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NO. 236587-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

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.

BRIEF OF APPELLANTS

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I. INTRODUCTION

Plaintiff Carey Erwin brought this action to collect a commission for leases entered into between Texas resident defendant James Cotter and a California corporation for health care facilities owned by Cotter in Texas and California. Erwin's claim was based on an Agreement entered into between Erwin and Cotter in California. The trial court awarded Erwin \$187,703, plus attorney fees and costs of \$100,108.

During the term of the Agreement, Erwin was licensed as a real estate broker in Washington but not in California or Texas. Erwin's Agreement purported to waive any defense based on illegality and to select Washington law.

California law governs the legality of this Agreement. Erwin was performing brokerage services, for which he had to be licensed to maintain a suit to collect a commission. Under California law, the Agreement is illegal and void, and it is unenforceable under California or Washington law. The waiver clause drafted by Erwin does not waive the defense of illegality.

The Agreement also violates the statute of frauds because the California properties are not listed in the Agreement and Cotter never agreed to add them to the agreement.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering judgment for Erwin. CP 27-42.
2. The trial court erred in finding that Erwin's efforts to find new tenants to lease Cotter's facilities were not brokerage services, as defined by statute. CP 31, F/F 20. (A copy of the findings and conclusions is attached as Appendix C).
3. The trial court erred in finding that after they executed the Agreement, Cotter and Erwin discussed the California properties. CP 31, F/F 21.
4. The trial court erred in entering finding of fact 31, to the extent that it finds that Sleeth had the authority to bind Cotter. CP 33, F/F 31.
5. The trial court erred in concluding that correspondence between Sleeth and Erwin establishes that the California facilities were included in the Agreement. CP 37-38, C/L 7.
6. The trial court erred in concluding that Erwin had the right to rely on Sleeth's representations. CP 38, C/L 8.
7. The trial court erred in entering conclusion of law 9, to the extent that it concludes that Washington law applies to determine the legality of the Agreement. CP 38, C/L 9.

8. The trial court erred in concluding that allowing Erwin to maintain a suit for brokerage fees in Washington does not violate California public policy even though his suit would be barred in California. CP 38, C/L 13.
9. The trial court erred in concluding that California law does not apply. CP 38-39, C/L 14.
10. The trial court erred in concluding that Washington law does not prohibit Erwin's claim. CP 39, C/L 14.
- 11-19. The trial court erred in entering conclusions of law premised in the assumption that the California facilities were properly added to the Agreement. *E.g.*, CP 39, C/L 15, 20; CP 39-40, C/L 22-26; CP 40, C/L 28-29.
20. The trial court erred in concluding that Erwin was entitled to a commission on the California facilities. CP 40, C/L 28.
21. The trial court erred in concluding that Erwin was entitled to a commission on the Abilene Texas facilities. CP 40, C/L 27.
22. The trial court erred in awarding Erwin attorneys' fees under the Agreement. CP 40, C/L 31.

III. ISSUES ON REVIEW

1. Can Erwin maintain a suit to recover a brokerage commission, where (1) the contract for brokerage services was executed and performed for the most part in California; (2) California law makes it unlawful to provide brokerage services without an in-state license and prohibits an unlicensed broker from maintaining suit for a brokerage commission; and (3) Erwin is not licensed in California?

2. Is the Agreement void under the Statute of Frauds as to the California facilities, where it is undisputed that the facilities were never included in the written Agreement and that the party who allegedly agreed to include the California facilities in the Agreement had no authority to bind Cotter?

3. Can Erwin maintain his suit for a commission in Washington even though he is not licensed in California, where the Agreement was made and performed, and the facilities are located?

4. Should Cotter be awarded attorneys' fees for defending against Erwin's efforts to enforce the unlawful Agreement?

IV. STATEMENT OF THE CASE

James Cotter became involved in the nursing home industry when he was in college and helped with a facility his mother owned. RP 562. Shortly after Cotter's college graduation, his cousin was selling a nursing home he owned in California. *Id.* Cotter's wife, a nurse, was very interested in the facility, and they purchased it in 1964. *Id.* Cotter leased a number of different California facilities over the next 15 years, and began purchasing more facilities as well. RP 563. By 1980, Cotter had purchased about seven nursing homes in California. *Id.* Some of these facilities were purchased by Cotter individually, others through Cotter's corporations. RP 566-68.

Cotter now owns a number of adult health care facilities in California, Texas, Idaho and some east coast states, and after this case was filed, Washington. RP 562. The following facilities are at issue in this suit:

- ◆ Cloverdale California – owned by Cotter Heath Centers, Inc. ("CHC"). RP 563-64. CHC is a California corporation. RP 564. Cotter is the president and sole shareholder in CHC. *Id.*
- ◆ Palm Springs California – owned by Coachella House, Inc. RP 565. Cotter acquired the Palm Springs facility by purchasing all of the stock in Coachella, which owned the facility. RP 563, 570.

- ◆ Sonoma California – owned by Cotter in his individual capacity. RP 566.
- ◆ Willits California – owned by Cotter in his individual capacity. RP 566, 570.
- ◆ Abilene Texas (2 facilities) – owned by Cotter in his individual capacity. RP 568-69.

CP 29, F/F 5-6. Although Cotter, CHC, and Coachella own these facilities, they do not operate them, but lease the facilities to independent operators. RP 567-68.

Bill Sleeth was the “controller” of Cotter’s operations from 1989 to 2000. RP 396-98. Sleeth handled many different aspects of Cotter’s business, including preparing financial statements and taxes, collecting rents, corresponding with tenants, and managing local properties. RP 398. Sleeth assumed responsibility for property management because buildings sitting empty were negatively affecting cash flow. RP 399-400. Thus, Sleeth tried to locate new tenants by sending information to prospectively interested parties, showing the properties, and preparing leases. RP 400.

A. Cotter became acquainted with Erwin because one of Cotter’s tenants had hired Erwin to help them find a new tenant to take over their leases.

Cotter first became acquainted with Erwin when Erwin was representing Camlu Care Centers, Inc., one of Cotter’s tenants.

From about 1983, Cotter leased three Texas facilities to Camlu. RP 579. In late 1998, early 1999, Camlu requested Cotter's permission to sublease the Camlu facilities. *Id.* Unbeknownst to Cotter, Camlu had entered a contract with Erwin to pay him a commission for his efforts to help sublet the Camlu facilities. RP 39-40, 590.

Erwin began trying to market the Camlu facilities by simply making phone calls throughout Texas and other states. RP 41-42. One of Erwin's clients passed on Erwin's name to Ray Lavender, a broker for Ensign Group, Inc. RP 42. Lavender contacted Erwin about the Camlu properties, and Erwin forwarded Lavender a detailed financial package. RP 42-43. When Lavender first contacted Erwin about Ensign's interest in the Camlu properties, Erwin had become aware that Cotter owned the facilities, and would have to agree to an assignment. RP 47.

Camlu wanted to extend its current leases and then assign the leases to Ensign based on the extension. RP 580. The market was very hot at the time, and Cotter believed that extending the leases had substantial value. RP 588-89. Camlu told Cotter that Ensign was willing to pay \$1.4 million up front to lease the Camlu facilities, conditioned on extending the remaining three-year lease

term to a 15-year term. RP 582. Ensign, which was started by Roy Christianson and his son Christopher, was new to the nursing home business. RP 582-83. Cotter and Roy Christianson were both well-established in the industry, and Cotter had previously become acquainted with Roy Christianson as part of an effort to address then Governor Reagan's cutbacks on medical reimbursement in California in the early 1970's. RP 583-84. Cotter had also formerly authorized a tenant to sublease an Oklahoma facility to one of Roy Christianson's companies. RP 584.

Cotter met Erwin shortly after his initial conversation with Camlu about the assignment to Ensign. RP 589-90. The potential assignment had become problematic because Camlu's principals were upset that Cotter wanted a *pro rata* share of the \$1.4 million front money, and Erwin contacted Cotter to try to salvage the deal. RP 590. Cotter didn't know whether Erwin represented Ensign or Camlu, but understood that he represented one or the other. RP 592.

B. Cotter and Erwin entered a Consultant Agreement, under which Erwin was to help Cotter find new lessees for some problematic facilities in Texas and Oklahoma.

While Cotter, Camlu and Erwin continued to work on Camlu's lease assignment to Ensign, Cotter and Erwin executed a

“Consultant Agreement,” under which Cotter agreed to pay Erwin a commission for Erwin’s efforts to market some of Cotter’s facilities. RP 49-52. The parties agree that they executed the Agreement at Cotter’s California home, on February 9, 1999. RP 70; Ex. 8, the Agreement is attached as Appendix A. The parties disagree, however, on which properties are included in the Agreement.

According to Cotter, Erwin became interested in meeting with Cotter during the Camlu transaction. RP 595. Erwin understood that Cotter had a number of properties that would soon be available, and was trying to convince Cotter to list his properties with Erwin. *Id.* Although Cotter does not usually enter exclusive listing agreements, he was having some difficulties with properties in Texas and Oklahoma, and decided to hear Erwin out. *Id.*

Some of Cotter’s facilities in Texas and Oklahoma were smaller, older facilities that were difficult to market. RP 599-600. Cotter was interested in hiring Erwin to market these problematic facilities only. RP 597. Thus, Cotter’s intent was that the Agreement would include only the problematic facilities in Texas and Oklahoma. RP 597, 599.

Cotter was adamant that he and Erwin did not discuss Erwin representing Cotter on the Camlu transaction when they met in February 1999:

There was never talk about [Erwin] representing me. You can't represent everybody.

RP 592; *also* RP 599. By that time, Cotter knew that Erwin represented Camlu, and didn't need or want Erwin to represent his interests. RP 601.

Erwin, however, believes that he represented Cotter (and Camlu) on the Camlu transaction. RP 50-51. Ensign was willing to put up the \$1.4 million front money only if Cotter was willing to extend the lease term. RP 50. Cotter believed that since he was providing the majority of the incentive – the lease extension – he should get the majority of the benefit – the front money. RP 50. Camlu disagreed, but Erwin felt that Cotter's position "made sense." RP 51. Thus, Erwin felt that he had to represent Cotter's interests in restructuring the loan with Ensign. RP 51.

The parties' Agreement said that it applied to the facilities listed as Addendum A (Ex. 8, ¶ 9), but there was no addendum attached to the Agreement when the parties signed it. RP 72, 597. Ten days later, Erwin sent Cotter an addendum listing the facilities

to be included in the Agreement. RP 73; Ex. 10. Addendum A includes the Camlu facilities and four other facilities in Texas. Ex. 8 (App. A). Cotter never signed off on Addendum A. RP 224.

Addendum A does not include any California facilities. RP 78. When the parties entered the Agreement, Cotter did not want Erwin to market California facilities, but only the Texas facilities. *Id.* Thus, the California facilities were not part of the Agreement. RP 78, 85. Rather, they were a future prospect, as Erwin acknowledged (RP 85):

By signing [the Agreement], it basically gave me instruction, you know, to get busy, go out and represent me in finding this new tenant that I need in Texas . . . And potentially California is going to be coming down the line.

C. Although Cotter's California facilities were not a part of the Agreement, Erwin and Sleeth discussed the possibility of leasing the California facilities.

Erwin agrees that when he and Cotter executed the Agreement, Cotter did not expressly give Erwin an exclusive on the California facilities. RP 213. Rather, Cotter told Erwin not to work on any California facilities. RP 78. The California facilities were never added to the Agreement in writing. RP 78.

Erwin concedes that Cotter never asked him to add the California facilities to the Agreement (RP 229) and admits that he should have sent a supplemental Addendum to add the California

facilities. RP 78. In fact, Erwin concedes that neither Cotter nor Sleeth ever actually instructed him to start marketing any California facilities. RP 100. Yet Erwin claimed that it “became apparent” from his conversations with Sleeth, that Cotter was ready for Erwin “to do something” with respect to the California facilities. *Id.*

According to Erwin, Sleeth sent Erwin information about the California facilities because Cotter wanted Erwin to start marketing them. RP 100. But the information Sleeth sent Erwin was no different than the financial packages he put together annually for each of Cotter’s facilities. RP 423-26. Sleeth did not recall whether Erwin requested the information, but he would have forwarded the information to Erwin if he asked for it. RP 424. In fact, he would have sent the same information to any broker or consultant who requested it. RP 426. Part of Sleeth’s job was locating prospective tenants (RP 427) and Sleeth was communicating with multiple parties interested in the California facilities. RP 449.

Further, Sleeth did not know that Erwin was working for Cotter when Sleeth sent Erwin information about the California facilities. RP 427. In fact, Sleeth’s understanding was that he was the only person marketing Cotter’s facilities:

I worked for Mr. Cotter and I was the only one employed by Mr. Cotter. I was his, basically, his quote property manager, end quote, and I didn't know anybody else was employed.

RP 449. Although Sleeth believed he was marketing Cotter's facilities to Erwin, the trial court concluded that Cotter "gave the signal through Mr. Sleeth that Mr. Erwin should move ahead with work on the California properties." CP 33, F/F 31.

Erwin received the financial information about the California facilities in early April 1999. Ex. 12. In late June, Erwin wrote Sleeth that Ensign remained interested in the California and Abilene, Texas, facilities if they became available to lease. Ex. 17. Erwin organized a July 6 meeting among Cotter, Sleeth, Ensign, Ray Lavender (Ensign's broker), and Erwin, to discuss Ensign's potential lease of the California and Abilene Texas facilities. RP 115-16. Cotter described the meeting as a general meeting between people "in the industry":

I talked over all different kinds of market-like proposals, what the market would bring at this time as opposed to what other people had paid, and there was a lot of discussion. These are people that know their way around in the industry.

RP 705. Sleeth agreed, referring to the meeting as "a brain storming session." RP 433.

Shortly after the meeting, Ensign proposed a lease agreement for the California and Abilene, Texas, facilities. Ex. 21.

For about three weeks in late July and early August, Erwin, Sleeth, and Ensign continued to discuss the potential of Ensign leasing the California and Abilene facilities (e.g. Ex. 23-31) and on August 18, 1999, Cotter and Ensign executed a lease for the Abilene facilities. Ex. 50. The lease could not take effect immediately because the previous operator abandoned the facilities, but failed to transfer the state licenses to Ensign. RP 629-32. Since Ensign was a licensed operator, it operated the Abilene facilities under a “management agreement” until January 1, 2000, when the previous operator transferred the state licenses to Ensign. RP 629; Ex. 76.

Around the time the Abilene leases closed, the Camlu transaction was also wrapping up. CP 33-34, F/F 34. Camlu’s leases with Cotter were extended and transferred to Ensign. *Id.* Camlu proposed that Cotter and Camlu split 50/50 the front money and all expenses including Erwin’s fee, about \$155,000. RP 591. Cotter refused, and Camlu and Cotter eventually agreed that Erwin’s fee would be paid out of the front money, and the remainder would be divided between Cotter and Camlu on a *pro*

rata basis. RP 591.¹ The trial court nonetheless concluded that Camlu and Cotter shared Erwin's fee. CP 33-34, F/F 34.

D. Due to problems with the existing tenant, the California facilities could not be leased and Cotter and Ensign discontinued discussions about a potential lease.

In late August 1999, Cotter's attorney, Richard Jenkins, sent Ensign proposed leases for the California facilities. CP 34, F/F 39. The California facilities, were not, however, ready to be leased. CP 34-35, F/F 41. The lessee of Cotter's California facilities had assigned their lease to Sun Healthcare without Cotter's authorization. *Id.* Sun Healthcare refused to vacate the facilities, and Cotter sued to evict Sun Healthcare. *Id.*; RP 646. Sun Healthcare filed for bankruptcy protection in September 1999, placing the leases on the California facilities in the bankruptcy court's jurisdiction. *Id.* Sun Healthcare refused to vacate the properties during the bankruptcy proceedings. RP 646-47.

Since Sun Healthcare refused to vacate the California facilities, Cotter could not lease the facilities to Ensign. RP 646. Sun Healthcare remained physically present in the buildings. *Id.*

¹ Although Cotter does not precisely explain the *pro rata* division, under his agreement with Camlu, Camlu's share of the front money remaining after expenses continued decreasing while the lease assignment was pending. RP 591.

Sun Healthcare still possessed the state operating licenses for the California facilities, and Ensign could lease the facilities only if Sun Healthcare agreed to transfer the licenses – the state would not issue new licenses. RP 645. Ensign also would be unable to obtain medical reimbursement contracts (Medicare and Medicaid) without Sun Healthcare’s cooperation. *Id.* The “bottom line” was that Ensign could not and would not lease the facilities until Sun Healthcare vacated. RP 645-46.

With the California properties tied up in the litigation between Cotter and Sun Healthcare, Cotter and Ensign discontinued any discussions about a potential lease:

Q. [When Sun Healthcare refused to abandon the California properties during the bankruptcy] what happened to [Cotter’s] discussions with The Ensign Group?

A. Well, we didn’t have any real discussions because there’s nothing to discuss.

Q. In fact, the discussion stopped, didn’t they?

A. Yeah, there was nothing to talk about.

RP 647. The deal was “dead.” RP 460.

On March 6, 2000, Cotter cancelled the Agreement with Erwin. Ex. 42. Cotter cancelled the Agreement because Erwin approached Cotter about whether Cotter would lease the California

properties to Erwin and Andy Turner, a Sun Healthcare employee. RP 656. Cotter found it “amazing” that Erwin would partner up with the very entity Cotter was trying to evict, and then suggest leasing the very facilities Sun Healthcare refused to vacate. RP 656. Although the Agreement expired on its own terms on November 9, 1999 (Ex. 8, ¶ 3) Cotter’s attorney Jenkins cancelled the Agreement out of an abundance of caution. RP 679-80. Cotter explained that Jenkins had a tendency to “overkill.” RP 679. The letter unequivocally directed Erwin to cease marketing Cotter’s properties and soliciting prospective lessees. Ex. 42. On March 7, Cotter withdrew the proposed leases sent to Ensign in August 1999. Ex. 43.

E. Cotter was eventually able to free-up the California facilities, and Ensign agreed to lease the facilities.

After terminating the Agreement and withdrawing the proposed leases on the California facilities, Cotter undertook to liberate the California facilities so they would be available to re-let. CP 35, F/F 45. Finally in December 2000, Cotter obtained a judgment against Sun Healthcare. RP 648. At that point, Cotter resumed discussions with Ensign. *Id.*

On February 9 2001, Cotter, CHC and Coachella entered lease agreements with Ensign for the California facilities. CP 35, F/F 46; Ex. 46-49. Erwin was not in contact with Ensign or Cotter when the leases were entered. RP 254-55. He was not in any way involved in the leases. *Id.* The leases took effect in November 2001 (CP 35, F/F 46; Ex. 46-49) after the bankruptcy court released the California facilities. CP 35, F/F 41.

F. Procedural History

Erwin sued Cotter in Washington to collect a Commission for the leases on two facilities in Abilene Texas and four facilities in California. CP 328-34. After Erwin filed his action, Cotter filed suit in California and Texas to bar Erwin from proceeding in Washington. CP 36, F/F 49. The California Court granted Erwin's motion to stay until the Washington litigation was complete. CP 36, F/F 51. The Texas court denied Erwin's motion to stay, and proceedings in Texas were pending during the litigation. CP 35, F/F 52.

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 that Washington had sufficient contacts with the transaction because Erwin and his corporation were Washington residents and “Erwin performed a good deal of work in Washington.” CP 38, C/L 10. The court failed to enter any finding on what performance actually occurred in Washington. CP 28-37. 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.

Cotter also argued that Erwin could not collect a commission for the California facilities because they were never added to the written Agreement. CP 199-202. He argued that correspondence between Sleeth and Erwin about the California facilities could not add the California facilities to the Agreement because the facilities had to be added in writing. RP 781-82. The trial court found that the correspondence between Sleeth and Erwin “signal[ed]” Cotter’s intention that Erwin work on the California facilities (CP 33, F/F 31), and thus concluded that the absence of a writing expressly adding the California properties to the Agreement was not fatal. CP 125.

The court did not otherwise address Cotter's argument that the properties had to be added to the Agreement in writing.

The trial court found that Erwin was entitled to a commission on the California and Abilene, Texas, facilities, and awarded him \$134,409.93, plus interest. CP 27; CP 34, F/F 37-40. The court also awarded Erwin attorneys' fees from the Washington litigation, and fees from the motions to stay the proceedings in California and Texas, totaling over \$100,000. CP 27; CP 37-38, F/F 53-55.

Cotter also raised the following issues before the trial court, which he does not appeal: (1) the trial court lacked jurisdiction over Cotter because he did not sign the Agreement in his personal capacity, and thus was not a party to the Agreement (CP 191-97); (2) the trial court lacked jurisdiction over Coachella because it did not sign the Agreement, and thus was not a party to the Agreement (CP 197); (3) there was no delayed closing on the California properties – the leases ultimately entered with Ensign was the product of new negotiations, in which Erwin did not take part (CP 201-02); and (4) the CHC's and Coachella's corporate forms should not be disregarded. CP 198.

Cotter respectfully disagrees with the trial court's decision in Erwin's favor on these issues. He does not challenge the

resolution of these issues on appeal, but in no way concedes the point. These issues are fact-based, and Cotter chooses not to challenge them on appeal in appreciation of the standard of review.

V. ARGUMENT

A. **Erwin cannot enforce the Agreement because he is not a licensed real estate broker in California or Texas, and an unlicensed party cannot maintain a suit to collect brokerage commissions.**

Neither Erwin nor his corporation, Healthcare Properties, Inc., (“HP”) is or has ever been a licensed real estate broker in Texas or California.² RP 12-13, 202. Erwin was aware that he could not lawfully provide brokerage services in either state without obtaining an in-state license, or associating with an in-state licensed broker. RP 202-03. He chose not to. The choice of law provision (Ex. 8, ¶ 7) and waiver provision (*id.* at ¶ 9) are clear efforts to avoid California and Texas law. The trial court erred in allowing Erwin to evade the law and enforce the Agreement for unlawful services.

² Erwin was licensed as a real estate salesman in California for about one year in 2001. RP 13. A salesman’s license does not permit Erwin to lawfully provide brokerage services – he has never been licensed as a broker in California. *Id.* Further, Erwin was not licensed as a salesman in California during the term of this Agreement, or when he filed suit (July 29, 2002). Thus, the brief refers to Erwin as unlicensed.

1. Erwin performed brokerage services as defined in Washington, California, and Texas.³

During trial, Erwin claimed that he did not need to have a brokerage license in Washington (or any state) to collect a commission for his services. RP 203. He didn't disagree that a broker must be licensed in the state in which he provides brokerage services to maintain a suit for a commission. Rather, he defines his services as something other than brokerage services. *Id.* to the contrary, under Washington, California, and Texas law, Erwin was performing brokerage services, for which he had to be licensed to maintain a suit to collect a commission.

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 18.85.010.⁴ It is a gross misdemeanor to provide brokerage services without a license (RCW 18.85.340), and an unlicensed

³ As discussed *infra* § VI A. 2, the applicable law is California. The trial court, however, applied Washington law, and two of the disputed facilitates are located in Texas. Thus, Cotter discusses each state's law.

⁴ All applicable statutes are attached as Appendix B.

party may not maintain a suit to collect a commission. RCW 18.85.100.

In California, a broker is a person who, with expectation of compensation, sells, buys, leases, rents, solicits prospective sellers, buyers, lessees, or renters of, solicits or obtains listings of, and/or negotiates the purchase, sale, exchange, lease, or rent of real property or a business opportunity. Cal. Bus. & Prof. Code § 10131 (2004). It is unlawful to provide brokerage services without an in-state license. *Id.* at § 10130. An unlicensed party may not maintain a suit for compensation for brokerage services. *Id.* at § 10136.

Finally, in Texas, a broker is a person who, in exchange for a commission, (1) sells, exchanges, purchases, or leases real estate, or offers to do the same; (2) provides listing, appraisal or auction services for real estate; (3) deals in options on real estate; (4) aids in locating or obtaining real estate for purchase or lease; and (5) procures a prospect or property to effect a real estate sale. Tex. Occ. Code § 1101.002 (1)(A) (2004). A person acts as a broker by providing any of these services. *Id.* at § 1101.004. A person must be licensed in-state to act as a broker in Texas. *Id.* at § 1101.351. It is a misdemeanor to provide brokerage services without an in-

state license. *Id.* at §1101.756. An unlicensed party cannot maintain an action for a commission from brokerage services. *Id.* at § 1101.806(b).

Erwin performed brokerage services under Washington, California, and Texas law. Erwin introduced Ensign to the Camlu properties. CP 30, F/F 15-16. He toured the Camlu facilities (RP 56) and provided Ensign detailed financial information about the Camlu facilities to assist Ensign in negotiating a lease. CP 30, F/F 15. Erwin claims that he negotiated the lease terms on Cotter's behalf (CP 32, F/F 24) and was paid a commission on the Camlu properties. CP 33-34, F/F 34.

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.

The trial court nonetheless found that Erwin's services were something other than brokerage services:

The purpose of a consultant agreement of the type that was signed between Messrs. Cotter and Erwin was to provide specialized business services to a small group of clients who operate on a regional or national basis. This purpose was completely different from regular real estate activity in terms of the properties involved and the interstate range of possible transactions. CP 31, F/F 20.

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. CP 38, C/L 11.

These findings ignore the statutory definitions of brokerage services. Pursuant to the Agreement, Erwin agreed to market Cotter's facilities for lease or sale in exchange for a commission. Ex. 8. This is a brokerage service, for which one can lawfully collect a commission only if licensed in the state in which the service is performed. RCW 18.85.010; Cal. Bus. & Prof. Code § 10131; Tex. Occ. Code § 1101.756. Contrary to the trial court's findings, there is no exception to this rule for "specialized" services or markets. CP 31, F/F 20; CP 38. C/L 11.

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.

2. The Agreement’s legality should be determined by the law of the state with the most significant contacts – California.

The Court must employ a conflicts of law analysis to determine what state’s law to apply to the Agreement. The conflicts analysis proceeds through a series of steps.

a. Step 1: the parties cannot resolve the issue of illegality through a choice of law clause.

Whether a contract is legal is usually determined by the law of the state in which the contract was executed:

... whether there is any illegality will usually depend upon the local law of each state where an act related to the contract was, or is to be, done. So the local law of the state where a promise was made will usually be applied to determine the legality of its making.

Restatement (Second) Conflict of Laws § 202(1) comment c (1971).⁵ There is no dispute that the Agreement was executed at Cotter's home in California. RP 70. Thus, in the usual course of events, this Agreement would be governed by California law.

Erwin included a venue/choice of law clause in the Agreement:

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. Paragraph 7 does not purport to select Washington law to determine illegality and California law should apply. Nevertheless, the trial court held that the Agreement selected Washington law. CP 38, C/L 9. The Court will honor a choice of law provision if the parties could have resolved the issue at hand in an express contract provision:

The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

⁵ Washington follows the **Restatement** in addressing conflicts of law questions. **O'Brien v. Shearson Hayden Stone, Inc.**, 90 Wn.2d 680, 684, 586 P.2d 830 (1978).

Restatement (Second) of Conflicts § 187(1) (1989). Generally speaking, a “particular issue” that can be resolved by an express contract provision includes most contract terms, such as price and performance. **Restatement, supra**, § 187 comment c. Questions of “substantial validity” such as those about capacity to contract, contract formalities, and contract validity, cannot be resolved by the contract itself:

[Q]uestions [that cannot be resolved by the contract] are those involving capacity, formalities and substantial validity. A person cannot vest himself with contractual capacity by stating in the contract that he has such capacity. He cannot dispense with formal requirements, such as that of a writing, by agreeing with the other party that the contract shall be binding without them. Nor can he by a similar device avoid issues of substantial validity, such as whether the contract is illegal.

Id. at comment *d* (emphasis supplied).

b. Step 2: The Court may still determine illegality based on the choice of law clause unless application of the law of the chosen state would be contrary to a fundamental policy of the state with the most significant contacts.

If the parties could not resolve the issue in an express contract provision, then the Court will nonetheless honor a choice of law provision unless (1) the chosen state has no substantial relationship to the parties or transaction, or is otherwise an unreasonable choice; or (2) applying the chosen state’s law would

offend the public policy of the state which is the state of applicable law absent the choice of law provision:

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(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)(a) and (b). A court addressing the choice of law question will apply the chosen law to determine whether a policy is “fundamental” and whether the other interested state has a materially greater interest than the state of the chosen law. *Id.*

Cotter concedes that the first exception listed in § 187(2)(a) does not apply – Washington has a relationship with the transaction such that choosing Washington law was not unreasonable (**Restatement**, *supra*, § 187(2)(a) and comment *f*). But under § 187(2)(b), California law should apply because (1) California would be the state of applicable law absent the choice of law provision; (2)

California has a materially greater interest than Washington; and
(3) applying Washington law would offend fundamental California policy.

c. Step 3: California would be the state of applicable law absent the choice of law provision.

Absent the choice of law provision, California law would govern this transaction. Whether California law would apply absent the choice of law provision is determined by the *Restatement* § 188, under which the Court must consider the following five factors:

- (a) the place of contracting,
- (b) the place of negotiation of the contract,
- (c) the place of performance,
- (d) the location of the subject matter of the contract, and
- (e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

Restatement, supra, § 188. When a contract is executed (*id.* at (a)) and performed (*id.* at (c)) in the same state, that state's law will usually govern. *Id.* at § 188(3). The relative importance of these factors is otherwise case-dependent. *Id.* at comment *b.*

Balancing these factors shows that absent the Agreement's choice of law provision, California would be the state of applicable law. It is undisputed that the Agreement was executed in

California. § 188(2)(a); RP 70. Erwin drafted the Agreement (RP 204), and to the extent that the Agreement was negotiated, negotiations occurred at Cotter's California home, where Erwin claims to have read Cotter the contract word-for-word and repeatedly asked if he had any questions. § 188(2)(b); RP 77. Most of the facilities that are the "subject matter of the contract" are located in California – none are in Washington. § 188(2)(d); CP 13, F/F 5-7.

The parties reside, are incorporated, and do business in Washington, Texas, and California. **Restatement**, *supra*, § 188 (2)(e). Erwin's primary place of business was in California until about one week before executing the Agreement, when he moved it to Washington. RP 82-83. Erwin also resided in California until just before executing the Agreement. *Id.* He subsequently moved back to California and obtained a California real estate agent's license in 2001, after the term of the Agreement. RP 13, 74-75.

Cotter owns a home in California and resides there sometimes, although he is a Texas resident. RP 561. Both Cotter Health Centers and Coachella House are California Corporations. RP 564; CP 28-29, F/F 3; CP 29, F/F 6. Cotter's business is run from the CHC office in California. Ex. 11, 13, 15, 17, 19, 21.

Finally, the Agreement was substantially performed in California, with some performance in Texas and Washington. **Restatement**, *supra*, § 188(2)(c). All meetings between Cotter, Erwin, Sleeth, and any other relevant entities such as Camlu or Ensign took place in California. RP 60-61, 70, 117-18. Sleeth performed his obligations under the Agreement (Ex. 8 ¶ 12) primarily from a CHC office in California. Ex. 11, 13, 15, 17, 19, 21. Sleeth's communications to Erwin were generated in the California office, and Erwin directed his communications with Sleeth to the California office. Ex. 11, 15, 17, 19, 21.

d. Step 4: California has a materially greater interest in deciding this matter than Washington.

California's interest in the resolution of this contract dispute is "obvious" – the Agreement provides for a "business practice" that is unlawful in California:

... a state where a contract provides that a given business practice is to be pursued has an obvious interest in the application of its rule designed to regulate or to deter that business practice.

Restatement, *supra*, § 188 comment c. California has enacted a detailed statutory scheme (*supra* § IV A. 1) to "regulate" brokerage activities in the state and "deter" unlicensed brokerage activities. *Id.* at comment c. Erwin's unlicensed brokerage activities are

unlawful under California's licensing requirements and regulations. The Agreement permits Erwin to perform unlicensed brokerage services, and is "illegal, void and unenforceable" in California. *In re Estate of Baldwin*, 34 Cal. App. 3d 596, 604 (1973). Thus, California's interest in determining the outcome of this litigation is "obvious" – the "application of its [statutes] designed to ... deter" unlicensed persons, like Erwin, from providing brokerage services in-state. *Restatement, supra*, § 188 comment c.

Washington, however, has little interest in the application of its statutes governing real estate brokers because Washington's contacts with the transaction are minimal. None of the disputed properties are located in Washington. Erwin is the only person involved in the transaction residing in Washington, and his is the only corporation involved in the transaction incorporated in Washington. Although Erwin performed some services in Washington, all meetings with Cotter and others occurred in California. RP 60-61, 70, 117-18. Neither Cotter, Sleeth, nor Ensign ever traveled to Washington with respect to this transaction. Moreover, Erwin resided in California, and his primary office was located in California until about one week before executing the Agreement, and he has since moved back to California. RP 82-83.

e. Step 5: Applying Washington law would offend fundamental California public policy.

Applying Washington Law would be contrary to the “fundamental” public policy behind California’s brokerage licensing scheme. *Restatement, supra*, § 187. The *Restatement* acknowledges that it is impossible to define a “fundamental” policy. *Id.* at comment *g.* “To be ‘fundamental,’ a policy must in any event be a substantial one.” *Id.* For example, a fundamental policy may be one that is “embodied in a statute which makes one or more kinds of contracts illegal.” *Id.*

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 at 604-05.

A party can obtain a license in California only if he (1) has at least two years active experience as a licensed real estate agent, or equivalent experience or education (Cal. Bus. & Prof. Code §

10150.6); (2) has passed California's broker license examination (*id.* at § 10150); (3) has completed requisite education requirements (*id.* at § 10153.2); and (4) submits a written application to the real estate commission. *Id.* at § 10150. California strictly enforces its licensing scheme. ***Consul Ltd. v. Solide Enterprises, Inc.***, 802 F.2d 1143, 1151 n.7 (9th Cir. 1986). The purpose of California's licensing requirements is "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 (1971).

Erwin provided brokerage services in California without first obtaining a state license or associating with an in-state broker. *Supra* § VI A. 1. The unlicensed services Erwin provided were unlawful (Cal. Bus. & Prof. Code § 10130) and the Agreement for such services is void and unenforceable. ***Baldwin***, 34 Cal. App. 3d at 604-05. Further, Erwin is statutorily prohibited from maintaining the underlying action in California because he is not licensed in California. Cal. Bus. & Prof. Code § 10136. By permitting Erwin to nonetheless maintain his suit and enforce the unlawful Agreement, the trial court undermined California's ability to regulate in-state

brokerage activities to protect its citizens. **Schantz**, 19 Cal. App. 3d at 292-93.⁶ This offends a fundamental policy of California law.

The trial court applied Washington law pursuant to paragraph 7 of the agreement. CP 38-39, C/L 14. The court also concluded that enforcing the Agreement did not violate any public policy of Texas or California. CP 38, C/L 13. These conclusions were error for the reasons discussed above.

In sum, California law should govern the Court's determination of whether the Agreement is legal. Under California's brokerage licensing scheme, Erwin's actions were unlawful, the Agreement is void and unenforceable, and Erwin cannot maintain his suit. He should not have been permitted to do so in Washington. The Court should reverse.

3. A party cannot waive the defense that a contract is unenforceable because it is illegal.

Erwin cannot circumvent the application of the correct law – California – by enforcing a provision in the Agreement that purports

⁶ Cotter does not focus on Texas law because California has the most significant contacts with this matter. Erwin's brokerage services were, however, also unlawful in Texas. In Texas it is a misdemeanor to broker real estate without an in-state license. Tex. Occ. Code §101.756 (2004). Erwin brokered real estate in Texas without an in-state license, and he could not maintain an action for a commission in Texas. Tex. Occ. Code § 1101.806(b) (2004).

to waive the defense that the Agreement is unenforceable because it fails to comply with applicable statutes. Ex. 8, ¶ 9. Erwin cannot enforce the purported waiver because the Agreement is unenforceable as to Erwin. Further, no Washington law suggests that a court will enforce a contract provision that attempts to waive an illegality defense. Both Erwin and Cotter knew that Erwin had to be licensed in California and Texas to lawfully provide brokerage services in-state. RP 202, 603. The Agreement cannot waive statutory licensure requirements, and is unenforceable.

In ***Vedder v. Spellman***, the Court held that an unlicensed contractor could not enforce a contract to collect a commission where a Washington statute expressly prohibited an unlicensed contractor from maintaining a suit for compensation. ***Vedder v. Spellman***, 78 Wn.2d 834, 835-38, 480 P.2d 207 (1971). Vedder contracted with Spellman to alter and repair Spellman's home. ***Vedder***, 78 Wn.2d at 835. Shortly before the work was complete, Spellman wrote Vedder a check for most of his commission, but placed a stop payment on the check before it cleared. *Id.* Vedder sued to collect the commission and the trial court granted summary judgment for Spellman. *Id.*

On appeal, Vedder conceded that he was barred from enforcing the contract because he was not a registered contractor:

No person engaged in the business or acting in the capacity of a contractor may bring or maintain any action in any court of this state for the collection of compensation for the performance of any work or for breach of any contract for which registration is required under this chapter without alleging and proving that he was a duly registered contractor at the time he contracted for the performance of such work or entered into such contract.

78 Wn.2d at 835 (citing RCW 18.27.080). Vedder argued, however, that the contract was legal and that equity required enforcement. 78 Wn.2d at 837. The Court rejected Vedder's argument as "untenable," holding that "[a] contract that is contrary to the terms and policy of a statute is illegal and unenforceable." 78 Wn.2d at 837. The Court acknowledged that refusing to enforce the contract gave Spellman a windfall because he received the benefit of the work and entered the contract knowing that Vedder was unlicensed. *Id.* at 838. Despite the windfall, the contract was unenforceable because the "teeth" of the statute are the prohibitions against using the courts to enforce a contract that is contrary to state law. *Id.* More recently, the Court held that a contract in violation of a licensing statute is unenforceable even if

not illegal. *Davidson v. Hensen*, 135 Wn.2d 112, 954 P.2d 1327 (1998).⁷

This Court recently applied *Vedder* and *Davidson* to bar an unlicensed contractor's suit to enforce a contract and obtain a commission:

[A]n unregistered contractor has no standing to seek redress from the courts if the person benefiting from the fruits of his unlicensed labor refuses to pay. ... [The] contractor's failure to fully comply with [statutory] registration requirements does not render the underlying contract void, but merely limits its enforceability for public policy reasons.

Bort v. Parker, 110 Wn. App. 561, 571, 42 P.3d 980, *rev. denied*, 147 Wn.2d 1013 (2002) (citing *Vedder* and *Davidson*).

Whether the Agreement is illegal (*Vedder*), or simply unenforceable (*Davidson* and *Bort*), Erwin cannot maintain a suit to enforce the Agreement. *Bort*, 110 Wn. App. at 571. Erwin cannot enforce the Agreement "for public policy reasons" because he unlawfully performed brokerage services without the required license. 110 Wn. App. at 571. Likewise, Erwin cannot enforce the purported waiver because it is, of course, part of the Agreement.

⁷ The Court nonetheless held that Hensen could confirm the arbitration award because confirming the award is not equivalent to "bringing ... an action," which is prohibited by RCW 18.27.080. 135 Wn.2d at 127.

Moreover, the parties cannot circumvent statutory requirements by purporting to waive them in the Agreement. The Agreement purports to waive a “provision” that would allow Cotter to contest Erwin’s commission on the ground that Erwin is not licensed in California and Texas where the property is located. Ex. 8, ¶ 9. But the purported waiver creates a contract that from its inception attempts to achieve something unlawful – providing brokerage services without a license. *Supra*, § IV A.1. The parties cannot draft the Agreement to “avoid” the Agreement’s illegality.

Restatement, supra, § 187 comment *d*.

B. Even if Washington law applies, Erwin cannot maintain a suit to obtain a commission for the California facilities because they were not included in any written agreement signed by Cotter.

The Court should not enforce the Agreement because it is illegal as discussed above. But even if it were not illegal, the Statute of Frauds would preclude enforcement of the Agreement as to the California properties because they were never made part of the written Agreement.

The parties agree that the California properties were never included in the written Agreement. RP 78. The trial court concluded, however, that correspondence between Sleeth and

Erwin “establish[ed]” that the California facilities were “part of the Agreement.” CP 37-38, C/L 7. But Cotter was not a party to this correspondence, and Sleeth could not bind Cotter to a contract. RP 237, 400. Thus, the Agreement is void under the Statute of Frauds as to the California properties because there is no writing to or from Cotter adding the California facilities to the Agreement.

An agreement that authorizes a broker to buy or sell real estate is “void” unless written and signed:

In the following cases, specified in this section, any agreement, contract and promise shall be void, unless such agreement, contract or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized, that is to say: ... (5) an agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission.

RCW 19.36.010; ***Bishop v. Hansen***, 105 Wn. App. 116, 120, 19 P.3d 448 (2001). The Statute of Frauds prevents fraud related to “disputes as to the amount of commission or compensation, the term of the listing agreement, if exclusive or nonexclusive, and most important, if any agreement existed at all.” ***Bishop***, 105 Wn. App. at 120 (quoting ***House v. Erwin***, 83 Wn.2d 898, 904, 524 P.2d 911 (1974)). Terms that must be in the written agreement

include (among others) a description of the real estate and the agreement to pay the commission.⁸ **Bishop**, 105 Wn. App. at 117.

No facilities were included in the Agreement when it was executed. RP 72. Subsequently, Erwin drafted Addendum A to outline the properties included in the Agreement. RP 72-73. The California properties were not included in Addendum A. RP 78.

No writing expressly purported to “include other real estate or business with the facility(ies) identified in [the] Agreement,” as the Agreement contemplated. Ex. 8, ¶ 18. Erwin concedes that Cotter never asked him to add the California properties to the Agreement. RP 229. Erwin never drafted a supplemental addendum adding the facilities. RP 78. Yet based on a series of communications between Erwin and Sleeth, the trial court concluded that Cotter “gave the signal through Mr. Sleeth that Mr. Erwin should move ahead with work on the California properties.” CP 33, F/F 31. The trial court thus concluded that Sleeth and Erwin’s communications “supplemented” the Agreement, and

⁸ A brokerage commission agreement need not include a complete legal description of the property because a brokerage commission agreement is not an agreement to sell real property. 105 Wn. App. at 120. Rather, an agreement that simply describes the property to be sold is enforceable. *Id.* at 121.

“establish[ed] that . . . the four California facilities were part of the Agreement.” CP 37-38, C/L 7.

But the correspondence between Sleeth and Erwin is not sufficient to satisfy the Statute of Frauds because it is not a writing signed by the party to be bound – Cotter. **Bishop**, 105 Wn. App. at 120. The Agreement must comply with RCW 19.36.010 because it “authorize[es]” ... an agent or broker [Erwin] to sell or purchase real estate for compensation or a commission.” RCW 19.36.010; e.g., Ex. 8, ¶ 4, 8, 10, 11-14, 16-17, 19-21. The correspondence was between Sleeth and Erwin, not Erwin and Cotter. Ex. 25-29. Thus, the written correspondence was not “signed by the party to be charged therewith” – Cotter. RCW 19.36.010. Further, Erwin knew that Sleeth had no authority to contract on Cotter’s behalf:

Q. Did you have any illusions that Mr. Sleeth was able to, had executory power, that is, that he could sign leases for Mr. Cotter?

A: No.

Q. Who did you understand had to do that?

A. Mr. Cotter.

RP 60; RP 237 (Erwin also acknowledged that Sleeth “cannot sign contracts”). Thus, the correspondence was not signed by a “person ... lawfully authorized” by Cotter to contract on his behalf. RCW

19.36.010. As such, the Agreement is void under the Statute of Frauds even if correspondence about the California facilities is a sufficient writing – the letters were not signed by Cotter or a party who can bind him. *Id.*; **Bishop**, 105 Wn. App. at 116.

In sum, the California facilities were not part of the Agreement Cotter signed, and could not be added to the Agreement without a writing signed by Cotter. Thus, the Agreement is “void” as to the California properties. RCW 19.36.010.

C. Even assuming Washington law applies, Erwin cannot maintain suit in Washington simply because he is licensed in Washington and performed some aspects of the Agreement in Washington.

As discussed above, RCW 18.85.100 bars a suit for a real estate broker’s commission unless the moving party first proves that he is licensed in Washington. *Supra*, § VI A. 1. This statute, however, is not without a narrow exception. Washington law permits a broker licensed in a foreign state, who executes and performs a contract for brokerage services in the state in which he is licensed, to utilize the Washington courts to recover a commission. This exception does not apply here – Erwin was not licensed in California, the state in which the Agreement was

executed and performed for the most part. Simply being licensed in Washington, and performing some of the Agreement in-state, does not enable Erwin to avoid RCW 18.85.100.

The Supreme Court permitted an Oregon broker to maintain a suit in Washington to recover a brokerage commission, even though he was not licensed in Washington, because he was licensed in Oregon, where the contract was made and performed. ***Stoddard's Estate***, 60 Wn.2d 263, 373 P.2d 116 (1962). Stoddard contracted with a Washington resident to sell real property located in Washington to an Oregon resident. ***Stoddard***, 60 Wn.2d at 264. Before entering the contract, Stoddard traveled to Washington to meet with the owner and show his client the property. 60 Wn.2d at 264. The contract was negotiated via telegraph, Stoddard in Oregon, and the property-owner in Washington, and executed in Oregon when Stoddard deposited his acceptance with the telegraph company. 60 Wn.2d at 264-65. All of Stoddard's negotiations with the purchaser occurred in Oregon. *Id.* at 264. Stoddard did not enter Washington after the contract was executed. *Id.* at 265.

The owner repudiated the contract and Stoddard sued in Washington to recover his commission. 60 Wn.2d at 264-65. The

trial court dismissed, finding that Stoddard could not maintain the suit because he was not a licensed broker in Washington. *Id.* at 265 (citing RCW 18.85). The Court reversed on appeal, holding that RCW 18.85 did not bar Stoddard's action because the contract was executed and performed in Oregon, where Stoddard was licensed. 60 Wn.2d at 265-67.

The ***Stoddard*** Court explained that the location of real property in Washington is not alone sufficient to bar a broker who is not licensed in Washington from seeking a commission:

The decided American cases hold that the failure of a real-estate broker to have a license in the state in which the land is situated does not bar recovery of a commission if the contract therefor was made and performed in another state in which the broker is licensed.

60 Wn.2d at 265. A broker who is not licensed in-state may sue in Washington to collect a commission, if the contract "was made and performed" in the state in which the broker is licensed. *Id.*

Stoddard is inapposite and does not permit Erwin to maintain a suit to collect a commission. ***Stoddard*** simply opens Washington courts to a party who lawfully makes and performs a contract for services in a state in which he is licensed to do so. 60 Wn.2d at 270. The Agreement, however, was not "made and performed" in Washington – the only state in which Erwin is

licensed. 60 Wn.2d at 265. Rather it is undisputed that the Agreement was made in California (RP 70) and performed in part in California, in which Erwin was not licensed. *Supra* § VI A. (2)(a). **Stoddard** does not permit a Washington broker to maintain a suit for a commission in Washington, where, as here, the contract was made and performed in part in a foreign state, and the property is located in a foreign state.

In sum, the narrow exception to RCW 18.85 does not apply here. The Agreement was made and performed in California, in which Erwin is not licensed. He cannot maintain a suit in Washington to collect a commission for his unlawful services.

D. The Court should reverse Erwin's fee award and award Cotter fees.

Erwin is not entitled to attorneys' fees under the Agreement's fee provision (Ex. 8, ¶ 5) because he cannot enforce the Agreement, and thus, cannot prevail. Cotter is entitled to fees if he prevails on appeal.

Attorneys' fees may be awarded only when authorized by a private agreement, statute, or recognized ground of equity. **Labriola v. Pollard Group, Inc.**, 152 Wn.2d 828, 839, 100 P.3d 791 (2004). Where a contract provides for an award of attorneys'

fees to one of the parties, the prevailing party is entitled to fees even if he is not the party specified in the contract:

[T]he prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys fees in addition to costs and necessary disbursements.

RCW 4.84.330; **Labriola**, 152 Wn.2d at 839. The prevailing party is entitled to recover attorneys' fees even when the contract containing the attorney' fee provision is invalidated. 152 Wn.2d at 839.

The Agreement provides that Erwin is entitled to attorneys' fees incurred in an effort to collect a commission. Ex. 8, ¶ 5. Erwin cannot enforce the Agreement, he is not a prevailing party, and he is not entitled to attorneys' fees. **Labriola**, 152 Wn.2d at 839.

The Court should award Cotter fees incurred defending against Erwin's efforts to enforce the unlawful Agreement and on appeal. **Labriola**, 152 Wn.2d at 839. Further, Cotter is entitled to an award of attorneys' fees even if the Court holds that the Agreement is invalidated in whole or in part. 152 Wn.2d at 839.

VI. CONCLUSION

Erwin knowingly entered a contract to provide services that he cannot lawfully provide. The statutory consequence of his action is that he cannot maintain a suit to collect a commission for

his services. The Court should reverse and remand for dismissal of all claims. Alternatively, the Court should hold that the Agreement is unenforceable as to the California facilities, which were not part of Addendum A.

DATED this 9 day of May 2005.

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Charles K. Wiggins, WSBA 6948
Shelby R. Frost Lemmel, WSBA 33099
241 Madison Avenue North
Bainbridge Island, WA 98110
(206) 780-5033

CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing BRIEF OF APPELLANT postage prepaid, via U.S. mail on the 9 day of May 2005, to the following counsel of record at the following addresses:

Counsel for Respondent

James Stephan Berg
James S. Berg, PLLC
105 N 3rd Street
Yakima, WA 98901-2704

Co-Counsel for Appellant

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



Charles K. Wiggins, WSBA 6948
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 1

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 I

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. Patton
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

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Ⓢ

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 4.84.330. Actions on contract or lease which provides that attorney's fees and costs incurred to enforce provisions be awarded to one of parties-- Prevailing party entitled to attorney's fees--Waiver prohibited

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract or lease which is entered into after September 21, 1977. Any provision in any such contract or lease which provides for a waiver of attorney's fees is void.

As used in this section "prevailing party" means the party in whose favor final judgment is rendered.

RCW 18.27.080. Registration prerequisite to suit

No person engaged in the business or acting in the capacity of a contractor may bring or maintain any action in any court of this state for the collection of compensation for the performance of any work or for breach of any contract for which registration is required under this chapter without alleging and proving that he was a duly registered contractor and held a current and valid certificate of registration at the time he contracted for the performance of such work or entered into such contract. For the purposes of this section, the court shall not find a contractor in substantial compliance with the registration requirements of this chapter unless: (1) The department has on file the information required by RCW 18.27.030; (2) the contractor has a current bond or other security as required by RCW 18.27.040; and (3) the contractor has current insurance as required by RCW 18.27.050. In determining under this section whether a contractor is in substantial compliance with the registration requirements of this chapter, the court shall take into consideration the length of time during which the contractor did not hold a valid certificate of registration.

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.

RCW 19.36.010. Contracts, etc., void unless in writing

In the following cases, specified in this section, any agreement, contract and promise shall be void, unless such agreement, contract or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized, that is to say: (1) Every agreement that by its terms is not to be performed in one year from the making thereof; (2) every special promise to answer for the debt, default, or misdoings of another person; (3) every agreement, promise or undertaking made upon consideration of marriage, except mutual promises to marry; (4) every special promise made by an executor or administrator to answer damages out of his own estate; (5) an agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission.

Cal. Bus. & Prof. Code § 10130 (2004). License requirement; Violation

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 or a real estate salesman within this state without first obtaining a real estate license from the department.

The commissioner may prefer a complaint for violation of this section before any court of competent jurisdiction, and the commissioner and his counsel, deputies or assistants may assist in presenting the law or facts at the trial.

It is the duty of the district attorney of each county in this state to prosecute all violations of this section in their respective counties in which the violations occur.

Cal. Bus. & Prof. Code § 10131 (2004). "Real estate broker"

A real estate broker within the meaning of this part is a person who, for a compensation or in expectation of a compensation, regardless of the form or time of payment, does or negotiates to do one or more of the following acts for another or others:

- (a) Sells or offers to sell, buys or offers to buy, solicits prospective sellers or purchasers of, solicits or obtains listings of, or negotiates the purchase, sale or exchange of real property or a business opportunity.
- (b) Leases or rents or offers to lease or rent, or places for rent, or solicits listings of places for rent, or solicits for prospective tenants, or negotiates the sale, purchase or exchanges of leases on real property, or on a business opportunity, or collects rents from real property, or improvements thereon, or from business opportunities.
- (c) Assists or offers to assist in filing an application for the purchase or lease of, or in locating or entering upon, lands owned by the state or federal government.
- (d) Solicits borrowers or lenders for or negotiates loans or collects payments or performs services for borrowers or lenders or note owners in connection with loans secured directly or collaterally by liens on real property or on a business opportunity.
- (e) Sells or offers to sell, buys or offers to buy, or exchanges or offers to exchange a real property sales contract, or a promissory note secured directly or collaterally by a lien on real property or on a business opportunity, and performs services for the holders thereof.

Cal. Bus. & Prof. Code § 10136 (2004). Pleading and proof of license in action for compensation

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 § 10150. Application for broker's license

(a) Application for the real estate broker license examination shall be made in writing to the commissioner. The commissioner may prescribe the format and content of the broker examination application. The application for the broker examination shall be accompanied by the real estate broker license examination fee.

(b) Persons who have been notified by the commissioner that they passed the real estate broker license examination may apply for a real estate broker license. A person applying for the broker examination may also apply for a real estate broker license. However, a license shall not be issued until the applicant passes the real estate broker license examination. If there is any change to the information contained in a real estate broker license application after the application has been submitted and before the license has been issued, the commissioner may require the applicant to submit a supplement to the application listing the changed information.

(c) Application for the real estate broker license shall be made in writing to the commissioner. The commissioner may prescribe the format and content of the broker license application. The application for the real estate broker license shall be accompanied by the appropriate fee.

Cal. Bus. Prof. Code § 10153.2. Education requirements

(a) An applicant to take the examination for an original real estate broker license shall also submit evidence, satisfactory to the commissioner, of successful completion, at an accredited institution, of:

(1) A three-semester unit course, or the quarter equivalent thereof, in each of the following:

- (A) Real estate practice.
- (B) Legal aspects of real estate.
- (C) Real estate appraisal.
- (D) Real estate financing.
- (E) Real estate economics or accounting.

(2) A three-semester unit course, or the quarter equivalent thereof, in three of the following:

- (A) Advanced legal aspects of real estate.
- (B) Advanced real estate finance.
- (C) Advanced real estate appraisal.
- (D) Business law.
- (E) Escrows.
- (F) Real estate principles.
- (G) Property management.
- (H) Real estate office administration.
- (I) Mortgage loan brokering and lending.

(J) Computer applications in real estate.

(K) On and after July 1, 2004, California law that relates to common interest developments, including, but not limited to, topics addressed in the Davis-Stirling Common Interest Development Act (Title 6 (commencing with *Section 1350*) of *Part 4 of Division 2 of the Civil Code*).

(b) The commissioner shall waive the requirements of this section for an applicant who is a member of the State Bar of California and shall waive the requirements for which an applicant has successfully completed an equivalent course of study as determined under Section 10153.5.

(c) The commissioner shall extend credit under this section for any course completed to satisfy requirements of Section 10153.3 or 10153.4.

Tex. Occ. Code § 1101.002 (2004). Definitions

In this chapter:

(1) "Broker":

(A) means a person who, in exchange for a commission or other valuable consideration or with the expectation of receiving a commission or other valuable consideration, performs for another person one of the following acts:

- (i) sells, exchanges, purchases, or leases real estate;
- (ii) offers to sell, exchange, purchase, or lease real estate;
- (iii) negotiates or attempts to negotiate the listing, sale, exchange, purchase, or lease of real estate;
- (iv) lists or offers, attempts, or agrees to list real estate for sale, lease, or exchange;
- (v) appraises or offers, attempts, or agrees to appraise real estate;
- (vi) auctions or offers, attempts, or agrees to auction real estate;
- (vii) deals in options on real estate, including buying, selling, or offering to buy or sell options on real estate;
- (viii) aids or offers or attempts to aid in locating or obtaining real estate for purchase or lease;
- (ix) procures or assists in procuring a prospect to effect the sale, exchange, or lease of real estate; or
- (x) procures or assists in procuring property to effect the sale, exchange, or lease of real estate; and

(B) includes a person who:

- (i) is employed by or for an owner of real estate to sell any portion of the real estate; or

(ii) engages in the business of charging an advance fee or contracting to collect a fee under a contract that requires the person primarily to promote the sale of real estate by:

(a) listing the real estate in a publication primarily used for listing real estate; or

(b) referring information about the real estate to brokers.

(2) "Certificate holder" means a person registered under Subchapter K.

(3) "Commission" means the Texas Real Estate Commission.

(4) "License holder" means a broker or salesperson licensed under this chapter.

(5) "Real estate" means any interest in real property, including a leasehold, located in or outside this state. The term does not include an interest given as security for the performance of an obligation.

(6) "Residential rental locator" means a person who offers for consideration to locate a unit in an apartment complex for lease to a prospective tenant. The term does not include an owner who offers to locate a unit in the owner's complex.

(7) "Salesperson" means a person who is associated with a licensed broker for the purpose of performing an act described by Subdivision (1).

(8) "Subagent" means a license holder who:

(A) represents a principal through cooperation with and the consent of a broker representing the principal; and

(B) is not sponsored by or associated with the principal's broker.

Tex. Occ. Code § 1101.004 (2004). Acting as Broker or Salesperson

A person acts as a broker or salesperson under this chapter if the person, with the expectation of receiving valuable consideration, directly or indirectly performs or offers, attempts, or agrees to perform for another person any act described by Section 1101.002(1), as a part of a transaction or as an entire transaction.

Tex. Occ. Code § 1101.351 (2004). License Required

- (a) Unless a person holds a license issued under this chapter, the person may not:
- (1) act as or represent that the person is a broker or salesperson; or
 - (2) act as a residential rental locator.
- (b) An applicant for a broker or salesperson license may not act as a broker or salesperson until the person receives the license evidencing that authority.
- (c) A licensed salesperson may not act or attempt to act as a broker or salesperson unless the salesperson is associated with a licensed broker and is acting for that broker.

Tex. Occ. Code § 1101.756 (2004). General Criminal Penalty

(a) A person commits an offense if the person wilfully violates or fails to comply with this chapter or a commission order.

(b) An offense under this section is a Class A misdemeanor.

Tex. Occ. Code § 1101.806 (2004). Liability for Payment of Compensation or Commission

(a) This section does not:

(1) apply to an agreement to share compensation among license holders;

or

(2) limit a cause of action among brokers for interference with business relationships.

(b) A person may not maintain an action to collect compensation for an act as a broker or salesperson that is performed in this state unless the person alleges and proves that the person was:

(1) a license holder at the time the act was commenced; or

(2) an attorney licensed in any state.

(c) A person may not maintain an action in this state to recover a commission for the sale or purchase of real estate unless the promise or agreement on which the action is based, or a memorandum, is in writing and signed by the party against whom the action is brought or by a person authorized by that party to sign the document.

(d) A license holder who fails to advise a buyer as provided by Section 1101.555 may not receive payment of or recover any commission agreed to be paid on the sale.

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
Total Judgment:	\$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.

Appendix C

- 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.

Appendix C

- 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,
33
34

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

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

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
- 5 8. Mr. Erwin had the right to reasonably rely upon the written and oral statements and
6 representations of Mr. Sleeth in the manner that he did.
- 7
- 8 9. In the absence of an effective choice of law provision by the parties, the validity and
9 effect of a contract are governed by the law of the state having the most significant
10 relationship with the contract. *Mulcahy v. Farmers Ins.*, 152 Wn.2d 92, (2004);
11 *Baffin Land Corp. v. Monticello Motor Inn.*, 70 Wn.2d 893 (1967). The Agreement
12 between Cotter and Erwin in February, 1999, contained an effective choice of law
13 clause designating Washington as the home jurisdiction.
- 14
- 15 10. Washington had connections to the various transactions, as Mr. Erwin and
16 Healthcare Properties, Inc., were both residents of Washington and Mr. Erwin
17 performed a good deal of work in Washington on these matters.
- 18
- 19 11. The services contemplated by the Agreement were not traditional real estate
20 broker/agent services. Rather, they were specialized consultant services in a
21 specialized facilities market that makes it impractical for a consultant to be licensed
22 in every state where he might do business. It also requires that such consultant
23 engage in considerable interstate travel and communication.
- 24
- 25 12. Mr. Erwin was subject to the regulatory system of the State of Washington for real
26 estate professionals.
- 27
- 28 13. Allowing a licensed real estate broker in the state of Washington to pursue a claim
29 for a consultant fee in Washington courts, pursuant to an Agreement which specifies
30 Washington as the home jurisdiction, does not violate the public policy of Texas,
31 California, or Washington.
- 32
- 33 14. Washington law applies to the transactions at issue by virtue of the Agreement
34 between the parties, and it is not necessary to use either California or Texas law to

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

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

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

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

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

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

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

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

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

31 23. The Agreement of February 9, 1999, was in effect when Mr. Erwin received
32 Attorney Jenkins' letter of March 6, 2000.
33
34

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

Appendix C

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
7 b. The attorney's fees and costs submitted by California attorney Randall
8 Nelson were reasonable and necessary to secure the stay of the California
9 proceedings.
10
11 c. The attorneys' fees (\$9,000.00) and costs (\$1,000.00) submitted by Texas
12 attorney David Jones were reasonable and necessary to try and secure the
13 stay of the Texas proceedings.

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

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

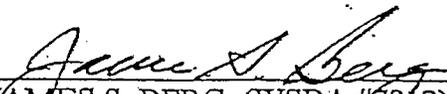
6
7 3. Allowable attorneys' fees and collection costs in the sum of \$100,108.28;
8 for a total judgment of \$287,811.44 (\$29,530.12 + \$158,173.04 + \$100,108.28), together with
9 interest thereon at the rate of 12% per annum from date of entry until paid.

10 DATED this 3rd day of December, 2004.

**MICHAEL E. SCHWAB
JUDGE**

11
12
13
14 MICHAEL E. SCHWAB, Judge

15 Presented by:

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

20
21 Approved for entry and notice
22 of presentation waived:

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

26
27
28 C:\Client Data\Clients\Erwin\Cotter\Pleadings\Findings, Concl & Judgment-Am.doc

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31
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34
Appendix C