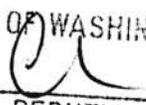


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DIVISION II

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STATE OF WASHINGTON

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No. 44018-1-II

**Court of Appeals, Div. II,
of the State of Washington**

Alpacas of America, LLC,

Appellant,

v.

Sam Groome, et ux,

Respondents.

Brief of Appellant

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ORIGINAL

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1. Introduction

This is an action for collection on two promissory notes. Alpacas of America, LLC (“AOA”) sold alpacas to Sam and Odalis Groome and took the Groomes’ promissory notes as partial payment of the purchase price. Groomes did not pay the notes when due. AOA sued on the notes to collect payment. Groomes made a CR 12(b)(6) motion to dismiss arguing the action was barred by the statute of limitations. The trial court dismissed the case. This Court should reverse.

The applicable limitations period for promissory notes, under UCC Article 3 (found at RCW 62A.3-118), is six years after the maturity date or demand for payment. The Complaint for Collection of Debt was timely filed under this statute. The trial court erred in dismissing the case under the four-year limitations period for breach of a sales contract under UCC Article 2 (found at RCW 62A.2-725). The statutes, official comments to the UCC, case law, and prominent commentaries all support the proposition that the Article 2 statute of limitations “is not applicable to an action on a promissory note.” 4B Larry Lawrence, *Anderson on the Uniform Commercial Code* § 2-725:62 (3d ed., 2010 rev. to vol. 4B). This Court should reverse the dismissal and the trial court’s award of attorney fees to Groomes and remand to the trial court for further proceedings.

2. Assignments of Error

Assignments of Error

1. The Superior Court erred in dismissing this action to collect on promissory notes on the basis of the four-year statute of limitations for breach of a sales contract under UCC Article 2.
2. The Superior Court erred in granting Groomes' motion for attorney fees based on untimely information submitted to the court over 40 days after final judgment.

Issues Pertaining to Assignments of Error

Whether the six-year statute of limitations for actions on promissory notes under UCC Article 3, RCW 62A.3-118, applies to this action to collect on promissory notes that were originally taken as partial payment in transactions for the sale of goods (assignment of error #1).

Whether a party moving for an award of attorney fees must meet its burden of production within the 10-day deadline provided in CR 54(d)(2) (assignment of error #2).

3. Statement of the Case

AOA sold alpacas to Groomes on January 14, 2006, and January 13, 2007. (CP at 5, 13.) Each purchase was memorialized in a contract of sale, which provided that a down payment would be made immediately, with the balance of the sale price financed by the seller by way of a promissory note, security agreement, and UCC-1 financing statement. (*Id.*) The promissory notes set repayment terms, including maturity dates by which all remaining indebtedness would be due and payable in full. (CP at 8, 16.) The promissory note dated January 14, 2006 was due on February 1, 2010. (CP at 8.) The promissory note dated January 13, 2007 was due on February 1, 2011. (CP at 16.)

On or around October, 2007, Groomes stopped making payments when due. (CP at 4.) AOA made demand for payment at some unspecified time. (*Id.*) Groomes remain in default on the promissory notes. (*Id.*)

AOA filed its “Complaint for Collection of Debt” on April 18, 2012, seeking payment of the amounts owed on the promissory notes. (CP at 3-4.) Groomes brought a CR 12(b)(6) motion to dismiss, arguing that the four-year statute of limitations under UCC Article 2 applied and had expired. (CP at 21.) AOA argued that the six-year statute of limitations under UCC Article 3 applied and the action on the notes was timely. (CP at 64.)

The trial court dismissed the action on September 7, 2012. (CP at 95-97.) AOA brought a timely motion for reconsideration. (CP at 98.) The court denied that motion on September 21, 2012. (CP at 133-35.) AOA appealed to this Court.

Groomes brought a motion in the trial court for an award of attorney fees pursuant to contract on October 1, 2012. (CP at 159.) The motion was originally set to be heard on October 12. (*Id.*) AOA opposed the motion, arguing that Groomes had failed to meet their burden of production and burden of proof under the lodestar method. (CP at 167-69.) Groomes immediately re-noted the hearing for November 2. (*See* CP at 194.) On November 1, the day before the rescheduled hearing and over 40 days after final judgment, Groomes filed new information to support their motion. (CP at 172.)

At the November 2 hearing, the trial court agreed that Groomes had failed to provide sufficient information in their original motion to enable the court to conduct a proper lodestar analysis. (RP, November 2, 2012, at 6.) The court allowed the parties additional time to present argument on the new information. (*Id.* at 9-10.) After a hearing on November 16, the court granted Groomes' motion and entered detailed findings on the record. (CP at 208-10; RP, November 16, 2012, at 14-24.)

4. Summary of Argument

The trial court erred in applying the four-year statute of limitations from UCC Article 2. The UCC expressly provides that a party in AOA's position may elect to sue on the promissory note or for breach of the underlying sales contract. AOA chose to sue on the notes. Article 3 provides the applicable statute of limitations with a six-year period from the due date stated on the notes. This action was timely filed and should not have been dismissed.

Whether the Article 3 or Article 2 statute applies to an action on a promissory note taken as payment for a sale of goods appears to be a matter of first impression in Washington. The South Dakota case of *O'Neill v. Steppat*, 270 N.W.2d 375 (S.D. 1978), provides persuasive authority in favor of applying the six-year limitation period of Article 3. The 7th Circuit case of *Fallimento C.Op.M.A.v. Fischer Crane Co.*, 995 F.2d 789 (7th Cir. 1993), based on a unique Illinois statute, is unhelpful here.

The promissory notes at issue are negotiable instruments as defined in UCC Article 3. The drafters of the UCC clearly contemplated that Article 3 promissory notes would be used in transactions for the sale of goods, and provided a comprehensive scheme of rights and remedies in Article 3, including a six-year statute of limitations. Applying the Article 2 limitation period renders this comprehensive scheme meaningless and allows the Groomes to escape their unconditional promises to pay under the promissory notes they freely gave. This Court should reverse the trial court's dismissal and award of attorney fees and remand for further proceedings.

5. Argument

The trial court erred in holding that the four-year statute of limitations provided in UCC Article 2 for breach of a contract for the sale of goods applies to this action on promissory notes. The six-year limitation period in UCC Article 3 for an action on a promissory note, found in RCW 62A.3-118 should apply. Since the six-year statute applies, AOA's action on the notes was timely and this Court should reverse.

An action on a promissory note given by a buyer in payment of the purchase price of goods is not subject to the Article 2 limitation period, despite the underlying sales contract. Under the UCC, a promissory note, as a negotiable instrument, is a separate undertaking from a promise to buy or sell goods. The drafters of the UCC explicitly contemplated that buyers and sellers of goods might use promissory notes as payment of the purchase price of goods, and crafted special provisions to govern such a transaction. An action on a promissory note is subject to the six-year statute of limitations provided in RCW 62A.3-118.

5.1 Standard of Review

This Court reviews dismissal under CR 12(b)(6) de novo. *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007). A motion to dismiss should be granted only “sparingly and with care” and “only if the court concludes, beyond a reasonable doubt, the plaintiff cannot prove any set of facts which would justify recovery.”*Id.* The court presumes all facts alleged in the

plaintiff's complaint are true and may consider hypothetical facts supporting the plaintiff's claims. *Id.*

5.2 AOA's Complaint Was Timely Filed Under the Six-Year Statute of Limitations for an Action on a Promissory Note in UCC Article 3, RCW 62A.3-118.

The UCC provides a comprehensive set of laws governing commercial transactions. Article 2 of the UCC governs the sale of goods. RCW 62A.2-102. Article 3 governs negotiable instruments, including promissory notes. RCW 62A.3-102; RCW 62A.3-104. Article 9 governs secured transactions. RCW 62A.9A-109. In practice, many commercial transactions involve all three of these articles. For example, a used car may be sold under a contract (UCC Article 2), the purchase price financed by a promissory note (UCC Article 3), and payment on the note secured by a security interest in the car as collateral (UCC Article 9). The drafters of the UCC recognized and accounted for this complexity.

Under UCC Article 2, the price of goods may be payable "in money or otherwise." RCW 62A.2-304. If a promissory note is taken for an obligation, such as an obligation to pay for goods sold, the obligation is suspended and subsequently discharged to the extent the note is paid. RCW 62A.3-310. When the holder of the note is also the person to whom the underlying obligation is owed, the person may enforce either the note or the obligation. *Id.*

Here, AOA sold alpacas to Groomes. The sale contracts provided the purchase price would be paid through a down payment in money with the

remaining principal payable by a promissory note. (CP at 5, 13.) AOA accepted the down payments and promissory notes as Groomes' tender of payment. Groomes' obligation under the contracts was thus conditionally fulfilled. Now that Groomes have defaulted on the notes, AOA has the right under the UCC to enforce either the notes or the underlying obligation. AOA chose to sue on the notes.

That is why the Complaint was titled "Complaint for Collection of Debt." (CP at 3-4.) The Complaint makes no mention anywhere of breach of contract; instead it states "Defendants are in default on the notes." *Id.* The prayer for relief does not ask for the purchase price or incidental damages; it asks for judgment for "the unpaid principal amount of the debt." *Id.* On its face, the Complaint is based on Defendants' default on the promissory notes, not on breach of the sales contracts.

The UCC provides the appropriate statute of limitations for an action on a note:

Except as provided in subsection (e), an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six years after the due date or dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date.

RCW 62A.3-118(a). Subsection (e) does not apply.

The promissory notes at issue were "payable at a definite time." "A promise or order is 'payable at a definite time' if it is payable ... at a fixed date or dates or at a time or times readily ascertainable at the time the promise or order is issued." RCW 62A.3-108(b). Each note sets forth a

schedule of monthly payments and a fixed final date when the balance was due in full. (CP at 8, 16.) The notes do not state that they are payable on demand or at the will of the holder. *Id.*

The applicable limitation period for notes payable at a definite time is six years from the due dates stated in the notes. *See* RCW 62A.3-118(a). The due dates stated in the notes are February 1, 2010, and February 1, 2011. (CP at 8, 16.) The Complaint was filed on April 18, 2012—well within the six-year limitation period from the due dates stated in the notes. (CP at 3.)

Even assuming the notes were accelerated or demand made in October, 2007 (the Complaint does not state whether the notes were ever accelerated and does not specify when demand was made), the applicable limitation period would be six years after acceleration or demand. *See* RCW 62A.3-118. The Complaint was filed within six years of October, 2007.

As obligor on both the notes and the sales contracts, AOA has the option under the UCC to enforce either the notes or the contracts. AOA chose to sue on the notes. The statute of limitations for these notes under the UCC is six years from the due dates stated on the notes. This action was timely. This Court should reverse dismissal and remand to the trial court for further proceedings.

5.3 An Action on a Promissory Note Is Not Subject to the Four-Year Statute of Limitations in UCC Article 2, RCW 62A.2-725.

The trial court erred in applying the Article 2 statute of limitations. This appears to be a matter of first impression in this state. However, the rule of law appears to be well-settled. The authors of a prominent treatise on the UCC state in unequivocal terms:

U.C.C. § 2-725 is not applicable to an action on a promissory note. The note given by a buyer in payment for the goods is to be distinguished from the underlying sales contract. While an action on the latter is subject to U.C.C. § 2-725, an action on the note is not.

4B Larry Lawrence, *Anderson on the Uniform Commercial Code* § 2-725:62 (3d ed., 2010 rev. to vol. 4B).

5.3.1 *O’Neill v. Steppat* provides persuasive authority that the Article 2 statute of limitations does not apply.

In the only published state appellate court opinion on this issue, the Supreme Court of South Dakota held that the four-year limitation period of Article 2 did not apply to an action on a promissory note, even though the note arose from a sale of goods. *O’Neill v. Steppat*, 270 N.W.2d 375 (S.D. 1978). The court noted that under the UCC, “[b]uyers, by signing a negotiable note, made a separate promise” from the underlying sale contract. *Id.* at 376 (citing former UCC § 3-413); accord RCW 62A.3-412 (the issuer of a note is obliged to pay the instrument according to its terms). After quoting the equivalent of RCW 62A.3-310 (stating the effect of an instrument on the obligation for which it is taken), the court concluded, “The clear intent is that

the holder of a note taken for an underlying contract has a choice of remedies. He can sue on the note or the underlying contract.” *O’Neill*, 270 N.W.2d at 376. Quoting UCC § 2-701—“Remedies for breach of any obligation or promise collateral or ancillary to a contract for sale are not impaired by the provisions of [Article 2].”—the court held that the Article 2 statute of limitations could not apply to bar an action on the note, which was “an ‘obligation or promise collateral or ancillary to’ any contract for sale.” *O’Neill*, 270 N.W.2d at 376-77. Instead, the court found the applicable limitation period in the state’s statute of limitations on actions to recover on obligations.¹ *Id.* at 376. The same reasoning should apply in the present case, only here the applicable limitation period is found in RCW 62A.3-118(a).

The trial court erroneously relied on a New York trial court holding in *Troy Boiler Works v. Sterile Tech.*, 777 N.Y.S.2d 574 (Sup. Ct. 2003). (See, e.g., RP, September 7, 2012, at 19.) The *Troy Boiler Works* court held that the Article 2 limitation applied to an action on an account stated² because, despite any later agreement on the amount due, the action arose out of breach of the contract of sale. *Id.* However, the New York courts have also approved the reasoning of *O’Neill*, distinguishing negotiable instruments as a

¹ At the time, Article 3 did not provide a uniform statute of limitations for actions on promissory notes. See *O’Neill*, 270 N.W.2d at 376.

² An “account stated” is an admission by the parties that a stated amount is due, to settle accounts on previous transactions. *Sunnyside Valley Irr. Dist. v. Roza Irr. Dist.*, 124 Wn.2d 312, 315-16, 877 P.2d 1283 (1994). It is, in essence, a ratification or modification of the underlying sales contracts.

special category, different from obligations that arise from an underlying contract:

O'Neill v. Steppat ... holds that a negotiable instrument executed in connection with a sale of goods is not subject to the Article 2 statute of limitations. Unlike the installment agreement in *May Co. v. Trusnik*, *supra* and the bills of lading here, a negotiable instrument is transferable independent of the underlying obligation. Moreover, [former] U.C.C. 3-802(1)(b) provides that if a negotiable instrument is dishonored, an “action may be maintained on either the instrument or the obligation.”

Globe Kirk, Ltd. v. E.D. & F Man Coffee Ltd., 474 N.Y.S.2d 388, 390 (Sup. Ct. 1984).

5.3.2 The contrary decision in *Fallimento v. Fischer Crane* was based on unique statutory language that is not present here.

The only other published opinion on this issue,³*Fallimento C. Op. M.A. v. Fischer Crane Co.*, 995 F.2d 789 (7th Cir. 1993), was decided on the basis of unique statutory language found in Illinois’ general statutes of limitation. *Anderson on the UCC* describes *Fallimento* as “a clearly erroneous opinion [in which] the court failed to recognize that the right of action on a promissory note is separate from the cause of action for the purchase price of the goods.” 4B Lawrence, § 2-725:62.

The *Fallimento* court was interpreting and applying Illinois law. *Fallimento*, 995 F.2d at 790-91. Illinois did not adopt the Article 3 statute of

³ See 49 A.L.R.5th 1, in which the able researchers for American Law Reports cite only two published opinions on this issue: *Fallimento* and *O’Neill*.

limitations for actions on promissory notes. *See* IL ST CH 26 ¶ 3-118 (subsections (a) and (b) of Illinois' enactment of UCC § 3-118, dealing with actions on a note, are left "blank"). The court instead relied on the state's general statute of limitations for bonds, promissory notes, and written contracts. *Fallimento*, 995 F.2d at 791.

The *Fallimento* court was particularly persuaded by the unique language of the Illinois statute:

Ten-year limitation. *Except as provided in § 2-725 of the 'Uniform Commercial Code,'* actions on bonds, promissory notes, bills of exchange, written leases, written contracts, or other evidence of indebtedness in writing, shall be commenced within ten years after the cause of action accrued.

Fallimento, 995 F.2d at 791 (quoting Ill. Rev. Stat. ch. 110, § 13-206) (emphasis provided by the *Fallimento* court). The court focused on this explicit exception in the otherwise applicable statute of limitations and was persuaded that it applied to any action related in any way to a sale of goods. *Id.* at 792.

The court did not take issue with the reasoning in O'Neill, but simply distinguished it on the grounds of the differences in statutory language:

There is a key distinction between O'Neill and the instant case: the South Dakota statute of limitations on promissory notes is only six years and does not contain a clear exception for contracts pertaining to sales of goods; whereas the Illinois statute of limitations on promissory notes is ten years and does contain an express exception for sales of goods. Because of this statutory distinction, O'Neill is of little value as persuasive authority for the instant case.

Id.

Washington's enactment of UCC § 3-118, like the South Dakota statute in *O'Neill*, and unlike the Illinois statute in *Fallimento*, does not contain an exception for contracts pertaining to sales of goods. *See* RCW 62A.3-118. By its terms it applies to **all** actions on promissory notes governed by Article 3. Because the *Fallimento* court relied on this statutory distinction in applying the Article 2 statute of limitations, *Fallimento* is of little value as persuasive authority for the instant case.

5.4 The Promissory Notes at Issue Are Negotiable Instruments Governed By UCC Article 3.

The trial court misapprehended the nature of the promissory notes at issue when it relied on *Troy Boiler Works*. *Troy Boiler Works* did not involve promissory notes; it dealt with a sale on an account. An account is “a right to payment of a monetary obligation,” but does not include “rights to payment evidenced by...an instrument.” RCW 62A.9A-102(a)(2). An account springs into being whenever the buyer accepts goods for which he has not paid; the seller has a right to payment for the goods. *See* RCW 62A.2-607(1). In contrast, a negotiable instrument can only be created by an intentional act, making a separate promise that gives rise to a separate remedy. *O'Neill*, 270 N.W.2d at 376. Thus an **account** that arises from a sale of goods “relates to and cannot be divorced from the underlying sales transaction.” *Troy Boiler Works*, 777 N.Y.S.2d at 579. However, as noted by the New York court in *Globekirk*, a **negotiable instrument** is transferrable independent of any underlying transaction and a separate cause of action exists on the instrument. *Globekirk*, 474 N.Y.S.2d at 390.

Under the UCC statutory scheme, “an instrument [the note] taken for an underlying obligation [the account or the purchase price] is conditional payment of the underlying obligation.” 6B Lawrence, § 3-310:4R. The account is suspended, pending payment of the note. “If the instrument is honored the underlying obligation is discharged. If the instrument is not honored, the suspension is terminated and the underlying obligation is restored.” *Id.* “The person entitled to enforce the instrument retains all of his rights on both the instrument and the underlying obligation.” *Id.*, § 3-310:9R. An action on an account is simply another name for an action on the underlying sales contract. An action on a negotiable instrument is a separate, alternative action defined and governed by UCC Article 3.

5.4.1 The notes are unconditional promises to pay the holder of the note.

The present case involves promissory notes, not accounts. A promissory note is a negotiable instrument, governed by UCC Article 3. The most common negotiable instruments are checks, drafts, and notes. They are commonly used substitutes for money. After receiving a negotiable instrument, the holder may endorse the instrument and transfer, or “negotiate” it to another person, who becomes the new holder entitled to enforce the instrument. Article 3 defines a negotiable instrument:

“negotiable instrument” means **an unconditional promise or order to pay a fixed amount of money**, with or without interest or other charges described in the promise or order, if it:

- (1) Is payable to bearer or to order at the time it is issued or first comes into possession of a holder;
- (2) Is payable on demand or at a definite time; and
- (3) Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor.

RCW 62A.3-104(a) (emphasis added).

As a default, a promise to pay is deemed to be unconditional under this definition, “unless it states (i) an express condition to payment, (ii) that the promise or order is subject to or governed by another writing, or (iii) that rights or obligations with respect to the promise or order are stated in another writing.” RCW 62A.3-106(a). In other words, a promise to pay is unconditional—and thus a negotiable instrument—unless **the document itself** states that there are conditions to the maker’s obligation to pay. *Holly Hill Acres, Ltd. v. Charter Bank of Gainesville*, 314 So. 2d 209, 211 n. 4 (Fla. Dist. Ct. App. 1975) (“The negotiability of an instrument is always to be determined by what appears on the face of the instrument alone.”).

The official comments to the UCC further explain:

For example, a promissory note is not an instrument defined by Section 3-104 if it contains any of the following statements: 1. “This note is **subject to** a contract of sale dated April 1, 1990 between the payee and maker of this note.” 2. “This note is **subject to** a loan and security agreement dated April 1, 1990 between the payee and maker

of this note.” 3. “Rights and obligations of the parties **with respect to this note** are stated in an agreement dated April 1, 1990 between the payee and maker of this note.” It is not relevant whether any condition to payment is or is not stated in the writing to which reference is made. The rationale is that the holder of a negotiable instrument should not be required to examine another document to determine rights **with respect to payment**.

RCWA 62A.3-106, UCC Comment 1 (2012) (emphasis added).

The promissory notes issued by Groomes and accepted as payment by AOA meet the definition of negotiable instruments. Each is an unconditional promise to pay. The 2006 note provides:

For Value Received, the undersigned, Sam & Odalis Groome, (herein the “Debtors”) ... promise to pay in legal tender of the United States of America to Alpacas of America, or order (herein the Note holder), the principal sum of \$18,750 with interest on the unpaid principal balance from the date of this Note until paid...

(CP at 8.)The 2007 note similarly provides:

Promise to Pay: FOR VALUE RECEIVED, the undersigned, Sam & Odalis Groome (each a “Debtor”), promises to pay in legal tender of the United States of America to Alpacas of America, L.L.C. (Herein the “AOA”), or to order, at the address set forth above, the Principal Amount together with interest at the Interest Rate on the unpaid balance of the Principal Amount from the date of this Note until paid in full.

(CP at 16.)

These promises are unconditional. There are no other provisions in either note that limit or place any conditions on Groomes’ obligation to pay. The notes do not state any express conditions to payment. The notes do not

state that the Groomes will pay only if the alpaca conceive. The notes do not state that the Groomes will pay unless they are entitled to a refund under the sales contracts. The notes do not state that the Groomes' promise to pay is subject to or governed by another writing. The notes do not state that any rights or obligations with respect to the promise to pay are stated in another writing. The notes do state that the Groomes promise to pay the holder of the note. There are no conditions to this promise to pay anywhere on the face of the notes. A holder of the notes would not be required to look anywhere other than to the notes themselves to determine rights with respect to payment of the notes. Thus, under the UCC definition, the notes are negotiable instruments governed by Article 3.

5.4.2 References to the underlying sales transactions do not affect negotiability of the notes.

Defendants argued below that references to the underlying sales transactions intertwine the Notes with the underlying sales, but under the UCC such a reference does not affect negotiability. "A reference to another writing does not of itself make the promise or order conditional." RCW 62A.3-106(a). An instrument "can retain its negotiability when it merely refers to the existence of another writing and does not require reference to the other writing as to whether or when payment is due. This includes references to the instrument: (1) arising out of a separate agreement ... or (3) executed "as per" or pursuant to another agreement." 6B Lawrence, § 3-106:14R (2003 rev. to vol. 6B); accord Washington State Bar Association, Washington Commercial Law Deskbook § 9.2(8)(b) (1995 Cum. Supp.).

“A mere recital of the transaction giving rise to the instrument does not affect negotiability.” *Nw. Nat. Bank of Minneapolis v. Shuster*, 307 N.W.2d 767, 771 (Minn. 1981).

Here, the notes remain negotiable because they merely recite the origin of the debt in the underlying sales. The 2006 note states:

“The indebtedness evidence [sic] by this Note is pursuant to a Sales Contract between the parties by which the Debtors have contracted to purchase the alpaca named Phashion Model, ARI # 1335088, further described as lot # 67 ID # D981 in The 2006 America’s Choice auction catalog (herein the “alpaca”), from the Note holder.”

(CP at 8.)The 2007 note similarly states:

“The indebtedness evidenced by this Note is owed pursuant to a Sales Contract between the parties by which the Debtor(s) have contracted to purchase Lot# 81 in the 2007 America’s Choice Alpaca Auction from the AOA.”

(CP at 16.)

Neither of these references condition the promise to pay on performance of the underlying sales contracts. They do not state that payment of the notes is subject to or governed by the sales contracts. They do not state that rights of the parties regarding payment are set forth in the sales contracts. A subsequent holder of the notes would not be required to look to any other document in order to determine the rights of the parties regarding payment. The notes are negotiable.

It is also clear from the face of the notes that they meet the other requirements of the definition of negotiable instruments. The promises to

pay are for fixed amounts of money. The notes are payable to order, payable at a definite time, and do not state any other undertaking or instruction by the Defendants to do any act in addition to the payment of money, other than those explicitly allowed under RCW 62A.3-104(a) (related to security agreements or waiver of defenses of the obligor). The promissory notes are negotiable instruments under the UCC. As such, they are governed by Chapter 62A.3 RCW (UCC Article 3).

By issuing negotiable instruments, Groomes made a separate, unconditional promise to pay according to the terms of the notes. As holder of the notes, AOA is entitled to all of the rights of a holder set forth in Article 3, including the right to bring an action on the note rather than on the contract. See RCW 62A.3-310(b)(3). The applicable limitation period for an action on the note is six years from the due date stated on the note, as provided in RCW 62A.3-118(a).

5.5 The Drafters of the UCC Explicitly Contemplated the Use of Promissory Notes in Sales Transactions and Provided a Separate Statute of Limitations for Actions on a Note.

The official UCC comments make it clear that the drafters of the UCC contemplated the use of promissory notes in sales transactions and intended the notes to be treated separately from the underlying sales. This is most apparent in the comments to RCW 62A.3-310:

Subsection (b) concerns cases in which an uncertified check or a note is taken for an obligation. **The typical case is that in which a buyer pays for goods or services by giving the**

seller the buyer's personal check, or in which the buyer signs a note for the purchase price. ... If the check or note is dishonored, the seller may sue on either the dishonored instrument or the contract of sale if the seller has possession of the instrument and is the person entitled to enforce it.

RCWA 62A.3-310, UCC Comment 3 (2012) (emphasis added). Not only did the drafters contemplate the exact situation present in this case, they also stated explicitly that it is the “typical case” for which this section was drafted. In contemplation of the “typical case,” the drafters provided that a seller who still held an unpaid note would have the option of suing either on the note or on the underlying contract, as two alternative causes of action. *See* RCW 62A.3-310.

In discussing defenses to an action on a note, the comments further demonstrate that the drafters intended Article 3 to govern notes taken as payment in sales transactions: “**If Buyer issues an instrument to Seller** and Buyer has a defense against Seller, that defense can obviously be asserted.” RCWA 62A.3-305, UCC Comment 2 (2012) (emphasis added).

Another comment further notes:

Subsection (a)(3) is concerned with claims in recoupment which can be illustrated by the following example. **Buyer issues a note to the order of Seller** in exchange for a promise of Seller to deliver specified equipment. If Seller fails to deliver the equipment or delivers equipment that is rightfully rejected, Buyer has a defense to the note because the performance that was the consideration for the note was not rendered. ...

But suppose Seller delivered the promised equipment and it was accepted by Buyer. The equipment, however, was

defective. ... Under Article 2, Buyer is obliged to pay the price of the equipment which is represented by the note. ... If Buyer has a warranty claim, the claim may be asserted against Seller as a counterclaim or as a claim in recoupment to reduce the amount owing on the note.

RCWA 62A.3-305, UCC Comment 3 (2012) (emphasis added). The existence of obligations under the underlying sales contract do not affect negotiability of the note, rather they create defenses or claims in recoupment to be asserted in the action on the note.

Article 3 provides a complete scheme governing the rights of the parties to a note, including defenses or claims in recoupment arising from an underlying transaction. The six-year statute of limitations for an action on a note is part of that scheme:

an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six years after the due date or dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date.

RCW 62A.3-118(a).

The larger UCC scheme also accounts for this. Article 2 provides: “Remedies for breach of any obligation or promise collateral or ancillary to a contract for sale are not impaired by the provisions of this Article.”

RCW 62A.2-701. A promissory note given in a sales transaction “is an ‘obligation or promise collateral or ancillary to’ any contract for sale.” *O’Neill*, 270 N.W.2d at 377. It is a separate, unconditional promise to pay according to the terms of the note. The drafters of the UCC did not intend any

provisions of Article 2 to impair the comprehensive rights and remedies set forth in Article 3.

The drafters knew that buyers and sellers would use negotiable promissory notes as payment for the sale of goods. They provided rights and defenses in Article 3 for actions on such notes, including a six-year statute of limitations. Applying the four-year limitation period of Article 2 to a negotiable instrument governed by Article 3 would defeat the purpose of the UCC to promote predictability in commercial transactions. There would be no advantage to taking a promissory note in payment of the purchase price, as opposed to selling on account, if the same four-year limitation period applied regardless. There would be no purpose in Article 3 granting the seller the option to sue on either the note or the underlying sale contract. To give meaning to the whole statutory scheme, the six-year statute of limitations for an action on a note must apply.

5.6 This Court Should Not Allow Defendants to Escape Their Obligations Under the Notes.

Groomes freely made and delivered promissory notes to AOA. Now they seek to escape their obligations under those notes by re-casting the transactions as nothing more than sales contracts. But Groomes cannot deny that they signed the notes and gave them to AOA as payment of the purchase price. Under the UCC, Groomes' obligations under the contracts were conditionally satisfied, but their obligations under the promissory notes and security agreements remained in force. There is more at play here than just sales contracts.

Groomes argued below that AOA is attempting to defeat the purposes of the UCC. It is difficult to see how one defeats the purposes of the UCC by applying a statute of limitations that is provided in the UCC itself. When, as here, a plaintiff is both the holder of a note and the obligor of a contractual promise, the UCC itself gives the plaintiff the option to enforce either the note or the underlying contract. The trial court instead forced AOA to enforce only the contract, defeating the clear language of the UCC.

The trial court held that the notes could not be separated from the underlying sale transaction. As negotiable instruments, the promissory notes are **designed** to be separated and negotiated to holders who are strangers to the underlying transaction. This is not simply an action on accounts. AOA required promissory notes and security agreements in order to protect its interests in payment. Groomes willingly made and delivered the notes to AOA. As holder of the notes, AOA is entitled to the remedies and limitations period provided in UCC Article 3 for promissory notes. To hold otherwise would defeat the purposes of the UCC, render promissory notes worthless in sales transactions, and allow Groomes to escape their obligations on the notes they freely made.

When one understands and properly applies the comprehensive scheme created by the UCC, everything falls into place. Groomes' interpretation, on the other hand, renders portions of the UCC scheme meaningless. If any note taken as payment in a sale of goods is governed by Article 2, rather than Article 3 as it should be, then there is no meaning to

the provision in RCW 62A.3-310(b)(3) that allows the obligee to enforce either the note or the obligation. If an action on the note is merely an action for the purchase price under another name, then there really is only one action, and this provision is rendered meaningless. So, too, are the official UCC comments, which clearly contemplate application of Article 3 to an action on a note taken as payment in a sale of goods. An interpretation that renders portions of a statute meaningless cannot be accepted. The six-year limitation period of Article 3 applies. This Court should reverse dismissal and remand to the trial court for further proceedings.

5.7 Even if the Four-Year Limitation Period Applies, This Court Should Reverse the Award of Attorney Fees to Groomes Because They Failed to Timely Meet Their Burden of Production.

If this Court reverses on the merits, Groomes will no longer be the prevailing party and the trial court's award of attorney fees must also be reversed. However, even if this Court affirms the statute of limitations issue on the merits, this Court should reverse the award of attorney fees because Groomes failed to timely meet their burden of production to enable the trial court to engage in the required lodestar analysis.

In awarding attorney fees, trial courts and litigants are required to "rigorously adhere to the lodestar methodology." *Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632 (1998). "The lodestar methodology affords trial courts a clear and simple formula for deciding the reasonableness of attorney fees in civil cases and gives appellate courts a

clear record upon which to decide if a fee decision was appropriately made.” *Id.* at 433. “Courts must take an active role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought.” *Id.* at 434-35. The trial court must enter detailed findings of fact and conclusions of law adequate to establish a record for appellate review of the award. *Id.* at 435.

Under the lodestar method, Groomes, as the requesting party, bear the burden of proving the reasonableness and necessity of the fees requested. *See Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993). “Unless otherwise provided by statute or order of the court, the motion [for attorney’s fees] must be filed no later than 10 days after entry of judgment.” CR 54(d)(2). For purposes of this rule, “judgment” is defined as “the final determination of the rights of the parties in the action and includes any decree and order from which an appeal lies.” CR 54(a)(1). A motion for attorney fees brought after the 10-day deadline is untimely and should be denied. *Corey v. Pierce County*, 154 Wn. App. 752, 773 74, 225 P.3d 367 (2010).

Assuming for sake of argument that the “final determination of the rights of the parties,” was the trial court’s order denying AOA’s motion for reconsideration (rather than the order granting Groomes’ motion to dismiss), the 10-day period began to run on September 21, 2012. (*See* CP at 133.) Groomes filed their original motion for fees on the tenth day, October 1, noting the motion for hearing on October 12. (CP at 159.) Plaintiff timely filed its response on October 10, arguing, among other things, that

Defendants had failed to meet their burden of production and burden of proof.(CP at 166-69.) Groomes recognized their failure and re-noted the motion to be heard on November 2, three weeks later. Groomes used this extra time to gather the information that they should have presented in their original motion—information that the Rules give them only 10 days to present to the Court. Defendants filed this new information as a “reply” on November 1, the day before the rescheduled hearing. (CP at 172.) The trial court explicitly noted that the materials supporting the original motion were insufficient to enable the court to engage in a proper lodestar analysis. (RP, November 2, 2012, at 6.)

In effect, Groomes struck their original motion, which they realized was insufficient, and made a new motion more than 40 days after final judgment. If Groomes had waited that long to file their original motion, it would unquestionably be untimely under CR 54(d)(2). In granting Groomes’ motion for fees, the trial court allowed Groomes to circumvent the judicially-approved time limitation of CR 54(d)(2) by making a facially insufficient “placeholder” motion within the 10-day deadline and providing the required supporting information one whole month later.

Under the Rules, the party requesting attorney fees by motion to the court must do so within the 10-day deadline provided in CR 54(d)(2). Surely the drafters of the Rules intended such a motion to be complete—fully demonstrating why the party believes it is entitled to fees, including the reasonableness and necessity of the fees. The 10-day deadline is the time at which trial courts should determine whether a party has met its burden of

producing the information required for a lodestar analysis. Any information produced after that 10-day deadline is untimely and should not be considered. Since Groomes failed to meet their burden within the time required by CR 54(d)(2), the trial court should have denied their motion for fees. *See Corey*, 154 Wn. App. at 773-74. This Court should reverse.

6. Conclusion

The limitation period applicable to AOA's action on promissory notes taken in payment of an underlying contract for sale of goods is the six-year period provided in UCC Article 3, RCW 62A.3-118. The due dates stated on the notes were February 1, 2010, and February 1, 2011. AOA's action, filed April 18, 2012, was timely under the statute. This Court should reverse the trial court's dismissal on statute of limitations grounds and remand to the trial court for further proceedings.

Even if the Article 2 statute applies, this Court should reverse the trial court's award of attorney fees because Groomes failed to timely meet their burden of producing information from which the trial court could engage in a proper lodestar analysis.

Respectfully submitted this 17th day of December, 2012.



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STATE OF WASHINGTON

BY _____
DEPUTY

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on December 17, 2012, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

original:	Court of Appeals Division II 950 Broadway, #300 Tacoma, WA 998402 253-593-2806	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input checked="" type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Electronic Mail
copy:	James B. Meade Amanda M. Searle Forsberg & Umlauf, P.S. 705 S. Nineth Street, Suite 302 Tacoma, WA 98405	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input checked="" type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Electronic Mail

DATED this 17th day of December, in Olympia, Washington.


 M. Katy Kuchno
 Paralegal to Jon E. Cushman
 & Kevin Hochhalter