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JUL 14 2006

CLERK OF SUPREME COURT
STATE OF WASHINGTON

78928-2

No. _____

SUPREME COURT
OF THE STATE OF WASHINGTON

CAREY D. ERWIN, a single person, and
HEALTHCARE PROPERTIES, INC., a Washington corporation,

Respondents,

vs.

COTTER HEALTH CENTERS, a foreign corporation, and
JAMES F. COTTER, a single person,

Petitioners.

ANSWER TO PETITION FOR REVIEW

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IDENTITY OF RESPONDENTS

Carey Erwin and Healthcare Properties, Inc., respondents, respond to petitioners' Petition for Review and respectfully request the Court to deny said petition.

ISSUES PRESENTED FOR REVIEW

Respondents do not present any new issues for review.

Respondents object to petitioners' 2nd and 3rd Issues Presented for Review, as they are unrelated to the "considerations governing acceptance of review" set forth in RAP 13.4(b).

In this regard, petitioners ask *only* that the Court "accept review under RAP 13.4(b) 1 and 2." *Petition for Review*, at 9. These two *considerations* require a showing that the instant decision conflicts with a decision of this Court or "another decision of the Court of Appeals." Petitioners, however, cite not one decision of the Supreme Court or the Court of Appeals *in conflict with* the decision in this case. More particularly, petitioners cite no conflicting decisions related to the identified issues of contractual choice of Washington law or whether a Washington broker can sue "for a commission in Washington where he is not licensed in California, the agreement was made and performed in California, and the facilities are located in California." *See Petition for Review*, at 1.

It is respectfully submitted that petitioners may not ignore these baseline considerations for acceptance of review under RAP 13.4(b) 1 and 2.

STATEMENT OF FACTS AND PROCEDURE

Respondents accept the basic format of petitioners' Statement of Facts and Procedure, but add to and/or correct the statements contained therein to provide greater context and understanding.

A. Respondents Erwin and Healthcare Properties, Inc., Had Extensive and Long-Term Connections with Washington, Both in General and with Reference to the Instant Transactions.

Petitioners infer that Erwin had only minimal and fleeting connections to the State of Washington. *Petition for Review*, at 2-3, and footnote 1. To the contrary, both Erwin and Healthcare Properties had extensive and long-term connections to Washington.

Erwin has been a licensed real estate broker in Washington since 1992. F/F 1. At all times material to the matters at issue, he was a resident of Washington. F/F 1. Healthcare Properties has been a Washington corporation since 1996, with Erwin as its sole owner and operator. RP 11; F/F 1¹ The trial judge also ruled that Erwin "performed

¹ F/F 1 stated that Healthcare Properties was incorporated in Washington in 1987. Respondents believe that this was a scrivener's error not picked up by either the parties or the trial court. Whether incorporation occurred in 1987 or 1996, it was years before the events at issue.

a good deal of work in Washington on these matters.” C/L 10.²

Therefore, and contrary to petitioners’ claim, the Court of Appeals correctly stated, within the context of the instant facts, that Erwin “lives and operates his business in Washington.” Opinion, at 8.³

In *Petition for Review*, footnote 2, petitioners note that the “Court of Appeals incorrectly stated that, ‘Cotter consulted Erwin to help divest Camlu of its leasehold interest.’” This is technically correct. However, Erwin did consult with and represent Cotter in the “Camlu” transaction by negotiating longer lease terms with the Ensign Group, which was taking over the leases from Camlu. F/F 24. Erwin received a commission from Cotter for such efforts. F/F 34. All of this was specifically noted by the Court of Appeals. Opinion, at 3-4.

B. While the Trial Court Properly Reasoned that Erwin Was Not Engaged in “Traditional Real Estate Broker/Agent Services,” It Still Ruled as a Matter of Law that Erwin “Was Subject to the Regulatory System of the State of Washington for Real Estate Professionals.” C/L 12.

Throughout their *Petition for Review*, petitioners argue and infer that the sole reason for the trial court’s decision was that Erwin was

² Notably, petitioners did not assign error to either Finding of Fact 1 or Conclusion of Law 10. *Brief of Appellants*, at 2-3.

³ In *Petition for Review*, footnote 1, petitioners state: “Erwin admitted that he had only relocated to Washington shortly before entering into the contract *and has since left Washington*,” citing to RP 83-84. (*Emphasis added.*) The citation says nothing about Mr. Erwin leaving Washington. Petitioners also incorrectly cite to RP 82-83 as support for their statement that Erwin “has since moved back to California.” *Petition for Review*, at 3.

engaged in specialized consultant work in a specialized market that rendered licensure unnecessary. While both the trial court and the Court of Appeals acknowledged the specialized nature of Erwin's services and the senior healthcare properties business, neither ignored that Erwin **was** a licensed real estate broker in Washington, or that he had to be. F/F 1; C/L 12; Opinion at 11-12. To the contrary, the trial court specifically ruled that Erwin **was** subject to the Washington regulatory system for real estate professionals. C/L 12.

As noted by the Court of Appeals, it did not matter "where" Erwin was licensed. Opinion at 11. What mattered was that the underlying policy for both Washington's and California's licensing laws--"to protect the public from the perils incident to dealing with incompetent or untrustworthy real estate practitioners"--was "satisfied by proof of a valid real estate broker's license." Opinion, at 12. Therefore, far from suggesting that Erwin's specialized expertise was the sole basis of the decision, both courts effectively ruled that the specialized nature of the business and the consulting services rendered made it impractical and unnecessary that Erwin be licensed in every state. He still had to be licensed, however, which he was in Washington.

Petitioners also argue that the trial court did not address whether the Consultant Agreement was illegal in Texas or California. *Petition for*

Review, at 6. However, this petition seeks review of the Court of Appeals opinion, not the decision of the trial court.⁴ In fact, the Court of Appeals opinion addressed extensively the “illegality” issue. *See Opinion*, at 10-12.

C. The Court of Appeals’ Affirmation of the Trial Court Decision Was Based Upon More than the Consulting Agreement’s Focus Beyond “Classic Real Estate Brokering.”

As already addressed, the Court of Appeals, like the trial court, specifically recognized that under the instant facts, Erwin had to be a licensed broker in Washington as a condition to bringing suit in Washington. *Opinion*, at 11-13. Petitioners quote extensively from pages 11 and 12 of the *Opinion*. However, petitioners cut off the quotation prematurely, thereby camouflaging the full context under which the uniqueness of the industry and Erwin’s services were discussed.

Picking up where petitioners left off, the Court of Appeals stated, at 12:

Moreover, the policy underlying California’s licensing law is the same as Washington’s – “to protect the public from the perils incident to dealing with incompetent or untrustworthy real estate practitioners. *Schantz v. Ellsworth*, 19 Cal. App. 3d 289, 292-93, 96 Cal. Rptr. 783 (1971). As with Washington, California courts recognize that this policy is satisfied by proof of a valid real estate

⁴ The trial court ruled, with considerable explanation, that applying Washington law to the facts and circumstances did not violate the public policy of California or Texas. This was based upon Erwin’s being a licensed broker in Washington, that suit was pursued in Washington courts, that the subject Consultant Agreement specified that Washington was to be the home jurisdiction, that such term was a legally effective choice of law provision, that Cotter submitted himself to the jurisdiction of Washington courts, that Erwin and Healthcare Properties were both residents of Washington, and that much of the work by Erwin was performed in Washington. C/L 13, 9, 3, 10

broker's license. *Estate of Baldwin*, 34 Cal. App. 3d 596, 605, 110 Cal. Rptr. 189 (1973). Like Washington, California does not construe its licensing laws so literally as to require exact compliance if to do so “would transform the statute into an “unwarranted shield for the avoidance of a just obligation.”” *Id.* (quoting *Schantz*, 19 Cal. App. 3d at 293) (quoting *Latipac, Inc. v. Superior Court of Marin County*, 64 Cal.2d 278, 281, 411 P.2d 564, 49 Cal. Rptr. 676 (1966))).

Ultimately, then, we agree with the trial court's conclusion that applying Washington law did not violate California or Texas public policy concerning licensing. CP at 38 (conclusion of law 13).

Adding the above-quoted language to the quotations from the *Petition for Review* reveals that while the senior healthcare business was unique and Erwin had special qualifications related thereto, the public policy of licensure still had to be met. In fact, it was, as Erwin was a licensed real estate broker in Washington.

WHY THE COURT SHOULD REJECT REVIEW

A. The parties Have Not Evaded the Registration Requirements of the Washington Real Estate Brokers and Salespersons Act (“REBSA”).

Petitioners' only argument that conceivably relates to RAP 13.4(b) 1 and 2 is that the instant Court of Appeals decision disregards decisions of this Court and/or other Court of Appeals related to the registration requirements REBSA. *Petition for Review*, at 8-16. In this regard, petitioners suggest that Erwin has evaded or attempted to circumvent those requirements. *Id.* This is a most curious argument, in that at all times

material hereto, and for many years before and since, Erwin has been in full compliance with REBSA. F/F 1. Erwin has in no way evaded, or tried to evade, his obligations to obtain and maintain licensure under RCW Chapter 18.85.

Petitioners cite to RCW 18.85.100 and RCW 18.85.340. These statutes make it unlawful for a person to act as a real estate broker without a license. RCW 18.85.100 also precludes a suit for commissions or compensation if the plaintiff fails to allege and prove that he or she is duly licensed as a broker or salesperson. Erwin both alleged and proved this fact, as confirmed by finding of fact 1. Notably, this finding was not identified by petitioners as being made in error. *Brief of Appellant*, at 2-3. Again, Erwin has neither evaded nor circumvented any requirement of REBSA. To the contrary, he has always been in full compliance therewith.

Consistent with this, petitioners offer no explanation of how Erwin evaded the registration requirements of REBSA. Rather, they cite to a number of Washington cases, all holding that one who is not licensed as a real estate broker or agent may not commence an action for recovery of compensation or commissions arising out of real estate related transactions. *Petition for Review*, at 9-11, (citing *Schmitt v. Coad*, 24, Wn. App. 661, 604 P.2d 507 (1979), *rev. denied*, 93 Wn.2d 1016 (1980);

Grammer v. Skagit Valley Lumber Co., 162 Wash. 677, 299 P. 376 (1931);
Shorewood, Inc. v. Standring, 19 Wn.2d 627, 144 P.2d 243 (1943);
Springer v. Rosauer, 31 Wn. App. 418, 641 P.2d 1216, *rev. denied*, 97
Wn.2d 1024 (1982); and *Main v. Taggares*, 8 Wn. App. 6, 504 P.2d 309
(1972)). Notably, these cases offer examples of how persons have sought
to explain, unsuccessfully, why REBSA did not apply to their actions.
However, each of those persons was unlicensed.⁵

In contrast, Erwin **was** licensed as a real estate broker in the state
of Washington prior to and at all times material to the transactions at issue.
The Consultant Agreement specifically provided that:

Any dispute regarding the interpretation or enforcement of this
Agreement shall by agreement of the parties be resolved in the
State of Washington pursuant to its laws as the parties
acknowledge that jurisdiction lies therein.

See Opinion, at 5. Erwin was a resident of Washington. F/F 1. Much of
the work he performed for petitioners was so performed in Washington.
C/L 10. Respondents' suit was commenced in Washington, and the
Washington trial court ruled that it had personal jurisdiction over
petitioners by virtue of the Consultant Agreement. C/L 1, 2, 3 and 4.
Within this context, respondents do not understand how the Court of

⁵ Respondents acknowledge the potential relevance of these cases if Erwin had not
been licensed as a real estate broker. In that circumstance, a finding that licensure was
unnecessary because Erwin was not providing classic real estate brokering services would be
subject to dispute. However, that is not the case here. While Erwin was providing something
different than classic real estate brokering services, he was still properly licensed.

Appeals decision in this matter is in conflict with any Supreme Court or other Court of Appeals decision regarding REBSA or attempted evasion of REBSA licensing requirements.

Petitioners further argue that the “Court of Appeals erred in holding that the consulting agreement does not fall within the requirements of the REBSA. Opinion at 11-12.” *Petition for Review*, at 12. The Court of Appeals did not make such a holding. Rather, after stating the policy in favor of licensing requirements, the Court of Appeals noted that Washington satisfies that policy “by proof of a valid real estate broker’s license.” Opinion at 12. The Court of Appeals held precisely the opposite of what petitioners’ urge.

Respondents can only surmise that what petitioners actually argue is that the licensing requirements of REBSA, and Washington cases supporting and applying those requirements, suggest that the Court of Appeals decision is in conflict with California appellate authority applying its licensing laws. That, however, is not an acceptable “consideration” under RAP 13.4(b).

Petitioners also cite to no conflicting Washington case holding that applying Washington law *would* violate California or Texas public policy concerning licensing. *See Petition for Review*, at 12. In fact, in *Nelson v. Kaanapali*, 19 Wn. App. 893, 895, 578 P.2d 1319 (1978), which involved

a licensed Washington contractor suing in Washington for work performed in Hawaii, the court held that while the state of Hawaii “can control access to its courts, it should not as a matter of policy be able to control access to Washington courts.” The instant opinion is consistent, rather than in conflict, with Washington appellate authority. It follows that the *Petition for Review* should be denied.

B. The Court of Appeals Decision Does Not Conflict with Any California Appellate Decision.

Finally, even if the *considerations* for review identified in RAP 13.4(b) included a category for conflicts between the Court of Appeals opinion and out-of-state appellate decisions, that consideration is not present here. Cal. Bus. & Prof. Code §10136 provides that one rendering real estate brokerage services without a license cannot maintain any action *in California*.⁶ Respondents did not sue in either California or Texas courts. Rather, consistent with the Consultant Agreement, they sued in Washington.

In fact, the very case cited by petitioners as conflicting with the Court of Appeals decision--*In re Estate of Baldwin*, 34 Cal. App. 596, 110 Cal. Rptr. 189 (1973)--held that the “licensing law should not be so literally construed as to require exact compliance ‘if it would transform

⁶ Interestingly, Cal. Bus. & Prof. Code §10136 does not even state that the license must be from California.

the statute into an ‘unwarranted shield for the avoidance of the just obligation,’” (quoting from *Schantz v. Ellsworth*, 19 Cal. App. 3d 289, 292-93, 96 Cal. Rptr. 783 (1971)).⁷ Notably, this citation and the quoted language are contained within the Court of Appeals decision at issue. Opinion, at 12.

James Cotter, a businessman with considerable experience and acumen in the senior healthcare industry, contractually agreed in writing with Mr. Erwin and his corporation, Healthcare Properties, Inc., to allow Washington jurisdiction and Washington law to apply to their business dealings. F/F 3–6, 19, 26, 27 & 48; C/L 1, 3, 4 & 5. The trial court found, and the Court of Appeals affirmed, that Erwin, a resident of Washington, rendered the services contemplated by this written agreement and that much of those services were performed in Washington. F/F 29, 33; C/L 10, 15 – 22, 27 & 28. As required by REBSA as a condition to bringing an action in Washington for collection of compensation, Mr. Erwin alleged and proved that he was a “duly licensed real estate broker” in this state. F/F 1. RCW 18.85.100.

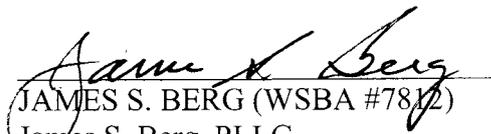
⁷ In *Baldwin*, the court affirmed a decision allowing recovery of real estate commissions even though the contracting realty company was not licensed--when the party actually performing the brokerage services was licensed.

Despite these facts and circumstances, petitioners seek to transform the California statute into an “unwarranted shield for the avoidance of a just obligation.” This attempt should be rejected.

CONCLUSION

No Washington appellate decision is in conflict with the trial court decision and Court of Appeals affirmance. It is respectfully submitted that the *Petition for Review* should be denied.

RESPECTFULLY SUBMITTED this 30th day of June, 2006.


JAMES S. BERG (WSBA #7812)
James S. Berg, PLLC
Attorneys for Respondents

DECLARATION OF SERVICE

I, CHERYL I. BRICE, do hereby declare and state: On this day, in
Yakima, Washington, I sent to:

Mr. Charles K. Wiggins
Wiggins & Masters, P.L.L.C.
241 Madison Avenue North
Bainbridge Island, WA 98110

James E. Montgomery, Jr.
12175 Network Drive
San Antonio, TX 78249

a copy of this document by U.S. Mail, postage prepaid. I certify under
penalty of perjury under the laws of the State of Washington that the
foregoing is true and correct.

SIGNED at Yakima, Washington, on June 30, 2006.



CHERYL I. BRICE

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APPENDIX

- A. Amended Findings of Fact, Conclusions of Law,
and Judgment
- B. Published Court of Appeals Opinion
- C. RCW 18.85.100 & RCW 18.85.340
- D. Cal. Bus. & Prof. Code §10136

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FILED
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KIM M. EATON, YAKIMA COUNTY CLERK

SUPERIOR COURT OF WASHINGTON FOR YAKIMA COUNTY

CAREY D. ERWIN, a single person, and
HEALTHCARE PROPERTIES, INC., a
Washington corporation,

Plaintiffs,

vs.

COTTER HEALTH CENTERS, a foreign
corporation, and JAMES F. COTTER, a single
person,

Defendants.

NO. 02-2-02282-0

AMENDED FINDINGS OF
FACT, CONCLUSIONS OF
LAW, AND JUDGMENT

SUMMARY OF JUDGMENT

<u>Judgment creditor:</u>	Carey D. Erwin and Healthcare Properties, Inc.,
<u>Attorney for judgment creditor:</u>	James S. Berg and James S. Berg, PLLC
<u>Judgment debtor:</u>	Cotter Health Centers and James F. Cotter
<u>Judgment principal:</u>	\$134,409.93
<u>Interest to date of judgment:</u>	53,293.23 (as of 12/03/04)
<u>Taxable costs and attorneys' fees:</u>	100,108.28
<u>Total Judgment:</u>	\$287,811.44

THIS MATTER having come before the above-entitled Court on August 2, 2004, and
continuing through August 5, 2004, plaintiffs appearing in person by and through their

1 attorneys of record, JAMES S. BERG, PLLC, and James S. Berg, and defendants appearing in
2 person and by and through their attorneys of record, HALVERSON & APPLGATE, P.S., and
3 Gregory S. Lighty, and THE LAW OFFICES OF JAMES E. MONTGOMERY, and James E.
4 Montgomery, and the Court having heard and considered the testimony of the following
5 witnesses: (1) Carey Erwin; (2) Ray Lavender; (3) Andrew Martini; (4) James Cotter;
6 (5) William Sleeth; and (6) Gregory Stapley (by deposition), and having further reviewed and
7 considered 73 exhibits, all of which are listed on the attached Memorandum Opinion, and
8 having further reviewed and considered the arguments of counsel and the following legal
9 submissions: (1) Plaintiffs' Trial Brief; (2) Post Trial Brief of Cotter Health Centers, Inc., and
10 James F. Cotter; and (3) Plaintiffs' Rebuttal to Defendants' Post Trial Brief, and the Court
11 further being familiar with the entire court file, including various memorandums in support of
12 and in opposition to motions for summary judgment, and in all respects, the Court being fully
13 advised in the premises, makes the following FINDINGS OF FACT and CONCLUSIONS OF
14 LAW, and issues the following JUDGMENT in favor of plaintiffs:

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17 FINDINGS OF FACT:

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1. At all times material hereto, plaintiff Carey D. Erwin was a resident of the state of Washington and since 1992 has been a licensed real estate broker in the state of Washington. Mr. Erwin, who was also licensed as a real estate agent in the state of California in 2001, was and remains the sole owner and operator of plaintiff Healthcare Properties, Inc., a corporation incorporated in Washington in 1987.
 2. Mr. Erwin has worked as a consultant exclusively in the specialized area of senior health care facilities since 1987. During the course of that work, Mr. Erwin has developed the expertise and network of contacts within the industry that has allowed him to represent buyers, sellers, lessors, and lessees in many transactions involving senior health care facilities. Mr. Erwin has also developed a keen understanding of government regulations and procedures, as well as commercial and legal practices.
 3. At all times material hereto, defendant James F. Cotter has been a resident of the state of Texas. He previously lived in the state of California and continues to be a

1 licensed contractor in California. He is also the sole owner and operator of
2 defendant Cotter Health Centers, Inc., which is a California corporation.

3
4 4. Mr. Cotter has, for many years, owned and continues to own personal and corporate
5 interests in numerous commercial properties, including senior health care facilities,
6 shopping centers, and office buildings in several states, including, but not limited to,
7 California, Texas, and Washington.

8
9 5. At all times material hereto, Mr. Cotter personally owned five nursing facilities
10 located in McAllen, Temple, San Antonio, Fredericksburg, and Lytle, Texas, and
11 owned two nursing facilities located in Abilene, Texas.

12
13 6. At all times material hereto, Mr. Cotter personally owned two nursing facilities in
14 Willits and Sonoma, California, was the sole owner of a nursing facility in
15 Cloverdale, California, through his ownership of Cotter Health Centers, Inc., and
16 was the sole owner of Coachella House, Inc., a California corporation which owned
17 a nursing facility in Palm Springs, California.

18
19 7. At all times material hereto, Camlu Care Centers, Inc., was a Texas corporation and
20 operated three nursing facilities which it leased from Mr. Cotter. These facilities
21 were located in McAllen, Temple, and San Antonio, Texas. Camlu also had
22 interests in similar facilities in other states, including Washington, which were held
23 in various forms of business organizations. None of these other facilities, however,
24 was owned by Mr. Cotter or any corporations in which he held an interest.

25
26 8. The Ensign Group is an entity originated in California in the late 1990's for the
27 purpose of owning and/or operating/managing senior health care facilities on the
28 West Coast. Two of the principals of The Ensign Group were Roy Christensen and
29 Christopher Christensen. Roy Christensen had been involved in the nursing home
30 business for many years and was well known in that industry.

31
32 9. Mr. Erwin had known the Camlu organization since the early 1990's and was
33 personally familiar with its principal owners, Carl and Danny Campbell, who
34 maintained their main office in Wenatchee, Washington. Mr. Erwin had performed
consulting work for Camlu on properties located in the state of New Mexico.

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10. In late 1997, Camlu asked Mr. Erwin to help it divest its leasehold interest in the three Texas nursing facilities in McAllen, Temple, and San Antonio owned by Mr. Cotter, which at that time had approximately three years left to run. Plaintiffs and Camlu entered a consultant agreement for the purpose.
11. In response, Mr. Erwin began the process of finding an operator to take over the leases and operations of these "Camlu" facilities. This required considerable research and contacts within the specialized network of nursing home ownership, operation, and investment on the regional and national level.
12. Mr. Erwin became aware that the owner of the three Camlu facilities was Mr. Cotter, and, as such, Mr. Cotter would need to be involved in any transfer of the Camlu leases.
13. In early 1998, and following the execution of the consultant agreement between plaintiffs and Camlu, Mr. Erwin was contacted by Ray Lavender. Mr. Lavender, who was also a healthcare consultant, was representing The Ensign Group, a healthcare company interested in locating health care facilities on the West Coast and in Texas to purchase and/or operate. Mr. Lavender learned that Mr. Erwin was representing a company that might have such facilities available for sale or lease through a conversation with Mr. Steve Gilleland, Director of Acquisitions for Centennial Healthcare. Mr. Gilleland was located in the eastern part of the country.
14. Previous to this conversation with Mr. Gilleland, Mr. Erwin had spoken with Mr. Gilleland inquiring whether Centennial might be interested in the Camlu facilities. This was an example of how the network connecting those in the specialized area of senior health care facilities worked.
15. Following Mr. Lavender's contact with Mr. Erwin, Mr. Erwin introduced Lavender and The Ensign Group to the Camlu properties and prepared a detailed financial package for them.
16. The Ensign Group was very interested in taking over the Camlu properties, but only if they could negotiate lease terms with Mr. Cotter that were substantially longer than the approximate three years that remained under the Camlu leases.

1 17. In the course of representing Camlu, Mr. Erwin made contact and met with
2 Mr. Cotter during mid- to late 1998. Mr. Erwin also became acquainted with
3 William Sleeth, who was Mr. Cotter's controller and/or chief financial officer.
4 While Mr. Sleeth was an employee of Cotter Health Centers, Inc., and was paid by
5 that company, he performed property management activities for Mr. Cotter related
6 to all of his solely owned and corporately held health care facilities. He also
7 prepared tax returns for Mr. Cotter and the various Cotter corporations.
8

9 18. Many of Mr. Cotter's and his affiliate company's senior health care properties in
10 Texas and California were experiencing operational problems in 1997 and 1998, for
11 which he needed assistance. These problems increased over time due to his
12 inability to liberate such properties from inefficient and irresponsible operators,
13 which problems were draining significant resources from him. To assist him out of
14 these problems, Mr. Cotter turned to Mr. Erwin, among others, for assistance.
15

16 19. On February 9, 1999, Messrs. Erwin and Cotter signed a document entitled
17 Consultant Agreement ("Agreement") (Exhibit 8) at Mr. Cotter's home in Rancho
18 Mirage, California. The Agreement designated Carey D. Erwin and Healthcare
19 Properties, Inc., as "Consultant" and Cotter Health Centers as "Client."
20

21 20. The purpose of a consultant agreement of the type that was signed between
22 Messrs. Cotter and Erwin was to provide specialized business services to a small
23 group of clients who operate on a regional or national basis. This purpose was
24 completely different from regular real estate activity in terms of the properties
25 involved and the interstate range of possible transactions.

26 21. When the Agreement was signed on February 9, 1999, Exhibit A thereof was not
27 filled in as to any specific properties that were covered by the Agreement.
28 However, prior to, during, and immediately after the meeting of February 9, 1999,
29 there were discussions between Messrs. Erwin, Cotter, and Sleeth as to the
30 properties which Cotter was interested in working on, which included facilities in
31 Texas, California, Oklahoma, and possibly others. In February of 1999,
32

1 Mr. Cotter's needs were very broad based in terms of the properties that would be
2 involved.

3
4 22. As a result, Mr. Erwin sent a letter to Mr. Cotter on February 19, 1999, (Exhibit 10)
5 which specified seven properties in Texas on Addendum A. The identified
6 properties included the three "Camlu" properties, plus two properties in Abilene and
7 one each in Fredericksburg and Lytle, Texas. There is no indication that Mr. Cotter
8 did not receive this letter and, in fact, there is every indication by the subsequent
9 actions of Messrs. Cotter and Sleeth that such letter was received.

10 23. Neither Messrs. Cotter nor Sleeth objected to Addendum A or the listing of the
11 seven properties on it.

12
13 24. At this point, Mr. Erwin was representing Camlu with regard to securing the
14 leasehold transfers of the Texas "Camlu" properties to The Ensign Group and was
15 representing Mr. Cotter with regard to negotiating the existing leases for a longer
term with The Ensign Group.

16
17 25. The Agreement of February 9, 1999, was drafted by Mr. Erwin and was consistent
18 with other agreements he had used. Mr. Erwin was told by Mr. Sleeth to designate
19 "Cotter Health Centers" as the "Client" on the Agreement.
20

21 26. Mr. Erwin signed the Agreement as President of Healthcare Properties, Inc.
22 Mr. Cotter signed the Agreement simply as "Owner." Both parties signed the
23 Agreement on February 9, 1999. The Agreement did not specify the "Client" as a
24 corporate entity, and Mr. Cotter did not specifically sign as a corporate
25 representative, which was consistent with the directions from Mr. Sleeth and the
26 manner in which Mr. Cotter maintained his vast business organization.
27

28 27. The business structure of the Cotter health care facilities empire was largely a
29 matter of convenience for licensing, regulatory, tax, and certain liability purposes.
30 In reality, it was the sole property of Mr. Cotter and under his complete control.
31 There occurred the commingling use of business stationery and transfer of funds
from one entity to the other, and the status of all the various components of the
32 Cotter empire were convoluted. (For example, see Exhibit 13 - Sleeth letter to Care
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34

1 Enterprises regarding the "four California nursing homes owned by James F.
2 Cotter.")

- 3
4 28. After the Agreement was signed in February 9, 1999, Mr. Cotter told Mr. Erwin to
5 deal primarily with Mr. Sleeth regarding the status of efforts to achieve transfers of
6 Mr. Cotter's interests.
- 7 29. Between February, 1999, and February, 2000, there was considerable
8 communication between Messrs. Erwin and Sleeth and Messrs. Erwin and Lavender
9 related to all of the Texas properties and the four additional senior healthcare
10 properties identified in Finding No. 6 herein. This communication is manifested in
11 Exhibits 11, 12, 13, 17-39, 40, and 51-56.
- 12
13 30. Pursuant to Paragraph 18 of the Agreement, the parties contemplated that properties
14 could be added to the original Agreement.
- 15 31. Mr. Cotter initially wanted Mr. Erwin to work on the Texas properties but later gave
16 the signal through Mr. Sleeth that Mr. Erwin should move ahead with work on the
17 California properties. This is confirmed by the documents conveyed back and forth
18 between the parties during this period of time. (Exhibits 11, 12, 13, 17-39, 40,
19 51-56).
- 20
21 32. The February 9, 1999 Agreement provides for commissions or consultant fees of
22 14% of the first year's annual lease payment and further provides that in the event
23 that fees are not paid in accordance with the terms, interest shall accrue at the lesser
24 of the highest lawful rate allowed by applicable law or 12% per annum.
- 25
26 33. Mr. Erwin arranged for meetings between Lavender and the Christensens and
27 Messrs. Sleeth and Cotter at Mr. Cotter's home in Palm Springs, California, in July,
28 1999. At that meeting, the discussions included all of the "Cotter" properties
29 identified in Findings No. 5 and 6 herein.
- 30
31 34. In August through September, 1999, the Camlu leases were renegotiated and
32 transferred to The Ensign Group. Mr. Erwin received a commission for his efforts,

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payment of which was shared by Camlu and Mr. Cotter. This is confirmed by Exhibits 38 and 39.

35. On August 18, 1999, Mr. Cotter signed an agreement with The Ensign Group to lease the Abilene, Texas, facilities. (Exhibit 50). However, this lease could not take effect until the state licenses were transferred to The Ensign Group from the previous operator, which was completed on or before January 1, 2000. Until that was accomplished, Mr. Cotter and Ensign agreed that Ensign would manage the facilities. (Exhibit 76).

36. The first year's annual lease payment for the Abilene, Texas, facilities was \$132,595.92.

37. If a commission or consultant fee is owed to plaintiffs related to the Abilene, Texas, leases, that commission or consultant fee would be \$18,563.43 (14% x \$132,595.92).

38. The last lease rental rates for the California properties communicated between the parties was on August 13, 1999 (See Exhibit 31). Pursuant to those rates, the first year's annual rental charges would be as follows: (a) Manzanita (Cloverdale) - \$143,6400; (b) Sonoma - \$287,280; (c) Palm Springs - \$256,905; and (d) Willits - \$139,650. (See Exhibits 25, 26, 28, 30, 31, and 37).

39. On or about August 20, 1999, Richard Jenkins, a Texas attorney representing Mr. Cotter, sent proposed leases on the four California properties.

40. If commissions or consultant fees are owed to plaintiffs related to the four California leases, those commissions or consultant fees would be \$115,846.50 (14% x \$827,475).

41. Leases of the California properties between Mr. Cotter and his applicable affiliate companies and The Ensign Group would have been executed on the terms set forth in Finding No. 38, but for Mr. Cotter's inability to deliver the properties to Ensign due to certain contingencies, all of which were eventually resolved by Cotter. Those contingencies included: (1) pending litigation by Cotter against Sun

1 Healthcare to break long-term leases involving the California properties arising out
2 of the unauthorized assignment to Sun Healthcare of operational control over those
3 properties; (2) Sun Healthcare's filing for bankruptcy protection in September,
4 1999, which thereby rendered the California leases subject to the bankruptcy court
5 proceeding; and (3) the bankruptcy court's delay in releasing the four California
6 leases until November, 2001.

7
8 42. On March 6, 2000, Attorney Jenkins sent Mr. Erwin a certified letter which
9 purported to terminate or cancel any agreements or other arrangements between
10 Messrs. Cotter and Erwin as to marketing of properties owned by Mr. Cotter and his
11 affiliates. (Exhibit 42).

12
13 43. On March 7, 2000, Attorney Jenkins sent a certified letter to The Ensign Group
14 withdrawing the proposed leases sent to Ensign in August, 1999, and further
15 requesting that such proposed leases be destroyed. (Exhibit 43).

16
17 44. Coachella House, Inc., the owner of the nursing facility in Palm Springs, is clearly
18 one of the entities referred to in Attorney Jenkin's letter of March 6, 2000 (Exhibit
19 42) and is clearly one of the entities referenced in the Sleeth correspondence and all
20 of the Erwin-Lavender-Sleeth communications.

21
22 45. Between March, 2000, and February, 2001, Mr. Cotter and his attorneys and
23 associates engaged in numerous efforts and legal proceedings to liberate the
24 California facilities and make them available for transfer and further engaged in
25 negotiations with Ensign and other parties regarding the California properties.

26
27 46. In February, 2001, Mr. Cotter and his applicable affiliate companies and Ensign
28 signed lease agreements regarding the four California properties. (Exhibits 46, 47,
29 48, and 49). Those leases, however, did not actually take effect until November 16,
30 2001, when the previously referred to contingencies were resolved.

31
32 47. Since March 6, 2000, Mr. Erwin has maintained that he has performed important
33 services for Mr. Cotter pursuant to the February 9, 1999 Agreement which entitle
34 him to compensation for the Cotter-Ensign transaction involving the Abilene,
Texas, facilities and for the Cotter-Ensign transactions involving the four California

1 facilities in Palm Springs, Sonoma, Cloverdale, and Willits. Mr. Cotter has denied
2 that he owes Mr. Erwin or Healthcare Properties, Inc., anything for these
3 transactions.

4
5 48. Mr. Cotter has achieved great success in the business world in a wide variety of
6 ventures, having done so without partners, colleagues, or fellow stockholders.
7 While he has relied upon employees and outside professionals to provide services
8 for his various business interests, pursuant to delegations of authority, he is the sole
9 master of his domain. He has demonstrated a thorough mastery thereof. The only
10 exception was when he was experiencing health problems related to a heart
11 condition and was taking medications in early 1999. Mr. Cotter has a fuzzy
12 recollection of the events of February, 1999.

13
14 49. The litigation herein was filed by plaintiffs on July 29, 2002. Subsequent to that
15 filing, the defendants filed actions against the plaintiffs in Texas and California
16 seeking to block the plaintiffs' efforts in Washington.

17 50. The plaintiffs hired separate counsel in California and Texas to defend their
18 interests and to promote their position that the substantive issues should be decided
19 in Washington's courts.

20
21 51. The Butte County, California, Superior Court granted plaintiffs' motion to stay their
22 proceedings until the litigation in Washington was completed. The California court
23 recognized the choice of law provision of the Cotter-Erwin agreement as providing
24 for jurisdiction in Washington.

25 52. The Bexar County, Texas, County Court denied plaintiffs' motion to stay their
26 proceedings which are pending at this time. No explanation was provided in the
27 Court's decision.

28
29 53. The plaintiffs have incurred attorneys' fees for Yakima counsel, James S. Berg, in
30 the amount of \$72,443.75 and costs in the amount of \$8,865.98. The attorneys' fees
31 were billed out by Mr. Berg for 339 hours at \$170-175 per hour, an associate for
32 108 hours at \$75-100 per hour, and a legal assistant for 51 hours at \$50-55 per hour.

1 The services provided include extensive pre-trial work, trial, and post-trial
2 activities.

3 54. The plaintiffs have incurred \$8,364.00 for attorneys' fees for California counsel,
4 Randall Nelson, and costs in the amount of \$434.55. The attorneys' fees were
5 billed out by Mr. Nelson for 25 hours at \$195 per hour and an associate for 22 hours
6 at \$165 per hour.
7

8 55. The plaintiffs have incurred \$53,472.00 for attorneys' fees for Texas counsel, David
9 Jones, and costs in the amount of \$3,203.38. The attorneys' fees were billed out by
10 Mr. Jones for 9 hours at \$400-425 per hour and various associates for 215 hours at
11 \$195-395 per hour. Of the total amount, \$9,067.00 was involved in the motion to
12 stay the Texas litigation.
13

14 CONCLUSIONS OF LAW:

- 15 1. James Cotter signed the Agreement personally, on behalf of himself and all his
16 affiliate companies. He is properly designated as a party to the Agreement.
17
18 2. Paragraph 7 of the Agreement of February 9, 1999, is clear and unambiguous.
19
20 3. James Cotter submitted himself to the jurisdiction of the Washington courts as he
21 was a personal party to the Agreement.
22
23 4. The Court has personal jurisdiction over James Cotter, Cotter Health Centers, Inc.,
24 and the applicable Cotter affiliate companies.
25
26 5. Mr. Cotter's actions and representations regarding the four California facilities
27 make Mr. Cotter personally accountable and responsible for the transaction
28 involving the Coachella House, Inc., property.
29
30 6. The corporate forms of Cotter Health Centers and its affiliates should be
31 disregarded to prevent loss to innocent parties, which include Mr. Erwin and
32 Healthcare Properties, Inc.
33
34 7. The Agreement of February 9, 1999, was supplemented by Mr. Erwin's letter of
February 19, 1999, (Exhibit 10) and the correspondence between Messrs. Sleeth and

1 Erwin thereafter. (See especially Exhibit 25). These materials are sufficient to
2 establish that the Abilene, Texas, facilities and the four California facilities were
3 part of the Agreement.

4
5 8. Mr. Erwin had the right to reasonably rely upon the written and oral statements and
6 representations of Mr. Sleeth in the manner that he did.

7
8 9. In the absence of an effective choice of law provision by the parties, the validity and
9 effect of a contract are governed by the law of the state having the most significant
10 relationship with the contract. *Mulcahy v. Farmers Ins.*, 152 Wn.2d 92, (2004);
11 *Baffin Land Corp. v. Monticello Motor Inn.*, 70 Wn.2d 893 (1967). The Agreement
12 between Cotter and Erwin in February, 1999, contained an effective choice of law
13 clause designating Washington as the home jurisdiction.

14
15 10. Washington had connections to the various transactions, as Mr. Erwin and
16 Healthcare Properties, Inc., were both residents of Washington and Mr. Erwin
performed a good deal of work in Washington on these matters.

17
18 11. The services contemplated by the Agreement were not traditional real estate
19 broker/agent services. Rather, they were specialized consultant services in a
20 specialized facilities market that makes it impractical for a consultant to be licensed
21 in every state where he might do business. It also requires that such consultant
22 engage in considerable interstate travel and communication.

23
24 12. Mr. Erwin was subject to the regulatory system of the State of Washington for real
25 estate professionals.

26
27 13. Allowing a licensed real estate broker in the state of Washington to pursue a claim
28 for a consultant fee in Washington courts, pursuant to an Agreement which specifies
29 Washington as the home jurisdiction, does not violate the public policy of Texas,
30 California, or Washington.

31
32 14. Washington law applies to the transactions at issue by virtue of the Agreement
33 between the parties, and it is not necessary to use either California or Texas law to
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resolve any issues involved herein. Washington law does not prohibit the plaintiffs' claims in this case.

15. Review of the correspondence that passed between February, 1999, and January, 2000, confirms that Mr. Erwin was working for Mr. Cotter pursuant to the Agreement of February 9, 1999.
16. Mr. Erwin introduced The Ensign Group to Camlu regarding the "Camlu" leases and further provided the introduction of Ensign to all of the subject properties in the manner contemplated by the Agreement.
17. Mr. Erwin also used his expertise to facilitate the interaction between Mr. Cotter and Ensign and also made the various facilities/properties and potential transactions more understandable to both sides.
18. Mr. Erwin's services led directly to the closing of the Abilene leases, which took place during the term of the original Agreement.
19. Mr. Erwin's services also produced the initial state of the negotiations between Mr. Cotter and Ensign on the California properties, which services also took place during the term of the Agreement.
20. As of March, 2000, there were pending leases between Mr. Cotter and Ensign related to the four California properties.
21. The Ensign Group was a "registered company" of Mr. Erwin and Healthcare Properties, Inc., as that term was used in the Agreement of February 9, 1999, in that it was introduced by Mr. Erwin to Mr. Cotter through written documents.
22. Offers to lease the four California properties were presented by Ensign prior to November 9, 1999, when the Agreement of February 9, 1999 expired, which, pursuant to paragraph 3, automatically extended the Agreement to cover a deferred closing of leases of the four California properties by Ensign.
23. The Agreement of February 9, 1999, was in effect when Mr. Erwin received Attorney Jenkins' letter of March 6, 2000.

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- 24. Attorney Jenkins' letter to Mr. Erwin of March 6, 2000, served to cancel the Agreement of February 9, 1999.
- 25. Execution of the leases of the four California properties between Mr. Cotter and his applicable affiliates and The Ensign Group occurred within 36 months of the cancellation of the Agreement of February 9, 1999, thereby triggering paragraph 21 of the Agreement.
- 26. Lease agreements between Mr. Cotter and Ensign related to each of the four California properties were executed during the term of the Agreement, by virtue of the extension clauses of the Agreement.
- 27. Mr. Erwin is entitled to an entire fee for the closing of the Abilene, Texas, properties, which fee totals \$18,563.43.
- 28. Mr. Erwin is entitled to an entire fee for the closing of the four California properties based upon the pending offers that were in place in March, 2000, which fee totals \$115,846.50.
- 29. Commissions or consultant fees should have been paid by Mr. Cotter to plaintiffs on January 1, 2000, on the Abilene, Texas, properties and on November 16, 2001, on the four California properties.
- 30. Because commissions or consultant fees were not paid when due, Plaintiffs are entitled to recover accrued interest on the unpaid amounts at 12% per annum, pursuant to paragraph 5 of the Agreement.
- 31. Plaintiffs are the prevailing party and, as such, are entitled to recover all attorneys' fees and collection costs, pursuant to paragraph 5 of the Agreement.
- 32. Accrued interest on the unpaid commissions or consultant fees, calculated through October 22, 2004, totals \$51,428.09 (Abilene - 4.808 years x \$18,563.43 x 12% per annum = \$10,710.36; California - 2.929 years x \$115,846.50 x 12% per annum = \$40,717.73). In the event judgment is not rendered until after October 22, 2004, interest will accrue at the daily rate of \$6.103 for Abilene and \$38.305 for California.

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33. Plaintiffs are entitled to the following attorneys' fees and collection costs:¹
- a. The attorneys' fees and costs submitted by Washington attorney James Berg were reasonable and necessary to secure the successful outcome by the plaintiffs. They reflect fees customarily charged for these services which involved extensive preparation and skill for complex legal and factual issues.
 - b. The attorney's fees and costs submitted by California attorney Randall Nelson were reasonable and necessary to secure the stay of the California proceedings.
 - c. The attorneys' fees (\$9,000.00) and costs (\$1,000.00) submitted by Texas attorney David Jones were reasonable and necessary to try and secure the stay of the Texas proceedings.

34. The plaintiffs are entitled to a judgment for the fees and costs as outlined hereinabove.

JUDGMENT

The Court having entered the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, now, therefore,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiffs, CAREY D. ERWIN, a single person, and HEALTHCARE PROPERTIES, INC., a Washington corporation, be and they are hereby awarded judgment against defendants COTTER HEALTH CENTERS, a foreign corporation, and JAMES F. COTTER, a single person, as follows:

- 1. A consulting fee on the Cotter-Ensign leases for the Abilene, Texas, facilities, in the amount of \$18,563.43, together with interest at 12% per annum from January 1, 2000, to December 3, 2004, in the amount of \$10,966.69, for a total of \$29,530.12 (in the event judgment is rendered after December 3, 2004, interest shall accrue at \$6.103 per day);

¹ These Findings of Fact and Conclusions of Law also incorporate all of the Findings and Conclusions set forth in the Court's Memorandum Opinion of September 10, 2004, and Judge Schwab's Decision on Proposed Findings of Fact, Conclusions of Law and Judgment dated November 15, 2004.

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2. A consulting fee on the Cotter-Ensign leases for the four California facilities, in the amount of \$115,846.50, together with interest at 12% per annum from November 16, 2001, to December 3, 2004, in the amount of \$42,326.54, for a total of \$158,173.04 (in the event judgment is rendered after December 3, 2004, interest shall accrue at \$38.305 per day); and

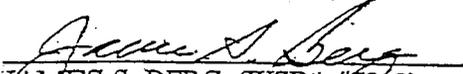
3. Allowable attorneys' fees and collection costs in the sum of \$100,108.28; for a total judgment of \$287,811.44 (\$29,530.12 + \$158,173.04 + \$100,108.28), together with interest thereon at the rate of 12% per annum from date of entry until paid.

DATED this 3rd day of December, 2004.

**MICHAEL E. SCHWAB
JUDGE**

MICHAEL E. SCHWAB, Judge

Presented by:


JAMES S. BERG (WSBA #7812)
James S. Berg, PLLC
Attorneys for Plaintiffs

Approved for entry and notice
of presentation waived:


GREG LIGHTY (WSBA #21275)
Attorney for Defendants

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FILED

MAY 25 2006

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CAREY D. ERWIN, a single person,)
and HEALTHCARE PROPERTIES,)
INC., a Washington corporation,)
)
Respondents,)

No. 23658-7-III

v.)

Division Three

COTTER HEALTH CENTERS, INC.,)
a foreign corporation, and JAMES F.)
COTTER, a single person,)
)
Appellants.)

PUBLISHED OPINION

SWEENEY, C.J.—We are asked here to review a forum selection clause in a multi-state contract under which a Washington resident, Carey D. Erwin, arranged the lease of several nursing homes in California and Texas for a California corporation owned by James F. Cotter. The contract specified that any disputes would be resolved under Washington law. Erwin sued Cotter in Washington to collect his commission, and the trial judge upheld the forum selection clause over Cotter’s objection. We conclude this was a proper exercise of the trial court’s discretion, well supported by the record and the law, and we affirm.

APPENDIX B

FACTS

This case was decided by a trial judge following a four-day bench trial, based on the following facts.

BACKGROUND

Cary D. Erwin lives and does business in Washington state where he has been a licensed real estate broker since 1992. He is the sole proprietor of Healthcare Properties, Inc. Since 1987, Erwin has been a consultant in the highly specialized field of health care facilities for seniors. This specialty requires fluency in pertinent government regulations and procedures as well as an understanding of the commercial and legal implications and practices attendant in the sale and lease of health care facilities. Erwin had developed a network of contacts in the health care industry nationwide. He represented clients on both sides of real estate transactions including sales and leases of health care facilities across the country.

James F. Cotter lives in Texas. He is a licensed contractor in California, where he once lived. His company, Cotter Health Centers, Inc., is a California corporation. Through his corporation, Cotter owns health care facilities in California, Texas, and Washington. He personally owns nursing homes in Texas and California. The operations for Cotter's health care facilities were structured largely for convenience in

licensing, regulation, tax, and liability exposure. The properties were in fact the property of Cotter and under his complete control.

In 1997, Camlu Care Centers, Inc., a Texas corporation, was leasing and operating three Cotter facilities in Texas. Cotter consulted Erwin to help divest Camlu of its leasehold interest.

Erwin and Cotter signed a consultant agreement. Through Healthcare Properties, Erwin provided specialized business services to a select category of clients who operate nursing homes on a regional or national basis. Significantly for this dispute, the services Erwin was to perform under the Cotter agreement were "completely different from regular real estate activity in terms of the properties involved and the interstate range of possible transactions." Clerk's Papers (CP) at 31 (finding of fact 20).

After the consulting agreement was signed, Cotter, Erwin, and William Sleeth (Cotter's comptroller and chief financial officer) discussed plans for Erwin to assist Cotter with properties located in the states of Texas, California, Oklahoma, and possibly others. Erwin confirmed to Cotter in February 1999 that he would begin work on seven specific properties in Texas, including the three Camlu properties. Erwin then went to work arranging for transfers from Camlu in Texas to a West Coast operating company called the Ensign Group. Ensign wanted leases with terms longer than the three years remaining on the Camlu leases. This required considerable research on a regional and

national scale. CP at 30 (finding of fact 11). Erwin renegotiated the Camlu leases, which were then transferred to Ensign. Cotter paid Erwin a commission pursuant to the consulting agreement.

The agreement between Cotter and Erwin also anticipated that certain California properties would also be added to the original agreement. So, although the transfer of the Texas properties was the first project, Cotter gave Erwin the go-ahead to work on the transfer of the California properties. These California properties are the subject of this dispute.

THE DISPUTE

On March 6, 2000, an attorney representing Cotter sent Erwin a letter saying that any agreements between Cotter and Erwin were terminated. The attorney also wrote to the Ensign Group, withdrawing the proposed leases and requesting that the leases be destroyed. Cotter and his attorneys then worked on their own to “liberate” the California facilities and make them available for transfer. At the same time, they negotiated with the Ensign Group and other parties for those California properties. The upshot was that, in February 2001, Cotter and his affiliates signed lease agreements with Ensign for four California properties, effective in November 2001.

Erwin demanded a fee for his services. Cotter and his companies refused. Erwin sued in Washington to recover commissions for the leases of two facilities in Texas and

No. 23658-7-III
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four in California. Cotter filed suit in Texas and California to bar Erwin from proceeding in Washington. The California court recognized the parties' choice of law provision and stayed Cotter's action pending the outcome of the Washington litigation. CP at 36 (finding of fact 51). Cotter contends that the dispute should be resolved under California and Texas law and that the contract is illegal under the law of both those states.

THE COURT'S DECISION

The trial court concluded that Cotter's consulting agreement with Erwin was enforceable in Washington and that Cotter submitted to personal jurisdiction in Washington under the written agreement. The contract provided that:

Any dispute regarding the interpretation or enforcement of this Agreement shall by agreement of the parties be resolved in the State of Washington pursuant to its laws as the parties acknowledge that jurisdiction lies therein.

CP at 266. It also provided that:

Should property(ies) that are listed on Addendum "A" be located in a state other than the state of Washington then owner [Cotter] expressly acknowledges that they are not knowingly entering into an agreement which is illegal by contracting with real estate broker which is not licensed in state where facilities are located. In addition Client [Cotter] agrees to waive any such provision that would allow for a contest of fees based on the fact the Consultant [Erwin] is not licensed as a real estate broker in the state where facilities are located.

CP at 266. The agreement goes on to acknowledge that the agreement is not the typical listing agreement with a real estate broker or agent.

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Erwin v. Cotter Health Centers, Inc.

The trial court concluded that the contract was not illegal under Washington law. The court found that Erwin did not provide classic real estate brokering. Instead, he performed specialized national facilities marketing consultant services. CP at 31 (finding of fact 20). Accordingly, the court concluded that Erwin was not required to be licensed in every state touched by the transaction. CP at 38 (conclusion of law 11).

The court also found that Erwin was instrumental in introducing the Ensign Group and facilitating the transfer of the Camlu leases from Camlu to the Ensign Group. The court then awarded consulting fees and attorney fees to Erwin and Healthcare Properties, Inc. Cotter appealed.

DISCUSSION

CHOICE OF LAW

Cotter argues that Erwin is not a licensed real estate broker in either Texas or California. He was not, therefore, entitled to a commission for what amounts to real estate brokerage services in either of those states. Erwin responds that the express choice of law in the agreement was Washington, and that, so long as it does not offend the public policy of Washington as the forum state, the court should enforce the agreement.

Standard of Review

We will enforce a forum selection clause provided it is fair and reasonable. *Exum v. Vantage Press, Inc.*, 17 Wn. App. 477, 478, 563 P.2d 1314 (1977). We generally

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Erwin v. Cotter Health Centers, Inc.

review a court's decision to enforce a forum selection clause for abuse of discretion. *Dix v. ICT Group, Inc.*, 125 Wn. App. 929, 934, 106 P.3d 841, *review granted*, 155 Wn.2d 1024 (2005). The standard of review applicable here, however, is not clear. Both abuse of discretion and de novo review have been applied. *See Bank of Am., N.A. v. Miller*, 108 Wn. App. 745, 748, 33 P.3d 91 (2001). The analysis of many so-called "abuse of discretion" questions can be broken down into questions of fact and the conclusions of law these facts support. *State v. Karpenski*, 94 Wn. App. 80, 102, 971 P.2d 553 (1999). That is what we do here.

Findings of Fact

The first question is whether there is sufficient evidence to support the findings underlying the court's decision. *Cox v. Lewiston Grain Growers, Inc.*, 86 Wn. App. 357, 367, 936 P.2d 1191 (1997).

Here, the essential facts are easily supported by this record. Both Cotter and Erwin were experienced, seasoned businessmen with a particular expertise in the field of nursing homes and elder health care facilities. Erwin had both expertise and industry-wide contacts across state borders. Cotter wanted to take advantage of both that expertise and those contacts to extricate himself from what had proved to be very unfavorable lease arrangements with Camlu.

Erwin's services required transfer of leases from one entity to another. That naturally suggested Washington as the forum state, because Erwin was licensed only in Washington. It was for that reason that these sophisticated businessmen freely negotiated and designated Washington as the forum state. Moreover, the agreement freely acknowledges the legal complications created by the fact that the properties were located in Texas and California.

Conclusions of Law

The next question is whether the findings are sufficient to support the judge's conclusion that the choice of Washington law was effective. That is a question of law that we review de novo. *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986).

We will enforce a freely negotiated forum selection clause unless it is unfair or unreasonable. *Exum*, 17 Wn. App. at 478. This policy enhances the predictability of contractual obligations. *Voicelink Data Servs., Inc. v. Datapulse, Inc.*, 86 Wn. App. 613, 617, 937 P.2d 1158 (1997). When the chosen state has some substantial relationship to either the parties or the contract, we assume the parties had a reasonable basis for their choice of forum. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187, cmt. f (1971). A substantial relationship exists when one of the parties is domiciled and has his principal place of business in the state. *Id.* Here, Erwin lives and operates his business in Washington.

The primary aim of contract law is to secure the justifiable expectations of the parties and to enable them to predict their rights and responsibilities under the contract. *Id.* § 187, cmt. e. In multi-state transactions, certainty and predictability are likely to be enhanced when the parties choose the law that governs the validity of their own contract. *Id.* Accordingly, when parties to a contract choose to apply the law of a particular state, the courts will apply that state's law to an issue so long as the issue is one the parties could have resolved by an explicit provision in their agreement. *Id.* § 187(1).¹

That is the case here. The particular issue here is generated by Cotter's agreement to pay Erwin to arrange a series of specialized transactions in multiple states. This is an issue the parties could and did resolve by an explicit provision in their agreement.

No Conflict Of Laws

We will nonetheless reject a forum selection clause if (a) a conflict exists between the laws of the chosen state and those of another state; (b) the other state has a greater interest in deciding the issue; and (c) application of the forum selection clause would be contrary to that state's public policy. RESTATEMENT, *supra*, § 187(2)(b). Cotter asserts that we must undertake a conflict of laws analysis. The trial court correctly concluded,

¹ Cotter contends the choice of Washington law in this contract is ineffective because the subject matter of the contract is illegal under the law of California. Clearly, however, the legality of a contract must be determined under the applicable law. The effectiveness of a choice of law provision must, therefore, be adjudicated before the chosen law is applied.

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however, that the facts do not present a conflict of laws problem here. CP at 38.
(conclusion of law 14).

A conflict of laws exists when “two or more states have an interest in the determination of the particular issue.” RESTATEMENT, *supra*, § 187(2), cmt. d. If the law is the same and the resolution of a dispute would be the same in all potentially affected states, no state has an interest in having its own law applied. There is no conflict of laws. *Pac. States Cut Stone Co. v. Goble*, 70 Wn.2d 907, 909, 425 P.2d 631 (1967).

Providing real estate brokerage services for commission without a license is illegal in all three states—Washington, California, and Texas—and no action to recover a commission may be maintained in any of these states. RCW 18.85.100; CAL. BUS. & PROF. CODE § 10136;² TEX. OCC. CODE § 1101.351. So, regardless of which state’s law

² Compare the Washington and California statutes: “No suit or action shall be brought for the collection of compensation as a real estate broker, associate real estate broker, or real estate salesperson, without alleging and proving that the plaintiff was a *duly licensed real estate broker*, associate real estate broker, or real estate salesperson prior to the time of offering to perform any such act or service or procuring any promise or contract for the payment of compensation for any such contemplated act or service.” RCW 18.85.100 (emphasis added).

“No person engaged in the business or acting in the capacity of a real estate broker or a real estate salesman within this State shall bring or maintain any action in the courts of this State for the collection of compensation for the performance of any of the acts mentioned in this article without alleging and proving that he was a *duly licensed real estate broker* or real estate salesman at the time the alleged cause of action arose.” CAL. BUS. & PROF. CODE § 10136 (emphasis added).

we apply, the dispositive question is whether Erwin can maintain an action for a commission for the services he provided to Cotter; that is, whether the contract was void for illegality.

The trial court concluded that the contract was legal under the laws of Washington. The court found that Erwin did not provide classic real estate brokering. Instead, he performed specialized national facilities marketing consultant services. CP at 31 (finding of fact 20). Accordingly, the court concluded that Erwin was not required to be licensed in every state touched by the transaction. CP at 38 (conclusion of law 11). The trial court's determination is supported by the record of the services Erwin provided. This was not a typical "listing agreement." It was instead a hybrid "consulting agreement" calculated to capitalize on Erwin's unique expertise in this highly regulated industry and his contacts in the industry, throughout the country. The court's conclusion is also consistent with the contract itself. The parties agree that they are aware of brokerage commission laws but are contracting for services for which a commission can be paid.

And we agree given the nature of the undertaking here—transferring business interests in a national market—that it did not make any difference where Erwin lived or worked, or for that matter where he was licensed. The crucial qualification, and what Erwin sold to Cotter, was his competence to advise on the management and leasing of

properties, as part of a very unique industry. And that is exactly what Erwin did. These businessmen had a good understanding of the problems, pitfalls, and opportunities available under this consulting agreement. They deliberately chose to refer to it as a consulting agreement.

Moreover, the policy underlying California's licensing law is the same as Washington's—"to protect the public from the perils incident to dealing with incompetent or untrustworthy real estate practitioners." *Schantz v. Ellsworth*, 19 Cal. App. 3d 289, 292-93, 96 Cal. Rptr. 783 (1971). As in Washington, California courts recognize that this policy is satisfied by proof of a valid real estate broker's license. *Estate of Baldwin*, 34 Cal. App. 3d 596, 605, 110 Cal. Rptr. 189 (1973). Like Washington, California does not construe its licensing laws so literally as to require exact compliance if to do so "would transform the statute into an "unwarranted shield for the avoidance of a just obligation."”” *Id.* (quoting *Schantz*, 19 Cal. App. 3d at 293) (quoting *Latipac, Inc. v. Superior Court of Marin County*, 64 Cal. 2d 278, 281, 411 P.2d 564, 49 Cal. Rptr. 676 (1966))).

Ultimately, then, we agree with the trial court's conclusion that applying Washington law did not violate California or Texas public policy concerning licensing. CP at 38 (conclusion of law 13).

The law of one state or another had to apply. And the fact that we or Cotter can argue that California or Texas could also have been chosen will not override a freely negotiated contract. We certainly cannot say that the trial court abused its discretion by choosing to enforce the agreement. We conclude that the interests of the parties are best served by leaving them exactly where they placed themselves—litigating this dispute in Washington.

STATUTE OF FRAUDS

Cotter also contends that Erwin cannot collect a commission for the California facilities because they were not part of the written agreement. Thus, Cotter contends, Washington's statute of frauds applies. But the statute of frauds applies solely to agreements to buy and sell real estate. *Sherwood B. Korssjoen, Inc. v. Heiman*, 52 Wn. App. 843, 851-52, 765 P.2d 301 (1988). Thus the statute of frauds is not a bar under Washington law to enforcing an agreement to procure a lessee. Moreover, the trial court correctly concluded that written correspondence between Erwin and Sleeth satisfied the statute regarding the addition of the disputed properties to the agreement.

ATTORNEY FEES

Finally, Cotter contends that Erwin is not entitled to attorney fees under the fee provision in the agreement, because the agreement is not enforceable.

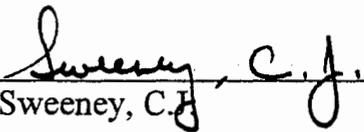
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Attorney fees may be awarded if authorized by statute, private agreement, or a recognized ground of equity. *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 839, 100 P.3d 791 (2004). When a contract contains an attorney fee provision, the prevailing party is entitled to an award of fees and costs. *Id.* The prevailing party is entitled to fees even if the contract is invalidated. *Id.*

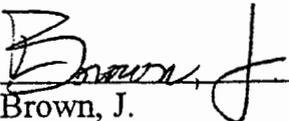
The agreement contained an attorney fee provision. Erwin is the prevailing party. He is, then, entitled to fees and costs on appeal.

CONCLUSION

We affirm the trial judge's conclusion that Washington is the appropriate forum state. We affirm the award of fees in the trial court. And we award costs and fees on appeal.


Sweeney, C.J.

WE CONCUR:


Brown, J.


Kato, J.

RCW 18.85.100

License required — Prerequisite to suit for commission.

It shall be unlawful for any person to act as a real estate broker, associate real estate broker, or real estate salesperson without first obtaining a license therefor, and otherwise complying with the provisions of this chapter.

No suit or action shall be brought for the collection of compensation as a real estate broker, associate real estate broker, or real estate salesperson, without alleging and proving that the plaintiff was a duly licensed real estate broker, associate real estate broker, or real estate salesperson prior to the time of offering to perform any such act or service or procuring any promise or contract for the payment of compensation for any such contemplated act or service.

[1997 c 322 § 6; 1972 ex.s. c 139 § 9; 1951 c 222 § 8. Formerly: (i) 1941 c 252 § 6; Rem. Supp. 1941 § 8340-29. (ii) 1941 c 252 § 25; Rem. Supp. 1941 § 8340-48.]

RCW 18.85.340

Violations — Penalty.

Any person acting as a real estate broker, associate real estate broker, or real estate salesperson, without a license, or violating any of the provisions of this chapter, shall be guilty of a gross misdemeanor.

[1997 c 322 § 21; 1951 c 222 § 20; 1941 c 252 § 23; Rem. Supp. 1941 § 8340-46. Prior: 1925 ex.s. c 129 § 17.]

California Business & Professions Code:

§10136. No person engaged in the business or acting in the capacity of a real estate broker or a real estate salesman within this State shall bring or maintain any action in the courts of this State for the collection of compensation for the performance of any of the acts mentioned in this article without alleging and proving that he was a duly licensed real estate broker or real estate salesman at the time the alleged cause of action arose.