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No. 236587-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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

Respondents.

vs.

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

Appellants,

BRIEF OF RESPONDENTS

JAMES S. BERG (WSBA #7812)
Attorney for Respondents
Erwin & Healthcare Properties, Inc.

James S. Berg, PLLC
105 North 3rd Street
Yakima, WA 98901
(509) 453-3322

TABLE OF CONTENTS

I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR.....	2
III. STATEMENT OF THE CASE	6
A. Introduction.	6
B. Plaintiffs Carey D. Erwin & Healthcare Properties, Inc.	8
C. Distinction Between a Senior Health Care “Consultant” Versus a Traditional Real Estate “Agent” or “Broker.”	9
D. The “Camlu Facilities.”	13
E. The “Additional Texas Facilities.”	16
F. The Consulting Agreement.....	17
G. Relevant Terms of the Agreement.	20
H. The “California Facilities.”	24
I. Mr. Erwin’s Introduction of The Ensign Group as a “Registered Company.”	25
J. Continuing Negotiations on All Facilities-- Camlu, Texas, and California	25
K. Lease Closings on the Camlu facilities, and the Two Abilene Facilities.....	27
L. Termination Letters.	28
M. Lease Closings on the California Facilities.	30
IV. ARGUMENT.....	30

A.	Under the Consultant Agreement, Plaintiffs Can Sue to Collect Commissions in Washington.....	30
B.	Choice of Law.....	32
1.	<u>The Consultant Agreement contains an effective choice of Washington law, and a “conflicts analysis” is not necessary.</u>	32
2.	<u>The parties not only expressly chose the substantive “local” law of Washington to govern the Agreement, they chose Washington as the “forum” state.</u>	34
3.	<u>The California licensing statutes do not apply to the Agreement. There is no “gap” in the Agreement as to enforceability, and even if a “gap” did exist, it would be filled pursuant to the parties’ express choice of Washington law.....</u>	38
4.	<u>Even if this Court were to adopt defendants’ five-step analysis, Washington law would still apply. California does not necessarily have a materially greater interest than Washington in this lawsuit, nor does this lawsuit offend California’s public policy.</u>	42
C.	The Statute of Frauds Does Not Apply. The Objective of the Agreement Was for Plaintiffs to Facilitate Lease Transactions, and None of the Transactions at Issue Involved the “Sale” or “Purchase” of Real Estate.....	45
D.	In the Alternative, this Court Can and Should Affirm the Trial Court’s Verdict on any Number of Legal Theories.	47
E.	This Court Should Award Plaintiffs’ their Attorneys Fees and Costs Incurred on this Appeal.....	48
IV. CONCLUSION		49

TABLE OF AUTHORITIES

Cases

<u>Baffin Land Corp. v. Monticello Motor Inn, Inc.</u> , 70 Wn.2d 893, 901, 425 P.2d 623 (1967)	32
<u>Beckendorf v. Beckendorf</u> , 76 Wn.2d 457, 465, 457 P.2d 603 (1969)	47
<u>Becwar v. Bear</u> , 41 Wn.2d 37, 246 P.2d 1110 (1952)	7
<u>Bell v. Hegewald</u> , 95 Wn.2d 686, 689, 628 P.2d 1305 (1981)	3, 8
<u>Bort v. Parker</u> , 110 Wn. App. 561, 571, 42 P.3d 980 (2002)	41
<u>Cochran v. Ellsworth</u> , 12 Cal. App. 429, 437, 272 P.2d 904 (1954)	44
<u>Colwell v. Etzell</u> , 119 Wn. App. 432, 440, 81 P.3d 895 (2003)	2, 8
<u>Cowiche Canyon Conservancy v. Bosley</u> , 118 Wn.2d 801, 808, 828 P.2d 549 (1992)	3, 4
<u>Davidson v. Hensen</u> , 135 Wn.2d 112, 115-117, 954 P.2d 1327 (1998)	41
<u>Gill v. Waggoner</u> , 65 Wn. App. 27, 276, 828 P.2d 55 (1992)	47
<u>Granite Equip. Leasing Corp. v. Hutton</u> , 84 Wn.2d 320, 327, 525 P.2d 223 (1974)	48
<u>Greaves v. Medical Imaging Systems, Inc.</u> , 71 Wn. App. 894, 898, 862 P.2d 643 (1993)	47
<u>Harberd v. City of Kettle Falls</u> , 120 Wn. App. 498, 512, 84 P.3d 1241 (2004)	4, 46
<u>Hunt v. Great Western Savings Bank</u> , 54 Wn. App. 571, 774 P.2d 554 (1989)	47
<u>In re Marriage of Thomas</u> , 63 Wn. App. 658, 660, 821 P.2d	

1227 (1991)	2
<u>Inland Foundry Co., Inc. v. Dept. of Labor & Industries</u> , 106 Wn. App. 333, 340, 24 P.3d 424 (2001)	2, 3, 4, 8, 22
<u>Johnson v. Rutherford</u> , 32 Wn.2d 194, 200 P.2d 977 (1948)	46
<u>LaMon v. Butler</u> , 112 Wn.2d 193, 200-201, 770 P.2d 1027 (1989)	47
<u>McGill v. Hill</u> , 31 Wn. App. 542, 547-548, 644 P.2d 680 (1982)	33, 34
<u>McIntyre v. Fort Vancouver Plywood Co., Inc.</u> , 24 Wn. App. 120, 124, 600 P.2d 619 (1979)	7
<u>Mulcahy v. Farmers Ins. Co. of Washington</u> , 152 Wn.2d 92, 100, 95 P.3d 313 (2004)	32
<u>Myers v. Arthur</u> , 135 Wn. 583, 238 P. 899 (1925)	46
<u>Nelson v. Kaanapali Properties, Inc.</u> , 19 Wn. App. 893, 578 P.2d 1319 (1978)	44
<u>Northwest Land & Investment, Inc. v. New West Federal Savings & Loan Assoc.</u> , 64 Wn. App. 938, 947, 827 P.2d 334 (1992)	48
<u>O'Brien v. Shearson Hayden Stone, Inc.</u> , 90 Wn.2d 680, 586 P.2d 830 (1978)	35, 36
<u>Parrott Mechanical, Inc. v. Rude</u> , 118 Wn. App. 859, 864, 78 P.3d 1026 (2003)	32
<u>Professionals 100 v. Prestige Realty, Inc.</u> , 80 Wn. App. 833, 842, 911 P.2d 1358 (1996)	2, 48
<u>Salisbury v. Alskog</u> , 144 Wn. 88, 256 P. 1030 (1927)	46
<u>State v. Black</u> , 100 Wn.2d 793, 802, 676 P.2d 963 (1984)	2
<u>Syputa v. Druck Inc.</u> , 90 Wn. App. 638, 954 P.2d 279 (1998)	48

<u>Vedder v. Spellman</u> , 78 Wn.2d 834, 835, 480 P.2d 207 (1971)	41
<u>Voicelink Data Services, Inc. v. Datapulse, Inc.</u> , 86 Wn. App. 613, 618, 937 P.2d 1158 (1997).....	32
<u>Whitaker v. Spiegel</u> , 95 Wn.2d 408, 623 P.2d 1147 (1981)	33

Statutes

<u>Cal. Bus. & Prof. Code</u> , §10136.....	42, 43
RCW 18.85.100.....	39

Other Authorities

<u>Restatement</u> §187	33, 35, 37
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Rules

RAP 10.3(a)(4)	6
RAP 10.3(c).....	4

I. INTRODUCTION

This brief responds to and rebuts defendants' Brief of Appellants. As the Court reviews the briefs submitted by the parties, it will be noted that appellants/defendants have selectively chosen only those passages of the factual record that support their analysis. In their Statement of the Case, respondents/plaintiffs have attempted to fill in the many gaps in defendants' factual review so that this Court has a better "flavor" of what was actually heard and considered by the trial judge, the Honorable Michael D. Schwab.

The Court will also notice that the primary thrust of defendants' legal argument is based upon the laws of California (and Texas), which they claim have over-riding importance to the resolution of this dispute. Plaintiffs also analyze the various conflict of laws issues, but do so within the context of the **totality** of Washington law. Contrary to defendants' position, the laws of those other states do not guide resolution of the dispute because the parties to the Consultant Agreement at issue, who were both well experienced in their respective businesses, agreed that Washington law would apply, that Washington courts would have jurisdiction, and that interpretation and enforcement of the Agreement would occur only in Washington. It follows that the outcome of this case will be governed under the laws and policy of this state.

II. ASSIGNMENTS OF ERROR

Defendants' assignments of error can effectively be segregated into three categories for purposes of critical analysis. The **first** category includes assignments #2 through #4. These all relate to Findings of Fact, specifically findings #20, #21, and #31. See Brief of Appellants, p. 2. It should be noted that assignment #2 not only cites finding #20 for something it does not state, but attempts to "create" a conclusion of law that was not made by the trial judge. Id.

Related to this first category, it is noted that findings of fact are reviewed under a "substantial evidence" standard of review. See State v. Black, 100 Wn.2d 793, 802, 676 P.2d 963 (1984); Inland Foundry Co., Inc. v. Dept. of Labor & Industries, 106 Wn. App. 333, 340, 24 P.3d 424 (2001). "Substantial evidence is evidence that is sufficient to persuade a fair-minded person of the truth of the declared premise." Colwell v. Etzell, 119 Wn. App. 432, 440, 81 P.3d 895 (2003).

"The law is well established that factual issues will not [simply] be retried on appeal." In re Marriage of Thomas, 63 Wn. App. 658, 660, 821 P.2d 1227 (1991). To the contrary, "findings of fact are presumed correct" and are accepted as "verities" when unchallenged. Professionals 100 v. Prestige Realty, Inc., 80 Wn. App. 833, 842, 911 P.2d 1358 (1996); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 808, 828 P.2d

549 (1992). “The appellant must present argument to the court why specific findings of fact are not supported by the evidence and must cite to the record to support that argument.” Inland Foundry Co., 106 Wn. App. at 340. The evidence and all reasonable inferences are construed in the light most favorable to the respondent. See Bell v. Hegewald, 95 Wn.2d 686, 689, 628 P.2d 1305 (1981).

Against this standard, defendants have not properly argued and supported assignments #2 through #4. Defendants do not even acknowledge the “substantial evidence” standard within their brief. The Argument section of defendants’ brief focuses exclusively on legal issues, most notably choice of law and the statute of frauds. Defendants offer no meaningful analysis or critique as to whether the trial court’s findings are supported by sufficient evidence. Rather, defendants refer to the challenged findings of fact by weaving them into defendants’ arguments against the trial court’s conclusions of law. In this regard, what defendants are really offering is legal argument. See Brief of Appellants, pp. 21-49.

For example, at page 25, defendants simultaneously argue against finding of fact #20 and conclusion of law #11. The inclusion of conclusion of law #11 is curious, as it is not identified as an “erroneous” conclusion in defendants’ Assignment of Error section. See Appellants’

Brief, pp. 2-4. Be that as it may, no distinction is made as far as applicable standards of review. Defendants merge the two into a single proposition, by stating: “[T]hese **findings** ignore the statutory definitions of brokerage services.” (Emphasis added.) See Brief of Appellants, p. 25.

This argument is entirely legal-based; and, against the “substantial evidence” standard, it is not a legitimate challenge to finding of fact #20. See e.g., Inland Foundry Co., 106 Wn. App. at 340. On the whole, defendants employ this same approach throughout their brief. See e.g., Brief of Appellants, pp. 42-43. Plaintiffs respectfully submit that these assignments should be dismissed, and the scope of this appeal should be limited to the legal issues argued in defendants’ brief.¹

The **second** category of assignments of error includes assignments #5, #6, and ##11-19. See Brief of Appellants, pp. 2-3. Notably, defendants offer no argument why assignment #6, which contests the trial court’s conclusion that Mr. Erwin was reasonably able to rely upon the written and oral statements of defendants’ controller, William Sleeth, is wrong. Assignments #5 and ##11-19 contest the trial court’s conclusions that the “California facilities” were included in and covered by the Consultant Agreement. Defendants’ analysis in this regard relies

¹ Defendants cannot cure this failure via their reply brief. Proper argument must be presented within the opening brief. See RAP 10.3(c); Cowiche Canyon, 118 Wn.2d at 808; Harberd v. City of Kettle Falls, 120 Wn. App. 498, 512, 84 P.3d 1241 (2004).

primarily upon a Statute of Frauds argument. Plaintiffs' response is set forth below at §IV, C. See infra, pp. 45-46.

The **third** category includes assignments of error ##7-10, all of which question the trial judge's ruling that Washington law, rather than California or Texas law, applies to the interpretation and enforcement of the Consultant Agreement. See Brief of Appellants, p. 3. These assignments of error are based upon conclusions of law # 9, #13, and #14. This category represents the primary thrust of defendants' appeal. Plaintiffs' response is found generally at §IV, ¶¶A – B. See infra, pp. 30-44.

With regard to this category, it is noteworthy that plaintiffs do **not** contest conclusions of law #10, #11, #13, #16, #17, #18, #19, #2,1 and #27. These conclusions, in part, include reference to: plaintiffs' contact with Washington and that a "good deal" of the work performed related to the subject transactions was performed in Washington (C/L #10); that Mr. Erwin used his expertise to facilitate the various interactions between Mr. Cotter and Ensign (C/L #17); that the services of Mr. Erwin led directly to the leasing of the Abilene facilities (C/L #18)²; and that Ensign

² The fact that defendants did not assign as error conclusion of law #18, which held that Mr. Erwin's services led directly to the closing the Abilene leases during the term of the Agreement, but contested conclusion #27, which awarded plaintiffs consulting fees for those leases, is curious.

was a “registered” company of plaintiffs, as that term was used in the Consultant Agreement. (C/L #21). CP 38-40.

The remaining assignments of error, which include assignments #1 and ##20-22, merely rely upon the outcome of the previously identified assignments of error for resolution.

III. STATEMENT OF THE CASE

A. Introduction.

Out the outset, plaintiffs must object to defendants’ Statement of the Case as not being a “fair statement of the facts . . . without argument,” as required by RAP 10.3(a)(4). In both substance and approach, defendants’ Statement of the Case is misleading and contrary to the trial court’s findings of fact.

For example, defendants recount portions of testimony by Mr. Cotter that were rejected by the trial court as non-credible. In relevant part, defendants write, “Cotter was adamant that he and Erwin did not discuss Erwin representing Cotter on the Camlu transaction. . . . Erwin, however, believes that he represented Cotter. . .” Brief of Appellants, p. 10. These representations are directly refuted by finding of fact #24, which is unchallenged and stated:

At this point, Mr. Erwin was representing Camlu with regard to securing the leasehold transfers of the Texas “Camlu” properties to The Ensign Group and was representing

Mr. Cotter with regard to negotiating the existing leases for a longer term with the Ensign Group.

CP 32 (F/F #24).

Defendants also claim the California facilities were only “a future prospect” and that Mr. Erwin “concedes” he was never instructed to start marketing the California facilities or asked to include them within the Consultant Agreement. See Brief of Appellants, pp. 11-12. In fact, findings of fact #21 and #30-#31 clearly establish that the California facilities were discussed from the inception of the Consultant Agreement, and that Mr. Cotter “gave the signal through Mr. Sleeth that Mr. Erwin should move ahead with work on the California facilities.” CP 31, 33 (F/F ##21, 30-31, 33).

The Court should also note that defendants attempt to improperly “bootstrap” factual disputes into this appeal, either directly or by implication. “An assignment directed to a conclusion of law does not bring up for review the facts upon which it is founded.” McIntyre v. Fort Vancouver Plywood Co., Inc., 24 Wn. App. 120, 124, 600 P.2d 619 (1979) (citing Becwar v. Bear, 41 Wn.2d 37, 246 P.2d 1110 (1952)). “When the trial court has weighed the evidence, review is limited to determining whether the trial court’s findings are supported by substantial evidence, and, if so, whether the findings support the court’s conclusions

of law and judgment.” Colwell v. Etzell, 119 Wn. App. at 440. “No element of discretion is involved.” Bell v. Hegewald, 95 Wn.2d at 689. Of course, such a determination is only necessary when proper argument has been presented, which defendants have not done. See Inland Foundry Co., 106 Wn. App. at 340.

Having dispensed with this preliminary issue, plaintiffs offer the following Statement of the Case.

B. Plaintiffs Carey D. Erwin & Healthcare Properties, Inc.

At all times material hereto, plaintiff Carey D. Erwin was a legal resident of the state of Washington. CP 28 (F/F #1). Mr. Erwin has been a licensed real estate broker in Washington since 1992. RP 10, 13; CP 28 (F/F #1); Ex 63. He was previously licensed as a real estate agent in Oregon from approximately 1985 through 1992. RP 12-13. He was also briefly licensed as a real estate agent in California in 2001. RP 13; CP 28 (F/F #1).

Mr. Erwin is the founder and sole shareholder of plaintiff Healthcare Properties, Inc. RP 9-11; CP 28 (F/F #1). At all times material hereto, Healthcare Properties has been a duly-licensed corporation in the state of Washington. RP 11-12; CP 28 (F/F #1).

Since 1987, Mr. Erwin has worked exclusively as a real estate consultant in the senior health care industry. RP 15-16; CP 28 (F/F #2).

As of trial, he had closed and earned commissions on transactions involving approximately 90 to 95 facilities. RP 25-26; see also CP 28 (F/F #2). He has represented as many as 40 different entities or individuals in the industry, including buyers, sellers, lessors, and lessees. RP 26; CP 28 (F/F #28). In addition, Mr. Erwin has owned a nursing home in Salem, Oregon, since approximately 1997. RP 24.

C. Distinction Between a Senior Health Care “Consultant” Versus a Traditional Real Estate “Agent” or “Broker.”

The senior health care industry is complex and specialized. CP 28 (F/F #2). A high degree of expertise is required to facilitate a senior health transaction. See RP 16-18. For example, Mr. Erwin testified that consultants need to understand state-level reimbursement trends, health care surveys and Medicaid formulations, all of which impact the value and feasibility of a transaction. RP 17. Consistent with this, Mr. V. Ray Lavender, who is also a senior health care consultant (RP 306-307), testified as follows:

There’s a lot to know. For example, if you’re doing something that I do, you can’t just be a real estate person. Having a real estate license doesn’t make you qualified to do what I do. Knowing the business, knowing third-party reimbursement, knowing how the marketplace may or may not value product. Those are all special things to this industry. . .

RP 318; see also 319. Likewise, Mr. Andrew Martini, an owner and operator of several senior facilities who has periodically retained

Mr. Erwin (RP 282-288), testified that he expects the following from a consultant:

I expect them to do due diligence on the property, look at -- compile a package of basic materials, including current and at least one year, prior year, financials, health, state health and welfare survey reports, safety code inspections, which include fire inspections and that sort of thing, cost reports from both Medicaid and Medicare, lease documents if there's a lease involved, debt service analysis, if it's a purchase, and if there's underlying debt and whether or not that debt is assumable. . .

I also expect them to tour the facility and tell me generally what kind of condition it's in. . .

The vernacular in and of itself is fairly complex. For example, one of the key factors we look at is a labor utilization, and we have a phrase called PPD or per patient, per day, and we want to see expenses broken down in that kind of manner so that we can compare facilities. . . We don't necessarily look at net income. It varies widely by state. It may or may not be GAAP prepared. So we look at a number like EBITDA, which is earnings, before interest[,] tax, depreciation, [and] amortization. . . We want somebody to know what a state survey is, we want them to be able to look at that and look at the types of situations that they can point out any real problems to us. . .

So the broker should be very aware of the current licensure status and certification status of a facility.

RP 289-292; see also CP 28 (F/F #2).

Against this backdrop, Mr. Erwin testified that it would almost be a waste of time for a traditional real estate agent to try to broker a senior health transaction. RP 17-18. The field is just too specialized and unique for a general agent. RP 18. Consistent with this, Mr. Lavender explained,

My experience has been that the skilled nursing home industry is a fairly closed industry. If you're in it, then there's a network of people that you typically know and can work within. If you're outside it, it's, I would think it's difficult to--I have known some people who have tried to get into it and never really was [*sic*] able to make a go of it.

RP 316; see also 317.

Mr. Lavender also testified that there are a limited number of "players" in the senior health field. RP 316-317. Figuring out who these "players" are can be difficult. Unlike residential and commercial listing services, the senior health industry does not maintain a database of available properties and interested tenants. RP 319-320. Consultants search for interested parties on a regional or nationwide scale, and transactions can involve parties from different states. See RP 19-23, 28-29, 32-34, 287-288, 320-321; see also CP 30 (F/F # 11).

Consultants devote themselves to building relationships with owners, operators, and other consultants. See RP 21-23. A broad network of contacts is vital and takes years to establish. RP 21-23, 320-322. This is a principal reason so few consultants exist. RP 317-318. Throughout his close to 20 years in the field, Mr. Erwin has had contact with just 15 to 20 experienced, trustworthy consultants. RP 24-25.

All of this explains the distinction between a general real estate "agent" or "broker," versus a "consultant" in the senior health field.

Consultants are industry specialists. Similar to a broker, part of a consultant's job is to find and bring parties together. More than this, however, consultants are hired for their ability to cultivate and facilitate transactions. Mr. Erwin explained the distinction, in part, as follows:

Well, a broker, in my mind . . . is someone who may have a real estate license, that has a broker license, but who is functioning in the general scope of real estate, you know, they list properties for sale. They submit them into a Multiple Listing Service, they share those listings readily with other people, other agents within the industry, they put "for sale" signs out, they advertise the property, and, again, they do so in a market where there are thousands, literally, hundreds or thousands of other agents or brokers that assist and work diligently to try and market that public property. . . .

In my line of work, there are not very many people that do it, and the extra knowledge that it takes to do it, many times the advice that you are giving people based on your experience, which you share with them, the knowledge that you bring to the table far exceeds that of someone that would go down to a local real estate agent or company to speak with one of the their particular agents or brokers. . . .

RP 29-30; see also 30-31, 116, 289-292, 317-321.

Messrs. Lavender and Martini confirm that Mr. Erwin is an experienced and competent health care consultant. RP 294-295, 320-321; see also CP 28 (F/F #2). Mr. Erwin testified that having closed transactions on 90 to 95 facilities places him in the top five to ten percent nationwide in terms of experience. RP 27.

D. The “Camlu Facilities.”

Mr. Erwin first met defendant James Cotter in 1997 or 1998. RP 36-38; CP 31 (F/F #17). Mr. Erwin was representing Camlu Care Centers, Inc., which desired to transfer its leases on three Texas facilities. RP 36, 59; CP 30-31 (F/F ##10, 17). Specifically, the facilities were located in Temple, McAllen, and San Antonio and were collectively referred to as the “Camlu facilities” during trial. RP 38, 267; CP 29 (F/F #7). Approximately three years remained on the leases. RP 39; see also 590. As it turned out, the facilities were owned by Mr. Cotter. RP 38; CP 29 (F/F #5); see also RP 592.

Mr. Erwin and Camlu executed a consultant agreement, which was generally the same as the Consultant Agreement later entered into by plaintiffs and defendants. RP 40; CP 30 (F/F #10); see also CP 32 (F/F #25). Interest in the facilities was low, in part because the facilities were older and in part because the health care industry was going through a difficult period. RP 41.

Mr. Erwin contacted Mr. Steven Guiland, Director of Acquisitions at Centennial Health Care in Atlanta, Georgia. RP 41-42; CP 30 (F/F ##13-14). Centennial was not interested in the facilities, but Mr. Guiland subsequently communicated the opportunity to Mr. Lavender. RP 42, 324; CP 30 (F/F #13). At the time, Mr. Erwin did

not personally know Mr. Lavender, although he had heard his name within the industry. RP 42.

Mr. Lavender owned and operated a consulting company called The Sidney Group. RP 89. He was the consultant for a relatively new operating company known as The Ensign Group. RP 42, 46, 314-315, 325; CP 29 (F/F #8), 30 (F/F #13). Among Ensign's owners was Mr. Roy Christiansen, a prominent person within the health care industry whom Mr. Erwin knew from prior transactions. RP 46; see also CP 29 (F/F #8). Mr. Erwin had previously heard Mr. Christiansen was forming a new operating company named Ensign. See RP 46.

Ensign was interested in the Camlu facilities. See RP 43, 325-326; CP (F/F #16). On February 8, 1999, Mr. Erwin mailed a financial and marketing package for the Camlu facilities to Mr. Lavender. RP 43, 80-81; Ex 66; CP 30 (F/F #15). Messrs. Erwin and Lavender both testified that this process, starting with the initial contact to Mr. Guiland, is an example of how consultants rely upon their established network of contacts to facilitate transactions. RP 42-43, 326; CP 30 (F/F #14).

During this time, Mr. Erwin learned the Camlu facilities were owned by Mr. Cotter and that his approval would be required for any change in operations. RP 47; CP 30 (F/F #12); see also RP 327-328, 580. Moreover, the facilities needed repairs and Camlu was requesting a sizable

lump sum payment from Ensign. Ensign was not willing to make these commitments without an extension of the leases. RP 47-54, 334-335; CP 30 (F/F #16).

Mr. Erwin approached Mr. Cotter about restructuring the leases. RP 50-54. Mr. Cotter was willing to extend the leases, but in exchange felt he, rather than Camlu, should receive the bulk of Ensign's lump sum payment. RP 50-52; see also 580-582. This also made sense from Mr. Erwin's perspective. RP 50-51. Mr. Cotter asked Mr. Erwin to negotiate new lease terms with Ensign on his behalf, and Mr. Erwin agreed. See RP 50-51; Ex 8 (Consultant Agreement).

At this point, Mr. Erwin was representing Camlu's interests in negotiating the buyout by Ensign, and also Mr. Cotter's interests in restructuring the leases with Ensign. RP 52-54; CP 32 (F/F #24). Both were aware of Mr. Erwin's representation of the other. RP 54, 180-181. In fact, Mr. Erwin testified, "It was essential in closing the transaction." RP 54.³

Mr. Cotter instructed Mr. Erwin to work with his business "controller," Mr. Bill Sleeth. RP 55-56, 461, 463. Mr. Sleeth was

³ The interests of Mr. Cotter and Camlu were not conflicting or on opposite sides of the same transaction. See RP 52-54. Mr. Erwin's representation of both Camlu and Mr. Cotter was completely ethical. For clarification, any references to Mr. Erwin having a "dual role" should not be interpreted as implying anything unethical or illegal. Compare Sherwood B. Korssjoen, Inc. v. Heiman, 52 Wn. App. 843, 850, 765 P.2d 301

Mr. Cotter's "right-hand man," and Mr. Cotter deferred to him on most day-to-day issues involving the facilities. RP 55, 58-60; CP 31 (F/F #17). Mr. Cotter instructed Mr. Erwin to go through Mr. Sleeth regarding the dealings with the "Camlu," "the other Texas" and "California" facilities. RP 55-56. In fact, Mr. Erwin began corresponding with Mr. Sleeth in December of 1998 related to restructuring the leases on the Camlu facilities. RP 56-60; Ex 3.

E. The "Additional Texas Facilities."

During this same period, Mr. Cotter was experiencing difficulties with other facilities in Texas, Oklahoma, and California. RP 61-62; CP 31 (F/F #18). The Texas facilities included Lytle, Fredericksburg, and Abilene, which was two separate facilities at a single location. See RP 64, 90; see also 689-691. At trial, these properties were collectively referred to as "the other Texas facilities," "the Texas Health Enterprise facilities," or simply as "the Texas facilities." See e.g., RP 56, 65, 266-267, 411-412, 728; see also Ex 8 (Consultant Agreement, Addendum "A").

Messrs. Cotter and Sleeth mentioned the possibility of Mr. Erwin working on these facilities as well. RP 68, 84; CP 31 (F/F #21). Mr. Erwin testified that Mr. Cotter "wanted to piggyback all of these other buildings -- the Lytle, Abilene and Fredericksburg -- if he could into a deal

(1998) (discussing the term "dual agency").

and piggyback it with the Camlu transaction [with Ensign].” RP 64; see also 62-65. Notably, this was as early as mid-January, 1999. See Ex 4-5.

F. The Consulting Agreement.

On February 9, 1999, Messrs. Cotter, Sleeth, and Erwin met at Mr. Cotter’s house in Rancho Mirage, California. RP 68-70. By this time, Mr. Erwin had been representing Mr. Cotter’s interests in restructuring the Camlu leases since December 1998. See RP 60-62; Ex 3. It was at this meeting that Messrs. Cotter and Erwin ultimately signed the Consultant Agreement at issue. RP 68-70, 596-597; Ex 8 (Consultant Agreement); CP 31 (F/F #19).

Mr. Erwin had previously mailed a draft of the Agreement to Messrs. Cotter and Sleeth so they could review it prior to the February 9th meeting. See RP 66-72; Exs 64-65. In a cover letter to Mr. Sleeth, Mr. Erwin wrote, in relevant part: “In addition I have enclosed an Engagement Agreement^[4] with regards to **the other nursing facilities** Mr. Cotter owns in Texas and Oklahoma that he has asked me to locate a tenant for.” (Emphasis added.) Ex 64.

At Mr. Sleeth’s direction, Mr. Erwin listed Cotter Health Centers as the “client.” RP 69; Ex 8 (Consultant Agreement, p. 1); CP 32 (F/F

⁴ The terms “Engagement Agreement” and “Consultant Agreement” were used interchangeably by Mr. Erwin. See RP 67.

#25). By its terms, the Agreement did not specify the client as a corporate entity. Ex 8 (Consultant Agreement); CP 32 (F/F #26).

Mr. Erwin also mailed Messrs. Cotter and Sleeth a blank copy of Addendum “A.” RP 67; Ex 7. Mr. Erwin asked Mr. Sleeth to fill in the facilities they envisioned Mr. Erwin working on, which Mr. Sleeth said he would do. RP 72-73. As explained later, in addition to any properties listed on Addendum “A,” the Agreement specifically contemplated that additional facilities could be added to the Agreement subsequent to its execution. Ex 8 (Consultant Agreement, p. 1, ¶3, p. 3, ¶18) CP 33 (F/F #30).

During the February 9th meeting, the parties discussed the Camlu facilities, the additional Texas facilities, and certain other facilities in California and Oklahoma. RP 84-86; CP 31 (F/F #21). Following the meeting, Messrs. Erwin and Sleeth traveled to Texas for a week to tour the Camlu and additional Texas facilities. RP 56, 84, 418-419.

Mr. Erwin testified that the parties went over the Agreement “word for word,” and that he periodically stopped to ask if Messrs. Cotter or Sleeth had any questions. RP 69, 77. At no time did Messrs. Cotter or Sleeth lodge any objection or indicate they did not understand the terms of the Agreement. RP 69-70, 77.

Both sides signed the Agreement during the February 9th meeting. RP 70-71; Ex 8 (Consultant Agreement, p. 5); CP 31 (F/F #19).⁵ Mr. Erwin signed the Agreement as “President” and on behalf of “Healthcare Properties, Inc.” RP 70-71; Ex 8 (Consultant Agreement, p. 5); CP 31 (F/F #19). In contrast, Mr. Cotter signed the Agreement in his personal name and without any reference to Cotter Health Centers. Specifically, Mr. Cotter placed his signature on the line marked “Principal/Officer – Selling Entity,” left the “Of” line blank, and simply wrote “Owner” on the line marked “Title.” Ex 8 (Consultant Agreement, p. 5); CP 31 (F/F #19); see also RP 261-263, 660-661; CP 32 (F/F #26). Mr. Cotter admits, and Mr. Erwin confirms, that Mr. Erwin did not tell him how to sign the Agreement. RP 660-661, 71, 263.

In addition, Messrs. Cotter and Sleeth had not completed Addendum “A” by the February 9th meeting. RP 72; CP 31 (F/F #21). Following the meeting, Mr. Erwin returned to his office in Vancouver, Washington and listed the three Camlu facilities and the four additional Texas facilities on Addendum “A.” RP 72-73, 90-92; Ex 8 (Consultant Agreement, Addendum “A”); CP 32 (F/F #22); see also RP 82-83.

⁵ The first paragraph of the Agreement contains blank lines for the month and date of execution, as well as a stated year of “1998.” See Ex 8 (Consultant Agreement, p. 1). Nevertheless, it is undisputed that the Agreement was signed on February 9, 1999.

On February 19th, Mr. Erwin mailed a copy of the executed Agreement, including the completed Addendum “A,” to Messrs. Cotter and Sleeth at Cotter Health Centers’ office in Sebastopol, California. RP 73, 88-92; Ex 10; CP 32 (F/F #22). Within his cover letter, Mr. Erwin specifically stated: “Enclosed you will find a copy of our Agreement wherein I have identified all 7 facilities on Addendum ‘A.’” RP 90-91; Ex 10 (p. 2). At no time did Messrs. Cotter or Sleeth object to Addendum “A” or the inclusion of the additional Texas facilities within the Agreement. RP 92-93; CP 32 (F/F ##22-23).

G. Relevant Terms of the Agreement.

The purpose and intent of the Consultant Agreement was completely different from a typical real estate listing agreement. Specifically, paragraphs 10 and 15 through 17 provided as follows:

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.

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) with 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.

(Emphases added.) Ex 8 (Consultant Agreement, p. 2, ¶10, p. 3, ¶¶15-17);
CP 31 (F/F #20).

Paragraph 3 established the original term of the Agreement and, in relevant part, provided:

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 fees stated (to follow) to Healthcare Properties, Inc. Facility(ies) to be sold or leased are commonly known as (see Addendum “A”).

(Emphases added.) Ex 8 (Consultant Agreement, p. 1, ¶3); RP 73.

Paragraph 7 included an express choice of jurisdiction and applicable law:

Any dispute regarding the interpretation 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.

(Emphasis added.) Ex 8 (Consultant Agreement, p. 2, ¶7); RP 76.

Recognizing that Mr. Erwin was licensed only within Washington, paragraph 9 provided, in relevant part, as follows:

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.

(Emphasis added.) Ex 8 (Consultant Agreement, p. 2, ¶9); RP 76-77.

Notably, Mr. Lavender testified that he includes a similar “waiver” provision in his consulting agreements. RP 323. Messrs. Erwin, Lavender, and Martini all testified it is not practical for a consultant to maintain licensed in every state. RP 31-32, 294-295, 321-324; see also CP 31 (F/F #20), 38 (C/L #11).⁶

⁶ Although designated as a conclusion of law, plaintiffs submit that C/L #11 also contains fact-based findings. “If a determination concerns whether evidence shows that something occurred or existed, it is properly labeled a finding of fact.” Inland Foundry Co., 106 Wn. App. at 341. Specifically, plaintiffs submit the trial court’s finding that it is “impractical for a consultant to be licensed in every state where he might do business” is a finding of fact.

In addition to the properties identified on Addendum “A,” paragraph 18 of the Agreement contemplated that additional facilities could subsequently be included within the Agreement:

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. . .

Ex 8 (Consultant Agreement, p. 5, ¶18); CP 33 (F/F #30); see also RP 77-79, 108-109, 263-265, 269-270.

Of final importance, paragraph 21, in relevant part, provided as follows:

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. . .

(Emphases added.) Ex 8 (Consultant Agreement, p. 4, ¶21). Notably, paragraph 21 applies both to the properties listed on Addendum “A,” as well as any “other healthcare related property(ies).” Id.⁷

⁷ The Agreement also specified when and how Mr. Erwin’s commissions were to be calculated, and included an attorneys’ fees and interest clause. See Ex 8 (Consultant Agreement, p. 1, ¶¶4-5); see also CP 34 (F/F ##36-38, 40).

H. The “California Facilities.”

Following execution of the Agreement, Mr. Sleeth forwarded information to Mr. Erwin on four California facilities. These facilities were located in Cloverdale, Willits, Palm Springs, and Sonoma and were collectively referred to as the “Care facilities” or simply as the “California facilities.” RP 99-102, 423; CP 33 (F/F ##29, 31).

Mr. Erwin contacted Mr. Lavender to gauge Ensign’s interest in the California facilities. Mr. Lavender reported that Ensign was quite interested. As with the other prospective transactions, Mr. Erwin supplied information on the California facilities to Mr. Lavender and from this point forward, all future negotiations included the California facilities. RP 106-107, 123-150; Exhibits 12,13, 17-40, 51-56.

Upon weighing the evidence, the trial court concluded that Mr. Cotter “gave the signal through Mr. Sleeth that Mr. Erwin should move ahead with work on the California properties.” CP 33 (F/F #31). In this regard, the court specifically noted the significant correspondence between the parties discussing the California facilities. *Id.* (citing Exs. 11-13, 17-40, 51-56).⁸

⁸ Defendants’ representation that “Cotter’s intent was that the Agreement would include only the problematic facilities in Texas and Oklahoma” is inconsistent with the trial court’s findings of fact, and should be rejected. Compare Brief of Appellants, p. 9; CP 33 (F/F #31).

I. Mr. Erwin's Introduction of The Ensign Group as a "Registered Company."

On April 21, 1999, Mr. Erwin formally introduced The Ensign Group as a "registered company" pursuant to paragraph 3 of the Agreement. RP 113-114. In relevant part, Mr. Erwin wrote,

Ensign Care, Inc. [*sic*] is owned primarily by Mr. Roy Christiansen who has a reputation for success in this industry that few can match. I am pleased to be able to introduce this company as a potential tenant for Jim Cotter and believe that Ensign Care would continue to operate the nursing facilities in a responsible fashion.

Ex 15; see also CP 39 (C/L #21). Notably, defendants do not contest conclusion of law #21.

Mr. Lavender confirms that it was exclusively through Mr. Erwin that he and Ensign learned of the availability of the facilities in question. RP 327-329, 363-364. This is confirmed by Mr. Erwin. RP 154. Furthermore, it was Mr. Erwin, and Mr. Erwin alone, who brought Ensign "to the table." RP 154.

J. Continuing Negotiations on All Facilities--Camlu, Texas, and California

As of June of 1999, it was becoming increasingly clear that the current California tenant, Sun Healthcare, was headed for bankruptcy. RP 108-111, 356; see also CP 34-35 (F/F #41). Mr. Cotter knew Mr. Erwin had a long-standing relationship with Sun Healthcare's CEO,

and asked Mr. Erwin to start negotiations to free the California facilities. See RP 108-112; Ex 16.

In July, Mr. Erwin arranged a meeting at Mr. Cotter's home in Palm Springs, California between himself and Messrs. Cotter, Sleeth, Lavender, and Roy and Christopher Christiansen of Ensign. RP 107-108; 115-116, 330-331; CP 33 (F/F #33). At this meeting, the parties discussed all of the prospective Ensign leases--the Camlu facilities, the additional Texas facilities, and the California facilities. RP 120-122, 338-341; CP 33 (F/F #33).

Negotiations continued over the next several months. The parties exchanged numerous letters and memos related to all of the prospective leases. This correspondence was always originated by, or delivered through, Mr. Erwin. See Exs 20-37; RP 344-345. Plaintiffs will not summarize the series of correspondence that are Exhibits 20-37. A review of that correspondence, however, clearly shows the chronology and progression of the continued negotiations related to the subject facilities.

As of August 4, 1999, it appeared that all nine of the prospective leases were near finalization. Mr. Sleeth faxed a letter to Mr. Erwin that, in relevant part, read as follows:

A couple hours after we talked, I was able to talk to Jim regarding the Abilene facility. As we discussed before, all the terms discussed in my memo to you dated July 28 and the

response from Ray Lavender dated July 29, are acceptable to Jim Cotter. . .

If we have a positive response from Ray Lavender today, I will turn this all over to Rich Jenkins and we will go forward with the finalization of the leases. . .

I look forward to a positive response from The Ensign Group regarding the entire proposal.

Ex 28; RP 134-137. In addition, Mr. Sleeth's fax cover stated, "I believe this will put this one in the sack." Ex 30; RP 137.

K. Lease Closings on the Camlu facilities, and the Two Abilene Facilities.

Between August and September, 1999, the new leases for the Camlu facilities were finalized and signed. CP 33 (F/F #34). Camlu and Mr. Cotter shared payment of Mr. Erwin's commission (which commission is not at issue in this case). Id.; see also Exs 38-39.

On August 18, 1999, Ensign signed a lease agreement for the two Abilene facilities, which were part of the additional Texas facilities. CP 34 (F/F #35); Ex 50. The Fredericksburg and Lytle facilities could not be freed from the current tenant, Texas Health, which had also entered bankruptcy. See RP 627-628. In addition, the new Abilene lease could not take effect until Ensign obtained a Texas operating license. RP 629-632; CP 34 (F/F #35). In the meantime, Ensign and Mr. Cotter

signed a management agreement that allowed Ensign to operate the facilities under Mr. Cotter's license. RP 629-632; Ex 76; CP 34 (F/F #35).

The Abilene lease was closed within the original nine-month term of the Agreement. See Ex 50; Ex 8 (Consultant Agreement, p. 1, ¶3). Notably, however, Mr. Erwin was not notified and was not paid his commission. See CP 34 (F/F ##36-37).

Mr. Erwin explained that the Abilene and California leases had moved to a point where he had nothing left to do. From a consulting-standpoint, the relevant lease terms were established. It was now up to the parties' attorneys to sort out the licensing issues and evict any holdover tenants. Mr. Erwin tried to stay in contact with Mr. Sleeth and offer any help he could, but Mr. Sleeth's only response was to say "the attorneys are working it out, don't worry about it." See RP 149-153; CP 34 (F/F #41). Consistent with this, Mr. Lavender also testified there was not much for him to do either, and he just tried to maintain a dialogue. RP 358-359.

L. Termination Letters.

To atone for the unavailability of the Fredericksburg and Lytle facilities, it was agreed that the monthly rents for the California facilities would be reduced. RP 138-140; see also Ex 31. On August 20, 1999, Mr. Cotter's attorney, Richard Jenkins, sent proposed leases for the California facilities to Ensign. See Ex 37, 43; CP 34 (F/F #39). Ensign

was ready and willing to close, but Mr. Cotter was still in the process of trying to evict Sun Healthcare. See CP 34-35 (F/F #41).

Then, in early March of 2000, Mr. Erwin received a letter from attorney Jenkins. RP 158-160; Ex 42. In relevant part, Mr. Jenkins' letter provided as follows: "You are hereby notified by Cotter that any and all contracts, agreements, listings, or other arrangements between you and Mr. Cotter or any of the Cotter affiliates **are terminated as of March 6, 2000.**" (Emphasis in original.) Ex 42; see also RP 158-159. This came as a complete surprise to Mr. Erwin. RP 159-160.

Messrs. Erwin and Lavender both testified that they had no prior notice that there was a distinction between "Mr. Cotter" and "Cotter Health Centers" related to ownership of the facilities. RP 99, 152-159, 362; Ex 44. All of the correspondence between the parties simply referred to "Mr. Cotter." Exs 3-37, 51-57. In addition, Mr. Cotter signed the Consultant Agreement simply as "Owner." RP 71, 263; CP 32 (F/F #26).

Mr. Jenkins also sent a letter to Ensign, dated March 7, 2000, withdrawing the proposed lease agreements for the California facilities. RP 357-358; Ex 43; CP 35 (F/F #43). Mr. Lavender testified that, from his perspective, the parties had previously struck a deal and Mr. Cotter was now trying to back out. See RP 359-363.

M. Lease Closings on the California Facilities.

In December of 2000, Mr. Cotter successfully obtained a judgment against Sun Healthcare. RP 647-648. Mr. Cotter then resumed negotiations with Ensign. On February 9, 2001, Mr. Cotter and his affiliate companies executed lease agreements with Ensign for the California facilities. See Exs 46-49; see also CP 35 (F/F #36). The leases took effect on November 16, 2001, after the facilities were released from Sun Healthcare's bankruptcy case. CP 35 (F/F #46).

These leases were generally consistent with the terms previously negotiated by Mr. Erwin. See RP 124-125. As with the Abilene transaction, Mr. Erwin was not notified or paid any commissions on the closing of the California leases. See CP 35-36 (F/F #47).

IV. ARGUMENT

A. Under the Consultant Agreement, Plaintiffs Can Sue to Collect Commissions in Washington.

The primary thrust of defendants' analysis is that because neither plaintiff was a licensed real estate broker in Texas or California at material times hereto, they should be precluded from maintaining suit to collect commissions. In fact, defendants' analysis has merit only if the question before this Court is plaintiffs' right to sue to collect commissions in either **Texas or California**. However, and as emphasized throughout plaintiffs'

argument, suit was not filed in Texas or California. Rather, it was filed in **Washington**, pursuant to an effective jurisdiction and choice of law provision contained within the Consultant Agreement. Ex. 8 (Consultant Agreement, p. 2, ¶7).

The trial judge upheld the validity of that Consultant Agreement and, more particularly, the choice of law provision, paragraph 7. CP 37-38, (C/L ##3, 4, 14, 2, and 9). The trial judge also found that paragraph 7 was clear, unambiguous and did not violate the public policy of Texas, California or Washington, and by virtue of the entire Agreement, it was unnecessary to use either Texas or California law to resolve the issues in this case. Id. (C/L ##2, 13 and 14). Therefore, it is respectfully submitted that defendants improperly couch the question in terms of what the laws of Texas and/or California provide related to maintaining actions in those states.

Defendants also present a defective analysis in addressing choice of law issues. In fact, 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. Answering that question confirms that the Amended Findings of Fact, Conclusions of Law, and Judgment should be upheld.

B. Choice of Law.

1. The Consultant Agreement contains an effective choice of Washington law, and a “conflicts analysis” is not necessary.

In Washington, the general rule is an express choice of law clause will be given effect. Parrott Mechanical, Inc. v. Rude, 118 Wn. App. 859, 864, 78 P.3d 1026 (2003); as corrected April 6, 2004; see also Voicelink Data Services, Inc. v. Datapulse, Inc., 86 Wn. App. 613, 618, 937 P.2d 1158 (1997). It is only “[i]n the absence of an effective choice of law by the parties” that a conflicts analysis is required. Mulcahy v. Farmers Ins. Co. of Washington, 152 Wn.2d 92, 100, 95 P.3d 313 (2004); see also Baffin Land Corp. v. Monticello Motor Inn, Inc., 70 Wn.2d 893, 901, 425 P.2d 623 (1967). In that defendants have already acknowledged that Paragraph 7 of the Agreement is an express choice of law provision, (see Brief of Appellant, p. 27), there is no need for this Court to go through the “conflicts analysis” suggested by defendants. See Brief of Appellants, p. 26.

In this regard and at the outset, it is important to recognize the difference between a “conflicts analysis” versus application of an express choice of law clause. Defendants incorrectly apply a conflicts analysis to the question of whether an express choice of law provision violates the public policy of the state with the most significant contacts.

See Brief of Appellant, p. 28-29.⁹ In fact, the rule in Washington is that the validity of an express choice of law clause, which everyone admits is present in this case, is dependent upon whether it violates the public policy of the “forum state.” See C/L #2; Appellant’s Brief, pp. 2-3. This distinction is critically important in reviewing the trial court decision.

As stated, “[a]n express choice of law clause in a contract will be given effect, as expressing the intent of the parties, so long as application of the chosen law does not violate the fundamental public policy **of the forum state.**” (Emphasis added.) McGill v. Hill, 31 Wn. App. 542, 547-548, 644 P.2d 680 (1982) (citing Whitaker v. Spiegel, 95 Wn.2d 408, 623 P.2d 1147 (1981)). In this case, the parties not only expressly chose Washington law, they agreed that Washington court’s had jurisdiction and that “interpretation and enforcement of this Agreement shall . . . be resolved **in the state of Washington.**” (Emphasis added.) See Ex 8 (Consultant Agreement, p. 2, ¶7). Not only was Washington to be the “forum state” under to the Agreement, it **was** the forum state in application. Therefore, the fundamental question is whether the express choice of law provision violates a public policy of Washington.

⁹ Defendants rely upon Restatement §187(2)(b), which considers the public policy of the state whose law, but for the choice of law, would have applied. See Brief of Appellants, pp. 28-36 (steps 3-5).

Notably, defendants have offered no explanation of how the trial court's application of Washington law, somehow, violated Washington's public policy. Any such argument would be strained at best. It follows that the parties' choice of Washington law is valid and should be enforced. Accordingly, defendants' Assignments of Error #7 – #10 should be dismissed, and the trial court's conclusions of law #9 and #14 should be affirmed. See Brief of Appellants, pp. 2-3 (Assignments of Error, ##7- 10); CP 38-39 (C/L ##9, 14).

2. The parties not only expressly chose the substantive “local” law of Washington to govern the Agreement, they chose Washington as the “forum” state.

Defendants argue that the express choice of law clause does not purport to select Washington law to determine illegality. Appellants' Brief, p. 27. This statement is both unreasonable and irrelevant. It is unreasonable because Paragraph 7 of the Agreement not only specifies that Washington law applies regarding “interpretation and enforcement” of the Agreement, it directs that only Washington courts have “jurisdiction” and that disputes will be “resolved” in Washington. Within this context, how can it be suggested that some law other than Washington's should determine “illegality” or any other question?

It is irrelevant because, consistent with McGill v. Hill, 31 Wn. App. 542, 644 P.2d 680 (1982), in applying an express choice of law

clause, it is the public policy of the **forum state** that is the determinative factor. The law of Washington is not only the express choice of law, Washington is the forum state. Therefore, the question of “illegality” will be based upon the public policy of Washington, not California and/or Texas.

While it should be unnecessary, this result also can be reached under “Step 1” of defendants’ analysis. See Brief of Appellants, p. 26-28 (¶A2). In this regard, defendants rely upon Restatement §187, as recognized and applied in O’Brien v. Shearson Hayden Stone, Inc., 90 Wn.2d 680, 586 P.2d 830 (1978).

Plaintiffs submit the dispositive provisions of Restatement §187 are subsection (3), and Comments *a* & *h*. Restatement §187, Comment *a*, provides, in relevant part:

a. Scope of section. The rule of this Section is applicable only in situations where it is established to the satisfaction of the forum [court] that the parties have chosen the state of the applicable law. . .

On the other hand, the rule of this Section is inapplicable unless it can be established that the parties have chosen the state of the applicable law. . .

Restatement §187, Comment *a*. Plainly stated, §187 applies when, and only when, the parties have made an effective choice of law.¹⁰

¹⁰ Defendants’ reliance upon §187 within their brief further confirms that paragraph 7 of the Agreement is an express and valid contractual choice of Washington

More to the point, subsection (3) and Comment *h* provide as follows:

(3) **In absence of a contrary indication of intention**, the reference [within the contract] is to the local law of the state of the chosen law.

h. Reference is to “local law” of chosen state. The reference, in the absence of a contrary indication of intention, is to the “local law” of the chosen state and not to that state’s “law,” which means the totality of its law including its choice-of-law rules. When they choose the state which is to furnish the law governing the validity of their contract, the parties almost certainly have the “local law,” rather than the “law,” of that state in mind (compare §186, Comment *b*). **To apply the “law” of the chosen state would introduce the uncertainties of choice of law into the proceedings and would serve to defeat the basic objectives, namely those of certainty and predictability, which the choice-of-law provision was designed to achieve.**

(Emphases added.) Restatement, §187 (3), Comment *h*; see also O’Brien v. Shearson, 90 Wn.2d at 685 (citing and applying Restatement, §187 (1)-(3)).

These provisions, despite being somewhat wordy, directly refute defendants’ claim that the choice of law clause “does not purport to select Washington law to determine illegality.” First, consistent with the language of §187(3), there is a “contrary indication of intention” in the Agreement that more than the “local” law of Washington was to apply. In

law, and that defendants’ Assignment of Error #7 should be dismissed. See and compare, Brief of Appellants, pp. 2, 28-30; CP 38-39 (C/L #14).

fact, everything about the Agreement was Washington--laws, jurisdiction and in whose courts it would be interpreted and enforced.

Second, “uncertainty,” rather than “certainty,” would be injected into the fray by applying a conflicts analysis. Recall that this Agreement was executed at a time when there was the contemplation that facilities in Texas, Oklahoma and California might become available. CP 32-33 (F/F #21). Rather than creating uncertainty, agreeing that “everything” would be tied to Washington, and Washington law would preserve certainty. Imagine the quagmire of trying to determine, without paragraph 7 of the Agreement, what law would apply to a contract executed in California, for a property located in Oklahoma, owned by resident of Texas and facilitated by a consultant licensed in Washington.

Finally, if there was any question of the intent of the parties, the “waiver” provision of paragraph 9 of the Agreement, and the express acknowledgment in paragraph 10 that plaintiffs were providing something different than normal real estate brokerage services, clarify the issue.¹¹ As before, it follows that defendants’ assignments #7 through

¹¹ At page 37, defendants write, “Both Erwin and Cotter knew that Erwin had to be licensed in California and Texas to lawfully provide brokerage services in-state.” Brief of Appellants, p. 37. Paragraph 9 of the Agreement also provides that Owner is not knowingly entering into an illegal contract. Certainly defendants cannot be suggesting by the above-quoted sentence that Mr. Cotter knowingly and intentionally signed an unenforceable contract? Rather, consistent with the Restatement provisions cited above, the more reasonable conclusion is that Mr. Cotter intended the Agreement to be valid and enforceable. See also, Ex 8 (Consultant Agreement, p. 2, ¶9, providing, in part, “owner

#10 should be dismissed, and the trial court's conclusions of law #9 and #14 should be affirmed. See supra, p. 32-34.

3. The California licensing statutes do not apply to the Agreement. There is no "gap" in the Agreement as to enforceability, and even if a "gap" did exist, it would be filled pursuant to the parties' express choice of Washington law.

Defendants attempt to focus the Court's attention on the various regulatory schemes in Washington, Texas and California defining "brokerage services." See Brief of Appellants, pp. 21-26. From this premise, defendants assert that a "conflicts analysis" is required to determine which state's regulatory statutes should be applied. Id., p. 26. Then, based upon that conflicts analysis, they assign error to conclusions of law #11 and #14.

In response, plaintiffs direct the Court's attention to paragraph 9 of the Agreement, which provides as follows:

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 [a] 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.

expressly acknowledges that they are not knowingly entering into an agreement which is illegal.").

(Emphasis added.) Ex 8 (Consultant Agreement, p. 2, ¶9). Consistent with the arguments already presented, Washington law applies to determine the validity of this provision of the Agreement. Notably, 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. See RCW 18.85.100.

For purposes of argument, however, plaintiffs will consider both possibilities, that is, that the paragraph 9 “waiver” provision may be valid or invalid. As previously noted, defendants rely heavily upon Restatement, §187. Of course, §187 applies only when there exists an express choice of law provision in an agreement. Pursuant to Restatement §187 Comment *c*, the real purpose of an express choice of law is “to fill gaps in a contract which the parties could themselves have filled with express provisions.” Restatement, §187, Comment *c*.

Defendants have offered nothing to suggest that paragraph 9 of the Agreement would be invalid under **Washington** law. Rather, the focus of defendants’ argument is **California** law. See Appellants’ Brief, p.34-40. However, defendants’ have not filed suit in California and the trial court determined that the services provided by defendants were not “traditional real estate broker/agent services,” rather 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. Consistent with this, the Agreement expressly provided that the parties were not entering into a brokerage agreement, rather “an independent contractor relationship.” Ex. 8 (Consultant Agreement, p. 2, ¶10).

Therefore, there is significant and supportable evidence that the paragraph 9 “waiver” provision is valid, and no “gap” exists. In such case, the Agreement is enforceable as written and the California statutes have no application.

Conversely, even if the “waiver” provision is invalid under California law, then a “gap” potentially exists as to which regulatory statutes, if any, apply to the Agreement. Ultimately, however, the result will be the same as applied to the “no-gap” situation. Under the express choice of clause, the “gap” would be filled pursuant to the law of Washington. The all-encompassing nature of paragraph 7 confirms that both “local” and substantive Washington law applies. See supra, pp. 32-38. Therefore, Washington’s regulatory statutes would apply, and the California statutes would still have no application. Under either scenario, the California statutes cited and argued by defendants simply do not apply to the Agreement or plaintiffs’ activities thereunder.

In this regard, the cases cited and argued by defendants are easily distinguished from the instant case, and, in fact, support plaintiffs' entitlement to sue and recover. See Brief of Appellants, pp. 37-38. Vedder v. Spellman was an attempt by an unlicensed contractor to circumvent Washington's licensing laws and recover indirectly in a Washington court by suing on a dishonored check. Vedder v. Spellman, 78 Wn.2d 834, 835, 480 P.2d 207 (1971). Similarly, Davidson v. Hensen concerned whether an unlicensed contractor could confirm an arbitration award in a Washington court. Davidson v. Hensen, 135 Wn.2d 112, 115-117, 954 P.2d 1327 (1998). The notable difference between these cases and the case at bar is that here, it is undisputed that plaintiffs were duly licensed in Washington at all times.¹²

Defendants ignore this vital difference in writing as follows: "Erwin cannot enforce the Agreement 'for public policy reasons' because he unlawfully performed brokerage services without the required license." Brief of Appellants, p. 39. To the contrary, plaintiffs have all the required Washington licenses, this case was filed in Washington and

¹² Defendants also cite Bort v. Parker. See Brief of Appellants, pp. 39. Bort references the Vedder and Davidson decisions by saying that a contract entered into by a non-licensed contractor is not "void ab initio" but rather of "limited enforceability." Ultimately, however, the cases are not applied because the contractor in Bort was properly licensed. See Bort v. Parker, 110 Wn. App. 561, 571, 42 P.3d 980 (2002). In this regard, Bort adds nothing to defendants' argument.

the Agreement specifically provides that Washington law applies and waives all other states' licensing requirements.

4. Even if this Court were to adopt defendants' five-step analysis, Washington law would still apply. California does not necessarily have a materially greater interest than Washington in this lawsuit, nor does this lawsuit offend California's public policy.

At pages 32 and 33, defendants argue that California has a materially greater interest in the determination of this case than does Washington. Notably, defendants write, "Washington's contacts with the transaction are minimal." By contrast, defendants submit, "California's interest in determining the outcome of this litigation is 'obvious.'" See Brief of Appellants, pp. 32-33 (citing Restatement, §188, Comment *c*).

Later, at pages 34 and 35, defendants argue that this lawsuit offends California's public policy. In part, defendants write, "Erwin is statutorily prohibited from maintaining the underlying action in California because he is not licensed in California," citing Cal. Bus. & Prof. Code, §10136. Brief of Appellants, pp. 34-35.

In response, plaintiffs first direct the Court's attention to finding of fact #51, which provides as follows:

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

CP 36 (F/F #51); see also (F/F #49). In conflict with defendants' analysis, at least one California court was not offended by the terms of the Agreement.

In addition, defendants' representation that Washington's contacts are "minimal" is contrary to conclusion of law #10, which defendants do not contest:

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

CP 38 (C/L #10). Against this backdrop, plaintiffs submit that California does not have a "materially greater" interest than Washington in this case.

There is also no reason to conclude that this Washington-based lawsuit has in any way offended California policy. What California's statutes provide is that without a California license a party cannot "bring or maintain any action **in the courts of this State.**" (Emphasis added.) Cal. Bus. & Prof. Code, §10136. Moreover, California courts have noted,

The purpose of the [licensing] statute was to protect landowners from the fictitious claims of real estate dealers who actually never sold the land they claimed to sell and never earned the commissions for which they were claimants; **but it was never the intention of the Legislature to protect the real estate owner against legitimate claims for services which he authorized in writing, and which were honestly**

rendered. Therefore courts will frown upon efforts to avoid payment of a just claim merely because an agreement was signed in a place requiring a license.

(Emphasis added.) Cochran v. Ellsworth, 12 Cal. App. 429, 437, 272 P.2d 904 (1954).

In 1978, Division 1 considered an analogous case, specifically Nelson v. Kaanapali Properties, Inc., 19 Wn. App. 893, 578 P.2d 1319 (1978). The case involved an attempt by a duly-licensed Washington contractor to recover in Washington for work performed in Hawaii. The Court summarized the issue on review as follows:

Was the trial court correct in holding that a subcontractor residing and registered under the Washington Contractor's Act was precluded by the Contractor's Licensing Act of the State of Hawaii from maintaining a cause of action for breach of contract in the State of Washington?

Nelson v. Kaanapali Properties, 19 Wn. App. 895. The Court reversed the trial court's decision and wrote as follows: "While Hawaii can control access to its courts, it should not as a matter of policy be able to control access to Washington courts. . ." Id., at 899.

For these reasons, even if this Court adopts defendants' five-step analysis, plaintiffs submit that Washington law still ought to apply.

C. The Statute of Frauds Does Not Apply. The Objective of the Agreement Was for Plaintiffs to Facilitate Lease Transactions, and

None of the Transactions at Issue Involved the “Sale” or “Purchase” of Real Estate.

In the alternative, defendants argue “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.” Defendants challenge finding of fact #31, whereby the trial court found that “Mr. Cotter . . . gave the signal through Mr. Sleeth that Mr. Erwin should move ahead with work on the California facilities.” Defendants also challenge conclusion of law #7, whereby the court ruled that the Agreement “was supplemented by . . . correspondence between Messrs. Sleeth and Erwin.” The gist of defendants’ position is that Mr. Cotter did not personally sign or exchange this correspondence, and Mr. Sleeth did not have authority to supplement the Agreement. See Brief of Appellants, pp.40-44.

Respectfully, plaintiffs submit this entire discussion is a “red herring.” Whatever properties were included, it is undisputed that the objective of the Agreement was that plaintiffs would locate prospective tenants, and then negotiate leases on defendants’ behalf. All of the transactions at issue are leases, and plaintiffs are seeking commissions related to facilitating the lease agreements, as opposed to trying to enforce the underlying agreements.

The law in Washington is exceedingly clear that an agreement to broker lease transactions does not have to be in writing and is outside the Statute of Frauds. See e.g., Sherwood B. Korssjoen, Inc. v. Heiman, 52 Wn. App. 843, 765 P.2d 301 (1988); Johnson v. Rutherford, 32 Wn.2d 194, 200 P.2d 977 (1948); Salisbury v. Alskog, 144 Wn. 88, 256 P. 1030 (1927); Myers v. Arthur, 135 Wn. 583, 238 P. 899 (1925).

By its terms, the Statute of Frauds applies only to “an agreement authorizing or employing an agent or broker to **sell or purchase** real estate for compensation or a commission.” RCW 19.36.010(5). In Sherwood, the Court specifically wrote as follows:

The Statute of Frauds must be strictly construed and not applied to cases that are not squarely within its terms. An agreement authorizing an agent to procure a lessee for a commission is not an agreement to sell or purchase real estate, and Washington courts have held that subsection (5) is inapplicable to agreements employing brokers to sell or purchase leases of real property.

(Citations omitted.) Sherwood v. Heiman, 52 Wn. App. at 852.

D. In the Alternative, this Court Can and Should Affirm the Trial Court’s Verdict on any Number of Legal Theories.

The Court of Appeals “can affirm the trial court on any alternative basis supported by the record and the pleadings even if the trial court did not consider that alternative.” Harberd v. City of Kettle Falls, 120 Wn. App. at 508 (citing LaMon v. Butler, 112 Wn.2d 193, 200-201, 770 P.2d

1027 (1989)). Without limiting the Court's consideration, plaintiffs offer the following remarks.

A contract can be comprised of several writings. See e.g., Hunt v. Great Western Savings Bank, 54 Wn. App. 571, 774 P.2d 554 (1989); Knight v. American National Bank, 52 Wn. App. 1, 756 P.2d 757 (1988); see also CP 162-182 ("Plaintiffs' Trial Brief"). Reformation may also be appropriate, either based on mutual mistake or unilateral mistake with inequitable conduct. See e.g., Gill v. Waggoner, 65 Wn. App. 27, 276, 828 P.2d 55 (1992); see also CP 162-182 ("Plaintiffs' Trial Brief"). "The underlying purpose of the Statute of Frauds is to prevent fraud, not to be a means of its perpetration." See e.g., Greaves v. Medical Imaging Systems, Inc., 71 Wn. App. 894, 898, 862 P.2d 643 (1993), reversed on other grounds, 124 Wn.2d 389, 879 P.2d 276 (1994); see also Beckendorf v. Beckendorf, 76 Wn.2d 457, 465, 457 P.2d 603 (1969); CP 162-182 ("Plaintiffs' Trial Brief").

The trial court ruled, "The corporate forms of Cotter Health Centers and its facilities should be disregarded to prevent loss to innocent parties, which include Mr. Erwin and Healthcare Properties, Inc." CP 37 (C/L #6); see also (C/P #5).

In the event any portion of the Agreement is deemed invalid, plaintiffs submit that they are nonetheless entitled their commissions

under the doctrine of procuring cause. See e.g., Syputa v. Druck Inc., 90 Wn. App. 638, 954 P.2d 279 (1998); Professionals 100, 80 Wn. App. at 837; see also CP 162-182 (“Plaintiffs’ Trial Brief”).

E. This Court Should Award Plaintiffs’ their Attorneys Fees and Costs Incurred on this Appeal.

Paragraph 5 of the Agreement provides as follows:

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 attorney fees and collection cost for said fees whether or not suit action is instituted.

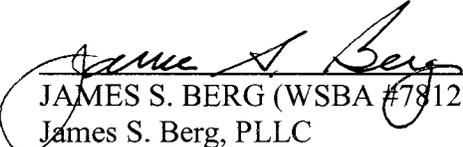
Ex 8 (Consultant Agreement, p.1, ¶5). “When an agreement provides for the payment of attorney fees to one party, a prevailing party is entitled to reasonable fees and costs, including fees incurred at trial and on appeal.” Northwest Land & Investment, Inc. v. New West Federal Savings & Loan Assoc., 64 Wn. App. 938, 947, 827 P.2d 334 (1992) (citing Granite Equip. Leasing Corp. v. Hutton, 84 Wn.2d 320, 327, 525 P.2d 223 (1974)).

Consistent with this, and likewise pursuant to RAP 14.1 through 14.3, plaintiffs respectfully ask this Court to award them their attorney fees and costs incurred on this appeal.

IV. CONCLUSION

The Consultant Agreement is valid and enforceable pursuant to Washington law, and it entitles plaintiffs to commissions on the transactions at issue. This Court should deny defendants' appeal in its entirety. Consistent with the above analysis, the trial court's findings of fact and conclusion of law should be affirmed.

DATED this 1st day of July, 2005.



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

DECLARATION OF SERVICE

I, IRENE NIEMI, do hereby declare and state: On this day, in
Yakima, Washington, I sent to:

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

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

SIGNED at Yakima, Washington, on July _____, 2005.



IRENE NIEMI