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

COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

Martin Pagel,
Appellant

v.

The Isabella Franziska Xochitl Pagel Irrevocable Trust,
Respondent

On Appeal from King County Superior Court
Cause No. 15-4-06497-2 SEA
Hon. Palmer Robinson

RESPONSE BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES.....	iii
I. Introduction.....	1
II. Issues on Appeal	1
III. Counter-Statement of the Case	2
3.1 Facts.....	2
3.1.1 Two Door Garage and the West 7 th Property.....	2
3.1.2 Two Door Garage Creditors	5
3.1.3 Constable/Lindstrom Transfer West 7 th Property to Satisfy Business Loan.....	7
3.1.4 Sale of the West 7 th Property and Distribution of the Proceeds.	8
3.2 Procedural History.....	9
IV. Argument	10
4.1 Pagel's Alleged PMSI is Irrelevant to a Determination of the Case.	11
4.1.1 The West 7 th Property Was Distributed to Pagel in Satisfaction of the Business Loan.....	11
4.1.2 Pagel Did Not Follow Mandatory California Foreclosure Procedures.	12

4.2	Pagel Breached his Fiduciary Duties to Isabella's Trust.....	17
4.2.1	Pagel Fiduciary Duties to Isabella's Trust.....	17
4.2.2	A Participation Agreement Can Give Rise to Fiduciary Duties Without Unequivocal Language.	20
4.2.3	Pagel was a Fiduciary as a Grantor of Isabella's Trust and Did Not Satisfy His Duty to Fund Isabella's Trust.....	23
4.2.4	Pagel Breached His Fiduciary Duties to Isabella's Trust.	24
4.3	Claims are not Time Barred.....	26
4.3.1	The Statute of Limitations is six years for Actions on Written Agreements.	27
4.3.2	The Statute of Limitations Began to Run on September 16, 2013.....	28
4.4	Estoppel Does Not Prevent Isabella's Trust from Recovering.	30
4.5	Pagel's Motion for Summary Judgment Properly Denied.	32
4.6	Attorney's Fees.	33
V.	Conclusion	35

TABLE OF AUTHORITIES

STATE CASES

<i>Bostain v. Food Express, Inc.</i> , 159 Wn.2d 700, 153 P.3d 846, cert denied, 552 U.S. 1040 (2007).....	10
<i>Brock v. First S. Sav. Ass'n</i> , 8 Cal. App. 4th 661, 10 Cal. Rptr. 2d 700 (Ct. App. 1992)	14, 15
<i>Burton v. Twin Commander Aircraft, LLC</i> , 171 Wn.2d 204, 254 P.3d 778 (2011).....	11
<i>Chem. Bank. v. WPPS</i> , 102 Wn.2d 874, 691 P.2d 524 (1984).....	14
<i>Dexter Horton Bldg. Co. v. King County</i> , 10 Wn.2d 186, 116 P.2d 507 (1941).....	35
<i>Fleishbein v. Thorne</i> , 193 Wash. 65, 74 P.2d 880 (1937)	14
<i>Green v. A.P.C.</i> , 136 Wn. 2d 87, 960 P.2d 912 (1998).....	31, 32
<i>Int'l Marine Underwriters v. ABCD Marine, LLC</i> , 179 Wn.2d 274, 313 P.3d 395 (2013).....	10
<i>LaMon v. Butler</i> , 112 Wn.2d 193, 70 p.2d 1027, cert. denied, 493 U.S. 814 (1989)	10
<i>Liebergesell v. Evans</i> , 93 Wn. 2d 881, 613 P.2d 1170 (1980).....	19, 20, 27
<i>Lodis v. Corbis Holdings, Inc.</i> , 172 Wn. App. 835, 292 P.3d 779 (2013).....	18
<i>McGuire v. Bates</i> , 169 Wn.2d 185, 234 P.3d 205 (2010).....	36
<i>Melendrez v. D & I Inv., Inc.</i> , 127 Cal. App. 4th 1238 (Ct. App. 2005)	13

<i>Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP</i> , 110 Wn. App 412, 40 P.3d 1206 (2002).....	18, 26
<i>Moeller v. Lien</i> , 25 Cal. App. 4th 822, 30 Cal. Rptr. 2d 777 (Ct. App. 1994)	13, 17
<i>Richards v. Seattle Met. Credit Union</i> , 117 Wn. App. 30, 68 P.3d 1109 (2003).....	18
<i>S.H.C. v. Lu</i> , 113 Wn. App. 511, 54 P.3d 174 (2002)	18
<i>Salter v. Heiser</i> , 36 Wn. 2d 536, 219 P.2d 574 (1950).....	19
<i>Sanders v. State</i> , 169 Wn.2d 827, 240 P.3d 120 (2010)	36
<i>Schweikhardt v. Chessen</i> , 329 Ill. 637, 161 N.E. 188 (1928)	19

FEDERAL CASES

<i>Bertelsen v. Harris</i> , 459 F. Supp. 2d 1055 (E. D. Wash. 2006)	29
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STATUTES

Cal. Civ. Code § 2898(a)	13
Cal. Civ. Code §§ 2924–2924l.....	13, 16, 17
RCW 11.96A.010.....	35
RCW 11.96A.150.....	1, 36, 37
RCW 4.16.040	29, 30
RCW 4.16.080	29

I. INTRODUCTION

As part of a 2004 dissolution Property Settlement Agreement, Martin Pagel assigned to his minor daughter's trust ("Isabella's Trust") a percentage interest in a business loan owed to him. After the assignment, however, Pagel repeatedly undermined the Trust's position, and when the business loan was finally paid in part, Pagel misled the Trustee, his ex-wife Susi Schuegraf, about it and privileged his own interest over the Trust's. The trial court held that Pagel owed and breached fiduciary duties to the Trust and entered judgment against him for the loss caused by his final self-privileging breach.

The trial court was correct as a matter of law in every respect, and Schuegraf respectfully requests this Court affirm the decision below and award to her the fees and costs incurred on appeal, pursuant to RCW 11.96A.150 and the contract between the parties.

II. ISSUES ON APPEAL

1. Whether Pagel had legal grounds to use the proceeds from the sale of the West 7th Property to repay himself without observing California's mandatory foreclosure procedure.

2. Whether the Settlement Agreement and Participation Agreement caused Pagel to be a fiduciary to Isabella's Trust.
3. Whether Pagel's actions to secure payment on a debt owed to him prior to securing payment on the debt owed to Isabella's Trust breached his fiduciary duties to Isabella's Trust.
4. Whether the statute of limitations was six (6) years, and whether Pagel's breach of the requirement, under the Participation Agreement, to pay proceeds to Isabella's Trust within ten (10) days of receipt began the statute of limitations with respect to Pagel's secret decision to divert a portion of the proceeds to himself.
5. Whether Schuegraf's claims that Pagel breached his fiduciary duties by reconveying the security for the Business Loan should be equitably estopped due to Schuegraf's prior disagreement as to the value of securing the Business Loan.
6. Whether attorney's fees were properly awarded to Schuegraf, and whether fees should be granted to Schuegraf on appeal.

III. COUNTER-STATEMENT OF THE CASE

3.1 Facts.

3.1.1 Two Door Garage and the West 7th Property

The business and real estate dealings which precede this dispute are straightforward, but somewhat complex. Martin Pagel and his business partners Robin Constable and Anna Lindstrom (hereinafter "Constable/Lindstrom") formed a now-defunct California corporation called Two Door Garage, which did business

as “Charlie Rocket.” CP 489–92. Two Door Garage was located in Los Angeles on real estate that Pagel bought in 1999 (hereinafter the “West 7th Property”). CP 489, 496–503. Pagel sold a 50 percent interest in the West 7th Property to Constable/Lindstrom for a \$212,500 promissory note (hereinafter the “Purchase Loan”) and an unrecorded deed of trust (the “Constable/Lindstrom deed of trust”) in 1999. CP 508–16. Pagel did not disclose or produce the unrecorded Constable/Lindstrom deed of trust until he filed his March 13, 2016, Second Declaration of Martin Pagel in response to Schuegraf’s motion for summary judgment. CP 490. Pagel also loaned between \$1.2 and \$1.6 million to Two Door Garage (hereinafter the “Business Loan”). CP 58.

3.1.2 Divorce and Participation Agreement

Pagel and Schuegraf filed for divorce and reached a Property Settlement Agreement on July 20, 2004. CP 58, 63–78. Two facts from the Property Settlement Agreement are salient. First, Pagel retained sole ownership of the West 7th Property. CP 68. Second, Pagel agreed to assign a 25 percent interest in the Business Loan to a trust for their daughter, Isabella, and 25 percent to a trust for their son, Max. CP 72–73. Max’s Trust is not a party to this

action. The principal debt owed under the Business Loan was still unascertained at the time of the divorce. CP 58.

In 2006, Pagel unilaterally negotiated with Two Door Garage and Constable/Lindstrom to establish a specific dollar amount for the Business Loan. CP 58. Pagel obtained a Promissory Note from Two Door Garage, dated January 2, 2004, fixing the amount owed at \$1.2 million. CP 552. However, there was evidence that the outstanding balance could have been as high as \$1.6 million. CP 58. Pagel claimed he secured the debt, CP 139, with a deed of trust executed on March 3, 2006. CP 139, 553–54. It does not appear the March 3, 2006, deed was recorded. CP 553. However, a nearly identical deed of trust was executed on March 17, 2008, and recorded on March 19, 2008. CP 265–67.

Following Pagel’s unilateral negotiations relating to the Business Loan, Schuegraf, as Trustee of Isabella’s Trust, refused to endorse Pagel’s decision to reduce the Business Loan to what she argued was less than fair value. CP 305. The dispute went to arbitration at Pagel’s demand. CP 364–68. The arbiter agreed with Schuegraf that Pagel lacked the necessary authority to bargain down the Trusts’ interests and that Pagel’s negotiations and the resulting promissory note were a “*fait accompli* . . .” CP 32. The arbiter

concluded 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 PSA in July 2004.” CP 32. The arbitration decision increased the share of Isabella’s Trust to offset the unauthorized negotiated reduction. CP 368, 373.

Because the parties feared “that the assignment and reissuance of the notes might result in complications . . .” Pagel and Schuegraf entered into a Participation Agreement. CP 370–72. The Participation Agreement stated that the Business Loan would remain payable to Pagel but increased Isabella’s Trusts’ interest to 31.89 percent interest. CP 373. Pagel was required to disburse any payments he received within ten (10) business days of receipt pro rata between himself and the Trusts. CP 370. Two years after Pagel negotiated for the security, Pagel recorded a deed of trust executed by Constable/Lindstrom encumbering their one-half interest in the West 7th Property. CP 265–70.

3.1.3 Two Door Garage Creditors

Two Door Garage used factors in connection with the handling of its accounts receivable, including Capital Business Credit (California), LLC and Lantern Finance Company. CP 578–

84, 605–15. On January 30, 2009, Constable/Lindstrom personally guaranteed Two Door Garage’s debt to Capital Business Credit (California). CP 585–601. The next day, less than 11 months after it was recorded, Pagel reconveyed to Constable/Lindstrom the deed of trust that secured the Business Loan. CP 273–76, 645–46. Pagel neither sought permission to do so nor informed Schuegraf of his action. The security for which Pagel reduced the note value was erased.

Fifteen months later, on April 27, 2010, Pagel and Constable/Lindstrom executed a promissory note (the “Lantern Debt”), in favor of Lantern Finance Company, Inc. (“Lantern”). CP 615. Pagel and Constable/Lindstrom each personally guaranteed the Lantern Debt. CP 611–15. Pagel and Constable/Lindstrom executed a deed of trust in favor of Lantern, each as to their one-half interest in the West 7th Property. *See* CP 402, 605–15, 647. The Lantern Debt money was used to repay the Capital Business Credit (California) debt in May 2010. In return, Capital Business Credit (California) reconveyed its security in the West 7th Street Property. CP 606.

3.1.4 Constable/Lindstrom Transfer West 7th Property to Satisfy Business Loan.

On June 3, 2010, Two Door Garage executed a “Joint Action by Written Consent of a Majority of the Shareholders and the Directors of Two Door Garage, Inc.” CP 617–18. Pagel and Constable/Lindstrom agreed “that a transaction wherein the [\$1,200,000] Promissory Note and the Company’s obligations pursuant thereto are extinguished in consideration of Constable and Lindstrom assigning their interests in full in the West 7th Property to Pagel (the ‘Transaction’) would be in the best interests of the Company.” CP 617. Two Door Garage was dissolved almost two years later on April 20, 2012. CP 302–03. On September 17, 2012, Constable/Lindstrom executed a grant deed transferring their one-half interest in the West 7th Property to Pagel. CP 278–81. Pagel never informed Schuegraf that he reconveyed the security three years earlier and never told Schuegraf that Constable/Lindstrom transferred their one-half interest in the West 7th Property to satisfy the Business Loan in which Isabella’s Trust had a 31.89 percent interest. CP 305, 620–26.

3.1.5 Sale of the West 7th Property and Distribution of the Proceeds.

Pagel sold the West 7th Property on October 1, 2012, for \$1,336,500.00. CP 379. From the proceeds, \$635,247.91 was distributed directly to Lantern to discharge the Lantern Debt, and \$618,074.67 was distributed to Pagel. CP 379.

On October 7, 2012, Pagel told Schuegraf that the West 7th Property had been sold and the share for Isabella's Trust was in a separate account. CP 626. However, Pagel still did not tell Schuegraf that the Business Loan had been deemed satisfied years earlier by Constable/Lindstrom's transfer to him of their one-half interest in the West 7th Property. *See* CP 626. On September 16, 2013, Pagel sent Schuegraf an email and attached a closing statement providing a breakdown of the proceeds of sale. CP 141–42. Pagel told Schuegraf that of the \$618,074.67 in proceeds, one-half belong to him. CP 141. Out of the remaining one-half, Pagel said that \$238,900.00 was used to “Repay Anna Robin loan principal.” CP 141. This was untrue, however. The Anna/Robin loan principal (the Purchase Loan) was \$212,500, not \$238,900. CP 508–13.

The September 16, 2013, email was also the first notice to Schuegraf that Two Door Garage had been dissolved: “Two Door Garage was insolvent and had to shut down. Anna kept the CR [Charlie Rocket] brand.” CP 141.

3.2 Procedural History.

Schuegraf filed a Trust and Estate Dispute Resolution Action (“TEDRA”) on November 14, 2015, seeking a judgment against Pagel, alleging he owed and breached fiduciary duties to Isabella’s Trust. CP 1–5, 397–407. Pagel denied the liability allegations of the Action and counterclaimed for removal of Schuegraf as Trustee, for failure to account. Schuegraf accounted, and the trial court denied Pagel’s motion for summary judgment on removal. CP 200–02. Following discovery, Schuegraf moved for judgment as a matter of law.

The motion for summary judgment was heard and granted by the trial court, which awarded Isabella’s Trust \$98,552.00 (31.89 percent of one-half of the net sale proceeds). CP 715–16. Schuegraf moved to amend the judgment to include an award for attorney’s fees and prejudgment interest, which the trial court awarded in the amount of \$63,202.25 (fees) and \$42,213.11 (interest) “yielding a

final judgment of \$203,967.36 . . .” CP 830. Pagel appealed. CP 816, 872.

IV. ARGUMENT

A summary judgment decision is reviewed de novo on appeal. *Int'l Marine Underwriters v. ABCD Marine, LLC*, 179 Wn.2d 274, 291, 313 P.3d 395 (2013). Facts are viewed in a light favoring the party resisting the motion for summary judgment. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846, *cert denied*, 552 U.S. 1040 (2007). However, an appellate court can “sustain the trial court’s judgment upon any theory established in the pleadings and supported by the proof, even if the trial court did not consider it.” *LaMon v. Butler*, 112 Wn.2d 193, 200–01, 70 P.2d 1027, *cert. denied*, 493 U.S. 814 (1989). When reviewing issues on appeal, an appellate court must apply the standard of proof that would apply at trial. *Burton v. Twin Commander Aircraft, LLC*, 171 Wn.2d 204, 238 n.8, 254 P.3d 778 (2011).

Even when viewing the facts in Pagel’s favor, the trial court was correct in its decision to grant judgment against Pagel as a matter of law on each alleged error. Schuegraf respectfully requests this Court affirm the trial court’s decision in its entirety.

4.1 Pagel’s Alleged PMSI is Irrelevant to a Determination of the Case.

Even if the unrecorded Constable/Lindstrom deed of trust created a Purchase Money Security Interest (PMSI) under California law, the PMSI is irrelevant to a determination of this case for two reasons: 1. The Constable/Lindstrom interest in the West 7th Property was quitclaimed to Pagel to satisfy the Business Loan in which Isabella’s Trust had a 31.89 percent interest; and 2. Pagel did not follow California law to realize the PMSI.

4.1.1 The West 7th Property Was Distributed to Pagel in Satisfaction of the Business Loan.

Pagel received the West 7th Property in satisfaction of the Business Loan, not the Constable/Lindstrom Purchase Loan. CP 617–18. Under the Participation Agreement, Pagel was required to distribute 31.89 percent of one-half of the Business Loan proceeds to Isabella’s Trust within 10 days of receipt. CP 370–72.

Isabella’s Trust did not owe money to Pagel. Nonetheless, Pagel paid himself \$238,900 from the one-half of proceeds subject to the Trust’s interest. CP 141. Furthermore, he dissembled in describing the basis for the \$238,900, calling it “loan principal” even though the “loan principal” was \$212,500.00. Pagel mislead

Schuegraf about the basis for the \$238,900, and he privileged his personal return over Isabella's Trust.

4.1.2 Pagel Did Not Follow Mandatory California Foreclosure Procedures.

Pagel argues that selling the West 7th Property free and clear and then enforcing his unrecorded PMSI against Isabella's Trust is somehow equivalent to a California nonjudicial foreclosure. RP 32, CP 177. Although an unrecorded California deed of trust securing a purchase money security interest can take priority over other deed holders, it must be enforced by a specific set of procedures. Pagel did not even attempt to follow these procedures and the alleged priority of his PMSI is an irrelevant red herring.

A California deed of trust with a power of sale clause can be nonjudicially foreclosed by complying with a mandatory procedure outlined in California Civil Code §§ 2924–2924l. *Moeller v. Lien*, 25 Cal. App. 4th 822, 830, 30 Cal. Rptr. 2d 777 (Ct. App. 1994) (criticized on other grounds by *Melendrez v. D & I Inv., Inc.*, 127 Cal. App. 4th 1238 (Ct. App. 2005)). The purpose of this statutory scheme is threefold: “1) to provide the creditor/beneficiary with a quick, inexpensive and efficient remedy against a defaulting debtor/trustor; (2) to protect the debtor/trustor from wrongful loss of

the property; and (3) to ensure that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser.” *Moeller*, 25 Cal. App. 4th at 830.

California Civil Code §2898(a) states that a PMSI is “subject to the operation of the recording laws.” This statute has been interpreted to mean that a PMSI has priority over other encumbrancers and interest holders except a “purchaser or encumbrancer in good faith and for value.” *Brock v. First S. Sav. Ass'n*, 8 Cal. App. 4th 661, 670, 10 Cal. Rptr. 2d 700 (Ct. App. 1992).

Pagel was the creditor on two separate and distinct debts: the Purchase Loan owed by Constable/Lindstrom, with security in the form of an unrecorded deed of trust, and the Business Loan owed to Pagel by Two Door Garage, which was secured for about ten months by a recorded deed of trust in favor of Pagel.

Constable/Lindstrom transferred their one-half interest in the West 7th Property to Pagel on June 3, 2010, to satisfy the Business Loan in which Isabella’s Trust had a 31.89 percent interest. CP 617. “[E]quity treats that as done which by agreement is to be done . . .” *Chem. Bank. v. WPPS*, 102 Wn.2d 874, 929, 691 P.2d 524 (1984) (citing *Fleishbein v. Thorne*, 193 Wash. 65, 72, 74

P.2d 880 (1937)). The transfer was made via a Two Door Garage shareholder agreement which Pagel executed as shareholder and director and which explicitly stated that the transfer was in satisfaction of the Business Loan owed by Two Door Garage. CP 617–18. Pagel testified by declaration that he took title to Constable/Lindstrom’s one-half interest in the West 7th Property to recover on the Business Loan. CP 492. This is an important fact ignored by Pagel’s brief.

Upon the transfer of Constable/Lindstrom’s one-half interest in the West 7th Property to Pagel, the Two Door Garage Business Loan was deemed satisfied, even though Pagel never sought authority from Schuegraf (the Trustee) to bargain the Trust’s interest in this way.

When Pagel agreed to accept Constable/Lindstrom’s one-half interest in the West 7th Property in satisfaction of the Business Loan, it exposed Pagel’s unrecorded PMSI to loss if the West 7th Property was sold to a good faith purchaser, for value, without knowledge of the secret security interest. *See Brock*, 8 Cal. App. 4th at 670. Despite this risk, Pagel sanctioned the transfer by personally signing the agreement. CP 618. And then Pagel did nothing to

obtain repayment on the Purchase Note debt owed by Constable/Lindstrom.

Pagel had numerous avenues to protect his rights under the Purchase Note. Pagel could have refused to accept the Property in satisfaction of the Business Loan and instead demanded transfer to satisfy the Purchase debt. He did not. Pagel could have secured his interest in the Purchase Note by recording his deed of trust, thereby placing potential purchasers on notice of his security interest and making his alleged PMSI a disclosed rather than secret security interest. He did not. Pagel could have foreclosed on the PMSI debt under the procedures outlined in California Civil Code §§2924–2924l. He did not.

Instead of taking any of the number of available legal avenues to protect or realize his unrecorded PMSI, Pagel sold the West 7th Property to an unrelated third party for \$1,336,500.00 on October 1, 2012. CP 379. As noted in the Counter-Statement of Facts, Pagel offered several mutually exclusive and inconsistent explanations regarding the allocation of proceeds from the sale. The last explanation, which Pagel made for the first time in response to Schuegraf's Motion for Summary Judgment, was that selling the West 7th Property to an innocent third party buyer and then

enforcing his secret security interest against Isabella's Trust was like an imaginary foreclosure. RP 32, CP 177. But Pagel failed to follow mandatory California foreclosure law, so any imaginary foreclosure analysis is useless, since Pagel failed to follow the law that would have allowed a real foreclosure in the first place. *See* Cal. Civ. Code §§ 2924–2924l.

Pagel's assertion that the PMSI gave him priority over Isabella's Trust is meritless. A PMSI only gives priority to the security itself and the remedy for breach of the debt secured by the PMSI is foreclosure. *See Moeller*, 25 Cal. App. at 829–32. Pagel sold the property without disclosing the PMSI, and then lied to Schuegraf about the allocation of proceeds. There was no foreclosure, imaginary or otherwise, no compliance with California law on realizing security interests, and no honesty or forthrightness in explaining what happened to the once-secured interest of Isabella's Trust in the Business Loan. The alleged priority of Pagel's secret PMSI is irrelevant to a decision of the case and the trial court's decision to grant summary judgment on this issue should be affirmed.

4.2 Pagel Breached his Fiduciary Duties to Isabella's Trust.

4.2.1 Pagel Fiduciary Duties to Isabella's Trust.

Pagel had fiduciary duties arising from the Trust Agreement, the Separation Agreement, and the Participation Agreement. The existence of a fiduciary relationship is a question of law. *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 857, 292 P.3d 779 (2013)

(citing *S.H.C. v. Lu*, 113 Wn. App. 511, 524, 54 P.3d 174 (2002)).

“A fiduciary is a person who, on account of his relationship with another person (‘the beneficiary’), is both authorized to act for the beneficiary and owes a duty of loyalty to the beneficiary.” *Richards v. Seattle Met. Credit Union*, 117 Wn. App. 30, 33–34, 68 P.3d

1109 (2003) (citing *Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP*, 110 Wn. App 412, 433–34, 40 P.3d 1206 (2002)). A

fiduciary relationship can arise outside of a formally defined fiduciary role—*e.g.* attorney/client or doctor/patient—in cases

where a “person whose relation with another is such that the latter justifiably expects his welfare to be cared for by the former.”

Liebergesell v. Evans, 93 Wn.2d 881, 891, 613 P.2d 1170 (1980)

(citing *Restatement of Contracts* § 427 Cmt. C). See also *Salter v. Heiser*, 36 Wn.2d 536, 551, 219 P.2d 574 (1950) (quoting

Schweikhhardt v. Chessen, 329 Ill. 637, 649, 161 N.E. 188 (1928)

(“A fiduciary relation is not limited to cases of trustee and *cestui que trust*, guardian and ward, attorney and client, or other recognized legal relations, but it exists in all cases where confidence is reposed on the one side and a resulting superiority and influence on the other side arises therefrom. *The origin of the confidence is immaterial. It may be moral, social, domestic, or merely personal.*”)).

For example in *Liebergesell*, the Court found that a contractual relationship gave rise to fiduciary duties. *Liebergesell*, 93 Wn.2d at 890–96. When analyzing which factors evidenced a fiduciary duty arising from the Participation Agreement the Court referred to: 1. the lack of business expertise of one party, 2. the superior knowledge of the other party, 3. a friendship between the parties that made it reasonable for one to rely on the other, and 4. the assumption of an advisory role by one party. *Liebergesell*, 93 Wn.2d at 891–92.

Pagel had superior business expertise relative to Isabella’s Trust due to Pagel’s history of business dealings with Two Door Garage and Constable/Lindstrom. Pagel had superior knowledge of the relevant facts due to his roles as the original, voluntary creditor of both Two Door Garage and Constable/Lindstrom. Pagel had

superior knowledge of his own unrecorded PMSI and of the conflict between his interest and that of Isabella's Trust. Unlike Isabella's Trust, Pagel was both a shareholder and director of Two Door Garage. Despite the divorce, Pagel was Isabella's father—a status and role that made it more than reasonable for Isabella's Trust to expect Pagel would care for its interests. And finally, Pagel acted as an advisor as he was the sole party who negotiated the terms of the Business Loan with Two Door Garage, the security for the Business Loan, the reconveyance of the security for the Business Loan, and the deemed "satisfaction" of the Business Loan by transfer of the Constable/Lindstrom one-half interest in the West 7th Property.

The Participation Agreement explicitly required Isabella's Trust to completely rely on Pagel to collect the Business Loan and remit the Trusts' share of the amounts collected: "If and to the extent that Martin receives payments . . . on any Note, Martin will disburse such payments . . . pro rata in accordance with the percentage interests . . . set forth in Exhibit A." CP 35. Isabella's Trust was not even a direct beneficiary of the relevant debt instruments—Isabella's Trust was simply assigned an interest in a note issued to Pagel, and it was explicitly required to rely on Pagel to collect payments and remit the proper share. CP 35. Neither

Isabella (the beneficiary) nor the Schuegraf (the trustee) were sophisticated or voluntary lenders; Isabella's Trust was merely a third party beneficiary of a loan Pagel made to a business he owned. Pagel alone knew all the facts related to the Business Loan, how and when that debt could and would be collected, and the amounts collected. The trial court properly held that Pagel was a fiduciary and owed fiduciary duties to Isabella's Trust.

4.2.2 A Participation Agreement Can Give Rise to Fiduciary Duties Without Unequivocal Language.

Pagel argues that a Participation Agreement must contain unequivocal fiduciary language to create a fiduciary relationship. *See* Appellant's Opening Br. 36–37. This argument depends entirely on plucking favorable-sounding quotes from a non-precedential opinion, *First Citizens Fed. Sav. & Loan Ass'n v. Worthen Bank & Trust Co., N.A.*, 919 F.2d 510 (9th Cir. 1990), and ignoring the rest.

The *First Citizens* court addressed a \$57 million loan participation agreement between 22 savings and loan institutions and explicitly limited its holding to “sophisticated lending institutions.” *First Citizens*, 919 F.2d at 514:

In the context of loan participation agreements among sophisticated lending institutions, we are of the

opinion that fiduciary relationships should not be inferred absent unequivocal contractual language similar to that discussed in *Women's Federal*. Banks and savings institutions engaged in commercial transactions normally deal with one another at arm's length and not as fiduciaries.

(italics added).

The *First Citizens* court limited its holding to commercial transactions between sophisticated lending institutions because they “normally deal with one another at arm’s length and not as fiduciaries.” *First Citizens*, 919 F.2d at 514 Additionally, the *First Citizens* court recognized that “the contract relationship must be evaluated on the *particular facts* of the case and not by simple reliance on the status of parties.” *First Citizens*, 919 F.2d at 513 (italics added). The limiting phrase “among sophisticated lending institutions” recognizes that a participation agreement not among sophisticated lending institutions may create a fiduciary relationship even though the participation agreement does not contain “unequivocal contractual language.” *First Citizens*, 919 F.2d at 513 Otherwise the court would simply have declared that “unequivocal contract language” is required per se. See *First Citizens*, 919 F.2d at 513. One of the particular facts militating in favor of finding a fiduciary relationship in First Citizens was language stating that

“Worthen holds the . . . note and any collateral . . . in trust . . .”

First Citizens, 919 F.2d 513. Isabella’s Trust was not a sophisticated, voluntary, institutional lender like the savings and loan institutions in *First Citizens*. Isabella’s Trust was not even a lender in the first place—it was merely an assignee of an interest in a loan made by Pagel, and that interest arose out of a divorce, not an arm’s length transaction. CP 22. The Participation Agreement was an instrument necessitated by the parties’ agreement “that the assignment and re-issuance of the Notes might result in complications” and thus “each of Martin, Max and Isabella [would] be assigned an undivided interest in the Notes . . .” CP 35. The Participation Agreement was a “work-around” from its very inception, not a vehicle chosen for its effectiveness in allowing collective investment.

Pagel, on the other hand, was a sophisticated business man with business lending experience who chose to make the loan that was assigned in part to Isabella’s Trust. CP 489–93. Pagel was an owner and shareholder of the debtor Two Door Garage and was explicitly identified as the sole Payee on the Notes. Additionally, the Participation Agreement explicitly required Pagel to disburse any payments received on the debt within ten (10) days of receipt to

Isabella's Trust. This language was nearly identical to the language discussed in *First Citizens* as evidencing a fiduciary relationship. CP 370.

The fact that Isabella's Trust was neither a sophisticated nor voluntary lender, that Pagel was a sophisticated businessman with business lending experience, and the language of the Participation Agreement give ample ground to distinguish the limited holding of *First Citizens* from this case. The nonbinding decision in *First Citizens* does not prevent the finding of a fiduciary relationship in this case. The trial court properly found that Pagel owed fiduciary duties to Isabella's Trust as a matter of law.

4.2.3 Pagel was a Fiduciary as a Grantor of Isabella's Trust and Did Not Satisfy His Duty to Fund Isabella's Trust.

Pagel appears to argue that his sole responsibility to Isabella's Trust was to "fund it" by signing the Participation Agreement. Appellant's Opening Br. 34. However, the Participation Agreement did not fund Isabella's Trust. By its explicit terms it deferred the funding of Isabella's Trust until proceeds were received by Pagel. CP 370. The Participation Agreement specifically stated that it was necessary because reissuing the Notes might result in complications. CP 370. The parties avoided the

complications by assigning undivided interests in the notes payable to Pagel and explicitly charging Pagel with the duty to properly and timely disburse payments received by him in accordance with the Participation Agreement. CP 370.

Pagel claims there is no law that equates the grantor of a trust with a fiduciary. Appellant's Opening Br. 34. This straw man ignores important facts in this case. First, as discussed above, a fiduciary relationship can be created based on the trusting relationship between parties of unequal knowledge and sophistication, especially where one party has to rely on the other to protect its interests. And second, Pagel was not merely a trust grantor; he was required by the Participation Agreement to remit to Isabella's Trust its share of payments collected by him on the Business Loan.

4.2.4 Pagel Breached His Fiduciary Duties to Isabella's Trust.

Pagel breached his fiduciary duties when he favored his interest in the proceeds of the sale of the West 7th Property over those of Isabella's Trust. "In a fiduciary relationship one party 'occupies such a relation to the other party as to justify the latter in expecting that his interest will be cared for . . .'" *Micro*

Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP, 110 Wn. App 412, 433, 40 P.3d 1206 (2002) (quoting *Liebergesell v. Evans*, 93 Wn.2d 881, 889–90, 613 P.2d 1170 (1980) (quoting *Restatement of Contracts* § 472(1)(c))).

The record is replete with evidence showing that Pagel serially violated his fiduciary duties to Isabella's Trust since 2009. CP 489–93. However, only his last and final breach is relevant to the judgment.

When Pagel sold the West 7th Property, Lantern Finance was paid from escrow, along with closing costs, and net proceeds of \$618,074.67 were distributed to Pagel. CP 142. Half the net proceeds belonged to Pagel free and clear. But “the children’s interests in the CR Debt were in 31.89 percent of the collateral Pagel collected—so, 31.89 percent of ½ of West 7th St.” CP 454, n.15. Pagel did not distribute 31.89 percent of one-half of the proceeds to Isabella’s Trust. Instead, he simply kept \$238,900 for himself, and now claims that the \$238,900 was due to him based on the Purchase Note and his unrecorded PMSI.

Pagel’s fiduciary duty required him to act in the best interest of Isabella’s Trust at all times. Instead, he repeatedly favored his interests over those of Isabella’s Trust. The principal on the

Purchase Loan was \$212,500, not \$238,900, meaning that Pagel’s statement to Schuegraf at CP 141 was untrue, as is his Second Declaration, Paragraph 7, where he blamed Schuegraf for his own self-dealing and claimed Isabella’s Trust received nothing from the sale of West 7th, while he “as the secured party, did receive payment from the sale of the West 7th Street collateral property.” CP 284. Pagel’s repeated breaches of fiduciary duty denied Isabella’s Trust its interest in 31.89 percent of one-half of the West 7th Property. The trial court’s decision that Pagel breached his fiduciary duties to Isabella’s Trust should be affirmed.

4.3 Claims are not Time Barred.

Pagel claims a statute of limitation protects him from being held responsible for his breaches of fiduciary duties. The trial court rejected his argument for two reasons: 1. Pagel’s obligations were based on a writing and the statute of limitations for breach of a written contract is six years from the date of breach, and 2. The statute of limitations on Pagel’s last breach of fiduciary duty began to run on September 16, 2013, when Pagel sent Schuegraf a copy of the seller’s statement and dissembled about the basis for paying himself \$238,900.00 against the interests of Isabella’s Trust. CP 378–79.

4.3.1 The Statute of Limitations is six years for Actions on Written Agreements.

Pagel cites to *Bertelsen v. Harris*, 459 F. Supp. 2d 1055, 1062 (E.D. Wash. 2006) for the proposition that RCW 4.16.080 applies to breaches of fiduciary duty and thus limits the statute of limitations to three (3) years. *Bertelson* is not binding authority and is entirely lacking in analysis. Furthermore, RCW 4.16.080 does not apply to this case because Pagel's fiduciary duties arise out of a writing: "Except as provided in RCW 4.16.040(2), an action upon a contract or liability, express or implied, *which is not in writing* and *does not arise out of any written instrument.*" RCW 4.16.080 (emphasis added). The statute on which Pagel relies does not apply to actions arising out of the breach of a written instrument. The trial court recognized that Pagel's duties arose from written instruments—the Separation Agreement, the Trust Agreement, and the Participation Agreement—thus rendering RCW 4.16.080 inapplicable. Therefore, the trial court should be upheld in its determination that the proper statute of limitations was six (6) years pursuant to RCW 4.16.040.

4.3.2 The Statute of Limitations Began to Run on September 16, 2013.

The statute of limitations began to run on September 16, 2013, the date Pagel first notified Schuegraf of the amount of proceeds he allocated to Isabella's Trust.

Pagel seeks to establish October 7, 2012, as the date the statute of limitations began to run on his breach of fiduciary duty. Appellant's Opening Br. 43. To support this theory, Pagel cites to an email he sent to Schuegraf telling her the 7th Street Property sold. But nothing in that email, which Pagel fails to quote, put Schuegraf on notice that Pagel had favored himself over Isabella's Trust. The email states in relevant part:

There are several issues to be resolved on behalf of Isabella

2. Proper Management of her trust fund including quarterly reporting and tax filing. Still waiting for requested transfer of trusteeship.

3. 7th property was sold last week. Max's share of proceeds has been transferred into his trust, Isabella's share into a separate account awaiting resolution of issue #2.

CP 626.

Pagel did not state, or even hint, that he was self-dealing in detriment to Isabella's Trust. Quite the opposite, Pagel stated that

he would fund Isabella's Trust after he was satisfied with the resolution of other issues he raised. CP 626. The email plainly states that Pagel had separated out the funds attributable to Isabella's Trust and was holding them in a separate account. The email gives no notice whatsoever that Pagel had decided to retain a portion of the Trust's proceeds for himself.

Schuegraf argued that Pagel breached his fiduciary duties when he favored his interest over that of Isabella's Trust. Until September 16, 2013, when Pagel finally shared the closing statement, his self-dealing was a secret that only Pagel knew. While Pagel's delay in funding Isabella's Trust was also potentially a breach of his fiduciary duties, it was neither the last breach, nor the breach upon which judgment was granted.

Appellant argues that Pagel's secret breach of fiduciary duties to Isabella's Trust was sufficient to trigger the statute of limitations and for support cites to *Green v. A.P.C.*, 136 Wn.2d 87, 960 P.2d 912 (1998). However, *Green* involved toxic torts and merely noted that a cause of action may trigger a "statute of limitations if a party should have discovered salient facts regarding a claim." *Green*, 136 Wn.2d at 95. "When a plaintiff is placed on notice by some appreciable harm occasioned by another's wrongful

conduct, the plaintiff must make further diligent inquiry to ascertain the scope of the actual harm.” *Green*, 136 Wn.2d at 96.

The breach of fiduciary duty upon which judgment was granted in this case was not a breach of the 10 day funding requirement, it was Pagel’s self-dealing at the expense of Isabella’s Trust and subsequent misleading of the Trustee. Pagel fails to explain how the breach of one fiduciary duty would trigger the statute of limitations on other breaches, including secret self-dealing entirely unrelated to the 10-day funding breach.

4.4 Estoppel Does Not Prevent Isabella’s Trust from Recovering.

Pagel argues that estoppel prevents Schuegraf from alleging that removing the security for the Business Loan was a breach of his fiduciary duty. Appellant’s Opening Br. 44. While Pagel’s reconveyance of security was unquestionably a breach of fiduciary duty, it was not the breach upon which judgment was granted, thus rendering Pagel’s argument on this score irrelevant. Furthermore, Pagel’s entire argument relies on a gross mischaracterization of Schuegraf’s position.

Pagel recites like a mantra that Schuegraf opposed securing the Business Loan, and cites to his lawyer’s arbitration letter for

support. Appellant's Opening Br. 44 (citing CP 133–34). But the issue at arbitration was whether Pagel had authority to unilaterally reduce the value of the debt, not whether he had authority to secure it. CP 305. As stated by the arbitrator “Pagel . . . was without authority to unilaterally change the terms of the existing account receivable and alter the interests of the children’s Trusts.” CP 32.

The advocate letter cited by Pagel does not even state that Schuegraf argued against security. The letter states that Schuegraf “would not agree to the amount of the promissory note” and she refused to “acknowledge the value of having a . . . secured” note. CP 134.

Pagel has not demonstrated in any way that Shuegraf's current position is inconsistent with her previous position in arbitration and the argument for equitable estoppel is meritless. And even if it had merit and Schuegraf were barred from arguing that Pagel's reconveyance was a breach, Isabella's Trust would not be barred from seeking the proceeds it was due from the sale of the West 7th Property. Whether the security was right or wrong, or existed or did not, it was Pagel's self-dealing post-sale that caused the harm upon which judgment was based.

4.5 Pagel’s Motion for Summary Judgment Properly Denied.

Pagel claims the trial court erred in failing to grant judgment as a matter of law to Pagel. But Pagel offers no argument or authority in support of this assignment of error and does not discuss it meaningfully. An appellate court generally does not address issues that a party does not meaningfully discuss or brief, and this Court should not address the denial of Pagel’s motion for summary judgment. To the extent this Court is inclined to review this unbriefed and unargued assignment of error, Schuegraf respectfully requests this Court affirm the trial court’s decision to deny Pagel’s motion for summary judgment. Schuegraf’s “failure to account” was remedied by a full and unreserved accounting for funds in Isabella’s Trust. CP 122–24, 160–61. Schuegraf’s “failure” was harmless, and Pagel’s Reply in support of his motion for summary judgment failed to identify any harm caused by Schuegraf’s failure to account until 2016. CP 169–74. “All cases involving trusts, regardless of whether the trust [is] express or *ex maleficio*, are exclusively within the jurisdiction of equity.” *Dexter Horton Bldg. Co. v. King County*, 10 Wn.2d 186, 192, 116 P.2d 507 (1941). Equity is not an entitlement; it is a matter of the Court’s discretion,

and the trial court acted well within its discretion to deny Pagel’s motion for summary judgment. If it were granted, the effect would be to elevate Pagel to the role of Trustee of Isabella’s Trust, putting him in charge of the action against him. The trial court recognized these dynamics, recognized that Schuegraf remedied the failure to account, recognized that her failure to account prior to 2016 was harmless, and properly denied Pagel’s motion for summary judgment. Schuegraf respectfully requests this Court affirm the trial court’s decision.

4.6 Attorney’s Fees.

Schuegraf sued Pagel under RCW 11.96A, which “set[s] forth generally applicable statutory provisions for the resolution of disputes and other matters involving trusts and estates in a single chapter” RCW 11.96A.010.

Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys’ fees, to be awarded to any party: (a) From any party to the proceedings The court may order the costs, including reasonable attorneys’ fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

RCW 11.96A.150.

Furthermore, the Participation Agreement included an attorneys' fee clause. CP 36. On appeal, a trial court's decision to award attorney's fees is a question of law and reviewed de novo.

McGuire v. Bates, 169 Wn.2d 185, 189, 234 P.3d 205 (2010).

However, the amount of attorney's fees granted by the trial court is reviewed for abuse of discretion. *Sanders v. State*, 169 Wn.2d 827, 866–67, 240 P.3d 120 (2010).

The trial court awarded fees to Schuegraf. CP 716, 829–30. Pagel breached fiduciary duties to Isabella's Trust, he harmed Isabella's Trust as a consequence, and Schuegraf successfully held Pagel financially responsible for his breach of fiduciary duty. Attorneys' fees were properly awarded under RCW 11.96A.150 within the discretion of the trial court, and based on the Participation Agreement.

Schuegraf respectfully requests this Court affirm the judgment below in all respects, including the award of fees and costs and amounts thereof, and further award to her the fees and costs incurred on appeal in this matter. The sole purpose of this litigation has been to benefit Isabella's Trust, which was proximately harmed by Pagel's self-dealing. It would be inequitable

to place the financial burden of righting Pagel's wrongs on the Trust that Pagel wronged in the first place.

V. CONCLUSION

The trial court correctly granted summary judgment in favor of Isabella's Trust as Pagel breached his fiduciary duties to Isabella's Trust. Pagel accepted a transfer of an interest in one-half of the West 7th Property to satisfy the Business Loan. The Participation Agreement required Pagel to distribute the 31.89 percent of one-half of the proceeds to Isabella's Trust. Instead, Pagel decided to take those proceeds and use them to satisfy a debt owed to him by Constable/Lindstrom. In doing so, he breached his fiduciary duties to Isabella's Trust by failing to act in the trust's best interests.

Pagel argued that his PMSI gave him priority in the sale of the property. However, this was only partially correct, it gave him priority in chain of title. However, he did not enforce his priority under California's mandatory foreclosure procedures. Thus, the court should affirm the summary judgment decision of the trial court as Pagel has not demonstrated any legal grounds for his decision to retain the proceeds from the West 7th Property.

DATED this 15 day of December, 2016.

REED, LONGYEAR, MALNATI, &
AHRENS, PLLC

By 

Jason W. Burnett, WSBA #30516
Anton B. Cauthorn, WSBA #45191
Counsel for Appellant

No. 75159-0-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

In re: Pagel, Appellant

v.

The Isabella Franziska Xochitl
Pagel Irrevocable Trust,
Respondent

CERTIFICATE OF SERVICE

I declare under penalty of perjury, under the laws of the State of Washington, that on December 15, 2016 I caused true and correct copies of the RESPONDENT'S RESPONSE BRIEF, and this Certificate of Service, to be served to the parties and counsel of record as follows:

<i>Person / Address</i>	<i>Via</i>
James T. Yand	<input type="checkbox"/> U.S. Postal Service
A. Paul Firuz	<input type="checkbox"/> (1 st Class)
Miller Nash Graham & Dunn, LLP	<input checked="" type="checkbox"/> Legal messenger
Pier 70	<input type="checkbox"/> Facsimile
2801 Alaskan Way, Ste. 300	<input type="checkbox"/> E-mail
Seattle, WA 98121	<input type="checkbox"/> Hand delivery

DATED this 15th day of December, 2016.


Melissa R. Macdonald, RP, CRP
Paralegal to Jason W. Burnett and
Anton B. Cauthorn