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No. 75159-0-I
COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

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Martin Pagel,

Appellant,

v.

The Isabella Franziska Xochitl Pagel Irrevocable Trust,

Respondent.

OPENING BRIEF

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STATE OF WASHINGTON

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I. INTRODUCTION

At its core, this case involves the parties' respective rights to the proceeds from the sale of a piece of commercial real property located on West 7th Street in Los Angeles, California (the "Property"). Defendant Martin Pagel purchased the Property in 1999. Then he sold half the Property to his two business partners (the "Partners") on a note secured with a deed of trust in favor of Pagel (the "PMSI"). The Property was leased to a now-defunct business owned by Pagel and the Partners: Two Door Garage d/b/a Charlie Rocket (the "Company").

The plaintiff in this case, Susanne Schuegraf, is Pagel's former wife. The dispute stems from the terms of their divorce settlement in 2004. As part of the settlement, a trust was created for each of the parties' two children; Pagel is trustee of their son Max's trust and Schuegraf is trustee of their daughter Isabella's trust. This dispute involves only the trust created for Isabella, the Isabella Franziska Xochitl Pagel Irrevocable Trust (the "Trust").

By the time the parties divorced, the Company's liabilities exceeded its assets; among other debts, the Company owed Pagel over a million dollars (the "Company Debt"). The parties agreed in the divorce

settlement that Pagel would assign one-quarter of the Company Debt to each child's trust. The Company made some payments on the Company Debt, but eventually failed and went out of business.

In the 2004 divorce, Pagel was awarded his half of the Property and the PMSI in the Partners' half. When the Company failed, the Partners could not repay on the PMSI, and deeded their half of the Property back to him in 2012 in lieu of foreclosure. Pagel sold the Property. He used the proceeds first for full payment of a Company business creditor ("Lantern"). He kept one-half of the net proceeds attributable to his half of the Property, and used the proceeds attributable to the Partners' half of the Property to repay the principal and some of the interest due on his PMSI. Pagel set aside a portion of the remaining proceeds for each of his children.

Schuegraf agrees that payment to Lantern was proper, and agrees that Pagel was entitled to the remaining proceeds from his one-half interest in the Property, but claims that the balance of the proceeds from the Partners' one-half interest (\$309,037) should have been paid toward the Company Debt before repayment of the PMSI, and that the Trust's share of that payment (\$98,552) should have been paid to the Trust.

Schuegraf contends that Pagel became a fiduciary of the Trust and that, as such, he was obligated to use the Property proceeds to pay the Company Debt before the preexisting PMSI was repaid.

The trial court agreed with Schuegraf on summary judgment, deciding the case as a matter of law two weeks before the trial was set to begin. This Court should reverse the trial court and either dismiss the action on the ground that the undisputed facts entitle Pagel to judgment as a matter of law or, in the alternative, remand for trial.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to grant judgment as a matter of law to Pagel based on the undisputed facts of this case.
2. The trial court erred in entering the judgment and judgment summary of April 8, 2016, as amended, granting summary judgment to Schuegraf and awarding attorney fees to Schuegraf. CP 713-16. (For the Court's convenience, the April 8, 2016, Order is attached hereto as Appendix A.)

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. Whether Pagel as holder of a purchase money security interest in the Property was entitled to priority as against any security interest held by the Trust. (Assignments of Error 1 and 2.)
- B. Whether the trial court erred in holding that Pagel owed a fiduciary duty to the Trust. (Assignments of Error 1 and 2.)
- C. Whether the trial court erred in holding that the Company would have repaid its debt to the Trust but for Pagel's actions. (Assignments of Error 1 and 2.)
- D. Whether the statute of limitations barred Schuegraf's claim, which was brought more than three years after she was informed that the Trust would not receive any proceeds from the Property's sale. (Assignments of Error 1 and 2.)
- E. Whether Schuegraf's claim is barred by the doctrine of equitable estoppel because she successfully argued in binding arbitration that Pagel's negotiation of security for the Company Debt should be unwound, but her argument now relies on Pagel's failing to maintain the security interest. (Assignments of Error 1 and 2.)
- G. Whether attorney fees were erroneously awarded to Schuegraf, and whether fees should be awarded to Pagel on appeal. (Assignment of Error 2.)

IV. STATEMENT OF THE CASE

A. FACTS

1. Purchase and Sale of West 7th St. Property

a. Pagel's Purchase, Sale to Partners, and Purchase Money Security Interest

Pagel purchased the Property in 1999. CP 489-90. He made some improvements and sold half of the Property to his business partners, Anna Lindstrom and Robin Constable (the "Partners"), on a note. CP 490; CP 505; 508-10. The Partners promised to repay Pagel \$212,500 with interest at a rate of 9 percent. CP 515. The Partners' purchase-money debt to Pagel was secured by their half of the Property. CP 512-13; CP 515-16.

When Pagel and Schuegraf divorced in 2004, they agreed that Pagel would retain ownership of his half of the Property after paying Schuegraf \$595,000 for her community interest in it. CP 686; CP 667, ¶ 22 (relevant provisions of the Property Settlement Agreement and the couples' negotiations leading to that agreement have been excerpted and are attached hereto as Appendix B). They also agreed that Pagel would retain the right to repayment of the Partners' purchase-money debt to him. CP 490; CP 668, ¶ 30; CP 687 (Appendix B at 1, 3). Although the Partners made some early interest payments, they did not repay any

principal, and by 2012 they owed Pagel approximately \$605,000 in principal and unpaid interest. CP 493. Unable to pay their debt to him, the Partners transferred their one-half of the Property back to Pagel in 2012. CP 278-81. Shortly thereafter, Pagel sold the entire Property. CP 141.

b. Other Creditors With Rights in the Property; Payment of Proceeds in Order of Priority; Gift to Children

Between 1999 when Pagel's PMSI arose and 2012 when the Property sold, two other parties gained an interest in the Property: (1) the Company's business lenders demanded that the Property be used to secure the Company's debts (CP 598, ¶ 23); and (2) after the divorce, Pagel took steps to have the Partners' one-half of the Property secure the Company Debt to Pagel and the Trust. CP 186-89.

Schuegraf admits that the Company's business lender, Lantern Finance Company,¹ was properly repaid first from the sales proceeds. RP 10. (Hereinafter, the Company's debt to Lantern will be

¹ Lantern was actually a successor in interest to several prior business lenders of the Company, including Capital Factors, Inc., Capital Business Credit LLC, and Capital Business Credit (California) LLC. The parties agree that Lantern was a successor in interest to each of these prior business lenders (RP 10), and for clarity's sake, all factors and business lenders will collectively be referred to as "Lantern" throughout this brief.

referred to as “Lantern’s First Priority Debt.”) Schuegraf also admits that Pagel was entitled to the portion of the net proceeds attributable to his one-half interest in the Property. RP 10-11. This dispute involves the parties’ disagreement about which debt should have been repaid next after Lantern’s First Priority Debt from the Partners’ one-half of the proceeds: Pagel’s PMSI or the Company Debt.

Pagel repaid the PMSI first. CP 378. But although the Partners owed him approximately \$605,000 (CP 493), he paid himself only \$238,900 from their share of the proceeds. CP 378. This represented the unpaid principal owed since 1999 (\$212,500), plus a small amount of accrued and unpaid interest. Even though the Property’s sales proceeds should have been entirely consumed by senior debt, Pagel *wanted* his children to share in the proceeds. CP 177-78. After repaying himself less than he was owed under the PMSI, he split the remaining sales proceeds as though the Trust were a secured creditor of record, giving \$21,810.90 to each child. CP 190; CP 194.

2. **Schuegraf Objected to Pagel's Effort to Secure the Company Debt**

a. **The Trust Acquired an Interest in Unsecured, Subordinated, Unliquidated Debt as Part of the Divorce**

When Schuegraf and Pagel divorced, the Company owed Pagel between \$1.2 and \$1.6 million (the "Company Debt"). CP 58. The Company Debt was unsecured, the precise amount due to be repaid was uncertain, and the terms of repayment were not recorded in any written document. Id.; CP 491. The only contemporaneous records of the Company Debt are several subordination agreements, executed by Pagel and the Company in the year 2000. CP 567-71 (the "Subordination Agreements," attached hereto as Appendix C). The Subordination Agreements required that the Company Debt to Pagel would be and remain subordinate to Lantern's First Priority Debt; the Company could not repay any of the Company Debt, or give Pagel the benefit of any security or collateral, before repaying Lantern's First Priority Debt. Id.

Four years later, in the Property Settlement Agreement, Schuegraf and Pagel agreed that Pagel would retain one-half of the Company Debt (which was still uncertain in amount, unwritten, unsecured, and

subordinated to Lantern's First Priority Debt), and transfer one-quarter of it into trust for each of their children. CP 671 (Appendix B at 2).²

b. Pagel Negotiated a Security Interest for the Company Debt

After the divorce, Pagel memorialized the Company Debt in a note. CP 491. In his negotiation of the Company Debt with the Partners, Pagel chose to forgo up to \$400,000 of the Company's undocumented obligation to him in exchange for documenting and securing the Company Debt in the amount of \$1,200,000. Id. The Partners agreed to use their one-half of the Property as collateral to secure this note. Id.; CP 552-56. The Partners signed a deed of trust securing the now liquidated and documented Company Debt on March 3, 2006. CP 554. At the time, one-half of the Property was valued at approximately \$1 million. CP 58. And at the time, the Partners' half of the Property was already collateral for the purchase-money debt that they personally owed to Pagel. CP 508-16.

Pagel's action to secure the Company Debt using the Partners' one-half of the Property was voluntary. It was not required by the divorce

² Although the Property Settlement Agreement references an "existing promissory note/account receivable," there is no evidence of such a note, and neither party has alleged that the Company's debt to Pagel was evidenced by a promissory note at the time of the divorce.

settlement. He negotiated for a security interest because he was afraid that the Company would not be able to pay the Company Debt. CP 491. But for Pagel's action to negotiate that security interest, the Trust had no connection with or interest in the Property. A visual analysis of the creditors of the Company and of the Property is below.

TABLE 1			
Creditors of Company & Property at Signing of Property Settlement Agreement			
Creditor	Debtor	Interest	Priority As Of
Lantern	Company	Superior to all other creditors of the Company; not secured by Property	2000
Pagel	Partners	PMSI in Partners' ½ of the Property	1999
Pagel	Company	Company Debt (unsecured, unliquidated, subordinated)	None

At the time of the divorce, Pagel personally was the only creditor with an interest in the Property; no creditor of the Company had an interest in the Property. When the Trust gained an interest in the Company Debt, the Company Debt had nothing to do with the Property, and was unsecured, unliquidated, and subordinated to Lantern's First Priority Debt.

TABLE 2			
Creditors of Company and Property Under Property Settlement Agreement			
Creditor	Debtor	Interest	Priority As Of
Lantern	Company	Superior to all other creditors of the Company; not secured by Property	2000
Pagel	Partners	PMSI in Partners' ½ of the Property	1999
Pagel	Company	½ of Company Debt (unsecured, unliquidated, subordinated)	None
Isabella's Trust		¼ of Company Debt (unsecured, unliquidated, subordinated)	
Max's Trust		¼ of Company Debt (unsecured, unliquidated, subordinated)	

The divorce did not change the order of priority of creditors of the Company or the interests in the Property. It merely divided one-half of Pagel's interest in the Company Debt between the two children's trusts. CP 671-72 (Appendix B at 2).

When the Partners signed the deed of trust securing the Company Debt with their half of the Property on March 3, 2006 (CP 187), for the first time, a creditor of the Company became secured by an interest in the Property. The deed of trust signed on March 3, 2006, was backdated to be effective as of January 2, 2004 (CP 186), which gave the Trust the benefit of the security dating back to the year of the parties' divorce (two years before Pagel's negotiations were finalized).

TABLE 3			
Priority Following Pagel's Negotiations			
Creditor	Debtor	Interest	Priority As Of
Lantern	Company	Superior to all other creditors of the Company; not secured by Property	2000
Pagel	Partners	PMSI in Partners' ½ of the Property	1999
Pagel	Company	½ of Company Debt secured by Partners' ½ of the Property	2004 Deed of Trust
Isabella's Trust		¼ of Company Debt secured by Partners' ½ of the Property	
Max's Trust		¼ of Company Debt secured by Partners' ½ of the Property	

c. Schuegraf Objected to Pagel's Negotiation for Security; Arbitration Ordered Debt Transferred to Trust "As It Was in 2004"

Pagel's obligation under the divorce settlement was to transfer one-quarter of the *then-existing* Company Debt to the Trust. CP 671. When Pagel reduced the debt to writing and secured it in 2006, Schuegraf argued that Pagel did not have the authority to change the terms of the Company Debt, that he was obligated to transfer exactly what he had promised to transfer in 2004, and that his negotiation had harmed the Trust. CP 133-35. In 2007, in binding arbitration, Judge Roselle Pekelis (Ret.) agreed with Schuegraf, holding that the value of the Trust's interest in the Company Debt should be adjusted to give the Trust one-quarter of the Company Debt

as it existed when Pagel's obligation to fund the Trust arose in 2004.

CP 32, 33 (attached hereto as Appendix D). Judge Pekelis in her August 17, 2007, Arbitration Decision said that Pagel's interest in the Company Debt must be adjusted

in such a way as to give the childrens' Trusts one-quarter each of the amount of the account receivable as it existed per the Property Settlement Agreement in July, 2004.

CP 32 (Appendix D at 1).³

That is, Judge Pekelis held that Pagel had no right to change the Trust's interests in the Company Debt by negotiating a reduced liquidated amount in exchange for security, and Pagel was required to pay the Trust 31.89 percent of the amounts he received on the Company Debt as it was when the Property Settlement Agreement was signed to compensate for the reduction in the face value of the note that Pagel had negotiated. Id. In July 2004, the Company Debt was unsecured and subordinated to

³ Schuegraf's proposed order, which Judge Robinson signed granting summary judgment, inaccurately quotes Judge Pekelis's prior ruling:

Judge Pekelis ruled that each of the children's trusts should be given "a thirty-one point eight nine percent interest in the promissory note in the amount of \$1,200,000 dated January 2, 2004 . . ."

CP 714 (Appendix A at 2, lines 13-15).

But the quoted language is nowhere to be found in Judge Pekelis's ruling. CP 32-33 (Appendix D).

Lantern's First Priority Debt. Pagel complied with the order. CP 305; CP 59. He transferred 31.89 percent of the Company Debt to the Trust (see *infra* Section 3). And, although not obligated to, he recorded the deed of trust he had negotiated securing the Company Debt. CP 265-70.

3. Schuegraf and Pagel Agreed to Use a Participation Agreement to Administer the Company Debt

Once the percentage of debt to be transferred to the trusts was finally determined, Pagel and Schuegraf agreed that rather than creating separate notes, any payments on the Company Debt should be shared among its obligees (Pagel and the two children's trusts) using a participation agreement. CP 573-76 (the "Participation Agreement," which is attached hereto as Appendix E). The Participation Agreement ensured that Lantern's First Priority Debt would maintain its priority. CP 491-2; CP 573, ¶ 5 (Appendix E at 1).

4. Pagel Kept the Company Debt Subordinate to Lantern's First Priority Debt

As Schuegraf pointed out to the trial court, in 2008 when Pagel recorded the deed of trust he had negotiated to secure the Company Debt, he turned himself and the Trust into the most senior lienholders of record

against the Property.⁴ CP 241. Lantern's First Priority Debt was not then secured of record by the Property, and the deed of trust recorded in 2008 meant that the Company Debt might be repaid (from proceeds of the Property) before Lantern's First Priority Debt.

In early 2009, Lantern insisted that Lantern's First Priority Debt continue to be superior to the Company Debt per the Subordination Agreements of 2000, and required that a deed of trust be recorded against the Property in its favor. CP 598, ¶ 23. This ensured that, per the Subordination Agreements (CP 567-71 (Appendix C), Lantern's First Priority Debt would be repaid before the Company repaid the Company Debt from any source.

To restore Lantern to its senior position against the Company Debt, Pagel substituted and reconveyed the 2008 deed of trust he had obtained to secure the Company Debt, and recorded a first-priority deed of trust in the entire Property in favor of Lantern. CP 401-02; CP 645-46. This was necessary to allow the Company to continue to operate and have any hope of repaying the Company Debt. Thereafter, Lantern remained the only

⁴ Pagel's PMSI in the Partners' one-half interest was never recorded. As shown below, however, it was always entitled to priority under California law.

secured creditor of record in the Property.⁵ When the Property sold in 2012, Lantern's deed of trust was still on record, and the deed of trust securing the Company Debt to Pagel and the Trust was not.

Schuegraf argued to the trial court that once Pagel secured the Company Debt, he had an obligation to maintain the security interest. RP 50. Pagel argued that his obligation was to transfer a portion of the Company Debt as it was in 2004 per Judge Pekelis' order, which he did. CP 460-61. He further argued that even if he had an obligation to maintain the security interest, the Trust suffered no damages as a consequence of its unsecured status: the Company Debt had always been subordinate to Lantern's First Priority Debt and junior to Pagel's PMSI, and when the Property sold in 2012, the proceeds were insufficient to satisfy the first two creditors. RP 38; CP 461-63.

5. The Company's Failure

Back in 2004, Schuegraf and Pagel's independent valuation experts agreed that immediately before the divorce, the Company's liabilities exceeded its assets and the Company's future looked bleak.

⁵ Lantern Finance Company became the Company's business lender in 2010, assuming the secured senior-creditor position of the prior lender, and that is when a deed of trust was recorded in Lantern's favor. CP 402; CP 647.

CP 490; Grant Thornton valuation, CP 534-40 (the Company had “little to no current value creation on a stand-alone basis,” and “the book value of equity, as of June 30, 2003, was negative \$920,165”); Morrow Kessler Dowsing appraisal, CP 541-50 (concluding that 50 percent ownership interest in the Company was worth \$0 as of December 31, 2003).

When Pagel and Schuegraf agreed to transfer a portion of the Company Debt to the Trust in 2004, they knew that the Company’s ability to repay it was uncertain at best, and that the Company was bound to repay Lantern’s First Priority Debt before it repaid the Company Debt. The Company failed during the recession, and was unable to repay its debts. CP 492; CP 300-03. The Property was sold to satisfy Lantern’s First Priority Debt when the Company could not repay it.

6. Schuegraf’s and Pagel’s Duties to the Trust

a. Schuegraf’s Duties and Performance as Trustee

Schuegraf is Trustee of the Trust. CP 79. Pagel and Schuegraf together agreed to transfer one-quarter of the unsecured and unliquidated Company Debt to the Trust in 2004. CP 671-72 (Appendix B at 2). When the Property Settlement Agreement was signed in 2004, no trust agreement had been prepared; a trust agreement was signed creating the

Trust in 2008. CP 79-96; CP 97-98. In the time between 2004 and 2008 when the Trust was signed, Pagel deposited interest the Company paid toward the Company Debt into a Helsell Fetterman trust account on behalf of the Trust. CP 97; CP 134. Schuegraf did not dispute the propriety of those payments. Id.

In 2008, Pagel and Schuegraf agreed the Trust should be paid through a participation agreement, and that the Trust's interest should not take seniority over Lantern's First Priority Debt. CP 573-76 (Appendix E). Schuegraf signed the Participation Agreement on behalf of Isabella, as Trustee of the Trust. Id. The Participation Agreement does not name Pagel as a fiduciary of the Trust, and does not explicitly impose any fiduciary duties on Pagel. Id.

Pagel asked Schuegraf for accountings of her management of Trust assets quarterly, as required under the Trust (CP 84), but she did not respond or account until Pagel moved for summary judgment in this case; the accounting she provided in response to that motion showed that Trust assets had languished in a deposit account for years. CP 176-78; CP 493.

b. Payment of Debt Under Participation Agreement

Under the Participation Agreement, Pagel was responsible for dividing and distributing payments on the Company Debt as he received them. CP 573-76 (Appendix E). The parties do not dispute that Pagel made payments of interest as he received them from the Company. No party has alleged that Pagel collected interest payments and then failed to deposit the correct amount into the Helsell Fetterman trust account, or that Helsell failed to deposit this collected interest into the Trust once it was formed. Rather, the dispute begins with the Company's inability to pay the Company Debt.

Pagel was to notify Isabella and Max if the Company was in default, and seek approval from them before foreclosing on the Company Debt. CP 573-76 (Appendix E). Isabella was a minor until September 16, 2015. CP 79. The Participation Agreement is between Pagel, Isabella, and Max. CP 573-76 (Appendix E). But Schuegraf and Pagel, as the parents of Isabella and Max and the trustees of their respective trusts (not the children themselves), signed the Participation Agreement. Id.

c. Pagel Kept Schuegraf Informed; Schuegraf Did Not Respond

Pagel informed Schuegraf that the Company was unable to pay on the Company Debt in his first quarterly report following that failure, in January 2009. CP 620. Pagel continued to tell Schuegraf quarterly that the Company was unable to pay. CP 621-24. Schuegraf did not respond to Pagel or provide any comments or opinions about what Pagel should do on behalf of the Trust to enforce the Company Debt. CP 493. Pagel did not seek or obtain a signed writing from his 11-year-old daughter regarding the Company's inability to repay its debt, or its effective default.

Pagel informed Schuegraf of the Property's sale within seven days of closing, on October 7, 2012, and informed her that he would not be depositing any of the sales proceeds into the Trust. CP 626. Pagel did not deposit money into the Trust because he was concerned about Schuegraf's management of Trust assets. *Id.*; CP 178. Pagel invested a portion of the Property's proceeds for Isabella outside the Trust, and gave Schuegraf account statements showing that the assets he managed were growing. CP 178; CP 196-99.⁶ Although Schuegraf knew that Pagel had been

⁶ With each email, Pagel also asked Schuegraf how Trust assets she managed for Isabella were performing. Schuegraf did not respond. CP 178.

managing these assets for Isabella for years, and even received statements showing Pagel's management of those assets, she did not seek to have those funds placed in the Trust. Schuegraf sued Pagel insisting that the money should be under her control only when, after she had refused to pay Isabella's college tuition and health insurance from the Trust, Pagel used these funds to pay those expenses for Isabella.⁷ CP 178-79.

d. Pagel Maintained a Separate Account for Isabella When Schuegraf Failed as Trustee

When the Property sold in 2012, the Partners' share of the net proceeds after payment of Lantern's First Priority Lien was \$309,037, and they owed him \$605,000. Even though the Partners' PMSI debt to him consumed the full amount of their share of the proceeds, Pagel did not keep all the proceeds for himself. *See* Section 1.b, *supra*. Instead, after repaying himself an artificially low amount for his purchase-money interest, Pagel set aside \$21,810.90 of the Property's sales proceeds for each child. CP 190; CP 194. He used a separate investment account for Isabella, rather than depositing this money into the Trust, because of Schuegraf's nonresponsiveness and failure to adhere to the terms of the

⁷ Schuegraf still refuses to pay for Isabella's college tuition from the Trust. Pagel's payment to satisfy the trial court judgment has left him unable to help Isabella pay her tuition, and Isabella is not attending college for this academic year.

trust agreement. CP 178. Since 2012, Pagel's separate account for Isabella, which started at less than \$22,000, earned more than the Trust earned on its corpus of \$80,000 in the entire eight years of Schuegraf's administration, in large part because Schuegraf kept Trust assets in a low-interest savings account for years. Id.; CP 126-31.

When Schuegraf refused to pay for Isabella's college and health insurance with Trust funds, Pagel used money in Isabella's investment account to pay for these expenses on Isabella's behalf. CP 178-79. Now that Pagel has paid the Trust to satisfy the judgment in this action, he is unable to continue to pay for Isabella's education. And Schuegraf as Trustee continues to refuse to pay for Isabella's tuition from the Trust.

B. PROCEDURAL HISTORY

Schuegraf filed a Verified TEDRA Petition seeking a judgment against Pagel in the amount of \$382,680 on November 13, 2015. CP 1-40. The original amount sought was 31.89 percent of the \$1,200,000 Company Debt. Id. Later, Schuegraf acknowledged that the maximum amount the Trust could recover was 31.89 percent of the proceeds received from the Partners' one-half interest in the Property. RP 10-11.

Schuegraf also acknowledged that Pagel's use of the proceeds to pay Lantern's First Priority Debt first was proper. Id.

The matter was certified for trial on December 11, 2015, with the requirement that the parties engage in mediation. CP 902-03. Schuegraf moved for summary judgment, alleging that Pagel had become a fiduciary of the Trust in 2004 when he agreed to assign a portion of the Company Debt to the Trust, and that he had breached his fiduciary duty when the Company went into default and he did not obtain additional security, substitute security, provide a personal guarantee for the debt, or seek approval from Isabella (who was at the time a minor child) before taking action. CP 232-47.⁸ The parties engaged in unsuccessful mediation.

With the summary judgment pending, Schuegraf amended her Petition to try to make it more consistent with the documents.⁹ Judge Palmer Robinson heard oral argument and granted Schuegraf's summary judgment motion, holding that Pagel was in fact a fiduciary, that he had

⁸ Pagel moved for summary judgment, arguing that his obligation under the Property Settlement Agreement was to transfer a percentage of a debt, which he did, not to personally guarantee that debt or ensure its repayment. Pagel further argued that Schuegraf had breached her fiduciary duties to the Trust for years and that she should be removed as Trustee for failing to provide an accounting in contravention of the terms of the trust agreement and Washington law. CP 100-16. The trial court denied this motion. CP 200-02.

⁹ An attempt to add Max's trust to the suit was denied. CP 394-96.

breached fiduciary duties to the Trust as a matter of law, and that his actions had damaged the Trust. CP 713-16 (Appendix A). Judge Robinson concluded that Pagel owed \$98,552 to the Trust, which is 31.89 percent of the net sales proceeds attributable to the Partners' one-half interest in the Property, before any payment to Pagel on the Partners' purchase-money debt to him. Id. Judge Robinson did not allow a setoff for the amount that Pagel had used from the proceeds of the Property's sale to pay for Isabella's college tuition and health insurance. Id.

Judge Robinson signed an amended judgment on May 4, 2016, adding prejudgment interest of \$42,213.11,¹⁰ awarding attorney fees and costs in the amount of \$63,202.25,¹¹ and removing Max's Trust from the judgment. CP 829-32.

Pagel timely filed appeals of the two judgments. CP 816-829 and 872-878. Schuegraf wrongfully garnished both Pagel's and Isabella's

¹⁰ This amount was later treated as though it was liquidated, when in fact the amount was disputed; Pagel maintains that, if in fact he was obligated to pay the Trust any amount of the Property's proceeds, that amount should be reduced by the amount that he used to pay for Isabella's college tuition and health insurance when the Trustee refused to make those payments from the Trust. CP 1125-27.

¹¹ The fee award initially included a double award for time spent opposing a motion to compel, which was later corrected. CP 1037-40.

bank accounts (CP 834-36),¹² then argued for and received post-judgment interest calculated as though prejudgment interest was included in the principal amount of the judgment.¹³ CP 1125-27.¹⁴

V. ARGUMENT

This Court reviews a grant of summary judgment de novo and views the facts and all inferences in the light most favorable to the nonmoving party. Verdon v. AIG Life Ins. Co., 118 Wn. App. 449, 452, 76 P.3d 283 (2003). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. E.g., Doe v. Dep't of Transp., 85 Wn. App. 143, 147, 931 P.2d 196, rev. denied, 132 Wn.2d 1012 (1997). A material fact is one on which the outcome of the case depends. Tran v. State Farm Fire & Cas. Co., 136 Wn.2d 214, 223, 961 P.2d 358 (1998).

¹² Schuegraf still has not paid the attorney fees that the court awarded to Pagel in the amount of \$2,500. CP 835.

¹³ Although the total amount that should have accrued post-judgment interest was \$161,754 (only the judgment principal and fees and costs), post-judgment interest was in fact accrued on \$203,967 (an amount that included prejudgment interest). CP 1104-27.

¹⁴ Pagel filed a Supplemental Designation of Clerk's Papers on September 29, 2016, and received an Index of these Supplemental Clerk's Papers on October 10, 2016. Pagel has corrected the affected pages (pages 25-26) of this brief and transmitted them to the Court of Appeals and counsel for Susanne Schuegraf.

The trial court's findings of fact are entitled to no weight, Chelan Cty. Deputy Sheriffs' Ass'n v. Cty. of Chelan, 109 Wn.2d 282, 294 n.6, 745 P.2d 1 (1987); Eagle Grp., Inc. v. Pullen, 114 Wn. App. 409, 58 P.3d 292 (2002), and all facts and reasonable inferences from those facts must be viewed most favorably to the party resisting the motion. Schaaf v. Highfield, 127 Wn.2d 17, 21, 896 P.2d 665 (1995).

Pagel, in appealing summary judgment in favor of Schuegraf, asks that this Court view all facts and reasonable inferences from the record below in his favor. He also believes that, even when viewing all facts and reasonable inferences in Schuegraf's favor, this Court can and should dismiss the action because the undisputed facts entitle Pagel to judgment as a matter of law for each of the independent reasons set forth in Argument Sections A-E.

A. PAGEL'S PMSI TOOK PRIORITY OVER ALL OTHER CREDITORS

The trial court concluded that Pagel was not entitled to repayment on his PMSI before the Trust received payment on the Company Debt. This conclusion was in error. The apparent grounds for the trial court's ruling were that (1) the PMSI was unrecorded (RP 51), and (2) when

Pagel took title to the Partners' one-half of the Property, his PMSI was extinguished before the Property was sold (RP 31-33). Both rationales are directly contrary to California law. Under a proper application of clear California law, Pagel's PMSI had priority over the Company Debt, and summary judgment should have been entered dismissing this action.

Additionally, the trial court apparently concluded that the parties did not intend for Pagel to be repaid on the PMSI, and that the legal order of priority of creditors hinged on the parties' intent. But this conclusion is based on contested facts, and should not have been resolved against Pagel on summary judgment.

Because the Property was in California, California law applies to determine which party's interest in the Property took priority. Brown v. Brown, 46 Wn.2d 370, 372, 281 P.2d 850 (1955).

1. **PMSI, Even if Unrecorded, is Superior to All Other Creditors Under California Law**

In California, the holder of a PMSI is always a first-priority creditor, even if unrecorded. Walley v. P.M.C. Inv. Co., 262 Cal. App. 2d 218, 220, 68 Cal. Rptr. 711 (1968); Isaac v. City of Los

Angeles, 66 Cal. App.4th 586, 601, 77 Cal. Rptr. 2d 752 (1998). In Walley, 262 Cal. App. 2d at 220, the plaintiff argued “that [a] purchase money encumbrance has priority only if it was recorded prior to the other lien.” The California court squarely rejected this argument: “There is nothing in the recording laws to require that.” Id. Here, the fact that Pagel’s PMSI in the Partners’ one-half of the Property was unrecorded had no effect on its priority over the Company Debt.

2. **Pagel Continued to Be the First-Priority Creditor Even After Taking Title to the Collateral**

At oral argument, the trial court sua sponte asked whether the Partners’ debt to Pagel was satisfied upon their transfer to him of their one-half of the Property. RP 28-39. The court may have relied on the merger doctrine, which was not briefed, to conclude that Pagel was not entitled to repayment under his PMSI from the Property proceeds. But California never presumes a merger when there are multiple liens on the same piece of collateral:

Equity will keep the legal title and the mortgagee’s interest separate, although held by the same person, whenever necessary for the full protection of the person’s just rights. (Carpentier v. Brenham, 40 Cal. 221.) If there is an intervening mortgage, the acquirement of title will not operate as a merger. (Brooks v. Rice, 56 Cal. 428.) The

same rule would apply as to an intervening attachment or other lien.

Scrivner v. Dietz, 84 Cal. 295, 299, 24 P. 171 (1890).¹⁵

A century's worth of California cases reaffirm the principle that when more than one lien encumbers a property, merger is a question of intent, and courts presume that a grantee intends to protect his or her rights; therefore, where the grantee is a senior lienholder, California will presume no merger occurs when the grantee takes title. Davis v. Randall, 117 Cal. 12, 16-17, 48 P. 906 (1897). So when multiple liens encumber the same piece of collateral, the presumption is that no merger results when one lienholder acquires title to the collateral. Rumpp v. Gerken, 59 Cal. 496, 501 (1881) ("In law, a merger . . . takes place when a greater estate and a less coincide and meet in the same person in one and the same right, without any intermediate estate.") (emphasis added); Sheldon v. La Brea Materials Co., 216 Cal. 686, 692, 15 P.2d 1098 (1932) ("It is a general rule, therefore, that the mortgagee's acquisition of the equity of

¹⁵ Likewise, under Washington law, a deed in lieu of foreclosure does not result in merger when there are junior liens. See, e.g., Altabet v. Monroe Methodist Church, 54 Wn. App. 695, 699, 777 P.2d 544 (1989).

redemption does not merge his legal estate as mortgagee so as to prevent his setting up his mortgage to defeat an intermediate title . . .”).

Two intervening estates had interests in the Property that prevented Pagel’s interests from merging: Lantern’s interest as a secured creditor of the entire Property (CP 402; CP 647) and, under Schuegraf’s theory, the Trust’s interest in the Partners’ one-half of the Property. Therefore, when Pagel took title to the Partners’ one-half of the Property, his priority under the PMSI was preserved.

3. Parties’ Intent Is a Factual Determination and Has No Bearing on Legal Order of Repayment

Without citing any law or relevant facts, the trial court held that allowing Pagel priority over the Trust “would give him the benefit of the note and the security, which was clearly not contemplated by the parties.” CP 715 lines 17-18 (Appendix A at 3). This erroneous conclusion is apparently based on a finding of fact about the parties’ intent—a disputed issue of fact that should have been viewed in Pagel’s favor on summary judgment.

The record is clear that when they divorced, Schuegraf and Pagel were both aware that the Partners owed Pagel money for their half-

interest in the Property. CP 490; CP 662-89 (Appendix B). The record is also clear that the PMSI existed before the Trust gained an interest in the Company Debt, and before the Company Debt was secured with the Property. *See* Section IV.A.2, *supra*.

The undisputed facts and applicable California law show that regardless of whether the Trust's interest in the Property was secured or of record, Pagel *always* had first right to the proceeds of the Partners' one-half of the Property as a secured purchase-money creditor. No subsequently recorded deeds of trust could alter that fact, which entitles Pagel to judgment as a matter of law: After payment of the first two priority creditors, there was nothing with which to pay the Company Debt. But if, as the trial court ruled, the result hinges on the parties' intent, then this case should be remanded so the parties' understanding of their arrangements can be explored at trial.

B. PAGEL IS NOT A FIDUCIARY OF THE TRUST

All of Schuegraf's claims on summary judgment were based on her allegation that Pagel was a fiduciary of the Trust. CP 232-47. To meet the elements of a cause of action for breach of fiduciary duty, Schuegraf must prove (1) existence of a duty owed, (2) breach of that duty,

(3) resulting injury, and (4) that the claimed breach proximately caused the injury. Miller v. U.S. Bank of Wash., 72 Wn. App. 416, 426, 865 P.2d 536 (1994). Schuegraf has failed to show the existence of any fiduciary duty owed by Pagel to the Trust, and cannot show breach, resulting injury, or proximate cause.

A fiduciary relationship arises as a matter of law in certain contexts, such as attorney and client or trustee and beneficiary. None of those legal fiduciary relationships exist between Pagel and the Trust. A fiduciary relationship can also arise in fact. Liebergesell v. Evans, 93 Wn.2d 881, 890–91, 613 P.2d 1170 (1980). But without a legal fiduciary relationship, whether a fiduciary relationship exists is a factual determination, and should not have been decided in Schuegraf’s favor on summary judgment.¹⁶ Schuegraf proposed that Pagel became a fiduciary in fact under either (1) the Property Settlement Agreement, when he agreed to form and fund an express trust for his daughter with Schuegraf

¹⁶ Whether a party has breached a duty owed to another is also generally a question of fact, and in this case, it was a contested material fact. See Valentine v. Dep’t of Licensing, 77 Wn. App. 838, 846, 894 P.2d 1352 (1995) (breach of fiduciary duty is generally question of fact); Uni-Com Nw, Ltd. v. Argus Publ’g Co., 47 Wn. App. 787, 796, 737 P.2d 304 (1987); Grund v. Del. Charter Guarantee & Trust Co., 788 F. Supp. 2d 226, 249 (S.D.N.Y. 2011) (whether a party owed and breached its fiduciary duty involves questions of fact).

as Trustee, or (2) the Participation Agreement, when he agreed to share payments on the Company Debt with the Trust. Those facts simply do not give rise to a fiduciary duty under Washington law.

1. **Obligation to Fund a Trust Does Not Create Fiduciary Duty in Grantor**

Schuegraf has pointed to no Washington law that would transform a trust's grantor into a fiduciary, or make a fiduciary out one who agrees to fund an express trust. Pagel was obligated to create and fund an express trust for his daughter Isabella, which he did. CP 79-96. Schuegraf was named as the Trustee. Id.

Pagel as grantor was obligated to transfer a percentage of the Company Debt to the Trust, and he did that. CP 305; CP 59. When that obligation arose, the Company Debt was unsecured, unliquidated, and subordinate to Lantern's First Priority Debt. *See* Section IV. A.2.a, *supra*.

The Trust is an express trust with a named fiduciary—Schuegraf—who is charged with managing and protecting Trust assets and administering the Trust for the benefit of its beneficiary.¹⁷ Pagel and Schuegraf agreed to fund the Trust in part with a portion of a debt owed

¹⁷ Before the Trust was signed in 2008, Pagel transferred the Company's payments on the Company Debt to a Helsell Fetterman trust account (CP 134; CP 97), and none of Schuegraf's complaints stem from that period. CP 232-245.

by a then-struggling company to Pagel (*see* Section IV.A.5., *supra*), and nowhere in the Property Settlement Agreement did the parties agree that Pagel would individually assume the debt or ensure that the Company repaid it.¹⁸ The Property Settlement Agreement created an obligation for Pagel to fund the Trust, not to serve as its fiduciary.

Schuegraf argued to the trial court that Pagel's negotiation to secure the Company Debt created duty in him to ensure its repayment (RP 50), but years earlier, Schuegraf had argued that the same negotiation was unauthorized, and she won. *See* Section IV. A.2.c, *supra*. Pagel's obligation to the Trust arose in 2004 when he signed the Property Settlement Agreement. The fact that the Company Debt was secured when he ultimately assigned a portion of it to the Trust in 2008 did not change his obligation under the Property Settlement Agreement, which was clarified under Judge Pekelis' order (holding that the Company Debt be transferred exactly as it was in July, 2004). CP 32-33 (Appendix D).

¹⁸ In fact, when Pagel took action to try to increase the chances that the Trust would be repaid by negotiating a note and securing the debt, Schuegraf sued him, arguing that Pagel should not have reduced the debt amount in exchange for a security interest in the Partners' share of the Property, and she prevailed. CP 97; CP 133-35. Pagel, although he had no obligation to do so, tried to ensure repayment, but his attempt was frustrated by Schuegraf. CP 58-59; CP 368.

2. **Participation Agreement Does Not Create Fiduciary Duty Unless Terms of Agreement So Specify**

Schuegraf also claimed that the Participation Agreement, which made Pagel responsible for dividing the Company's loan payments among himself and his children's trusts, created a fiduciary duty. A participation agreement inherently creates a duty in one participant to administer repayment of a debt to multiple parties—the administering party collects payments and remits the appropriate amount to each participant. The Ninth Circuit has been confronted multiple times with the question of whether a participation agreement creates a fiduciary duty in the administering party, and has concluded that it does not, unless the agreement itself contains specific language that imposes a fiduciary relationship. First Citizens Fed. Sav. & Loan Ass'n v. Worthen Bank & Trust Co., N.A., 919 F.2d 510, 513 (9th Cir. 1990). Although the administering party does undertake duties to the other loan participants, the Ninth Circuit rejected the idea that those duties automatically rise to the level of fiduciary duties, holding firmly that “fiduciary duties among loan participants depend upon the terms of their contract.” Id.

Here, the Participation Agreement in question makes no mention of a fiduciary duty. CP 573-76 (Appendix E). The contract that Schuegraf and Pagel agreed upon to share the repayment of the Company Debt identifies Schuegraf as Trustee as the fiduciary of the Trust. Id. The duties that Pagel assumed under the Participation Agreement were to accept repayment of the Company Debt and to divide payments according to the terms of the agreement. Schuegraf did not claim that he breached those duties, and he did not. Rather, he properly distributed all the funds he collected from the Company on the Company Debt. Schuegraf apparently argues that an 11-year-old Isabella should have been consulted before the Company defaulted, but Schuegraf herself was consistently informed of the Company's failure to perform (CP 620-624), and as Trustee for Isabella, she offered not one word of advice or direction to Pagel regarding his collection activities under the Participation Agreement. CP 493.

C. PAGEL'S ACTIONS CAUSED NO DAMAGES

The trial court in its April 8 Judgment stated:

Mr. Pagel ignored the separate interest of the beneficiaries by removing security for the trusts' interests without consideration and by privileging his own interest in the debt over that of his children's trusts.

CP 715, lines 21-23 (Appendix A at 3).

The record does not support this conclusion. Pagel's reconveyance of the deed of trust he had negotiated to secure the Company Debt neither privileged his own interests nor harmed the Trust's. On the contrary:

(1) Lantern's First Priority Debt was always superior to all other creditors of the Company based on the Subordination Agreements that predated the parties' divorce (*see* Section IV.2.b, *supra*), and (2) Pagel's PMSI was always entitled to priority under California law. This was true when the deed of trust securing the Company Debt was on file, and it was true after it was reconveyed. A recorded deed of trust securing the Company Debt would not have changed the fact that the Partners' one-half of the Property was not valuable enough in 2012 to satisfy the two first-priority creditors, and so a recorded deed of trust securing the Company Debt would not have changed the Trust's prospects of repayment.

1. **Pagel's Actions Did Not Prejudice the Trust Because Lantern Always Had a Superior Right to Repayment**

The parties agree that Lantern had a superior right to repayment, and that Lantern's First Priority Debt was properly paid before the Company Debt. RP 10. This is because, years before the Trust gained an interest in the Company Debt, that same debt (then owed to Pagel only) had been subordinated to Lantern's First Priority Debt.¹⁹ Pagel's action to preserve Lantern's priority in 2009 was within his authority to maintain the order of priority of creditors under the Participation Agreement (CP 573, ¶ 5 (Appendix E at 1)), and was required under the Subordination Agreements of 2000. CP 567-71 (Appendix C). Because Lantern's First Priority Debt was properly repaid from the Property proceeds before the Company Debt, Pagel's reconveyance of the Company Debt deed of trust did not damage the Trust—it was destined to be repaid behind Lantern in any case.

2. **Pagel's PMSI Had Priority Since 1999, and No Action He Took Altered the Trust's Position vis-à-vis the PMSI**

Since 1999, Pagel had a PMSI in the Partners' one-half of the Property. CP 505-16. The Partners had promised to pay Pagel \$212,500

¹⁹ See Section IV.A.4, *supra*, and Subordination Agreements, CP 567-71 (Appendix C).

at a rate of 9 percent, and in 2012, they owed him approximately \$605,000 of unpaid principal and accrued interest. Id.; CP 493. The Company Debt deed of trust was never superior to Pagel's interest as a purchase-money creditor, and none of Pagel's actions changed the PMSI's first priority.

Nothing in the record or in the law suggests that Pagel's action to secure the Company Debt somehow gave that debt or the Trust's interest in it priority over Pagel's preexisting PMSI. After Pagel acquired the Partners' interest in the Property, he sold the Property and used its proceeds to repay creditors in their order of legal priority: first Lantern, then his PMSI. After repaying those two debts, there was nothing left with which to repay the Company Debt to Pagel and the Trust. But Pagel voluntarily reduced the PMSI repayment in order to create a fund for his children's benefit. *See* Section IV. A.1.b, *supra*. Approximately thirteen years of unpaid interest meant that Pagel was owed around \$605,000, which would have consumed all the proceeds attributable to the Partners' one-half of the Property (\$309,037), but he repaid himself only \$238,900, based on the principal amount of \$212,500, plus a small amount of interest. CP 378.

After this repayment, Pagel split the remaining proceeds as if the Company Debt were a secured debt of record. So although the full repayment of secured creditors in order of legal priority would have provided nothing to the Trust—even if it held a recorded security interest in the Property—Pagel set aside \$21,810.90 (31.89 percent of the net sales proceeds from the Partners’ share of the Property, after Pagel underpaid himself for the PMSI) for each child. CP 378; CP 190; CP 194.

Pagel had no legal obligation to secure the Company Debt, but he did. He had no legal obligation to repay the Company Debt before the PMSI—even if it was a secured debt of record—but he did, giving some of the money to each of his children instead of repaying himself in full.

D. SCHUEGRAF’S CLAIMS ARE TIME-BARRED

Schuegraf’s claims are founded on an alleged breach of fiduciary duty. CP 232-47. The catchall three-year statute of limitations under RCW 4.16.080 applies to claims for breach of fiduciary duty against an alleged fiduciary who is not a trustee of an express trust or a personal representative. Bertelsen v. Harris, 459 F. Supp. 2d 1055, 1062 (E.D. Wash. 2006), aff’d, 537 F.3d 1047 (9th Cir. 2008). When a plaintiff is on notice that he or she may have been harmed by another person’s wrongful

conduct, the general rule in Washington is that “the plaintiff must make further diligent inquiry to ascertain the scope of the actual harm.” Green v. A.P.C., 136 Wn.2d 87, 96, 960 P.2d 912 (1998). The statute of limitations is not postponed by the fact that more serious harm may later be discovered. Id.

Schuegraf was aware on October 7, 2012, that Pagel had sold the Property and that he would deposit funds into a separate account for Isabella, and would not make a deposit to the Trust. CP 626. But Schuegraf’s TEDRA Petition was filed more than three years later, on November 13, 2015. CP 1. Her claims are time-barred as a matter of law.

The trial court, however, held that the statute of limitations did not begin to run when Schuegraf had notice that no portion of the proceeds would be transferred to the Trust; instead, the trial court held that the statute of limitations began to run later when Pagel explained his calculations of each party’s share. If there is any doubt that Schuegraf knew, or in the exercise of reasonable diligence should have known, all facts giving rise to her cause of action more than three years before she filed this action, that factual dispute is one that should have been viewed in the light most favorable to Pagel on summary judgment.

Further, the question of whether a plaintiff was duly diligent in pursuing a legal claim is a question of fact for the jury unless reasonable minds could reach only one conclusion. Allen v. State, 118 Wn.2d 753, 760, 826 P.2d 200 (1992); August v. U.S. Bancorp, 146 Wn. App. 328, 346, 190 P.3d 86 (2008), as amended (Sept. 4, 2008). Pagel believes that the record is clear that Schuegraf was on notice, and that her suit is time-barred: She was told on October 7, 2012, that Pagel would deposit \$0 into the Trust, and she watched for years as Pagel managed the Property's proceeds for Isabella in a separate account (CP 196-99), only suing him in November, 2015, arguing that those funds should belong to the Trust. If, however, this Court holds that reasonable minds could disagree regarding whether the statute of limitations barred Schuegraf's claim, the question should be remanded for trial.

E. SCHUEGRAF'S CLAIMS ARE BARRED BY ESTOPPEL

Judicial estoppel prevents a party from asserting a position that is clearly inconsistent with a previously asserted position, when acceptance of the new and inconsistent position would indicate that either the initial or the current court was misled, and when the opposing party would be hurt

by the acceptance of the inconsistent position. Baldwin v. Silver, 147 Wn. App. 531, 535, 196 P.3d 170 (2008).

The elements of estoppel are met here. When the parties divorced, the Company was insolvent and its prospects for repaying the Company Debt to Pagel were slim.²⁰ Pagel negotiated to secure the Trust's interest in the Company Debt, but Schuegraf objected and argued in arbitration that Pagel had no authority to change the nature of the obligation under the Property Settlement Agreement (CP 133-34), and she prevailed. CP 32-33 (Appendix D). As a result, the Trust's share of the Company Debt was increased to reflect the debt as it existed in 2004, before it was reduced in exchange for a security interest in the Property. Id. Eight years later, Schuegraf's tune has changed. Now she claims that Pagel had a fiduciary duty to maintain the status quo that she objected to in 2007—with the Property acting as security for the Company Debt. RP 49-50.

Meanwhile, though, Pagel acted to restore the Trust's interests to what they had been in 2004 at the time the Property Settlement Agreement

²⁰ The two independent valuations of the Company at the time of the divorce concluded that the Company had “little to no current value creation on a stand-alone basis,” and that “the book value of equity, as of June 30, 2003, was negative \$920,165” (Grant Thornton valuation, CP 534-40); and that 50 percent ownership interest in the Company was worth \$0 as of December 31, 2003 (Morrow Kessler Dowsing appraisal, CP 541-50).

was signed: he transferred 31.89 percent of the Company Debt to make up for the loss in face value (CP 305; CP 59), and he did not concern himself with maintaining the recorded junior deed of trust he had negotiated to secure the Company Debt with the Partners' interest in the Property. Judicial estoppel bars Schuegraf's claim here.

F. ATTORNEY FEES

Pagel requests this Court to reverse the award of attorney fees to Schuegraf and award attorney fees and expenses to him under RAP 18.1 and RCW 11.96A.150 ("TEDRA"), and to award him costs under RAP 14.2. TEDRA provides that a court on appeal "may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party. . . [f]rom any party to the proceedings." Unlike many attorney-fee statutes, TEDRA does not require that a party prevail to be awarded fees, but generally, when a fiduciary has breached duties to a beneficiary or engages in fruitless litigation, that fiduciary is not rewarded with attorney fees. Allard v. Pac. Nat'l Bank, 99 Wn.2d 394, 406, 663 P.2d 104 (1983). Before awarding fees from the trust estate, a court should consider whether "the litigation is indispensable to the proper administration of the trust; the issues presented are neither immaterial nor trifling; the conduct

of the parties or counsel is not vexatious or litigious; and that there has been no unnecessary delay or expense.” Id. at 407. Although in this case fees were awarded to the Trust, not from the Trust, the unchallenged record shows that the Trustee refused to account as required by the terms of the Trust for years (CP 84; CP 176-78), then refused to use Trust assets to pay for the sole beneficiary’s college education and health insurance (CP 176-78), and that in fact, Pagel himself paid for those expenses on behalf of the beneficiary. Id. Here, increasing the amount of funds held in the Trust has the effect of depriving the beneficiary of those assets: The Trustee still refuses to pay for college, and Isabella is not attending school this academic year.

The same factors indicate that Schuegraf should not be compensated for her efforts: When the trustee’s conduct has caused the litigation, the trustee individually must pay the expenses associated with the litigation. Allard, 99 Wn.2d at 407. When a trustee breaches her fiduciary duties, a person seeking to remedy that breach has a right to recover fees against the trustee personally. In re Estate of Cooper, 81 Wn. App. 79, 92, 913 P.2d 393 (1996); Baker Boyer Nat’l. Bank v. Garver, 43 Wn. App. 673, 682, 719 P.2d 583 (1986).

The legal basis for an award of attorney fees is a question of law reviewed de novo. McGuire v. Bates, 169 Wn.2d 185, 189, 234 P.3d 205 (2010).

1. Award of Attorney Fees to Schuegraf Was in Error

Because Schuegraf's motion for summary judgment was founded on a failure to relate material facts that the record demonstrates she was aware of, and because Schuegraf is the only fiduciary of the Trust, and had breached her fiduciary duties by failing to account for her actions for years and refusing to abide by the terms of the trust agreement (CP 176-78; CP 493), this Court should overturn the award of attorney fees to Schuegraf.

Schuegraf was aware that the Partners purchased their one-half of the Property from Pagel on a note, and that they owed him money for that purchase. Indeed, she agreed to transfer the Partners' purchase-money debt to Pagel in the Property Settlement Agreement, and then she redacted the relevant provision before submitting the Property Settlement Agreement to the trial court. Twice. (Compare Property Settlement Agreement Article I, ¶ B(30) at CP 19 and CP 420 (Schuegraf's Petition and Amended Petition) with CP 668 (Appendix B at 1).) Schuegraf was also aware that the Trust's interest in the Company Debt was junior to

Lantern's First Priority Debt from the beginning, and explicitly agreed to preserve that arrangement, giving Pagel the right to keep the Company Debt subordinate to debts owed to Lantern or other factors. CP 573-76 (Appendix E). Yet she initially claimed that Pagel had breached a duty to the Trust when he used the Property proceeds to pay Lantern first. This resulted in unnecessary attorney fees for both parties. Schuegraf also ignored the terms of the trust agreement, which require engaging in mediation, then arbitration, before filing a lawsuit. CP 91.

Since 2004, Schuegraf was in a true fiduciary role as Trustee of the Trust. From 2004 to 2016, Pagel took prudent and reasonable steps to protect the Trust's interests—not because he was the Trustee, but because he cared about his daughter. He secured the Trust's interest, and Schuegraf sued him for it (CP 97-8; CP 133-35). He kept Schuegraf informed of the Company's performance (CP 620-24; CP 493), but when he asked for information about the Trust, Schuegraf refused to respond (CP 178-79), and instead sued him for failing to maintain the security interest that she had objected to in 2007.

Schuegraf should not have been awarded fees.

2. Request for Fees, Expenses, and Costs on Appeal

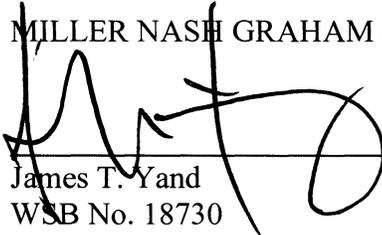
Under the same standard, Pagel should be awarded fees against Schuegraf personally (Pagel is not seeking a fee award against the Trust). As shown above, Schuegraf's claims against Pagel were not meritorious and did not benefit the Trust. Had Schuegraf reviewed the pertinent records rather than embark on a legal fishing expedition, or if she had started with mediation and arbitration as required by the Trust, she would have known why the Trust did not receive funds from the Property's sale. Moreover, it is Pagel's belief that this entire lawsuit is Schuegraf's response to Pagel's inquiries about her Trust management—or lack thereof—prompted by her refusal to make distributions for the sole beneficiary's college tuition and health insurance. It is Schuegraf, not Pagel, who should bear the cost of this lawsuit.

VI. CONCLUSION

Pagel requests this Court to reverse and either dismiss the action on the ground that the undisputed facts entitle him to judgment as a matter of law for each of the independent reasons set forth in Arguments A-E or, in the alternative, remand for trial. Pagel also requests an award of attorney fees, expenses, and costs.

DATED this 15 day of October, 2016.

MILLER NASH GRAHAM & DUNN LLP



James T. Yand
WSB No. 18730
A. Paul Firuz
WSB No. 45664

Attorneys for Appellant

CERTIFICATE OF SERVICE

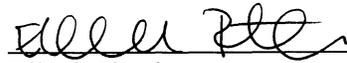
Elizabeth Pitman affirms and states:

That on this day, I caused to be served a true and correct copy of Appellant’s Opening Brief, by the method indicated below, and addressed to each of the following:

Jason W. Burnett Reed Longyear Malnati Ahrens 801 Second Avenue, Suite 1415 Seattle, WA 98104 jburnett@reedlongyearlaw.com Attorneys for Respondent	<input type="checkbox"/>	U.S. Mail, Postage Prepaid
	<input checked="" type="checkbox"/>	Hand Delivered
	<input type="checkbox"/>	Overnight Mail
	<input type="checkbox"/>	Facsimile Transmission
	<input type="checkbox"/>	Electronic Mail

I declare under penalty of perjury under the laws of the State of Washington and the United States of America, that the foregoing is true and correct to the best of my knowledge.

EXECUTED this 7th day of October, 2016.


Elizabeth Pitman

APPENDIX A

King County Superior Court

Judgment and Summary Judgment: CP 713-716

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

In re the

ISABELLA FRANZISKA XOCHITL
PAGEL IRREVOCABLE TRUST.

NO. 15-4-06497-2 SEA

**JUDGMENT AND JUDGMENT
SUMMARY**

[Clerk's Action Required]

I. JUDGMENT SUMMARY

Judgment Creditors:	Isabella Franziska Xochitl Pagel Trust Maximilian Florian Pagel Trust
Attorney for Judgment Creditor:	Jason W. Burnett
Judgment Debtor(s):	Martin J. Pagel
Principal Amount of Judgment in Favor of Isabella Trust:	\$98,552.00
(Isabella's Trust):	\$ Interest to date of Judgment at statutory rate \$ from October 1, 2012.
Attorney's Fees and Costs:	\$ RESERVED

Judgment shall bear interest at the statutory rate of 12% per annum

THIS MATTER came on regularly for hearing before the undersigned judge of the above-entitled Court on Petitioner's Motion for Summary Judgment. The Court reviewed the Petitioner's Motion for Summary Judgment, Declaration of Schuegraf and Exhibits thereto,

1 Declaration of Burnett and Exhibits thereto, the Response and supporting declarations and
2 exhibits, the Reply and supporting declarations.

3 Mr. Pagel and Ms. Schuegraf were married. They had two children, Maximilian and
4 Isabella. Mr. Pagel and Ms. Schuegraf separated on January 24, 2003. The Decree of
5 Dissolution was entered on October 22, 2004. The Property Settlement Agreement, dated
6 July 20, 2004, executed by Mr. Pagel and Ms. Schuegraf, was incorporated into the Decree
7 of Dissolution. The Property Settlement Agreement created trusts for each of the children
8 and provided that Mr. Pagel would fund the children's trusts, according to its terms. The
9 trusts were, in part, funded with twenty five percent of "the existing note/account receivable
10 from Charlie Rocket." A dispute arose when the note was eventually executed was for
11 \$1,200,000, rather than \$1,530,000, the sum Ms. Schuegraf argued was contemplated when
12 the Property Settlement Agreement was signed. That dispute was arbitrated by the Hon
13 Roselle Pekelis Ret. Judge Pekelis ruled that each of the children's trusts should be given "a
14 thirty-one point eight nine percent interest in the promissory note in the amount of
15 \$1,200,000 dated January 2, 2004, from Two Door Garage, Inc. dba Charlie Rocket." This
16 note was secured by the same 50% interest in the property as the 1999 note executed by
17 Constable and Lindstrom individually (the principals of Two Door Garage). This is the
18 same debt which Mr. Pagel refers to as his purchase money security interest.

19 Mr. Pagel and Ms. Schuegraf also executed a Participation Agreement effective
20 January 2, 2004. They agreed that the children would be assigned undivided interests in
21 certain notes and that "if and to the extent that Martin receives payments, whether in whole
22 or in part, on any Note, Martin will disburse such payments within ten (10) business days or
23

1 less of their receipt, pro rata.” The Participation Agreement provided for reasonable
2 attorneys’ fees.

3 On September 16, 2013, Mr. Pagel e-mailed Ms. Schuegraf that the property had
4 sold for \$1,336,500. Net proceeds were \$618,074.67. The Isabella Franziska Xochitl Pagel
5 Irrevocable Trust asks for judgment of 39.89% of half of the net proceeds from the sale,
6 recognizing that the note which was the corpus of the trust, was to secure the 50% of the net
7 sales price of the property.

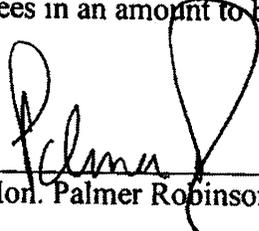
8 Mr. Pagel also argues the case against him should be dismissed because the statute of
9 limitations had run before the lawsuit was filed. He would have the statute run from
10 October 7, 2012, when he sent Ms. Schuegraf an e-mail stating that the 7th Street Property
11 sold. However, that e-mail did not contain any information about how much he calculated
12 each of the interested parties would receive. However, the statute of limitations did not
13 begin to run until September 16, 2013, when Mr. Pagel sent Ms. Schuegraf a copy of the
14 seller’s statement and his calculation that each child’s trust would receive \$21,810.90.
15 Furthermore, his obligation is based on a written agreement.

16 He also argues that the children’s trusts are to receive 31.89% of the net after he is
17 fully reimbursed for the PMSI. That agreement would give him the benefit of the note and
18 the security, which was clearly not contemplated by the parties. Mr. Pagel argues that, as a
19 matter of law, he did not owe the trusts a fiduciary duty. However, he did owe them a
20 fiduciary duty under the Property Settlement Agreement and the Participation Agreement.
21 Mr. Pagel ignored the separate interest of the beneficiaries by removing security for the
22 trusts’ interests without consideration and by privileging his own interest in the debt over
23 that of his children’s trusts.

1 Furthermore he is liable for reasonable attorney's fees under the Participation Agreement.

2 Accordingly, the motion for summary judgment is granted in favor of the Isabella
3 Franziska Xochitl Pagel Irrevocable Trust in the amount of \$98,552.00 plus prejudgment
4 interest from the date of sale, plus attorneys' fees in an amount to be determined.

5 DATED April 8, 2016.

6 
7 _____
8 Hon. Palmer Robinson

8 Presented by:

9 REED LONGYEAR MALNATI & AHRENS PLLC

10
11 By /s/
12 Jason W. Burnett, WSBA# 30516
13 Attorneys for Petitioner
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APPENDIX B

Excerpts

Property Settlement Agreement: CP 662 - 677

CR2A Agreement: CP 679 - 689

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

In Re the Marriage of

MARTIN PAGEL,

Petitioner,

and

SUSANNE SCHUEGRAF,

Respondent.

NO. 03-3-07634-5 SEA

PROPERTY SETTLEMENT
AGREEMENT

THIS AGREEMENT, made and executed this 20th day of July, 2004, by and between MARTIN PAGEL, hereinafter referred to as "Husband", and SUSANNE SCHUEGRAF, hereinafter referred to as "Wife".

ARTICLE I

DISPOSITION OF PROPERTY, PROPERTY RIGHTS AND OBLIGATIONS

B. Property Distributed to Husband MARTIN PAGEL:

The Husband shall have as his sole and separate property, free and clear of any claim of any right, title, lien or interest of the Wife, and the Wife does hereby sell, convey, assign, quit claim, and deliver unto Husband all of the following:

22. All interest of the parties in the real property located at 2855 - 2861 W. 7th Street, Los Angeles, California 90005 subject to any obligations thereon, and which is legally described as: Lot 53 of Sunset Park Tract, as per Map recorded in Book 6, Page 69 of Maps, in the office of the County Recorder of said county.

30. All interest of the parties in the promissory note/account receivable from Constable & Lindstrom.

ARTICLE VI

TRUST FOR CHILDREN

Wife and Husband hereby grant and convey to each of their two children, Max and Isabella, a one-fourth interest in the existing promissory note/account receivable from Charlie Rocket, and a one-sixth interest in the IXIO, Inc. existing promissory note/account receivable, including conversion rights, in trust as follows:

1. There shall be one trust for each child. Wife shall be the trustee of the trust for Isabella, and Husband shall be the trustee for the trust for Max.

No trust distributions may be made without approval of both parents.

2. If Max or Isabella die prior to the trusts terminating, their then living children shall be the equal beneficiaries of the trusts.

3. Each child shall be the remainder beneficiary of the other's trust, if the deceased child leaves no then-living children.

4. If both Max and Isabella die prior to the trusts terminating without living children, then the trust shall be distributed in equal shares to Martin and Susanne.

5. The corpus of each trust shall be distributed as follows: one third at the beneficiary reaching age 25, one half of the balance at the beneficiary reaching age 30 and the remainder of balance at the beneficiary reaching age

6. The parties shall cooperate in the preparation of a formal trust agreement by not later than September 1, 2004, and share the cost of preparation by an agreed-upon attorney equally. Other necessary terms shall be negotiated. Any disputes over the terms of the trust agreement shall be resolved by Judge Rosselle Pekelis in binding arbitration.

CR 2A Agreement

In resolution of the division of property, allocation of debts, spousal maintenance claims, temporary child support and attorney fees and costs, the parties agree as follows:

Charlie Rocket

- Charlie Rocket stock held by parties – ¼ to Max, ¼ to Isabella, and ½ to Martin. One party as custodian for each child.
- Charlie Rocket loan – ¼ loan into trust for Max and ¼ into trust for Isabella, ½ of loan to Martin. Martin is trustee of Max's trust. Susi is trustee of Isabella's trust as set forth below.

Balance of property to Husband. See Wife and Husband's listing of assets/debts attached to our final proposal of 3/29/04, a copy of which is attached as Exhibit B.

Real estate and Investment			
2855-2861 West 7th St. LA 90005 (duplex "rocket pad") Grant Deed for one-half interest to Robin and Anna 10/27/2000. Appraised at 1,100,000	550,000	595,000 ✓	550,000 10/00 Grant Deed, Lea Valu. Summary

Money loaned/Recievables			
Constable & Lindstrom LA 7th St.	\$212,500		212,500 Pet. Spread Sheet

APPENDIX C

Subordination Agreements: CP 567 - 571

CAPITAL FACTORS, INC.

SUBORDINATION AND STAND-BY AGREEMENT

The undersigned (sometimes hereinafter referred to as "we" or "us") are financially interested in **TWO DOOR GARAGE, INC.**, a California corporation, referred to as the "Company." The Company as now appears on the books is indebted to the undersigned as follows:

LOAN PAYABLE TO MARTIN PAGEL IN THE AMOUNT OF THREE HUNDRED THOUSAND DOLLARS (\$300,000.00) AS OF January 1, 2000.

To induce you to discount or purchase from the Company deferred payment paper, accounts receivable, notes, conditional sales contracts, chattel mortgages, customer obligations, or other receivables (herein called "Receivables"), at any time offered to you by the Company, or to lend or advance monies or otherwise extend faith or credit to the Company, and to better secure you in respect thereof and in consideration of the premises and the sum of One Dollar (\$1.00) to us in hand paid, receipt whereof is hereby acknowledged, we agree to and do hereby subordinate the aforesaid indebtedness owing by the Company to the undersigned (together with all collateral and security, if any, for the payment of any such indebtedness aforesaid) to any and all debts, demands, claims, liabilities or causes of action for which the Company may now or at any time hereafter in any way be liable to you; and we further covenant and agree with you that the Company shall not pay, and we will not accept payment of or assert or seek to enforce against the Company, any indebtedness now or hereafter owing by the Company to the undersigned or any collateral or security thereto appertaining, unless and until you have been paid in full any and all such debts, claims, liabilities, demands or causes of action now or hereafter owing to you by the Company; and as further security for the undertakings of the undersigned in that behalf, the undersigned hereby subrogate you to any and all such indebtedness now or hereafter owing by the Company to the undersigned and to any and all collateral or security therefor, and covenant and agree to assign, endorse and deliver to and deposit with you any and all notes or other obligations or instruments evidencing any such indebtedness and all collateral and security thereto appertaining, hereby irrevocably authorizing you to collect, receive, enforce and accept any and all sums or distributions of any kind that may become due, payable or distributable on or in respect of such indebtedness, either principal or interest, or such collateral or security, whether paid directly or indirectly by the Company, or paid or distributed in any bankruptcy, receivership, reorganization or dissolution proceedings or otherwise; hereby irrevocably authorizing you in your discretion to make and present claims therefor in any such proceedings either in your name or ours; and in case any such sums or distributions come into our hands, we agree to promptly turn the same over to you. The undersigned represent and warrant to you that the undersigned have not assigned or transferred any of said indebtedness or any interest therein or any such collateral or security to any other person and that they will make no other assignment or transfer thereof, and that any notes or written obligations taken to evidence said indebtedness or any renewal notes or written obligations will be endorsed with a proper notice of this agreement.

In consideration hereof, the undersigned hereby postpone in your favor any and all claims of every kind and description that the undersigned may now or hereafter have against the Company to the payment to you of any and all debts, claims, demands or causes of action of every character and description that you may now or hereafter have against the Company, whether arising hereunder or in any other manner. The undersigned waive notice of acceptance hereof, notice of the creation of any indebtedness or liability of the Company to you, the giving or extension of credit to the company, or the taking or releasing of security for the payment thereof, and waive presentment, demand, protest, notice of protest or default and all other notices to which the undersigned might otherwise be entitled.

This agreement shall be continuing irrevocable and binding on the undersigned (jointly and severally, if there be two or more persons who sign the same) and their respective heirs, personal representatives and assigns, and shall inure to the benefit of yourselves, your successors and assigns. The death of any one of the undersigned (if there be more than one party signatory hereto) shall not affect this agreement as to any other of the undersigned. If there be only one person who has signed this agreement, the words "undersigned," "we" and "us" shall be deemed to mean that one person.

IN WITNESS WHEREOF, the undersigned have set their hands and seals this 1st of June, 2000.

Martin Pagel (Seal) [Signature]
Martin Pagel Witness

THE ABOVE NAMED COMPANY assents to the foregoing and agrees in all respects to be bound thereby and to keep, observe and perform the several matters and things therein intended of it to be done, and particularly agrees not to make any payment contrary to the foregoing.

TWO DOOR GARAGE, INC.
[Signature]
Robin Constable, Secretary



CAPITAL FACTORS, INC.

SUBORDINATION AND STAND-BY AGREEMENT

The undersigned (sometimes hereinafter referred to as "we" or "us") are financially interested in TWO DOOR GARAGE, INC., a California corporation, referred to as the "Company." The Company as now appears on the books is indebted to the undersigned as follows:

LOAN PAYABLE TO MARTIN PAGEL IN THE AMOUNT OF ONE MILLION DOLLARS (\$1,000,000.00) AS OF AUGUST 31, 1999.

To induce you to discount or purchase from the Company deferred payment paper, accounts receivable, notes, conditional sales contracts, chattel mortgages, customer obligations, or other receivables (herein called "Receivables"), at any time offered to you by the Company, or to lend or advance monies or otherwise extend faith or credit to the Company, and to better secure you in respect thereof and in consideration of the premises and the sum of One Dollar (\$1.00) to us in hand paid, receipt whereof is hereby acknowledged, we agree to and do hereby subordinate the aforesaid indebtedness owing by the Company to the undersigned (together with all collateral and security, if any, for the payment of any such indebtedness aforesaid) to any and all debts, demands, claims, liabilities or causes of action for which the Company may now or at any time hereafter in any way be liable to you; and we further covenant and agree with you that the Company shall not pay, and we will not accept payment of or assert or seek to enforce against the Company, any indebtedness now or hereafter owing by the Company to the undersigned or any collateral or security thereto appertaining, unless and until you have been paid in full any and all such debts, claims, liabilities, demands or causes of action now or hereafter owing to you by the Company; and as further security for the undertakings of the undersigned in that behalf, the undersigned hereby subrogate you to any and all such indebtedness now or hereafter owing by the Company to the undersigned and to any and all collateral or security therefor, and covenant and agree to assign, endorse and deliver to and deposit with you any and all notes or other obligations or instruments evidencing any such indebtedness and all collateral and security thereto appertaining, hereby irrevocably authorizing you to collect, receive, enforce and accept any and all sums or distributions of any kind that may become due, payable or distributable on or in respect of such indebtedness, either principal or interest, or such collateral or security, whether paid directly or indirectly by the Company, or paid or distributed in any bankruptcy, receivership, reorganization or dissolution proceedings or otherwise; hereby irrevocably authorizing you in your discretion to make and present claims therefor in any such proceedings either in your name or ours; and in case any such sums or distributions come into our hands, we agree to promptly turn the same over to you. The undersigned represent and warrant to you that the undersigned have not assigned or transferred any of said indebtedness or any interest therein or any such collateral or security to any other person and that they will make no other assignment or transfer thereof, and that any notes or written obligations taken to evidence said indebtedness or any renewal notes or written obligations will be endorsed with a proper notice of this agreement.

In consideration hereof, the undersigned hereby postpone in your favor any and all claims of every kind and description that the undersigned may now or hereafter have against the Company to the payment to you of any and all debts, claims, demands or causes of action of every character and description that you may now or hereafter have against the Company, whether arising hereunder or in any other manner. The undersigned waive notice of acceptance hereof, notice of the creation of any indebtedness or liability of the Company to you, the giving or extension of credit to the company, or the taking or releasing of security for the payment thereof, and waive presentment, demand, protest, notice of protest or default and all other notices to which the undersigned might otherwise be entitled.

This agreement shall be continuing irrevocable and binding on the undersigned (jointly and severally, if there be two or more persons who sign the same) and their respective heirs, personal representatives and assigns, and shall inure to the benefit of yourselves, your successors and assigns. The death of any one of the undersigned (if there be more than one party signatory hereto) shall not affect this agreement as to any other of the undersigned. If there be only one person who has signed this agreement, the words "undersigned," "we" and "us" shall be deemed to mean that one person.

IN WITNESS WHEREOF, the undersigned have set their hands and seals this 27th day of February, 2000.

Martin Pagel (Seal)

Witness

THE ABOVE NAMED COMPANY assents to the foregoing and agrees in all respects to be bound thereby and to keep, observe and perform the several matters and things therein intended of it to be done, and particularly agrees not to make any payment contrary to the foregoing.

TWO DOOR GARAGE, INC.

By: Robin Constable, Secretary



CAPITAL FACTORS, INC.

SUBORDINATION AND STAND-BY AGREEMENT

The undersigned (sometimes hereinafter referred to as "we" or "us") are financially interested in TWO DOOR GARAGE, INC., a California corporation, referred to as the "Company." The Company as now appears on the books is indebted to the undersigned as follows:

LOAN PAYABLE TO MARTIN PAGEL IN THE AMOUNT OF ONE MILLION THREE HUNDRED FIFTY DOLLARS AND 00/100 (\$1,350,000.00) AS OF January 1, 2000.

To induce you to discount or purchase from the Company deferred payment paper, accounts receivable, notes, conditional sales contracts, chattel mortgages, customer obligations, or other receivables (herein called "Receivables"), at any time offered to you by the Company, or to lend or advance monies or otherwise extend faith or credit to the Company, and to better secure you in respect thereof and in consideration of the premises and the sum of One Dollar (\$1.00) to us in hand paid, receipt whereof is hereby acknowledged, we agree to and do hereby subordinate the aforesaid indebtedness owing by the Company to the undersigned (together with all collateral and security, if any, for the payment of any such indebtedness aforesaid) to any and all debts, demands, claims, liabilities or causes of action for which the Company may now or at any time hereafter in any way be liable to you; and we further covenant and agree with you that the Company shall not pay, and we will not accept payment of or assert or seek to enforce against the Company, any indebtedness now or hereafter owing by the Company to the undersigned or any collateral or security thereto appertaining, unless and until you have been paid in full any and all such debts, claims, liabilities, demands or causes of action now or hereafter owing to you by the Company; and as further security for the undertakings of the undersigned in that behalf, the undersigned hereby subrogate you to any and all such indebtedness now or hereafter owing by the Company to the undersigned and to any and all collateral or security therefor, and covenant and agree to assign, endorse and deliver to and deposit with you any and all notes or other obligations or instruments evidencing any such indebtedness and all collateral and security thereto appertaining, hereby irrevocably authorizing you to collect, receive, enforce and accept any and all sums or distributions of any kind that may become due, payable or distributable on or in respect of such indebtedness, either principal or interest, or such collateral or security, whether paid directly or indirectly by the Company, or paid or distributed in any bankruptcy, receivership, reorganization or dissolution proceedings or otherwise; hereby irrevocably authorizing you in your discretion to make and present claims therefor in any such proceedings either in your name or ours; and in case any such sums or distributions come into our hands, we agree to promptly turn the same over to you. The undersigned represent and warrant to you that the undersigned have not assigned or transferred any of said indebtedness or any interest therein or any such collateral or security to any other person and that they will make no other assignment or transfer thereof, and that any notes or written obligations taken to evidence said indebtedness or any renewal notes or written obligations will be endorsed with a proper notice of this agreement.

In consideration hereof, the undersigned hereby postpone in your favor any and all claims of every kind and description that the undersigned may now or hereafter have against the Company to the payment to you of any and all debts, claims, demands or causes of action of every character and description that you may now or hereafter have against the Company, whether arising hereunder or in any other manner. The undersigned waive notice of acceptance hereof, notice of the creation of any indebtedness or liability of the Company to you, the giving or extension of credit to the company, or the taking or releasing of security for the payment thereof, and waive presentment, demand, protest, notice of protest or default and all other notices to which the undersigned might otherwise be entitled.

This agreement shall be continuing irrevocable and binding on the undersigned (jointly and severally, if there be two or more persons who sign the same) and their respective heirs, personal representatives and assigns, and shall inure to the benefit of yourselves, your successors and assigns. The death of any one of the undersigned (if there be more than one party signatory hereto) shall not affect this agreement as to any other of the undersigned. If there be only one person who has signed this agreement, the words "undersigned," "we" and "us" shall be deemed to mean that one person.

IN WITNESS WHEREOF, the undersigned have set their hands and seals this 6 of Sept, 2000.

Martin Pagel (Seal)
MARTIN PAGEL

Witness [Signature]

THE ABOVE NAMED COMPANY assents to the foregoing and agrees in all respects to be bound thereby and to keep, observe and perform the several matters and things therein intended of it to be done, and particularly agrees not to make any payment contrary to the foregoing.

TWO DOOR GARAGE, INC.
By: [Signature]
Robin Constable, Secretary

APPENDIX D

Judge Pekelis's Arbitration Ruling: CP 32 - 33

From: Rosselle Pekelis [<mailto:pekelis@drllc.com>]
Sent: Friday, August 17, 2007 12:29 PM
To: Jerry Kimball; dgoodwin@helsell.com
Cc: Beth Forbes
Subject: PAGEL/SCHUEGRAF

Dear Counsel:

The following is the Pagel/Schuegraf Arbitration Decision:

THE ARBITRATOR has determined that Mr. Pagel, however well-intended, was without authority to unilaterally change the terms of the existing account receivable and alter the interests of the childrens' Trusts. This could only have been accomplished with the consent of the Co-Trustee, Ms. Schuegraf. As the execution of the promissory note appears to be a fait accompli, the only remedy is to adjust Mr. Pagel's share in said note in such a way as to give the childrens' Trusts one-quarter each of the amount of the account receivable as it existed per the Property Settlement Agreement in July, 2004. Mr. Kimball contends that that total was \$1,530,000, and he contends further that his proposed Exhibit A to the Participation Agreement and Exhibit A to the Trust Agreements fairly reflect that adjustment. Before finally confirming that form of order, the Arbitrator is providing Ms. Goodwin with an additional 3 days to address the form of Order proposed by Mr. Kimball. If there is no response by Ms. Goodwin by end of day Wednesday, August 22, 2007, the proposed Exhibits A referenced above shall become the final Order herein.

Dated: August 17th, 2007

Rosselle Pekelis,
Arbitrator

Judicial Dispute Resolution, LLC

September 24, 2007

Darla J. Goodwin
Helsell Fetterman LLP
1001 4th Ave Ste 4200
Seattle, WA 98154-1154

Jerry R. Kimball
Attorney at Law
1200 5th Ave Ste 2020
Seattle, WA 98101-3132

Charles S. Burdell Jr.
JoAnne I. Tompkins
Terrence A. Carroll
Rosselle Pekelis
George Finkle
Larry Jordan
Steve Scott
Michael S. Spearman

RE: Pagel/Schuegraf Rodriguez Arbitration – Children's Trust

Dear Counsel:

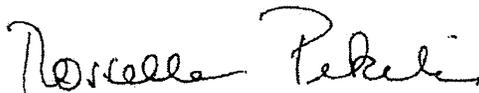
I have carefully reviewed the party's submissions as requested by me on the issue of what form of order would be consistent with my earlier ruling. Mr. Pagel's counsel's submission is, in large part, the equivalent of a motion for reconsideration. To the extent he argues that the proposed order is not appropriate or equitable, his arguments are not persuasive.

Of particular note, I do not accept his contention that the children's interest in the company will inevitably result in their recapture of the sums lost by Mr. Pagel's negotiation of a promissory note. These interests are not mirror images of one another, as counsel for Ms. Schuegraf Rodriguez explains in his reply. Moreover, the fact that there may be some ultimate benefit to the children from the unauthorized transaction is speculative, and if it indeed occurred, it would be the result of Mr. Pagel's unilateral actions.

The request for further oral argument is denied. The Arbitrator's previous ruling stands and the newly proposed Exhibits A attached to Mr. Kimball's letter of September 17, 2007 are incorporated and made a part of the Order. If necessary, Mr. Kimball may present a final Order for my signature.

Thank you both for your interesting and thoughtful presentations.

Sincerely yours,



Rosselle Pekelis
Arbitrator

APPENDIX E

Participation Agreement: CP 573-576

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PARTICIPATION AGREEMENT

HELSELL FETTERMAN

This Participation Agreement ("**Agreement**"), effective as of January 2, 2004 ("**Effective Date**"), is by and among Martin Pagel ("**Martin**"), Maximilian Pagel ("**Max**") and Isabella Pagel ("**Isabella**").

Martin has entered into business transactions in which he has loaned money to business enterprises. In order to comply with certain agreements arising from the property settlement agreement between Martin Pagel and Susanne Rodriguez Schuegraf ("**Susi**"), dated July 20th, 2004, the parties agree to enter into this Participation Agreement. Max and Isabella are minor children of Martin and Susi, Max and Isabella each are beneficiaries of a trust in their respective names, and Martin serves as trustee of Max's trust, and Susi serves as Isabella's trustee.

For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. Transactions to Which This Agreements Apply. This Agreement shall apply only to the promissory notes listed on **Exhibit A** attached hereto and incorporated herein by reference (the "**Notes**"). If and to the extent that the Notes are either (a) paid in full, or (b) converted into equity, this Agreement will no longer apply to such Notes.
2. Martin to Hold Notes. Each of the Notes originally was issued to Martin. The parties agree that the assignment and re-issuance of the Notes might result in complications. Therefore, the parties agree that the Notes will not be re-issued to each of Martin, Max and Isabella. Instead, each of Martin, Max and Isabella will be assigned an undivided interest in the Notes in accordance with the percentage interests and limitations set forth in **Exhibit A**.
3. Disbursements of Note Payments. If and to the extent that Martin receives payments, whether in whole or in part, on any Note, Martin will disburse such payments, within ten (10) business days or less of their receipt, pro rata in accordance with the percentage interests and limitations set forth in **Exhibit A**. To the extent that taxes, if any, are withheld, such tax withholdings shall be made pro rata in accordance with the percentage interests and limitations set forth in **Exhibit A**.
4. Default, Etc. by Note Maker. If the maker of any Note defaults in its obligations pursuant to such Note, or is otherwise in default of its obligations evidenced by such Note, Martin first shall obtain the written approval of Max and Isabella before declaring such maker in default, or instituting foreclosure action against such maker, or compromising, amending or waiving any rights arising under such Note.
5. Priority of Notes to Remain. Any further borrowing under a Note by any maker of a Note (such as, for example, a revolving line of credit), shall be junior to the security interest, if any, previously granted to Martin by such Note maker. Notwithstanding the foregoing, all Notes made by Two Door Garage, Inc. are subordinated to any and all the interests of factors of the accounts receivables of the makers of the Notes, and Martin can sign any and all subordination agreements and related documents requested by such factors and any and all letters

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COPY

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of credit on behalf of the makers of the Notes. Martin will provide a copy to Max and Isabella within twenty (20) business days or less of signing.

6. Termination. When all of the Notes have been paid in full, this Agreement will terminate.

7. Miscellaneous.

(b) Invalidity; Headings; Entire Agreement. The invalidity or unenforceability of any term or provision of this Agreement will not affect the validity or enforceability of any other term or provision hereof. The headings in this Agreement are for convenience of reference only and will not alter or otherwise affect the meaning of this Agreement. This Agreement, the Notes, and the exhibits and schedules thereto together constitute the entire agreement and understanding of the parties regarding the subject matter hereof and supersede any and all prior understandings and agreements between the parties with respect to such subject matter.

(c) Amendments and Waivers. No amendment or modification of this Agreement may be made or be effective unless and until it is set forth in writing and signed by the parties.

(d) Governing Law; Jurisdiction; Venue. This Agreement will be governed by and construed exclusively in accordance with the internal laws of the State of Washington, without reference to that body of law relating to conflict of laws or choice of law. The parties agree that any dispute regarding the interpretation or validity of, or otherwise arising out of this Agreement, shall be subject to the exclusive jurisdiction of the Washington State Courts in and for King County, Washington or, in the event of federal jurisdiction, the United States District Court for the Western District of Washington sitting in King County, Washington, and each party hereby agrees to submit to the personal and exclusive jurisdiction and venue of such courts and not to seek the transfer of any case or proceeding out of such courts.

(e) Attorneys' Fees. If any party hereto commences or maintains any action at law or in equity (including counterclaims or cross-complaints) against the other party hereto by reason of the breach or claimed breach of any term or provision of this Agreement, then the substantially prevailing party in said action will be entitled to recover its reasonable attorneys' fees and court costs incurred therein.

(f) Successors and Assigns. The provisions of this Agreement will inure to the benefit of, and be binding on, each party's respective heirs, successors and assigns.

(g) Execution in Counterparts. This Agreement may be executed in any number of counterparts, which together will constitute one instrument.

Dated as of the date above first written.

By: Martin Pagel
Martin Pagel

By: Martin Pagel
Martin Pagel as trustee of Max' trust

By: Susanne Rodriguez Schuegraf
Susanne Rodriguez Schuegraf as trustee of
Isabella's trust

Exhibit A:

1. Promissory Note in the amount of \$1,200,000 from Two Door Garage, Inc., a California corporation, as borrower, to Martin Pagel, as lender, dated January 2, 2004 and immediately:
 - a. 31.89% is assigned to Max Pagel's trust,
 - b. 31.89% is assigned to Isabella Pagel's trust.

Provided further, however, that only 25% of interest paid on the note prior to January 1, 2007 is assigned.