wn. App. at *3 (2010). This Court held that the trial court's order was void because, "Sanders was not a party to the supplemental proceedings." *Id.* This Court's 2010 opinion is the law of the case,⁹ and DBM cannot now ignore it, and should not ask this Court to rule otherwise now that it might be to DBM's benefit. *Roberson*, 119 Wn. App. at 931.

The supplemental proceeding is a new proceeding, in which all necessary parties must be timely served in order for the trial court to have jurisdiction over them. *DBM II*, 157 Wn. App. at *3 (2010). Whether or not DBM thinks this is an "ultra technical approach," it did not petition for review from this Court's decision, and cannot challenge it now.

DBM next avers that even if Sanders was not properly made a party until 2014, this Court should ignore the rule that a failure to timely serve a party deprives the plaintiff of the ability to proceed against that party. Br. of Resp't at 39. DBM claims that the UFTA's "unique statutory language" of an extinguishment provision, rather than a statute of limitations, supports this result. *Id.*

DBM's claim that the UFTA's extinguishment provision functions differently from a statute of limitations is contradicted by our Supreme

⁹ Unlike Sanders' statute of limitations argument, the issue of whether Sanders was made a party to the supplemental proceedings *was* resolved in the prior appeal.

Court, which has called the extinguishment provision “the UFTA statute of limitations” and analyzed it as such. *Freitag v. McGhie*, 133 Wn.2d 816, 822, 947 P.2d 1186, 1189 (1997), *as amended* (Dec. 18, 1997).

Sanders was not a party in 2010. Even allowing DBM the benefit of the doubt as to the need to timely accomplish service on him before 2010, this Court’s ruling made it crystal clear. Failure to serve Sanders for three more years ends DBM’s cause of action as to him, and deprived the trial court of authority to enter any order binding him. *CHD, Inc. v. Taggart*, 153 Wn. App. 94, 106, 220 P.3d 229 (2009).

Finally, DBM argues that CR 15(c) allows the three-year delay in adding Sanders as a party, because DBM’s actions were not due to “inexcusable neglect.” Br. of Resp’t at 41-43. DBM cites its “timeline” as evidence of why its neglect was not inexcusable. *Id.*

“Inexcusable neglect” in the context of CR 15 relation back is when “no reason for the initial failure to name the party appears in the record.” *Perrin v. Stensland*, 158 Wn. App. 185, 202, 240 P.3d 1189 (2010), *as amended* (Nov. 10, 2010). If the failure to name the party was for strategic reasons, rather than for an inability to identify the party, then relation back will not apply. *Id.*

In this case, DBM *admits* that the failure to serve Sanders after this Court’s clear 2010 decision was a strategic choice, rather than an inability

to identify him. CP 171-72. DBM explained that it did not serve Sanders because it wanted to pursue its malpractice claims against its insurers. *Id.*

Also, DBM cannot dispute that its “timeline” documenting its three-year delay was not the result of its failure to identify Sanders as a party. This Court’s 2010 ruling was clear.

Sanders was not made a party to the UFTA action for three years after this Court ruled that he must be served in order for the trial court to have jurisdiction over him. DBM offers no plausible excuse for its failure to serve him. The action should have been dismissed under the UFTA’s statute of limitations.

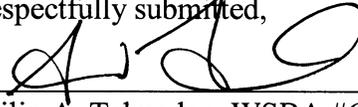
D. CONCLUSION

DBM’s three-year late attempt to make Sanders a party was untimely, and its summary judgment motion lacked legal merit under the UFTA. The trial court should have dismissed DBM’s claims.

The legal deficiencies of DBM’s claims and actions should not be ignored by this Court based on equitable grounds. The full and fair facts of this case reveal that Sanders was not a villain, but acted in good faith to protect both his rights and DBM’s claim. DBM cannot lay the blame for inadequate lawyering at Sanders’ and Soos Creek’s feet.

DATED this 2^d day of April, 2015.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973
Sidney Tribe, WSBA #33160
Talmadge/Fitzpatrick/Tribe
2775 Harbor Ave. SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Walter H. Olsen, Jr., WSBA #24462
Olsen Law Firm PLLC
205 S. Meridian
Puyallup, WA 98371-5915
(253) 200-2288

Attorneys for Appellants
Joseph Sanders and
Soos Creek Vista, Inc.

DECLARATION OF SERVICE

On said day below, I emailed and deposited with the U.S. Postal Service a true and accurate copy of the Reply Brief of Appellant in Court of Appeals Cause No. 72053-8-I to the following parties:

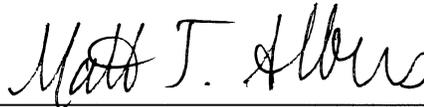
James Derrig
James T Derrig Attorney At Law PLLC
14419 Greenwood Ave N Ste A-372
Seattle, WA 98133-6865

Walter H. Olsen, Jr.
Olsen Law Firm PLLC
205 S. Meridian
Puyallup, WA 98371

Original and one copy sent by legal messenger for filing with:
Court of Appeals, Division I
Clerk's Office
600 University Street
Seattle, WA 98101-1176

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: April ^{3rd} ___, 2015 at Seattle, Washington.



Matt J. Albers, Legal Assistant
Talmadge/Fitzpatrick/Tribe