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STATE OF WASHINGTON
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Case No. 323757

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

WASHINGTON PROFESSIONAL REAL ESTATE, LLC,
d/b/a Prudential Almon Realty,

Plaintiff/Respondent

vs.

DR. KIPP YOUNG, et ux.,

Defendants/Appellants

REPLY BRIEF OF APPELLANTS

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A. INTRODUCTION

The plaintiff's "Response to Appellants' Brief" is exceedingly limited in scope. Most of the defendants' opening "Brief of Appellants" is, literally, unchallenged. Accordingly, no reply is necessary on many points. Instead, this "Reply Brief of Appellants" will (primarily) focus on the few issues that the plaintiff actually does attempt to challenge. Even on those issues, the plaintiff's presentation is woefully lacking. The plaintiff offers very few citations to the record, even fewer citations to legal authority, and the citations that are offered are generally inapposite and incorrect. The plaintiff misconstrues this court's prior appellate decision in this case, misstates the standards of review, and repeatedly conflates separate topics. The plaintiff's presentation is simply unreliable.

There are numerous bases whereby this court should, and the defendants respectfully submit must, reverse the trial court's decision.¹

B. ARGUMENT AND ANALYSIS

B.1. The Plaintiff Fails to Acknowledge, Much Less Validly Rebut, Most of the Defendants' Legal Arguments. That Failure Constitutes a Waiver by the Plaintiff.

Via their opening brief, the defendants advanced ten legal arguments (and several alleged errors). *See Brief of Appellants*, pp.7-10,

¹ For clarity, the defendants persist in every argument made in their opening brief. Certain arguments not mentioned or repeated in this reply because they were not challenged by the plaintiff. But those arguments are not abandoned in any regard.

sections A.1-B.6 & pp.33-50, sections E.1-E.10. The plaintiff addresses just three of the ten, fully ignoring the rest. Specifically, the plaintiff addresses two arguments vis-à-vis the standards of review (corresponding to sections E.1 and E.2. from the *Brief of Appellants*), as well as one argument on the timing element (*i.e.*, whether it matters when the buyers secured information about the property, which corresponds to section E.5. from the *Brief of Appellants*).

The plaintiff's arguments on those three issues are cursory, incorrect, and largely non-responsive. For instance, the plaintiff's most extensive argument focuses on procuring cause, even though that claim was dismissed by this court on the prior appeal. The plaintiff also claims that the "tail" provision is unambiguous, even though the trial court squarely ruled that it was ambiguous. The plaintiff did not file a cross-appeal, so its stealth attempt to relitigate these matters must be rejected.

The merits (or, really, lack thereof) of the plaintiff's arguments will be separately addressed below. *See infra*, pp.10-25. More immediately, the defendants will itemize the arguments that the plaintiff has fully ignored and will summarize the applicable rules on waiver.

The following arguments are completely ignored by the plaintiff:

- The general rules of contract interpretation/construction, including (a) that a contract must be interpreted as an average

person would have read it upon signing it, (b) that all words must be given effect, and (c) that hindsight is not relevant. *See Brief of Appellants*, pp.33-34, section E.3;

- That the trial court's decision violates the *ejusdem generis* canon of interpretation/construction, because the trial court used a later general clause (*i.e.*, clause C) to trump a preceding more-specific clause (*i.e.*, clause B). *See Brief of Appellants*, pp.35-40, section E.4;
- That the trial court misapplied the rules on construing ambiguities against the drafter, because (a) the contract was exclusively drafted/selected by the plaintiff, (b) the trial court squarely ruled that the tail provision is ambiguous, (c) the trial court deemed the defendants' urged interpretation to be a "reasonable", and yet (d) the trial court ultimately adopted a different interpretation that was not in the defendants' favor. *See Brief of Appellants*, pp.43-45, section E.6;
- That the trial court failed to consider and follow the "object and purpose" tail provisions, and instead permitted the plaintiff-broker to use the tail as a "sword" against the defendants rather than as a "shield". *See Brief of Appellants*, pp.45-47, section E.7;
- That the only connection between the plaintiff and the subject sale was that John Place, who was not the buyer, had previously seen the "for sale" sign and flyer. By contrast, the sale was not caused by any other "information", "knowledge", "activities", etc., by the plaintiff-broker or any of its agents.

See Brief of Appellants, pp.47-49, section E.8;

- That there are zero Washington precedents wherein a tail provision was stretched to cover people who did not even learn about the property until after the listing had expired. *See Brief of Appellants*, p.49, section E.9; and
- That the trial court erred by granting relief to the plaintiff on arguments that the plaintiff did not make, most notably (a) applying clause C which the plaintiff never advocated for, and (b) using a damage calculation that the plaintiff never advocated for. *See Brief of Appellants*, pp.49-50, section E.10.

Under Washington law, it is well-established that when an appellant fails to present any argument on an issue, the issue will not be considered. *See e.g., Holder v. City of Vancouver*, 136 Wn. App. 104, 105, 147 P.3d 641 (2006) (“A party abandons an issue by . . . failing to brief the issue”, ellipsis added); *Yakima County v. Eastern Washington Growth Management Hearings Bd.*, 146 Wn. App. 679, 698, 192 P.3d 12 (2008) (“If a party raises an issue but fails to provide argument relating to the issue in his or her brief, the party waives any challenge”).

In the instant case, it is the respondent who has failed to address multiple arguments/issues that were raised by the appellants. Appellants’ counsel searched but did not find any published Washington decisions that precisely address such scenario. However, the above-quoted *Holder* and *Yakima County* decisions are phrased generically (*i.e.*, “a party”, without

limitation to just appellants). Moreover, case law from other jurisdictions confirms that a respondent who fails the appellants' arguments (and/or veers off course by attempting to interject new issues without filing a cross-appeal) thereby waives any challenge to the arguments he ignored. The relevant decisions provide as follows:

Most vexing, however, is appellees' failure to present an 'argument on each point presented by appellant'. (Rule 3.7, subd. g(3)). Instead of responding to the arguments presented by appellant on the points raised by appellant, appellees has ignored appellant's points and the arguments in support thereof and has gone off on a tangent resulting in the points raised in each brief hanging in the air like Haley's Comet. Such unorthodox procedure, completely contrary to the provisions of the rules in such cases made and provided, as rendered our task of review extremely difficult and cumbersome. If appellees desired to present additional points the rule makes specific provision therefor. However, the presentation of new points by appellees does not excuse failure to respond to points raised and argued in appellant's brief.

Am. Baseball Cap, Inc. v. Duzinski, 308 So.2d 639, 641 (Fla. Dist. Ct. App. 1975) (underscore emphases added);

The failure to respond to an issue raised by the appellant is akin to the failure to file a brief. . . . Under such circumstances, we may reverse upon a showing of prima facie error on the issue which was not addressed.

Nat'l Oil & Gas, Inc. v. Gingrich, 716 N.E.2d 491, 496 (Ind. Ct. App. 1999) (ellipsis and underscore emphasis added);

It is well settled in this jurisdiction that an appellee's failure to file an answering brief where there are debatable issues constitutes a confession of reversible error. . . . We believe the principle is equally applicable when an appellee does in fact file a brief which fails to respond to the issues presented.

Bulova Watch Co. v. Super City Dep't Stores of Ariz., Inc., 422 P.2d 184, 187 (Ariz. App. 1967) (underscore emphasis and ellipsis added); and

Where the appellant's brief makes out an apparent case of error as in this matter, we do not regard it as our obligation to look to the record to find a way to avoid the force of the appellants' argument.

Dethlefs v. Beau Maison Dev. Corp., 458 So.2d 714, 717 (Miss. 1984) (underscore emphasis added).

This court should follow these persuasive authorities. The plaintiff-respondent should be deemed to have waived any challenge to the arguments/issues that it failed to address within its brief. It is well-settled, in both Washington and elsewhere, that new contentions cannot be raised during oral argument. The relevant decisions provide as follows:

We generally will not consider issues raised for the first time in oral argument.

Rizzuti v. Basin Travel Serv. of Othello, Inc., 125 Wash. App. 602, 611, 105 P.3d 1012, 1017 (2005);

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. . . it would have been impermissible for Gates to address points at oral argument that were not addressed in her brief.

Gates v. City of Tenackee Springs, 822 P.2d 455, 461, n.6 (Alaska 1991) (ellipsis added);

Issues raised on appeal should be fully briefed, with a fair and adequate opportunity for response from opposing parties.

Roise v. Kurtz, 587 N.W.2d 573, 574-575 (N.D. 1998); and

. . . an issue first raised in oral argument before this Court is untimely and will not be considered.

Morgan v. Sexual Offender Classification Bd., 220 P.3d 314, 317 (Idaho 2009) (ellipsis added).

At the upcoming appellate hearing, respondent's counsel should be barred (a) from trying to dispute the legal citations offered by the appellant on those issues, (b) from trying to present any competing legal citations on those issues, and (c) from trying to dispute the appellants' reasoning and conclusions on those issues.

The respondent cannot "sandbag" the appellants by staying silent on multiple issues during briefing and then suddenly and inconsistently speaking up at the hearing. Rather, the arguments/issues that the respondent failed to address should be deemed conceded, or, at worst, the only discussion thereon should occur between appellants' counsel and the court members. *See Bulova Watch v. Super City*, 422 P.2d at 187 (failure

to address the appellants' arguments is a "confession of reversible error"); *Nat'l Oil & Gas v. Gingrich*, 716 N.E.2d at 496 ("we may reverse upon a showing of prima facie error on the issue which was not addressed").²

B.2. The Plaintiff Also Fails to Rebut Any Aspect of the Defendants' "Introduction" and/or "Statement of the Case". As Before, that Constitutes a Waiver by the Plaintiff.

Both sides agree, and have always agreed, that the material facts are largely (but not entirely) undisputed. *See Brief of Appellants*, p.15; *Response to Appellants' Brief*, p.3. This case has previously been before this court, so the underlying facts will be familiar to the court members. However, the defendants' opening brief emphasized, *inter alia*, that the current appeal "touches on a few issues that were not implicated in the prior appeal." *See Brief of Appellants*, p.17.

The newly-implicated issues are, most notably, (a) the trial court's unexpected application of clause C; (b) that the trial court's ruling, after considering arguments by the defense that this court declined to consider on the prior appeal, the tail provision is ambiguous; and (c) the trial court's unexpected methodology of calculating the plaintiff's supposed damages. *See e.g., Brief of Appellants*, pp.27-28, section D.14; pp.31-33,

² Because traditional objections are typically not allowed before the Court of Appeals, appellants' counsel will primarily rely upon the court members to identify and halt any improper new arguments that respondent's counsel might offer. To the extent necessary, appellant's counsel will also respectfully reiterate during his rebuttal remarks that any improper new arguments by respondent's counsel must be disregarded.

section D.17; & p.14. The plaintiff does not challenge the defendants' presentation on these points, nor on any other factual issue. Specifically,

- the plaintiff does not dispute that it redacted clause C within its “Complaint” and “Trial Brief”, nor that it did not advance any meaningful argument for application of that clause during the prior appeal and/or during trial following remand, such that the trial court’s decision to apply that clause effectively “came out of left field”;
- the plaintiff does not dispute that the trial court deemed the tail “ambiguous” (although, the plaintiff attempts to now argue that the tail is unambiguous, which attempt will be separately rebutted below because the plaintiff did not file a cross-appeal on that issue, nor on any other issue); and
- the plaintiff does not dispute that the trial court employed a methodology to calculate the plaintiff’s supposed damages that the plaintiff did not advocate, which also came as a surprise.

Not only does the plaintiff not challenge any aspect of the defendants’ presentation on these points, but the plaintiff’s own “Procedural History” and “Facts” sections lack any citations to the record. *See Response to Appellants’ Brief*, pp.1-3. As before, this constitutes a waiver of any possible argument on these points. Relevant decisions – from Washington and elsewhere – provide as follows:

Where an appellee neither cites authority nor gives pertinent reference to something in the record dispositive of a case, it is

tantamount to failure to submit a brief.

Bill Brown Mtr., Inc. v. Crane, 589 P.2d 708, 710 (Ok. Civ. App. 1978);

In the absence of any citation by appellee to the transcript which would controvert appellant's claims, appellant's assertions regarding the evidence are deemed true, accurate and complete.

Ron Eason Enterprises, Inc. v. McColgan, 258 S.E.2d 761, 762 (Ga. App. 1979);

Any statement made by appellant in his original brief as to the facts or the record may be accepted by the court unless challenged by the opposing party.

Bachus v. State, 803 S.W.2d 402, 403 (Tex. App. 1991);

When a party fails to contest a significant point from an opposing party, we consider the point conceded.

118th St. Kenosha, LLC v. Wisconsin Dep't of Transp., 841 N.W.2d 568, 572 (Wisc. App. 2013); and

[Division Three] generally will not consider issues raised for the first time in oral argument.

Rizzuti v. Basin Travel, 125 Wash. App. at 611 (bracketed change made).

B.3. The Plaintiff's Arguments Vis-à-vis the Standards of Review are Manifestly Incorrect.

The plaintiff contends that because the underlying facts are largely undisputed, "[i]t follows then that the trial court's findings and legal conclusions . . . are . . . sound." *See Response to Appellants' Brief*, p.3

(ellipses added). This argument is not well-taken. First, some of the trial court's F/findings³ go beyond the undisputed facts, including, as mentioned above, its unexpected application of clause C and its unexpected damage calculation methodology. On damages, the trial court specifically rejected the plaintiff's own quantification as "incorrect". See e.g., *Brief of Appellants'*, pp.31-33, section D.17. Second, even assuming *arguendo* that each of the trial court's F/findings was fully correct (which, for clarity, the defendants do not concede), it does not necessarily follow that the trial court's C/conclusions are therefore automatically "sound". Tellingly, the plaintiff presents zero authority in support of that proposition, because none exists. Determinations of law are separate from determinations of fact. It is possible for a trial court to get the facts correct (or mostly correct, particularly when the facts are largely undisputed), yet to then get the law incorrect. The instant case is a vivid example.

The plaintiff also contends that this court "has the discretion to review legal conclusions *de novo*". See *Response to Appellants' Brief*, p.3. This, too, is incorrect. The plaintiff is conflating two different standards of review, namely discretionary review and *de novo* review.

³ Consistent with the "Brief of Appellants", this brief will also refer to the finding and conclusions recited in the trial court's letter ruling by lower case references, to those found within the writing "Findings of Fact and Conclusions of Law" by uppercase references, and to those found in both documents by hybrid designations – *i.e.*, "F/findings" and "C/conclusions". See e.g., *Brief of Appellants*, p.2, n.3.

Moreover, because the defendants have challenged multiple C/conclusions, this court must review those C/conclusions on a *de novo* basis. There is no “discretion” for this court to not review the challenged C/conclusions, nor to review them under any standard other than *de novo* review. *See e.g., Gamboa v. Clark*, 180 Wn. App. 256, 267 (2014) (*de novo* review applies as to “whether the trial court’s conclusions of law are properly derived from the findings of fact”); *Washington Fed. v. Gentry*, 179 Wn. App. 470, 490, 319 P.3d 823 (2014) (*de novo* review also applies to the “trial court’s interpretation of the language of a contract”).

Finally, the plaintiff argues that “there exists substantial evidence to support the trial court’s findings and the resulting legal conclusions.” *See Response to Appellants’ Brief*, p.3. This is misstated. The F/findings are reviewed as to whether “substantial evidence” exists to support them. *See e.g., Ridgeview Properties v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). By contrast, the C/conclusions are reviewed both as to general appropriateness, and as to whether they are validly supported by the proper F/findings. *See id.*

B.4. The Defendants’ Current Arguments Have *Not* Been Previously Considered by this Court.

The plaintiff contends that the defendants’ arguments were previously “ruled upon in the prior appeal”, and have been “merely repackage[d]”. *See Response to Appellant’s Brief*, p.4 (bracketed change

made). This is not accurate. First, the defendants' arguments regarding the trial court's overall decision, and more specifically its unexpected application of clause C and unexpected damage-calculation methodology, have not been previously addressed by this court. How could they have been, as those decisions/occurrences had not yet happened by the date of the prior appeal? The simple timeline proves that these are new issues.

Second, the defendants' arguments regarding the canons of interpretation/construction (*i.e.*, *ejusdem generis* and *noscitur a sociis*) were not raised on the prior appeal. Nor were the persuasive out-of-state authorities supporting those arguments. Again, these are new issues which arose only after the trial court's decision wherefrom this appeal arises.

Third, the defendants' arguments vis-à-vis construing ambiguities against the contract's drafter are different now versus the prior appeal, both substantively and by procedural context. The prior appeal focused exclusively on clause B and concerned summary judgment, whereas this appeal now focuses on clause C and a trial judgment. *See and Compare, Washington Professional Real Estate v. Young*, 163 Wn. App. 800, 816-818, 260 P.3d 991 (2011); *Brief of Appellants*, pp.27-28, section D.14.

B.5. It is Actually the *Plaintiff* Who is Attempting to Relitigate Issues that Were Decided on the Prior Appeal.

The plaintiff insists that it was the "procuring cause of the sale" and says the doctrine "must be addressed". *See Response to Appellants'*

Brief, p.4. To the contrary, the plaintiff's procuring cause claim was rejected by this court on the prior appeal. See *Washington Professional Real Estate v. Young*, 163 Wn. App. at 811 ("Because the Eastmans' offer and the sale of the Youngs' home occurred after the listing agreement expired, it is the tail provision that controls. Prudential is entitled to a commission only if the conditions of the tail, not the procuring cause doctrine, are satisfied", underscore emphasis added); *accord id.*, at 816 ("We have already determined that the tail provision is not consistent with the procuring cause standard, which is therefore irrelevant", underscore emphasis added).

The plaintiff also insists that the "minimum casual relationship" standard of *Roger Crane* and *Lloyd Hammerstad* should be dispositive. See *Response to Appellants' Brief*, pp.5-8. However, that argument was also previously rejected by this court. This court did not rule that the minimum casual relationship standard somehow trumped the actual language of the tail. Quite the contrary, this court questioned whether the standard even applied to this case, because this is a selling broker case rather than a buyer's agent case. *Roger Crane* and *Lloyd Hammerstad* were each buyer's agent cases. Regardless, this court concluded that the standard – even if it does apply – was a non-issue because a minimum connection did exist. This court said the trial court's original ruling

“should have been the end of the *Lloyd Hammerstad* ‘some minimal causal relationship’ analysis.” See *Washington Professional Real Estate v. Young*, 163 Wn. App. at 814 (¶26). But this case still remanded or trial. Whether a “minimal” connection exists is not the issue; the issue is whether the specific language of the tail is satisfied. The tail controls.⁴

B.6. The Trial Court Ruled that the “Tail” Provision is Ambiguous, the Plaintiff Did Not Cross-Appeal, and this Court’s Prior Decision Does Not Resolve the Issues Presented on the Current Appeal.

The plaintiff contends that “[t]he terms of the ‘tail’ provision are unambiguous”. See *Response to Appellants’ Brief*, p.6 (bracketed change made). To the contrary, the trial court squarely ruled that the tail provision – and most notably clause C – is ambiguous. See CP 529 (FF 1.8) & CP 538 (CL 2.10); see also CP 465-466 (letter ruling, p.5, 5th ¶ – p.6, top ¶) & CP 466 (letter ruling, p.6, #3).

By its brief, the plaintiff seems to be contending that this court’s prior appellate decision supposedly foreclosed any determination by the

⁴ The plaintiff’s contention that its efforts were supposedly “similar to the efforts of Mr. Erwin in *Professionals 100 v. Prestige*, 80 Wn. App. 833, 911 P.2d 1358 (1996)” is not well-taken. First, as explained above, the issue is whether the tail is satisfied, not whether the plaintiff’s efforts were similar or dissimilar to other brokers in other cases. Second, Mr. Erwin’s efforts in *Professionals 100* were different, and far more extensive, than Prudential’s efforts vis-à-vis the subject sale in the instant case. Mr. Erwin personally telephoned and sent written correspondence to all of the involved parties, he facilitated their negotiations, and it was solely via his efforts that the transaction occurred. He played such a significant role that this court deemed him to be the “procuring cause” of the transaction, whereas this court has already decided that the plaintiff did not qualify as the procuring cause in the instant case.

trial court on the issue of ambiguity. *See Response to Appellants' Brief*, pp.6-8. That suggestion is not accurate. This court did not rule that the tail was unambiguous, and it certainly did not rule that clause C was unambiguous (because that clause was not even at-issue on the prior appeal). Quite the contrary, this court concluded that “disputed facts and the choice among reasonable inferences to be drawn from the facts” precluded an immediate ruling at that point (via summary judgment). *See Washington Professional Real Estate v. Young*, 163 Wn. App. at 817-818, ¶¶33-35. This court did not foreclose the trial court from determining, as it did, that the tail was ambiguous. Tellingly, the plaintiff does not cite any excerpt to that effect from this court’s prior appellate decision, because none exists. The issue was not previously decided by this court.

Furthermore, the plaintiff did not file a cross-appeal, whether on the ambiguity ruling or on any other issue. And the defendants have not challenged it either. As such, the trial court’s ruling that clause C is ambiguous should stand. Neither party challenges that aspect of the lower decision, so this court should not disturb that ruling.

In a similar vein, the plaintiff’s failure to file a cross-appeal means the core issue on this appeal is whether or not clause C is satisfied. By contrast, clause A and clause B are no longer viable options. The trial court specifically determined that clause A and clause B were not

satisfied. *See* CP 465 (letter ruling, p.4, 2nd & 3rd ¶¶). As before, neither party has challenged that determination so it should not be disturbed. Instead, this appeal must be decided exclusively under clause C.

B.7. The Plaintiff's Arguments Regarding the Timing Element of Clause C are Incorrect, Conclusory and Lacking of Support. It *Does* Matter When the Buyers Secured Information About the Property. Also, An Ordinary Person Reading the Contract Would *Not* Foresee that this Scenario Supposedly Fits Clause C.

The plaintiff contends that the defendants' argument vis-à-vis the timing element of clause C (*i.e.*, "during the term of this agreement") is supposedly "inconsistent" with this court's prior appellate decision. In this regard, the plaintiff again points to this court's earlier discussion of *Lloyd Hammerstad*. *See Response to Brief of Appellants*, p.8. Yet again, the plaintiff is conflating separate topics. Yes, this court previously ruled that the minimal causal relationship standard from *Lloyd Hammerstad* "was met", as the plaintiff says. *See id.* However, that ruling did not hinge on when the buyers secured information about the property, nor did it render the timing element of clause C (which was not even at-issue on the prior appeal) irrelevant. The minimal casual relationship standard is not dispositive of this case; the actual language of the tail is what matters.

Nevertheless, the plaintiff writes as follows:

Were it the view of the Court of Appeals that all of the . . . events must have occurred during the term of the listing agreement, then it

necessarily would have had to upheld [*sic*, uphold] the summary judgment in favor of the Youngs and the case would have been dismissed long ago. However, it was not, and the trial court agreed with this court by correctly determining that *when* the Eastmans learned of the Youngs' home was on the market is irrelevant

See Response to Appellants' Brief, p.9 (ellipses and bracketed material added; italic emphasis in original). This argument by the plaintiff is incongruent and also false. It is incongruent because it mixes separate topics. The question of when the buyers acquired information about the property is, quite simply, a different (narrower) question than the question of when "all" of the relevant events must have occurred. Under clause C, the relevant inquiry is when the buyers acquired information. Other events are relevant as background facts, but they are not dispositive.

The plaintiff's argument is false because this court did not previously make a merits ruling on the timing element. Rather, this court expressly declined to make any ruling on the timing element, saying:

In oral argument, the Youngs urged us to affirm the grant of summary judgment in their favor on alternate grounds, arguing [*inter alia*, focusing on whether the buyers'] attention [was] drawn [to the property] "during the term of this Agreement." These arguments were not made . . . in the Youngs' appellate briefing . . . [and] [w]e will not decide a case on the basis of issues that were not set forth in the parties' briefs.

Washington Professional Real Estate v. Young, 163 Wn. App. at 818, n.3 (bracketed material and ellipses added).⁵

Continuing further, the plaintiff argues that “[t]he language ‘or on information secured directly or indirectly from or through [Prudential] during the term of this Agreement’ does not mean that it must be secured by the purchaser as opposed to [by] a third party.” *See Response to Appellants’ Brief*, p.9 (1st & 3rd bracketed changes added; 2nd bracket in original). This argument is completely conclusory. The plaintiff offers no grammatical analysis of the phrase “during the term of this Agreement”, nor any structural analysis of how that phrase relates to the different clauses of the tail. The plaintiff also does not address the *ejusdem generis* and *noscitur a sociis* canons of contract interpretation/construction, which form the basis of the defendants’ argument on the timing element. *See Brief of Appellants*, pp.35-43, sections E.4.-E.5. In fact, the plaintiff does not present any law whatsoever vis-à-vis the timing element. *See Response to Appellants’ Brief*, pp.8-10 (section “2.”).

Conclusory arguments and arguments lacking supporting legal authority are not valid. *See e.g., Stranberg v. Lasz*, 115 Wn. App. 396,

⁵ This excerpt, from the prior appellate decision in this case, is further confirmation (a) that the defendants’ current arguments were not resolved by the prior appeal, and (b) that the plaintiff, likewise, cannot prevail based on new arguments presented for the first time during oral argument at the upcoming appellate hearing.

405, 63 P.3d 809 (2003) (“the court should not consider conclusory statements submitted by either party”); *Foster v. Gilliam*, 165 Wn. App. 33, 56, 268 P.3d 945 (2011) (“Arguments that are not supported by any reference to the record or by any citation of authority need not be considered”). Accordingly, the plaintiff’s argument should be rejected.

“Courts must read each contract as an average person would read it without giving it a straining or forced meaning.” *Litho Color, Inc. v. Pacific Employers Insurance, Company*, 98 Wn. App. 286, 304, 991 P.3d 638 (1999). As the tail is written, an ordinary person would not anticipate that the at-issue scenario would be covered by clause C. This is because the only people mentioned in the tail are the eventual buyers, the broker, and people affiliated with the broker as agents or employees. See plaintiff’s trial exhibit 1.1 (Exclusive Listing Agreement, p.2, ¶8.a. – the “tail” provision). Under the *noscitur a sociis* cannon of interpretation/construction, “the meaning of items in a list is ascertained by referring to the others, giving preference to an interpretation that uniformly treats items similar in nature and scope.” *Meresse v. Stelma*, 100 Wn. App. 857, 867, n.10, 999 P.2d 1267 (2000) (internal quotation omitted). A doubtful word/clause “is known by its associates”. See e.g., *Bourke v. Grey Wolf Drilling Co., LP*, 2013 WY 93, 305 P.3d 1164, 1169 (2013).

The tail provides no indication/warning that intervening lay-people, unlicensed⁶ and totally unaffiliated with the broker, would also be effectively deputized under the tail. To believe otherwise is to “strain or force” a non-obvious meaning onto the contract. To believe otherwise is to disregard the language/structure of the other clauses, and to apply a non-uniform meaning to clause C.

Moreover, there is certainly no indication/warning that if a lay-person acquires information and then waits until after the listing expires before (allegedly⁷) emailing that information on to different parties (who were not even interested in buying a house when the listing still existed), that those new parties (whom the information did not reach until after the listing expired) would nevertheless be deemed to have acquired the information “during” the listing. That is even more of a “strained” interpretation. It is even more of a non-uniform meaning.

When John Place acquired information about the property,⁸ that information stayed exclusively with him (and his own spouse) until after

⁶ The plaintiff does not dispute that John Place lacks a realtor license.

⁷ The alleged email was never produced as an exhibit. *See Brief of Appellants*, p.19, section D.6.

⁸ The only “information” John Place acquired was, and was based on, him seeing the “for sale” sign and flyer. *See Brief of Appellants*, pp.26-27, section D.13 & pp.28-30, section D.15. Consistent with their opening brief, the defendants contend that those things correspond to clause B of the tail (*i.e.*, the sign-and-advertising-specific clause), not clause C (*i.e.*, the more-generic “information” clause). *See e.g., id.*, pp.35-40, section E.4.

the listing expired. *See Brief of Appellants*, p.18, section D.4. No information whatsoever, from any source whatsoever, reached the actual buyers until after the listing expired. *See id.*, p.19, section D.6. So, how can the buyers be said to have supposedly acquired information “during the term of the Agreement”? The defendants respectfully submit that they cannot. John Place may have acquired some information during the listing, but the buyers did not.

Although it is true that clause C includes the phrase “secured directly or indirectly”, it also manifestly includes the phrase “during the term of this Agreement”. *See* plaintiff’s trial exhibit 1.1 (Exclusive Listing Agreement, p.2, ¶8.a. – the “tail” provision). Factually, John Place did not hold any sort of realtor’s license, and the buyers had not requested him to locate properties for them. Rather, he was just an unsolicited, lay-person volunteer.⁹ To effectively impute his receipt of information about the property (*i.e.*, him seeing the “for sale” sign and taking home one of the flyers) to the buyers goes too far, particularly when he waited months until after the listing expired to relay that information to the buyers.

Only information acquired by a duly-licensed realtor and/or someone who is actually in the employ of the buyers should be imputable

⁹ The plaintiff does not dispute that John Place was an unsolicited, volunteer.

to other parties in matters of real estate. To rule otherwise is to largely negate the realtor-licensing statutes (*i.e.*, RCW Chapters 18.85 and 18.86.) and to expose parties to all variety of potential problems. To rule otherwise is to open the floodgates such that no meaningful limit exists as to the number and/or character of people whose knowledge might be imputable to eventual buyers even when, as here, the eventual buyers were not even interested in buying a house when the listing still existed and had not requested any help. For instance, if someone sees a “for sale” sign (during the listing) and then conveys that information without solicitation to a complete stranger (after the listing), that would seemingly satisfy clause C under the trial court’s decision. Also, it would not matter if there were just two people/steps in the series of events (*i.e.*, John Place and Pat Eastman), or whether there were one or more additional intermediaries (between John Place and Pat Eastman). There are endless unworkable possibilities, which would likely generate much litigation.

Surely the better result, and the only one that is consistent with the “object and purpose” of tail provisions, is to rule that the information must actually be secured by the buyers personally (*i.e.*, “directly”) or by someone properly engaged by them such as a duly-licensed realtor (*i.e.*, a legitimate “indirect” securing of information). Tail provisions are intended to prevent the seller from trying to negate his own broker’s

commission by waiting to close until after the listing expires. *See e.g., Brief of Appellants*, pp.45-47, section E.7. By contrast, tail provisions are not intended to be used by the broker as “sword” against the seller. Tail provisions are not intended to allow the broker to link events backward in hopes of establishing some tangential connection to the sale. Rather, that is the essence of a procuring cause claim¹⁰, which no doubt explains why the plaintiff attempts to re-characterize this case as a procuring cause case (despite this court’s previous rejection of the procuring cause claim).

This court should rule that clause C (assuming it has any application to the facts of this case, which, for clarity, the defendants do not concede) requires the buyers to secure the information during the listing (not afterward). That did not occur here. No information reached the buyers until after the listing expired.

B.8. The Trial Court’s Damage Calculation was Erroneous.

The plaintiff contends that the trial court’s damage award is supposedly “supported by sound reasoning.” *See Response to Appellants’ Brief*, p.10. But the plaintiff does not, and cannot, dispute that it did not advocate the methodology that the trial court used. Nor does the plaintiff

¹⁰ *See e.g., Washington Professional Real Estate v. Young*, 163 Wn. App. at 810 (“A broker is a procuring cause of a sale if it sets in motion a series of events culminating in the sale”).

offer any critique of the defendants' legal authorities on this issue, nor any competing authorities. *See and Compare, Response to Appellants' Brief*, p.10; *Brief of Appellants*, pp.49-50, section E.10. Finally, "sound reasoning" is not an actual standard of review.

C. CONCLUSION

The defendants should be granted a reversal, plus costs and fees via paragraph 14 of the contract (or otherwise).

This case now hinges exclusively on clause C; the other two clauses are no longer viable. The plaintiff (as a fiduciary) drafted the contract. The trial court ruled that the contract is ambiguous and that the defendants' urged interpretation is reasonable. Yet, the trial court then adopted an interpretation/construction of clause C that was not to the defendants' advantage and not consistent with the law (including the canons of construction). Adding insult to injury, the plaintiff did not even advocate for application of clause C. Quite the contrary, the plaintiff redacted clause C from its "Complaint" and "Trial Brief" – focusing exclusively on clause B. The plaintiff also did not advocate the damage-calculation methodology that the trial court employed. Now, the plaintiff ignores the bulk of the defendants' arguments and attempts to re-litigate its previously-rejected procuring cause claim. With sincere respect, a reversal should be granted. The current result is not justice.

DATED this 3rd day of December, 2014.

A handwritten signature in black ink, appearing to read 'D. R. CASE', written over a horizontal line.

D. R. (ROB) CASE (WSBA #34313)
Larson Berg & Perkins PLLC
Attorneys for Respondents

DECLARATION OF SERVICE

I, D. R. (ROB) CASE, do hereby declare and state: On this day, in Yakima, Washington, I filed and served copies of this document as follow:

Court of Appeals, Division III
Clerk's Office
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Spokane, WA 99201-1905

Via Regular Mail
(original & one copy)

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Via Hand-Delivery

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED at Yakima, Washington, on December 3rd, 2014.



D. R. (Rob) Case