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No. 64826-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

HILLCREST MEDIA, LLC,

Appellant,

v.

FISHER COMMUNICATIONS, INC., and
FISHER BROADCASTING, INC.

Respondents.

On Appeal From King County Superior Court
Hon. Michael J. Fox

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Fisher Communications, Inc. and Fisher Broadcasting, Inc. (collectively, “Fisher”) contend that Hillcrest Media, Inc. (“Hillcrest”) has improperly emphasized factors discussed in the Restatement of Conflicts that support its position that Arkansas law should apply to the dispute between the parties. In particular, Fisher argues that even though (1) the last act necessary to complete the Brokerage and Commission Agreement – Mr. Morton’s execution of the agreement on behalf of his principal – occurred in Arkansas; (2) Mr. Morton never set foot in Washington; and (3) the parties’ justified expectations that they had entered into a binding Brokerage and Commission Agreement can only be fulfilled if Arkansas law applies, because the subject matter of the contract was located in Washington, Washington law should apply and invalidate the agreement. Fisher, by emphasizing one Restatement factor that it claims supports its position, is guilty of the same sin which it claims dooms Hillcrest’s claim. Moreover, Fisher’s premise – that the subject matter of the contract was located in Washington – may not even be the case. Because no discovery occurred prior to the Court’s decision on Fisher’s motion to dismiss, it is unknown where the shares of African-American Broadcasting Co. of Bellevue, Inc. (“African-American”) were located when the stock

transferred to Fisher and where its owner was located when negotiations for the transfer occurred. This Court may take judicial notice of the records of Washington's Secretary of State, and in 2006, the residence of Christopher Racine – who sold 100% of the shares of African-American to Fisher – was listed as “Honolulu, Hawaii.” The subject matter of the purchase transaction, the stock of African-American, and the owner of the stock were apparently located in a state other than Washington. Because there are, at a minimum, issues of fact relevant to these issues and whether Hillcrest conducted brokerage activities in Washington, the trial court should not have determined on Fisher's CR 12(c) motion that RCW 18.85.100 bars Hillcrest's claim. This Court should reverse the trial court and reinstate the case, so Hillcrest may have the opportunity to conduct discovery as to where the shares and their owner were located, and other issues relevant to the inquiry of what state's laws should apply.

II. ADDITIONAL DISCUSSION

A. No brokerage activities occurred in Washington, so Washington law does not apply to whether Fisher owes Hillcrest a commission.

It is undisputed that Hillcrest and its principal, Larry Morton, never traveled to Washington state to conduct the broker services that gave rise to Fisher's obligation to pay the commission due. A long line of cases

from many jurisdictions, including *Estate of Stoddard v. Pacific National Bank of Seattle*, 60 Wn.2d 263, 373 P.2d 116 (1962), directs that because Hillcrest performed no broker services in Washington, Hillcrest was not required to be licensed in Washington to recover the commission owed by Fisher. *See* Opening Brief at 19-23. Fisher argues that *Stoddard* is inapplicable because (1) the Court performed a conflict of laws analysis and concluded Oregon law applied, (2) the decision predated Washington's adoption of the Restatement (Second) of Conflict of Laws; and (3) the broker's negotiations with the buyer occurred in Oregon. *See* Respondent's Brief at 14-15. However, the Court in *Stoddard* made it clear that the broker's commission could be due *irrespective* of a traditional conflict of laws analysis:

Reed v. Kelly, 7 Cir., 1949, 177 F.2d 473, and *Arnold v. Eilson*, D.C.S.D. Tex. 1952, 107 F.Supp. 961, cited as cases in which the court made a belabored resort to "remedy", were both based on a specific state statute similar to the one in Tannenbaum denying enforcement where contracts failed to conform with the requirements of the statutes. Such a statute closing the doors of the courts appears to be a directive which the courts quite clearly should follow irrespective of whether the contract would otherwise be enforceable under conflicts of laws principles. These cases are of doubtful relevance where a contract or its performance has infringed a local licensing or other regulatory statute but there is no special provision closing the courts. In Ehrenzweig's "Contracts in the Conflicts of Laws", 59 Col. 973 (1959), he points out that "invalidation has occurred only exceptionally"; that "even in [the] area

[of contracts violating licensing provisions] the trend toward validation can be observed.” 59 Col. 973, 1003.

Stoddard, 60 Wn.2d at 269 (quoting *Richland Development Co. v. Staples*, 295 F.2d 122, 125, 126, n.2 (5th Cir. 1961)) (added content in original).

Despite the fact that the decision in *Stoddard* predated the Supreme Court’s adoption of the Restatement test in *Baffin Land Corp. v. Monticello Motor Inn, Inc.*, 70 Wn.2d 893, 425 P.2d 623 (1967), there is no suggestion in *Stoddard*, and Fisher makes no suggestion, that the outcome would be any different under the Restatement.

Finally, with respect to the fact that the broker’s negotiations in *Stoddard* occurred in Oregon, it is a conceivable hypothetical fact that Hillcrest’s negotiations with African-American occurred in a state other than Washington.¹ Where such negotiations occurred is unknown, because the case was dismissed before discovery was permitted to illuminate this issue. What is known, however, is that Christopher Racine listed Honolulu, Hawaii, as his residence in 2006 with the Secretary of State. It is just as likely, if not more likely, that Hillcrest’s communications with

¹The Washington Supreme Court recently confirmed that the “conceivable hypothetical fact” standard still applies to Civil Rule 12 motions in Washington, notwithstanding a different federal court standard. *McCurry v. Chevy Chase Bank, FSB*, __ Wn.2d __, __ P.3d __, 2010 WL 2521772 (June 24, 2010) (emphasis in original) (“Under CR 12(b)(6), a plaintiff states a claim if it is *possible* that facts could be established to support the allegations in the complaint.”).

Racine occurred while Racine was in a state other than Washington as it is that they occurred while he was in Washington.

In addition to the cases cited in Hillcrest's opening appeal brief, courts in other cases have enforced commission agreements where the broker was unlicensed in the state where the property was located, if the substantial portion of the broker's activities did not occur in that state. For example, in *Richland Development Company*, a broker commission agreement for the sale of Alabama land was formed in Missouri between a broker licensed in Missouri and an Alabama resident. The broker procured a purchaser for the property and actually conducted some of his services in Alabama. The seller refused to pay the broker his commission, arguing that because he was not a licensed broker in Alabama, the commission agreement was invalid. The Fifth Circuit Court of Appeals upheld the district court's decision that the commission was due and payable, determining that most of the broker's acts occurred outside of Alabama:

If a contract is an Alabama contract or is performed formed [sic] in Alabama, the state has a legitimate interest in regulating the transaction; its citizens expect the state's protection, and brokers should be alert to comply with the state's requirements. If, however, an Alabama citizen goes out of the state and enters into a contract that primarily is to be performed in a foreign state, he should expect to forego certain protections that his own state would afford, just as

he becomes entitled to enjoy the protection of the foreign state. When only incidental parts of the transaction take place in the forum state, the remoteness of relation between forum policy and the significant acts bearing on the transaction, and the injustice of depriving a foreign citizen of the fruits of his labors because of a violation of local regulations weigh heavily in favor of enforcement of the contract. A contrary result favoring a purported policy of the forum would be as arbitrary as would be the selection of the law of the place of making, if selection of the latter law depended solely on the fortuitous circumstance that on a cross-country airplane flight the contracting parties happened to be over Missouri at the moment when they shook hands to the deal.

Richland Development Company, 295 F.2d at 128.

In this case, not only was the last act necessary for the formation of the broker commission agreement performed in Arkansas – Mr. Morton’s execution of the agreement – but it is a conceivable fact, indeed, a likely fact, that Fisher expected and knew that Hillcrest would perform the broker services in Arkansas. The fact that some, or all, of African-American’s property may have been located in Washington should be no bar to enforcement of the Brokerage and Commission Agreement.

Similarly, in *Vandenburg Enterprises, Inc. v. Park Drive Manor, Inc.*, 678 F. Supp. 515 (E.D. Pa. 1987), a broker licensed in Texas attempted to recover on a promissory note signed by the defendant to pay for a commission due for the sale of stock of a corporation that owned an apartment building in Pennsylvania. The defendant corporation argued

that because the plaintiff was not licensed as a broker in Pennsylvania, its promise to pay a commission was unenforceable. The trial court first determined that Pennsylvania's real estate broker licensing statutes applied to stock transfer transactions like the one before it where the corporation owned real estate in Pennsylvania. Nevertheless, the court ruled that the licensing requirement did not apply to bar the suit to recover the commission because the defendant did not show that the broker performed services in Pennsylvania. *Id.* at 517. Similarly, in this case, even though neither Hillcrest nor its principal were licensed Washington brokers, because they performed no broker activities in Washington, Washington's broker licensing requirement should not be a bar to this action.

Fisher argues that even if Hillcrest and Mr. Morton were located in Arkansas, by communicating by telephone, mail, facsimile, and e-mail with persons located in Washington, Hillcrest engaged in brokerage activities in Washington. Fisher directs the court to two out-of-jurisdiction cases to support this argument. In *Klein v. Antebi*, 832 N.Y.S.2d 904, 15 Misc.3d 901 (N.Y. Sup. Ct. 2007), *aff'd*, 861 N.Y.S.2d 143, 53 A.D.3d 529 (N.Y. App. Div. 2008), the court denied a New York broker a commission for procuring a buyer for Pennsylvania real estate because neither it nor its principals or agents were licensed in Pennsylvania.

However, the court placed great weight on the fact that the agents drove the prospective purchaser to view the properties, thus setting foot inside Pennsylvania: “It is doubtful that the Pennsylvania courts would accept plaintiffs’ argument that [agents] Shami and Marachli did not hold themselves out as brokers, but acted only as chauffeurs, while they were in Harrisburg[, Pennsylvania].” *Klein*, 832 N.Y.S.2d at 912. As previously noted, neither Hillcrest nor Mr. Morton traveled to Washington. In addition, there is no evidence that either Hillcrest or Mr. Morton communicated with any persons located in Washington in furtherance of the Brokerage and Commission Agreement.²

Fisher also cites *Meteor Motors, Inc. v. Thompson Halbach & Associates*, 914 So.2d 479 (Fla. Dist. Ct. App. 2005), where an intermediate Florida appeal court ruled that an Arizona-based broker could not recover a promised commission related to the sale of the corporate stock of a Florida automobile dealership because the broker wasn’t licensed in Florida. The court concluded that by soliciting potential

²Fisher directs the Court to a January 19, 2006 letter written by Mr. Morton for Hillcrest addressed to Mr. Racine in Washington. Fisher’s Brief at 17, n.12; CP 186-87. That letter predated the date of the Brokerage and Commission Agreement between Hillcrest and Fisher, so it is not probative of whether (1) Hillcrest engaged in brokerage activities in Washington; or (2) Hillcrest communicated with Mr. Racine in Washington for the purpose of conducting brokerage activities.

purchasers in Florida by telephone, fax, and e-mail, the broker engaged in brokerage activities in Florida. *Id.* at 482-83.

Meteor Motors, Inc. is an anomaly. The case has never been cited by another published or reported decision in support of the same conclusion, or for any purpose, and the decision has been specifically criticized and wasn't followed by the federal district court in *Ledecky v. Source Interlink Companies, Inc.*, No. 05-1039 (JPG), 2007 WL 396997, at *6 (D.D.C. 2007) ("Were that ruling to be rigidly applied in this case, plaintiff's introduction of Source to Endeavor would constitute illegal brokerage under Florida law and the entire Referral Agreement would be rendered void *ab initio*. The Court views this as an odd result as it would frustrate the parties' clear intent in this case to be bound by the terms of the Referral Agreement."). Fisher cites no other cases where a broker's mere communication with a prospective purchaser from outside the state where the property is located has been held to constitute brokerage activities.

Further and importantly, there is no evidence in this case that Hillcrest performed any broker activities in Washington. There is no evidence that Hillcrest ever communicated with Christopher Racine, the previous owner of African-American's stock, while he was in Washington.

It is a conceivable hypothetical fact that any communications with Mr. Racine occurred while he was located in a state other than Washington. His presumed location was not an appropriate basis for the trial court to grant Fisher's Rule 12(c) motion.

Nor has Hillcrest conceded that some of its brokerage activities occurred in Washington, or anywhere else other than Arkansas, contrary to Fisher's contention. *See* Fisher's Brief at 4 (emphasis in original) ("As alleged by Hillcrest, '[t]he negotiations for and execution of the [March 26 Letter] occurred, in *substantial part*, in the State of Arkansas,' thus conceding that negotiations were not entirely conducted in Arkansas."). Webster's New Universal Unabridged Dictionary (2d Ed. 1972) defines "substantial" to include, *inter alia*, "with regard to essential elements; corporeal; material." Therefore, in its Complaint, Hillcrest alleged that the essential, corporeal, and material elements of the Brokerage and Commission Agreement between it and Fisher were negotiated in Arkansas, and that the last act necessary to give effect to its terms – Mr. Morton's execution of it – occurred in Arkansas. No suggestion was made, and no presumption is warranted, that the negotiation for the agreement occurred in any other state.

Because RCW 18.85.100 does not bar Hillcrest's claim to recover

the commission from Fisher if it performed no brokerage activities in Washington, and at a minimum there are issues of fact concerning whether Hillcrest performed brokerage activities in Washington, the trial court judge should not have granted Fisher's CR 12(c) motion dismissing Hillcrest's Complaint.

B. Hillcrest does not concede that “the subject matter” of the transaction between African-American and Fisher was located in Washington.

The transaction that is the subject of Hillcrest's claim is Fisher's acquisition of 100% of African-American's stock, not the assets of the corporation. Because the trial court dismissed Hillcrest's Complaint before discovery occurred and on Fisher's CR 12(c) motion, it is unknown where the stock was located prior to the transfer to Fisher. However, the Court is entitled to take judicial notice of the records of Washington's Secretary of State: in a filing that expired on December 31, 2006 for Fisher Broadcasting-Bellevue TV, Inc., Christopher Racine listed Honolulu, Hawaii as his residence. (See http://www.sos.wa.gov/corps/search_detail.aspx?ubi=601758637 (last accessed July 30, 2010); see also Appendix 1). ER 201; *Gnecchi v. State*, 58 Wn.2d 467, 472-73, 364 P.2d 225 (1961) (records of a state agency are official records which may be judicially

noticed).³ The transfer of Mr. Racine's stock occurred in June and September 2006. CP 3-4 (Complaint, ¶¶ 12, 13). Therefore, it isn't clear where the "subject matter" of the transaction – the shares of African-American – were located when the transfer occurred. It is a conceivable hypothetical fact that the shares were located in a state other than Washington. Further, it is unclear where Hillcrest's negotiations with Racine occurred, given his representation that he resided in Honolulu.

Fisher tries to obscure that the real subject matter of the transaction was the shares of African-American by arguing that physical assets of the corporation were located in Washington. However, the fact that some assets were located in Washington does not mean that all of the corporation's assets were located in Washington. Until Hillcrest is provided the opportunity to conduct discovery, it will remain unknown where all of African-American's assets were located. It is a conceivable hypothetical fact that the greater part of African-American's assets were located in a state other than Washington, which would result in a

³Fisher supports its contention that Mr. Racine was a Washington resident and that Hillcrest carried on negotiations with him pursuant to the Brokerage and Commission Agreement only with a representation in the Stock Purchase Agreement and Draft Asset Agreement attached to its counsel's declaration (CP 35). Hillcrest objected to the trial court's consideration of this document and has requested this Court to disregard it in considering its appeal. CP 158, 170; Opening Brief at 46-48; *see also, infra* at 22-25.

conclusion that the “subject matter of the transaction” factor would not favor the application of Washington law. Moreover and in any event, as previously noted, the actual subject matter of the transaction was not the physical assets of the corporation, but its shares. CP 3 (Complaint, ¶¶ 11-12).

C. Analysis of the Restatement factors favors the application of Arkansas law.

Fisher attempts to downplay the significance of “the [parties’] justified expectations” factor stated in Section 6(2)(e) of the Restatement, but “[p]rotection of the justified expectations of the parties is the basic policy underlying the field of contracts.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS (“Restatement”) § 188(1), cmt. b. In a close case, protecting the parties’ justified expectations in the validity of the rights and obligations of their contract should “tip the scales in favor of one jurisdiction’s laws being applied over another’s.” *Potlatch No. 1 Fed. Credit Union v. Kennedy*, 76 Wn.d 806, 810, 459 P.2d 32 (1969). Where there are factors favoring application of either state’s laws, equitable considerations support upholding the parties’ reasonable and justified expectations that their contract was valid and enforceable.

Although Fisher repeatedly criticizes Hillcrest for its allegedly “formalistic” approach to evaluating the Restatement factors to determine

which state's law applies, Fisher itself engages in "contact-counting" to support its argument that Washington law applies. For example, it argues that the property subject to the transaction was located in Washington; that the purchaser was located in Washington; and that the seller was located in Washington. However, as previously discussed, it is not known where African-American's shares were located; it is not known where Christopher Racine resided; it is not known where all of African-American's property was located; and indeed, it is not known where the Fisher personnel with whom Hillcrest communicated were located. Fisher Broadcasting is a wholly owned subsidiary of Fisher Communications, which is a publicly traded corporation. The ownership of Fisher Communications, and therefore the ownership of Fisher Broadcasting, was spread across the United States. Fisher Broadcasting owns broadcasting assets, including television and radio stations, in many states. The mere fact that Fisher Broadcasting was incorporated in Washington cannot be viewed in isolation; it has a nationwide presence, and its state of incorporation is not definitive of where it and its employees are "located." There is nothing in the record to support a conclusion that the persons employed by Fisher with whom Hillcrest was communicating were Washington residents or were in Washington when communications

between Hillcrest and Fisher occurred.

As Hillcrest anticipated in its Opening Appeal Brief (*see* Opening Brief at 32-34), Fisher argues that Section 196 of the Restatement supports the conclusion that Washington law should be applied to this case. *See* Fisher's Brief at 20-22. And, as Hillcrest discussed at length in its Opening Brief, Section 196 is inapplicable because the brokerage services contemplated by the agreement between Fisher and Hillcrest could be rendered exclusively in Arkansas. Restatement §196, cmt. a. Further, even if Section 196 does apply, it directs that if, under the laws of the state with the most significant relationship the contract is invalid and under the laws of another state with a close relationship to the transaction it will be valid, the laws of the state validating the contract should be applied. Restatement, §196, cmt. d. Thus, whether Section 196 applies or it doesn't, it supports the conclusion that Arkansas law applies and that the commission agreement is enforceable.

Fisher also argues that Section 202 of the Restatement supports the conclusion that Washington law applies to determine the validity of the commission agreement, contending that Washington is the place of performance of the contract, and under Washington law the commission agreement is illegal. *See* Fisher's Brief at 21-24. However, whether a

contract is illegal under Section 202 is to be determined by the law selected by application of Section 188. Restatement, §202(1). And, as discussed in detail in Hillcrest's Opening Brief, analysis of the Section 188 factors leads to the overwhelming conclusion that Arkansas law should apply to the Brokerage and Commission agreement. Opening Brief at 26-37. Under Arkansas law, the contract is enforceable, as Fisher concedes. Hillcrest does not dispute that under Washington law the agreement is unenforceable, but Section 202 lends nothing to the determination of what state's law applies, and it does not compel the conclusion that Washington law applies.

1. The additional cases cited by Fisher to support its argument that Washington law applies are not on point.

Neither of the additional Washington cases cited by Fisher that address conflicts of laws issues are on point to this case. In *Canron, Inc. v. Federal Insurance Company*, 82 Wn. App. 480, 918 P.2d 937 (1996), Division One of the Court of Appeals applied Washington law instead of the law of Quebec to interpret whether an exclusionary clause in a contract of insurance eliminated coverage for cleanup expenses associated with the release of hazardous wastes in Washington, for which the insured, the manufacturer of galvanized steel products, sought recovery. The policy contained an exclusion if the insured did not immediately notify the

insurance company when it first learned of the potential claim. The manufacturer did not notify the insurer when it first learned of the potential for the claim, and the insurer denied coverage based on the exclusion. The policy had been issued in Quebec, Canada; under the law of Quebec, the exclusion would be given literal effect, but under Washington law, in order for the exclusion to operate to deny coverage, the insurer was required to prove that the delay caused it actual prejudice in its investigation of the claim.

The Court of Appeals applied Washington law and ruled that the insured was entitled to coverage. In making this determination, the court looked particularly to three factors: (1) although Quebec was the place of negotiating and entering the contract, the insurer no longer had any business presence in Quebec; (2) the parties understood that the insurance policy covered multiple risks in multiple locations, the laws of some of which required insurers to show actual prejudice resulting from a delay in claim reporting in order to deny coverage; and (3) Washington had a far greater interest in the issue than Quebec because the hazardous waste dump occurred in Washington, Washington bore the primary legal responsibility to clean up the site under the applicable federal laws, and whether or not there was insurance coverage could determine whether or

not the site was remediated. *Id.* at 494.

Obviously, the case before this Court does not involve either insurance or the cleanup of a federal hazardous waste site. And here, Hillcrest's offices are still located in Arkansas. Therefore, none of the three factors which led the court to apply Washington law in *Canron* are present in this case, and the decision in the case is not relevant to this dispute.

In *Cox v. Lewiston Grain Growers, Inc.*, 86 Wn. App. 357, 936 P.2d 1191 (1997), Division Three of the Court of Appeals determined that an exclusionary clause in a seed purchase contract, which would have been enforceable in Idaho, was not enforceable to shield the seed supplier from liability under Washington law. The farmer alleged that the seed supplier had deceived him, thus violating Washington's Consumer Protection Act, by certifying a germination rate of seed when in fact the seed did not have that germination rate. While the court concluded that both Idaho and Washington had significant relationships to the transaction, factors peculiar to the farming nature of the transaction and the interest Washington has in protecting consumers from deceptive practices of companies authorized to do business in Washington that are not present in this case dictated the application of Washington law:

Turning to policy matters, Washington has an interest in regulating the actions of corporations authorized to do business in this state and to insure the employment of fair business practices. [Citation omitted]. Washington also has an interest in protecting the agricultural industry in this state. In fact, the Legislature has enacted a body of law regulating the sale and movement of agricultural seed to provide uniformity in the packaging of agricultural seed, and protect consumers. RCW 15.49.005. Thus, Washington has a strong interest in this transaction. Idaho, likewise, has an interest in regulating business in its state, but other than the sale, this transaction had little effect in Idaho. Mr. Cox used the seed in Washington, a fact known to [seller] LGG, and the crop failure occurred in Washington. LGG was also authorized to do business in Washington, and as a result is subject to the laws of this state. *See* RCW 23B.15.050. Washington has significant contacts with this transaction, and a significant policy interest.

Id. at 366-67.

Unlike in *Cox*, there is no allegation that Hillcrest, the party who is requesting the application of law different than Washington's, engaged in deceptive business practices. Washington's policy interests in protecting the agricultural industry in the state, Washington farmers, and consumers from deceptive practices foisted on them by businesses authorized to transact business in Washington have no relevance to this case. This was an isolated transaction, and Hillcrest, which is not authorized to conduct business in Washington and which is not subject to the laws of the state, did not set foot in the Washington, unlike the seed seller in *Cox*. These

Washington residents, and the criminal penalty for non-registration in Hawaii was a misdemeanor rather than the gross misdemeanor penalty associated with acting as an unlicensed real estate broker in Washington. Notwithstanding Fisher's attempt to downplay the significance of the real issues in the case, the court placed heavy emphasis on the parties' expectation at the time of contracting that they had created an enforceable contract, notwithstanding the potential for unenforceability in the state where performance was to occur:

In personal service contracts the Restatement rule appears to be that when the expectation interest of the parties outweighs the policy of the performance state in applying its invalidating rule, the local law of the place of performance should not apply. Washington law not only supports this position, but requires consideration of the public policies of both Hawaii and Washington. ...

The desire of the parties at the time of contracting was to create an enforceable contract. Kaanapali expected the work to be performed and Nordic Tile expected to be paid and to make a profit. Consideration of the expectation interest of the parties would weigh heavily in upholding the validity of the contract against the interests and public policy of Hawaii.

Id. at 898.

In this case, the policy interests of Arkansas and Washington in regulating unlicensed brokers are essentially the same. In light of and in conjunction with the other factors discussed in Section 188 of the

Restatement, Hillcrest's and Fisher's justified expectations that they had entered into an enforceable Brokerage and Commission Agreement should be fulfilled.

D. Because Fisher is relying on purported facts which it contends support its argument that Washington law should apply which only appear in the documents to which Hillcrest has objected and which it requests the Court to disregard, the trial court's consideration of the documents was error.

When Hillcrest found out that Fisher had purchased the stock of African-American, it requested Fisher to pay it the commission due on the transaction. CP 4, ¶ 7. Fisher refused, and Hillcrest sued in Arkansas to recover the commission. *Id.*; CP 82-89. In support of its Complaint filed in Arkansas, Hillcrest filed documents that it had not created or signed, but which showed that Fisher had made a bargain for Hillcrest to pay a commission, and that Fisher had breached the bargain. Among the documents attached to the Arkansas Complaint were the final Stock Purchase Agreement (CP 35-72), that Hillcrest had not signed and of which Hillcrest had no part in drafting; a draft Asset Purchase Agreement (CP 91-145) prepared by Fisher's attorneys, which was unsigned and of which Hillcrest had no part in drafting; and cover correspondence for the draft Asset Purchase Agreement from a Fisher representative to Hillcrest's principal (CP 147). In attaching these documents to its Arkansas

Complaint, Hillcrest did not vouch for the accuracy of all the alleged and represented facts in the exhibits; the point of attaching them was merely to show that a binding agreement existed between Hillcrest and Fisher and that Fisher had breached the agreement because it had acquired 100% of the stock of African-American without paying Hillcrest the commission that is due – the same allegations it made in its Complaint in King County Superior Court. CP 1-7.

In the trial court and now in this appeal, Fisher is using purported “facts” poached from the exhibits to the Arkansas Complaint to support its claim that Washington law applies to the enforceability of the Brokerage and Commission Agreement. Fisher’s suggestion that the trial court, and this Court, was and are permitted to take judicial notice of “facts” stated in these documents in support of its CR 12(c) motion merely because Hillcrest attached them to its Arkansas Complaint and that the documents appear in a public record illustrates a gross misunderstanding of Evidence Rule 201.

ER 201 provides, in pertinent part, as follows:

(a) Scope of Rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction

of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

...

(c) Opportunity to be Heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

To the extent the trial court relied on these objectionable documents to determine that Mr. Racine was a Washington resident, this is not a kind of fact of which ER 201 permits the court to take judicial notice, because the fact is not generally known within the territorial jurisdiction of the trial court or capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. The issue of where Mr. Racine was located during the period the transfer of his stock to Fisher was being negotiated is important to the issue of what state's law should apply. If the trial court relied on the Stock Transfer Agreement recitation that Mr. Racine was a resident of Washington at the time he transferred his stock to Fisher in any way to support its conclusion that Washington law applies and bars Hillcrest's claim, that reliance was error and the decision should be reversed.

Fisher concedes that this Court may decide Hillcrest's *de novo* appeal without consideration of the three documents that Hillcrest

contends should not have been considered by the trial court: "The facts referenced in the documents are merely cumulative; the fundamental facts necessary for the conflict of laws analysis are undisputed and compel application of Washington law." Fisher's Brief at 35. This Court should take up Fisher at its offer, decide the appeal without considering the three documents, and reverse the trial court's order dismissing the case.

III. CONCLUSION

The trial court committed error when it (1) considered and took judicial notice of the Stock Purchase Agreement, draft Asset Purchase Agreement, and April 10, 2006 correspondence from Robert Bateman to Larry Morton, and (2) granted Fisher's CR 12(c) motion and dismissed Hillcrest's Complaint. This Court should reverse the trial court, reinstate the case, and permit Hillcrest's claim to proceed to trial.

DATED THIS 6th day of August, 2010.

BERRY & BECKETT, PLLP



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1708 Bellevue Ave.
Seattle, WA 98122
Tel: 206.441.5444

Attorneys for Appellant

DECLARATION OF SERVICE

Guy W. Beckett declares:

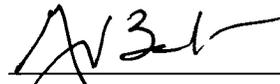
On August 6, 2010, I mailed a copy of the foregoing document by

United States first-class mail, with proper postage affixed, to:

Harry H. Schneider, Jr., WSBA #9404
Jeffrey M. Hanson, WSBA #34871
PERKINS COIE LLP
1201 Third Ave., Ste. 4800
Seattle, WA 98101-3099

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

EXECUTED THIS 6th day of August, 2010, at Seattle,
Washington.



Guy W. Beckett

**APPENDIX NO. 1
WASHINGTON SECRETARY OF STATE
REGISTRATION DETAIL FOR
FISHER BROADCASTING-BELLEVUE TV, INC.**



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FISHER BROADCASTING-BELLEVUE TV, INC.

UBI Number 601758637
 Category REG
 Profit/Nonprofit Profit
 Active/Inactive Inactive
 State Of Incorporation WA
 Date of Incorporation 12/24/1996
 Expiration Date 12/31/2006
 Dissolution Date
 Registered Agent Information
 Agent Name ROBERT B JACKSON ESQ
 Address 2100 116TH AVE NE
 City BELLEVUE
 State WA
 ZIP 98004

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