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NO.
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON
Court of Appeals No. 23658-7-III

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Washington Court of Appeals, Division Three
By _____

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

Respondents,

v.

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

Petitioners.

PETITION FOR REVIEW

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IDENTITY OF PETITIONERS

Cotter Health Centers Inc. and James F. Cotter, petitioners, respectfully ask the Court to grant review of the published decision of the Court of Appeals.

COURT OF APPEALS DECISION

The published decision of the Court of Appeals was filed on May 25, 2006. A copy is Appendix D to this petition.

ISSUES PRESENTED FOR REVIEW

1. Can a broker evade the requirements of the Washington State Real Estate Broker and Salespersons Act by drafting a contract that characterizes the broker's services as "an independent contractor relationship with Consultant and not a typical listing agreement with a real estate broker or agent"?

2. Will the Court honor a contractual choice of Washington law if it would be contrary to a fundamental policy of California, the state with the most significant contacts with the relationship?

3. Even if Washington law applies, can a broker maintain a suit 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?

STATEMENT OF FACTS AND PROCEDURE

- A. Petitioner Cotter, a Texas resident, entered into a contract in California with respondent Erwin, a Washington resident, under which Erwin was to help Cotter find new lessees for health care facilities located in Texas, Oklahoma and California.**

This case arises out of respondent Erwin's claim for a commission on the lease of California and Texas Health Care facilities (nursing homes). Four of the facilities are located in California, two owned by different corporations controlled by Cotter, and two by Cotter individually. BA 5-6. The two Texas facilities are owned by Cotter individually. BA 6.

Respondent/plaintiff Carey Erwin is a licensed real estate broker in the State of Washington and the sole owner and operator of respondent Health Care Properties, Inc., a Washington corporation. F/F 1, CP 28. (The findings are found at Appendix C to this Petition.) Erwin is not licensed as a real estate broker in California, and was not licensed as a real estate agent in California until 2001. *Id.* Erwin resided in California and his primary office was located in California until about one week before executing the

agreement at issue in this case, and he has since moved back to California. RP 82-83.¹

Cotter is a resident of Texas. F/F 3, CP 28. At the time of these events, Cotter personally owned seven nursing home facilities in Texas and two nursing home facilities in California. F/F 5-6, CP 29. He owned two California corporations, Cotter Health Centers Inc. and Coachella House Inc., each of which owned a nursing facility in California. *Id.*

Camlu Care Centers, Inc. was a Texas corporation that leased three of Cotter's Texas facilities. F/F 7, CP 29. Camlu hired Erwin to help it sublease or divest its leasehold interests in three of Cotter's Texas facilities. F/F 10, CP 30.² Erwin found a potential lessor for the Camlu properties, the Ensign Group. F/F 16, CP 30. The Ensign Group was only interested if they could negotiate longer leases with Cotter. In the course of representing Camlu,

¹ The Court of Appeals incorrectly assumed that Erwin "lives and does business in Washington State . . ." Opinion at 2. The Court may have relied on F/F 1 that Erwin was a resident of Washington "[a]t all times material hereto", but Erwin admitted that he had only relocated to Washington shortly before entering into the contract and has since left Washington. RP 83-84.

² The Court of Appeals incorrectly stated that, "Cotter consulted Erwin to help divest Camlu of its leasehold interest." Opinion at 3. To the contrary, as the trial court found, Camlu retained Erwin.

Erwin met with Cotter, and offered to assist Cotter with other properties as well as the Camlu properties. F/F 17-18, CP 31.

Cotter and Erwin met at Cotter's home in Rancho Mirage, California, and entered into a document entitled "Consultant Agreement". F/F 19, CP 31. (Copy attached as Appendix A). The terms of the agreement are discussed below. The agreement applied to properties listed on "Addendum A", but there was no addendum attached when the agreement was signed. F/F 21, CP 31. Erwin subsequently sent a letter with an Addendum A listing seven Texas properties – the three Camlu properties and four others. F/F 22, CP 32. None of the California properties at issue in this case were ever listed on Addendum A. But the trial court found that Cotter "later gave the signal" that Erwin should move forward with the California properties. F/F 31, CP 33.

At this point, Erwin was representing Camlu with respect to the transfer of the leases to the Ensign Group, and was representing Cotter with respect to negotiating longer term leases for the Ensign Group. F/F 24, CP 32. Eventually the Camlu leases were renegotiated and transferred to the Ensign Group. F/F 34, CP 33-34. Erwin was paid a commission for his efforts and the Camlu properties are not involved in this case. *Id.*

Cotter also agreed to lease to the Ensign Group two of the Texas facilities listed in Addendum A. F/F 35, CP 34. The commission for the two Texas facilities is at issue in this appeal. F/F 36-37, CP 34.

Cotter and Ensign negotiated for Ensign to lease the four California properties, but the properties were tied up in pending litigation with a prior lessee of the facilities. F/F 41, 34-35.

Thirteen months after Cotter and Erwin entered into the Consultant Agreement, Cotter cancelled the agreement. F/F 42, CP 35. Over the next year, Cotter and his attorneys litigated with the existing lessee and eventually succeeded in clearing the California facilities of any claim by the prior lessee. F/F 45, CP 35. Cotter then leased the facilities to Ensign. F/F 46, CP 35.

B. The trial court awarded judgment to Erwin, reasoning that Erwin was not engaged in “traditional real estate broker/agent services.”

The Consultant Agreement chose Washington as the forum and for the law to apply to the contract:

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.

Ex. 8, ¶ 7. Erwin brought suit in Yakima County to collect a commission for the leases for the two Texas facilities and the four California facilities. CP 328-34.

Cotter argued that Erwin could not enforce the Agreement because it is illegal. CP 202-09. He argued that the Agreement's legality or illegality should be determined by California and Texas law and that the Agreement is unlawful and unenforceable in both states. CP 202-09. The trial court applied Washington law, and thus it did not address whether the Agreement was illegal in California and Texas. CP 38-39, C/L 14, CP 126-27.

The trial court concluded without explanation that applying Washington law did not violate California and Texas public policy surrounding in-state licensing requirements. CP 38, C/L 13.

Ultimately, the trial court concluded that Erwin was not rendering "traditional real estate broker/agent services":

11. The services contemplated by the Agreement were not traditional real estate broker/agent services. Rather, they were specialized consultant services in a specialized facilities market that makes it impractical for a consultant to be licensed in every state where he might do business. It also requires that such consultant engage in considerable interstate travel and communication. CP 38.

C. The Court of Appeals affirmed the judgment on the ground that the consulting agreement was not for “classic real estate brokering.”

Cotter appealed, arguing that Erwin was performing brokerage services as defined under the laws of Washington, California and Texas. BA 22. Cotter argued that the Court should disregard the choice of Washington law in the consulting agreement because California is the state with the most significant contacts and application of Washington law would be contrary to a fundamental policy of California law. BA 26-40. Cotter also argued that even under Washington law, Erwin cannot maintain suit in Washington simply because he is licensed in Washington and performs some aspects of the agreement in Washington. BA 44.³

The Court of Appeals agreed with the trial court that the contract was legal because Erwin was not providing classic real estate brokerage services:

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

³ Cotter also raised other issues in the trial court, but did not pursue those issues on appeal. BA 20.

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.

Opinion at 11-12.

WHY THE COURT SHOULD ACCEPT REVIEW

A. The Court should accept review to reaffirm its consistent holdings that parties may not evade the registration requirements of the Washington Real Estate Brokers And Salespersons Act by clever draftsmanship.

1. Introduction.

The appellate court decision that Erwin did not provide “classic real estate brokering” conflicts with the consistent decisions of this Court and the Court of Appeals that a party cannot evade the registration requirements of the Washington Real Estate Brokers

and Salespersons Act (“REBSA”) by clever draftsmanship. The Court should accept review under RAP 13.4(b) 1 and 2.

The purpose of the REBSA is to protect the public from fraud and misrepresentation. **Schmitt v. Coad**, 24 Wn. App. 661, 665, 604 P.2d 507 (1979), *rev. denied*, 93 Wn.2d 1016 (1980). The **Schmitt** court stated:

Statutes regulating the real estate business, and requiring brokers and salesmen to procure a license before acting as such, have been enacted in many States. They have the same general purpose and are designed to protect the public from the fraud, misrepresentation and imposition of dishonest and incompetent persons. The reasons are not hard to see. The relations of trust and confidence which lie in the very nature of the business require that honesty and a fair amount of intelligence be exercised by those engaged in its pursuit. The records of the courts disclose far too many instances of litigation arising from unrestricted and unregulated agencies in this field.

24 Wn. App. at 665, *quoting Massie v. Dudley*, 173 Va. 42, 55, 3 S.E.2d 176 (1939).

By requiring licensing, the state screens those who can practice in the fields and requires an adequate level of education and knowledge. Licensing also enhances and facilitates the regulation of a particular profession or trade.

This published decision gives a roadmap for evading the requirements of the licensing statute by skillful draftsmanship,

stripping the public of the protections intended by the Legislature.

The Court should grant review to scotch this dangerous precedent.

2. This Court and the Court of Appeals have consistently rejected efforts to avoid the registration requirements of the REBSA through clever draftsmanship.

In an early case, the plaintiff performed services that resulted in obtaining a buyer of a lumber mill and associated timber properties. ***Grammer v. Skagit Valley Lumbar Co.***, 162 Wash. 677, 681-82, 299 P. 376 (1931). The plaintiff claimed that he did not fall within the real estate broker statute because he did not obtain a purchaser or negotiate, but merely “prepared” the property for presentation to purchasers, cruised timber, and gathered data. *Id.* This Court had no trouble rejecting the argument, holding that the plaintiff was employed as a broker. The Court quoted from an earlier New York case:

If real estate is going to be the principal element involved in the transaction, a broker has to have a license and cannot evade its necessity by referring to the services as originating or introducing or any other fantastic term. A statute enacted for the protection of the public must be interpreted fairly to effect the purposes of its enactment. It is not to be rendered ineffectual by a strained construction.

162 Wash. at 685, quoting ***Baird v. Krancer***, 138 Misc. 360, 246 N.Y. Supp. 85 (1930).

This Court adhered to **Grammer** in a subsequent case in which the broker attempted to avoid the registration requirements by taking title to seller's land and reselling it. **Shorewood, Inc. v. Standring**, 19 Wn.2d 627, 144 P.2d 243 (1943). Again, this Court held that the true relation intended to be created was that of real estate broker. The Court cited its earlier decision in **Grammer** "as indicating the attitude of this court in applying the real estate broker's act to contracts which it might be said were attempted evasions of the act." 19 Wn.2d at 638.

The Court of Appeals has reached the same result in several cases. In the **Main** case, the property seller agreed to pay a commission under an agreement that recited that the plaintiff had "materially assisted" [the seller] with financial planning and analysis in respect to my business affairs" **Main v. Taggares**, 8 Wn. App. 6, 9, 504 P.2d 309 (1972). The Court of Appeals concluded that the contract was for a broker's commission:

This is so, notwithstanding defendant's argument that it was not the intention of the parties to make a brokerage contract and, since they did not intend it to be one, it was not. This is a non sequitur. The name given an instrument does not necessarily determine what it is in law. 8 Wn. App. at 10.

Accord, **Springer v. Rosauer**, 31 Wn. App. 418, 421-22, 641 P.2d 1216, rev. denied, 97 Wn.2d 1024 (1982); **Schmitt v. Coad**, *supra*.

The consistent teaching of these cases is that parties cannot by clever draftsmanship avoid the registration requirements of the REBSA.

3. The appellate court erred in concluding that Erwin was not acting as a real estate broker.

The Court of Appeals erred in holding that the consulting agreement does not fall within the requirements of the REBSA. Opinion at 11-12. This is an issue of law to be reviewed *de novo* by the Court.⁴

In Washington, a “broker” is a person who charges a commission to (1) buy, sell, list, or offer to do the same for another, and/or (2) negotiate (directly or indirectly) the purchase, sale, exchange, lease, or rental of real estate or business opportunities. RCW 18.85.010.⁵ It is a gross misdemeanor to provide brokerage services without a license (RCW 18.85.340), and an unlicensed

⁴ It is unclear what standard of review was used by the appellate court. The Court repeatedly referred to the issue as involving “a forum selection clause”, Opinion at 7, 8, 9, and stated that a trial court’s decision to enforce a forum selection clause is reviewed for abuse of discretion. *Id.* at 6-7. The issue here is the choice of law clause, not the forum selection clause. The appellate court stated that it reviewed legal issues *de novo*, Opinion at 8, but ultimately concluded that, “We certainly cannot say that the trial court abused its discretion by choosing to enforce the agreement.” Opinion at 13. The application of the REBSA to this agreement and the conflict of laws analysis is an issue of law reviewed *de novo*, not for abuse of discretion.

⁵ All applicable statutes are attached as Appendix B.

party may not maintain a suit to collect a commission. RCW 18.85.100. The California and Texas brokerage statutes are similar. BA 23-24. Significantly, Washington's REBSA is not limited to the sale of property, but includes direct or indirect negotiation of leases, rentals of real estate, "or business opportunities."

Erwin's "Consultant Agreement" was obviously drafted to evade registration requirements. In the most direct effort to evade the REBSA, the Agreement provides:

Client expressly acknowledges that they are entering into an independent contractor relationship with Consultant and not a typical listing agreement with a real estate broker or agent. Consultant represents that they have performed functions involving financial statement analysis, valuation, structuring letters-of-intent, purchase and sale agreements or contracts, leases, financing, negotiating and closing health care facility(ies) transactions for the past 12 years involving publicly traded companies as well as single facility owner/operators. Consultant has specific knowledge as to prevailing market conditions as it pertains to buyers and their parameters for acquisitions and tendencies relating to contractual expectations, financing and the like.

Ex. 8 at ¶ 10. The contract includes a purported "waiver" of illegality:

Should property(ies) that are listed on Addendum "A" be located in a state other than the state of Washington then owner 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 agrees to waive any

such provision that would allow for a contest of fees based on the fact that Consultant is not licensed as a real estate broker in the state where facilities are located.

Ex. 8 at ¶ 9. The “waiver” is, of course, unenforceable; a party cannot contractually waive the defense of illegality. BA 36-40.

The Agreement further attempts to avoid licensing requirements of other states by selecting Washington law in a Washington forum, the state in which Erwin is licensed as a broker.

Ex. 8 ¶ 7.

The Consultant Agreement also attempts to avoid the REBSA by describing Erwin’s responsibilities in the vaguest possible terms. But the thrust of the agreement is clearly for brokerage services:

- ◆ Facilities are “to be marketed for a sales price/lease rate”, Ex. 8 ¶ 3;
- ◆ A commission will be owed even after the expiration of the agreement if the properties are “sold, leased, exchanged, joint venture, stock purchased or management contract arranged”, *Id.*;
- ◆ Client warrants that it has marketable title and agrees to execute necessary documents to transfer an interest in the property, *Id.* at ¶ 8;
- ◆ “Consultant has requested certain information in order to effectively market facility(ies)”, *Id.* at ¶ 12;
- ◆ “Consultant represents that they have been directly involved in the negotiations of health care facility transactions”, *Id.* at ¶ 15;

- ◆ Client agrees to make consultant a party to any “purchase and sale contract, lease or sublease agreement, and any escrow established,” *Id.* at ¶ 19.

Whatever Erwin may have written in the Consultant Agreement, he clearly provided brokerage services under Washington, California and Texas law. Erwin “provided the introduction” of Ensign to the California and Texas facilities. CP 39, C/L 16. He “facilitate[d] the interaction” between Cotter and Ensign (CP 39, C/L 17) including setting up meetings between Cotter and Ensign to discuss potential leases on the Texas and California facilities. CP 33, F/F 33. He toured the Texas facilities (RP 56) and his efforts “led directly to the closing of the Abilene leases.” CP 39, C/L 18. His actions also led to negotiations and proposed leases on the California facilities. CP 39, C/L 19-20. The whole purpose of the relationship was for Erwin to market Cotter’s facilities.

Erwin’s attempt to evade the REBSA should be no more successful than: the plaintiff in ***Grammer***, who contended that he never obtained purchaser or “negotiated”; or the plaintiff in ***Shorewood***, who took title to the property between the seller and the buyer; or the plaintiff in ***Main***, who claimed he did not intend to make a brokerage contract and did not call it one; or the plaintiff in

Schmitt, who claimed, like Erwin, that his services were those of a “consultant” not a broker. As the **Main** court held, “the name given an instrument does not necessarily determine what it is in law. **Main**, supra, 8 Wn. App. at 10.

The issue is not, as the trial court concluded, whether it is “impractical” for a consultant to be licensed on every state where he or she might do business. CP 38, C/L 11. The issue is what the legislatures of these states intended, which was clearly to regulate business and leasehold brokerage services. If it was “impractical” for Erwin to be licensed in California and Texas, then he should have associated with a local, properly licensed broker. Practical or impractical, he has no right to ignore proper and salutary licensing laws.

The Court should take review and hold unequivocally that Erwin was performing brokerage services within the meaning of the statutes of Washington, California, and Texas.

B. The Court should hold that California law covers the consulting agreement and that the agreement is illegal and unenforceable under California law.

Cotter presented the appellate court with a careful conflict of laws analysis under **Restatement (Second) of Conflicts** § 187

(1989). Under § 187, the Court will refuse to apply the law of the state chosen by the parties (here, Washington) if:

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Restatement, supra, § 187(2)(b). Cotter explained in his brief that California would be the state of applicable law absent the choice of law provision, that California has a materially greater interest in deciding this matter than Washington, and that applying Washington law would offend fundamental California public policy. BA 30-36.

The appellate court went sideways on the conflict analysis, seemingly holding that there is no conflict between the laws of Washington and California on this point: “[R]egardless of which state’s law 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 a void for illegality.” Opinion at 10-11. The Court then erred in holding that applying Washington law would not violate any fundamental California policy. Opinion at 12. This was error because California law

makes it unlawful to provide real estate brokerage services without an in-state license:

It is unlawful for any person to engage in the business, act in the capacity of, advertise or assume to act as a real estate broker ... within this state without first obtaining a real estate license from the department.

Cal. Bus. & Prof. Code § 10130. An agreement employing an unlicensed party to provide brokerage services for a commission is “illegal, void and unenforceable.” *In re Estate of Baldwin*, 34 Cal. App. 3d 596, 604, 110 Cal. Rptr. 189, 194 (1973). This is a classic example of a fundamental policy violated by the application of another state’s law. *Restatement*, *supra* § 187 comment *g*.

Erwin certainly violated the California statute. He acted as a real estate broker “within this state without first obtaining a real estate license from the department.” Cal. Bus. & Prof. Code § 10130. Erwin met with Cotter in California to sign the contract, F/F 19, CP 31, and arranged for other meetings between Cotter and the Ensign Group in California. F/F 33, CP 33. The fact that Erwin “performed a good deal of work in Washington on these matters” does not undermine the fact that he performed brokerage services in California. C/L 10, CP 38. California would likely refuse to enforce any contract to recover a commission for brokerage activities within California where the broker was not licensed in

California. *Consul, Ltd v. Solide Enterprises, Inc.*, 802 F.2d 1143, 1151 n. 7 (9th Cir. 1986).

C. The Consultant Agreement is not enforceable even under Washington law.

As discussed above, the Court of Appeals erred in holding that the REBSA did not even apply to the Consultant Agreement. For the reasons discussed in Cotter's Brief of Appellant, even if Washington law applies, the Consultant Agreement is not enforceable. BA 44-47.

D. The Court should award attorney fees to Cotter and remand for an award of fees at trial.

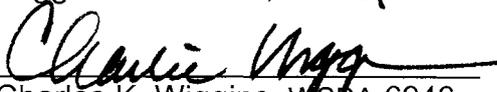
The Court should reverse Erwin's fee award and award fees to Cotter. BA 47-48.

CONCLUSION

For all these reasons, Cotter respectfully asks the Court to grant review, reverse the Court of Appeals and the trial court, dismiss Erwin's claims, and award fees to Cotter.

RESPECTFULLY SUBMITTED This 23 day of June 2006.

Wiggins & Masters, P.L.L.C.,



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CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing PETITION FOR REVIEW postage prepaid, via U.S. mail on the 23 day of June 2006, to the following counsel of record at the following addresses:

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Attorney for Appellant

Consultant Agreement

This agreement entered into this _____ day of _____ 1998, by and between Carey D. Erwin and Healthcare Properties, Inc., or its assigns, hereinafter referred to as "Consultant" and Cotter Health Centers, referred to as "Client", the undersigned do hereby agree as follows:

1. Parties acknowledge that Consultant is licensed to provide real estate services by the State of Washington as a real estate broker.
2. Client acknowledges that Consultant shall act for the sole benefit of Client and Client acknowledges they shall be solely responsible for payment of all fees as set forth hereafter.
3. This agreement shall continue for a period of nine (9) months from the date hereof and shall be automatically extended to cover a deferred closing of any business opportunity or Buyer presented to Client during the term hereof. Should said property(ies) be sold, leased, exchanged, joint venture, stock purchased or management contract arranged to any one of the registered companies or individuals (to be presented from time to time via written communication throughout the term of this agreement) of Carey D. Erwin within 24 months (2 years) after expiration of this agreement; then Client, agrees to pay the fee stated (to follow) to Healthcare Properties, Inc. Facility(ies) to be sold or leased are commonly known as (see Addendum "A"). Facility(ies) to be marketed for a sales price/lease rate of (see Addendum "A") for fee simple and operations/business and any other value or asset associated with the contemplated sale of said facility(ies).
4. Fee amount to equal four (2.5) percent of the gross sales price for fee simple and operations. Should an operational lease be negotiated and consummated then the fee shall equal 14% of the first year annual lease payment plus two (2) percent of any cash payment made at closing or in the form of note or stock for the leasehold interest. The definition of this agreement shall be that of an exclusive engagement to represent and right to sell or lease said facility(ies). In the event Client requests that Healthcare Properties, Inc. negotiate financing or refinancing and Healthcare Properties, Inc. is successful in doing so then a fee of one and one-half (1.5) percent shall be paid in addition to any sales or leasing fee earned.
5. All fees shall be due and payable upon closing of any transaction. Any fees not paid in accordance with the terms of this agreement shall accrue interest at the lesser of the highest lawful rate allowed by applicable law or a rate of 12% per annum until paid. In addition, Client agrees to pay all attorneys fees and collection cost for said fees whether or not suit action is instituted.

Appendix A

EXHIBIT I

6. Client acknowledges that all information provided to Consultant is supplied by sources deemed reliable, however, Consultant makes no representations, express or implied, as to its accuracy, reliability and truth in relation to furthering said information to prospective buyers.
7. 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.
8. Client hereby warrants the information contained on the property description to be correct and that they have marketable title or otherwise established right to sell said property(ies), except as stated. Client agrees to execute the necessary documents or conveyance and to prorate general taxes, insurance, rents, interest, and other expenses affecting said property to agreed date of possession and to furnish a good and marketable title with a policy of title insurance in the amount of the purchase price and in the name of the Purchaser. In the event of sale other than real property, Client agrees to provide proper conveyance and acceptable evidence of title or right to sell or lease facilities as outlined in Exhibit A.
9. Should property(ies) that are listed on Addendum "A" be located in a state other than the state of Washington then owner 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 agrees to waive any such provision that would allow for a contest of fees based on the fact that Consultant is not licensed as a real estate broker in the state where facilities are located.
10. Client expressly acknowledges that they are entering into an independent contractor relationship with Consultant and not a typical listing agreement with a real estate broker or agent. Consultant represents that they have performed functions involving financial statement analysis, valuation, structuring letters-of-intent, purchase and sale agreements or contracts, leases, financing, negotiating and closing health care facility(ies) transactions for the past 12 years involving publicly traded companies as well as single facility owner/operators. Consultant has specific knowledge as to prevailing market conditions as it pertains to buyers and their parameters for acquisitions and tendencies relating to contractual expectations, financing and the like.
11. Client acknowledges that they have consulted with their accountant and are aware of the tax implications of this potential sale and that the results thereof do not prohibit them from closing this transaction or leasing said facilities.

12. Client acknowledges that Consultant has requested certain information in order to effectively market facility(ies), see Addendum "B" and agrees to supply Consultant with said information as quickly as possible so as to allow for time involved to analyze and distribute said information. Client acknowledges that Consultant may ask for additional data or information during the term of this agreement that might also be requested by prospective buyers. Client agrees to cooperate within reason to further requested information in timely manner to Consultant.
13. Client agrees that once a letter-of-intent to purchase has been submitted by a potential buyer, or beforehand if appropriate, to introduce Consultant to Client's legal counsel so as to establish a relationship and develop a strategy as far as any counter-offer and the preparation of any purchase and sales, lease or sublease agreement. Consultant represents that they have been directly involved in the negotiation of numerous purchase and sale and lease agreements or contracts specifically related to the health care industry and offers such experience to Client's legal counsel as a course of fiduciary responsibility to Client. Should Client be experienced in the sale of health care facilities and feel that their legal counsel is fully prepared to draft any legal documents as it would pertain to the sale of fee simple and or the business related to said facility(ies) then Consultant shall be introduced to Client's legal counsel once a letter-of-intent has been submitted to Consultant and delivered to Client.
14. Client agrees to instruct their legal counsel to deliver to Consultant a copy of any and all letters-of-intent, counter-offers, purchase and sale agreements, lease agreements or contracts and any changes or addendum's thereof.
15. Consultant represents that they have been directly involved in the negotiations of health care facility transactions (in excess of 60 facilities closed) and has industry experience that may be of value to Client and their respective legal counsel.
16. Consultant expressly agrees not to advertise the facility(ies) for sale in any publication(s) without the prior written consent of Client. No for sale signs shall be placed on the facility(ies) or announcement made to any general forum or disinterested parties during the term of this agreement.
17. Consultant agrees not to "list" said facility(ies) in any multiple listing service via local, national or inter-national real estate services, the Internet or other media source without prior written consent of Client. Should Client wish to have facility(ies) marketed via any local, national or inter-national medium of advertising then Client agrees to hold Consultant harmless from any liability from loss of confidentiality regarding facility(ies) being offered for sale.

18. Should Client decide after execution of this agreement that they wish to include other real estate or business with the facility(ies) identified in this agreement to any party with whom Consultant has registered or introduced to Client then Client agrees to pay a fee or commission for the inclusion of that real estate or business as if it were originally a part of this agreement. Properties, facilities or businesses shall be identified and made a part of this agreement.

19. Client agrees to make Consultant a party to, and identify in, any purchase and sale contract, lease or sublease agreement, and any escrow established, acknowledging the responsibility to pay Consultant.

20. So as to retain as much confidentiality as possible related to this potential sale Consultant agrees to submit a Confidentiality Agreement to potential buyers and retain their signatures prior to sending out any information on facility(ies) being offered for sale. A copy of the executed Confidentiality Agreement shall be sent to Client for their records. Should Client elect not to have a Confidentiality Agreement executed by potential buyers then Client agrees to hold Consultant harmless from any liability associated with a breach of confidentiality associated with this offering.

21. In the event Client wishes to cancel this agreement at any time during the term referenced in paragraph 3, then Client agrees to pay Consultant a fee equaling one half of the amount which would have been owed had the facility(ies) been sold at the established asking price in Addendum "A". However, should Client transfer or sell any interest in property(ies) identified in Addendum "A" or other healthcare related property(ies) to a registered buyer after having canceled this Agreement, and for a period of up to 36 months (3 years) after having done so, then the entire fee shall be paid to Consultant at the closing of such transaction or the applicable fee in the event of a sale not involving the fee simple and operations.

22. In the event Consultant submits an all-cash offer from a qualified buyer at the asking price identified in Addendum "A" and Client rejects said offer then Client agrees to pay Consultant entire fee established and agreed upon in paragraph 3.

[SIGNATURE PAGE TO FOLLOW]

Appendix A

EXHIBIT 1

CONSULTANT

By: Carey D. Erwin
Carey D. Erwin

Of: Healthcare Properties, Inc.
Healthcare Properties, Inc.

Title President
President

Dated: Feb. 9, '99

CLIENT

By: James F. Potter
Principal/Officer - Selling Entity

Of: _____

Title Owner

Dated: 2/9/99

Healthcare Properties, Inc.

Seafirst Financial Center
805 Broadway, Suite 747
Vancouver, WA. 98660

800.783.2525
360.690.4343
360.690.4333 - FAX

4
(e)

Addendum "A"

Identification of Facilities:

Asking Price:

List of Camlu Facilities:

1. Casa De San Antonio Care Center / Camlu Care Center
603 Corinne Street
San Antonio, TX 78286
of Beds: 120

2. Southern Manor Nursing Center / Camlu Care Centers
1802 South 31st Street
Temple, TX 76501
of Beds: 145

3. The Village Convalescent Hospital / Oakridge Center
615 North Ware Road
Mc Allen, TX 78501
of Beds: 114

List of Texas Health Enterprise Facilities:

1. Browns Nursing Home / Live Oak Care Center
619 West Live Oak Road
Fredicksburg, TX 78624
of Beds: 92

2. Lytle Nursing Home
614 Oak Street
Lytle, TX 78052
of Beds: 70

3. Shady Oaks Nursing Homes / Abilene Convalescent Center
2630 Old Anson Rd
Abilene, TX 79603
of Beds: 114

4. Shady Oaks Nursing Homes / Anson Place
2722 Old Anson Rd
Abilene, TX 79603
of Beds: 112

Addendum "B"

<u>Information Required</u>	<u>Date Received</u>
1. Year-end detailed financial statements previous three years	_____
2. Most recent month & YTD '98 detailed financial statements	_____
3. Most recent Medicaid Cost Reports	_____
4. Most recent Medicare Cost Reports	_____
5. 1995 Medicare Cost Reports	_____
6. Facility Lease Contracts	_____
7. Medicaid rate letters with workpapers for the most recent rate period	_____
8. Medicare rate letter and provider summary report (PSR) for the most recent period	_____
9. Facility summary sheets	_____
10. Facility floor plans, showing number of beds per room	_____
11. Two most recent State Health Surveys with plan of corrections.	_____
12. Most recent Fire & Life Safety Inspection Reports (Fire Marshall)	_____
13. Photographs of facilities	_____
14. Appraisals, (for salient facility data)	_____
15. Most recent detailed employee wage scales and or labor reports showing number of actual hours worked, FTE's, by department, job classifications, etc.	_____
16. Current census, mix and rate reports	_____

Appendix A

RCW 18.85.010. Definitions

In this chapter words and phrases have the following meanings unless otherwise apparent from the context:

(1) "Real estate broker," or "broker," means a person, while acting for another for commissions or other compensation or the promise thereof, or a licensee under this chapter while acting in his or her own behalf, who:

(a) Sells or offers for sale, lists or offers to list, buys or offers to buy real estate or business opportunities, or any interest therein, for others;

(b) Negotiates or offers to negotiate, either directly or indirectly, the purchase, sale, exchange, lease, or rental of real estate or business opportunities, or any interest therein, for others;

(c) Negotiates or offers to negotiate, either directly or indirectly, the purchase, sale, lease, or exchange of a manufactured or mobile home in conjunction with the purchase, sale, exchange, rental, or lease of the land upon which the manufactured or mobile home is, or will be, located;

(d) Advertises or holds himself or herself out to the public by any oral or printed solicitation or representation that he or she is so engaged; or

(e) Engages, directs, or assists in procuring prospects or in negotiating or closing any transaction which results or is calculated to result in any of these acts;

(2) "Real estate salesperson" or "salesperson" means any natural person employed, either directly or indirectly, by a real estate broker, or any person who represents a real estate broker in the performance of any of the acts specified in subsection (1) of this section;

(3) An "associate real estate broker" is a person who has qualified as a "real estate broker" who works with a broker and whose license states that he or she is associated with a broker;

(4) The word "person" as used in this chapter shall be construed to mean and include a corporation, limited liability company, limited liability partnership, or partnership, except where otherwise restricted;

(5) "Business opportunity" shall mean and include business, business opportunity and good will of an existing business or any one or combination thereof;

(6) "Commission" means the real estate commission of the state of Washington;

(7) "Director" means the director of licensing;

(8) "Real estate multiple listing association" means any association of real estate brokers:

(a) Whose members circulate listings of the members among themselves so that the properties described in the listings may be sold by any member for an agreed portion of the commission to be paid; and

(b) Which require in a real estate listing agreement between the seller and the broker, that the members of the real estate multiple listing association shall have the same rights as if each had executed a separate agreement with the seller;

(9) "Clock hours of instruction" means actual hours spent in classroom instruction in any tax supported, public technical college, community college, or any other institution of higher learning or a correspondence course from any of the aforementioned institutions certified by such institution as the equivalent of the required number of clock hours, and the real estate commission may certify courses of instruction other than in the aforementioned institutions;

(10) "Incapacitated" means the physical or mental inability to perform the duties of broker prescribed by this chapter; and

(11) "Commercial real estate" means any parcel of real estate in this state other than real estate containing one to four residential units. "Commercial real estate" does not include a single-family residential lot or single-family residential units such as condominiums, townhouses, manufactured homes, or homes in a subdivision when sold, leased, or otherwise conveyed on a unit-by-unit basis, even when those units are part of a larger building or parcel of real estate, unless the property is sold or leased for a commercial purpose.

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.

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.

FILED
DEC 3 2004

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

Appendix C

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:

15
16
17 FINDINGS OF FACT:

- 18 1. At all times material hereto, plaintiff Carey D. Erwin was a resident of the state of
19 Washington and since 1992 has been a licensed real estate broker in the state of
20 Washington. Mr. Erwin, who was also licensed as a real estate agent in the state of
21 California in 2001, was and remains the sole owner and operator of plaintiff
22 Healthcare Properties, Inc., a corporation incorporated in Washington in 1987.
- 23 2. Mr. Erwin has worked as a consultant exclusively in the specialized area of senior
24 health care facilities since 1987. During the course of that work, Mr. Erwin has
25 developed the expertise and network of contacts within the industry that has
26 allowed him to represent buyers, sellers, lessors, and lessees in many transactions
27 involving senior health care facilities. Mr. Erwin has also developed a keen
28 understanding of government regulations and procedures, as well as commercial
29 and legal practices.
- 30 3. At all times material hereto, defendant James F. Cotter has been a resident of the
31 state of Texas. He previously lived in the state of California and continues to be a
32
33
34

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.

- 1 10. In late 1997, Camlu asked Mr. Erwin to help it divest its leasehold interest in the
2 three Texas nursing facilities in McAllen, Temple, and San Antonio owned by
3 Mr. Cotter, which at that time had approximately three years left to run. Plaintiffs
4 and Camlu entered a consultant agreement for the purpose.
- 5
- 6 11. In response, Mr. Erwin began the process of finding an operator to take over the
7 leases and operations of these "Camlu" facilities. This required considerable
8 research and contacts within the specialized network of nursing home ownership,
9 operation, and investment on the regional and national level.
- 10
- 11 12. Mr. Erwin became aware that the owner of the three Camlu facilities was
12 Mr. Cotter, and, as such, Mr. Cotter would need to be involved in any transfer of the
13 Camlu leases.
- 14
- 15 13. In early 1998, and following the execution of the consultant agreement between
16 plaintiffs and Camlu, Mr. Erwin was contacted by Ray Lavender. Mr. Lavender,
17 who was also a healthcare consultant, was representing The Ensign Group, a
18 healthcare company interested in locating health care facilities on the West Coast
19 and in Texas to purchase and/or operate. Mr. Lavender learned that Mr. Erwin was
20 representing a company that might have such facilities available for sale or lease
21 through a conversation with Mr. Steve Gilleland, Director of Acquisitions for
22 Centennial Healthcare. Mr. Gilleland was located in the eastern part of the country.
- 23
- 24 14. Previous to this conversation with Mr. Gilleland, Mr. Erwin had spoken with
25 Mr. Gilleland inquiring whether Centennial might be interested in the Camlu
26 facilities. This was an example of how the network connecting those in the
27 specialized area of senior health care facilities worked.
- 28
- 29 15. Following Mr. Lavender's contact with Mr. Erwin, Mr. Erwin introduced Lavender
30 and The Ensign Group to the Camlu properties and prepared a detailed financial
31 package for them.
- 32
- 33 16. The Ensign Group was very interested in taking over the Camlu properties, but only
34 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. Cotters' 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
33
34

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
16 term with The Ensign Group.

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

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
32 from one entity to the other, and the status of all the various components of the
33 Cotter empire were convoluted. (For example, see Exhibit 13 - Sleeth letter to Care
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
16 31. Mr. Cotter initially wanted Mr. Erwin to work on the Texas properties but later gave
17 the signal through Mr. Sleeth that Mr. Erwin should move ahead with work on the
18 California properties. This is confirmed by the documents conveyed back and forth
19 between the parties during this period of time. (Exhibits 11, 12, 13, 17-39, 40,
20 51-56).

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,

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

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

9
10 36. The first year's annual lease payment for the Abilene, Texas, facilities was
11 \$132,595.92.

12
13 37. If a commission or consultant fee is owed to plaintiffs related to the Abilene, Texas,
14 leases, that commission or consultant fee would be \$18,563.43 (14% x
15 \$132,595.92).

16
17 38. The last lease rental rates for the California properties communicated between the
18 parties was on August 13, 1999 (*See Exhibit 31*). Pursuant to those rates, the first
19 year's annual rental charges would be as follows: (a) Manzanita (Cloverdale) -
20 \$143,6400; (b) Sonoma - \$287,280; (c) Palm Springs - \$256,905; and (d) Willits -
21 \$139,650. (See Exhibits 25, 26, 28, 30, 31, and 37).

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

24
25 40. If commissions or consultant fees are owed to plaintiffs related to the four
26 California leases, those commissions or consultant fees would be \$115,846.50
27 (14% x \$827,475).

28 41. Leases of the California properties between Mr. Cotter and his applicable affiliate
29 companies and The Ensign Group would have been executed on the terms set forth
30 in Finding No. 38, but for Mr. Cotter's inability to deliver the properties to Ensign
31 due to certain contingencies, all of which were eventually resolved by Cotter.
32 Those contingencies included: (1) pending litigation by Cotter against Sun
33
34

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

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

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

30
31 53. The plaintiffs have incurred attorneys' fees for Yakima counsel, James S. Berg, in
32 the amount of \$72,443.75 and costs in the amount of \$8,865.98. The attorneys' fees
33 were billed out by Mr. Berg for 339 hours at \$170-175 per hour, an associate for
34 108 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 8. Mr. Erwin had the right to reasonably rely upon the written and oral statements and
5 representations of Mr. Sleeth in the manner that he did.
6

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

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

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

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

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

31 14. Washington law applies to the transactions at issue by virtue of the Agreement
32 between the parties, and it is not necessary to use either California or Texas law to
33
34

1 resolve any issues involved herein. Washington law does not prohibit the plaintiffs'
2 claims in this case.

3
4 15. Review of the correspondence that passed between February, 1999, and January,
5 2000, confirms that Mr. Erwin was working for Mr. Cotter pursuant to the
6 Agreement of February 9, 1999.

7
8 16. Mr. Erwin introduced The Ensign Group to Camlu regarding the "Camlu" leases
9 and further provided the introduction of Ensign to all of the subject properties in the
10 manner contemplated by the Agreement.

11
12 17. Mr. Erwin also used his expertise to facilitate the interaction between Mr. Cotter
13 and Ensign and also made the various facilities/properties and potential transactions
14 more understandable to both sides.

15
16 18. Mr. Erwin's services led directly to the closing of the Abilene leases, which took
17 place during the term of the original Agreement.

18
19 19. Mr. Erwin's services also produced the initial state of the negotiations between
20 Mr. Cotter and Ensign on the California properties, which services also took place
21 during the term of the Agreement.

22
23 20. As of March, 2000, there were pending leases between Mr. Cotter and Ensign
24 related to the four California properties.

25
26 21. The Ensign Group was a "registered company" of Mr. Erwin and Healthcare
27 Properties, Inc., as that term was used in the Agreement of February 9, 1999, in that
28 it was introduced by Mr. Erwin to Mr. Cotter through written documents.

29
30 22. Offers to lease the four California properties were presented by Ensign prior to
31 November 9, 1999, when the Agreement of February 9, 1999 expired, which,
32 pursuant to paragraph 3, automatically extended the Agreement to cover a deferred
33 closing of leases of the four California properties by Ensign.

34
35 23. The Agreement of February 9, 1999, was in effect when Mr. Erwin received
36 Attorney Jenkins' letter of March 6, 2000.

- 1 24. Attorney Jenkins' letter to Mr. Erwin of March 6, 2000, served to cancel the
2 Agreement of February 9, 1999.
- 3 25. Execution of the leases of the four California properties between Mr. Cotter and his
4 applicable affiliates and The Ensign Group occurred within 36 months of the
5 cancellation of the Agreement of February 9, 1999, thereby triggering paragraph 21
6 of the Agreement.
- 7 26. Lease agreements between Mr. Cotter and Ensign related to each of the four
8 California properties were executed during the term of the Agreement, by virtue of
9 the extension clauses of the Agreement.
- 10 27. Mr. Erwin is entitled to an entire fee for the closing of the Abilene, Texas,
11 properties, which fee totals \$18,563.43.
- 12 28. Mr. Erwin is entitled to an entire fee for the closing of the four California properties
13 based upon the pending offers that were in place in March, 2000, which fee totals
14 \$115,846.50.
- 15 29. Commissions or consultant fees should have been paid by Mr. Cotter to plaintiffs on
16 January 1, 2000, on the Abilene, Texas, properties and on November 16, 2001, on
17 the four California properties.
- 18 30. Because commissions or consultant fees were not paid when due, Plaintiffs are
19 entitled to recover accrued interest on the unpaid amounts at 12% per annum,
20 pursuant to paragraph 5 of the Agreement.
- 21 31. Plaintiffs are the prevailing party and, as such, are entitled to recover all attorneys'
22 fees and collection costs, pursuant to paragraph 5 of the Agreement.
- 23 32. Accrued interest on the unpaid commissions or consultant fees, calculated through
24 October 22, 2004, totals \$51,428.09 (Abilene - 4.808 years x \$18,563.43 x 12% per
25 annum = \$10,710.36; California - 2.929 years x \$115,846.50 x 12% per annum =
26 \$40,717.73). In the event judgment is not rendered until after October 22, 2004,
27 interest will accrue at the daily rate of \$6.103 for Abilene and \$38.305 for
28 California.
29
30
31
32
33
34

1 33. Plaintiffs are entitled to the following attorneys' fees and collection costs:¹

- 2 a. The attorneys' fees and costs submitted by Washington attorney James Berg
3 were reasonable and necessary to secure the successful outcome by the
4 plaintiffs. They reflect fees customarily charged for these services which
5 involved extensive preparation and skill for complex legal and factual issues.
6 b. The attorney's fees and costs submitted by California attorney Randall
7 Nelson were reasonable and necessary to secure the stay of the California
8 proceedings.
9 c. The attorneys' fees (\$9,000.00) and costs (\$1,000.00) submitted by Texas
10 attorney David Jones were reasonable and necessary to try and secure the
11 stay of the Texas proceedings.
12

13 34. The plaintiffs are entitled to a judgment for the fees and costs as outlined
14 hereinabove.
15

16 **JUDGMENT**

17 The Court having entered the foregoing FINDINGS OF FACT and CONCLUSIONS
18 OF LAW, now, therefore,
19

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

- 24 1. A consulting fee on the Cotter-Ensign leases for the Abilene, Texas, facilities, in the
25 amount of \$18,563.43, together with interest at 12% per annum from January 1,
26 2000, to December 3, 2004, in the amount of \$10,966.69, for a total of \$29,530.12
27 (in the event judgment is rendered after December 3, 2004, interest shall accrue at
28 \$6.103 per day);
29
30
31

33 ¹ These Findings of Fact and Conclusions of Law also incorporate all of the Findings and Conclusions set
34 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.

1 2. A consulting fee on the Cotter-Ensign leases for the four California facilities, in the
2 amount of \$115,846.50, together with interest at 12% per annum from
3 November 16, 2001, to December 3, 2004, in the amount of \$42,326.54, for a total
4 of \$158,173.04 (in the event judgment is rendered after December 3, 2004, interest
5 shall accrue at \$38.305 per day); and
6

7 3. Allowable attorneys' fees and collection costs in the sum of \$100,108.28;
8 for a total judgment of \$287,811.44 (\$29,530.12 + \$158,173.04 + \$100,108.28), together with
9 interest thereon at the rate of 12% per annum from date of entry until paid.
10

11 DATED this 3rd day of December, 2004.

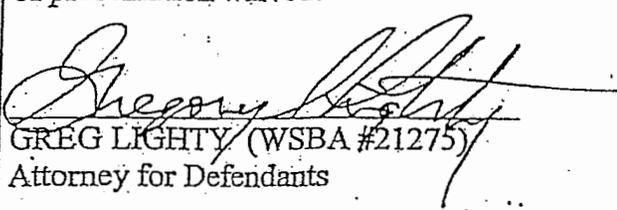
**MICHAEL E. SCHWAB
JUDGE**

12
13
14 MICHAEL E. SCHWAB, Judge

15 Presented by:

16
17 
18 JAMES S. BERG (WSBA #7812)
19 James S. Berg, PLLC
20 Attorneys for Plaintiffs

21 Approved for entry and notice
22 of presentation waived:

23 
24 GREG LIGHTY (WSBA #21275)
25 Attorney for Defendants
26
27

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29
30
31

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,

v.

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

Appellants.

No. 23658-7-III

Division Three

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 D

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

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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

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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

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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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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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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).

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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

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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.

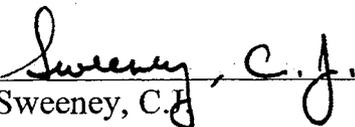
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Attorney fees may be awarded if authorized by statute, private agreement, or a recognized ground of equity. *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 839, 100 P.3d 791 (2004). When a contract contains an attorney fee provision, the prevailing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

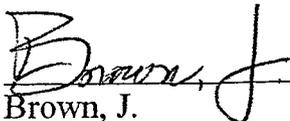
The agreement contained an attorney fee provision. Erwin is the prevailing party. He is, then, entitled to fees and costs on appeal.

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.