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NO. 23658-7-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.

REPLY BRIEF

James E. Montgomery, Jr.
Texas Bar No. 14292200
12175 Network Drive
San Antonio, Texas 78249

WIGGINS & MASTERS, P.L.L.C.
Charles K. Wiggins
WSBA 6948
Shelby R. Frost Lemmel
WSBA 33099
241 Madison Ave. North
Bainbridge Island, WA 98110
(206) 780-5033

Attorneys for Appellant

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INTRODUCTION

The Brief of Respondent Erwin comes down to two propositions: illegality of the Agreement must be decided under Washington law because the Agreement adopts Washington law; and, the Agreement is not illegal because the Agreement says that the Agreement is not illegal.

Erwin's first argument is wrong because the parties to an agreement cannot choose the law of a particular jurisdiction simply to avoid the illegality of the agreement. The ***Restatement (Second) of Conflicts*** (1989) is quite clear on this point, BA 26-34, and Erwin has no response.

Erwin's second argument is circular: if the Agreement is illegal, the provision in the Agreement saying it is legal is of no effect. That is why Washington has consistently held that parties cannot waive the contract defense of illegality. BA 36-40. Again, Erwin has no response.

California law governs the legality of this Agreement. The Agreement was executed and substantially performed in California, the disputed properties are located in California (one in Texas), and all interested entities other than Erwin reside in, work in, and/or are incorporated in California. Under California law, the Agreement is

illegal and void, and it is unenforceable under California or Washington law. The Court should reverse.

ASSIGNMENTS OF ERROR

Erwin criticizes Cotter for making “entirely legal-based” arguments, rather than arguing that challenged findings are not supported by sufficient evidence. BR 4. These issues are properly before the Court and should be considered.

Cotter assigned error to some findings out of an abundance of caution. His arguments include challenges to the appropriate findings underlying the trial court’s incorrect conclusions of law. For example, Cotter challenged the findings and conclusions that Sleeth had authority to bind Cotter, Erwin could rely on Sleeth’s representations, and the correspondence between Sleeth and Erwin was sufficient to add the California properties to the written agreement. BA 2, assignments of error 4-6. Erwin mistakenly claims that Cotter “offers no argument” on this point. BR 4. To the contrary, Cotter argued that the Agreement did not satisfy the Statute of Frauds with respect to the California properties because there was no writing signed by Cotter, and “Erwin knew that Sleeth had no authority to contract on Cotter’s behalf.” BA 43 (citing RP 60; RP 237).

Erwin also claims that assignment of error number two misrepresents finding 20 and attempts to “create” a conclusion of law. BR 2. Cotter’s assignment of error correctly paraphrases the trial court’s finding:

Assignment of error No. 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.

Finding of Fact No. 20: The purpose of a consultant agreement of the type that was signed ... was to provide specialized business services ... This purpose was completely different from regular real estate activity ...

Contrary to Erwin’s argument, the trial court did enter a conclusion of law consistent with finding 20, as summarized in the Brief of Respondent:

[T]he trial court determined that the services provided by [Erwin] were not ‘traditional real estate broker/agent services,’ rather were ‘specialized consultant services

BR 39-40 (quoting CP 38, C/L 11).

STATEMENT OF THE CASE

The first part of Erwin’s fact section is a continuation of the legal argument about findings and conclusions, beginning in his “Assignments of Error” section. BR 2-8. Erwin objects to Cotter’s statement of the case under RAP 10.3(a)(4), arguing that it is misleading because it presents testimony that is contrary to the trial

court's findings. BR 6. The challenged findings, Erwin argues, "clearly establish" the very prospect Cotter challenges. BR 7. Of course the findings encompass the propositions Cotter challenges, that is why he challenges them. One cannot be criticized for presenting facts contrary to a challenged finding.

Essentially Erwin objects to Cotter telling his side of the story (in addition to telling Erwin's side). BR 6-8. For example, Cotter did not believe that Erwin represented him on the Camlu transactions, and Erwin believed that he did. BA 10. Cotter gave both accounts in his brief. BA 10. The trial court found that Erwin did represent Cotter. CP 32, F/F 24. It is not "misleading," however, to present Cotter's side. BR 6.

ARGUMENT

Erwin spends remarkably little time, at the end of his brief, addressing Cotter's arguments. BR 42-46. Erwin's primary argument is accurately summarized as follows: Erwin can maintain a suit in Washington because he is licensed in Washington and the Agreement chooses Washington law. BR 30-31. The choice of law clause is enforceable, Erwin argues, simply because it is in the Agreement. BA 30-34. Erwin's effort to avoid the conflict analysis is telling. A provision is not enforceable just because it is in a

contract, and a contract is not legal just because the parties agreed to it.

A. Erwin cannot enforce the Agreement because he is not licensed in California where the Agreement was executed and substantially performed.

Erwin drafted the Agreement to evade California and Texas Law. He is not licensed in California or Texas, but argues that his Washington license permits him to broker real estate in California and Texas, avoiding their licensing requirements. BR 30-31. Erwin's argument offends the public policies of California and Texas, and in reverse, would offend the public policy of Washington.

1. The Agreement is for brokerage services as defined by any and all applicable statutes.

The Agreement purportedly entitles Erwin to a commission for selling or leasing real property (Ex. 8), brokerage services in Washington, California, and Texas. BA 22-24 (citing RCW 18.85.010; Cal. Bus. & Prof. Code § 10131 (2004); Tex. Occ. Code § 1101.002(1)(A)(2004)). Erwin does not contest that his services are brokerage services as defined by these statutes. BR 38-42. Rather, Erwin complains that Cotter looks to the relevant regulatory schemes at all. BA 38.

Erwin argues that the Agreement itself “expressly provided that the parties were not entering into a brokerage agreement.” BR 40 (citing Ex. 8 ¶ 10). The Agreement does not “expressly provide” that it is not a “brokerage agreement” – it says only that it is not a “typical listing agreement.” Ex. 8 ¶ 10. Erwin may offer “specialized” services in a “specialized” market – brokers can specialize. BR 39-40. The Agreement purportedly entitles Erwin to a commission for selling and leasing real property, which are undeniably brokerage services in Washington, California, and Texas. BA 22-26.

Erwin cannot escape the relevant regulations by calling his brokerage services something else. Such a rule would permit a party to illegally operate in a regulated field by changing their title or job description. The relevant statutes, not the Agreement, determine whether the services Erwin is providing are brokerage services.

Erwin’s argument is reminiscent of a story, possibly apocryphal, of Abraham Lincoln’s cross-examination of a witness during his career as a trial lawyer:

"How many legs does a horse have?"
"Four," said the witness.
"Right," said Abe.

"Now, if you call the tail a leg, how many legs does a horse have?"

"Five," answered the witness.

"Nope," said Abe, "callin' a tail a leg don't make it a leg."

Lamon v. McDonnell Douglas Corp., 19 Wn. App. 515, 534-35, 576 P.2d 426 (1978) (Andersen, J., dissenting). Calling a brokerage agreement an "independent contractor relationship" does not mean the services are not defined as brokerage services by statute.

2. The Agreement's legality should be determined by California law.

Erwin's response wrongly presupposes that the "validity" of the choice of law clause is the end-all and be-all of this Court's inquiry: "the relevant question before this Court concerns the validity of the choice of law provision of the Agreement, and the Agreement itself under Washington Law." BR 31. As explained in the Brief of Appellant, however, even if a choice of law clause is valid, whether it will be enforced depends on a series of steps (BA 26-36) Erwin tries to evade. BR 30-31.

a. Step 1: The choice of law clause cannot determine whether the Agreement is illegal.

A valid choice of law clause is enforceable only if the parties could have resolved the underlying issue in the contract provision. BA 27-28 (citing **Restatement (Second) of Conflicts** § 187(1))

(1989)). Parties cannot draft a contract to determine whether it is legal, so the chosen law does not automatically apply to determine illegality. BA 28 (citing *Restatement, supra*, § 187 comment c). Erwin does not respond to this argument. BR 34-38.

Erwin focuses on the following sentence in the Brief of Appellant: “Paragraph 7 [the choice of law clause] does not purport to select Washington law to determine illegality” BA 27. Erwin calls this argument “unreasonable” because the Agreement selects Washington law to govern “interpretation and enforcement,” and “irrelevant” because the Agreement directs that only Washington courts have “jurisdiction” and that disputes will be “resolved” in Washington. BR 34 (no citation). Whether a contract is illegal is a different inquiry than whether it is enforceable, or how it will be interpreted. The choice of law clause, which limits its own application to “interpretation and enforcement,” does not include illegality. Ex. 8 ¶ 7. Further, selecting Washington jurisdiction (BR 34) does not select which law applies – Washington courts can apply a foreign state’s laws.

This single sentence in the Brief of Appellant also provokes in Erwin a tangent about a comment in the *Restatement* that absent a contrary intent, a choice of law clause selects the “local

law” of the state, not the “totality of its law.” BR 34-38 (quoting **Restatement (Second) Conflict of Laws** § 187(3) and comment *h*). Erwin misses the point – § 187(1) makes clear that a contractual choice of law does not govern determination of illegality. “Local law” versus “totality of the law” is a red herring.¹

b. Step 2: Washington law may still determine illegality unless it would be contrary to a fundamental policy of California law.

Although the Agreement itself cannot determine whether it is illegal, the Court will nonetheless apply Washington law to determine illegality unless applying Washington law would offend the public policy of California – the state of applicable law absent the choice of law provision. BA 28-29 (citing **Restatement**, *supra*, § 187(2)(a) and (b)). California law applies 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. BA 29-30.

¹ Erwin also argues that the choice of law clause is enforceable so long as it does not offend the policy of Washington, the “forum state.” BR 33-34 (citing **McGill v. Hill**, 31 Wn. App. 542, 547-48, 644 P.2d 680 (1981)). **McGill** does not purport to replace the required analysis under the **Restatement** – it in fact cites the applicable Restatement. **McGill**, 31 Wn. App. at 548 (citing **Restatement**, *supra* § 187 (3)).

c. Step 3: California would be the state of applicable law without the choice of law clause.

Erwin purports to address the five-factor inquiry required by the **Restatement** in three pages of his brief. BR 42-44. At best, he addresses only two of the five factors. *Id.* Erwin offers no response to the argument that California law would apply absent the choice of law clause. *Id.*

California law would govern this Agreement absent the choice of law clause because it is the state with the most significant contacts based on the following: (a) the place of contracting, (b) the place of negotiation, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties. BA 30 (citing **Restatement**, *supra*, § 188). Factors (a), (b), and (d) highly recommend the application of California law. The Agreement was executed in California and any negotiations occurred at Cotter's California home. RP 70, 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 remaining two factors, residency/place of incorporation and place of performance, strongly support the application of

California law. Cotter owns a home in California and conducts his business in California (RP 561-62; Ex. 11, 13, 15, 17, 19, 21) and both Cotter Health Centers and Coachella House are California Corporations. RP 564; CP 28-29, F/F 3; CP 29, F/F 6. Erwin resided in and primarily conducted his business in California until just before executing the Agreement. RP 82-83. After a brief period in Washington, he left Washington and now lives in Nevada. RP 9.

The Agreement was also substantially performed in California. **Restatement, supra**, § 188(2)(c). All meetings leading up to the leases 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) and all communications about the leases went into and out of Cotter's California office. Ex. 11, 15, 17, 19, 21.

d. Step 4: California has a much greater interest in the matter than Washington.

California's interest is "obvious" – the "application of its [detailed statutory scheme] designed to ... deter" unlicensed persons, like Erwin, from providing brokerage services in-state. BA 33 (quoting **Restatement, supra**, § 188 comment c). Erwin's

services are unlawful in California, and the Agreement is “illegal, void and unenforceable” in California. BA 33 (quoting *In re Estate of Baldwin*, 34 Cal. App. 3d 596, 604 (1973)). Erwin’s Washington license doesn’t change that.

California’s interest in the dispute is greater than Washington’s as Washington has minimal contacts (BA 32-33):

- ◆ None of the disputed properties are located in Washington.
- ◆ All meetings between the parties occurred in California. RP 60-61, 70, 117-18.
- ◆ No one other than Erwin was ever present in Washington with respect to this transaction.
- ◆ Erwin lived and worked in California until just before executing the Agreement, and he has since left Washington. RP 82-83.
- ◆ Erwin is the only relevant person who resided in Washington, and his is the only relevant corporation incorporated in Washington.

Erwin does not respond to the argument that California has a significant interest in this matter. BR 42-44. Rather, his only response to this step of the conflicts analysis is that Cotter’s argument that Washington’s contacts are “minimal” is contrary to the Conclusion of Law stating that “Erwin performed a good deal of work in Washington.” BR 43 (citing C/L 10). Erwin’s argument misses the mark – the question is whether California has a materially greater interest than Washington, not whether

Washington has any interest in the matter. *Restatement, supra*, ¶ 187(2)(b). California’s interest is “obvious.” BA 32-33 (quoting *Restatement, supra*, § 188 comment c).

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

Applying Washington law offends California policy because the agreement and Erwin’s services are illegal in California. A “fundamental” state policy includes policies “embodied in a statute which makes one or more kinds of contracts illegal.” *Restatement, supra*, § 187 comment g. California statutes make the unlicensed brokerage services Erwin provided and the Agreement illegal. Cal. Bus. & Prof. Code § 10130. California strictly enforces its licensing schemes to protect the public and Erwin could not maintain suit in California. BR 35. Applying Washington law violates California policy.

In response, Erwin argues that “at least one California court was not offended by the terms of the Agreement” (BR 43), referring to the Butte County Superior Court’s decision to stay the proceeding pending a decision in the Washington court. BR 42. The Butte County Superior Court stayed the proceedings – it did

not dismiss the case or otherwise pass on the merits. Erwin's argument is meritless.

Erwin also argues that applying Washington law does not offend California policy because “[w]hat California’s statutes provide is that without a California license a party cannot ‘bring or maintain any action in **the courts of this State.**’” BR 43 (emphasis Erwin’s). To the contrary, California law also makes it illegal to provide brokerage services without a California license. BA 23, citing Cal. Bus. & Prof. Code § 10131 (2004). Erwin wholly ignores the purpose of California’s scheme regulating brokers – to “regulate” brokerage activities in the state and “deter” unlicensed brokerage activities. BA 32-33. California denies unlicensed parties access to the courts to deter unlicensed brokerage services. *Id.* Providing access to a court in a different forum undermines the purpose of California’s statutes.

Finally, Erwin quotes from, but does not analyze, two inapposite cases. BR 43-44. Erwin “note[s]” that California courts “frown upon efforts to avoid payment” *just because a contract is signed where the broker is unlicensed.* BR 44-45 (citing **Cochran v. Ellsworth**, 126 Cal. App.2d 429, 437, 272 P.2d 904 (1954) (emphasis added)). In **Cochran**, all performance occurred in the

state in which the broker was licensed, and the court held that the single act of signing the contract where the broker was not licensed did not render the contract void. 126 Cal. App. at 437-38. The **Cochran** court resolved any uncertainty against the party challenging the brokerage agreement as he drafted the contract. *Id.*

Cochran is inapposite. Here, negotiations, execution, and substantial performance all occurred in California, where Erwin is not licensed, and most of the interested persons resided in, conducted business in, and/or where incorporated in California. *Supra* § IV (A)(2)(d). Further, Erwin drafted the Agreement (RP 204) and any uncertainty should be resolved against him. 126 Cal. App. at 438.

Nelson is also inapposite. BR 44 (citing **Nelson v. Kaanapali Properties**, 19 Wn. App. 893, 895, 578 P.2d 1319 (1978)). In **Nelson**, there was no choice of law clause, so the court conducted a “significant contacts analysis.” 19 Wn. App. at 896. While performance occurred in Hawaii where the contractor was unlicensed, the contract was executed in Washington, Washington had a superior interest in the case, and all relevant parties,

including the party seeking to avoid the contract, resided in, or were domiciled and/or incorporated in Washington. *Id.* at 894, 899-900.

3. Cotter did not and cannot waive the defense of illegality.

Parties cannot agree by contract to waive statutes and regulations. BA 36-40. Erwin's failure to comply with applicable licensing requirements renders the contract "illegal, void and unenforceable" in California (BA 33), and illegal (BA 37-39 citing ***Vedder v. Spellman***, 78 Wn.2d 834, 835-38, 480 P.2d 207 (1971)), or simply unenforceable (BA 38-39, citing ***Davidson v. Hensen***, 135 Wn.2d 112, 954 P.2d 1327 (1998); ***Bort v. Parker***, 110 Wn. App. 561, 571, 42 P.3d 980, *rev. denied*, 147 Wn.2d 1013 (2002)) in Washington. Either way, the purported waiver creates a contract that is unlawful and/or unenforceable from its inception. *Id.*

Erwin argues that Cotter failed to provide any authority for the argument that the purported waiver is "invalid" under Washington law. BR 39. To the contrary, Cotter cited ***Vedder***, ***Davidson***, and ***Bort*** (*supra*) all of which support the argument that Agreement is unlawful and/or unenforceable. BA 37-39. Further, Washington follows the Restatement, under which parties cannot avoid illegality by clever drafting:

A person cannot . . . by agreeing with the other party . . . avoid issues of substantial validity, such as whether the contract is illegal.

Restatement, supra, § 187 comment *d* (emphasis supplied).

There is no need for additional support for the very simple point that one cannot render a illegal contract legal and enforceable by waiving the argument that it is illegal.

Erwin attempts to distinguish *Vedder* and *Davidson* on the ground that the brokers in those cases were not licensed in Washington and Erwin is. BR 41. Similarly, *Bort* “adds nothing to [Cotter’s] argument,” Erwin argues, because the contractor in *Bort* was “properly licensed.” BR 41 n.12. Erwin’s response betrays the true nature of his argument – the Agreement purports to waive California’s licensing requirements:

[Erwin has] all the required Washington licenses, this case was filed in Washington and the Agreement specifically provides that Washington law applies and waives all other states’ licensing requirements.

BR 41-42. Such a contract is illegal and/or unenforceable. BA 36-40.

Whether a choice of law clause is enforceable depends on the five-step conflicts of law analysis discussed above. Erwin never responds to the real issues on this point: the parties cannot waive the defense of illegality.

B. Erwin cannot enforce the contract even if (1) Washington law applies and (2) the Agreement is enforceable because the Agreement violates the Statute of Frauds.

The parties agree that the California facilities were never added to the written Agreement. *Compare* BA 40-44 *with* BR 45-46. Erwin does not disagree that the correspondence between Erwin and Sleeth does not satisfy the Statute of Frauds because it is not a writing signed by the party to be bound – Cotter. BA 42-43 (citing *Bishop v. Hansen*, 105 Wn. App. 116, 120, 19 P.3d 448 (2001)). Thus, it is undisputed that no written document satisfies the Statute of Frauds. *Id.*

Erwin’s entire response is that the Statute of Frauds does not apply because the Agreement is for leases of real property, not sales:

Respectfully, [Erwin] submit[s] this entire argument is a “red herring.” Whatever properties were included, it is undisputed that the objective of the Agreement was that [Erwin] would locate prospective tenants, and then negotiate leases on [Cotter’s] behalf.

BR 45 (without citation). This unsupported argument flatly contradicts the Agreement itself, which expressly contemplates sales, not just leases:

- ◆ Facility(ies) to be sold or leased ... 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). Ex. 8 ¶ 3.

- ◆ Fee amount to equal four (2.5) [sic] percent of the gross sales price The definition of this agreement shall be that of an exclusive engagement to represent and right to sell or lease said facility(ies). . . . [If Erwin negotiates financing] then a fee of one and one-half (1.5) percent shall be paid in addition to any sales or leasing fee earned. Ex. 8 ¶ 4.
- ◆ [Cotter] hereby warrants ... that [he has] marketable title or otherwise established right to sell said property(ies) ... [Cotter] agrees to provide proper conveyance and acceptable evidence of title or right to sell Ex. 8 ¶ 8.

The Agreement also refers to “prospective buyer” (¶ 6, 12, 13), “purchase price” and “Purchaser” (¶ 8), “purchase and sale agreements” (¶ 10), “buyers” (¶ 10), “tax implications of this potential sale” (¶ 11), and so on. The Agreement, on its face, is “an agreement authorizing or employing an agent or broker [Erwin] to **sell or purchase** real estate for compensation or a commission.” BR 46 (quoting RCW 19.36.010(5) (emphasis by Erwin)). The Statute of Frauds applies.

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.

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. BA 22-23, 44-47. Erwin relies on the trial court’s

finding that he was not performing “traditional real estate broker/agent services.” BR 39-40. But a broker cannot evade the requirements of licensing regulations merely by re-labeling his services as something else, as discussed above.

Erwin also argues that, “RCW 18.85.100 only requires a broker/consultant to be licensed in Washington in order to bring suit in Washington—it does not require that the broker/consultant be licensed in every state where the properties sit.” BR 39. To the contrary, the statute requires that a broker or agent be “duly licensed” in order to bring suit in Washington (RCW 18.85.100):

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.

“Duly” means “in a proper manner; in accordance with legal requirements.” *Black’s Law Dictionary* 517 (7th ed. 1999). To be “duly licensed” means to be licensed in accordance with legal requirements.

It is neither necessary nor sufficient to be licensed in Washington in order to bring an action to collect a commission for

the sale of a business or lease of property in California or Texas. It is not sufficient because California requires licensing in California and Texas requires licensing in Texas. BA 34-36. It is not necessary because a broker/salesperson licensed in Oregon may bring an action in Washington for a commission for the sale of real property to an Oregon resident where the contract was made and performed in Oregon. ***Stoddard's Estate***, 60 Wn.2d 263, 373 P.2d 116 (1962). The Oregon broker was "duly licensed" in Oregon and nothing in Washington law prevented him from bringing the action.

Erwin is not "duly licensed" for the purpose of bringing this action. He is trying to collect a commission for leases in California of California and Texas facilities under a contract made and primarily performed in California. Cotter showed in his opening brief that Erwin cannot recover under the reasoning of ***Stoddard's Estate***. BA 45-47. Erwin never responds and never cites ***Stoddard's Estate***. The Court should hold that even if Washington law applied, Erwin would be barred from recovery.

D. Erwin's alternate grounds to affirm are meritless.

Without any argument, Erwin lists "alternative bases" upon which he claims this Court may affirm. BR 46-48. Erwin provides no argument or analysis to support these claims, and the Court

should disregard them. ***Eugster v. City of Spokane***, 118 Wn. App. 383, 425, 76 P.3d 741 (2004). Nonetheless, Cotter briefly responds to each as follows.

“A contract can be comprised of several writings.” BR 47. Assuming that the “several writings” to which Erwin refers is the correspondence between Sleeth and Erwin, Erwin failed to respond to Cotter’s argument that the correspondence could not add the California properties to the Agreement and did not satisfy the Statute of Frauds because Sleeth has no authority to bind Cotter. *Compare* BA 42-43 *with* BR 45-46.

“Reformation may also be appropriate, either based on mutual mistake or unilateral mistake” BR 47. Erwin’s claim for reformation was only to extend the agreement to Cotter personally. CP 177. Cotter has not appealed this aspect of the judgment and reformation would not help Erwin.

Erwin argues, “The underlying purpose of the Statute of Frauds is to prevent fraud” BR 47. As related to brokerage contracts, the purpose of the Statute of Frauds is to prevent exactly what happened here – fraud related to “disputes as to the amount of commission or compensation . . . and most important, if any agreement existed at all.” BA 41 (quoting ***Bishop***, 105 Wn. App. at

120). Cotter has consistently maintained that he never intended to include the California properties in the Agreement. BA 9-11.

“The corporate forms . . . should be disregarded.” BR 47. This is irrelevant to which state’s law applies, and whether Erwin can enforce the unlawful Agreement.

“In the event that any portion of the Agreement is deemed invalid, [Erwin] submit[s] that [he is] nonetheless entitled to [his] commissions under the doctrine of procuring cause.” BR 47-48 (citing **Syputa v. Druck Inc.**, 90 Wn. App. 638, 954 P.2d 279 *rev. denied* 136 Wn.2d 1024 (1998)). According to **Syputa**, the “procuring cause doctrine” is the rule that a principal can terminate an agent at will, but cannot deny the compensation if the agent caused a sale. 90 Wn. App. at 645. The trial court considered Erwin’s “procuring cause” argument and found that Erwin was a procuring cause of the Abilene lease, but that Erwin only “produced the initial state of the negotiations between Cotter and Ensign on the California properties.” CP 129. Thus, there is no finding or conclusion that Erwin was a procuring cause of the California leases. The judgment cannot be sustained on this theory.

In any event, the procuring cause doctrine does not apply when “a written contract expressly provides ‘how commissions will

be awarded when an employee or agent is terminated.” **Syputa** at 645 (quoting **Willis v. Champlain Cable Corp.**, 109 Wn.2d 747, 755, 748 P.2d 621 (1988)). The procuring cause doctrine does not apply because the Agreement expressly provides for compensation in the event that Erwin is terminated before the Agreement expired. 90 Wn. App. at 645; Ex. 8 ¶ 21.

E. Cotter is entitled to fees.

Cotter is entitled to an award of attorneys’ fees under the Agreement if successful on appeal. Ex 8 ¶ 5. The Court should award those fees incurred at trial and on appeal, even if the Court holds that the Agreement is unlawful or unenforceable only in part. BA 47-48 (citing **Labriola v. Pollard Group, Inc.**, 152 Wn.2d 828, 839, 100 P.3d 791 (2004)).

CONCLUSION

Erwin entered an illegal and unenforceable contract to perform services he cannot lawfully provide. He is not entitled to a fee. The Court should reverse.

DATED this 25 day of August 2005.

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



James E. Montgomery, Jr.
Texas Bar No. 14292200
12175 Network Drive
San Antonio, Texas 78249
(210) 690-3700



Charles K. Wiggins, WSB# 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 REPLY BRIEF postage prepaid, via U.S. mail on the 25 day of August 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