

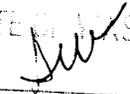
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STATE OF WASHINGTON

No. 34961-2-II

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COURT OF APPEALS,
DIVISION II OF THE STATE OF WASHINGTON

TACOMA FIXTURE CO., INC.,

Respondent/Cross-Petitioner,

v.

RUDD COMPANY, INC.,

Petitioner.

APPELLATE BRIEF OF RUDD COMPANY, INC.

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CORPORATE DISCLOSURE

Rudd Company, Inc., is a closely-held Washington Corporation.

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I. INTRODUCTION

This appeal concerns a Uniform Commercial Code (“UCC”) sale of goods dispute between two sophisticated commercial merchants – plaintiff Tacoma Fixture Co., Inc., (“TFC”) and defendant Rudd Company, Inc. (“Rudd”) – both of whom are extremely knowledgeable and experienced in dealing with the raw materials and finishing products at issue in the underlying case. In particular, the dispute is over the application and enforceability of terms contained in the *only* writings evidencing the essential terms of the parties’ otherwise oral sales agreements, the invoices provided by Rudd to TFC with each of 775 orders over a three year commercial course of dealing.

Based upon venue provisions, warranty disclaimers, and limitations of remedies provisions contained in each of the invoices, Rudd filed alternative motions in the trial court for change of venue and summary judgment. The trial court denied both motions, applying the twenty-five year old holding in *Hartwig Farms*¹ rather than more recent holdings of this Court and the Washington State Supreme Court to rule that the provisions contained in the invoices were not part of the parties’

¹ *Hartwig Farms, Inc. v. Pacific Gamble Robinson Co.*, 28 Wn.App. 539, 625 P.2d 171 (1981).

contracts for the sale of goods. This, despite the fact that the invoices are the *only* writings evidencing the contracts at issue, the *only* evidence containing all of the essential elements of an enforceable contract and despite more recent controlling authority to the contrary from the Washington Supreme Court. Rudd submits that the trial court committed reversible error.

II. ASSIGNMENTS OF ERROR

- A. The trial court erred in denying defendant Rudd's Motion to Dismiss or in the Alternative to Change Venue for Improper Venue, ruling that the venue provisions in the invoices provided by Rudd to plaintiff TFC were not part of the parties' contracts for the sale of goods under the UCC.
- B. The trial court erred in denying Rudd's motion for summary judgment or partial summary judgment, ruling that the exclusion of warranty provisions on the invoices provided by Rudd to TFC were not part of the parties' contracts for the sale of goods.
- C. The trial court erred in denying Rudd's motion for summary judgment or partial summary judgment, ruling that the limitation of remedies provisions on the invoices provided by Rudd to TFC after each

and every transaction were not part of the parties' contracts for the sale of goods.

1. Issues Presented.

a. Did the trial court err by ignoring more current binding authority from the Washington Supreme Court and instead choosing to follow another line of cases that are factually distinguishable from the facts of this case to deny both of Rudd's motions in finding that the terms on the invoices were not part of the contracts between the parties?

b. Did the trial court err by ignoring applicable UCC provisions for enforceability of contract provisions or modifications provided in later writings in finding that the terms of the invoices were not part of the contracts between these commercial merchants?

c. Based on the record, should this Court hold that the identical exclusion of warranty and limitation of remedies provisions in each of the invoices provided by Rudd over a three year course of dealing were conscionable and enforceable terms of the contracts between Rudd and TFC?

III. STATEMENT OF THE CASE

Rudd is a paint, coatings and finishes products manufacturer and supplier of raw materials located in Seattle, Washington. It was established in 1912. *CP 107*. According to its website, TFC is “one of the West Coast’s oldest and most respected manufactures (sic) of quality wood products.” *CP 144*. Rudd and TFC began their business relationship in September 2000 after TFC became dissatisfied with their previous supplier of the raw materials used to manufacture two types of conversion varnish – a clear coat and a white coat. *CP 293-CP 294*. For a period of over three years, Rudd sent approximately seven hundred seventy-five [775] deliveries of raw materials used to manufacture the conversion varnishes along with separate invoices to TFC. *CP 117 - CP 136*. The first invoice for products purchased by and delivered to TFC is dated September 22, 2000. *CP 111 - CP 112*. The final invoice for products purchased by and delivered to TFC is dated thirty-seven months later on October 31, 2003. *CP 114 - CP 115*.

TFC filed suit against Rudd in the Superior Court for Pierce County on January 5, 2005. *CP 1- CP 7*. In its complaint, TFC alleges that “as part of its business” it purchased certain coatings and finishes

from Rudd. *CP 2*. TFC then applied those coatings and finishes to its products which it subsequently sold and delivered to its customers. *Id.* TFC claims that after delivery of its products to its customers, the clear finishes began to degrade, the cabinets began to change color and the white paint coatings began to crack. *Id.*

TFC's suit against Rudd alleges: (1) Breach of Contract and/or Breach of Express Warranty under RCW 62A.2-313; (2) Breach of Implied Warranty of Merchantability under RCW 62A.2-314; and (3) Breach of Implied Warranty of Fitness for a Particular Purpose under RCW 62A.2-315. *CP 1 - CP 7*. Thus, TFC has conceded that: (a) the parties had a contractual relationship and (b) that Washington's version of the UCC applies to the transactions in question – otherwise a UCC warranty action does not and can not exist.

Rudd specifically denied the allegations that it supplied defective products or raw materials, breached its contract and/or breached any implied or express warranties that may apply to these transactions. Regardless of the claims by the parties, the issue here is what were the terms and conditions of the contracts entered into over a three year course of dealing between commercial merchants. The trial court certified – and

the parties agreed – that this is a core issue under CR 54(b) upon which the outcome of the litigation depends.

Upon receiving an oral order for raw material used to manufacture the finishes and coatings from TFC, Rudd delivered the materials to TFC and sent (usually separately from the raw materials themselves) an invoice to TFC documenting the contract for the sale of goods between the parties. *CP 299*. The invoices contained, among other information, the date, invoice number, order date, payment terms, item number, item description, quantity ordered, unit price, invoice total (including applicable taxes and delivery charges), and an integration clause. *CP 111 - CP 112, CP 114 - CP 115*.

The following statement appears in capital letters and bold print in a shaded box on the front of each invoice, “**THIS ORDER IS SUBJECT TO THE TERMS AND CONDITIONS STATED ON THE REVERSE HEREOF.**” *Id.*

On the reverse side of each invoice, at the top of the page containing the terms and conditions of the invoice, there is a notice that provides:

NOTICE This order is expressly made conditional upon assent by the purchaser to any terms additional

to or different from those proposed by the purchaser on his purchase order. Such assent shall be deemed complete if no contrary written notice is sent by purchaser within five (5) days of receipt hereof.

Id.

In the middle of the reverse side of the invoice once again in bold print and all capital letters the following language (in pertinent part) appears:

NON WARRANTY - PLEASE READ CAREFULLY

5. SELLER MAKES NO WARRANTY EXTENDING BEYOND THE DESCRIPTION OF THE GOODS ON THE FACE HEREOF, AND THERE IS NO IMPLIED WARRANTY OF MERCHANTABILITY OR OF FITNESS FOR ANY PARTICULAR PURPOSE. SELLER DISCLAIMS ANY LIABILITY FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES. CLAIMS OF FAILURE TO MEET SPECIFICATIONS SHALL BE DEEMED WAIVED UNLESS MADE IN WRITING WITHIN TEN (10) DAYS OF DELIVERY. SELLER'S LIABILITY FOR ANY SUCH FAILURE SHALL BE LIMITED TO THE REPLACEMENT OF MATERIALS WITH RESPECT TO WHICH SUCH FAILURE IS CLAIMED, OR THE REPAYMENT OF ANY PORTION OF THE PURCHASE PRICE RECEIVED THEREFOR SUBJECT TO THE RETURN OF SUCH MATERIALS TO THE SELLER. . . .

Id.

Paragraph 9 of the Terms and Conditions located on the reverse of the invoice states:

9. Venue. The parties agree that any claim, counterclaim, crossclaim, third party claim, other legal action or arbitration by any party against any other party may be commenced and maintained in any state or federal court or any applicable arbitration association located within King County, State of Washington, U.S.A., having subject matter jurisdiction over the dispute between the parties. Each party hereby submits to the jurisdiction of such courts or arbitration association over each of them personally in connection with any such litigation, and agree that the venue may be laid in any such court and shall not be removed or transferred therefrom except upon the written consent of all parties to this Agreement.

Id.

The language in the shaded box on the front of the invoice and the language quoted above found on the reverse side of the invoice remained identical on each and every invoice throughout the three year course of business between Rudd and TFC. *CP 108*.

It is undisputed that Rudd *never received* a written five (5) day notice rejecting the terms and conditions of the invoice from TFC following any delivery of raw materials during the parties' three year course of conduct. In addition, it is undisputed that Rudd *never received* a

written ten (10) day notice of any claims that the delivered products did not meet specifications following any delivery to TFC. *CP 109*.

IV. ARGUMENT

The issue of whether the terms of the Rudd invoices are part of the contracts for the sale of goods between the parties revolves around the application of two separate lines of Washington authority regarding later writings provided in confirmation of each of TFC's oral purchase orders. Rudd relies on the recent line of cases from the Washington Supreme Court, including *M.A. Mortenson Co., Inc. v. Timberline Software Corp.*, 140 Wn.2d 568 (2000) and *Puget Sound Financial, LLC v. Unisearch, Inc.*, 146 Wn.2d 428, 47 P.3d 940 (2002), while TFC relies on a line of cases culminating twenty-five years ago in the factually distinguishable *Hartwig Farms* decision from Division III of this Court. *E.g., Hartwig Farms, Inc. v. Pacific Gamble Robinson Co.*, 28 Wn. App. 539, 625 P.2d 171 (1981).

As an analysis of the cases argued by the parties reveals, TFC's reliance is misplaced, and the trial court erred in applying *Hartwig* and its progeny to rule that the terms in the invoices were not part of the contracts, ignoring the more recent Washington Supreme Court authority and

authority of this Court to the contrary.

A. The Terms in the Invoices were Part of the Contracts.

The fact that TFC and Rudd entered into contracts for the sale of goods governed by the Uniform Commercial Code is not disputed.² In actual practice, the parties transacted business over the course of three years involving hundreds of transactions. TFC's lawsuit is premised on the existence of UCC warranties – which would not exist in the absence of an enforceable UCC contract.

The trial court committed error in this matter by inconsistently agreeing that the parties had a UCC contract on the one hand, yet ruling that the terms on the Rudd invoices were not part of the contract for the sale of goods between the merchant parties on the other. If the terms on the invoices are not considered part of the contract, among other things there would be *no price or quantity terms* to the contract, two fundamental provisions of any enforceable contract. In fact, there would be no writings memorializing the contract whatsoever, in contradiction to one of the primary tenets of the UCC Statute of Frauds: that all contracts for the sale

² In fact, the relief sought by TFC is based on alleged breaches of warranty under RCW 62A.2-313, 62A.2-314 and 62A.2-315. Consequently, TFC admits—as it must—that the parties had valid contracts for the sale of goods under Washington's version of the Uniform Commercial Code. *CP 1 - CP 7.*

of goods over \$500 between merchants must be in writing. RCW 62A.2-201(1).

“The essential elements of a contract are ‘the subject matter of the contract, the parties, the promise, the terms and conditions, and (in some but not all jurisdictions) the price or consideration.’” *DePhillips v. Zolt Construction Co., Inc.*, 136 Wn.2d 26, 31, 959 P.2d 1104 (1998) *citing Family Medical Building, Inc. v. DSHS*, 104 Wn.2d 105, 108, 702 P.2d 459 (1985). In this case, all of the necessary elements of a contract *are provided* in the Rudd invoices – which also meet the writing requirement of the UCC. They do not exist otherwise. *See e.g.*, RCW 62A.2-201(2); *Smith v. Skone & Connors Produce, Inc.*, 107 Wn.App. 199, 206, 26 P.3d 981 (2001). As stated in *Smith*:

Between merchants, however, a signature may not be needed if a written confirmation of an oral contract is sent within a reasonable time and the party receiving it has reason to know of its contents. RCW 62A.2-201(2). In that case, if the receiver does not give written notice of objection within 10 days after the confirming writing is received, the writing constitutes an enforceable contract under the statute of frauds. RCW 62A.2-201(2).

Smith, 107 Wn.App. at 206, *citing* RCW 62A.2-201(2).

Here, it is undisputed that Rudd's invoices are the only writings confirming the contracts at issue, and it is undisputed that the oral purchase orders by TFC were not, themselves, integrated enforceable contracts. An integrated contract generally only results from a writing. *See Emrich v. Connell*, 105 Wn.2d 551, 556 (1986), *citing* RESTATEMENT (SECOND) OF CONTRACTS § 209(1) ("An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement."). In this case, the integration clause printed in bold at the bottom of every single invoice is conclusive:

**13. THE TERMS AND CONDITIONS
APPEARING HEREON CONSTITUTE
THE ENTIRE AGREEMENT
BETWEEN SELLER AND BUYER,
AND THE SELLER SHALL NOT BE
LIABLE OR BOUND IN ANY MANNER
BY ANY REPRESENTATIONS OR
COMMITMENTS EXCEPT AS
SPECIFICALLY PROVIDED HEREIN.**

CP 111 - CP 112, CP 114 - CP 115.

Thus, each Rudd invoice is a fully integrated contract, confirming the sales agreement between Rudd and TFC in compliance with the applicable provision of the UCC.

TFC admits that each invoice was received and carefully reviewed

by its shop manager, Mike Stanley, who placed the orders, and approved by him prior to being forwarded to TFC's accounting department for payment. *CP 300*. TFC never objected to any of the invoice terms, including the choice of venue, exclusion of warranties and limitation of remedies provisions. Accordingly, the invoices provided by Rudd to TFC are the writings that establish the terms of the contract for each sale of goods between the merchant parties. *See e.g., Smith*, 107 Wn.App. at 206, *citing* RCW 62A.2-201(2).

1. **The Washington Supreme Court has held that language in invoices, not objected to, are incorporated into the parties' contract.**

The Washington Supreme Court has endorsed a similar formation of a contract where the transaction between the parties consisted of an oral purchase order followed by an invoice in *Puget Sound Financial, LLC v. Unisearch, Inc.*, 146 Wn.2d 428, 47 P.3d 940 (2002). ("The invoice stated the price and quantity terms. Without both the search report and the invoice, there was no contract.")³

In *Puget Sound Financial*, during the course of a similar three year

³ While the contract at issue in *Puget Sound Financial* was indisputable one for services, the Supreme Court applied the UCC by analogy in its definitive analysis. *See Puget Sound Financial*, 146 Wn.2d at 438 fn.12.

course of dealing, the plaintiff, Factors of Puget Sound (“Factors”) routinely contacted defendant Unisearch via telephone to conduct searches under specified names for UCC filings in Washington. *Id.* at 431. Unisearch would complete the requested search and then forward a search report and invoice to Factors. *Id.* Both the reports and invoices included limitations of liability. *Id.* Each report included the statement, “The responsibility for maintaining public records rests with the filing officer, and Unisearch, Inc., will accept no liability beyond the exercise of reasonable care.” *Id.* at 431. Each invoice contained the statement, “Liability Limited to Amount of Fee.” *Id.* Unisearch completed 47 searches for Factors prior to the litigated dispute resulting in 47 reports and 47 invoices containing exactly the same language limiting liability. *Id.*

The litigation in *Puget Sound Financial* arose from a UCC filing search conducted by Unisearch that failed to identify a variant name for the proposed debtor, and consequently failed to identify a \$100,000 first priority lien already attached to the proposed collateral. *Puget Sound Financial*, 146 Wn.2d at 432. Factors made the loan, but was left without recourse against the collateral when the debtor defaulted and the prior lien

was discovered. *Id.* Factors then sued Unisearch, but the trial court granted Unisearch summary judgment that damages were limited to \$25 based upon the limitation of liability in the invoices. *Id.* at 433. The Court of Appeals reversed, and the Supreme Court accepted review, reversing the Court of Appeals and holding that the course of dealing between the parties established that the liability limitation clause was part of the parties' contract. *Id.* at 434.

Similarly, in the present case, TFC typically submitted oral purchase orders to Rudd over the telephone. Rudd would then ship the raw materials, usually the same day or the next day, then send an invoice identifying the products ordered, the quantity, price, and terms and conditions on the front and back of the invoice. *CP 111- CP 112, CP 114 - CP 115.* Like the *Puget Sound Financial* case, there was no time to negotiate or discuss all of the terms and conditions of the sale prior to the sale because the product was shipped as soon as possible after receipt of the oral purchase order. *CP 299.* The parties in this case repeated the same process some 775 times over the next three years. *CP 117 - CP 136.*

As the Court recognized in *Puget Sound Financial*, trade usage and course of dealing are relevant to interpreting a contract and determining

the contract's terms. *See id.*, citing generally, *Bremerton Concrete Prods. Co. v. Miller*, 49 Wn. App. 806, 810, 745 P.2d 1338 (1987). Ambiguity is not required before evidence of trade usage or course of dealing can be used to ascertain the essential terms of a contract. *See Puget Sound Financial*, 146 Wn.2d at 434 (citing RESTATEMENT (SECOND) OF CONTRACTS § 222 cmt. b, and § 223 cmt. b (1981)).

Regarding a course of dealing between merchants, Section 223 of the Restatement states:

- (1) A course of dealing is a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.
- (2) Unless otherwise agreed, a course of dealing between the parties gives meaning to or supplements or qualifies their agreement.

Id. at 436, quoting RESTATEMENT (SECOND) OF CONTRACTS § 223(1)&(2) (1981). “Course of dealing may become part of an agreement either by explicit provision or by tacit recognition, or it may guide the court in supplying an omitted term.” *Id.*, quoting RESTATEMENT (SECOND) OF CONTRACTS § 223 cmt. b (1981).

Additionally, the Court in *Puget Sound Financial* recognized that a

contract such as the contract between TFC and Rudd can be interpreted as a “layered” contract, which incorporates the sales invoices. *See Puget Sound Financial*, 146 Wn.2d at 438, *citing Mortenson, supra*, 140 Wn.2d 571.

In *Mortenson*, the Court “addressed a shrinkwrap license on software and held that the original purchase order was not an integrated contract, that the licensing agreement in the software packaging and instruction manual was part of the contract, and that the provision limiting damages to the recovery of the purchase price was not unconscionable.” *Id.* “[The *Mortenson* Court] applied RCW 62A.2-204 pertaining to contract formation, to reach this conclusion: ‘[B]ecause RCW 62A.2-204 allows a contract to be formed “in any manner sufficient to show agreement . . . even though the moment of its making is undetermined,” it allows the formation of “layered contracts”’” *Id.*, *citing Mortenson* 140 Wn.2d at 584. Accordingly, the Court in *Puget Sound Financial* held that the “layered contract” analysis in *Mortenson* was not limited to shrinkwrap software licenses, and the language in the Unisearch reports and invoices could be incorporated into the parties’ contracts on this alternative basis, as well. *See id.*

There is no evidence in the record, and TFC never argued to the trial court, that the oral purchase orders were integrated contracts, which would preclude the finding of a layered contract in this case, as was found in *Mortenson*.

Under either analysis – by course of dealing or through the use of a layered contract – it is clear that TFC and Rudd incorporated the invoice into their contracts for sale of goods. But they did not incorporate just select portions of it. They also incorporated the exclusion of warranties, limitation of remedies, and forum selection provisions contained on the back of the invoices into their contracts for the sale of goods. Those provisions were contained on each and every invoice for products ordered by TFC, delivered by Rudd, and paid for by TFC over slightly more than a three year period. Thus, as in *Mortenson*, the invoice is an integral part of the contracts for sale of goods between TFC and Rudd and governs the transactions between these merchants.

Rudd believes the entire 775 invoices represent a continuous course of conduct and must be a part of each and every contract for sale of raw materials between the parties because (1) absent the invoices, essential elements for a contract for the sale of goods would be missing (*i.e.*, price,

description and quantity); (2) the front page of the same invoices gave notice in capital letters and bold type to TFC that the order was **“SUBJECT TO THE TERMS AND CONDITIONS ON THE REVERSE HEREOF,”** which include both the forum selection clause, the warranty disclaimer, and limitation of remedies; and, (3) TFC’s Production Manager during the time period in question, Mike Stanley, reviewed each invoice and used the invoices to verify that Rudd’s products had been received before forwarding the invoices to TFC’s accounting department for payment. *CP 300.*

If TFC’s position regarding the disclaimer of warranties is accepted, the court would have to rely on the 25 year old opinion in *Hartwig Farms, Inc. v. Pacific Gamble Robinson Co.*, 28 Wn. App. 539, 625 P.2d 171 (1981), and completely ignore and disregard the Washington Appellate Courts’ development of that area of the law under the UCC over the last 25 years to say nothing of manufacturing a “contract” out of whole cloth without price, description and quantity.

The fallacy of TFC’s analysis is illustrated in the recent opinion of Judge Franklin Burgess of the U.S. District Court for the Western District of Washington (Tacoma) in *Berry v. Spooner Farms*, 2006 WL 1009299,

59 UCC Rep.Serv.2d 443 (2006). CP 419 - CP 422. Judge Burgess summarizes Washington's warranty law under the UCC in a manner very similar to that used in *Puget Sound*, and actually cites to *Puget Sound*, in part, as authority for his decision. See *Berry*, 2006 WL at p. 2, CP 420.

Of particular significance, the facts of the *Berry* case parallel the salient facts at issue in this case. In *Berry*, Spooner agreed to provide "viable" raspberry roots to Berry for the purpose of planting and producing commercial quality raspberry fruit in Mexico. Berry alleged breach of contract claiming the roots were defective causing damage to Berry. Spooner moved for summary judgment based upon a written exclusionary clause. Berry claimed the contract was oral, the clause was not negotiated, was not known to Berry at the time the contract was formed, and not delivered to Berry until after the roots were paid for and delivered. *Id.* at p. 1, CP 419. Claims that are identical with TFC's.

Judge Burgess held that the exclusionary clause was valid, not unconscionable, was of a type commonly used in the trade and that Plaintiff had ample opportunity to read the exclusion, which was prominently displayed on the invoices. "Acceptance of Plaintiff's arguments would result in sellers of nursery stock being virtual insurers of

the crop regardless of the vagaries of the weather or the individual farmer's practices or other influences over which the nursery has no control." *Id.* at p. 4, CP 422.

Similarly, by accepting and adopting TFC's arguments, the trial court essentially made Rudd an insurer of the raw materials/products they sold to TFC for the conversion varnishes no matter for what purpose TFC utilized them or in what manner they used them, blended them or mixed them. Rudd had no control or involvement in the manner by which TFC mixed the Rudd products, applied the Rudd products or the type of material to which TFC applied the Rudd products.

At his deposition, Steven Ryan⁴ explained the process by which TFC applied Rudd products to its cabinets and doors. *CP 404 - CP 408.* Mr. Ryan explained that for each Rudd product involved in the claims being made by TFC, TFC employees would mix the Rudd product at TFC's facilities, wait a specified period of time and then apply the Rudd products to the cabinet or door. *CP 405.* Thus, TFC admits that Rudd was not involved in any way with the actual mixing or application of the products. Rudd had no control over whether the TFC employees mixed

⁴The owner and president of TFC and its CR 30(b)(6) designee for its corporate deposition.

the products in the proper proportions, waited a sufficient time to allow the products to blend properly before application, allowed the mixture to sufficiently dry after application before sanding and applying a top coat, how thick each coat was applied, or on what type of wood product the mixture was applied. All of those decisions and procedures were controlled by TFC, just as a farmer decides when to plant a raspberry root, where to plant it, how deep to plant it, how much water to give it, whether and how much to fertilize, and on and on.

For the very same reasons explained by Judge Burgess, Rudd was not an insurer of the products it sold to TFC and Washington's version of the UCC does not make it one.

2. **Cases relied upon by TFC are both distinguishable and largely superseded by the *Puget Sound Financial and Mortenson cases*.**

The case law TFC cited to the trial court as “the core legal principle” applicable to this issue quite simply does not apply.

In *Hartwig Farms*, a telephone order was followed by a **“confirmation of sale signed by the broker”** that did not contain exclusion of warranty language. *Hartwig Farms*, 28 Wn. App. at 541 (Emphasis added). The seller then sent an invoice to the buyer that

contained exclusionary language. *Id.* The exclusionary language was found by the trial court to be inconspicuous as it was in the smallest type used on the entire invoice. *Hartwig Farms*, 28 Wn. App. at 545 (Emphasis added). **Because there was a conflict between two writings**, one of which contained exclusionary language and one of which did not, the Court employed the “battle of the forms” analysis under RCW 62A.2-207.

Here, TFC admits there was no confirmation of sale document. And, in fact, there is no battle of forms. “Importantly, neither Rudd nor Tacoma Fixture issued any type of written purchase orders, acknowledgments or confirmations after the orders were placed, and before the products were shipped and delivered to Tacoma Fixtures.” *CP* 299. As such, there is no battle of the forms to analyze and therefore, RCW 62A.2-207 and the holding of *Hartwig Farms* do not apply.

A simple table outlining the differences between the facts at issue between the parties before this Court and the facts of *Hartwig Farms* is particularly useful in demonstrating how *Hartwig Farms* is not applicable to the facts at issue:

<u>Fact</u>	<u>Hartwig Farms</u>	<u>TFC/Rudd</u>
Oral Order	Yes	Yes
Written purchase order or confirmation	Yes	<u>No</u>
Invoice in conflict with order or confirmation	Yes	<u>No</u>
Two forms to analyze in a battle of the forms	Yes	<u>No</u>
Invoice terms inconspicuous and in small type	Yes	<u>No</u>

As is evident from the absence of the pertinent facts upon which the *Hartwig Farms* decision was based in the case at bar, the trial court's reliance upon *Hartwig Farms* for its ruling that the terms contained on the Rudd invoices were not part of the contracts between the parties for the sale of goods was misplaced.

The Rudd/TFC transactions much more closely align with the facts presented in *Mortenson, Puget Sound Financial*, and *Berry* where, in each case, the invoices provided the necessary contract terms such as price and quantity, and were held to contain the terms of the contracts between the parties.

Under *Hartwig Farms*, when there has been an exchange of written forms, the terms of the invoices are not part of the contract between the parties as they are deemed to be a modification of the parties'

original written contract using a “battle of the forms” analysis under RCW 62A.2-207.

In its opposition to summary judgment in the trial court, TFC similarly relied upon *Rottinghaus v. Howell*, 35 Wn. App. 99, 666 P. 3d 899 (1983). *Rottinghaus* in large part relies upon *Hartwig Farms*. Significantly however, *Rottinghaus* acknowledges that warranties can be excluded under RCW 62A.2-316(3)(c). The *Rottinghaus* court simply found that the seller had not established that the parties had a course of dealing or that there was a usage of trade that permitted the court to enforce the exclusion of the warranties. *Rottinghaus*, 35 Wn. App. at 107. Further, the *Rottinghaus* court also found that the exclusionary language was “inconspicuous, incomplete and confusing.”⁵ *Id.* Those factors are not present here.

Finally, TFC relied on *Morgan Bros., Inc. v. Haskell Corp.*, 24 Wn. App. 773, 604 P. 2d 1294 (1977), an even older case which addresses the requirements under UCC 62A.2-209(1) for a modification of a contract. That analysis simply does not apply to the facts presented in this

⁵ At the risk of pointing out the obvious, *Rottinghaus* was decided in 1983 and Rudd contends the law of warranties has been significantly developed as outlined above since that time.

case, which is an issue of terms necessary for contract formation, not modification. Further, the predictions of the Ninth Circuit Court of Appeals in *Western Recreational Vehicles, Inc. v. Swift Adhesives, Inc.*, 23 F.3d 1547 (9th Cir. 1994), also relied upon by TFC, regarding the future extension of the law of warranties by the Washington Appellate Courts have proven to be inaccurate based upon the actual development of the law since 1994. Neither case correctly states current Washington law pertinent to the facts presented here, as outlined in *Mortenson and Puget Sound Financial*, and therefore should be disregarded.

B. Clauses Limiting Remedies are Enforceable.

Having established that the language in the invoices is part of the parties' contracts, the next logical step in the analysis is to determine whether they are enforceable, *i.e.*, whether they are substantively and procedurally conscionable. Here, because the trial court found that the language in the invoices was not part of the contracts, it did not reach the issue of enforceability of either the warranty exclusions or limitations of liability. However, where the issue was fully briefed to the trial court and is subject to de novo review, the appellate court may review the matter and, if appropriate, direct that summary judgment be granted. *See e.g.*,

Coppernoll v. Reed, 155 Wn.2d 290, 296, 119 P.3d 318 (2005) (“We engage in the same inquiry as the trial court when reviewing an order of summary judgment”); *Mithoug v. Apollo Radio of Spokane*, 128 Wn.2d 460, 909 P.2d 291 (1996) (appellate court should consider all evidence before the trial court); *Douchette v. Bethel School District*, 117 Wn.2d 805, 808, 818 P.2d 1362 (1991).

Enforceability depends on whether the terms of the liability limitation clause are conscionable or unconscionable. *See e.g., Mortenson*, 140 Wn.2d at 585-89 (“Limitations on consequential damages are generally valid under the UCC unless they are unconscionable”), *citing* RCW 62A.2-719(3). The *Schroeder*⁶ and *Puget Sound Financial Courts* recognized several nonexclusive factors for considering the unconscionability of a liability exclusionary clause.

In *Schroeder* we recognized the following nonexclusive factors to consider in assessing the unconscionability of a liability exclusionary clause: (1) the conspicuousness of the clause in the agreement; (2) the presence or absence of negotiations regarding the clause; (3) the custom and usage of the trade; and (4) any policy developed between the parties during the course of dealing. 86 Wash.2d at 259-61,

⁶ *Schroeder v. Fageol Motors, Inc.*, 86 Wn.2d 256, 544 P.2d 20 (1975).

544 P.2d 20. Additionally, in *American Nursery*, we noted that "[u]nconscionability is determined in light of all the surrounding circumstances, including (1) the manner in which the parties entered into the contract, (2) whether the parties had a reasonable opportunity to understand the terms of the contract, and (3) whether the important terms were hidden in a maze of fine print." 115 Wash.2d at 222, 797 P.2d 477 (citing *Schroeder*, 86 Wash.2d at 260, 544 P.2d 20).

Puget Sound Financial, 146 Wn.2d at 441-442.

1. Conscionability of the Clauses

As discussed above, limitations on damages are generally valid under the UCC unless they are unconscionable. RCW 62A.2-719(3).⁷ Whether a limitation on damages is unconscionable is a question of law. RCW 62A.2-302(1). *Mortenson*, 140 Wn.2d at 585 (citations omitted). "Exclusionary clauses in purely commercial transactions . . . are prima facie conscionable and the ***burden of establishing unconscionability is on the party attacking it.***" *Id.* at 585-586 [Emphasis added]. The issue may

⁷ RCW 62A.2-719(3) provides: "Limitation of consequential damages for injury to the person in the case of goods purchased primarily for personal, family or household use or of any services related thereto is invalid unless it is proved that the limitation is not unconscionable. Limitation of remedy to repair or replacement of defective parts or non-conforming goods is invalid in sales of goods primarily for personal, family or household use unless the manufacturer or seller maintains or provides within this state facilities adequate to provide reasonable and expeditious performance of repair or replacement obligations. Limitation of other consequential damages is valid unless it is established that the limitation is unconscionable."

be determined on summary judgment if there is no threshold showing of unconscionability. *Id.* At 586 (citing *Nelson v. McGoldrick*, 127 Wn.2d 124, 132-133, 896 P.2d 1259 (1995)). And because it is an issue of law, review in this Court is *de novo*.

Washington recognizes two separate types of unconscionability – substantive and procedural. *Mortenson*, 140 Wn.2d at 586. They are discussed in order.

a. Substantive Unconscionability

Substantive unconscionability “involves those cases where a clause or term in the contract is alleged to be one-sided or overly harsh.” *Id.* (citing *Nelson*, 127 Wn.2d at 131, quoting *Schroeder* 86 Wn.2d at 260). Terms like “shocking to the conscience”, “monstrously harsh”, and “exceedingly calloused” are terms sometimes used to define this type of unconscionability. *Mortenson*, 140 Wn.2d at 586 (citations omitted).

The Washington Supreme Court has questioned whether clauses in a commercial contract can *ever* be substantively unconscionable. *Id.* citing *American Nursery Products*, 115 Wn.2d at 237-38 (Utter, J., concurring) and *Tacoma Boatbuilding Co. v. Delta Fishing Co.*, 28 U.C.C. Rep. Serv. 26, 35 (W.D. Wash 1980).

In *Tacoma Boatbuilding*, the Western District of Washington considered whether a contractual clause limiting consequential damages was substantively unconscionable under Washington law, where mechanical problems developed in several boat engines after the contracting process. Like *Mortenson*, the purchaser in *Tacoma Boatbuilding* argued because the product did not work properly, the limitation clause was unconscionable. The court rejected this theory: Comment 3 to [U.C.C.] section 2-719 generally approves consequential damage exclusions as "merely an allocation of unknown or undeterminable risks." Thus, the presence of latent defects in the goods cannot render these clauses unconscionable. The need for certainty in risk-allocation is especially compelling where, as here, the goods are experimental and their performance by nature less predictable. *Tacoma Boatbuilding*, 28 U.C.C. Rep. Serv. at 35 (citation omitted).

We find the result in *Tacoma Boatbuilding* an accurate analysis of Washington's law of substantive unconscionability and adopt it here. In a purely commercial transaction, especially involving an innovative product such as software, the fact an unfortunate result occurs after the contracting process does not render an otherwise standard limitation of remedies clause substantively unconscionable.

An example of the proper focus of the substantive unconscionability doctrine is found in *Brower v. Gateway 2000, Inc.*, 246

A.D.2d 246, 254, 676 N.Y.S.2d 569 (1998). There, a shrinkwrap software license similar to the license in the present case included a mandatory arbitration clause, which required the use of a French arbitration company, payment of an advance fee of \$4,000 (half which was nonrefundable), significant travel fees borne by the consumer, and payment of the loser's attorney fees. *Brower*, 246 A.D.2d at 249, 676 N.Y.S.2d 569. The *Brower* court found this clause substantively unconscionable. *Brower*, 246 A.D.2d at 254, 676 N.Y.S.2d 569.

Mortenson, 140 Wn.2d at 586-587.

The Rudd consequential damages clause does not contain language that “shocks the conscience” and does not contain any onerous provisions like the *Brower* clause. The finished products manufactured by TFC here were experimental in the sense that they were specifically formulated for TFC. Therefore, the Rudd clause is not substantively unconscionable.

b. Procedural Unconscionability

“Procedural unconscionability has been described as the lack of a meaningful choice, considering all the circumstances surrounding the transaction including ‘ “[t]he manner in which the contract was entered,” whether each party had “a reasonable opportunity to understand the terms of the contract,” and whether “the important terms [were] hidden in a

maze of fine print. . . .” *Id.* at 588 citing *Nelson*, 127 Wash.2d at 131, 896 P.2d 1258 (alterations in original) (quoting *Schroeder*, 86 Wash.2d at 260, 544 P.2d 20).

i. Conspicuousness of the Clause

The factors relating to conspicuousness of the clause and whether the important terms are hidden in a maze of fine print are the same and therefore will be discussed together. The exclusion of warranty and limitation of remedies provisions in the Rudd invoices were not hidden in a maze of fine print, but rather were written in capital letters and bold print in the same font size as the surrounding text with a heading in larger font stating “**NON WARRANTY - PLEASE READ CAREFULLY**”. *CP 111 - CP 112, CP 114 - CP 115*. Similarly in larger, bold, font, the limitations of liability and remedy provisions state,

**SELLER DISCLAIMS ANY LIABILITY
FOR INCIDENTAL OR
CONSEQUENTIAL DAMAGES. . .
SELLER’S LIABILITY FOR ANY
SUCH FAILURE SHALL BE LIMITED
TO THE REPLACEMENT OF
MATERIALS WITH RESPECT TO
WHICH SUCH FAILURE IS CLAIMED,
OR THE REPAYMENT OF THE
PURCHASE PRICE RECEIVED
THEREFORE SUBJECT TO RETURN
OF SUCH MATERIALS TO THE**

SELLER.

Id. While the terms appeared on the back of the invoice, the front of the invoice stated in a shaded box in capital letters and bold print, “**THIS ORDER IS SUBJECT TO THE TERMS AND CONDITIONS STATED ON THE REVERSE HEREOF.**” *Id.* This clause is written in the same font size as the surrounding text on the front of the invoice. Therefore it is clear that these clauses are not hidden in “a maze of fine print” and are conspicuous.

ii. Presence or Absence of Negotiations

The analysis of the presence or absence of negotiations often overlaps with the manner in which the parties entered into the contract and whether there was a reasonable opportunity to understand the terms of the contract. In this case, Rudd concedes the parties never explicitly discussed the terms of the exclusion or limitation of liability clause. However, this is not dispositive of the issue.

Like *Puget Sound Financial*, in this case TFC had a reasonable opportunity to understand the terms of the clause which remained unchanged throughout the over three year course of dealing. Further, at the top of the page containing the terms and conditions of the invoice,

there is a notice that specifically provides:

“NOTICE This order is expressly made conditional upon assent by the purchaser to any terms additional to or different from those proposed by the purchaser on his purchase order. Such assent shall be deemed complete if no contrary written notice is sent by purchaser within five (5) days of receipt hereof.”

CP 112. As a result, TFC had every opportunity to “reject” either the goods themselves or the terms of the warranty exclusion or the limitation of liability provisions. It is undisputed that Rudd *never* received any such written notice from TFC. *CP 109.* Accordingly, it follows that TFC accepted those terms of the contract when it accepted the goods with the invoice, failed to send written notice to Rudd rejecting the terms of the invoice and subsequently paid for the goods. *See, e.g., Puget Sound Financial*, 146 Wn.2d at 436-7.

This conclusion, and the conditional nature of the invoice explicitly stated in the Rudd invoices, also closely parallels the decision of the *Mortenson* court regarding whether a contract to purchase commercial software includes the terms of the licensing agreement that are included with or printed on the software wrapping or package. *See, e.g., CP 112.*

Mortenson argued that delivery of the license terms merely constituted a request to add terms which were never agreed upon by the parties. The software company argued the terms of the license were part of the contract between the parties. In analyzing the “layered contract,” the *Mortenson* court held “the terms of the license were part of the contract between *Mortenson* and *Timberline*, and *Mortenson*’s use of the software constituted its assent to the agreement, including the license terms.”

Mortenson, 140 Wn.2d at 584.⁸

Therefore, utilizing the guidance of *Puget Sound Financial* and *Mortenson*, even though there were no specific negotiations concerning these clauses, TFC had a reasonable opportunity to understand them, they remained constant throughout the course of dealing between the parties, and TFC never provided written notice of rejection of either the terms or the goods. Consequently, the provisions must be deemed terms of the contract for sale of goods between the parties.

iii. Course of Dealing

A limitation of liability clause may be conscionable regardless of

⁸ *Mortenson* argued that he never saw the licensing agreement. The court disposed of the argument by stating: “it was not necessary for *Mortenson* to actually read the agreement in order to be bound by it.” *Mortenson*, 140 Wn.2d at 584.

the surrounding circumstances if the general commercial setting indicates a prior course of dealing or reasonable usage of trade as to the exclusionary clause. *American Nursery*, 115 Wn.2d at 223 (citations omitted).

The course of dealing in the case at bar strongly supports enforcing the clauses. In *Puget Sound Financial*, the Court found a course of dealing based upon 47 invoices. *See Puget Sound Financial*, 146 Wn.2d at 436. Here, Rudd sent approximately **775 deliveries of raw materials and products along with separate invoices containing identical terms and conditions** to TFC over an approximately three-year period of time, or 16.5 times as many as in *Puget Sound Financial*. Each invoice contained the identical exclusionary and limitation of liability language. *CP 108*. Despite language requiring it to do so if it objected to any of the terms written on the invoice, TFC never rejected any of the terms or deliveries in writing within five (5) days of receipt – or at any time prior to its filing of the present lawsuit. Thus, the general commercial setting of these sales of goods between these parties establishes a prior course of dealing supporting enforcement of the clauses on the invoice.

Moreover, the clause was not hidden in a maze of fine print. The

clause was in bold print in capital letters. While it was on the back of the invoice, there was language on the front of the invoice in capital letters and in a shaded box advising the reader that there were terms and conditions “on the reverse hereof.” TFC is not an inexperienced retail consumer, but rather a large commercial cabinet making company.⁹

The same evidence of course of dealing noted above in the analysis of whether the clauses were part of the contract supports the conclusion that the clause is procedurally conscionable. *See Mortenson*, 140 Wn.2d at 599, fn 12.

For all of these reasons, the limitation of remedies clause contained on the Rudd invoices to TFC is conscionable and therefore enforceable. TFC failed to dispute the conscionability of the clauses in the trial court. Accordingly, this Court can find that the limitation of remedies clause is conscionable and enforceable and order that summary judgment be granted to Rudd on this issue.

2. The Exclusionary Provisions of the Invoice Preclude All Express Warranties and the Implied Warranties of Merchantability and Fitness for a Particular Purpose.

⁹ See *Northwest Acceptance Corp. v. Hesco Construction, Inc.*, 26 Wn. App. 823, 830-31, 614 P. 2d 1302 (1980) (finding liquidated damages clause conscionable in part because parties were commercially experienced).

Much of the law applicable to the limitation of liability provisions is also applicable to the exclusionary provisions contained in the Rudd invoices. RCW 62A.2-316 pertains to both the exclusion or limitation of warranties in a sale of goods. The same analysis for an exclusionary clause applies to a liability limitation clause in this case. Both terms relate to the exclusion of certain remedies. Thus, the appellate courts use the terms interchangeably. *Puget Sound Financial*, 146 Wn.2d at 438, fn. 12.

Rudd concedes that disclaimers of warranties are disfavored in the law and under the *Berg* rule ineffectual unless specifically negotiated between the buyer and the seller. *Cox v. Lewiston Grain Growers*, 86 Wn. App. 357, 367, 936 P.2d 1191, 1197 (1997) (citing *Berg v. Stromme*, 79 Wn.2d 184, 196, 484 P.2d 380, 386 (1971)). However, the *Berg* rule has not been applied in all commercial transactions and should not be applied in the present case. (See the development of law as outlined in *Puget Sound Financial*).

The *Berg* rule should not apply here for the same reasons the limitations of liability provisions of the invoice are valid, enforceable, conscionable terms of the contracts for the sale of goods between TFC and

Rudd. The exclusionary provisions, too, are valid, enforceable, conscionable terms of the contracts.

Under RCW 62A.2-316(2), a person seeking to exclude the implied warranty of merchantability in the language of an agreement must mention the word “merchantability” and, in the case of a writing, this mention must be “conspicuous.” The statute also requires this same “conspicuous” mention to exclude the implied warranty of fitness. RCW 62A.2-316(2). “Language to exclude all implied warranties of fitness is sufficient if it states, for example, that ‘There are no warranties which extend beyond the description on the face hereof.’” RCW 62A.2-316(2).

In the present case, the language excluding warranties in the Rudd invoices tracks *exactly* with that in the statute, as follows:

NON WARRANTY – PLEASE READ CAREFULLY

**5. SELLER MAKES NO WARRANTY
EXTENDING BEYOND THE
DESCRIPTION OF THE GOODS ON
THE FACE HEREOF, AND THERE IS
NO IMPLIED WARRANTY OF
MERCHANTABILITY OR OF FITNESS
FOR ANY PARTICULAR PURPOSE.**

CP 112.

In addition, implied warranties may also be excluded by a course of

dealing, a course of performance, or a usage of trade unless consumer goods are involved. RCW 62A.2-316(3)(c).

The provisions comply with the requirements of RCW 62A.2-316 because they specifically mention the word “merchantability” and contain the “necessary language” to exclude the implied warranties of fitness for a particular purpose.

The conspicuousness of the provisions, whether they were negotiated between the parties, and the course of dealing between the parties were all was discussed, *supra*, with regard to the limitations of liability and remedies provisions. For those same reasons, the exclusionary provisions of the invoice are conspicuous and the product of an open, consistent, and long-term course of dealing over a three year period involving hundreds of transactions. They are neither procedurally nor substantively unconscionable.

For all of these reasons, the exclusionary provisions comply with the statute and are valid enforceable provisions of the contract for the sale of goods between TFC and Rudd and should be applied to the transactions between the parties. TFC’s claims for breaches of the implied warranties of merchantability and fitness for a particular purpose, as well as all

express warranties, must be dismissed as they were excluded by the provisions of contracts between the parties which incorporated the terms and conditions of the Rudd invoices.

3. Exclusion of Warranties for Latent Defects

TFC argued to the trial court that Rudd cannot exclude warranties or limit damages because the defects alleged are latent defects. First and foremost, there is no competent evidence before the court that Rudd's products are defective or that the alleged defects are latent. TFC did not submit a declaration from any individual competent to render such an opinion.¹⁰

Second, *Cox v. Lewiston Grain Growers*, 86 Wn. App. 357, 936 P. 2d 1191 (1997), conflicts with the more recent guidance of the Washington Supreme Court on a similar issue in *M. A. Mortenson Co. v. Timberline Software Corp.*, 140 Wn.2d 568, 998 P.2d 305 (2000).

In *Tacoma Boatbuilding*, the Western

¹⁰ Of note, the only disinterested person whose testimony was presented to the trial court on the issues of how the problems experienced by TFC could occur - Alan Dixon - stated there are at least six ways for these types of paint failures to occur: (1) overcatalyzation of the coating products (CP 413 at dep. pp. 14-15); (2) a bad batch of product (*id.* at CP 414, dep. p. 19); (3) improper sanding (*id.* at CP 414, dep. p. 20); (4) not letting the stain dry properly (*id.* at CP 414, dep. p. 20); (5) climatic conditions, i.e., heat causing expansion of the product and a faster finish failure (*id.* at CP 415, dep pp. 23-24); and, (6) oil on the wood product or in the finish (*id.* at CP 416, dep p. 26). Five out of six of those issues are not latent defects.

District of Washington considered whether a contractual clause limiting consequential damages was substantively unconscionable under Washington law, where mechanical problems developed in several boat engines after the contracting process. Like *Mortenson*, the purchaser in *Tacoma Boatbuilding* argued because the product did not work properly, the limitation clause was unconscionable. The court rejected this theory: Comment 3 to [U.C.C.] section 2-719 generally approves consequential damage exclusions as "merely an allocation of unknown or undeterminable risks." Thus, the presence of latent defects in the goods cannot render these clauses unconscionable. The need for certainty in risk-allocation is especially compelling where, as here, the goods are experimental and their performance by nature less predictable. *Tacoma Boatbuilding*, 28 U.C.C. Rep. Serv. at 35 (citation omitted).

Id. at 586. (Emphasis added). In fact, the passage above cites to Comment 3 to UCC section 2-719, the very section upon which TFC relied for its argument that Rudd's remedy exclusions must fail.

This result is entirely consistent with long-settled principles of Washington law regarding latent defects, as the Washington Supreme Court stated as long ago as 1935. *Puratich v. Pacific Marine Supply Co.*, 184 Wn. 531, 536-7, 51 P.2d 1080 (1935). In *Puratich*, the Supreme Court upheld the limitation of warranties presented on the bill or invoice

provided pursuant to defendant's sale of fishing nets. *See id.* at 532. In holding the warranty limitation was enforceable, the Court stated,

'While it is the intention of the Uniform Sales Act to make the seller liable as a grower or manufacturer would be under like circumstances, it certainly cannot be the intention of the act that the seller of ordinary merchandise produced in quantity impliedly warrants that the goods are without latent defects. The seller warrants only that they are of the kind and character which he was to deliver under his contract. If, as in this case, it should be held that the seller warrants against a defect not disclosed by over two and one-half years of use, and discoverable only by careful testing, a burden would be cast upon the sellers of merchandise which would be unreasonable and intolerable. No such result could have been contemplated by the codification of the law of sales.'

Puratich v. Pacific Marine Supply Co., 184 Wn. 531, 536-7, 51 P.2d 1080 (1935), quoting *United States Fidelity & Guaranty Co. v. Western Iron Stores, Co.*, 196 Wis. 339, 220 N.W. 192, 194 (1928).

Based upon the clear guidance of the Washington Supreme Court, TFC's arguments regarding remedy exclusions for latent defects must fail as they are contrary to Washington law.

C. The Venue Provision is Valid and Enforceable

With regard to the venue provision in the invoices at issue, Rudd incorporates herein by reference the discussion in its Argument, sections A & B, *supra*, for the proposition that the venue provision is a valid and enforceable term of the parties' contracts. For the same reasons already discussed with regard to the other terms and conditions in the invoices, this Court should reverse the trial court's ruling that the venue provision in the invoices was not part of the parties' contracts and order this case dismissed or transferred to King County Superior Court.

Paragraph 9 of the Terms and Conditions located on the reverse of the invoice states:

9. Venue. The parties agree that any claim, counterclaim, crossclaim, third party claim, other legal action or arbitration by any party against any other party may be commenced and maintained in any state or federal court or any applicable arbitration association located within King County, State of Washington, U.S.A., having subject matter jurisdiction over the dispute between the parties. Each party hereby submits to the jurisdiction of such courts or arbitration association over each of them personally in connection with any such litigation, and agree that the venue may be laid in any such court and shall not be removed or transferred therefrom except upon the written consent of all parties to this Agreement.

CP 112, CP 115.

Forum selection clauses in contracts specify the venue that is agreed to by the parties in the event of litigation arising out of the contract. Washington Courts generally enforce such provisions, even though they may alter the venue for an action that may otherwise apply pursuant to the venue statute. *State ex rel. Electrical Products Consol. v. Superior Court for King County*, 11 Wn.2d 678, 120 P.2d 484 (1941); *State ex rel. Lund v. Superior Court for Okanogan County*, 173 Wn. 556, 24 P.2d 79 (1933); *State ex rel. Schwabacher Bros. & Co., Inc. v. Superior Court for King County*, 61 Wn. 681, 112 P. 927 (1911); *Mangham v. Gold Seal Chincillas, Inc.*, 69 Wn.2d 37, 416 P.2d 680 (1966).

A forum selection clause in a contract is enforceable unless it is unreasonable. The party challenging such a clause must present evidence to justify its non-enforcement. *Voicelink Data Services v. Datapulse*, 86 Wn. App. 613, 618, 937 P.2d 1158 (1997), *citing Argueta v. Banco Mexicano*, 87 F. 3d 320, 324 (9th Circ. 1996). “The party claiming [unreasonableness] should bear a heavy burden of proof. *Id. citing M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S., 1, 17, 92 S.Ct. 1907, 1913, 32 L. Ed. 2d 513 (1972) (alteration in original). When the record and

findings do not support a conclusion that enforcement of the clause would be unreasonable, the trial court will only be reversed on the grounds of abuse of discretion. *Bechtel*, 51 Wn. App. at 148.

Forum selection clauses have been held to control over the doctrine of *forum non conveniens* (*Bank of America, N.A. v. Miller*, 108 Wn. App. 745, 33 P.3d 91 (2001)) even when the forum selection clause requires an action to be filed out of state. *See Voicelink Data Services v. Datapulse*, 86 Wn. App. 613, 937 P.2d 1158 (1997). “Particularly in the commercial context, the enforcement of forum selection clauses serves the salutary purpose of enhancing contractual predictability. *Voicelink*, 86 Wn. App. at 617.

The trial court’s finding that the venue provision in the invoices was not part of the parties’ contracts was error. Accordingly, this Court should reverse the trial court’s denial of Rudd’s motion to dismiss or transfer this case to King County, and order this case be dismissed or transferred to the King County Superior Court.

V. CONCLUSION

The trial court erroneously ignored current binding authority from the Washington Supreme Court, and instead applied an outdated and

factually distinguishable line of cases to support its finding that the invoices were not part of the contracts of sales between these commercial parties. At best, TFC's argument might make sense as to the first transaction, if at all; the other 774 transactions spanning an over three year course of dealing between these commercial merchants incorporated the terms and conditions of the Rudd invoices into each and every sale.

This Court should reverse the trial court and grant Rudd's Motion for Summary Judgment and/or Motion to Dismiss.

RESPECTFULLY SUBMITTED this 15th day of January, 2007.

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