

No.: 65159-5-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

ROBERTO RODRIGUEZ,

Respondent,

v.

WINDERMERE REAL ESTATE/WALL
STREET, INC.,

Appellant.

2011 JAN 31 PM 10:56
COURT OF APPEALS
CLERK OF COURT
39

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

The Broker/Sales Associate between plaintiff/respondent Roberto Rodriguez (“Rodriguez”) and Windermere Real Estate/Wall Street, Inc. (“Windermere”) provided that if Rodriguez did not pay amounts owing to Windermere, he would be liable for collection costs, including attorney fees. There is no dispute that RCW 4.84.330 makes this provision mutual such that the prevailing party in any collection action would be entitled to an award of attorney fees.

This, however, is not a collection action for unpaid costs owing to Windermere. It is a breach of contract action by an agent asserting entitlement to a disputed commission. King County Superior Court Judge Suzanne Barnett, however, held that RCW 4.84.330 not only makes the fee provision mutual, but also makes it apply to any contract claim. Judge Barnett made a similar ruling regarding judgment interest. The Broker/Associate agreement provides that Rodriguez would pay 18% interest on amounts owing to Windermere. Judge Barnett ruled that Rodriguez therefore is entitled to 18% judgment interest.

RCW 4.84.330 makes unilateral fee provisions bilateral, but does not expand the provision to cover additional claims. Similarly, the inclusion of an interest rate for one purpose in a contract does not establish a “contractual rate” for all purposes. Judge Barnett erred in awarding

contractual attorney fees and 18% judgment interest, and this Court should reverse those awards.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it awarded Rodriguez attorney fees under the Broker/Sales Associate Agreement.

2. The trial court erred when it imposed an 18% rate on judgment interest.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does the Broker/Sales Associate Agreement provide for an award of attorney fees in an action by an associate against the broker for a commission?

2. Does the Broker/Sales Associate Agreement provide for judgment interest at 18% per annum in an action by an associate against the broker for a commission?

IV. FACTUAL BACKGROUND

Rodriguez joined Windermere as a salesperson in 2004. The parties' relationship was defined by a written Broker/Sales Associate Agreement ("the Agreement"). Trial Exhibit 1 (relevant excerpts attached as Appendix 1).

The Agreement does not contain a standard attorney fee provision. In fact, it contains only a single reference to attorney fees in the “Term and Termination” section.

Unpaid Obligations to Broker: Upon termination Associate will immediately pay all amounts due Broker. If Associate moves to another real estate brokerage, Associate hereby irrevocably assigns the proceeds of any pending commissions and, upon Broker's written request to Associate's new Broker, authorizes the new Broker to deduct and forward such shortfalls out of commissions earned at Associate's new brokerage to Broker until owed amounts are paid in full. **Collection costs on amounts not paid, including attorney's fees, shall be paid by Associate.**

Exhibit 1 at p. 5, ¶ 13 (emphasis added) (attached as Appendix 1).

The Agreement contains two identical references to an interest rate for amounts that the associate owes to the broker.

If Associate fails to pay remaining balances by the deadline, then Broker may assess a late fee. All balances that remain unpaid thirty days after becoming due shall accrue interest at the rate of 18% until paid.

Exhibit 1 at ¶ 7 and at Schedule A, ¶ D (attached as Appendix 1).

After his termination in 1985, Rodrigues brought this action against Windermere, claiming that he was owed \$16,800 in commissions. CP 5-9. The case was tried to Judge Suzanne Barnett in 2009, and the

Court found for Rodriguez, awarding him \$12,338.92 of commissions.¹
CP 451.

In post-trial motions, Judge Barnett awarded Rodriguez \$164,755.53 of attorney fees and costs under the Agreement and RCW 4.84.330.

Mr. Rodriguez is entitled to an award of attorneys' fees and costs against defendant Windermere Real Estate/Wall Street, Inc. ("Windermere") by the terms of Paragraph 13 of the Broker/Sales Associate Agreement, Trial Exhibit #1 and RCW 4.84.330. Paragraph 13 is a contract provision that entitled Windermere to attorneys' fees arising from efforts to collect amounts due from a Sales Associate. RCW 4.84.330 operates to make that Paragraph 13 reciprocal. Mr. Rodriguez's attorney fees and costs in this matter were incurred in Mr. Rodriguez's effort to collect amounts owed to him by Windermere.

CP 398; *see* CP 448. Windermere brought a timely motion for reconsideration, arguing that RCW 4.84.330 made an award of fees reciprocal in an action by the broker to recover costs advanced by the broker, but did not expand the scope of the provision to commission claims by associates against the broker. CP 417-23. Judge Barnett denied the motion without calling for a response. CP 439-40.

In a separate post-trial motion, Rodriguez requested that the Court award judgment interest at the rate of 18% per annum. CP 23. Judge

¹ Rodriguez also sued another Windermere Agent, Sara Thompson, asserting a partnership with her and seeking damages for breach of fiduciary duty. The trial court found for Rodriguez on that claim as well, awarding \$66,283.53 in damages. CP 452. That judgment is not the subject of this appeal.

Barnett agreed, and awarded 18% judgment interest against Windermere. CP 451. Reconsideration was denied. CP 439-40.

Windermere and Thompson filed a timely Notice of Appeal. CP 441-455. This appeal subsequently was stayed by order of the Court after Thompson filed a bankruptcy petition. Thompson is now deceased and that part of the appeal is abandoned.

V. LEGAL ANALYSIS

A. The Trial Court Erroneously Awarded Fees Under the Broker/Sales Associate Agreement.

Judge Barnett was clear in her belief that RCW 4.84.330 not only made the fee provision in the Broker/Associate Agreement bilateral, but also expanded its application to additional claims.

Mr. Rodriguez is entitled to an award of attorneys' fees and costs against defendant Windermere Real Estate/Wall Street, Inc. ("Windermere") by the terms of Paragraph 13 of the Broker/Sales Associate Agreement, Trial Exhibit #1 and RCW 4.84.330. Paragraph 13 is a contract provision that entitled Windermere to attorneys' fees arising from efforts to collect amounts due from a Sales Associate. RCW 4.84.330 operates to make that Paragraph 13 reciprocal. Mr. Rodriguez's attorneys' fees and costs in this matter were accrued in Mr. Rodriguez's effort to collect amounts owed to him by Windermere.

CP 398 at ¶ 5. In so ruling, Judge Barnett misinterpreted the effect of RCW 4.84.330. RCW 4.84.330 makes unilateral the fee provisions bilateral, but it does expand the scope of attorney fee provisions.

Review is *de novo*, both because it concerns questions of statutory construction (*City of Spokane v. County of Spokane*, 158 Wash.2d 661, 672-73, 146 P.3d 893 (2006)) and whether a contract provides for an award of attorney fees (*McGuire v. Bates*, 169 Wn.2d 185, 189, 234 P.3d 205, 206-07 (2010)). This Court should hold that fee provisions are limited to their scope, and that the fee provision at issue in this case did not apply to Rodriguez's claims.

1. Attorney Fee Provisions Are Limited to the Scope of Their Terms.

That *de novo* review starts with consideration of the scope of the attorney fee provision. Some contracts have broad attorney fee clauses for any action "concerning this Agreement" that apply event to tort claims arising out of the contract. *E.g.*, *Brown v. Johnson*, 109 Wn.App. 56, 58, 34 P.3d 1233, 1234 (2001). Other fee provisions are narrower, applying only to actions "to enforce any terms of this Agreement," and do not extend to tort claims arising out of the contract. *E.g.*, *Boguch v. Landover Corp.*, 153 Wn.App. 595, 607, 224 P.3d 795, 801 (2009).

Washington courts are uniformly careful to enforce the scope of attorney fee provisions. As this Court recently stated, "A prevailing party may recover attorney fees under a contractual fee-shifting provision such as the one at issue herein only if a party brings a 'claim on the contract,'

that is, only if a party seeks to recover under a specific contractual provision.” *Boguch*, 153 Wn.App. at 615.

A good example is *Marks v. Benson*, 62 Wn.App. 178, 813 P.2d 180 (1991). The Marks owned a service station in Omak, Washington. They gave Seafirst Bank a note which was secured by a deed of trust on their home. They sold the service station to Benson under an agreement that Benson would make the payments on the note to Seafirst. Benson later defaulted on the note, resulting in foreclosure of the Marks’ home. Marks then sued Benson for breach of the agreement to service the Seafirst loan. Summary judgment for Marks was reversed on bankruptcy grounds. The Court, however, rejected the Bensons’ argument that they would be entitled to contractual attorney fees if they prevailed on remand.

Benson-Doty contend that if they prevail, they are entitled to attorney fees because the SeaFirst note requires payment of attorney fees “by the payee” in the event of default and RCW 4.84.330 makes the obligation mutual. We disagree. First, the note provides for attorney fees in the event of default by the maker-borrower, not the payee. Benson-Doty were neither makers nor payees on the note. Second, the assignment, not the note, was central to the controversy. *Hemenway v. Miller*, 116 Wash.2d 725, 742-43, 807 P.2d 863 (1991). The assignment contains no attorney fees provision.

Id. at 186. Just as the Seafirst not provided for fees only in the event of default by the borrower, Rodriguez’s contract with Windermere provided for fees only in the event of nonpayment by Rodrgiuez.

Similarly, in *C-C Bottlers, Ltd. v. J.M. Leasing, Inc.*, 78 Wn.App. 384, 389-90, 896 P.2d 1309 (1995), the plaintiff sued to enforce two promissory notes, and the defendant counterclaimed for securities fraud. *Id.* at 386. The trial court granted summary judgment on the claims to enforce the note, and the counterclaims went to trial. *Id.* The defendant lost at trial, and the trial court awarded the plaintiff all of its fees. *Id.* On appeal, the Court held reversed, noting that: “The prevailing party in an action to enforce a contract is entitled to attorney fees and costs if the contract so provides.” *Id.* at 387.

The costs and fees provision of the notes also limits recovery of costs and fees to collection of the notes. By its language, it extends to suits brought “*herein*”, when attorneys are hired to compel payment of “*this Note*” or any indebtedness shown “*hereby*”, “or to compel curing of any default *hereunder*”. (Italics ours). In *Tradewell*, the court interpreted similar language as establishing only a right to attorney fees and costs for claims arising under the contract. *Tradewell*, at 129-30, 857 P.2d 1053 (language authorizing fees for “any litigation” involving rights under the contract establishes only a right to fees incurred in litigation of contract-related claims). An action is on a contract if it arises out of the contract and the contract is central to the dispute. *Tradewell*, at 130, 857 P.2d 1053.

“[T]he prevailing party should be awarded attorney fees only for the legal work completed on the portion of the claim permitting such an award”, because while collateral claims may well be related to the contract claim and therefore conveniently tried together, they need not be resolved in order to decide the primary claim. See *King Cy. v. Squire Inv. Co.*, 59 Wash.App. 888, 897, 801 P.2d 1022 (1990), *review denied*, 116 Wash.2d 1021, 811 P.2d 219

(1991). Allowing recovery of fees for actions which do not authorize attorney fees would also give the prevailing party an unfair and unbargained for benefit. *See Boeing Co. v. Sierracin Corp.*, 108 Wash.2d 38, 66, 738 P.2d 665 (1987). CCB's claims here arise from the promissory notes. The attorney fees provision authorized recovery only for all legal expenses incurred in compelling payment of those notes. *Tradewell*, at 129, 857 P.2d 1053.

Id. at 389-90.

In *CPL (Delaware) LLC v. Conley*, 110 Wn.App. 786, 797-798, 40 P.3d 679, 685-86 (2002), the parties contract provided for an award of fees to the prevailing party in any action “instituted to enforce or interpret any of the terms of this Agreement.” (quotation omitted). In an action asserting mutual mistake under a related agreement, the Court denied an award of attorney fees because “the action was not ‘instituted to enforce or interpret’ a term of the purchase agreements.” *Id.* at 797.

In *Stevens v. Security Pacific Mortg. Corp.*, 53 Wn.App. 507, 523, 768 P.2d 1007, 1016 (1989), the court refused to apply a fee provision for acceleration of a loan to a claim for nonpayment.

By the terms of the Deed of Trust, Stevens covenanted to promptly pay when due the principal and interest indebtedness evidenced by the note.

Security Pacific bases its claim for fees on paragraph 17 of the Deed of Trust, which sets forth the procedure for accelerating sums due upon borrower's breach and further provides as follows:

If the breach is not cured on or before the date specified in the notice [of acceleration], Lender at Lender's option may declare all of the sums secured by this Deed of Trust to be immediately due and payable without further demand and may invoke the power of sale and any other remedies permitted by applicable law. Lender shall be entitled to collect all reasonable costs and expenses incurred in pursuing the remedies provided in this paragraph 17, including, but not limited to, reasonable attorney's fees.

Exhibit 13. We find that this provision applies only where the lender has accelerated the note upon borrower's breach. In the present case, Security Pacific was not seeking to accelerate the note, as it had already been sold to Westinghouse. Accordingly, there is no contractual provision which would support an award of attorney's fees from Stevens in the present case.

Although the lender could only accelerate the loan if the borrower defaulted, the provision by its terms was limited to acceleration.

In *Hindquarter Corp. v. Property Development Corp.*, 95 Wn.2d 809, 815, 631 P.2d 923 (1981), “the lease authorized attorney's fees only for curing defaults.” The landlord prevailed in an action concerning both the tenant’s breach and its attempt to renew the lease. *Id.* The Court held that: “The terms of the lease authorized attorney's fees only for curing defaults, and the award of fees should reflect only those services rendered toward that end.” *Id.*

In *Keyes v. Bollinger*, 27 Wn.App. 755, 761, 621 P.2d 168 (1980), a purchase and sale agreement for a new home provided that:

In the event that either party to this agreement wrongfully fails to perform the terms and conditions on his part to be performed, such party, for the express benefit of the other party and the broker, agrees to pay the broker the commission provided for herein, plus any costs of collection, court costs and attorney's fees.

After closing, the buyer prevailed in an action against the builder for construction defects and delays, but was not awarded attorney fees under the contract. *Id.* The Court of Appeals affirmed the denial because:

An earnest money agreement is a contract to close a real estate transaction. The clause in this case refers to attorney's fees incurred in the event it is necessary to enforce the obligation of a party in breach to pay the broker's commission. The transaction was closed, the broker was paid and the earnest money agreement was therefore performed.

Id.

Washington courts have long said that they will not rewrite a contract before them. *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 511, 115 P.3d 262, 271 (2005). This applies to attorney fee provisions as much as to any other contractual term. RCW 4.84.330 merely makes the agreed contractual fee provision bilateral; it does not impose an entirely new fee provision.

2. The Agreement Does Not Provide for Fees in This Action.

The Broker/Sales Associate Agreement does not contain a prevailing party attorney fee clause. The only reference to attorney fees is

in paragraph 13 dealing with expenses incurred by the agent. That paragraph provides:

Unpaid Obligations to Broker: Upon termination Associate will immediately pay all amounts due Broker. If Associate moves to another real estate brokerage, Associate hereby irrevocably assigns the proceeds of any pending commissions and, upon Broker's written request to Associate's new Broker, authorizes the new Broker to deduct and forward such shortfalls out of commissions earned at Associate's new brokerage to Broker until owed amounts are paid in full. Collection costs on amounts not paid, including attorney's fees, shall be paid by Associate.

Exhibit 1 at p. 5, ¶ 13. This provision applies by its terms only to actions to collect amounts owed by the associate to the broker.

Because the fee provision for such collections is unilateral, RCW 4.84.330 applies and makes the provision mutual. *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 489, 200 P.3d 683, 686 (2009). As the Court stated in *Wachovia*: “By its plain language, the purpose of RCW 4.84.330 is to make unilateral contract provisions bilateral.” *Id.* at 489. RCW 4.84.330 makes the attorney provision mutual within its scope, but does permit an award of fees outside the scope of the provision. *See id.* (“RCW 4.84.330 is not a fee-shifting statute.”).

The fee provision applies only to collection actions for expenses advanced by the broker, not to actions for breach of other provisions of the

Agreement. Washington cases consistently make this distinction when considering fee awards.

Generally, an appellate court may award attorney fees if the applicable law grants the prevailing party a right to recover fees. RAP 18.1. RCW 4.84.330 provides that if a contract provides that attorney fees are available in an action to enforce the agreement, such fees shall be awarded to the prevailing party, who is “the party in whose favor final judgment is rendered.” The contract here provided: “If for any reason the amount due under this Work Authorization is not paid when due, the Contractor shall be entitled to his expenses and attorneys fees incurred in the collection of this agreement.”

While Belfor prevailed in compelling arbitration in accordance with the contract, Belfor has not yet prevailed in collecting under the contract. Since the contract only provides for fees incurred in collecting under the contract for the amount due (as opposed to fees for enforcing a contractual term), Belfor is not entitled to attorney fees only for successfully compelling arbitration. *See, e.g., Hindquarter Corp. v. Prop. Dev. Corp.*, 95 Wash.2d 809, 815, 631 P.2d 923 (1981) (landlord not entitled to fees for prevailing in litigation regarding lease renewal because contract only provided fees for curing defaults.).

Belfor USA Group, Inc. v. Thiel, 160 Wn.2d 669, 670-71, 160 P.3d 39, 40 (2007).

Seaborn argues that under RCW 4.84.330, the collection clause “applies bilaterally to Glew's counterclaims.” Under RCW 4.84.330, a contract clause that appears to award attorney fees to only one party is construed bilaterally to both parties. But this does not mean that the collection clause applies to non-collection actions on the contract. If so, the litigation clause of the contract would be meaningless. The bilateral rule means that although the collection clause as written appears to apply only to

Seaborn, the Glews are also entitled to attorney fees if they prevail in Seaborn's collection action. Seaborn's argument that the collection clause should apply to the Glews' counterclaims has no basis in law or fact. The counterclaims are for breach of contract. The fact that they were brought in the context of a suit to collect on the contract does not transform them into "costs and charges incurred in collection."

Seaborn Pile Driving Co., Inc. v. Glew, 132 Wn.App. 261, 267-68, 131 P.3d 910, 912-13 (2006).

Here, Bogle & Gates' Standard Terms of Representation provides that "we reserve the right to withdraw from the representation and pursue collection of your account, in which case you agree to pay costs of collection including court costs and reasonable attorneys' fees." Clerk's Papers at 137. We conclude that RCW 4.84.330 authorizes the award of attorney fees and costs to Holly Mountain Resources. If Bogle & Gates had successfully proven a written contract as to Holly Mountain Resources and subsequently prevailed on its collection action, it would have been entitled to collect attorney fees and costs pursuant to this same provision. Because Holly Mountain Resources successfully defended against this action, this provision operates bilaterally. We grant reasonable attorney fees and costs to Holly Mountain Resources for defending this appeal.

Bogle and Gates, P.L.L.C. v. Holly Mountain Resources, 108 Wn.App. 557, 563-64, 32 P.3d 1002, 1005-06 (2001).

Contrary to Judge Barnett's ruling, RCW 4.84.330 does not operate to make "a contract provision that entitled Windermere to attorneys' fees arising from efforts to collect amounts due from a Sales Associate" apply to "Mr. Rodriguez's effort to collect amounts owed to him by Windermere." CP

398 at ¶ 5. The trial court's award of contractual attorney fees was error, and this Court should reverse.

B. The Trial Court Erroneously Awarded 18% Interest.

The trial court made a similar mistake with regard to the judgment interest rate. Paragraph 7 of the Agreement provides that associates will pay 18% interest on expenses paid by the broker.

If Associate fails to pay remaining balances by the deadline, then Broker may assess a late fee. All balances that remain unpaid thirty days after becoming due shall accrue interest at the rate of 18% until paid.

Exhibit 1 at ¶ 7 and at Schedule A, ¶ D. Rodriguez argued that the parties therefore “agreed that 18% interest is a reasonable rate for monies owed between them. Any argument that the interest rate was intended by the parties only to apply against the Associate should be disregarded.” CP 23. As Windermere pointed out in its response, Rodriguez did not cite any authority of any kind for his argument. CP 44; *see* CP 23. The trial court first awarded Rodriguez 18% interest on only a single transaction (CP 102 at ¶ 14) and later awarded 18% on all amounts against Windermere. CP 404.

No authority of any kind exists for the trial court's ruling. The relevant authority is RCW 4.56.110(1), which provides: “Judgments founded on written contracts, providing for the payment of interest until

paid at a specified rate, shall bear interest at the rate specified in the contracts.” No such contract exists in this case. RCW 4.56.110(4) provides that judgments otherwise shall bear interest at the maximum rate permitted under RCW 19.52.020. The trial court’s fabrication of a “contact rate” was erroneous, and this Court should reverse.

C. The Court Should Award Windermere Attorney Fees on Appeal.

Under case law interpreting RCW 4.84.3330 and the doctrine of mutuality of remedy, the Court should award Windermere attorney fees on appeal. Rodriguez alleges that he is entitled to attorney fees under RCW 4.84.330 and the Broker/Sales Associate Agreement. A party who asserts an entitled to attorney fees under RCW 4.84.330 is liable for fees if that party loses, even if the Court finds that no fee provision exists. *Herzog Aluminum, Inc. v. Gen. Am. Window Corp.*, 39 Wn.App. 188, 197, 692 P.2d 867 (1984). More recently, courts have described an equitable principle of “mutuality of remedy” that has the same effect. *Kaintz v. PLG, Inc.*, 147 Wn.App. 782, 788, 197 P.3d 710, 713 (2008). If this Court reverses the award of attorney fees, Windermere will be the prevailing party in this appeal, and the Court should award it attorney fees on appeal.

VI. CONCLUSION

No factual or legal basis exists for the trial court's award of attorney fees and 18% judgment interest. The Court should reverse those awards and remand for correction of the judgment.

DEMCO LAW FIRM, P.S.

A handwritten signature in black ink, appearing to read 'ML', is written over a horizontal line.

Melanie A. Leary, WSBA No. 21050

Matthew F. Davis, WSBA No. 20939

Attorneys for Appellants

VII. APPENDIX

1. Trial Exhibit 1 – Broker/Sale Associate Agreement
excerpts

BROKER/SALES ASSOCIATE AGREEMENT

This AGREEMENT is made this 26th day of JAN 2003 by and between Windermere Real Estate/ Wall Street Inc. ("Broker"), and ROBERTO RODRIGUEZ ("Associate").
The Parties hereby agree as follows:

1. **GENERAL.** Each party shall at all times hold a real estate license as required by the real estate licensing authority of the state in which Broker's office is located. In the event that either party's license expires, or is suspended or revoked by the state licensing authority, the party shall immediately so notify the other party in writing. Broker maintains a real estate office, equipped, furnished and staffed to serve the public and the parties. Both parties agree to exert best efforts to promote the reputation and business of Broker and Associate.

2. **STATUS OF THE PARTIES.** The parties agree that Associate is an independent contractor, is not an employee of Broker and specifically will not be treated as an employee for Federal tax purposes. Broker shall have no responsibility for withholding, reporting or paying Associate's federal, state or local taxes, (including but not limited to Federal income tax, Social Security and unemployment taxes or insurance), which shall be Associate's sole responsibility. Exception: Broker shall withhold and pay state Business and Occupation (B & O) taxes on Associate's share of commissions and fees where and when applicable. Broker and Associate shall each be responsible for payment of their proportionate share of state industrial insurance (worker's compensation), medical aid and supplemental pension fund portions of state industrial insurance where applicable.

3. **BROKER'S RESPONSIBILITY.** Broker shall provide Associate with a desk, office equipment, local telephone service, receptionist, business secretarial assistance, office advertising, membership in listing and/or referral services selected by Broker, and use of sales materials.

Associate, through personal contact as well as office meetings, shall have the benefit of Broker's guidance, suggestions and experience in matters of listings, sales, financing, current trends and general aspects of the real estate business.

Broker agrees to promote the image of the parties and office by establishing and maintaining rules regarding office use, days it will be open, advertising, listing and selling procedures and related matters. Broker reserves the right to establish, and Associate agrees to comply, with office procedures for inquiries, leads and similar sales opportunities. Broker may, at his/her discretion, modify any such policies and procedures at any time. Modifications will be communicated to Associate within a reasonable time frame.

4. ASSOCIATE'S RESPONSIBILITIES.

Legal Compliance: Associate agrees to maintain current knowledge of all laws governing licensed real estate salespersons and brokers, and agrees to strict adherence at all times.

Documents and Funds: Listings, sales and other agreements obtained by Associate shall be in the name of, and the property of, Broker. All wholly or partially executed instruments, documents and deposits shall be immediately delivered to Broker's possession in accordance with applicable laws.

Advertising/Marketing: Associate agrees to comply with all laws, local ordinances, rules and regulations (including Realtor® Association and MLS rules) regarding restrictions on advertising and signs, and to use only advertising, signs, brochures or other solicitation materials approved by Broker in advance of their use. Broker's authorization is required on all personal marketing materials and all other forms of advertising in any media whatsoever, including without limitation newspapers, magazines, telephone book listings ("white page" business listings and yellow page listings or advertisements), billboards, television, radio, buses, grocery carts, Internet web sites, other online solicitation (e.g. mass e-mail), etc., prior to use by Associate.

Associate agrees to use Broker's legally licensed name designation on all advertising and marketing materials as required by law. Associate also agrees to follow all Windermere policies, together with all policies and procedures published by Broker, concerning the Windermere logo, advertising, signage, and any related topics.

Associate shall not act as a loan officer or as a representative for any mortgage broker, lender, closing agent, or title company. Such activities are not covered by any insurance purchased or maintained by Broker, and Associate shall defend, indemnify, and hold Broker harmless from any and all claims against Broker arising from and/or relating to such activities.

Associate shall not engage in any property management activities without Broker's express written permission, and Associate shall defend, indemnify, and hold Broker harmless from any and all claims against Broker arising from and/or relating to Associate's involvement in such activities.

Use of Windermere Name: Associate understands that the name "Windermere" and the Windermere logo are registered trademarks of Windermere Services Company. Other names and logos used by Broker (including, without limitation, Premier Homes/Estates/Properties; Sea, Sun & Snow; Lifestyles Northwest, etc.) are also protected by trademark law at the state and/or federal level. During the term of this Agreement Associate is granted a limited, non-exclusive license to use the Windermere marks in connection with Associate's real estate business, provided that Associate at all times complies with all written policies and procedures governing their use. Such policies may be adopted from time to time by Windermere Services and/or Broker, and may be changed at any time without notice. Associate shall not, without the express written authorization of Broker, allow any third person or entity to use any of the marks, in any form, for any reason; nor shall Associate do anything to imperil or undermine the good will and public esteem of Broker, the brokerage, or the "Windermere" trade name and marks. Misuse of the Windermere name or trademarks shall constitute a material breach of this agreement, and may be grounds for immediate termination.

Standards of Practice: Associate shall control his/her own work hours and shall have no required floor time. Associate shall conduct business in a professional and courteous manner, acting with respect toward other agents, Associates and clients, and shall make a good faith effort to resolve differences quickly through Broker or Associate's manager.

Though subject to change from time to time, Associate shall abide by Broker's most current "Standards of Practice" guidelines (a copy of which is attached for reference), and agrees to adhere to published grievance or arbitration hearing procedures in the event of disputes involving other Windermere Associates and Brokers.

5. COMMISSION AGREEMENT. Windermere's Commission Schedule is attached hereto and incorporated in this agreement by reference and summarizes commission shares and conditions.

6. MEMBERSHIPS. Broker and Associate are members of the National and State Association of Realtors® and subscribe to one or more multiple listing service(s) (MLS). Associate shall pay all Realtor® and MLS dues and fees. Associate agrees to abide by the Association of Realtors® Code of Ethics, as well as any MLS rules and regulations.

7. EXPENSES. Broker shall not be liable to Associate or third parties for expenses incurred by Associate unless otherwise agreed to in writing. Associate shall be responsible for and shall promptly pay all of Associate's own expenses. Though subject to change from time to time, the "Windermere's Expense Schedule," which is attached hereto and incorporated herein by reference, summarizes most goods and services generally used by Associate and specifies who is responsible for payment.

Associate hereby authorizes Broker, at Broker's sole discretion, to advance payment of any expenses, dues, fees and charges (including Association of Realtors® dues), whether for accounting convenience of Broker or third party, or because Associate has failed to make such payment promptly. Associate agrees to reimburse Broker for all amounts advanced as well as for all B&O taxes (where applicable) assessed to Broker on reimbursements, advances, or prepayments made on Associate's behalf. Amounts advanced shall be deducted from Associate's first available commissions after payment. Balances remaining after commission deductions shall be due on the 7th day of each month. If Associate fails to pay remaining balances by the deadline, then Broker may assess a late fee. All balances that remain unpaid thirty days after becoming due shall accrue interest at the rate of 18% until paid.

8. WINDERMERE FOUNDATION. Associate agrees that a portion of the gross listing and/or selling commission from each transaction shall be allocated to the Windermere Foundation (a charitable non-profit organization).

commissions in Broker's account pending resolution of any disputes over division of the commission funds, or of any existing or potential legal actions.

Associate agrees to exercise utmost good faith and diligence to complete and close pending transactions. If any of Associate's transactions is not completed prior to termination, then Broker may appoint other licensees affiliated with Broker to complete the transaction. In such case, Broker is authorized to compensate other such licensees in an amount determined by Broker in its sole discretion, and to deduct such amounts from Associate's share of the commission up to and including the full amount owed to Associate.

Unpaid Obligations to Broker: Upon termination Associate will immediately pay all amounts due Broker. If Associate moves to another real estate brokerage, Associate hereby irrevocably assigns the proceeds of any pending commissions and, upon Broker's written request to Associate's new Broker, authorizes the new Broker to deduct and forward such shortfalls out of commissions earned at Associate's new brokerage to Broker until owed amounts are paid in full. Collection costs on amounts not paid, including attorney's fees, shall be paid by Associate.

Associate's license to use the Windermere name and trademarks shall be deemed revoked immediately upon termination of this Agreement, and Associate agrees to cease and desist from all use of the marks thereafter. Associate shall surrender to Broker, upon demand, all personal marketing materials in Associate's possession bearing or referring to the name Windermere, or any of the Windermere trademarks. Any Internet domain names registered by or to Associate which include the name "Windermere" in any fashion whatsoever shall, upon termination of this Agreement, be transferred to Broker or to Windermere Services Company upon demand. Associate agrees that Broker or Windermere Services may seek injunctive relief to enforce the provisions of this paragraph, in addition to seeking recovery of money damages. For purposes of protecting its trademark rights ONLY, Windermere Services Company shall be deemed a third party beneficiary of this Agreement, and shall have standing to bring suit for breach of this provision. In any such action arising from Associate's infringement of the Windermere trademarks, the prevailing party shall be entitled to recover attorney fees and costs.

14. DUTY TO ARBITRATE. Associate and Broker agree that commission or other disputes which cannot be resolved between them or between other Windermere Brokers or Associates (including disputes arising after termination of this Agreement) shall be submitted to and resolved in accordance with Broker's internal arbitration procedures. Arbitration is mandatory and the decision is binding. The 'Windermere Standards of Practice and Arbitration Manual' is available for Associate's review at any time in Broker's office and on the 'Windermere Online Resource Center' (WORC) intranet site. The version of the Manual in effect at the time arbitration is commenced will control. Associate hereby grants Broker the right to deduct resulting awards and damages from Associate's outstanding or future commissions, or if there is no closing or commissions, to pay immediately upon Broker's demand.

15. ASSISTANTS. In the event Associate hires a licensed or unlicensed assistant, Associate agrees to abide by and comply with Broker's guidelines pertaining to Associate Assistants. Associate shall advise Broker if Associate is hiring, using, or intends to hire or use an Assistant, and agrees to execute the required Addendum/Amendment to this Agreement at such time. If Associate is acting as an Assistant, then Associate agrees to execute the required Addendum/Amendment to this Agreement, and to limit his/her activities to those outlined in Broker's guidelines pertaining to Assistant activities.

16. HARASSMENT. Broker is committed to providing a work environment free of unlawful harassment and discrimination for all Windermere personnel, including real estate licensees. Broker's policy prohibits sexual harassment and any other type of unlawful harassment or discrimination, in accordance with federal, state, and local laws and ordinances. In addition, Broker will not tolerate any inappropriate harassment, intimidation, or similar conduct, whether or not such behavior is actually unlawful. If Associate feels that he or she is not being treated in a manner consistent with Broker's policy, then Associate shall so notify Broker. Broker will investigate all reports of violations of Broker's policy, and if Broker determines that a violation has occurred, then Broker will take corrective action, which may include termination of the person who violated Broker's policy. Associate may review Broker's written policy upon request.

17. ENTIRE AGREEMENT. This Agreement contains the entire understanding between the parties and supersedes any prior understanding and agreements between them.

18. **AMENDMENTS.** This Agreement may be amended only in writing, signed by each of the parties and attached to this Agreement.

19. **BINDING EFFECT.** Except as otherwise provided in this Agreement, every covenant, term and provision of this Agreement shall be binding upon and inure to the benefit of the parties and their respective heirs, legal representative, successors and all persons hereafter holding or having an interest in this Agreement.

20. **CONSTRUCTION.** Every covenant, term and provision of this Agreement shall be construed simply according to its fair meaning and not strictly for or against any party.

21. **HEADINGS AND PRONOUNS.** Section and other headings contained in this Agreement are for reference purposes only and are not intended to describe, interpret, define, or limit the scope, extent, or intent of this Agreement or any provision. All pronouns and any variations of them shall be deemed to refer to masculine, feminine, neuter, singular or plural, as required for the identification of the person or persons, firm or firms, corporation or corporations.

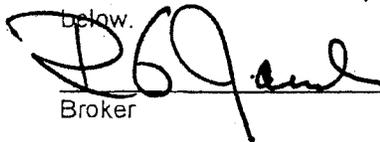
22. **SEVERABILITY.** Every provision of this Agreement is intended to be severable. If any term or provision is found to be illegal, invalid or unenforceable for any reason whatsoever, such illegality, invalidity, or unenforceability shall have no affect on the remainder of the Agreement, and it shall be enforced to the full extent permitted by law.

23. **WAIVER.** The consent, approval or waiver of any covenant, term or condition of this Agreement by either party shall not be construed as consent, approval or waiver of a subsequent similar act or breach of the same covenant, term or condition.

24. **GOVERNING LAW.** The laws of the state shall govern the validity of this Agreement, the construction of its terms, and the interpretation and construction of this Agreement. Any disputes arising from this Agreement shall be resolved through internal arbitration as set forth in 'Duty to Arbitrate' section above. Each party shall bear its own attorney fees and costs in all proceedings.

25. **NO THIRD PARTY BENEFICIARY INTENT.** Except as expressly stated in section 13 above, the promises between Broker and Associate in this Agreement are intended for Broker's and Associate's sole benefit and not for the benefit of any third party, including without limitation any buyer or seller of real estate, nor for the benefit of any other brokerage or broker.

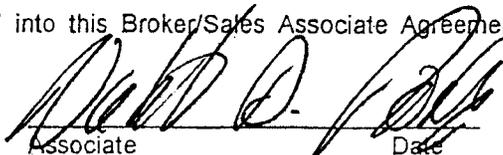
IN WITNESS WHEREOF, the parties have entered into this Broker/Sales Associate Agreement as of date below.



Broker

01/26/04

Date



Associate

01/26/04

Date

Schedule A
WINDERMERE COMMISSION AGREEMENT

I. GENERAL

- A. Associate shall not be entitled to any salary, draws, or compensation other than as set forth herein.
- B. Associate agrees to adhere to Broker's standard listing and selling fee schedule in all transactions. Neither Broker nor Associate shall alter the amount or defer payment of a commission without the prior agreement of the other.
- C. All commissions must be paid to Broker alone per licensing law. Associate shall have no claim to commission shares except from money actually received by Broker.
- D. Broker shall be entitled to deduct unpaid obligations owed to Broker from Associate's share. Balances remaining after commission deductions shall be due on the 7th day of each month. If Associate fails to pay remaining balances by the deadline, then Broker may assess a late fee. All balances that remain unpaid thirty days after becoming due shall accrue interest at the rate of 18% until paid.

Any sharing of expenses agreed to in advance between Broker and Associate shall be shared according to Associate's split at the time the shared expense is paid, or the closing date if it is a closed transaction.

- E. All commissions received from incoming or outgoing referrals, co-listing or co-selling agreements (whether within or outside the Windermere group), shall be divided according to Associate's split after deduction of all referral fees and commissions due third parties. Exception: Referrals generated by Windermere relocation companies or departments shall be split according to the commission schedule published by the appropriate Windermere relocation company or department and by Broker's commission schedule for incoming and outgoing referrals.

Associate shall be responsible for logging in with appropriate Windermere relocation companies or departments all out-of-area customers within a reasonable time (usually 72 hours). Failure to do so may result in a substantial reduction of Associate's commission share due to referral agreements/contracts with referring networks and companies.

Agreements for commissions shared shall be expressed as a percentage of the relevant listing or selling commission portion. Associate shall make all referrals, co-listing and co-selling agreements (whether within or outside the Windermere group) through Associate's Branch Manager. Commission sharing arrangements and partnerships between Associates shall be in writing at inception of relationship and include a description of responsibilities. Failure to do so could impact Associate's ability to recover commissions in Broker's arbitration procedure.

- F. In the case of special marketing programs or projects (including, but not limited to, builder accounts and condominiums and affinity groups), Broker reserves the right to set separate commission payment policies to cover the associated costs. By participating in such programs, Associate automatically agrees to exceptions in usual commission structure.
- G. If no signed listing agreement has been obtained, commission arrangements must be established in writing by Associate and Branch Manager prior to showing by other agents.

DECLARATION OF SERVICE

I, Linda Fierro, state: On this day I caused to be delivered by ABC Legal Messengers Appellants' Opening Brief for delivery on January 31, 2011 to the Court of Appeals Division I and for delivery on February 1, 2011 to:

Aviva Kamm
Scott A.W. Johnson
800 5th Avenue, Suite 4000
Seattle, WA 98104-3180

I certify under penalty of perjury under the laws of the State of Washington that the forgoing is true and correct.

Dated this 31st day of January, 2011 at Seattle, Washington.



Linda Fierro
Linda Fierro

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STATE OF WASHINGTON
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