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## I. INTRODUCTION

This is not a simple, straightforward, action for collection on two promissory notes by Alpacas of America, LLC (hereinafter “AOA”) as it boldly suggests. If it was, AOA would have filed its complaint and only attached the two promissory notes. Because the case was more complicated than a collection on stand-alone promissory notes, AOA attached not only the promissory notes, but also the two sales contracts that modified them. CP 3-20. AOA even drafted the following language into the Complaint:

4. Defendants purchased alpacas from AOA pursuant to contracts and promissory notes attached hereto as Exhibit A. Each contract provided for seller financing of the purchased alpacas in accordance with the promissory notes and provide for an award of attorneys fees to the prevailing party.

CP. 4.

When it filed its Complaint, AOA knew that it needed to file it with not only the promissory notes, but also the contracts which modified them. Missing from AOA’s Brief is any acknowledgement that its Complaint attached the two critical contracts. AOA has to duck this issue or admit that these contracts convert the promissory notes into conditional promises to pay that are subject to the UCC’s four year statute of limitation.

Because the promissory notes are modified and made conditional by the sales contracts, UCC Article 2's four-year statute of limitations applies to bar AOA's claims. The trial court correctly applied the four-year statute of limitations and dismissed AOA's lawsuit. The trial court also properly awarded the Respondents their attorney fees and costs as the prevailing party. The trial court's rulings in favor of the Groomes should be affirmed.

## **II. STATEMENT OF THE ISSUES**

(1) A motion to dismiss is appropriate where the Appellant cannot prove any set of facts that would justify recovery. Because the promissory notes are conditioned on the sales contracts, they are not negotiable instruments. Where AOA failed to bring its claims within the applicable four-year statute of limitations under UCC Article 2, should the trial court's ruling be affirmed?

(2) Under CR 54(d)(2), a prevailing party is required to bring a motion for attorney fees and costs within ten days of a final judgment being entered with the Court. The Groomes filed their motion for attorney fees and costs on October 1, 2012, ten days after the Court's September 21, 2012 ruling. Where the Groomes' motion for attorney fees and costs was timely filed, should the trial court's ruling be affirmed?

### **III. COUNTERSTATEMENT OF THE CASE**

#### **A. The Conditional Contracts to Purchase Two Alpacas.**

The Groomes entered into sales contracts with AOA, for the purchase of two alpacas. On January 14, 2006, they purchased “Phashion Model” for \$25,000. CP 32-39. After a down payment of \$6,250, they financed the remaining amount of \$18,750 for four years at initial monthly payments of \$459.95. CP 32, 35. On January 13, 2007, they purchased “Black Thunder’s Midnight” for \$27,000. CP 40-42. After a down payment of \$6,275, they financed the remaining balance of \$20,250 at initial monthly payments of \$506.33. CP 40, 43.

Because the Groomes financed the remaining balances due, they were required, per the sales contracts, to submit UCC-1 Financing Statements, promissory notes, and Security Agreements to AOA as a condition precedent to the execution of the sales contracts. CP 32, 40. The promissory notes were executed in conjunction with the sales contracts. CP 34, 39, 42, 44.

#### **B. The Promissory Notes are Conditioned on the Sales Contracts and Form the Basis of the Bargain.**

The 2006 and 2007 promissory notes & security agreements provide that the indebtedness evidenced by the promissory notes are owed

pursuant to sales contracts between the parties. CP 35, 43. The 2006 contract also provides:

The indebtedness evidenced by this Note is secured by the following Security Agreement the Note holder security in the alpaca(s) being purchased ***together with the UCC-1 form with the Sales Contract signed by the Borrowers.***

CP 36. With regard to the property covered by the 2006 promissory note, the instrument provides:

Without limiting the generality of the foregoing, the property covered hereby includes the following:

All of the Debtor's right, title, and interest in all alpaca livestock acquired from the Secured Party (***see attached Sales Contract***), wherever located, born or unborn, including all increases, additions, accessions; and substitutions thereof, and all progeny thereof, together with any all proceeds of the foregoing.

CP 37 (emphasis added). The rights of the parties forming the basis of the bargain are extensively outlined in the sales contracts. CP 32-34, 40-42.

In addition, the 2007 Security Terms and Conditions state:

Debtor hereby grants to ALPACAS OF AMERICA, LLC, a Washington limited liability company ("AOA"), a first purchase money security interest in all of the alpacas acquired from AOA ***under the Sales Contract described in the Promissory Note.***

CP 45. The 2007 promissory note also adds:

6. Notices. Any notice given under this note and the attached Security Terms and Conditions *shall be given in accordance with the Sales Contract between the parties* at the addresses set forth below, which addresses may be changed by written notice.

CP 44. Finally, the 2007 promissory note, just above the signature line, identifies the debtor as “[t]he buyer(s) *under the sales contract.*” CP 44.

On April 18, 2012, AOA sued the Groomes, alleging that in October of 2007, the Groomes stopped making payments when due. CP 30-31. As of March 19, 2012, AOA alleged that the Groomes owed a principal amount of \$29,500.79, exclusive of interest, fees, costs, and attorney fees. CP 31. In its complaint, AOA alleged that “jurisdiction and venue were proper in Thurston County, *pursuant to contract.*” CP 30. It alleged that “[d]efendants purchased alpacas from AOA *pursuant to contracts and promissory notes*” and that “the *contracts and notes* provide for an award of attorney fees to the prevailing party.” CP 31. It alleged that “[t]his claim qualifies for mandatory arbitration under RCW 7.06.020 LMAR 1.2, and *pursuant to the contracts and notes.*” CP 31. AOA attached to its complaint both the 2006 and 2007 sales contracts and promissory notes. CP 30-47.

**C. The Trial Court Properly Granted the Groomes' Motion to Dismiss Because the Sales Contracts Cannot Be Divorced from the Promissory Notes.**

On August 6, 2012, the Groomes' filed a pre-answer motion to dismiss, pursuant to Civil Rule 12(b)(6), based on an expired four-year statute of limitations applicable to the sale of goods under UCC Article 2 and RCW 62A.2-725. CP 21-63. AOA responded, arguing that the claims were governed by UCC Article 3's six-year statute of limitations, pursuant to RCW 62A.3-118. CP 64-90. The trial court conveyed a thorough understanding of the issues presented in the pleadings and also conducted independent research to arrive at its decision:

I welcomed the challenge of reviewing this issue on my own, and I spent a great deal of time looking at the issues and doing some independent research. And I feel very confident and comfortable in the decision that I have reached and which I am now going to articulate on the record.

RP (September 7, 2012), pg. 16. Finding that the promissory notes were conditioned on and could not be divorced from the sales contracts, the trial court granted the Groomes' Motion to Dismiss. RP (September 7, 2012), pgs.16-21; CP 95-97. AOA filed a Motion for Reconsideration on September 13, 2012 and the trial court denied that Motion on September 21, 2012. CP 133-134.

On October 1, 2012, ten days after the order was entered denying AOA's Motion for Reconsideration, the Groomes timely filed their motion for attorney fees and costs, pursuant to CR 54(d)(2) and RCW 4.84.330. CP 159-163. In their Motion, the Groomes apprised the trial court of their efforts, at every turn, to keep costs proportionate. CP 138-39, ¶¶ 3-4. On July 24, 2012, counsel for the Groomes wrote a letter to AOA's counsel asked AOA to dismiss that case based on the statute of limitations and even agreed to split the fees and costs incurred to date, with each party paying half or \$1,500. CP 149-150. Instead, AOA declined. At the time of bringing their motion for attorney fees and costs in October of 2012, the Groomes' fees and costs exceeded \$15,000. CP 151-55. Instead of incurring the costs of a Motion for Attorneys' fees and costs, the Groomes' attorney again invited AOA to save resources. CP 157-58.

Like it had done before, AOA refused to respond. When the Groomes timely filed their Motion, AOA responded with allegations that the Groomes petition was inadequately supported and needed an affidavit of reasonableness from an expert and howled about the excessive amount of the fees and costs incurred even though it had forced the fees to be that high in the first place. CP 166-71. Although not required to meet their burden of proof (but at the request of AOA), the Groomes retained local attorney Christopher Keay to value their attorney fees and costs. CP 186-

188. Mr. Keay opined that, given the amounts in controversy, the risk of loss and resultant attorney fees both expended and payable to the prevailing side, the time spent in preparation, research and study reflected in the billing statements of the Groomes' attorneys was reasonable, prudent, and necessary. CP 186-188. After Mr. Keay's review of the case and the additional work required to draft a supplemental reply, the Groomes requested \$17,250.50 in attorney fees. CP 188.

After oral argument on November 16, 2012, the trial court granted the Groomes' motion in the amount of \$13,515 in fees and costs. CP 208-209. It discounted \$1,707 for items it deemed duplicative, unnecessary or unrelated to the issues before the court, and denied attorney fees for the time spent on the three hearings to get the matter resolved. Verbatim Report of Proceedings (November 16, 2012), pg. 23-24.

AOA appeals the rulings on both the Motion to Dismiss and the Motion for Award of Attorney Fees and Costs.

#### **IV. SUMMARY OF ARGUMENT**

The trial court appropriately applied UCC Article 2's four-year statute of limitations. AOA argued below that the promissory notes are negotiable instruments under UCC Article 3. A negotiable instrument is an "*unconditional* promise or order to pay a fixed amount of money."

RCW 62A.3-104(a) (emphasis added). With certain limited exceptions, none of which apply in this case, a promise or order is deemed conditional, therefore making the instrument not negotiable, when the instrument requires reference to another writing to determine the rights of the parties. 6B Larry Lawrence, Anderson on the Uniform Commercial Code § 3-106:8R. Article 3 does not apply here.

AOA relies on the South Dakota case O'Neill v. Steppat, 270 N.W.2d 375 (S.D. 1978) to support its argument that Article 3's six-year limitation period applies. There, the court found that the sales contracts and promissory notes were separate and distinct from one another. The facts of this case are not analogous. Additionally, South Dakota's UCC Article 3 contained no statute of limitations in 1978. Courts have since recognized the UCC drafters' intent to introduce a uniform statute of limitations for sales contracts, eliminating jurisdictional variations and providing relief for concerns of doing business on a nationwide scale. Troy Boiler Works v. Sterile Technologies, Inc., 777 N.Y.S. 2d 574, 557 (2003). This Court should adopt the policy reasons behind the UCC drafters' intent to create cross-jurisdictional uniformity and affirm the trial court's ruling.

## V. ARGUMENT

AOA's appellate brief can be simplified into one basic, threshold question: Whether the promissory notes entered into by the parties are negotiable instruments. If the promissory notes are not negotiable instruments, UCC Article 3 does not apply and the instruments are governed by UCC Article 2's four-year statute of limitations. AOA argues that the Groomes' interpretation of the interplay between UCC Articles 2 and 3 would render portions of the UCC meaningless. Not so.

Under another set of facts, the holder of a negotiable instrument would be afforded the six-year statute of limitations applicable to UCC Article 3. Under another set of facts, a seller who has an unpaid note would have the option of suing either on the note or the contract. RCW 62A.3-310. AOA's hopeful facts, however, are not the facts of this case.

AOA's recitations of the statutes, official comments to the UCC, case law, and "prominent commentaries" all miss the point. The instruments at issue here are not "negotiable instruments" as defined by RCW 62A.3-104(a).

### A. Standard of Review.

A trial court's ruling to dismiss a claim under CR 12(b)(6) is reviewed de novo. Kinney v. Cook, 159 Wn.2d 837, 842, 154 P.3d 206, 209 (2007). A trial court may grant dismissal for failure to state a claim

under CR 12(b)(6) when the plaintiff can prove no set of facts, consistent with the complaint, which would entitle it to relief. Bowman v. John Doe Two, 104 Wn.2d 181, 183, 704 P.2d 140 (1985).

**B. The Promissory Notes Are Not Negotiable Because Duties and Obligations of the Parties are Stated in the Sales Contracts.**

AOA argues that because it titled its lawsuit “Complaint for Collection of Debt,” this case is governed by UCC Article 3’s six-year statute of limitations. Of course, AOA does not advertise in its brief that it not only attached the promissory notes to its Complaint, but also referenced the sales contracts in the Complaint.<sup>1</sup>

In determining the nature of a claim, courts will examine the actual facts of a case to determine the nature of a claim and should not be blinded by the deceptive pleading of a case to make the nature of the case appear to be other than that which it actually is. Martin v. Patent Scaffolding, 37 Wn.App 37, 39-40, 678 P.2d 362, 364 (1984). Article 3 of the UCC governs negotiable instruments. A negotiable instrument, under RCW 62A.3-104(a), means an “unconditional promise or order to pay a fixed

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<sup>1</sup> In its complaint, AOA alleged that “jurisdiction and venue were proper in Thurston County, *pursuant to contract*”. CP at 30. It alleged that “[d]efendants purchased alpacas from AOA *pursuant to contracts and promissory notes*” and that “the *contracts and notes* provide for an award of attorney fees to the prevailing party.” CP 31. It alleged that “[t]his claim qualifies for mandatory arbitration under RCW 7.06.020 LMAR 1.2, and *pursuant to the contracts and notes*.” CP 31. AOA attached to its complaint both the 2006 and 2007 sales contracts and promissory notes. CP 30-47.

amount of money.” RCW 62A.3-106(a), defines a promise or order as 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 the ***rights or obligations with respect to the promise or order are stated in another writing.*** A reference to another writing does not of itself make the promise or order conditional. (emphasis added).

Accordingly, if the promissory note is governed by, or the rights or obligations with respect to the promise are stated in, another writing, negotiability is destroyed and Article 3 does not apply. Authors of the practitioner treatise series, Uniform Commercial Code, explain the fine line drafters must walk when drafting negotiable instruments in the context of RCW 62A.3-104(a):

One might wish a note to disclose its relationship to a capitalization agreement, to a mortgage or to a variety of other contractual obligations. Here, the drafter of the note must walk a fine line through section 3-106, which describes the elements of a promise that might make it conditional and therefore not a negotiable instrument under 3-104. The drafter may, without rendering the promise conditional, refer to another writing...the drafter may not, however, violate the three taboos in 3-

106(a): (1) the promise must not state an express condition of payment, (ii) the promise may not be subject to or governed by another writing, and (iii) the promise must not be affected by rights or obligations stated in another writing.

Quite clearly, any note which says it is “subject to” or “governed by” a separate agreement is thus rendered nonnegotiable.

James J. White and Robert S. Summers, Uniform Commercial Code, Fifth Edition, Vol. 2, Ch. 17, § 17-4.

Official Comment 1 to RCW 62A.3-106, drafted in 2003, states:

...[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 the reference is made. *The rationale is that the holder of a negotiable instrument should not be required to examine another document to determine the rights with respect to the payment...*

(Emphasis added). The promissory notes at issue in this case specifically reference the Female Sales contracts.

The 2006 promissory note states that 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.” CP 35. Similarly, the 2007 promissory note states: “The indebtedness evidenced by this Note is owed pursuant to a Sales Contract between the parties...” CP 43. While mere reference to another writing itself does not make the promise or order conditional, here, the parties take it one step further. Multiple provisions of the promissory notes reference the sales contracts and condition the promise.<sup>2</sup> Any prospective holder of the promissory note would be required to examine the sales contracts to determine the rights and obligations of the parties, making the promissory notes conditional.

For example, with regards to the property covered by the 2006 promissory note, the instrument provides:

Without limiting the generality of the foregoing, the property covered hereby includes the following:

All of the Debtors right, title, and interest in all alpaca livestock acquired from Secured Party (*see attached Sales Contract*), wherever located, born or unborn, including

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<sup>2</sup> The sales contracts are so intertwined with AOA’s right to collect on the promissory note that AOA attached the sales contracts to its Complaint. CP 30-47.

all increases, additions accessions; and substitutions thereof, and all progeny thereof, together with any and all proceeds of the foregoing.

CP 37. (emphasis added). How is the holder of the promissory note supposed to determine the Debtors rights, title, and interest in the alpaca livestock, without examining the sales contracts? Answer: It is impossible.

What the holder would learn after reviewing the 2006 “Females Sales contract,” for example, is that the buyer has a right to exchange the alpaca if it does not produce cria. CP 33. The holder would learn that the buyer is required to obtain the seller’s written consent to sell alpaca offspring and to apply the proceeds to payment of the outstanding balance of the financed amount. CP 33. Additionally, the buyer is obligated to purchase insurance in the amount of the purchase price with each cria insured at fair market value from two days of age. CP 33.

The mere fact that another writing must be consulted to determine the terms of the instrument is sufficient to destroy negotiability. 6B Larry Lawrence, Anderson on the Uniform Commercial Code § 3-106:8R.<sup>3</sup> The

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<sup>3</sup> The 2006 contract also provides:

The indebtedness evidenced by this Note is secured by the following Security Agreement the Note holder security in the alpaca(s) being purchased *together with the UCC-1 form with the Sales Contract signed by the Borrowers.*

holding in Jackson v. Luellen Farms, Inc., 877 N.E.2d 848 (2007) is on point. There, a note holder, a commercial farm, brought an action against John Jackson, the owner and president of a business that purchased tomatoes, seeking recovery of the amount due on a note. After trial, the trial court issued a judgment in favor of LFI. Jackson appealed, arguing that the promissory note was not a negotiable instrument. Citing Ind.Code § 26-1-3.1-104 (a), Indiana’s version of RCW 62A.3-104, the Court of Appeals found that the note was not a negotiable instrument because it contained the language: “All covenants and agreements in said mortgage contained shall apply to this renewal note.” Id. at 853 (citing Mitchell v. Riverside Nat’l Bank, 613 S.W.2d 802, 803 (Texas.Civ.App.1981) (notes reference to a separate contract destroyed note’s negotiability as it was “burdened by the terms within the extrinsic contract.”) Here, without looking to the sales contracts for clarification, the holder of the note would

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CP 36.

In addition, the 2007 Security Terms and Conditions state:

Debtor hereby grants to ALPACAS OF AMERICA, LLC, a Washington limited liability company (“AOA”), a first purchase money security interest in all of the alpacas acquired from AOA *under the Sales Contract described in the Promissory Note.*

CP 45.

be unaware of the rights with respect to the seller and obligations with respect to the buyer. This is exactly the type of scenario that renders the 2006 instrument conditional, thus destroying its negotiability.

With regard to the 2007 purchase, the 2007 promissory note states:

6. Notices. Any notice given under this Note and the attached Security Terms and Conditions shall be given in accordance with the Sales Contract between the parties at the addresses set forth below, which addresses may be changed by written notice.

CP 44. Without looking at the sales contract, the holder of the promissory note is incapable of appreciating the agreement entered into between the parties with regards to giving notice. After review of the 2007 sales contract, the holder would learn, for example, that “all notices, consents and other communications under this Contract shall be in writing...” CP 42.

Because the holder of the promissory notes is required to look to the sales contracts to determine the rights and obligations of the parties, the promise to pay is governed by, and subject to, another writing. The promissory notes cannot be divorced from the sales contracts. To do so would undermine the purpose of the UCC and would allow the Plaintiff to “circumvent UCC § 2-725 in this instance [and] it would serve only to create the very jurisdictional variations that the UCC drafters sought to

avoid.” Troy Boiler Works v. Sterile Technologies, Inc., 777 N.Y.S. 2d 574, 557 (2003). The promissory notes are not negotiable instruments. Article 3’s six-year statute of limitations does not apply.

**C. Under RCW 62A.2-725, the statute of limitations for the sale of goods must be commenced within four years.**

Article 2 of the Washington’s Uniform Commercial Code governs the sale of goods.<sup>4</sup> An alpaca, by definition, is a movable good for purposes of Article 2. Under RCW 62A.2-725, the statute of limitations for a contract for the sale of goods reads in pertinent part:

(1) An action for breach of any contract for sale **must be commenced within four years after the cause of action has accrued.** By the original agreement the parties may reduce the period of limitation to not less than one year **but may not extend it.**

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. . . .

Id. (emphasis added). The policy reason for introducing a uniform statute of limitations for sales contracts was to eliminate the jurisdictional

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<sup>4</sup> “Goods” means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. “Goods” also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (RCW 62A.2-107).

variations and provide needed relief for individuals doing business on a nationwide scale whose contracts previously had been governed by several different periods of limitation depending upon the state in which the transaction occurred.<sup>5</sup> Accordingly, RCW 62.A2-725 takes sales contracts out of the general statute of limitations laws regarding written contracts.<sup>6</sup>

Here, AOA seeks to enforce a promissory note attached to a sales contract more than four-and-a-half years after the alleged breach. AOA cannot avoid its warranty obligations under the Sales Contracts, wait four and a half years and then try to re-characterize the parties' transactions,

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<sup>5</sup> See Uniform Commercial Code Comments, which reads in pertinent part:

**Purposes:** To introduce a uniform statute of limitations for sales contracts, thus eliminating the jurisdictional variations and providing needed relief for concerns doing business on a nationwide scale whose contracts have heretofore been governed by several different periods of limitation depending upon the state in which the transaction occurred. This Article takes sales contracts out of the general laws limiting the time for commencing contractual actions and selects a four year period as the most appropriate to modern business practice. This is within the normal commercial record keeping period.

<sup>6</sup> The only exception to this rule is that this statute of limitations period does not apply to sales contracts if the cause of action is based on fraud.

arguing that it is a simple breach of a promissory note with an applicable six year statute of limitations (RCW 62A.3-118).

**D. The Promissory Notes Are Not Separate and Distinct from the Sales Contracts.**

AOA argues that, under RCW 62A.3-310, a seller who still has an unpaid note has the option of suing on either the note or on the underlying contract, as two alternative causes of action. AOA relies on 1978 case from South Dakota for the sweeping proposition that a promissory note is an obligation or promise “collateral or ancillary to any contract for sale” and therefore the buyer may elect to sue on the promissory notes, affording it the option of the six-year statute of limitations. See O’Neill v. Steppat, 270 N.W.2d 375, 377 (1978).<sup>7</sup> In that case, the sellers and buyers entered into an agreement for the sale of a business, along with certain personal property. Id. at 375. There, a promissory note was executed, “covering all equipment, tools, and merchandise held by the buyers in connection with the business.” Id. In O’Neill, the Court found that the sales contracts for the business were not relevant, because the negotiable instrument covering the equipment, tools and merchandise was a “separate promise.” That case is distinguishable.

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<sup>7</sup> O’Neill was decided before Article 3 of the UCC contained its own statute of limitations. See O’Neill, 270 N.W.2d 375, 376 (1978).

Here, the promissory notes are not a “separate promise,” but (as outlined above) together with the sales contracts, govern the same transaction--the sale of alpacas. The promissory notes here are not “collateral or ancillary” to the contracts for sale, but are dependent upon and an extension of those contracts—which is precisely why the AOA relies on both document sets (Sales Contracts and Promissory Notes) to form its Complaint. The promissory notes here are not “unconditional promises to pay.” Some of the parties’ duties and obligations to the promissory notes are stated in another writing.

The more recent case, Fallimento v. Fischer Crane Company, 995 F.2d 789 (7<sup>th</sup> Cir. 1993), provides insight on how Washington’s UCC should be interpreted, given the intent of the drafters of the UCC to provide cross-jurisdictional uniformity when a promissory note is drafted in the context of a sales contract for goods. In that case, Fallimento delivered to Fischer supplies for hydraulic cranes, the payment for which Fischer executed promissory notes. Fischer failed to tender payment, alleging that Fallimento breached various contractual warranties going to the quality and fitness of the goods. Id. at 790. Fallimento filed a lawsuit and Fischer filed a motion for summary judgment, arguing that Fallimento’s claims were barred by the four-year statute of limitations for

contracts for the sale of goods. The Fischers relied on Ill.Rev.Stat.ch. 110, § 13-206, which provides, in relevant part:

“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.

Id. at 791. Fallimento argued that the statute of limitations was ten years under the promissory notes, as they were “separate and distinct” from the contract for the sale of crane supplies.

As AOA does here, Fallimento relied on O’Neill. The Court in Fallimento determined that O’Neill was of little value as persuasive authority in that case, because of the statutory provision in Illinois’ UCC, specifically excluding sales of goods from the statute of limitations on promissory notes. Id. at 792. The Court of Appeals in Fallimento explained the purpose of the statutory exclusion, stating that “the obligation to pay is a fundamental part of the contract for sale and is not, as plaintiffs suggested, separate and distinct from the transfer of the physical possession of the goods.” Id. at 792. Consequently, the Court determined that Plaintiff’s action was barred under the four-year statute of limitations.

The statutory scheme in Illinois and holding in Fallimento supports the policy reason for drafting the Uniform Commercial Code. The drafters of the UCC intended “to introduce a uniform statute of limitations for sales contracts, thus eliminating the jurisdictional variations and providing needed relief for concerns of doing business on a nationwide scale,” by taking “sales contracts out of the general laws limiting time for commencing contractual actions and select[ing] a four year period as the most appropriate to modern business practice.” Troy Boiler Works v. Sterile Technologies, Inc., 777 N.Y.S. 2d 574, 557 (2003).

While Washington’s UCC does not contain a similar exclusion to Illinois, the drafters of Washington’s UCC nevertheless clearly contemplated this rationale as evidenced by both the statutory framework of the UCC and through the Official Comments. Specifically, where the duties and obligations of the parties to a promissory note are stated in another writing, the promissory notes are not separate documents or unconditional promises to pay, but are an extension of the sales contracts to which the four-year statute of limitations applies.

**E. The Groomes timely filed their Motion for Attorney Fees and Costs.**

AOA appeals the trial court’s award of attorney fees and costs. It brings this supplemental appeal on the narrow issue of whether the

Groomes' motion for attorney fees and costs was timely filed.<sup>8</sup> CR 54(d)(2) states: "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). The Court denied AOA's motion for reconsideration on September 21, 2012. The Groomes filed their straightforward Motion for Attorney Fees and Costs on October 1, 2012. This Motion is timely.

AOA continues to try and escape its contractual and statutory obligations by arguing that the Groomes "in effect, struck" their original motion because they re-noted the motion hearing from October 12, 2012 to November 2, 2012. At the motion hearing on November 2, 2012, the trial court set the hearing of this motion over until November 16, 2012 to allow the parties further opportunity to respond. The trial court affords parties the option to re-note motions. The argument that re-noting a motion hearing renders the filing of that motion untimely is procedurally unsupported.

What is equally unconvincing is AOA's claim that the Groomes' motion was not timely because the affidavit of a third-party attorney,

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<sup>8</sup> AOA does not argue in its appellate brief that the amount of the trial court's award, totaling \$13,515 in attorney fees and costs, was an unreasonable and unnecessary amount for defending this lawsuit. The Groomes will not, therefore, recite their lodestar method analysis. For their prior briefing on this score, see CP 172-182.

Christopher Keay, was not filed until November 1, 2012. AOA apparently believes that this affidavit was required of the Groomes in their original motion to meet their burden of proof.

Although the law *encourages* parties to use third party opinions on the reasonableness and necessity of fee requests, this practice is not compulsory. Scott Fetzer Co. v. Weeks, 122 Wn.2d 151-152, 859 P.2d 1210 (1993). However, in keeping with AOA's theme of spending disproportionate amounts of money relative to the value of this case, it demanded in its response that the Groomes secure a declaration by a neutral, third-party attorney. The Groomes complied with AOA's request, securing the Affidavit of former Tacoma-Pierce County Bar Association President, Christopher Keay. He supports both the amount of time spent and attorney fees associated with the Groomes' defense of this case. CP 186-188. Offering this opinion in support of a reply brief does not render the Groomes' Motion untimely. Rather, it fulfills the requests of AOA as outlined in its response. The Groomes' Motion for Attorney Fees and Costs was filed within ten days, pursuant to CR 54(d)(2) and is timely.

## **VI. CONCLUSION**

The statute of limitations period applicable to AOA's claims is the four-years as provided in UCC Article 2 because the promissory notes are

conditional on the sales contracts. In addition, the Groomes filed their Motion for Attorneys' Fees and Costs in a Timely Manner.

Accordingly, this Court should affirm the trial court's dismissal on statute of limitations and its award of attorney fees to the Groomes as the prevailing party. In addition, this Court should also award the Groomes their attorney fees and costs for responding to this appeal.

Dated this 17<sup>th</sup> of January, 2013.

FORSBERG & UMLAUF:



James B. Meade, WSBA # 22852  
Amanda M. Searle, WSBA #42632  
Attorneys for Sam and Odalis Groome

**CERTIFICATE OF SERVICE**

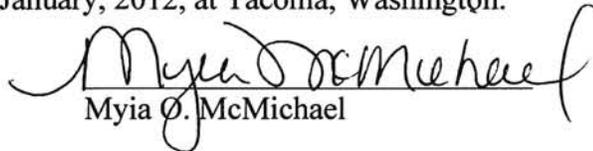
The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing **CORRECTED RESPONDENT SAM AND ODALIS GROOME'S REPLY BRIEF** on the following individuals in the manner indicated:

Kevin Hochhalter  
John Cushman  
Cushman Law Offices, P.S.  
924 Capitol Way South  
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Facsimile: 360-956-9795  
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Court Administrator / Clerk of the Court  
Court of Appeals  
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Tacoma, WA 98402-4454  
Facsimile: 1-253-593-2806  
 Via U.S. Mail  
 Via Facsimile  
 Via Hand Delivery  
 Via ECF

SIGNED this 17<sup>th</sup> day of January, 2012, at Tacoma, Washington.

  
Myia O. McMichael

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DIVISION II  
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