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No. 59738-8-1

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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

Appellants,

v.

DBM CONSULTING ENGINEERS, INC., a Washington corporation,

Respondent.

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RESPONDENT'S BRIEF

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## STATEMENT OF ISSUES

1. Did the trial court correctly determine that the transfer on June 1, 2005 was a fraudulent transfer from Soos Creek Vistas, Inc. to its corporate officer and “insider,” Joseph Sanders? (Answer: Yes)

2. Does CR 69 allow a UFTA claim against a defendant corporation, based on a transfer to a corporate insider, to be made as part of proceedings supplemental to the judgment against the corporation? (Answer: Yes)

3. Does the UFTA dictate that all fraudulent transfer claims always and in all circumstances can only be asserted in separate lawsuits regardless of what the procedural rules in the state adopting the UFTA might otherwise allow? (Answer: No)

4. As a person in privity with Soos Creek, is Joseph Sanders bound by the trial court’s determination that the transfer was fraudulent and that the property is property of Soos Creek and not Sanders? (Answer: Yes)

5. Can a court order a corporate officer to perform action on behalf of the corporation, including the production of corporate property in the officer’s possession, without first separately establishing personal jurisdiction over the officer in his individual capacity? (Answer: Yes)

6. Was Joseph Sanders an indispensable party required to be separately named and served when he was in privity with his corporation and actually participated in the litigation as a witness and corporate officer? (Answer: No)

7. Is DBM entitled to attorney fees pursuant to RAP 18.1? (Answer: Yes)

8. Is Soos Creek entitled to attorney fees? (Answer: No)

### **STATEMENT OF THE CASE**

On April 26, 2005 DBM Consulting Engineers, Inc. obtained an Amended Judgment against Soos Creek Vistas, Inc. (“Soos Creek”) for \$139,502.72. (CP 4) On June 1, 2005, 40 days after entry of the amended judgment in DBM’s favor, Mr. Sanders went to the offices of Inslee, Best, Doezie & Ryder, which prepared 3 assignments for 3 deeds of trust originally issued to Soos Creek.<sup>1</sup> (CP 78, 81, 84) Signing the documents as “President, Soos Creek Vistas, Inc.,” Mr. Sanders assigned the deeds of trust to himself.

The deeds of trust secured 3 promissory notes. Mr. Sanders wrote at the end of each note: “Pay To The Order Of Joseph D. Sanders.” (CP 192, 200, 206) He signed each of these notations as “Soos Creek Vistas,

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<sup>1</sup> The law firm’s identification is found in the upper left hand corner of each assignment.

Inc., by Joseph D. Sanders, President.” On the same day, Mr. Sanders wrote a check from the Soos Creek checking account to himself for \$12,200, leaving a balance of \$68.97. (CP 76 line 10, 87, 297) This appeal arises from these actions of Mr. Sanders on June 1, 2005.

The background now will be described in more detail. Soos Creek is a Washington corporation first incorporated on March 12, 1997. (CP 494) Soos Creek’s president and sole<sup>2</sup> shareholder is Joseph Sanders. (CP 703 Line 18)

At the time the judgment was entered, Soos Creek held three promissory notes from Barbara Shaw, Bridget Shaw, and Tollie Sterling respectively. (CP 199, 205, 211, 76 line 14) The 3 notes had been created as part of the pre-judgment sale of 3 lots owned by Soos Creek. (CP 105 line 8) The sales were seller-financed, i.e., financed by Soos Creek. (CP 105 line 18, 106 line 19, 108 line 1) Because of the seller financing, all three promissory notes were payable to Soos Creek Vistas, Inc. (CP 199, 205, 211, 76 line 14)

Originally, all of Soos Creek’s lots had been encumbered by a deed of trust Mr. Sanders executed to himself in April 1997, the month after forming Soos Creek. (CP 115) The deed of trust secured a

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<sup>2</sup> Technically, the company is community property and Mr. Sanders’ wife also is a shareholder but there is no indication that her participation in the corporation is other than nominal.

promissory note also dated April 1997. (CP 109) As an inducement to the 3 lot sales to Sterling and the two Shaws, Mr. Sanders had released his interest in this 1997 deed of trust, through partial reconveyances. (CP 105 line 14, CP 106 line 16, CP 107 line 18) The purchasers had, in turn, executed new, separate deeds of trust to Soos Creek to secure the three promissory notes held by Soos Creek. (CP 187, 195, 207) Other than his partial reconveyances of the 1997 deed of trust, Mr. Sanders had no other participation in the sales in any personal capacity. Soos Creek, not Sanders personally, was the property owner and financed the sales. (CP 105 line 8, CP 105 line 14, CP 106 line 16, CP 107 line 18)

A review of Soos Creek's financial records shows that up to June 1, 2005, the notes were treated exactly as what they appeared to be on their face: Payments on the notes were deposited into Soos Creek's account and treated as Soos Creek's income and property. In discovery, Mr. Sanders produced a 4 page spreadsheet that summarized the cash flow in and out of Soos Creek from 2002 through June 2005. (CP 276 line 13, 294-297) For the sake of brevity, this brief will only discuss the entries for 2004 and 2005.

The entries for 2004 are found at CP 296. The relevant portion is reproduced here:

	Y2004 Jan	Y2004 Feb	Y2004 Mar	Y2004 Apr	Y2004 May	Y2004 Jun	Y2004 Jul	Y2004 Aug	Y2004 Sep	Y2004 Oct	Y2004 Nov	Y2004 Dec	
Pre-Balance	\$ (431.46)	\$ 4,098.01	\$ 6,068.81	\$ 14,609.79	\$ 12,683.29	\$ 18,249.29	\$ 5,786.18	\$ 5,786.18	\$ 20,270.18	\$ 263.18	\$ 266.18	\$ 246.18	
Grows (Debits) Payments												\$ 22,491.72	\$ 22,491.72
Show (Credits) Payments												\$ -	\$ -
Skullage/ Bencor Return Ref	\$ 7,437.27												\$ 7,437.27
Sterling Payments			\$ 922.00	\$ 930.00									\$ 1,846.00

(Source: CP 296)

As the far right column shows, in 2004 Soos Creek received a total of \$26,183.72 in payment on the notes. These amounts were included as part of the “TOTAL DEPOSITS” into Soos Creeks’ account for 2004, which were recorded as \$596, 228.46. (CP 296) The payments did not go directly to Mr. Sanders and were treated as income to the corporation. Further down the same page, the spreadsheet contains this row in the debit section:

Sanders Repay			\$ (226,000.00)		\$ (230,000.00)								\$ (456,000.00)
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(Source: CP 296)

Repayments on Sanders’ “loan” thus are separately treated as transfers from the corporation’s general account, not as direct credits based on payments from the three notes.

The note payments received the same treatment in the period January 1, 2005 to June 1, 2005. The relevant portion of the spreadsheet is reproduced here:

	Y2005	Y2005	Y2005	Y2005	Y2005	Y2005	
	Jan	Feb	Mar	Apr	May	Jun	
Pre Balance	\$ 2,034.70	\$ 2,024.70	\$ 10,713.18	\$ 6,054.70	\$ 3,279.70	\$ 12,268.97	\$ 68.97
Shaw (Barbara) Payments		\$ 1,350.56	\$ 675.28	\$ 675.00	\$ 675.00		\$ 3,375.84
Shaw (Bridget) Payment		\$ 860.00	\$ 860.00	\$ 860.00	\$ 860.00		\$ 3,440.00
Sterling Payments		\$ 1,840.00	\$ 920.00	\$ 920.00	\$ 920.00		\$ 4,600.00
Sanders Advance		\$ 70,000.00			\$ 26,000.00		\$ 96,000.00
TOTAL DEPOSITS	\$ -	\$ 74,050.56	\$ 2,465.28	\$ 2,455.00	\$ 27,455.00		\$ 106,415.84
Sanders Repay		\$ (5,000.00)				\$ (12,200.00)	\$ (17,200.00)

(Source: CP 297)

Even a casual review of the entries shows that the note payments were treated as income to the corporation and did not flow to Sanders directly. In February Soos Creek received \$4050.56 on the 3 notes, but the “Sanders Repay” row shows \$5000. In March Soos Creek received \$2455.28, but Sanders received nothing, and the same is true in April and May. The “repay” for June is where Sanders drew the account balance down to \$68.97.

In sum, the records do not show anything but the very typical situation of a property development corporation recording income from lot sales and distributing proceeds to its shareholder only when there was a surplus of money in the corporate account. (CP 278 line 1-5) Until Sanders endorsed the notes over to himself, he was not treating the payments as direct income to himself personally, nor were the payments directly credited as reductions in the balance owed under the 1997 promissory note.

Other than the Shaw and Sterling promissory notes and its checking account, Soos Creek had no other personal property assets.<sup>3</sup> (CP 76, lines 14-18) Soos Creek's oppositions to DBM's motions below contain no statement or suggestion that Soos Creek now is solvent or has other assets sufficient to satisfy DBM's judgment. In other words, on June 1, 2005 Mr. Sanders rendered Soos Creek insolvent, unable to pay more than \$68.97 toward DBM's judgment.

DBM examined Soos Creek in supplemental proceedings. (CP 13) The witness produced to testify on Soos Creek's behalf was Mr. Sanders. (CP 18) When DBM then attempted to garnish the two Shaw notes, both Shaws responded that they owed nothing to Soos Creek. (CP 49, 51) DBM discovered the June 1, 2005 transfer.

On October 4, 2005, DBM brought a motion seeking "an Order to levy execution on assets transferred from judgment debtor Soos Creek Vista, Inc.'s possession to its insider Joseph D. Sanders, and for an order to levy execution on the proceeds of those assets." (CP 94, lines 16-20)

Soos Creek responded with a declaration from Mr. Sanders. (CP 103) As to payments on the Sterling and two Shaw promissory notes, he claimed "I personally received subsequent payments made by [the buyer]

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<sup>3</sup> Because of the 1997 Deed of Trust, any real property held by Soos Creek would be encumbered.

under [the buyer's] note, which were made payable to me individually. Said payments were credited against the amounts due to me pursuant to the original 1997 Note and Deed of Trust and Security Agreement.” (CP 106, lines 5-6; CP 107, lines 7-10; CP108, lines 9-12) Sanders did not produce any records substantiating this assertion.

This claim resulted in two continuances for further discovery. (CP 248, 259) As already has been discussed, the financial records subsequently produced by Sanders during that discovery show that his statement was false. The actual corporate records do not support Sanders' characterization of how payments from the notes were treated.

Sanders also claimed that with other lot sales prior to Sterling and the Shaws he “was to receive and did receive at closing the net proceeds of sale.” (CP 105 line 2) Apparently this was meant to suggest that he was supposed to personally and directly receive the full proceeds of the Sterling and Shaw sales as well, regardless of what the sellers' notes and deeds of trust actually said. As with his other assertion, Sanders did not produce any corporate records to support it.

The corporate records subsequently produced by Mr. Sanders included a copy of Soos Creek's check register for April 1997 through December 1999 (CP 299-328) and a copy of the check register for January 2000 through August 2002. (CP 330-368) The corporate records

again showed that Mr. Sanders' assertion was untrue. Take the sale of "lot 9" as an example. The Soos Creek check register tracks the proceeds of this sale, which was to Stephan and Victoria Sawyer in July 1999. On July 15, 1999 the register shows an entry of \$9,482.55 for "Deposit from Lot 9." (CP 325) A second entry for August 5 reflects an additional "Deposit Sawyer Lot 9 Aug" of \$723. Additional \$723 monthly payments from the Sawyers are recorded for September, October, November, and December 1999. (CP 326-328) Yet, during the entire year of 1999 the register does not show that Sanders received anything in repayment of his 1997 "loan" to Soos Creek. He was not receiving the net proceeds of sale for lot 9, as he had testified.

The year 2000 starts no differently. For example, the entries for May 2000 show receipt of further payment from the Sawyers and also from other lot purchasers. (CP 337) Another example is seen in December. (CP 348) Likewise, on October 2, 2000 the register reflects a deposit to Soos Creek of \$10,899.57 for "Cameron Lot 5 Down Payment" and \$74,859.56 for "Bennett Payoff Lot E." (CP 346)

The net proceeds of sale were not going directly to Sanders as his declaration claimed. Instead, Soos Creek was following the typical practice of making distributions to its shareholder when the corporate checking account had a sufficient balance to cover the distribution.

Accordingly, although Mr. Sanders received no money from Soos Creek in 1999, the register shows a “Sanders Advance Return” of \$95,000 on August 5, 2000 and \$80,000 on January 11, 2001. (CP 340, 349) These payments, which are round, integer numbers, are not connected to any particular lot sale.

Importantly, although Soos Creek and Sanders argued that the June 1, 2005 transfers to Sanders had been in the normal course of business, Sanders did not identify a single prior time in the history of the corporation in which a debt owned to Soos Creek had been assigned to Sanders as payment for his 1997 “loan.”

After discovery was taken, DBM secured a new hearing date and filed a supplemental memorandum discussing the newly-found evidence. (CP 265) Soos Creek responded and a hearing was held on February 15, 2007. (CP 507) On February 23, 2007 the Court issued an Order And Findings Of Fact And Law. (CP 514) The Court Ordered:

1. That Judgement Creditor DBM Consulting Engineers, Inc’s, Motion for an Order to Levy Execution is GRANTED.
2. Joseph D. Sanders, in his corporate capacity as an “insider” of Judgment Debtor is ORDERED to return the Ronald Shaw, Bridget Shaw, and Tollie Sterling promissory notes and Deeds of Trust to Judgment Debtor.

3. A writ of Execution shall issue directing the Sheriff of King County to thereafter levy the following personal property, no bond required . . . .

(CP 519)

Soos Creek appealed. (CP 299) Shortly thereafter Soos Creek attempted to file for bankruptcy in federal court. This appeal was stayed until the bankruptcy court dismissed Soos Creek's petition for lack of jurisdiction.

## **ARGUMENT**

### **A. Standard of Review**

The trial court entered findings of fact and conclusions of law after a hearing. Sanders argues this was improper. Even if a summary judgment standard is appropriate, however, the essential facts cannot truly be disputed. The only "dispute" is that before the corporate records were produced in discovery, Sanders baldly claimed that he always received net sale proceeds upon the closing of lot sales, that before June 1, 2005 the proceeds of the Shaw and Sterling promissory notes had been paid to him personally, and that these proceeds and payments were applied to reduce the balance of his 1997 "loan." This bald statement found no support in the actual corporate records, which showed how the proceeds really were treated. Soos Creek cannot avoid summary

judgment with a conclusory statement that merely nay-says what its own financial records actually show:

Although CR 56(e) makes no distinctions between affidavits of the moving and nonmoving party, the drastic potentials of a summary judgment motion compel the courts to indulge in leniency with respect to affidavits presented by the nonmoving party. Such leniency, however, does not permit stepping beyond the indulgence of the court and statements of conclusions and other surplusage contained in an affidavit will be disregarded.

*Public Utility Dist. No. 1 v. Washington Public Power Supply System*,  
104 Wn.2d 353,361, 705 P.2d 1195 (1985) (citations omitted).

**B. Arguments Advanced on Behalf of and Applicable to Soos Creek**

**1. The June 2005 Transaction Violated the Statute and the Court Correctly Determined that the Property Was Corporate Property Subject to Execution**

**a. The Transfer Was a Forbidden Preferential Transfer to an Insider**

A number of procedural arguments are raised, mostly pertaining to Mr. Sanders' absence as a named party to this lawsuit. There is no contention that the trial court lacked personal jurisdiction over Soos Creek itself. Accordingly, DBM first will address the issue of whether the trial court properly determined, adverse to the contentions of Soos Creek, that June 1, 2005 transfers were fraudulent.

Washington has adopted the Uniform Fraudulent Transfer Act.

One section states:

**19.40.051. Transfers fraudulent as to present creditors**

....

(b) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

While the statute uses the term “fraudulent,” this particular subsection might better be described as a prohibition on *preferential* transfers. “The idea here is that the insider cannot accept payment for an antecedent debt when the debtor is insolvent, unless other creditors are paid first.” *Mansolillo v. Parties by Lynn, Inc.*, 753 So. 2d 637, 639 (Fla. App. 2000). The subsection codifies the traditional rule that corporate officers, directors, and shareholders are fiduciaries of the corporation’s creditors and thus cannot pay debts allegedly owed to themselves in preference to third-party creditors such as DBM. *See generally Pepper v. Litton*, 308 U.S. 295, 60 S. Ct. 238, 245, 84 L. Ed. 281 (1939) (leading case); *Gaff v. Federal Deposit Ins. Corp.*, 919 F.2d 384, 392 (6th Cir. 1990) (discussing underlying legal theory); *Saviano v. Westport Amusements, Inc.*, 144 Wn. App. 72, 79, 180 P.3d 874 (2008) (recognizing rule). Because the rule is a prohibition on preferential

transfer rather than a rule targeted at transactions more akin to common law fraud, it is not necessary for the creditor to prove intent to defraud. See *Prairie Lakes Health Care System, Inc. v. Wookey*, 583 N.W.2d 405, 410 (S.D. 1998); *Wilder v. Miller*, 17 P.3d 883, 887 (Idaho App. 2000); *Alcan Bldg Products v. Peoples*, 859 P.2d 374 (Idaho App. 1993).

Rather, the test is an exceedingly simple one:

(1) Did the creditor's claim arise before the transfer was made? (2) Was the transfer made to an insider? (3) Was the transfer made for an antecedent debt? and (4) Was the debtor insolvent at the time the transfer was made and did the insider have reasonable cause to believe that the debtor was insolvent?

*Alcan, supra*, 859 P.2d at 376-7; see *Hasbro, Inc. v. Serafino*, 37 F. Supp. 2d 94, 98 (D. Mass. 1999); *Dominguez v. Eppley Transp. Servs., Inc.*, 763 N.W.2d 696, 702 (Neb. 2009) (employing similar analysis).

All four elements are easily satisfied here:

1. DBM's claim arose before the transfer was made because the judgment was entered in April 2005 while the transfer was made in June 2005.<sup>4</sup>

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<sup>4</sup> Actually, the existence of a claim does not require the existence of a judgment as "Claim' means a right to payment, whether or not the right is reduced to judgment[.]" RCW 19.40.011(3). DBM's claim existed years before judgment, when its engineering fees became due and payable.

2. As a corporate officer, Mr. Sanders is an insider. Sanders admits he is Soos Creek's president. (CP 103, line 18) The statute includes this definition:

"Insider" includes:

.....

(ii) If the debtor is a corporation:

.....

(B) An officer of the debtor;

RCW 19.40.010(7).

3. The transfer was made for an antecedent debt because it allegedly was made in payment for a "loan" Mr. Sanders made in 1997 at the corporation's inception. (CP 104, lines 5-8) "An antecedent debt is defined as a debt which is incurred prior to the relevant transfer." *In re Durant's Rental Center, Inc.*, 116 Bankr. 362, 366 (D. Conn. 1990); *see In re Bridge Information Systems, Inc.*, 302 Bankr. 41, 45 (E.D. Mo. 2003); *In re Bullion Reserve of North America*, 836 F.2d 1214 (9<sup>th</sup> Cir. 1988). The promissory note was a "debt" because it had been due on May 1, 2000, so it was due and payable when the transfer was made in June 2005. (CP 109 ¶(e))

4. The fourth element was met because Sanders' transfer made Soos Creek insolvent: After the transfer it had no personal property assets<sup>5</sup> other than the \$68.97 that Sanders left in the checking account. (CP 76, lines 14-18) Essentially, this case presents a textbook example of a corporate insider, after entry of an adverse judgment, stripping the corporation of assets so that he can be paid in preference to a third-party creditor.

**b. Sanders Did Not Show that the Transfer Was in the Ordinary Course of Business**

In the case below Sanders did not seriously contest the fact that the 4 elements of a prohibited preferential transfer are present. Instead, he relied on a statutory affirmative defense that states:

(f) A transfer is not voidable under RCW 19.40.051(b):

....

(2) If made in the ordinary course of business or financial affairs of the debtor and the insider; or

RCW 19.40.81(f).

An example of a transfer made in the ordinary course of business is a continuing salary payment for management services provided by the insider. *See In re Gateway Investments Corp.*, 152 Bankr. 354 (S.D. Fla.

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<sup>5</sup> As for real property assets, Mr. Sanders had encumbered those with the Deed of Trust he granted to himself in April 1997. (CP 115)

1993). While there is a broad spectrum of actions that may or may not qualify under this defense, one thing is certain: A single, extraordinary transfer with no precedent in the corporation's history is not made in the ordinary course of business or financial affairs. See *In re D.C.T., Inc.*, 295 Bankr. 236 (E.D. Mich. 2003); *Comer v. Calim*, 716 N.E.2d 245, 249 (Ohio App. 1998).

The transfer to Sanders in June 2005 was unprecedented and extraordinary:

5. The corporation had never previously assigned a deed of trust to Sanders.

6. The corporation had never previously endorsed promissory notes over to Sanders.

7. The endorsement of the notes over to Sanders actually *terminated* a prior, ordinary practice of accepting monthly payments from the property buyers and treating those payments as income to the corporation rather than as income to Sanders directly.

8. The transfer is the very transaction that made Soos Creek insolvent. A single transaction that transforms a corporation from being solvent to being judgment proof is not "made in the ordinary course of business or financial affairs of the debtor and the insider[.]" RCW 19.40.81(f).

2. **Washington Procedural Rules Allow Preferential Transfer Claims Against a Corporate Insider To Be Made as Part of Supplemental Proceedings, so DBM's Claim Was Timely Made**

Soos Creek argues that fraudulent transfer claims absolutely must, under all circumstances, be brought in separately filed lawsuits and cannot be asserted as part of supplemental proceedings. Since no separate lawsuit was brought, according to Soos Creek the statute of limitations has lapsed.

To support this assertion at the trial level, Soos Creek suggested there are no reported cases in which a fraudulent transfer claim has been asserted in supplemental proceedings. This assertion is incorrect; fraudulent transfer claims have been made in the course of supplemental proceedings. *See, e.g., Thomas, Head and Greisen Employers Trust v. Buster*, 95 F.3d 1449 (9<sup>th</sup> Cir. 1996); *HBE Leasing Corp. v. Frank*, 48 F.3d 623 (2<sup>nd</sup> Cir. 1995); *Shockey v. Harry Sander Realty Co., Inc.*, 771 S.W.2d 922 (Mo. App. 1989).<sup>6</sup>

The core problem with the argument is that the UFTA is not a procedural statute. It sets forth rules of substantive law which are applied

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<sup>6</sup> In an opinion that is wryly amusing considering the present argument, a federal court once discussed and rejected a debtor's claim that fraudulent transfer actions could only be brought in the context of supplemental proceedings and not as a separate lawsuit. *Fleming Companies, Inc. v. Rich*, 978 F. Supp. 1281, 1293-4 (E.D. Mo. 1997).

in the context of the procedural rules in force in the particular jurisdiction that adopts the UFTA. *See Thomas, supra* (applying Alaska court rule governing supplemental proceedings to UFTA claim).

The court's primary duty in interpreting any statute is to discern and implement the intent of the legislature. *Sanders v. State*, 166 Wn.2d 164, 171, 207 P.3d 1245 (2009). When the legislature wants a specific procedure to be followed in a particular type of civil suit, it certainly knows how to say so. Consider, for example, unlawful detainer suits, which are subject to a carefully dictated statutory procedure vesting a court with limited jurisdiction. RCW 59.12.010 *et. seq.*; *see generally Phillips v. Hardwick*, 29 Wn. App. 382, 386, 628 P.2d 50 (1981). No remotely similar provisions are found in the UFTA. In fact, the UFTA states:

Unless displaced by the provisions of this chapter, the principles of law and equity, including the law merchant and the law relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement its provisions.

RCW 19.40.902; *see Clayton v. Wilson*, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 210 WL 185948 (2010).

Nowhere in the UFTA is there an express statement that Washington's other procedural rules are displaced by the UFTA and that

UFTA claims can only be asserted in separate lawsuits, regardless of what those procedural rules otherwise might have allowed.

Attempting to find support in the UFTA, Sanders cites the Act's internal statute of limitations. One first must note that a statute of limitation governing when a cause of action must be asserted is a strange place to look for the procedure governing how a cause of action must be asserted. "[T]he statute of limitations is not such a meritorious defense that either the law or the facts should be strained in aid of it." *Guy F. Atkinson Co. v. State*, 66 Wn.2d 570, 573, 403 P.2d 880 (1965).

The present UFTA claim involves RCW 19.40.051(b). The applicable limitation period states:

A cause of action with respect to a fraudulent transfer or obligation under this chapter is extinguished unless action is brought:

....

(c) Under RCW 19.40.051(b), within one year after the transfer was made or the obligation was incurred.

RCW 19.40.91.

Sanders claims that the prefatory language must mean that a lawsuit has to be filed, since "action" can be a common noun identifying a lawsuit. While "action" can refer to a newly filed suit, the noun

actually is far more generic and flexible. Common definitions of the term include:

**a (1)** : a legal proceeding by which one demands or enforces one's right in a court of justice

*Webster's Third New International Dictionary* (Unabridged ed. 1976)

(copy in appendix).

**8 Law** The lawful demand of one's right through judicial proceedings; a judicial proceeding for the enforcement of rights, the redress of wrongs, or the punishment of public offenses.

*Funk & Wagnalls Standard Dictionary* (Intern'l ed. 1970) (copy in appendix).

A motion for execution falls within the broad parameters of these definitions.

Of course, in the present case a lawsuit was filed long before the transfer. It had been prosecuted to judgment and was in the supplemental proceedings stage. Sanders cannot really complain that no lawsuit was brought within one year of the transfer. What he really must argue is that a new lawsuit with a separate cause number had to be filed.

It did not, because Washington's procedural rules authorized DBM's chosen course of action. Action was brought by DBM through the procedure authorized by CR 69. CR 69 provides a vehicle for

asserting UFTA claim. *Accord Thomas, supra*, 95 F.3d at 1449. The

Rule states in part:

**(a) Procedure.** The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the State as authorized in RCW 6.13, 6.15, 6.17, 6.19, 6.21, 6.23, 6.32, 6.36, and any other applicable statutes.

Executions are governed by RCW 6.17.010 *et. seq.* This section specifically authorizes execution in the form of seeking delivery of personal property and execution in the form of commanding obedience to court orders:

There shall be three kinds of executions: First, against the property of the judgment debtor; second, for the delivery of the possession of real or personal property or such delivery with damages for withholding the same; and third, commanding the enforcement of or obedience to any other order of the court. In all cases there shall be an order to collect the costs

RCW 6.17.060 (emphasis added).

DBM's motion below sought all three forms of relief: It sought delivery of the possession of Soos Creek's personal property (note and proceeds), it sought execution against the delivered proceeds, and it

sought to command the obedience of a corporate officer to the Court's order.<sup>7</sup>

To grant the motion, of course, the trial court had to determine issues of substantive law concerning the ownership of the property DBM sought to execute upon, but determinations of law are an intrinsic part of any motion. DBM's motion thus was expressly authorized by CR 69 and action could be brought to resolve the UFTA issue within the context of a motion for execution. Since DBM followed a proper procedural path, it took timely action to void the transfer and the statute did not lapse.

Soos Creek also attempts to find support in RCW 19.40.071. The statute states in part:

**19.40.071. Remedies of creditors**

(a) In an action for relief against a transfer or obligation under this chapter, a creditor, subject to the limitations in RCW 19.40.081, may obtain:

...

(b) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds.

(Underline added.)

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<sup>7</sup> Mr. Sanders' argument that he cannot, in his capacity as a corporate officer, be commanded to obey an order against the corporation unless he is sued individually is rebutted later in this brief.

The above statute uses the permissive term “may” and only discusses what kind of relief a court may order in a UFTA proceeding. The statute does not state that under any and all possible situations a separate lawsuit must be filed to obtain relief under the UFTA. The statute simply doesn’t support the rule Sanders is trying to create.

Soos Creek also argues that the statute lapsed because the Court’s order did not issue until more than one year after the transfer. (Brief at 15) This argument would not make sense even if Soos Creek’s primary arguments had some merit: Not only would the separate lawsuit have to be filed within one year, but the suit would have to be prosecuted to judgment within one year, an absurd result. Further, Soos Creek stipulated to two continuances of DBM’s original motion and thus stipulated to the having the motion decided more than one year after the transfer. (CP 248, 259)

**C. Arguments Applicable to Sanders Personally**

**1. Because Sanders Is in Privity with His Corporation and Has Participated in This Litigation as a Witness, He Is Bound by the Proceedings in This Matter Regardless of Whether He Is a Named Defendant**

Soos Creek advances several arguments that really are personal to Mr. Sanders. All of the arguments arise from the common assertion that Sanders had to be separately joined and served as an additional

defendant. The entire argument fails to recognize that as a person in privity with the defendant, Sanders is bound by the court's decisions regardless of whether he is a named defendant. Put another way: Sanders is not still awaiting his day in court. He already had it.

[A] nonparty is bound by a judgment if she "assume[d] control" over the litigation in which that judgment was rendered. *Montana*, 440 U.S., at 154, 99 S.Ct. 970. See also *Schnell v. Peter Eckrich & Sons, Inc.*, 365 U.S. 260, 262, n. 4, 81 S.Ct. 557, 5 L.Ed.2d 546 (1961); 1 Restatement § 39. Because such a person has had "the opportunity to present proofs and argument," he has already "had his day in court" even though he was not a formal party to the litigation. *Id.*, Comment a, p. 382.

*Taylor v. Sturgell*, 523 U.S. \_\_\_, 128 S. Ct. 2161, 2173, 171 L. Ed. 2d 15 (2008).

In Washington, the doctrine is stated this way:

A person who is not a party to an action but who controls or substantially participates in the control of the presentation on behalf of a party is bound by the determination of issues decided as though he were a party.

*Mutual of Enumclaw Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 37 Wn. App. 690, 693, 682 P.2d 317 (1984), quoting *Restatement (Second) of Judgments* § 39, at 382 (1982).

"One who was a witness in an action, fully acquainted with its character and object and interested in its results, is estopped by the judgment as fully as if he had been a party."

*World Wide Video of Washington, Inc. v. City of Spokane*, 125 Wn. App.

289, 306, 103 P.3d 1265 (2005), quoting *Hackler v. Hackler*, 37 Wn. App. 791, 795, 683 P.2d 241 (1984) (citations omitted).

Here, Mr. Sanders is corporate officer and is the sole witness produced by Soos Creek. He signed all of the corporate documents; he was the witness produced for examination in supplemental proceedings; his declaration is the only testimony advanced in support of Soos Creek's various arguments, and all of the corporation's personal property was transferred to him.

It generally is held that in the absence of a demonstrated conflict of interest between the individual and his corporation, a corporate officer or shareholder is in privity with the corporation and thus is bound to the result in the action even if the officer was not individually named as a party. See *In re Teltronics Servs., Inc.*, 762 F.2d 185, 191 (2<sup>nd</sup> Cir. 1985); *Hellman v. Hoenig*, 989 F. Supp. 532, 537 (S.D.N.Y. 1998); *Woods v. Mehville Chrysler-Plymouth*, 198 S.W.3d 165, 170 (Mo. App. 2006); accord, *King County ex rel. Sowers v. Chrisman*, 33 Wn. App. 809, 819, 658 P.2d 1256 (1983). Mr. Sanders had his day in court because, through his corporation, he was able to appear as a witness, and to set forth all of the facts and make all of the legal arguments that he would have made if he had been a party personally.

When a person in control of a corporation had a right to intervene but instead chooses to participate as a witness for tactical reasons, there is no injustice in binding him to the judgment. *World Wide Video, supra*. Here, Mr. Sanders had a statutory right of intervention in the proceeding below. *See* RCW 6.19.010 *et. seq.*<sup>8</sup> He did not intervene because it was more tactically advantageous for him to stay out of the litigation, make all of his arguments through his corporation, and then allow the statute of limitations to lapse on DBM's ability to start a separate lawsuit. That was a clever tactic, but because of the privity rule it doesn't work.

2. **In a Proceeding Against the Corporation, a Corporate Officer Can Be Commanded To Produce Corporate Property, so It Was Not Necessary To Establish Personal Jurisdiction over Sanders Individually**

Sanders argues that he cannot be subject to a court order because the court did not obtain personal jurisdiction over him. There is no contention that jurisdiction was lacking over his corporation. And, because he is in privity with the corporation, Mr. Sanders is collaterally estopped from contending that the property as issue here is his property rather than corporate property properly belonging to Soos Creek. Thus,

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<sup>8</sup> This statute gives a person who claims title or right to possession of property levied on, the right to appear in court and contest the judgment creditor's right to the property.

the present situation is one in which a corporate officer is being commanded to turn over corporate property in his possession.

Sanders is playing the “hat switching” game one too many times. He cannot function in a corporate capacity when it is advantageous to him and then refuse to put on the corporate hat and act in his corporate capacity when it no longer accomplishes his ends. When corporate property is at issue, a court can directly order a corporate officer to obtain and produce corporate property without first establishing personal jurisdiction over the officer as a separate matter.

A command to the corporation is in effect a command to those who are officially responsible for the conduct of its affairs. If they, apprised of the writ directed to the corporation, prevent compliance or fail to take appropriate action within their power for the performance of the corporate duty, they, no less than the corporation itself, are guilty of disobedience, and may be punished for contempt.

*Wilson v. United States*, 221 U.S. 361, 376, 31 S. Ct. 538, 55 L. Ed. 771 (1911).

A corporation can only act through its agents. By choosing to operate under the corporate form, Mr. Sanders agreed to be responsible for executing, as the corporation’s agent, the commands a court might issue to the corporation:

When one accepts an office of joint responsibility, whether on a board of directors of a corporation, the governing

board of a municipality, or any other position in which compliance with lawful orders requires joint action by a responsible body of which he is a member, he necessarily assumes an individual responsibility to act, within the limits of his power to do so, to bring about compliance with the order.

*United State v. Fleischmann*, 339 U.S. 349, 356-7, 70 S. Ct. 739, 94 L. Ed. 906 (1950); *see Nilva v. United States*, 352 U.S. 385, 392, 77 S. Ct. 431, 1 L.Ed.2d 415 (1957); *In re World Parts, LLC*, 291 Bankr. 248, 254-5 (W.D.N.Y. 2003); *accord, King County ex rel. Sowers v. Chrisman*, 33 Wn. App. 809, 819, 658 P.2d 1256 (1983).

An example of how this rule can be implemented is found in *World Parts, supra*. In that case, the corporate debtor was ordered to physically segregate certain parts of its inventory, which consisted of automobile parts. The corporate officers who failed to do this could be subject to contempt even though they had not themselves declared bankruptcy and subjected themselves individually to the court's jurisdiction. 291 BR at 254-5.

Here, the trial court has determined that the property is corporate property and has commanded the corporate officer in possession of that property to produce it. It also should be noted that Sanders' attempt to fraudulently transfer the notes and proceeds was his act as a corporate officer: He could not, in his "personal" capacity, assign to himself deeds

and notes held by the corporation in the corporation's name. This appeal involves the act of a corporate officer, in his corporate capacity, to violate a statutory prohibition on placing corporate assets out of the reach of corporate creditors. Mr. Sanders is more than capable, in his corporate capacity, of undoing these wrongs and the trial court correctly ordered him to do so.

If this appeal had not been taken, DBM would have taken the next step in enforcing the court's order. A statute provides:

When any judgment of a court of this state requires the payment of money or the delivery of real or personal property, it may be enforced by execution. When a judgment of a court of record requires the performance of any other act, a certified copy of the judgment may be served on the party against whom it is given or the person or officer who is required by the judgment or by law to obey the same, and a writ may be issued commanding the person or officer to obey or enforce the judgment. Refusal to do so may be punished by the court as for contempt

RCW 6.17.070 (underline added)

Mr. Sanders is the person required by law to act on behalf of his corporation to return the corporation's promissory notes and their proceeds to the corporation. The trial court's Order correctly commanded him to do so. If Sanders will not comply voluntarily, DBM may serve a certified copy of the Order on him and may obtain a writ commanding

him to obey the Order.<sup>9</sup> This is not a deprivation of Mr. Sanders' "personal" rights, because he chose to form a corporation and thus became responsible to bring about the corporation's compliance with the court's orders.

### **3. Sanders Is Not an Indispensable Party**

Sanders argues that he was an indispensable party to the proceedings below. The question of whether a person is indispensable is heavily influenced by the facts and circumstances of the individual case. *Mathson v Gregoire*, 139 Wn. App. 625, 634-5, 161 P.3d 486 (2007). The burden of proving the party was indispensable is on the one urging dismissal. *Id.*

Soos Creek has not carried that burden. Many cases have said the transferees in a fraudulent conveyance claim are "necessary" or "indispensable" parties. These cases, however, base their statements on the general concept that "[f]undamental principles of due process require that transferees who claim an interest in real property or its proceeds have a full and fair opportunity to contest claims of fraudulent transfer." *Tanaka v. Nagata*, 868 P.2d 450, 455 (Haw. 1994); *cf. Veradale Valley Citizens' Planning Committee v. Board of County Com'rs of Spokane*

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<sup>9</sup> If Mr. Sanders attempted to contest the substantive validity of the Order he would be collaterally estopped from doing so because he is in privity with Soos Creek.

*County*, 22 Wn. App. 229, 233, 588 P.2d 750 (1978) (“due process” required joinder of all property owners).

The privity rule, however, is a well established exception to the general principle that due process requires a person to be individually present. *See Taylor v. Sturgell, supra*, 128 S. Ct. 2161 at 2173. A person in privity thus is not an indispensable party. *See State Farm Fire & Cas. Co. v. John J. Rickhoff Sheet Metal Co.*, 914 N.E.2d 577, 592 (Ill. App. 2009). As was shown earlier in this brief, Mr. Sanders is in privity because of his status as a corporate officer, a witness, and a person who could have intervened as a matter of right but chose not to.<sup>10</sup>

Sanders depends on *In re Schneider*, 99 Bankr. 52 (W.D. Wash. 1989). That case presents an excellent example of why “indispensable party” issues are heavily dependant on the facts and circumstances of the individual case. *Mathson, supra*. 130 Wn. App. at 634. *Schneider* involved a fraudulent transfer from an individual debtor to a trust, not an “insider” transfer from a corporation to its officer. There was no argument or discussion about whether the debtor was in privity with the trust. Here, Sanders is in privity and thus is not indispensable.

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<sup>10</sup> Although it uses the term “indispensable,” Soos Creek’s brief does not cite CR 19 or engage in an analysis of whether Sanders was “indispensable” as defined by that rule. The Court of Appeals is not required to do an appellant’s work for him, and thus is not obliged to consider the argument from that perspective. *See Bercier v. Kiga*, 127 Wn. App. 803, 824, 103 P.3d 232 (2004).

**D. DBM Is Entitled to Its Attorney Fees and Soos Creek Is Not**

The judgment entered below establishes that DBM has a right to reasonable attorney fees. (CP 5 line 22 to CP 6 line 5) The judgment never was appealed, and the trial court's determination thus is the law of the case. See *Detonics .45 Associates v. Bank of California*, 97 Wn.2d 351, 353, 644 P.2d 1170 (1982). Pursuant to RAP 18.1, DBM is entitled to a supplemental attorney fee award should it prevail in this appeal.

Soos Creek argues that it should be awarded attorney fees. However, the applicable contractual provision only awards attorney fees to the prevailing party. (CP 5 line 23) Regardless of who prevails on individual disputes within the overall context of the lawsuit, DBM is the one with a judgment in its favor and is the prevailing party. Soos Creek would not prevail simply because it has whittled away at DBM's ability to collect on a judgment in DBM's favor. *Accord, Taliesen Corp. v. Razore Land Co.*, 135 Wn. App. 106, 142, 144 P.3d 1185 (2006).

**CONCLUSION**

For the above reasons, the Court of Appeals should affirm the trial court's Order below, remand the case for further supplemental proceedings, and award DBM its attorney fees on appeal.

DATED this 1st day of February, 2010.

EKLUND ROCKEY STRATTON, P.S.



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**CERTIFICATE OF SERVICE**

I certify that on Monday, February 1, 2010, service of a true and complete copy of the foregoing Respondent's Brief was made on following attorneys of record for appellants in this case:

Mr. William A. Linton  
Inslee, Best, Doezie & Ryder, P.S.  
777 - 108th Avenue NE, Suite 1900  
Bellevue, WA 98004

by delivering the same via messenger to the above-listed address for said attorneys and leaving it with the clerk therein, or with a person apparently in charge thereof.

DATED this 1st day of February, 2010.

EKLUND ROCKEY STRATTON, P.S.



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James T. Derrig, WSBA 13471  
Attorneys for Respondent

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be intensity of both infrared and ultra- d for protecting the eyes of industrial

ation (as the green, blue, violet, and spectrum) having marked photochemi-

-s [ISV actin- + -ide]: a chemical series

series of heavy radioactive metallic elem- number considered to be analogous s and to begin with actinium (89) or with element of atomic number 103 — ES, PERIODIC TABLE

cap [NL, fr. actin- + -idia (pl. of s (the type of the family Actiniidae) nes having alternate simple leaves, us axillary flowers, and many-seeded

aktē, nīdē, āsē, n pl, cap [NL, fr. r- -aceae]: a family of trees, shrubs, or (arietales) with stamens distinct or in petals and a single multiloculate pistil

adj [NL actinium + E ctinium, fōrm] adj [actin- + -form]: having a sea anemone

nān n-s [NL Actinia (genus name of ne): a base C<sub>7</sub>H<sub>13</sub>NO<sub>2</sub> found in a sea na) [Actinia]: actinian (actinochrome)

tinē, krōm n [ISV actinio- + -chrome] und in certain Anthozoa or Actinozoa (ak; tinē, ō) n-s [actinio- + hematin] t obtained from a sea anemone (Actinia ndered to be a mixture of cytochromes ak; tinē, mōrfā) [NL, fr. actinio- +

PHARIA n n-s [actin- + -ism]: the property of the visible and ultraviolet spectral re- changes are produced (as in light- emulsions) — compare ACTINIC RAY

stē, n pl, cap [NL, fr. actin- + -istia cloth, sail]; akin to Gk histos mast, more at STAMEN]: an order (superorder efly Mesozoic fishes including the family he interspinous bones supporting each side into one piece — compare LATIMERIA

n n-s [NL, fr. actin- + -ium; fr. the ht on some zinc sulfide] 1: a supposed e thought to occur in commercial zinc lent metallic element resembling lantha- erdies formed by alpha radiation from ind esp. in pitchblende — symbol Ac; CTINIUM SERIES; ELEMENT table

n: ACTINON a radioactive series beginning with tituting the isotope of uranium of mass fmg with actinium D, constituting the e of lead of mass number 207: actinou- ranium 235) — uranium Y, at. no. 90

protactinium 231, at. no. 91 — actin- radioactinium, at. no. 90 (syn. thorium at. no. 87 (syn. francium 223)) — actin- radium 223) — actinon, at. no. 86 (syn. m A, at. no. 84 (syn. polonium 215) — (syn. lead 211) (or astatine 215, at. no. . 83 (syn. bismuth 211) — actinium onium 211) (or actinium C, at. no. 81

+ actinium D, at. no. 82 (syn. lead 207) SERIES

zō, zōn, ak; t- adj [NL Actinzoa + E

aktē, (n) nō, basē, lerē also - b; silērē adj caused by actinobacilli

n, pl actinobacillosis inobacillus + -osis): a disease of cattle, ther domestic animals or man resembling used by a true bacterium (Actinobacillus

-lād-ik adj [fr. NL actinobacillosis, psychosis: E psychotic]: of or relating

b; silās n [NL, fr. actin- + bacillus] erobic gram-negative parasitic bacteria forming filaments resembling strepto- CILLOSIS 2 pl actinobacilli -i, ī, ā: a s Actinobacillus

tina, branġ or ac-ti-no-bran-chia n-s [NL actinobranchia, fr. actin- + organ of certain Anthozoa

aktē, (n) nō, -n-es [actin- + chemistry] tions to actinism: PHOTOCHEMISTRY tē, (n) nō, krī, nīt n-s [prob. fr. F, fr. NL ]: a fossil crinoid of Actinocrinus or a

inas n, cap [NL, fr. actin- + -crinus] (the family Actinocrinidae) of crinoids issipian rocks of America and Europe nā, drōm or ac-ti-nōd-ō-mōus \aktē- + -drome, -dromous] of a leaf: pal-

ktē, (n) nō, s; adj [actin- + electric] ductivity

nā, graf n-s [actin- + -graph]: an in- the principle of the slide rule and used le exposure time in photography — ac-

ac-ti-no-my-cēs \,s(ə)ˈmī,sēz n [NL, fr. actin- + -myces] 1 cap: a genus of filamentous bacteria (family Actinomyce- taceae) including numerous soil-inhabiting saprophytes and various disease-producing plant and animal parasites that form a much-branched mycelium which may break up into segments functioning as conidia and which in lesions of the animal body may make up conspicuous rosettes of radiating clavate threads — see ACTINOMYCOSIS 2 pl actinomyces : a bacterium of the genus Actinomyces

ac-ti-no-my-ce-ta-ce-ae \,s(ə)ˈmīsəˈtāsē,ē n pl, cap [NL, fr. Actinomycet-, Actinomyces, type genus + -aceae]: a family of filamentous bacteria of the order Actinomycetales, often branched, sometimes forming a mycelium that readily breaks up into bacillary elements, and sometimes producing conidia

ac-ti-no-my-ce-tal \,mī,sēd-əl adj [NL Actinomycetales] : of or belonging to the Actinomycetales

ac-ti-no-my-ce-ta-les \,mīsəˈtā(ə)lēz n pl, cap [NL, fr. Actinomycet-, Actinomyces + -ales]: an order of filamentous or rod-shaped bacteria tending strongly to the development of branches and true mycelium and lacking photosynthetic pigment — see MYCOBACTERIACEAE, STREPTOMYCETACEAE

ac-ti-no-my-cete \-mī,sēt-, -mīˈsēt n-s [ISV actin- + -mycete]: any organism belonging to the order Actinomyce- taceae — ac-ti-no-my-ce-tous \-mī,sēd-əs adj

ac-ti-no-my-ce-tin \-mī,sētˈn n-s [actin- + mycetin]: an enzymelike antibiotic obtained from a soil actinomycete (Streptomyces albus) that lyses various bacteria (as living streptococci or heat-killed colon bacilli)

ac-ti-no-my-cin \,s(ə)ˈmīsˈn n-s [NL Actinomyces + E -in]: any of various red or yellow-red mostly toxic crystal- line polypeptide antibiotics isolated from various soil bacteria (esp. Streptomyces antibioticus) — usu. followed by a dis- tinguishing letter (~ C is one of the less toxic members of the group)

ac-ti-no-my-co-ma \,s(ə)ˈmīˈkōmā n, pl actinomycomas \-məz or ac-ti-no-my-co-ma \-məd-ə) [NL, fr. actin- + myc- + -oma]: the characteristic granulomatous lesion of actinomycosis

ac-ti-no-my-co-sis \-mīˈkōsəs n, pl actinomyco-ses \-sēz [NL, fr. Actinomyces + -osis]: infection with actinomyces esp. of the genus Actinomyces: a: a chronic infec- tious disease of cattle, swine, and man characterized by the formation in mouth and jaw and sometimes also in chest, intestines, skin, mammary tissue, or brain of hard granulo- matous masses that may break down and discharge pus con- taining the causative actinomycetes (usu. Actinomyces bovis in domestic animals and presumably A. israeli in man) — see ACTINOMYCOMA b: POTATO SCAB

ac-ti-no-my-co-tic \-kād-ik adj [fr. NL actinomyco-sis, after such pairs as NL psychosis: E psychotic]: of or relating to actinomycosis

ac-ti-no-myx-i-da \-mīksədə) syn of ACTINOMYXIDIA

ac-ti-no-myx-i-dia \-(mīksˈidē) n pl, cap [NL, alter. of Actinomyxida, fr. actin- + myx- + -ida] a small order of cnidosporidian protozoan parasites of worms distinguished by spores with trivalve shells and three polar capsules — ac- ti-no-myx-i-dia \-sīdēn adj or n

ac-ti-no-myx-i-di-i-da \,s(ə)ˈmīksˈidēdā) syn of ACTINO- MYXIDIA

ac-ti-non \ˈaktē,nān n-s [NL, fr. actinium + -on]: a heavy radioactive gaseous isotope of the group of inert gases that is isotopic with radon and thoron, is formed from actinium X, emits alpha rays, and lives only a few seconds (mass number 219) — called also actinium emanation; see ACTINIUM SERIES

ac-ti-no-nē-ma \,aktē,(n)ōˈnēmā n, cap [NL, fr. actin- + -nema]: a form genus of imperfect fungi (order Melanconiales) having hyaline 2-celled spores

ac-tin-o-phage \ˈaktˈtīnə,fāj n-s [actinomycete + -phage]: a phage that develops in and lyses an actinomycete — compare BACTERIOPHAGE

ac-tin-o-phore \,fō(ə)r n-s [actin- + -phore]: a bony or cartilaginous element supporting the fin rays of fishes

ac-tin-oph-orous \ˈaktē,nāf(ə)rəs adj [Gk aktinophoros ray-bearing, fr. aktin- actin- + -phoros -phorous]: having raylike spines

ac-tin-oph-ry-an \ˈaktē,nāfrēn adj [NL Actinophrys + E -an]: of or belonging to Actinophrys

ac-tin-oph-rys \ˈaktē,nāfrās, ˈaktˈtīn- n [NL, fr. actin- + Gk ophrys brow, rim — more at BROW] 1 cap: a genus of protozoans (order Heliozoa) widely distributed in stagnant water 2 pl actinoph- rys: a protozoan of the genus Actinophrys

ac-ti-no-phy-to-sis \ˈaktē,(n)ō- (ə)ˈfītōsəs n, pl actinophyto-ses \-sēz [NL, fr. actin- + phy- tosis]: STREPTOTRICHOSIS

ac-tin-o-pod \ˈaktˈtīnə,pōd n-s [NL Actinopoda]: a protozoan of the subclass Actinopoda

ac-ti-nop-o-da \,aktēˈnāpədə) n pl, cap [NL, fr. actin- + -poda] 1 in former classifications: an order of holothurians with tentacles arising from radial ambu- lacral vessels 2: a subclass of Sarcodina comprising usu. freely floating protozoans with highly specialized pseudo- podia and including the orders Heliozoa and Radiolaria — compare AXOPODIUM — ac-ti-no-po-di-an \,s(ə)ˈnōˈpōdēn n-s

ac-ti-nop-te-ran \,aktēˈnāptērən n-s [NL Actinopteri + E -an]: ACTINOPTERYGIAN

ac-ti-nop-ter-i \-tēr-i) [NL, fr. actin- + -pteri (pl. of -pterus)] syn of ACTINOPTERYGII

1 ac-ti-nop-ter-yg-i-an \,s(ə)ˈrījēn adj [NL Actinopterygii + E -an]: of or relating to the Actinopterygii

2 actinopterygian \-n s: one of the Actinopterygii

ac-ti-nop-ter-yg-i-l \,s(ə)ˈrījē,ē,ī n pl, cap [NL, fr. actin- + -pterygii (fr. Gk pteryx-, pteryx wing); akin to Gk pteron feather, wing — more at FEATHER] in many classifications: a sub- class or other division of Teleostomi comprising fishes

ac-ti-no-zoa \,aktē,(n)ōˈzōə) [NL, fr. actin- + -zoa] syn of ANTHOZOA

ac-ti-no-zo-an \,s(ə)ˈzōən or ac-ti-no-zo-al \-əl adj [NL Actinozoa + E -an or -al]: ANTHOZOAN

ac-ti-no-zo-on \,s(ə)ˈzō,ən n-s [NL, fr. Actinaria + -zoon] : ANTHOZOON

actins pl of ACTIN

ac-tin-u-la \ˈaktˈtīnyələ) n, pl actinulae \-ləz or actinu-lae \-lē) [NL, fr. actin- + -ula]: a creeping larva of the hydroid generation of certain coelenterates (as Tubularia) that finally attaches and develops into a polyp

ac-tio \ˈakshē,ō, ˈaktē,ō) n, pl acti-ones \ˈakshēˈō,nēz, ˈaktēˈō,nās) [L] Roman law: an action or right of action — see FORMULA 5

ac-tio ad-di-stans \-adˈdi,stanz, -ədˈdi,stān(t)s) or actio in distans \-inˈd- n [NL]: action at a distance or without contact (Leibnitz held that the apparent physical impossibility of actio ad distans was an objection to gravitation)

actio bonae fidei \ˈbōnēˈfidē,ī, -ˈbō,nīˈfidē,ē) n, pl actio- nes bonae fidei [LL, lit., action of good faith]: an action in Roman law giving great power to the trial judge to take all matters of good faith, conscience, and equity into consid- eration of the whole case — contrasted with actio stricti juris

ac-tion \ˈakshən n-s [ME accioun, fr. MF action, fr. L action-, actio, fr. actus (past part. of agere to do) + -ion-, -io -ion — more at AGENT] 1: a deliberative or authorized pro- ceeding: a (1): a legal proceeding by which one demands or enforces one's right in a court of justice (2): a judicial pro- ceeding for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense — usu. distinguished from special proceeding (3): the right to bring or maintain such a legal or judicial proceeding — see SUIT b (1): an award by a judicial body (2): an act or decision by an executive or legislative body (as of a government or a political party) or by a supranational agency (the ~ taken by Congress followed a lengthy debate) (strikes organized by ~ committees) 2 a: the bringing about of an alteration by force or through some natural agency (the ~ of water on rocks) b: the process of change or alteration considered as a natural condition: ACTIVITY (intervals of ~ and repose) c: the progressive alteration of mental states or of mental and physical states coordinately esp. when resulting in an observable effect on the external world — compare BEHAVIOR lb d: a quantity expressed in cgs units of erg seconds relating to the change of a dynamic system from one configuration to another and regarded in classical dynamics as twice the product of the average kinetic energy during the change and the time interval in which the change takes place e ecol: the effect of the environment on the individuals exposed to it as a factor in community forma- tion — see COACTION 3: the process of doing: exertion of energy: PERFORMANCE: manner of doing: a: the deport- ment of an actor or speaker or his expression by means of attitude, voice, gesture, and countenance (an actor's words and ~s should agree) b: the movement of the feet and legs (of a horse or dog) c: a function of the body or of one of its parts or organs; specif: DEFECCATION 4: a voluntary act of will that manifests itself externally (an emergency requiring ~) or that may be completed internally (as in contemplation) — contrasted with passion 5 a: a thing done: DEED b actions pl: BEHAVIOR, CONDUCT 3c (somber ~s) c: INITIATIVE, EN- TERPRISE (a man of ~) 6 a (1): an engagement between troops (two small ~s for control of the hill) or ships (decks cleared for ~) (2): combat in war (he saw ~ on a destroyer) b (1): a real or imaginary event or series of events forming the subject of a play, poem, or other composition (2): the un- folding of the events of a drama or work of fiction: PLOT (3): the movement of incidents in a plot (action-packed drama) (an ~ story) c: the combination of circumstances that constitute the subject matter of a painting or sculpture d (1): a religious ceremony: a sacramental or devotional performance (2): the canon of the mass, the communion service, or the Lord's Supper 7: a share of stock 8 a: an operating mechanism: (1): a mechanism connecting the keys with the sounding or effective part (as strings, pipes, or type faces) of a keyboard instrument or machine (2): a mechanism by means of which a firearm is loaded and fired — compare LOCK; AUTOMATIC, DOUBLE-ACTION, SEMIAUTOMATIC, SINGLE- ACTION b: the manner in which a mechanism operates: (1): the response or resistance of keys in a keyboard-operated mecha- nism to the player's or operator's fingers (a stiff ~) (a sluggish ~) (2): the amount of resiliency and flexibility in a fishing rod in relation to its length and diameter (dry-fly ~) (wet-fly ~) (3): the relationship between the number of turns made by the reel spool in a fishing reel for every turn of the reel handle (a single-action reel) 9 a: the price movement and trading volume of a commodity, security, or market b: the entire process of betting including essentially the offering and acceptance of a bet and determination of a winner

2 action \- vt -ED/-ING/-S archaic: to bring a legal action against

ac-tion-abil-i-ty \ˈaksh(ə)nəˈbiləd-ē) n -es: the quality or state of being actionable

ac-tion-able \ˈaksh(ə)nəbəl adj: subject to or affording ground for an action or suit at law (slander is ~)

ac-tion-al \ˈakshənəl, -shnəl adj 1: relating to action or an action 2 of a substance verb form: expressing an action (as was closed in "the door was closed at eight o'clock") — con- trasted with statal

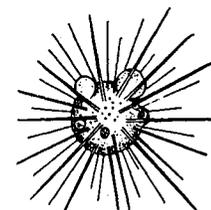
action current n: an electric current arising from a variation of potential occurring during activity in living tissue (as a muscle or nerve)

actiones pl of ACTIO

ac-tion-ing \ˈaksh(ə)nɪŋ, -ēŋ) n-s: the providing of an action to a gun; also: ACTION 8a(2)

ac-tion-ist \-sh(ə)nɪst) n-s: an advocate of direct action esp. in politics

action noun n: a noun denoting action (as belief, inspection, arrival) — sometimes used to include verbal nouns (as the in- finitive to believe or the gerund believing)



actinophrys

as of a legisla-  
tten statement.  
ural function or  
t, and *actum* a

ishment, achieve-  
n, deed, doing,  
xertion, exploit,  
ration, perform-  
n, work. *Act* is  
y; *action* a com-  
tate, or habit of  
d are both used  
fers to the power  
It accomplished.  
eat, notable, and  
event, exploit,  
ength, skill, per-  
l or physical; as,  
emory. *Achieve-*  
g great and notat-  
nt, but its effect  
nent is solid, and  
XERCISE, MOTION.  
ation, endurance,  
ity, inertia, pas-  
quiescence, quiet,  
ension.

ally, proceedings  
ept on record in  
a thing done]  
at can be acted,  
'a-bil'i-ty n.  
ek mythology, a  
bathing and was  
nd killed by his

opic hormone: a  
tracted from the  
other animals; it  
; cortical area of  
with the release of

f or relating to

ff. *Zool.* 1 Bear-  
f or pertaining to  
— *ac'ti-nal-ly* adv.  
erating or offici-  
of another: *act-*  
ing in working order.  
actors: the *act-*  
e, especially of a  
or simulation.  
-i-ae (-i-ē) or -i-as  
3k. *aktis, aktinos*

Pertaining to ac-  
chemical changes  
tin'i-cal. — *ac-tin'*.

gths in the violet  
spectrum capable  
ges, as in photog-

*Chem.* A trans-  
lements arranged  
n the analogy of  
h series: it begins  
iber 89, and con-  
sented by atomic

*adj. Zool.* Having

1 The property  
us and non-lumi-  
il changes. 2 The  
e. [*<ACTIN(O)-* +

A radioactive ele-  
from pitchblende  
; it has a half-life  
MENT.

A group of radio-

Exhibiting increased electric conductivity as a result of being acted upon by light.

**ac-tin-o-graph** (ak-tin'ə-graf, -gräf) *n.* An instrument for graphically recording the chemical intensity of the sun's rays by their action upon the sensitized surface of a rotating cylinder; a recording actinometer.

**ac-ti-noid** (ak'ti-noid) *adj.* Having the form of rays; radiate, as a starfish. [*<ACTIN(O)-* + *-OID*]

**ac-tin-o-lite** (ak-tin'ə-lit) *n.* A variety of amphibole.

**ac-ti-nol-o-gy** (ak'ti-nol'ə-jē) *n.* The science of the chemical action of light.

**ac-tin-o-mere** (ak-tin'ə-mir) *See* ANTIMERE.

**ac-ti-nom-e-ter** (ak'ti-nom'ə-tər) *n.* 1 An instrument for measuring the heat intensity of the sun's rays and for determining the actinic effect of light rays. 2 An instrument for determining the power of radiation by its chemical effect on gases, acids, etc. — **ac-ti-no-met-ric** (ak'ti-nō-met'rik) or **-ri-cal** *adj.* — **ac'ti-nom'e-try** *n.*

**ac-ti-no-mor-phic** (ak'ti-nō-mōr'fik) *adj. Bot.* Regularly ray-shaped: said of flowers that may be divided into similar halves in two or more vertical planes. Also **ac'ti-no-mor-phous**.

**ac-ti-no-my-cete** (ak'ti-nō-mī-sēt') *n. Bacteriol.* One of a class or genus (*Actinomycetes*) of filamentous micro-organisms intermediate between molds and the true bacteria; many species are pathogenic.

**ac-ti-no-my-co-sis** (ak'ti-nō-mī-kō'sis) *n.* A chronic infectious disease of cattle, hogs, and people, caused by the ray fungus (genus *Actinomyces*) and characterized by the formation of suppurating lesions and granulation tumors about the jaws: also called *lumpy jaw*. — **ac'ti-no-my-cot'ic** (-kot'ik) *adj.*

**ac-ti-non** (ak'ti-non) *n. Chem.* A radioactive isotope of radon, occurring as an emanation of actinium, with a half-life of nearly four seconds.

**ac-tin-os-co-py** (ak'tin-os'kə-pē) *n.* Examination of the body by X-rays.

**ac-tin-o-ther-a-py** (ak'tin-ō-ther'ə-pē) *n.* The application of violet and ultraviolet rays in the treatment of disease.

**ac-tin-o-u-ra-ni-um** (ak'tin-ō-yōō-rā'nē-əm) *n.* The isotope of uranium of mass 238, the initial member of the actinium series.

**ac-ti-no-zo-an** (ak'ti-nō-zō'ən) *n.* An anthozoan. [*<ACTINO-* + Gk. *zōon* life] — **ac'ti-no-zo'al** *adj.*

**ac-tion** (ak'shən) *n.* 1 The putting forth or exerting of power; an acting, doing, or working; operation; activity. 2 The performance by any organ of its proper function: The *action* of the heart was normal. 3 The movement of the parts or mechanism of something: the *action* of the engine. 4 The result of putting forth power; the thing done; especially, any act of volition; deed: the rational *actions* of men. 5 In literature, the connected series of events on which the interest depends. 6 A military conflict; battle: a general *action*. 7 *Rel.* A devotional exercise or religious function. 8 *Law* The lawful demand of one's right through judicial proceedings; a judicial proceeding for the enforcement of rights, the redress of wrongs, or the punishment of public offenses. 9 In sculpture or painting, gesture or attitude represented as expressing passion or sentiment. 10 *Physics* A magnitude describing the condition of any dynamic system, expressible as twice the mean kinetic energy of the system during a given interval, multiplied by the duration of the interval. *See* SYNONYMS under ACT, BATTLE, BEHAVIOR, EXERCISE, MOTION, OPERATION, TRANSACTION, WORK. [*<F <L actio, -onis <agere* do]

**ac-tion-a-ble** (ak'shən-ə-bəl) *adj.* Affording ground for prosecution, as a trespass or a libel. — **ac'tion-a-bly** *adv.*

**Ac-ti-um** (ak'tē-əm, ak'shē-əm) An ancient Greek town and promontory in NW Asia

5 To make active by aeration, as sewage.

**activated carbon** Carbon obtained from burning vegetable matter in the absence of air and preferably in a vacuum: important as an adsorbent of gases and vapors and in medicine.

**activated sludge** A mixture of aerobic bacteria and mineral substances found in aerated sewage, having the effect of purifying other sewage brought into contact with it.

**ac-ti-va-tion** (ak'tə-vā'shən) *n.* 1 The process of mixing sewage with air and bacteria to purify it. 2 *Chem.* Any process, such as heating, whereby a metallic catalyst is restored to activity. 3 *Biochem.* The transforming, by a kinase, of an inert enzyme into one that is active. 4 Excitation (def. 2).

**ac-ti-va-tor** (ak'tə-vā'tər) *n.* 1 *Biochem.* A substance that renders active an enzyme that is secreted in an inactive form. 2 *Chem.* A catalyst.

**ac-tive** (ak'tiv) *adj.* 1 Abounding in action; agile; lively; quick; brisk; busy. 2 *Gram.* a Designating a voice of the verb which indicates that the subject of the sentence is performing the action, as *fires* is in the active voice in *The soldier fires the gun*: opposed to *passive*. b Describing verbs expressing action as distinguished from being and state, as *run, hit, jump*. 3 Being in or pertaining to a state of action: opposed to *quiescent, extinct, or latent*: an *active volcano*. 4 Causing or promoting action, or manifested in action; practical. 5 Bearing interest; also, consisting of cash or of property easily exchanged for cash. — *n. Gram.* The active voice. [*<F actif, fem. active <L activus <agere* do] — **ac'tive-ly** *adv.* — **ac'tive-ness** *n.*

*Synonyms:* agile, alert, brisk, bustling, busy, diligent, energetic, expeditious, industrious, lively, mobile, nimble, prompt, quick, ready, restless, sprightly, spry, supple, vigorous. *Active* refers to both quickness and constancy of action; in the former sense it is allied with *agile, alert, brisk*, etc.; in the latter, with *busy, diligent, industrious*. The *active* enjoy employment, the *busy* are actually employed, the *diligent* and the *industrious* are habitually *busy*. The *restless* are *active* from inability to keep quiet; their activity may be without purpose, or out of all proportion to the purpose contemplated. The *officious* are undesirably *active* in the affairs of others. Compare ALERT, ALIVE, BUSY, MEDDLESOME. *Antonyms:* dull, heavy, idle, inactive, indolent, inert, lazy, quiescent, quiet, slow, sluggish, stupid.

**active account** One against which many checks are drawn and deposited.

**active component** *Electr.* The component of an alternating current that is in phase with the electromotive force.

**active duty** 1 Full military or naval status with full pay and allowances. 2 Service or action in the field or at sea in time of war. Also *active service*.

**active list** 1 A list of officers of the regular United States military establishment who are in a permanent legal active status entitling them to promotion by seniority. 2 Officers of other components of the United States Army on active duty.

**ac-tiv-i-ty** (ak-tiv'ə-tē) *n. pl. -ties* 1 The state or quality of being active; action; vigorous movement; active force or operation. 2 *Mech.* Mechanical work done in a unit of time. 3 *Physics* a The degree of emission from a radioactive substance in terms of observed effects. b The excitability of a gas subject to ionization. 4 *Optics* Capacity of a substance to rotate the plane of polarized light to left or right, measured by a polariscope. 5 *Chem.* The ion concentration of a given element or substance. *See* SYNONYMS under EXERCISE.

**Ac-ton** (ak'tən) ward Dalberg historian.

**ac-tor** (ak'tər) cally, a player etc. 2 Any do

CAUSE. [*<L, ē*

**ac-tress** (ak'tris) the stage, in t

**Acts of the A**

New Testamen

**ac-tu-al** (ak'chō real. 2 Being existent; preser — *n.* 1 Some a reality. 2 I cepts. 3 A d or events; espe television prese

**actu-ally** (ak' quality of being

**ac-tu-al-ness**

**ac-tu-al-ize** (ak' To make real, sibility. 2 To represent realis

**ac-tu-al-ly** (ak'c as a matter of

**ac-tu-ar-y** (ak'c who specialize: surance, mortal cially, the offici company, who premiums, etc. *See* ACT.] — **ac — ac'tu-ar'i-al**;

**ac-tu-ate** (ak'chū move to action; incite or influen ated by motiv

*actuatus*, pp. o

*See* ACT.] — **ac**

*Synonyms:* act drive, excite, i influence, lead, urge. One is u or impelled fro

*onyms:* deter, t

**ac-tu-a-tor** (ak'c that which actu releases the trig

**acu-** combining f

**acu-ate** (ak'yōō-

**acu-ity** (ə-kyōō' [*<MF acuité <L*

**acu-le-ate** (ə-kyū with a sting. 2 prickly. Also i

*<aculeus*, dim.

**acu-le-i-form** (: Thornlike.

**acu-le-us** (ə-kyōō prickle. 2 *Bot.* of the bark, as i ovipositor of a modified so as t of *acus* needle]

**acu-men** (ə-kyōō insight or discr

2 *Bot.* A sharply sharpness (of th

*Synonyms:* acu ment, insight, k cacity, sagacity, s ness, acuteness, and perception, the meaning of a astute and discr

a practical aptit

*Perspicacity* is th quickly through

olved. Compare ness, obtuseness,

**acu-mi-nate** (ə-ky