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No. 72047-3-I

DIVISION I, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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CECO CONCRETE CONSTRUCTION, LLC,

Plaintiff-Respondent

v.

SUZANNE MANCHESTER,

Defendant-Appellant

2014 DEC 3 2M 31 1  
FILED  
CLERK OF COURT  
DIVISION I  
COURT OF APPEALS  
STATE OF WASHINGTON

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ON APPEAL FROM King COUNTY SUPERIOR COURT  
(Hon. James D. Cayce)

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

Suzanne Manchester (“Manchester”) was the sole shareholder, director and officer of Bedrock Floors, Inc. (“Bedrock”). Bedrock sold its operations to Ceco Concrete Construction, LLC (“Ceco”), but agreed to remain in business for the sole purpose of collecting and passing-through to Ceco payments it received for Ceco’s work on certain construction projects, less any necessary administrative costs Bedrock incurred to “keep its doors open.” In an arbitration between Ceco and Bedrock, the arbitrator found that Bedrock had breached its fiduciary duties, and had wrongfully kept funds that rightfully belonged to Ceco. The arbitrator awarded Ceco over \$91,000 in damages. The award was confirmed by two federal courts, reduced to judgment, and not appealed.

Bedrock never paid the award, forcing Ceco to bring this action to hold Manchester personally liable for Bedrock’s debt. The trial court properly entered summary judgment in favor of Ceco on each of its alternative claims for corporate disregard, violation of the Uniform Fraudulent Transfers Act (“UFTA”), breach of fiduciary duty, and unjust enrichment. It is undisputed that Manchester literally treated Bedrock’s bank account as her own—using tens of thousands of dollars in corporate funds to make payments and purchases for her own personal benefit. Those payments and purchases, unrelated to Bedrock’s business and for

which it received no value in return, left Bedrock insolvent and unable to satisfy its debt to Ceco. The judgment below must be affirmed.

## **II. COUNTERSTATEMENT OF THE ISSUES**

1. Did the trial court properly grant Ceco's motion for summary judgment against Manchester (and properly deny Manchester's cross-motion for summary judgment) on one or all of Ceco's alternative claims for "corporate disregard," constructive fraudulent transfer, breach of fiduciary duty and/or unjust enrichment? **Yes.**

2. Did the trial court properly exercise its discretion in awarding Ceco its attorneys' fees, and finding that its "claims were so intertwined that segregation of fees among claims is not possible." **Yes.**

3. Is Ceco entitled to an award of fees on appeal? **Yes.**

## **III. COUNTERSTATEMENT OF THE CASE**

Manchester's "Statement of the Case" fails to properly cite to the Clerk's Papers and is replete with assertions unsupported by the record. Notwithstanding Manchester's protestation to the contrary, Op. Br. at 8, the "[a]bsolute core fact" in this case is that Manchester used Bedrock's business account—which held funds in trust for Ceco's benefit—as a family account, and her use of Bedrock's assets to pay the Manchesters' personal expenses left Bedrock unable to pay its corporate debts.

**A. Ceco Assumes Bedrock's Business, And Bedrock Agrees To Remain Operational For The Purpose Of Collecting Payments For Ceco's Benefit On Three Projects.**

Bedrock was in the business of providing concrete "flatwork" services and, at least from 2007 onward, it did most or all of its business in Hawaii. CP 45 (¶ 7); CP 397 (Manchester Dep. at 23:16-24).<sup>1</sup> For the entire relevant period, Manchester was (and still is) the sole shareholder, director and officer of Bedrock, and Manchester's husband, Alan "Buzz" Manchester, served as the company's project manager. CP 7 (Answer, ¶ 3); CP 882-83 (Manchester Decl., ¶¶ 2, 3); CP 393 (Manchester Dep. at 9:4-11:7); CP 925-26 (Buzz Manchester Decl., ¶ 4); CP 418-20.

In April 2010, Ceco hired Buzz Manchester to be its Manager of Concrete Finishing Operations for the northwest region. Ceco then hired Bedrock's employees, purchased its equipment and assumed its existing contracts. CP 45 (¶ 7); CP 422; CP 564. The plan was to have Ceco

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<sup>1</sup> Many facts relevant to this appeal are set forth in the Final Award issued in the Arbitration between Ceco and Bedrock. See CP 44-58. The arbitrator's findings cannot be disputed. As discussed below, a federal court confirmed the award and entered judgment in favor of Ceco, which Bedrock did not appeal. CP 312-17. Manchester's subsequent claim to vacate the award was likewise dismissed by a different federal judge. CP 337-39. Under the doctrine of collateral estoppel, the arbitrator's Final Award is binding in this action. *Robinson v. Hamed*, 62 Wn. App. 92, 813 P.2d 171 (1991). Indeed, although Manchester argued below that the arbitrator's findings should not be afforded preclusive effect, CP 879, she has not made, and therefore has waived, any such argument on appeal. *Stevens v. City of Centralia*, 86 Wn. App. 145, 155, 936 P.2d 1141 (1997).

assume Bedrock's business, employ Buzz Manchester to oversee the work, and wind-up Bedrock as a going concern. CP 45-46 (¶ 7); CP 394-95 (Manchester Dep. at 13:23-14:1); CP 325 ("Bedrock was to completely cease operations and dissolve as a corporation"); CP 346 ("The expectation ... was that Bedrock would shut down, Buzz would work for Ceco ..., and Ceco would be assigned and then perform or complete the contracts of Bedrock with the third party general contractors.").

But there was a snag in the plan. Three of Bedrock's customers—prime contractors on three construction projects in Hawaii (the "Projects")—would not assign their contracts to Ceco. CP 395 (Manchester Dep. at 14:2-15). So, the parties agreed that Bedrock would remain in business for Ceco's benefit, collect payment from the prime contractors for Ceco's work on the Projects, and then pass the payments on to Ceco; Ceco, in turn, would reimburse Bedrock for any costs it incurred to "keep its doors open." CP 46-47 (¶¶ 8-11); CP 395-96 (Manchester Dep. at 17:24-18:13); CP 346 ("Ceco agreed to compensate ... Bedrock for its expenses of operation based upon the continuation of Bedrock being at the sole request and for the benefit of Ceco"). Ceco and Bedrock entered into subcontracts for Ceco's work on the Projects (the "Subcontracts"). CP 958-70.

**B. Ceco Prevails At Arbitration After Bedrock Fails To Account For All The Payments Bedrock Received For Ceco's Work On The Projects.**

From June 2010 through January 2012, as a result of Ceco's work, Bedrock received payments from the prime contractors on the Projects of more than \$578,000, but passed through to Ceco only around \$455,000. CP 982. Yet Bedrock rarely, if ever, provided Ceco with accountings or expense reports to justify the amounts it was withholding. CP 53 (¶ 22); CP 928 (Buzz Manchester Decl., ¶ 10). Not surprisingly, disputes arose over the missing payments, and whether the funds Bedrock kept were actually being used to pay the company's administrative costs. CP 47 (¶ 11); CP 624 (Buzz Manchester Dep. at 9:7-15). When the parties were unable to resolve their disputes, Ceco file a demand for arbitration against Bedrock to recover the payments (the "Arbitration"). CP 956; CP 976-82.

During the course of the Arbitration, and again in the Final Award, the arbitrator specifically found that the parties had created an "express trust ... for the benefit of Ceco, pursuant to which Bedrock, as trustee, agreed to disburse all of the proceeds of Bedrock's contracts with Bedrock's customers on [the Projects], either directly to Ceco or else in payment of the expenses of Bedrock to continue operations for the benefit of Ceco," and ordered Bedrock to account for all payments received from the prime contractors on the Projects. CP 362-63 (order); CP 47 (¶ 12)

Bedrock did not do so. The arbitrator found Bedrock's effort to account for the payments to be "incomplete, erroneous and lacked backup detail for many of the charges claimed by Bedrock ...." CP 47 (¶ 13). Bedrock did not fare any better on the merits. After a two-day hearing, at which both sides were represented, presented witnesses and evidence, the arbitrator found that Bedrock could not show that all the prime contractor payments it withheld were necessary "to keep the doors open" and, thus, Bedrock should have passed additional funds through to Ceco. CP 47-51 (¶¶ 14-15). In its Final Award dated April 7, 2013, the arbitrator awarded Ceco \$91,604.32 in damages, attorneys' fees and expenses. CP 45.

When Bedrock did not pay, Ceco filed a motion for an order confirming the Arbitration award in federal district court. CP 312-17. In May 2013, Judge Coughneour confirmed the award, denied Bedrock's cross-motion to vacate (rejecting its claim that the arbitrator erred when he found the parties had formed an express trust), and entered judgment in Ceco's favor. *Id.* Bedrock did not appeal the judgment. In a subsequent employment-related lawsuit brought by Buzz Manchester against Ceco, a different federal district court, this time Judge Jones, likewise dismissed the Manchesters' claim to vacate the Arbitration award. CP 337-39.

**C. Ceco Sues Manchester To Collect Bedrock's Debt, And Discovers Undisputed Evidence That Manchester Used Bedrock's Corporate Assets To Pay Personal Expenses.**

In January 2013, even before the Arbitration was over, Ceco sued Manchester in this action to hold her personally liable for the amounts Bedrock owed Ceco. CP 1-6. Ceco alleged, on information and belief at the time, that Manchester had transferred funds received from the prime contractors—Bedrock corporate assets that ultimately belonged to Ceco—to herself. *Id.* Ceco asserted claims under corporate disregard doctrine, the UFTA, breach of fiduciary duty, and unjust enrichment. *Id.* During the litigation, like the Arbitration, the Manchesters could not and/or would not produce Bedrock's banking and account records. CP 388 (Buzz Manchester Dep. at 66:19-24); CP 413 (Manchester Dep. at 94:9-25).

Ceco subpoenaed those records, and they confirmed its suspicion that Manchester used Bedrock assets to pay personal expenses. But the scope was beyond anything Ceco imagined. During the approximately 20-month period in which Bedrock acted as Ceco's trustee (and thereafter), Manchester made or approved hundreds of purchases and transfers from Bedrock's accounts unrelated to Bedrock's business, including:

- Over \$26,000 in Bedrock corporate checks made payable to Manchester, her husband Buzz Manchester, or simply "cash" for which Bedrock received no consideration. CP 398-400; CP 423-438;

- A check for \$3000 used by the Manchesters to open a new personal banking account in Washington. CP 555; CP 409 (Manchester Dep. at 70:24-71:12);
- Approximately \$80,000 in rent and mortgage payments on both their high-rise apartment in Honolulu, Hawaii, and their house in Black Diamond, Washington. CP 81; CP 92; CP 100; CP 126; CP 156; CP 184; CP 196; CP 220; CP 229; CP 240; CP 461-78;
- Thousands of dollars in utilities, cable TV and phone service. CP 169; CP 203; CP 228; CP 231; CP 238; CP 505-21; CP 522-29; CP 530-38;
- \$5500 in landscaping and repair work on the Manchesters' house in Washington. CP 496-504; CP 540-41;
- Thousands of dollars spent on travel unrelated to Bedrock's business, including trips to Disneyland and Whistler, BC. CP 167-179; CP 196-97; CP 569-73;
- Nearly \$2,700 paid to various doctors, dentists, physical therapists and health clinics that provided health care services to the Manchesters and their daughter. CP 439-53;
- Thousands of dollars of retail purchases from places like Macy's, Nordstrom, Louis Vuitton, Sports Authority, Amazon, Toys R Us, Best Buy, Ross, Apple iTunes Store, The Disney Store, Armani, Sears, Gene Juarez, Williams-Sonoma, Sephora, Home Shopping Network, QVC and ShopNBC. CP 77-260; CP 454-57; CP 569-93; CP 621;
- \$9,000 in checks paid to Manchester's son's landlord. CP 479-83. Manchester testified she was repaid in cash by her son and his roommates for the payments, but could not remember if she deposited the money back into Bedrock's account. CP 404 (Manchester Dep. at 51:11-22);
- And, seemingly, every single restaurant, grocery store, bar, coffee-shop and convenience store purchase made by the Manchesters in both Hawaii *and* Washington (or wherever

they traveled) during the entire relevant period. CP 77-260; CP 282-310; CP 571-93.

Manchester testified she “ran everything through Bedrock” because she could “properly deduct[] many of the living expenses of my husband and I for federal income tax purposes.” CP 416 (Manchester Dep. at 100:11-15); CP 885-86 (Manchester Decl., ¶ 9). She candidly admitted, however, that “[l]ooking back, I can see how it did not make sense to run some expenses through the Bedrock checking account.” CP 887 (*id.* at ¶ 13).

**D. The Trial Court Grants Ceco’s Motion For Summary Judgment On Its Alternative Claims For Corporate Disregard, Constructive Fraudulent Transfer, Breach Of Fiduciary Duty And Unjust Enrichment.**

Armed with undisputed evidence that Manchester used tens of thousands of dollars from Bedrock’s accounts to pay personal expenses—leaving Bedrock with insufficient funds to pay its corporate debts—Ceco moved for summary judgment on all its claims. CP 10-35. Manchester cross-moved, seeking dismissal of Ceco’s claims. CP 630-49. On May 9, 2014, the trial court granted Ceco’s motion for summary judgment “except for actual fraudulent transfers,” and denied Manchester’s motion. CP 1043-48. The trial court thereafter awarded Ceco its reasonable attorneys’ fees on the basis of Manchester’s breach of fiduciary duty, finding that “Plaintiff’s claims were so intertwined that segregation of fees among

claims is not possible.” CP 1143-44. The trial court entered judgment in Ceco’s favor, CP 1155-57, and Manchester timely appealed. CP 1145-46.

#### IV. ARGUMENT

##### A. **The Trial Court Applied The Proper Standard On The Parties’ Cross-Motions For Summary Judgment.**

There is no merit to Manchester’s claim that the trial court treated the parties’ cross-motions for summary judgment as a “trial by affidavit.” Op. Br. at 27-31. Both parties moved for summary judgment and, at the hearing, both argued that there were no genuine issues of material fact for trial. RP (5/2/14) at 3-4. The trial court agreed and, with the exception of one alternative claim (discussed below), entered summary judgment for Ceco and against Manchester. CP 1043-48. Having argued that the material facts were undisputed and that judgment should be entered as a matter of law, Manchester cannot now be heard to complain that trial court applied a wrong legal standard simply because it ruled in Ceco’s favor.

Regardless, the trial court did not conduct a “trial by affidavit.” Indeed, the court specifically denied *both* parties’ motions as they related to Ceco’s allegation that Manchester made “actual fraudulent transfers” under RCW 19.40.041(a)(1)—presumably because Manchester disputed her actual intent to defraud. CP 1043-48; *cf. Sedwick v. Gwinn*, 73 Wn. App. 879, 887, 873 P.2d 528 (1994) (“where the debtor denies that ... her

intent was to defraud, the issue cannot be conclusively determined by the trier of fact until it has heard the testimony and assessed the witnesses' credibility"). Although Ceco's successful constructive fraudulent transfer claim rendered that issue moot (*see* fn. 4), the court's ruling shows that it did not, as Manchester suggests, blithely "rule one way or the other."

In the end, none of this matters. This Court's review is *de novo*. Thus, the basis of the trial court's ruling is irrelevant and, indeed, this Court can affirm on any basis supported by the record. *Plein v. Lackey*, 149 Wn.2d 214, 222, 67 P.3d 1061 (2003); *McKinstry Co. v. Aeronautical Machinists, Inc.*, 62 Wn. App. 442, 450 n. 6, 814 P.2d 251 (1991) ("the basis for the court's ruling is irrelevant because this court reviews an appeal from a summary judgment *de novo*").<sup>2</sup> As discussed below, the trial court properly concluded that Ceco was entitled to summary judgment on each of its claims. Because these are alternative claims, affirmance on any one entitles Ceco to a judgment as a matter of law.

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<sup>2</sup> For this reason too, Manchester's complaint that the trial court "failed" to issue findings or explain its reasoning, *see* Op. Br. at 31-32, is a non-starter. *Donald v. City of Vancouver*, 43 Wn. App. 880, 883, 719 P.2d 966 (1986) ("Findings of fact ... are not necessary on summary judgment ... and, if made, are superfluous and will not be considered by the appellate court."). Of course, the civil rules do not require findings in any event. *See* CR 52(a)(5)(B); CR 56(h).

**B. Manchester Is Personally Liable Under The Corporate Disregard Doctrine For Bedrock's Debt To Ceco.**

The trial court properly concluded that Manchester was personally liable for Bedrock's corporate liability to Ceco. CP 1043-44. "Piercing the corporate veil" is an equitable remedy imposed to rectify an abuse of the corporate privilege. *Truckweld Equip. Co. v. Olson*, 26 Wn. App. 638, 643, 618 P.2d 1017 (1980). There are two factors that warrant disregard of the corporate form: "First, the corporate form must be intentionally used to violate or evade a duty; second, disregard must be 'necessary and required to prevent unjustified loss to the injured party.'" *Meisel v. M & N Modern Hydraulic Press Co.*, 97 Wn.2d 403, 410, 645 P.2d 689 (1982) (quoting *Morgan v. Burks*, 93 Wn.2d 580, 587, 611 P.2d 751 (1980)). Ceco easily satisfied its burden on summary judgment of demonstrating that there was no genuine issue of material fact on either factor.

**1. Manchester Abused The Corporate Form.**

The first factor requires abuse of the corporate form, and usually involves "fraud, misrepresentation, or some form of manipulation of the corporation to the stockholder's benefit and creditor's detriment." *Meisel*, 97 Wn.2d at 410. Such abuse occurs, for example, where a shareholder commingled corporate and personal funds or otherwise treated corporate assets as her own; incurred corporate debts or used corporate funds for

personal benefit; or “stripped” the corporation of assets in the face of actual or potential liability. See *Morgan*, 93 Wn.2d at 585; *McCombs Constr., Inc. v. Barnes*, 32 Wn. App. 70, 76, 645 P.2d 1131 (1982); *Burns v. Norwesco Marine, Inc.*, 13 Wn. App. 414, 419-20, 535 P.2d 860 (1975); *Harrison v. Puga*, 4 Wn. App. 52, 480 P.2d 247 (1971).<sup>3</sup> In short:

[W]hen the corporate stockholder himself by his overt acts in dealing with the corporation disregards the separate entity of the corporation to the prejudice of such third person, he can scarcely complain if the court ... likewise disregards the corporate entity in order to enforce the right owed to the person dealing with that corporation.

*Harrison*, 4 Wn. App. at 63. Here, too, there is no dispute that Manchester intentionally disregarded Bedrock’s corporate entity for her own benefit.

This is not case where an insider simply failed to observe corporate formalities or occasionally “commingled” corporate and personal assets. Simply put, Manchester treated Bedrock’s corporate accounts as her own, and she admitted as much. CP 416 (Manchester Dep. at 100:11-15: “We ran everything through Bedrock.”). Bedrock’s bank records unequivocally

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<sup>3</sup> In *Meisel*, 97 Wn.2d at 410, the Supreme Court favorably cited a law review article that catalogued factors commonly found in corporate disregard cases, including: “[c]ommingling of funds and other assets, failure to segregate funds of the separate entities, and the unauthorized diversion of corporate funds or assets to other than corporate uses; the treatment by an individual of the assets of the corporation as his own; ... the absence of corporate assets, and undercapitalization; ... the diversion of assets from a corporation by or to a stockholder or other person or entity, to the detriment of creditors, ...” Harris, *Washington’s Doctrine of Corporate Disregard*, 56 Wash. L. Rev. 253, 260 n. 38 (1981).

demonstrate that both during and after Ceco's relationship with Bedrock, Manchester—as Bedrock's sole shareholder, director and officer with authority “to decide which payments were made ... and to whom” (CP 407 (*id.* at 64:16-19))—made or authorized hundreds of debit transactions, checks and credit card charges on Bedrock's accounts for purely personal benefit and/or to pay personal expenses. Conspicuously, Manchester does not bother to argue otherwise. *See* Op. Br. at 47-48. Nor could she.

Manchester testified she received no pay from Bedrock and, after Ceco hired Buzz Manchester in April 2010, Ceco paid Buzz's salary. CP 400, 406 (*id.* at 34:20-22; 59:19-60:10); CP 994 (Buzz Manchester Decl., ¶ 2). Yet, over that same period, Manchester wrote tens of thousands of dollars in checks to herself and Buzz—for which she had no explanation. CP 398-400; CP 423-438. At the same time, Manchester used Bedrock funds to pay tens of thousands of dollars more toward the family's home mortgage, rent (both the Manchesters' and their son's), groceries, utilities, cable, phone, gas, doctor bills, home repairs, landscaping, vacations, as well as thousands of dollars on retail and online purchases of clothes, make-up, music and who-knows-what-else at merchants ranging from Louis Vuitton to QVC. CP 77-260; CP 282-310; CP 423-555; CP 571-93.

On their face, these payments refute Manchester's claim that it was proper for her to treat these transactions as business expenses for which

Bedrock was entitled to a deduction. Op. Br. at 40. The whole point of the Arbitration was to determine how much Bedrock incurred as necessary business costs during 2010-2012, in which its only business was receiving payments on the Projects for Ceco's benefit. But besides travel, cell phone fees and "office rent," Bedrock never argued these other personal charges were business expenses. CP 48-51 (¶ 15). They weren't. And, as to "office rent," which was the dining room in the Manchesters' Honolulu apartment, Bedrock asked the arbitrator to award it only \$500 of the \$3000 Bedrock paid in monthly rent (*id.*; CP 931 (Buzz Manchester Decl., ¶ 16))—contrary to Manchester's claim below that she believed Bedrock could expense the *entirety* of her monthly mortgage and rent payments in *both* Hawaii and Washington. CP 885-86 (Manchester Decl., ¶ 9).

For similar reasons, the declaration filed by Manchester's CPA did not create an issue of fact on this score. The CPA testified that he told Buzz Manchester that "Bedrock would be able to deduct ... the meals and lodging expenses the Manchesters" incurred doing business in Hawaii. CP 829-30 (¶ 3). But the CPA did not testify that he told Manchester that Bedrock could pay for or deduct every single cost of daily living incurred by the Manchesters over several years in *both* Hawaii and Washington (including the entirety of their mortgage, rent, utilities, cable TV, phone, and food in both locales), or that it was proper to use Bedrock funds to pay

for the hundreds of other obviously personal purchases and charge cited above. *Id.* He wouldn't—not only because its contrary to tax law, but because it demonstrates a manifest disregard for the corporate entity.

## **2. Manchester's Conduct Harmed Ceco.**

The second factor relates to causation: the “wrongful corporate activities ... [must] actually harm the party seeking relief so that disregard is necessary.” *Meisel*, 97 Wn.2d at 410. There can be no dispute that Manchester's intentional disregard of Bedrock's corporate form harmed Ceco. The trial court did not “pierce the corporate veil”—as Manchester hopefully suggests, Op. Br. at 48—simply because Bedrock could not pay its corporate debt to Ceco. *Id.* at 411 (“Separate corporate entities should not be disregarded solely because one cannot meet its obligations.”). Rather, the court recognized that Manchester's improper use of tens of thousands of dollars of Bedrock's corporate assets for personal purposes made it impossible for Bedrock to fulfill its contractual and fiduciary duties to Ceco and, ultimately, to satisfy its debts and liabilities.

Ceco was not an ordinary creditor; it was Bedrock's only creditor. Manchester admitted that Bedrock remained in business solely for Ceco's benefit. CP 320 (Manchester Decl., ¶ 4: “Bedrock would have ... dissolved since it no longer had any assets. But for the administration of these contracts with Ceco, Bedrock also would have had no business

activity.”). Not only did Bedrock owe Ceco a contractual obligation, it owed a fiduciary duty with respect to the funds received on the Projects—a duty Bedrock breached. CP 44-53. At the same time that Manchester—as Bedrock’s sole shareholder and director—was required to preserve and pass-on Bedrock corporate assets held in trust for Ceco, she spent tens of thousands of those same assets on herself and her family. That abuse of the corporate form resulted in Bedrock’s failure to pay its debt to Ceco as it became due and after it was reduced to judgment. In short, if those assets remained in Bedrock’s account, Bedrock could have paid Ceco.

Manchester argues “no-harm-no-foul” because, she claims, various deposits and supposed “loans” make up for the money she pilfered from Bedrock. Op. Br. at 36-38, 48. Wrong. The funds Bedrock already had in its accounts or received from prior unrelated work were still Bedrock’s corporate assets; Manchester had no more right to use those funds to pay personal expenses than she did the funds Bedrock received on the Projects. Ceco was Bedrock’s only creditor, and Bedrock had a duty to pay Ceco with company assets, regardless of source, before paying off insiders. In any event, Manchester’s *post hoc* suggestion that her improper withdrawals and purchases were actually “distributions” from “profit” is baseless. *Id.* at 38. There is no evidence that Bedrock ever treated them

as a “distribution” and, even more importantly, Bedrock reported annual losses—not profits—during the entire relevant period. *See* CP 372-85.

By the same token, the Manchesters’ deposit of funds into Bedrock accounts were never documented as “loans,” CP 416 (Manchester Dep. at 99:21-100:1); CP 628 (Denithorne Dep. at 26:21-27:9)—so, if anything, it is just more evidence that Manchester treated Bedrock’s business account as her own account. Indeed, if the deposits were truly “loans,” until they were repaid, they were Bedrock’s assets and could only be used to pay company expenses and creditors, not Manchester’s personal expenses. Manchester likewise presented no evidence that Bedrock treated her improper withdrawals and purchases as de facto loan repayments and, to be sure, she could not have properly authorized Bedrock to repay a “debt” owed to herself or her husband when doing so would render Bedrock unable to satisfy its liability to Ceco—which is exactly what happened.

**C. Bedrock’s Payments For Manchester’s Personal Benefit Were Constructively Fraudulent Transfers For Which Manchester Is Liable.**

Under Washington’s version of the UFTA, Chapter 19.40 RCW, a fraudulent transfer occurs where one entity (the “debtor”) transfers an asset to another entity (the “transferee”), with the effect of placing the asset out of the reach of a creditor, with either the intent to delay or hinder the creditor (“actual fraudulent transfer”) or with the effect of insolvency

or practical insolvency on the part of the debtor (“constructive fraudulent transfer”). See *Thompson v. Hanson*, 168 Wn.2d 738, 744, 239 P.3d 537 (2010). In order to protect creditors harmed by fraudulent transfers, the UFTA allows creditors to bring an action against the “first transferee of the asset or the person for whose benefit the transfer was made” to satisfy the creditor’s claim against the debtor. *Id.*; RCW 19.40.081(b)(1).

The trial court also properly granted Ceko summary judgment on its constructive fraudulent transfer claim. CP 1043-44.<sup>4</sup> Such a claim requires a creditor to show, as a threshold matter, that the debtor did not receive “reasonably equivalent value” in exchange for the transfers. RCW 19.40.041(a)(2) & .051(a). The UFTA does not define “reasonably equivalent value” and, thus, reference to analogous bankruptcy law is proper. *Kreidler v. Cascade Nat. Ins. Co.*, 179 Wn. App. 851, 863, 321 P.3d 281 (2014). In general, the focus for determining whether reasonably

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<sup>4</sup> The trial court denied Ceko’s motion for summary judgment on its fraudulent transfer claim only as to “actual fraudulent transfers” under RCW 19.40.041(a)(1). CP 1044. Although Ceko disagrees with that ruling, it does not need to challenge it on appeal. The issue is moot. A transferee’s state of mind is irrelevant to a constructive fraudulent transfer claim and, if a transfer is fraudulent—either actually or constructively—the creditor’s remedies against the transferee are the same. *Thompson*, 168 Wn.2d at 749 (“The drafters ... accepted that some transfers would be constructively fraudulent (without intent) yet could still be remedied by way of a money judgment against first transferees.”). Thus, this Court may affirm the summary judgment on Ceko’s constructive fraudulent transfer claim even if, as Manchester argues, her self-serving declaration created a genuine issue of fact regarding her intent. Op. Br. at 42-43.

equivalent value exists is “the net effect of the transaction on the debtor’s estate and the funds available to the unsecured creditors.” *In re Northern Merchandise, Inc.*, 371 F.3d 1056, 1059 (9th Cir. 2004) (citation omitted). As shown below, it is undisputed that Bedrock did not receive “reasonably equivalent value” for the payments it made to or on behalf of Manchester.

If, as here, there was no “reasonably equivalent value,” a transfer is constructively fraudulent if any one of three conditions exist. *Clearwater v. Skyline Constr. Co., Inc.*, 67 Wn. App. 305, 320-21, 835 P.2d 257 (1992). One, the debtor was engaged or about to engage in a business or a transaction for which its remaining assets were unreasonably small, RCW 19.40.041(a)(2)(i); two, the debtor intended to incur, or believed or reasonably should have believed that it would incur, debts beyond its ability to pay as they became due, RCW 19.40.041(a)(2)(ii); or, three, the debtor was insolvent at the time of the transfer or became insolvent as a result of the transfer, RCW 19.40.051(a). It is undisputed that Bedrock’s payments to and/or for Manchester satisfied these conditions as well.

**1. Bedrock Received No Value For Payments Made To Or For The Personal Benefit Of Manchester.**

The fraudulent transfers made to or for the benefit of Manchester from Bedrock’s accounts fall into two categories: *one*, payments made to Manchester or her husband directly (*see* CP 423-438) and, *two*, payments

made to satisfy the Manchesters' personal expenses (*see* CP 77-260; CP 282-310; CP 439-555; CP 571-93). Manchester presented no evidence that Bedrock received reasonably equivalent value for either category. With respect to the \$26,000 in checks made payable to Manchester, Buzz or simply "cash," Manchester admitted she could not identify any benefit to Bedrock (CP 399-400 (Manchester Dep. at 32:22-34:13)), and, as discussed above, she presented no evidence that Bedrock treated or accounted for these transfers as some kind of implicit repayment for Manchester's and/or Buzz's supposed "loans" to the company.

With respect to the \$100,000-plus paid toward the Manchesters' family and personal expenses, as discussed above, Manchester testified she ran "everything through Bedrock" because she implausibly considered them business expenses. CP 416 (Manchester Dep. at 100:11-15). But they plainly were not and, indeed, that issue has already been adjudicated in Ceco's favor. At the Arbitration, Bedrock did not even argue that most of these transfers were proper business expenses and, of those challenged by Ceco in this case, the arbitrator awarded Bedrock only \$10,000 as a set-off for "office rent" paid on the Hawaiian apartment. CP 48-51 (¶ 15). Payments on the Manchesters' home mortgage, utilities, groceries, home repair and landscaping, doctors bills, retail and on-line purchases, vacation travel and so-on were never claimed or awarded as business expenses.

Manchester does not claim these transfers provided any value to Bedrock. Instead, she argues they didn't violate the UFTA because they were made "in exchange for contemporary goods or services" received by Manchester herself. Op. Br. at 33-34. But the issue here is whether the "debtor" (*i.e.*, Bedrock) received "reasonably equivalent value" for the transfer. RCW 19.40.041(a)(2) & .051(a). If not, and the other elements of the UFTA are satisfied, then the creditor (*i.e.*, Ceko) may bring a claim against the "transferee ... or the person for whose benefit the transfer was made" (*i.e.*, Manchester). RCW 19.40.081(b)(1). Thus, the fact that Manchester or Buzz actually received the food, doctor's exams, clothes, make-up, airline tickets, cable service or the like is irrelevant. Bedrock received nothing for those goods and services, and that is all that matters.<sup>5</sup>

## **2. The Transfers Rendered Bedrock Insolvent Or With Unreasonably Small Assets.**

Finally, there can be no dispute that Bedrock "became insolvent as a result of" Manchester's improper transfers of Bedrock's assets and/or

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<sup>5</sup> Manchester argues that Bedrock's transfers to anyone other than herself or her husband (such as payments made to the Manchesters' doctors, lawn care guy, handyman or Macy's) cannot qualify as fraudulent transfers because those third parties are not Bedrock "insiders." *See* Op. Br. at 35, 44-45. Under RCW 19.40.051(b), a transfer to an "insider" is fraudulent if made to pay an antecedent debt. Ceko did not move for summary judgment on the basis of RCW 19.40.051(b). CP 26-33. Rather, it relied on RCW 19.40.041(a)(2) and 19.40.051(a)—neither of which requires that the fraudulent transfer be made to an "insider." *Id.* Manchester's arguments regarding RCW 19.40.051(b) are irrelevant.

they left its “remaining assets ... unreasonably small in relation to the business.” RCW 19.40.041(a)(2)(i) & .051(a). Once Ceco assumed Bedrock’s business in May 2010, Bedrock “no longer had any assets,” “no equipment or operations with which to generate funds” and its only business was its “administration” of the Projects “for the benefit of Ceco.” CP 320 (¶ 4); CP 324-325. In short, at that point, Ceco was Bedrock’s only creditor, and Bedrock’s only obligation—only business—was to receive payments from the prime contractors on the Projects and pass them on to Ceco, less any legitimate administrative costs it incurred. By definition, then, absent improper use of those payments, Bedrock should have had sufficient funds to pay its debt to Ceco. But it couldn’t.

Bedrock received \$578,000 on the Projects, and passed on to Ceco around \$455,000. CP 982. Bedrock claimed it spent almost \$100,000 on operating costs. CP 44. The arbitrator rejected that claim, but even if Bedrock’s inflated costs were accepted as true, Bedrock should have had ample funds to pay Ceco—indeed, Bedrock should have been flush given the \$250,000 in unrelated receivables and supposed “loans” deposited in its accounts. Yet, it is undisputed that Bedrock reported losses on its tax returns and, by the time of the Arbitration, had spent the money received on the Projects, closed its bank accounts, had no revenue or assets, and owed the bank on its unpaid line of credit and credit card account. CP

325; CP 368; CP 372-85; CP 387, 389 (Buzz Manchester Dep. at 14:2-24; 131:11-132:14); CP 398, 415 (Manchester Dep. at 26:10-13; 94:12-95:3).<sup>6</sup>

Of course, Bedrock did not and could not pay Ceco the Arbitration award or judgment thereon. Op. Br. at 11 (“Bedrock was unable to pay that judgment because it had eventually exhausted its liquid assets.”). In other words, Bedrock was insolvent. Where did all the money go? After all, from May 2010 onward, other than its relationship with Ceco, Bedrock had no contracts, no debts, *and no other creditors*—and the arbitrator found that Bedrock incurred only around \$65,600 in legitimate business costs. CP 48. The answer cannot be disputed: Bedrock’s transfer of more than \$100,000 for Manchester’s own personal benefit—for which Bedrock received no value—depleted Bedrock’s assets to unreasonably small levels and, ultimately, insolvency. The trial court therefore properly concluded that Manchester was liable for the constructive fraudulent transfers she authorized, up to the amount of Bedrock’s underlying liability to Ceco.

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<sup>6</sup> The only “asset” Manchester identified was a claim Bedrock asserted against Ceco in the Manchesters’ federal lawsuit. CP 415 (Manchester Dep. at 94:18-24). However, the federal court summarily dismissed Bedrock’s claim, CP 330-43, and the company did not seek leave to re-plead. Thus, this baseless “claim” was never a corporate asset relevant to solvency, and Manchester does not claim otherwise on appeal.

**D. Manchester Breached A Fiduciary Duty To Ceco.**

Manchester does not dispute the arbitrator's preclusive finding that Bedrock breached its fiduciary duties to Ceco. CP 53 (¶ 23). The trial court properly concluded, based on the undisputed facts, that Manchester also owed fiduciary duties to Ceco under the circumstances, which she plainly breached. It is true, as Manchester notes (*see* Op. Br. at 41), that directors and officers generally owe fiduciary duties only to the corporation and its shareholders, not to third-party creditors. *Lynott v. Nat. Union Fire Ins. Co. of Pittsburgh*, 123 Wn.2d 678, 697, 871 P.2d 146 (1994). However, as the trial court recognized below, a director or officer can owe similar fiduciary duties directly to a creditor where, as here, the corporation is insolvent and the director or officer approves a transaction that benefits a corporate insider at the expense of the creditor.

This principle is based on Washington law—not Delaware law as Manchester suggests. *See* Op. Br. at 41-42. “[T]he equitable interests of the shareholders and creditors are altered by the insolvency; and the directors or managing agents, who originally stood in a fiduciary relation to the company, become placed in a fiduciary relation to its creditors. ... They cannot secure to themselves any advantage or preference over other creditors, by using their powers as directors for that purpose.” *Hein v. Forney*, 164 Wash. 309, 317, 2 P.2d 741 (1931) (internal quotation marks

and citation omitted); also *Tacoma Ass'n of Credit Men v. Lester*, 72 Wn.2d 453, 459 n. 1, 433 P.2d 901 (1967) (“In most jurisdictions ... a preference given by an insolvent corporation to a director or officer is invalid as against creditors, at least if the interested officer or director participates in the corporate action by which the preference is granted.”).

Washington courts have reached a similar result on the grounds that it would be a waste of resources to force the sole creditor of an insolvent corporation to first seek appointment of a receiver to challenge a director’s or officer’s breach of fiduciary duties—since the creditor would be the only beneficiary of any such action; better to let the creditor simply sue directly. *Harrison*, 4 Wn. App. at 64 (“This circuitous and more expensive remedy may be obviated since no innocent third party rights are involved.”); *Burns*, 13 Wn. App. at 419 (“in some jurisdictions, directors and officers of a corporation may be held directly liable to corporate creditors for breaches of duty owed to the corporation, especially during the corporation’s insolvency. ... This may be the case in Washington”).

The trial court properly applied these principles here. For all the same reasons described above, Manchester’s unfettered use of Bedrock’s corporate assets for personal purposes—including funds held in trust for Ceco’s benefit—violated the company’s contractual and fiduciary duties to Ceco, and left Bedrock insolvent and unable to satisfy its debt. Under

these circumstances, as Bedrock’s sole shareholder, director and officer, Manchester owed fiduciary duties not only to Bedrock, but also directly to Ceco—Bedrock’s only creditor—to refrain from giving herself and family what amounted to an improper preference at Ceco’s expense. She violated that duty, and Ceco was entitled to reach through Bedrock, in lieu of a receivership action, to hold Manchester personally liable.

Finally, this Court can easily reject Manchester’s suggestion that the business judgment rule, and/or RCW 23B.08.300(b), immunizes her breach of fiduciary duties. Op. Br. at 38-40. It is well-settled that the rule does not apply where a corporate director or officer acts in bad faith or with an improper purpose, including self-dealing transactions. *Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 509, 728 P.2d 597 (1986) (citing *Nursing Home Bldg. Corp. v. DeHart*, 13 Wn. App. 489, 535 P.2d 137 (1975)).<sup>7</sup> Thus, in *Interlake Porsche*, the court refused to apply the rule where it found that the defendant “treated the corporation and the corporate assets as [her] own and ... [approved] expenditures of

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<sup>7</sup> This is the rule everywhere. See *HMG/Courtland Props., Inc. v. Gray*, 749 A.2d 94, 114 (Del. Ch. 1999) (“where classic self-dealing exists the business judgment rule automatically falls by the wayside”); *Davis v. Dorsey*, 495 F. Supp. 2d 1162, 1176 (M.D. Ala. 2007) (“The business-judgment rule, however, does not operate to protect self-dealing by directors and officers.”); *In re Toy King Distribs., Inc.*, 256 B.R. 1, 173 (Bankr.M.D. Fla. 2000) (“The business judgment rule provides no protection to an officer or director who has engaged in self-dealing.”).

corporate funds for [her] own personal benefit because [she] had access to the bank accounts of the corporation.” 45 Wn. App. at 509.<sup>8</sup> Of course, all the same is true here; the business judgment rule simply doesn’t apply.

Even if the rule did apply, Manchester’s purported reliance on her CPA’s advice would not preclude summary judgment. As noted above, the CPA testified he told Buzz Manchester—not Manchester herself—that meal and lodging expenses incurred in Hawaii could be deducted on Bedrock’s tax returns. CP 829-30. He did not tell the Manchesters that it was proper to commingle accounts or to use Bedrock’s funds to pay tens of thousands of dollars to themselves or purchases wholly unrelated to the Manchesters’ Hawaiian living expenses or Bedrock’s business—especially where, as here, such payments left Bedrock unable to pay its corporate debts. To be sure, the CPA did not testify that he ever advised Manchester that the checks and charges subsequently challenged by Ceco were proper business expenses or deductions. *Id.* Manchester cannot claim to have relied on advice she never received. For this reason too, the business judgment rule does not excuse Manchester’s breach of fiduciary duty.

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<sup>8</sup> Manchester’s effort to analogize this case to *Nursing Home Bldg. Corp. v. DeHart*, supra, is particularly inapt. In *Nursing Home*, the court found “all of these expenses were reasonable expenditures for proper business purposes” and “[a]ll other disbursements presented to the Court were proper business expenses.” 13 Wn. App. at 499. The arbitrator found, and Bedrock’s corporate records confirmed, just the opposite here.

**E. Manchester Was Unjustly Enriched When She Used Bedrock Assets Held In Trust For Ceco's Benefit.**

Unjust enrichment occurs when one retains money or benefits that in justice and equity ought to belong to another. *Bailie Commc'ns, Ltd. v. Trend Bus. Sys., Inc.*, 61 Wn. App. 151, 160, 810 P.2d 12 (1991). A party may bring a claim for unjust enrichment to recover the value of the money or benefit retained even if they lack a direct contractual relationship, so long as fairness and justice require it. *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008). A claim for unjust enrichment has three elements: “(1) the defendant receives a benefit, (2) the received benefit is at the plaintiff's expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment.” *Id.* at 484–85.

The trial court properly found all three elements present here. Ceco performed services for Bedrock under the Subcontracts and Bedrock received payment for those services from the prime contractors, which it was required to hold in trust for Ceco's benefit. Rather than duly pass those payments on to Ceco, as Manchester was required to do in her capacity as Bedrock's sole shareholder and director, as discussed above, it is undisputed that she used those earmarked funds to make payments to herself and third parties for her or her family's personal benefit. It is equally undisputed that Manchester never repaid (or conferred reasonably

equivalent value to) Bedrock for those payments and, as a result, Bedrock was unable to pay its debts, liability or judgment to Ceco.

Thus, Manchester benefited directly from the money the prime contractors paid Bedrock for Ceco's services, and her improper personal use and retention of that money came at Ceco's expense. Under the circumstances, the trial court correctly concluded that it would be unjust to allow Manchester to retain Ceco's money. This is true even if, as Manchester argues (*see* Op. Br. at 46-47), she "poured" more money into Bedrock's commingled account than she took; even if that were true, it is undisputed that her use of Bedrock's corporate funds for personal benefit still left Bedrock unable to pay its debt to Ceco. In short, just as Bedrock held the prime contractors' payments in trust for Ceco's benefit, so too did Manchester. The trial court's entry of summary judgment in favor of Ceco can and should be affirmed on this basis as well.

**F. The Trial Court Properly Awarded Ceco Its Reasonable And Unsegregated Attorneys' Fees.**

The trial court awarded Ceco an award of attorneys' fees because it prevailed on its fiduciary duty claim. CP 1143. It is well-settled that Washington courts have discretion to award fees for breach of fiduciary duty. *Hsu Ying Li v. Tang*, 87 Wn.2d 796, 799-800, 557 P.2d 342 (1976); *Green v. McAllister*, 103 Wn. App. 452, 468-69, 14 P.3d 795 (2000).

Here, Manchester does not argue that the trial court abused its discretion. She argues that the award must be reversed only because the underlying summary judgment order itself must be reversed; she does not assert any independent ground for reversal. Op. Br. at 48-49. For all the reasons set forth above, because Manchester did breach her fiduciary duty as a matter of law, the corresponding award of attorneys' fees must be affirmed.

This Court may also affirm the fee award on the basis of Ceco's corporate disregard claim.<sup>9</sup> A fee award is proper where a creditor successfully "pierces the corporate veil" to hold a director personally liable on a corporate contract that includes an attorneys' fee clause. *DGHI Enters. v. Pacific Cities, Inc.*, 91 Wn. App. 109, 117, 956 P.2d 324 (1998) ("DGHI attempted to pierce PCSI's corporate veil and hold the individual shareholders liable on the lease, which includes an attorney fee provision. ... [H]ad the attempt to pierce the corporate veil been successful, DGHI would have been entitled to collect [fees] from the individual defendants"), *rev'd on other grounds*, 137 Wn.2d 933, 977 P.2d 1231 (1999); *also Burns*, 13 Wn. App. at 416 (affirming judgment on alter ego action holding defendant liable on company note and attorneys' fees).

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<sup>9</sup> This Court can affirm on any ground if the record is sufficiently developed to fairly consider the ground, as it is here. RAP 2.5(a).

Each of the Subcontracts between Ceco and Bedrock contained a prevailing party attorneys' fee clause. *See* CP 970 (**Enforcement Costs**). In any action or proceeding brought to enforce any of the provisions of the Contract, prevailing party shall recover the costs thereof, including attorney's fees, from the other party."). Ceco prevailed against Bedrock in the Arbitration, and the arbitrator awarded Ceco its fees on this basis. CP 52-53. Because Manchester's improper pilfering of Bedrock's assets rendered Bedrock unable to pay the Arbitration award, Ceco was forced to bring this action against Manchester to further enforce its rights under the Subcontracts. In short, for all the reasons Bedrock was liable to Ceco for an award of fees, so too is Manchester as Bedrock's "alter ego."

Finally, although Manchester does not appeal the reasonableness of Ceco's fees, she argues that the trial court erred in failing to segregate out time spent on claims for which there was no entitlement to fees. *See* Op. Br. at 49. But the trial court was not required "to artificially segregate time ... where the claims all relate to the same fact pattern, but allege different bases for recovery." *Ethridge v. Hwang*, 105 Wn. App. 447, 461, 20 P.3d 958 (2001); *Simpson v. Thorslund*, 151 Wn. App. 276, 289, 211 P.3d 469 (2009) ("the facts underlying the multiple claims are so intertwined that the related fees cannot feasibly be segregated"). Here, the trial court specifically found that just that: "[Ceco] sought the same relief

on each of its claims in this case. [Ceco's] claims were so intertwined that segregation of fees among claims is not possible." CP 1143.

The court's finding that segregation was impossible is reviewed for abuse of discretion. *MP Medical Inc. v. Wegman*, 151 Wn. App. 409, 426-27, 213 P.3d 931 (2009). Because Manchester does not assign error to or challenge that finding in her opening brief, it is verity on appeal. *Perry v. Rado*, 155 Wn. App. 626, 643, 230 P.3d 203 (2010). There was no abuse of discretion in any event. As Ceco demonstrated, CP 1049-1118, and the trial court recognized, all of Ceco's intertwined claims were based on precisely the same set of core facts (*i.e.*, Manchester's improper use of Bedrock's corporate assets for personal purposes to the detriment of Ceco) and sought precisely the same remedy (*i.e.* to hold Manchester personally liable for Bedrock's debt). There was no error in awarding Ceco its fees.

**G. Ceco Is Entitled To Attorneys' Fees on Appeal.**

This Court may award attorneys' fees if permitted by "applicable law." RAP 18.1(a). As explained above, the trial court properly awarded Ceco its attorney's fees for Manchester's breach of fiduciary duty, and that award can be affirmed on the alternative grounds of Manchester's "alter ego" liability on Bedrock's Subcontracts. Thus, if this Court affirms the trial court's grant of summary judgment on either claim, as it should, the Court must likewise award Ceco its reasonable attorneys' fees on appeal.

## V. CONCLUSION

Manchester cannot escape personal liability for Bedrock's corporate debts because she failed to treat Bedrock as a separate entity. Instead of ensuring that Bedrock fulfilled its contractual and fiduciary duty to Ceco, Manchester used and fraudulently transferred company funds for personal purposes—leaving Bedrock unable to pay its corporate debt. No genuine issue of material fact precludes summary judgment in this case.

RESPECTFULLY SUBMITTED this 3rd day of December, 2014.

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