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COURT OF APPEALS  
DIVISION II

2013 FEB 19 PM 1:23

STATE OF WASHINGTON

No. 44018-1-II

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

  
DEPUTY

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Alpacas of America, LLC,

Appellant,

v.

Sam Groome, et ux,

Respondents.

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**Reply Brief of Appellant**

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**ORIGINAL**

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## **1. Introduction**

The Groomes are correct when they assert that the substantive issue in this case boils down to whether the promissory notes are negotiable instruments under UCC Article 3. If the notes are negotiable instruments—and they are—then all of the rights, remedies, and defenses of Article 3 apply, including the six-year statute of limitations. Where the Groomes go wrong is in misapplying the Article 3 definitions to the facts of this case. The promissory notes contain unconditional promises to pay. The notes do not make those promises subject to the underlying sale contracts or any other document. They are negotiable instruments and the six-year statute applies.

The drafters of the UCC clearly intended Article 3 to govern promissory notes given as payment in a sale of goods. Article 2 governs the sale aspects of the transaction and Article 3 governs the promissory note, just as Article 9 would govern any security interest granted as part of the same transaction. By asking this Court to follow the erroneous reasoning of *Fallimento C.Op.M.A. v. Fischer Crane Co.*, 995 F.2d 789 (1993), which excludes all promissory notes given in a sale of goods from the Article 3 statute of limitations, the Groomes would destroy this statutory scheme and render large portions of Article 3 meaningless.

This Court should hold to the intent of the UCC drafters and Washington's legislature, as clearly set forth in the statutory language and official comments. The notes are negotiable instruments under the statute. The six-year statute of limitations applies. This Court should reverse.

## **2. Summary of Argument**

As demonstrated in AOA's opening brief, the six-year limitation period in UCC Article 3, found in RCW 62A.3-118, applies to this action to collect on promissory notes. Since the six-year statute applies, AOA's action on the notes was timely and this Court should reverse the trial court's order of dismissal based on the shorter four-year limitation period of Article 2.

The Groomes argue that the promissory notes are not negotiable instruments under the Article 3 definition. However, their argument is based on a misunderstanding of the definition. The notes, by their terms, do not make the Groomes' promises to pay subject to or conditioned on the provisions of the sale contracts or any other document. The promises contained in the notes are unconditional. A subsequent holder of the notes would not have to refer to any other document to determine their rights as to payment of the notes. The notes are negotiable instruments, so the Article 3 statute of limitations applies. Recognition of the Article 3 statute of limitations promotes the cross-jurisdictional uniformity intended by the drafters of the UCC.

The Groomes also misunderstand AOA's arguments regarding attorney fees. The issue, as stated in AOA's opening brief, is whether CR 54(d)(2) required the Groomes to meet their burden of production on a motion for attorney fees within the 10-day deadline. Groomes failed to do so, only producing sufficient information for a lodestar analysis after 40 days. Having failed to meet their burden, the motion should have been denied.

### **3. Argument**

#### **3.1 The Notes Are Negotiable Instruments Under the UCC Article 3 Definition.**

AOA has demonstrated that the notes at issue are negotiable instruments. (*See* Brief of Appellant at 15-20.) Under the Article 3 definition, 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. The notes at issue do not state that there are any conditions—in the notes themselves or in any other writing—to the Groomes’ promise to pay. The notes are therefore negotiable instruments.

In response, Groomes argue that multiple provisions of the notes create conditions to the promise to pay. (Respondent’s Brief at 14.) However, Groomes are unable to point to any provision of the note that actually does so. Contrary to Groomes’ apparent misunderstanding, the Article 3 definition of a negotiable instrument considers only the language of the note itself and whether the note refers to conditions on the promise to pay. None of the provisions raised by Groomes place any conditions on their promise to pay.

##### **3.1.1 The statutory definition of negotiable instruments focuses on whether the language of a note makes the promise to pay subject to or conditioned on the terms of another document.**

A negotiable instrument is “an unconditional promise or order to pay a fixed amount of money.” RCW 62A.3-104(a). “[A] promise or order is unconditional 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).

Groomes draw the Court’s attention to the rights and obligations provided in the underlying sales contracts (*e.g.*, Respondent’s Brief at 15), but the actual provisions of the sales contracts are irrelevant. *See* RCWA 62A.3-106, UCC Comment 1 (2012) (“It is not relevant whether any condition to payment is or is not stated in the writing to which reference is made.”). “The negotiability of an instrument is always to be determined by what appears on the face of the instrument alone.” *Holly Hill Acres, Ltd. v. Charter Bank of Gainesville*, 314 So. 2d 209, 211 n. 4 (Fla. Dist. Ct. App. 1975). This is consistent with the statutory language, “unless it states” (“it” referring to the “promise or order”). RCW 62A.3-106(a). Negotiability is only destroyed if **the document itself** states that there are conditions to the maker’s obligation to pay.

Groomes’ reference to the rights and obligations of the parties under the contract also fails to destroy negotiability because those rights and obligations do not affect or condition the Groomes’ promise to pay. Negotiability is only destroyed if the instrument states “(i) an express condition **to payment**, (ii) that **the promise** ... is subject to ... another writing, or (iii) that rights or obligations **with respect to the promise** ... are stated in another writing.” RCW 62A.3-106(a) (emphasis added). 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.” 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.).

Under the Article 3 definition, a promise to pay will only fail to be a negotiable instrument if the language of the instrument itself states that the promise to pay is subject to conditions, rights, or obligations either in the instrument or in another writing.<sup>1</sup> None of the provisions cited in Groomes’ brief meet these criteria.

**3.1.2 The notes at issue do not make the promise to pay subject to or conditioned on the terms of another document.**

Groomes point out that the notes recite that the indebtedness evidenced by each note is owed “pursuant to a Sales Contract between the parties.” (Respondent’s Brief at 14.) This recitation of the origin of the debt does not create an express condition to payment; it does not state that the Groomes’ promise to pay is subject to or governed by the sales contract; it does not state that rights or obligations with respect to the Groomes’ promise to pay are stated in the sales contract. It merely states that Groomes made their promise to pay as a result of a sales transaction. “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).

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<sup>1</sup> AOA recognizes that there are some additional requirements in the Article 3 definition (*see* Brief of Appellant at 19-20), but those requirements are not at issue here.

This reference does not require a holder of the notes to look to the sales contracts to determine the rights of the parties regarding payment.

The Groomes recite a reference to the sales contract regarding the debtor's right, title, and interest in the alpaca livestock. (Respondent's Brief at 14-15 (quoting CP at 37).) This provision is found in the 2006 Security Agreement (which begins at the bottom of CP at 36), not the note. It is not a part of the instrument or the promise to pay, so it cannot affect negotiability. Even though it is printed in the same document as the note, a negotiable instrument can contain a security agreement without destroying negotiability. *See* RCW 62A.3-104(a)(3)(i). In any event, this reference to the sales contract simply describes the collateral pledged by Groomes to secure payment:

SECURITY AGREEMENT—LIVESTOCK

Debtor hereby grants to ALPACAS OF AMERICA, L.L.C.,  
... a first purchase money security interest in all of the  
livestock ... as is described below...

All of the Debtor's right, title, and interest in all alpaca  
livestock acquired from Secured Party (see attached Sales  
Contract)...

(CP at 36-37.) It does not state any express conditions to payment; it does not state that the Groomes' promise to pay is subject to or governed by the sales contract; it does not state that rights or obligations with respect to the Groomes' promise to pay are stated in the sales contract. It merely describes the collateral. A holder of the note does not need to look to the sales contract to determine the rights of the parties regarding payment. The Groomes' promise to pay is unconditional.

In a footnote, Groomes also cite two other references to the sales contracts. (Respondent's Brief at 15-16.) The first, found in the 2006 note, provides: "The indebtedness evidenced by this Note is secured by the following Security Agreement ... together with the UCC-1 form with the Sales Contract signed by the Borrowers." (CP at 36.) Again, this is merely a reference to the security pledged by Groomes and the documents pledging that security. A negotiable instrument may refer to a security agreement "for a statement of rights with respect to collateral" without making the promise to pay conditional. RCW 62A.3-106(b).

The second reference in the footnote is found in the 2007 security agreement. (CP at 45.) Just as the reference found in the 2006 security agreement, this reference describes the collateral. It is not a part of the note, so it can have no effect on the note's status as a negotiable instrument. Even if it could, it does not state or refer to any conditions on the Groomes' promise to pay.

Finally, Groomes highlight the notice provision in the 2007 note. (Respondent's Brief at 17.) That provision requires: "Any notice given under this Note ... shall be given in accordance with the Sales Contract." (CP at 44.) However, examination of the terms of the note reveals that none of the rights or obligations of the parties with respect to payment are conditioned on any party giving notice to any other party. (*See* CP at 43-44.) In fact, the only mention of notice in the note is that the parties may change their address "by written notice." (CP at 44.) This reference to the sales contract does not state any express conditions to payment; it does not state

that the Groomes' promise to pay is subject to or governed by the sales contract; it does not state that rights or obligations with respect to the Groomes' promise to pay are stated in the sales contract. It merely describes the method for giving notice of a change of address—notice which does not affect the Groomes' unconditional promise to pay.

None of the provisions cited in Groomes' brief state or refer to any conditions, rights, or obligations impacting Groomes' promise to pay. A holder of the notes would have no need to look to any other writing to determine the rights and obligations of the parties with respect to payment. The promises to pay are unconditional. The notes are negotiable instruments.

Groomes attempt to analogize to *Jackson v. Luellen Farms, Inc.*, 877 N.E.2d 848 (Ind. Ct. App. 2007), but the case is easily distinguishable. In *Jackson*, the court held a promissory note was not a negotiable instrument under Article 3 because the note expressly stated: **“All covenants and agreements** in said mortgage contained **shall apply** to this renewal note.” *Id.* at 853 (emphasis added). The court held this language was similar to language forbidden by the UCC Official Comments: “‘This note is subject to a contract of sale ...’; ‘This note is subject to a loan and security agreement ...’ ‘Rights and obligations of the parties with respect to this note are stated in an agreement...’” *Id.* (quoting UCC § 3-106 (Official Comment 2)). The court reasoned that such an unlimited incorporation of the terms of another document would require a holder to examine that other document to determine rights with respect to payment, destroying negotiability. *Id.* at 854.

As shown above, there are no terms in either of the notes at issue here that are in any way similar to “all covenants and agreements ... shall apply.” The notes do not state they are subject to or governed by the sales contracts. The notes do not state that rights and obligations of the parties with respect to the notes are stated in the sales contracts. The promises to pay are unconditional. The notes are negotiable instruments. The six-year statute of limitations in Article 3 applies to this action.

### **3.2 UCC Article 3 Allows AOA to Pursue This Action on the Notes With a Six-Year Statute of Limitations.**

As set forth in AOA’s opening brief, the drafters of the UCC intended Article 3 to govern all actions to collect on negotiable instruments, including promissory notes given as the purchase price in a sales transaction. (Brief of Appellant at 20-23.) In fact, the “typical case” envisioned by the drafters was one “in which the buyer signs a note for the purchase price [of goods],” such as signing a promissory note for the purchase price of an alpaca. *See* RCWA 62A.3-310, UCC Comment 3 (2012). For this “typical case,” the drafters of the UCC—and the Washington legislature that enacted RCW 62A.3-310—intended that a seller who held such a note would have the option of suing either on the underlying contract or on the note. *Id.*

Groomes would have the Court ignore this clear legislative intent and instead adopt the flawed reasoning of *Fallimento*, which would render large portions of Article 3 meaningless in order to promote “cross-jurisdictional uniformity” in the sale of goods (but also necessarily sacrificing uniformity in negotiable instruments). This Court should decline the invitation.

**3.2.1 Under RCW 62A.3-310, AOA may elect an action on the sales contracts or an action on the notes.**

Under UCC Article 2, the price of goods may be payable “in money or otherwise,” such as by giving a promissory note. RCW 62A.2-304.

Article 3 governs the rights of the parties when the seller accepts the promissory note as payment:

(b) Unless otherwise agreed and except as provided in subsection (a), if a note or an uncertified check is taken for an obligation, the obligation is suspended to the same extent the obligation would be discharged if an amount of money equal to the amount of the instrument were taken, and the following rules apply:

...

(2) In the case of a note, suspension of the obligation continues until dishonor of the note or until it is paid. Payment of the note results in discharge of the obligation to the extent of the payment.

(3) Except as provided in subsection (b)(4), if the check or note is dishonored and the obligee of the obligation for which the instrument was taken is the person entitled to enforce the instrument, the obligee may enforce either the instrument or the obligation.

RCW 62A.3-310.

In the “typical case,” when the seller accepts the promissory note as payment, the buyer’s obligation on the contract is suspended—as far as the contract is concerned, the purchase price has been paid. 6B Lawrence, § 3-310:4R. This suspension is conditional on the maker/buyer honoring their unconditional promise to pay the note. *Id.* If the maker pays the note, the obligation on the contract is discharged. *Id.* But where, as here, the maker fails to pay the note (dishonor), the suspension ends and the maker/buyer’s

obligation on the contract is restored. *Id.* Where, as here, the seller is also the person entitled to enforce the note, the seller retains all of his rights on both the contract and the note and may choose to enforce either. *Id.*, § 3-310:9R; RCWA 62A.3-310 (UCC Comment 3) (“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.”)

### **3.2.2 This is an action on the notes.**

As noted in the opening brief, AOA elected to sue on the notes. (Brief of Appellant at 8.) Groomes have spent considerable effort attempting to convince the Court that attachment of the sales contracts as well as the notes makes this an action on the contracts, but examination of the complaint as a whole proves otherwise.<sup>2</sup> The essence of the case controls, based on the pleadings and complaint as a whole and the evidence relied upon. *Martin v. Patent Scaffolding*, 37 Wn. App. 37, 39-40, 678 P.2d 362 (1984).

AOA’s complaint, titled “Complaint for Collection of Debt,” alleges Groomes’ default on the notes, not breach of contract. (CP at 3-4.) It prays for judgment for the amount of the debt, not for the purchase price or incidental damages that could be sought in an action on the contracts. *Id.* While it mentions and attaches both the contracts and the notes, the only relief sought is on the notes.

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<sup>2</sup> And though Groomes give much lip service to the notion that the contracts are intertwined with the notes, they have utterly failed to demonstrate that the notes are in any way conditioned on the sales contracts. (*See* Part 3.1.2, above.)

Unlike *Martin*, AOA had the choice between two causes of action. In *Martin*, the essence of the case was a claim for personal injury caused by an unsafe product. *Martin*, 37 Wn. App. at 39. Though the complaint alleged both product liability and breach of warranty, the only legally cognizable claim under the facts was for product liability. *Id.* at 41. In contrast, AOA had the right, as shown above, to choose an action on the contracts or an action on the notes. AOA's election to sue on the notes, as evidenced in the complaint, should control.

There is no statute or court rule that required AOA to attach the contracts to its complaint. In contrast with other states, Washington does not require attachment of any instrument to a pleading. *P.E. Sys., LLC v. CPI Corp.*, --- Wn.2d ---, 289 P.3d 638, 642 (2012). Parties have the option, under CR 10(c), to do so. *Id.* AOA chose to attach both the contracts and the notes, providing the court and the parties with full factual context for the action.<sup>3</sup> The complaint as a whole still demonstrates AOA's election to sue on the notes, not the contracts.

### **3.2.3 The six-year statute of limitations applies to an action on the notes.**

The notes are negotiable instruments governed by Article 3, which includes its own statute of limitations for actions on promissory notes.

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<sup>3</sup> In this action on the notes, the contracts provide the context of the underlying sales transaction that gave rise to the notes. In contrast, in an action on the contracts, the notes would be superfluous. Attachment of both contracts and notes is more consistent with an action on the notes.

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). Even if the due date of these notes had been accelerated immediately when Groomes stopped making payments in October, 2007 (which is unclear from the complaint), the six-year limitation period would not expire until October, 2013.

### **3.2.4 *Fallimento* is not persuasive.**

Groomes would have this Court ignore the intent of the legislature and the UCC drafters to provide sellers in the “typical case” the right to elect to sue on a contract or on a note. They argue that *Fallimento C.Op.M.A. v. Fischer Crane Co.*, 995 F.2d 789 (1993), illustrates an interpretation that would promote cross-jurisdictional uniformity in sales of goods. But the drafters of the UCC intended the entire UCC scheme, not just Article 2, to be interpreted uniformly across jurisdictions. *See* RCW 62A.1-103(a)(3). *Fallimento* departed from uniformity when it distinguished *O’Neill v. Steppat*, 270 N.W.2d 375 (S.D. 1978), the only case interpreting the provisions of the UCC related to a promissory note given as payment for a sale of goods to determine the applicable statute of limitations.<sup>4</sup>

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<sup>4</sup> In *O’Neill*, the buyers purchased a business and certain personal property of the business. *O’Neill*, 270 N.W.2d at 375. The buyers gave a promissory note as partial payment for the personal property. *Id.* at 376. Groomes attempt to characterize the note as separate from the sale, but it is clear that the *O’Neill* court treated the note as having been given as payment for the sale of goods. *Id.* The court held that Article 2, by its own terms, did not apply. *Id.* at 376-77.

The *Fallimento* court's reasoning for departing from *O'Neill* was not any flaw in the reasoning of *O'Neill*, but because the court was faced with a unique Illinois statute of limitations for promissory notes, outside that state's version of the UCC, with an explicit exception for any case arising from a sale of goods. *Fallimento*, 995 F.2d at 792. The UCC Article 3 statute of limitations for promissory notes does not contain any such exception. RCW 62A.3-118. *Fallimento* did not interpret the UCC; *O'Neill* did. The *O'Neill* court held that under the terms of Articles 2 and 3, the four-year statute of limitations of Article 2 did not apply to an action on a promissory note given as payment in a sale of goods. *O'Neill*, 270 N.W.2d at 376-77. Adopting the result of *Fallimento* over that of *O'Neill* would defeat, rather than promote, uniformity of interpretation of the UCC across jurisdictions.

The notes at issue are negotiable instruments under Washington's enactment of the UCC. They are unconditional promises to pay. Groomes have not demonstrated any provision of the notes that renders the promises conditional. When Groomes failed to honor their unconditional promises to pay, AOA had the right to sue on the underlying contracts or on the notes. AOA chose to sue on the notes. The six-year statute of limitations in Article 3 applies to this action. Under that statute, the action was timely. This Court should reverse dismissal and remand to the trial court for further proceedings.

### **3.3 Groomes Failed to Meet Their Burden of Production on Their Motion for Attorney Fees Until Long After the 10-day Deadline Required by CR 54(d)(2).**

AOA argued in its opening brief that Groomes failed to meet their burden to produce evidence sufficient to enable the trial court to conduct a proper lodestar analysis within the 10-day deadline required by CR 54(d)(2). The Court only needs to reach this issue if it affirms dismissal under the statute of limitations.

Groomes misunderstand AOA's argument, and focus on the re-noting of the hearing and their failure to provide the opinion of a third-party attorney on the reasonableness of the fees. Groomes have missed the forest for the trees. Groomes did not properly support their motion for fees until over 40 days after final judgment. The motion should have been denied as untimely under CR 54(d)(2).

#### **3.3.1 Groomes failed to meet their burden of production in their original motion for attorney fees.**

A party requesting attorney fees by motion to the court must do so within the 10-day deadline provided in CR 54(d)(2). In any motion, it is the responsibility of the moving party to raise in its motion and supporting documents all of the issues and evidence on which it believes it is entitled to relief. *White v. Kent Med. Ctr., Inc., P.S.*, 61 Wn. App. 163, 168, 810 P.2d 4 (1991). On a motion for attorney fees, the moving party has the burden of production and burden of proof to demonstrate not only their fees, but the reasonableness and necessity of those fees. *See Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993). The moving party must provide the

court with sufficient information to conduct a proper lodestar analysis.

*Mabler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632 (1998).

Groomes failed to meet this burden in their original motion. The only support for the motion was the Declaration of Amanda Searle, which attached the sales contracts, correspondence between counsel, and her firm's billing records for the case. (CP at 138-58.) Ms. Searle stated her hourly rate (\$250) and the year she earned her JD (2008). (CP at 139.) She stated that Mr. Meade, a partner, "charges a higher rate." *Id.*

Groomes failed to provide any information to enable the trial court to interpret the billing records. They did not identify the timekeepers; describe their qualifications, experience, reputation, or ability; or identify fees customary in the locality for similar legal services. *See Mahler*, 135 Wn.2d at 433, n. 20; RPC 1.5(a). They did not identify any non-lawyer timekeepers; their qualifications to perform substantive legal work; whether the work was supervised by an attorney; or the customary fees in the community for similar services by that category of personnel. *See North Coast Elec. Co. v. Selig*, 136 Wn. App. 636, 644, 151 P.3d 211 (2007). They did not provide any testimony as to the reasonableness or necessity of the fees. Nor did they provide information from which the trial court could independently determine the reasonableness or necessity of the fees.

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:

From the information that I have reviewed in the file -- it is summary, and it doesn't provide me with any information to make a reasoned decision on whether the attorneys' fees claimed are truly representative of the amount of time worked. And then, of course, I have to make a decision on whether those fees requested are reasonable.

(RP, November 2, 2012, at 6:12-18.)

**3.3.2 Groomes should not be allowed to circumvent CR 54(d)(2) by supplementing their motion over 40 days after final judgment.**

The original motion and the insufficient supporting materials were filed on the tenth day after the trial court's decision on AOA's motion for reconsideration. Under CR 54(d)(2), this is the date on which the trial court should have determined whether Groomes had met their burden of proof. A motion for attorney fees that is not sufficiently supported until after the 10-day deadline should be denied as untimely. *See Corey v. Pierce County*, 154 Wn. App. 752, 773 74, 225 P.3d 367 (2010).

Groomes finally produced additional information over 40 days after final judgment. (CP at 172-88.) They did so in "reply" the day before the re-noted hearing, which, but for the trial court's intervention, would have deprived AOA of any opportunity to respond. The trial court accepted the new materials and continued the hearing for two weeks to allow AOA to respond. (RP, November 2, 2012, at 6-7.)

The effect of the trial court's decision, however, was to enable Groomes to circumvent the 10-day deadline of CR 54(d)(2). Instead of supporting their original motion with sufficient evidence for a lodestar

analysis, as should have been required, Groomes made a “placeholder” motion within the 10-day deadline, only to replace it with a properly supported motion over 40 days after final judgment. Allowing parties to supplement their motions for attorney fees so long after the 10-day deadline defeats the purpose of CR 54(d)(2) to promote speedy determination and finality of attorney fee awards prior to appeal.

Groomes did not make a properly supported motion until over 40 days after final judgment. Such a motion is untimely under CR 54(d)(2). This Court should reverse the attorney fee award.

#### **4. Conclusion**

The notes at issue are negotiable instruments under Washington's enactment of the UCC. There are no provisions in the notes that render the promises conditional. When Groomes failed to honor their unconditional promises to pay, AOA had the right to sue on the underlying contracts or on the notes. AOA chose to sue on the notes. This action on the notes was timely under the six-year statute of limitations in Article 3. This Court should reverse dismissal 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. Groomes did not make a properly supported motion for fees until over 40 days after final judgment. That motion was untimely. Affirming the fee award would allow parties in future cases to routinely circumvent the 10-day deadline of CR 54(d)(2), rendering it meaningless. This Court should reverse the fee award.

Respectfully submitted this 14<sup>th</sup> day of February, 2013.



Kevin Hochhalter, WSBA #43124  
Attorney for Appellant

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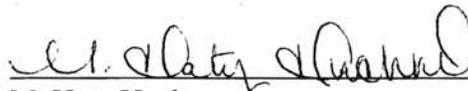
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**CERTIFICATE OF SERVICE**

I certify, under penalty of perjury under the laws of the State of Washington, that on February 14, 2013, 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 14<sup>th</sup> day of February, in Olympia, Washington.



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& Kevin Hochhalter