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I. STATEMENT OF FACTS

There is no dispute that the parties' contractually agreed that "[A]ny dispute, controversy or claim arising out of or relating to this Agreement or the breach thereof shall be settled by arbitration." Brief of Appellant, pg 5, CP 35, 51, 65. Further, it is undisputed that irrespective of the broad scope of the arbitration clause the trial court predetermined the enforceability of the choice of law, forum selection and limitation on damages clauses. In so doing, the trial court changed the agreement of the parties and usurped the authority delegated to the arbitrator. Thereby the court violated both state and federal law.

Plaintiffs do not dispute the factual assertions set forth in DAI's Brief of Appellant. Brief of Appellant, pg 4-10. Rather, the Plaintiffs choose to "supplement" the undisputed facts set forth by DAI. Respondents Answering Brief, pg 2-5.

A. *Forum Selection Clause.*

Plaintiffs begin their supplemental statement of facts by quoting three sentences out of DAI's oral argument presented during the hearing on the Motion to Compel Arbitration. Respondents' Answering Brief, pg 2 & 37. From these sentences Plaintiffs argue that DAI requested that the trial court "...sever the forum selection clause and order arbitration." Respondents' Answering Brief, pg 3 & 37. Further, based upon these same sentences, Plaintiffs argue that DAI invited the court to ignore the parties' contractually agreed forum selection clause. Respondents' Answering Brief, pg 36-37. Plaintiffs quote DAI's

argument completely out of context. Subsequently, their factual assertion is incorrect and the Plaintiffs' related legal arguments are without merit.

The quoted sentences are not "invited error." Respondents' Answering Brief, pg 3 & 37. A party may not induce the trial court to error and then argue that judgment should be reversed because of that error. "Invited error arises when a party requests a ruling which is erroneous and then seeks to claim error from that ruling on appeal." *Sandler v. U.S. Development Co.*, 44 Wn. App. 98, 103, 721 P.2d 532, 535 (1986). For the doctrine of invited error to apply a party must, by affirmative actions, knowingly and voluntarily set up the error. *In re Call*, 144 Wn.2d 315, 328-9, 28 P.3d 709, 716 (2001); *Lavigne v. Chase, Haskell, Hayes & Kalamon, P.S.*, 112 Wn. App. 677, 681-2, 50 P.3d 306, 308 (2002). That did not occur here.

In support of DAI's Motion to Compel Arbitration, DAI submitted a nine-page memorandum of authorities. CP 10-19. DAI argued that the court's authority was limited to challenges to enforcement of the arbitration clause. All other disputes were to be determined in arbitration and not by the court. Page 15, ln 3-7. Pages 16 and 17 of that memorandum are devoted to advocating that the franchise agreement forum selection clause is presumptively valid and must be enforced by the trial court. The memorandum cites multiple cases that support those arguments.

At oral argument DAI devoted nearly all of its comments to

advocating that the parties' forum selection clause must be enforced. That argument and the related colloquy between the court and Mr. Branfeld consumed five pages of the report of proceedings text. RP (9-19-08), pg 5-10. At no point did DAI request that the trial court sever the forum selection clause and order arbitration. In context, the sentences relied upon by the Plaintiffs are nothing more than acquiescence to the court's apparent predilection to not enforce the forum selection clause combined with DAI's attempt to prevent a potential second error of the court refusing to enforce the arbitration clause at all.

Therefore, DAI did not at any time affirmatively induce or invite the court to ignore the parties' forum selection clause. Instead, DAI appropriately provided the court with the correct law and then accepted an erroneous adverse ruling, rather than continuing to argue with the trial court on a decided point. The Plaintiffs' quoted sentences were simply DAI's effort to make the best of a bad situation for which DAI is not to blame. Thus, the invited error doctrine is not applicable. *Mary M. v. City of Los Angeles*, 54 Cal. 3d 202, 212, 814 P.2d 1341, 1346-7, 285 Cal. Rptr. 99, 104 – 5 (1991).

B. Controlling Law.

In their attempt to "supplement" factual assertions, Plaintiffs further state that DAI "...conceded that the dispute between Franchisor [DAI] and Franchisee [Plaintiff] would be governed by Washington's Franchise Protection Investment Act FIPA." Pg 3. This assertion is not

entirely accurate and thereby misleading.

The subject franchise agreements provide that the agreements are governed by Connecticut law with the exception of the application of the Federal Arbitration Act and those matters addressed in FIPA. CP 37, para. 13. DAI has always maintained that Washington franchise law applies to the issues addressed in FIPA. CP 11, CP 18, See Brief of Appellant at pg 23-4. However, the FIPA is not designed or intended to cover all disputes that might arise between parties to a franchise agreement. For instance, FIPA does not address the necessary basic elements applicable to breach of contract law, requisite burdens of proof, contracted choice of forum provisions, the application of arbitration clauses many other matters governed by other statutes or by the common law of the state designated as the forum of choice.

The parties contractually agreed that Connecticut law, other than Connecticut franchise law, is the governing law. In place of Connecticut franchise law - Washington franchise law is applicable. DAI has clearly and consistently advocated this position.¹

C. Plaintiffs' Remaining Supplemental Facts.

The Plaintiffs' remaining factual "supplements" assert that DAI's appeal was not filed until after arbitration and that after arbitration DAI moved to vacate the arbitration award because of the pre-arbitration errant rulings of the court. There are no disputes to these assertions.

¹ Note that this is not a matter that the Plaintiffs argued and thereafter DAI "conceded."

II. ARGUMENT

A. *Trial Court Limited to Determining Arbitrability.*

Where the parties have agreed to resolve all disputes by arbitration the court has the limited role of determining the enforceability of that clause in isolation of the rest of the contract. *Rent-A-Center, West, Inc. v. Jackson*, ---U.S. ----, 130 S. Ct. 2772, 2777-8 (2010); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S. Ct. 1204, 163 L. Ed.2d 1038 (2006); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403- 4, 87 S. Ct. 1801, 18 L. Ed.2d 1270 (1967); RCW 7.04A.060(2)(3) & RCW 7.04A070. If the arbitration clause is not enforceable (i.e., unconscionable or procured by fraud or duress), then the remaining contractual disputes are resolved by proceeding to trial in court. If the arbitration clause is enforceable, the court does not have the jurisdiction to determine any other dispute which the parties agreed to arbitrate.

Accordingly, if a party makes a discrete challenge to the enforceability of the arbitration clause, a court must determine the validity of the clause. If the court finds as a matter of law that the arbitration clause is enforceable, all issues covered by the substantive scope of the arbitration clause must go to arbitration. RCW 7.04A.060(2), (3). If the court finds as a matter of law that the arbitration clause is not enforceable, all issues remain with the court for resolution, not with an arbitrator.

Townsend v. Quadrant Corp., 153 Wn. App. 870, 881, 224 P.3d 818, 825 (2009) (petition for review granted 169 Wn.2d 1021, 238 P.3d 504); *McKee v. AT & T Corp.*, 164 Wn.2d 372, 383, 191 P.3d 845 (2008).

Thus, the trial court acted within its jurisdiction in determining

that there was a valid arbitration clause. However, when the court ruled that the forum selection paragraph, choice of law provision and limitation of remedies clause were not enforceable, the court exceeded its authority and usurped the authority the parties delegated to the arbitrator. Those matters were disputes that the parties contractually agreed would be determined in arbitration – not by the trial court.²

Dispute resolution by arbitration is a matter of consent memorialized by written contract. Parties may structure arbitration agreements as they see fit. Thus, parties are free to agree to which of their disputes will be resolved by arbitration. *Rent-A-Center, West, Inc. v. Jackson*, ---U.S. ----, 130 S. Ct. 2772, 2777-8 (2010); *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 479, 109 S. Ct. 1248, 103 L. Ed.2d 488 (1989).

The court is required to enforce arbitration agreements in the same manner as other contracts. *Nail v. Consolidated Resources Health Care Fund I*, 155 Wn. App. 227, 232, 229 P.3d 885, 887-8 (2010); *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 798, 225 P.3d 213, 224 (2009) (quoting *Volt Info. Scis., Inc. v. Bd. of Trustees*, 489 U.S. at, 478). The courts are not empowered to rewrite the agreements of the parties and thereby make a contract for parties that they did not

² This court should not be confused by the Plaintiffs' attempts to reword the primary thrust of DAI's argument. Respondents' Answering Brief, pg 5. DAI has steadfastly maintained that the trial court was authorized to determine the enforceability of the dispute resolution - arbitration clause. CP 211, ln 5-15.

make themselves. *McCormick v. Dunn & Black, P.S.*, 140 Wn. App. 873, 892, 167 P.3d 610, 619 (2007). “We interpret contract provisions to render them enforceable whenever possible.” *Schnall v. AT & T Wireless Services, Inc.*, 168 Wn.2d 125, 131, 225 P.3d 929, 933 (2010).

The parties here agreed that “[A]ny dispute, controversy or claim arising out of or relating to this Agreement or the breach thereof shall be settled by arbitration.” CP 35, CP 51, CP 65. Enforcement of the parties’ forum selection, choice of law and limitation on damages are all disputes “arising out of or relating to” the franchise agreement. By predetermining these disputes rather than leaving those matters to be resolved in arbitration, the court imposed upon the parties a contract that they did not make for themselves. In so doing, the trial court exceeded its powers. It is respectfully submitted that this is the trial court’s fundamental error that requires reversal of the order confirming the arbitration award (CP 323) and the subsequent trial order awarding attorneys’ fees to the Plaintiffs (CP 348-9).

B. RCW 7.04A.230 Does Not Apply to Pre-Arbitration Judicial Usurpation of Authority Contractually Delegated to Arbitrators.

The Plaintiffs argue that even though the court imposed its judgment on substantive issues that the parties agreed would be resolved by arbitration, RCW 7.04A.230 prohibits the court from vacating or not confirming the ultimate award of the arbitrator. Respondents’ Answering Brief, pg 6-10. This argument is fundamentally flawed.

Statutes must be read as a whole. Each section is viewed and harmonized with the other provisions within the statute. *Judd v. American Tel. and Tel. Co.*, 152 Wn.2d 195, 203, 95 P.3d 337, 341 (2004). RCW 7.04A.230, relied upon here by the Plaintiffs sets forth and limits the authority of the courts to review an arbitrator's award for arbitrator misconduct. This statute does not address the pre-arbitration constraints on the authority of the trial courts. Those parameters are governed by RCW 7.04A.060 and 070.

DAI is not advocating that the arbitrator's decision must be vacated because of arbitrator misconduct, corruption and other errors of the arbitrator addressed in RCW 7.04A.230. Instead, the errors here occurred in the trial court's pre-arbitration order which exceeded the limitations of its authority set forth in RCW 7.04A.060 and 070. See, *Teufel Constr. Co. v. American Arbitration Ass'n*, 3 Wn. App. 24, 25, 472 P.2d 572 (1970) relying on *All-Rite Contracting Co. v. Omev*, 27 Wn.2d 898, 181 P.2d 636 (1947); quoted as controlling law in *ACF Property Management, Inc. v. Chaussee*, 69 Wn. App. 913, 921 n 7, 850 P.2d 1387 (1993). Thus, Plaintiffs' reliance on RCW 7.04A.230 is misplaced.

Even applying RCW 7.04A.230 as controlling law, the arbitrator's award must be vacated. Here the parties limited any arbitration damage award to \$100,000. Yet, the award exceeded \$200,000. The parties agreed that the venue for arbitration would be in Connecticut. However, the arbitrator held all hearings in Tacoma,

Washington. Finally, by contract, the parties empowered the arbitrator to apply only the law of Connecticut (except Connecticut franchise law) but it is undisputed that the arbitrator was ordered by the trial court to apply Washington law, as to all matters and issues. Even though these errors were the fault of the trial court and not the arbitrator, the arbitrator did exceed his powers, as defined in the contract. Thus the resulting award should not have been confirmed, and should have been vacated. RCW 7.04A.230(d).

C. Plaintiffs' Reliance on Department of Financial Institutions' Advisory Opinion FIS-04 is Misplaced.

In this case Plaintiffs did not demonstrate that the determination of enforceability of the forum selection is integral to the court determination of the enforceability of the arbitration agreement. Thus, disputes regarding enforcement of the forum selection clause were a matter for the arbitrator and not for the court. *Townsend v. Quadrant Corp.*, 153 Wn. App. 881, 224 P.3d 818, 825 (2009). Alternatively, even if this was an issue that the trial court had authority to decide, it did so incorrectly.

The enforcement of forum selection clauses serves the purpose of enhancing contractual predictability. The party resisting enforcement has the burden of demonstrating that the clause is unenforceable. A forum selection clause is presumptively valid and to be enforced unless it is unconscionable or violates public policy. *Voicelink Data Servs., Inc. v. Datapulse, Inc.*, 86 Wn. App. 613, 617, 937 P.2d 1158 (1997).

Washington courts will enforce a forum selection clause unless doing so is unreasonable or unjust. *Voicelink v. Datapulse*, 86 Wn. App. 613, 618, 937 P.2d 1158 (1997). Because “the court does not accept the pleadings as true, ... the party challenging the forum selection provision bears a heavy burden to show it should not be enforced.” *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 239, 122 P.3d 729 (2005) (citing *Voicelink*, 86 Wn. App. at 618, 937 P.2d 1158). “[A]bsent some evidence submitted by the party opposing enforcement of the clause to establish fraud, undue influence, overweening bargaining power, or such serious inconvenience in litigating in the selected forum so as to deprive that party of a meaningful day in court, the provision should be respected as the expressed intent of the parties.” *Voicelink*, 86 Wn. App. at 618, 937 P.2d 1158 (quoting *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 280 (9th Cir.1984)).

Oltman v. Holland America Line USA, Inc., 136 Wn. App. 110, 119, 148 P.3d 1050, 1054-5 (2006); acc’d *Townsend v. Quadrant Corp.* 153 Wn. App. at 883 and *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. at 464.

Where the forum selection clause is integral to the arbitration clause it can be considered by the court in determining arbitrability. Where the forum selection is integral to the arbitration clause and deemed to be exculpatory our courts have held that an arbitration clause was not enforceable. Those cases then proceeded to trial before the court. *McKee v. AT & T Corp.*, 164 Wn.2d at 388 (litigation in a distant forum that bars class action suits in small damage consumer litigation violates Washington’s strong public policy that consumers must be truly able to vindicate their Consumer Protection Act rights); *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 464, 45 P.3d 594

(2002)³.

Here the Plaintiff did not present any evidence or argue that the forum selection clause was intrinsic to the arbitration clause. Nor did Plaintiffs present any admissible evidence that the forum selection clause was so unjust as to deprive them of a meaningful opportunity to arbitrate this dispute. Consequently, the Plaintiffs did not meet the prerequisite “heavy burden” necessary for a determination that the forum selection clause was unconscionable.

Plaintiffs’ reliance on the Securities Administrator opinion FIS-04 regarding the forum selection clause is unavailing. Respondents’ Answering Brief, pg 2 & 37. In *Management Recruiters International v. Bloor*, 129 F.3d 851 (CA 6, 1997), Bloor, a Woodinville, Washington franchisee, relied upon FIS-04 to argue that a Cleveland, Ohio choice of forum clause for a Washington based franchisee should not be enforced. In rejecting the argument that Securities Administrator opinion FIS-04 was authoritative the Sixth Circuit Court of Appeals noted:

Indeed, [Washington’s] FIPA contains a lengthy provision requiring franchisors to deal with franchisees “in good faith” and setting forth an extensive list of requirements governing franchise relationships, in which an in-state arbitration requirement is notable by its absence. See Wash. Rev. Code § 19.100.180.

³ Washington appellate courts have not found a forum selection clause unenforceable in a commercial dispute.

Id at 854. The Sixth Circuit then went on to acknowledge that Washington courts defer to authoritative agency interpretations of ambiguous statutes if such interpretations are reasonable. *Id* at 856, citing *Hart v. Peoples Nat'l Bank*, 91 Wn.2d 197, 588 P.2d 204, 207 (1978). The court then stated:

But FIS-[0]4 is not an authoritative agency interpretation; under the Washington Administrative Procedure Act, interpretive statements such as FIS-[0]4 are “advisory only.” See Wash. Rev. Code § 34.05.230. While the Washington courts appear not to have addressed the question, the majority view among federal courts is that statutory interpretations expressed in agency advisory opinions are not entitled to deference. See, e.g., *Crandon v. United States*, 494 U.S. 152, 177, 110 S. Ct. 997, 1011, 108 L. Ed.2d 132 (1990) (Scalia, J., concurring); *Southern Ute Indian Tribe v. Amoco Prod. Co.*, 119 F.3d 816, 832 (10th Cir.1997) (citing cases); but see *Elizabeth Blackwell Health Ctr. for Women v. Knoll*, 61 F.3d 170, 182 (3d Cir.1995), cert. denied, 516 U.S. 1093, 116 S. Ct. 816, 133 L. Ed.2d 760 (1996). We are persuaded that where, as here, an agency is empowered both to promulgate binding rules, see Wash. Rev. Code. § 34.05.320, and to issue “advisory-only” interpretive statements, by negative implication the agency's choice to do the latter indicates that its interpretation is not entitled to *de facto* binding effect through judicial deference.

Id. at 856. See also *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 184, 157 P.3d 847, 852 (2007) (agency opinion that conflicts with a statute is given no deference; *Cerrillo v. Esparza* 158 Wn.2d 194, 201-2, 142 P.3d 155, 159 (2006) (error to rely on agency opinion prior to a determination that the subject statute was ambiguous).

In a further key component of the *Management Recruiters International v. Bloor* decision, the court noted that FIS-04 would

violate the Federal Arbitration Act which prevents states from enacting blanket laws that countermand parties' written forum selection agreements.

We note in passing that, if Bloor were correct that FIPA (either in specific words or as interpreted by the Securities Administrator) imposed an absolute requirement of in-state arbitration notwithstanding the parties' agreement to arbitrate in Cleveland, its validity would be in serious doubt as a result of the preemptive effect of the FAA. Section 2 of the FAA provides that a "written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. *The Supreme Court has held that, under Section 2, the forum expectations of parties to an arbitration agreement as reflected in a written agreement may not be upset by state law. See Southland Corp. v. Keating, 465 U.S. 1, 10, 104 S. Ct. 852, 857, 79 L. Ed.2d 1 (1984). A state administrative rule along the lines of FIS-4, in which out-of-state forum-selection provisions are deemed inherently unconscionable, would be especially problematic in view of the Supreme Court's holding that a court "may not rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what ... the state legislature cannot." Perry v. Thomas, 482 U.S. 483, 492 n. 9, 107 S. Ct. 2520, 2527 n. 9, 96 L. Ed.2d 426 (1987).*

Id. at 856 (emphasis added); accord, *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn. 2d at 798.

Moreover, FIS-04 by its terms is limited to "...franchise agreement[s]that *unfairly* and non-negotiably sets the site of arbitration..." out of state. CP 96 (emphasis added). Thus, even if this agency advisory opinion was given deference, the Plaintiff would have

the burden to prove the prerequisite unfairness. Evidence of forum selection unfairness was presented in *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 464, 45 P.3d 594 (2002) (related costs prohibited real access to arbitrate claims). However, Plaintiff did not produce any such evidence in this case. See Brief of Appellant at pg 20-1.

D. 9 U.S.C. § 4 Does Not Require that a Washington Superior Court Order Arbitration in Washington.

The Plaintiffs note that under the FAA, a Federal District Court can only compel arbitration to take place in the district of the respective court. Respondents' Answering Brief pg 24. "Section 4 [9 U.S.C. § 4] further requires that the arbitration proceedings themselves 'shall be within the district in which the petition for an order directing such arbitration is filed.'" *Management Recruiters International v. Bloor*, 129 F.3d at 854. However, by its terms 9 U.S.C. § 4 is applicable only to decisions of the Federal District Courts. Here the parties did not submit the issue of arbitrability to the federal courts. Instead both parties relied upon RCW 7.04A in seeking determination of the issue in the Washington State Superior Court. CP 12-13 & CP 79, 82. Unlike 9 U.S.C. § 4, RCW 7.04A does address the issue of the venue of ordered arbitration. Further, DAI correctly argued that the issue of the venue was not a matter for court determination. Instead, Plaintiffs' choice of forum issue was a dispute that had to be addressed to the arbitrator. CP 211, ln 5-

15.

E. The Court Did Not Provide any Basis for its Ordering that the Arbitrator Apply Washington Law.

Plaintiffs argue that “[T]he Superior Court concluded that the choice of law provision was unconscionable...”. Respondents’ Answering Brief, pg 25. Plaintiffs do not provide the required reference to the record to support this assertion. Our appeal courts generally decline to consider factual statements recited in briefs that are not supported by the required reference to the record. RAP 10.3(a)(5) & (6), *Sherry v. Financial Indem. Co.*, 160 Wn.2d 611, 615, 160 P.3d 31, 33 (2007).

In any event, the trial court here did not articulate any basis for its decision to not enforce the parties’ choice of law provision. There are neither related factual findings nor legal conclusions. RP (9-19-08) 17, In 17-22; CP 218. Further, there is nothing in the record upon which to conclude that the choice of law provision was necessary or intrinsic to the trial court’s limited authority to rule on the enforceability of the parties’ arbitration clause. Thus enforcement of choice of law was a dispute that only the arbitrator, and not the court, had the authority to decide. *Townsend v. Quadrant Corp.*, 153 Wn. App. at 881.

Further, the Plaintiffs’ assertion that the arbitrator was not permitted to apply FIPA is not correct. Respondents’ Answering Brief, pg 27. DAI has always maintained that that FIPA was the contractually controlling franchisee law. CP 11, CP 18. As such, DAI would be

judicially estopped from taking an inconsistent position in arbitration.

Vision One, LLC v. Philadelphia Indemnity Ins. Co. ___ Wn. App ___,
2010 WL 4069508, 6 (Div. 2, 2010).

F. Limitation on Damages.

Plaintiffs argue that the parties' limitation on damages clause is unconscionable because it contravenes the Consumer Protection Act RCW 19.86.090 that may be applicable to this case under RCW 19.100.190(1) via RCW 19.100.180. However, Plaintiffs do not assert that the trial court determined that the limitation on damages clause was unconscionable. In fact, the trial court did not provide any reason factual findings or legal conclusions for ordering arbitration with "...no limitation on remedies in the arbitration." RP (9-19-08).

Further, Plaintiffs argument here is again predicated on the supposition that the courts have the authority to rule on enforceability of selected contract clauses irrespective of the parties' agreement to resolve all disputes arising out of the contract in arbitration. This presumption is not correct. *Townsend v. Quadrant Corp.*, 153 Wn. App. at 881, 224 P.3d 818, 825 (2009). The courts' authority is limited to determining the validity of an arbitration clause independently of the remaining contract provisions that are not intrinsic to the arbitration clause. Plaintiffs do not argue that the limitation of damage clause affects the arbitrability issue. Consequently, the determination of enforceability of the damage limitation clause was beyond the scope of

authority of the court.

Additionally, there was no evidence presented to the trial court that DAI's actions had contravened RCW 19.100.190 or the Consumer Protection Act. Thus, if the court based its ruling on the presumption that DAI violated the Consumer Protection Act, it improperly predetermined the application of law to disputed facts that were strictly a matter for the arbitrator to decide. But, the court is not allowed to speculate how an arbitrator will interpret facts or apply the law.

[W]e should not, on the basis of “mere speculation” that an arbitrator might interpret these ambiguous agreements in a manner that casts their enforceability into doubt, take upon ourselves the authority to decide the antecedent question of how the ambiguity is to be resolved. In short, since we do not know how the arbitrator will construe the remedial limitations, the questions whether they render the parties' agreements unenforceable and whether it is for courts or arbitrators to decide enforceability in the first instance are unusually abstract.

Zuver v. Airtouch Communications, Inc., 153 Wn.2d 293, 311-12, 103 P.3d 753, 764 (2004) quoting *PacifiCare Health Systems, Inc. v. Book*, 538 U.S. 401, 407, 123 S. Ct. 1531, 1536 (2003).

G. Court's Usurping of the Arbitrator's Authority to Resolve Disputes is Not Harmless Error.

Plaintiffs argue that the court's errors are harmless. Respondents Answering Brief, pg 31-36. “Harmless error” has three distinct requirements.” The error must: 1) be trivial, or formal, or merely academic; 2) not prejudicial to a substantial right; and 3) in know way

affected the case outcome. Plaintiffs here must show all three elements are present.

A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.

State v. Britton, 27 Wn.2d 336, 341, 178 P.2d 341, 344 (1947).

Under both state and federal law parties have a codified right to submit their disputes to arbitrators. RCW 7.04A.060; 9 U.S.C.A. § 2.

The purpose of these statutes is to compel the courts to honor the parties' agreement to arbitrate their disputes. "To overcome judicial resistance to arbitration, Congress enacted the Federal Arbitration Act (FAA), 9 U.S.C. § 1-16." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. at 443-444. Thus, enforcement of agreements to arbitrate disputes is a substantial right. And, it is not a trivial or merely academic matter when the courts take it upon themselves to resolve disputes that the parties have agreed to resolve in private arbitration. Instead, it is a violation of codified law.

There is no transcript of the arbitration proceedings in the court record. Therefore, there is no record from which the trial court or this court could judge the actual effect of the trial court's pre-arbitration order. Additionally, review of an arbitration award is severely limited by chapter RCW 7.04A.230. *Davidson v. Hensen*, 135 Wn.2d 112, 119, 954 P.2d 1327 (1998). Therefore, without improperly going

behind the arbitration award, it is not possible to know what affect the trial court's order had on the award.

III. CONCLUSION

United States Supreme Court has already held that, notwithstanding state laws, the arbitration clauses in the franchise agreements offered by DAI are valid and enforceable. *Doctor's Associates, Inc. v. Casarotto*, 17 U.S. 681, 116 S. Ct. 1652, 134 L. Ed.2d 902 (1996).

Ordering the parties to proceed to arbitration was proper here. Neither party disputes that portion of the trial court's order. However, the trial court predetermined the validity of disputes that were not integral components of arbitration clauses. In doing so the trial court exceeded its authority.

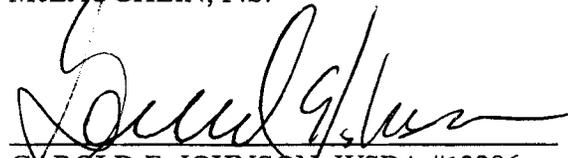
Therefore, for the all the reasons set forth in the Brief of Appellants and this Reply Brief, it is respectfully submitted that the trial court's order confirming the arbitrator's award (CP 323) must be reversed and the award vacated. Likewise, the court's order awarding the plaintiffs their attorney's fees and costs that is based upon the trial court's order that improperly confirmed the arbitrator's award (CP 348-9) should also be vacated.⁴

⁴ Not surprisingly our appellate courts, without discussion or analysis, routinely vacate trial court orders awarding a prevailing party attorney fees when the underlying order upon which it is based has been reversed. *Vision One, LLC v. Philadelphia Indemnity Ins. Co.*, 2010 WL 4069508, 10 (2010); *Segaline v. State, Dept. of Labor and Industries*, 169 Wn.2d 467, 479, 238 P.3d 1107, 1113 (2010); *Mattingly v. Palmer Ridge*

Further, this case should be remanded with instructions to the trial court to award to DAI the reasonable attorney's fees and costs it incurred in enforcing the arbitration clauses. Finally, DAI respectfully requests that this court award its reasonable attorney's fees and costs incurred in this appeal.

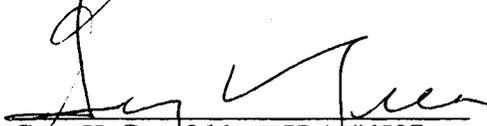
Dated this 24th day of November, 2010.

KRAM, JOHNSON, WOOSTER &
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Homes LLC, 157 Wn. App. 376, 399, 238 P.3d 505, 516 (2010). This is a concept so basic that no citation to authority should be necessary or warranted. Plaintiffs' contrary argument (ironically presented without citation to authority as required by RAP 10.3(a)(6)) is without merit. Respondent's Answering Brief pg 39.

COURT OF APPEALS
DIVISION II

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CERTIFICATE OF SERVICE

STATE OF WASHINGTON

BY

I, Dawne M. Rowley, hereby declare under the penalty of perjury

under the laws of the State of Washington in the County of Pierce that on

November 29, 2010, I hand-delivered a true and correct copy of

Appellant's Reply Brief to the Respondents at the following address:

Law Offices of Douglas D. Sulkosky
Douglas D. Sulkosky
1105 Tacoma Avenue S
Tacoma, WA 98402

That on November 29, 2010, I delivered by depositing in the United

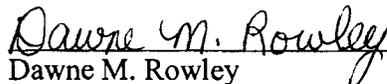
States mail, postage prepaid, a properly addressed envelope containing a

true and correct copy of Appellant's Response to Respondents' Motion to

Dismiss Appeal to the Respondents at the following address:

Todd S. Baran, PC
Attorney at Law
4004 SE Division St
Portland, OR 97202-1645

Dated at Tacoma, Washington this 29th day of November 2010.


Dawne M. Rowley