

NO. 77985-6

SUPREME COURT OF THE STATE OF WASHINGTON

HERBERT NELSON, on his behalf and on
behalf of all others similarly situated,

Respondent/Appellee,

v.

APPLEWAY CHEVROLET, INC., a Washington corporation, d/b/a
APPLEWAY SUBARU/VOLKSWAGEN/AUDI, APPLEWAY
ADVERTISING, APPLEWAY AUDI, APPLEWAY AUTOMOTIVE
GROUP, APPLEWAY CHEVROLET LEASING, APPLEWAY
GROUP, APPLEWAY MAZDA, APPLEWAY MITSUBISHI,
APPLEWAY SUBARU, APPLEWAY TOWING, APPLEWAY
TOYOTA, APPLEWAY VOLKSWAGEN, EAST TRENT AUTO
SALES, LEXUS OF SPOKANE, OPPORTUNITY CENTER, and
TSP DISTRIBUTORS; and AUTONATION, INC., a foreign
corporation,

Petitioners/Appellants.

RESPONDENT/APPELLEE HERBERT NELSON'S RESPONSE
TO AMICI CURIAE BRIEF OF CAMP AUTOMOTIVE, INC. AND
LITHIA MOTORS, INC.

TOUSLEY BRAIN STEPHENS PLLC
Kim D. Stephens, WSBA #11984
Max E. Jacobs, WSBA #32783
Kimberlee L. Gunning, WSBA #35366
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
206.682.5600

PHILLABAUM, LEDLIN,
MATHEWS & SHELDON, PLLC
Brian S. Sheldon, WSBA #32851
421 W. Riverside Avenue, Suite 900
Spokane, Washington 99201-0418
509.838.6055

Attorneys For Respondent/Appellee

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I. INTRODUCTION

The argument of Amici, Camp Automotive, Inc. and Lithia Motors, Inc. (collectively, “Camp and Lithia”), suffers from the same infirmities as that of Petitioners. Both misstate the issues before this Court and the facts before the trial court in their respective lawsuits. And, neither Camp and Lithia nor Petitioners provide this Court with reason to conclude that the Superior Court erred when it held RCW 82.04.500 prohibits retailers from assessing B&O tax on individual transactions and collecting B&O tax directly from consumers. Nor do Camp and Lithia present any argument or authority compelling the conclusion that the Superior Court abused its discretion when it certified the Class pursuant to CR 23(b)(2).

In the interest of brevity, Mr. Nelson will not restate the points in his previous briefing on appeal, which responds to most issues raised by Amici. Rather, Mr. Nelson takes this opportunity to address new issues raised by Camp and Lithia.

II. ARGUMENT

A. **Amici’s “Statement of Facts” Is Not Supported By the Record, Nor Is Its Attempt To Distinguish Its Itemization and Collection of B&O Tax From Appleway’s Illegal Practice**

Camp and Lithia’s “Statement of Facts” is not supported by the record in the trial court. Camp and Lithia claim without citation that their business practice was to “disclos[e] a negotiable B&O charge to customers during the course of negotiating a purchase price.” *See* Amici Curiae Br. at 3. With regard to Mr. and Mrs. Johnson, plaintiffs in the suit against Camp and Lithia, Camp and Lithia assert without citation that “a B&O

charge” was “disclosed” “[d]uring the pre-sale negotiation process” and that the “B&O charge” was “subject to negotiation before the Johnsons and Camp reached agreement on both the final purchase price and the components of that price.” Amici Curiae Br. at 1.

Camp and Lithia’s allegations regarding the facts of the Johnsons’ case and regarding Camp and Lithia’s business practices generally are not supported by any record before this Court. In the proceeding against Camp and Lithia filed in Spokane County Superior Court, *Johnson v. Camp Automotive, Inc.*, Case No. 05-2-05059-9, Camp and Lithia never filed any responsive pleading to the Johnsons’ complaint.¹ The only pleading on file is the Johnsons’ complaint, which describes the transaction as follows: “[a]fter agreeing on the vehicle price with Defendants’ sales agents, Defendants drafted a purchase agreement, which added to the sales price of the vehicle, among other things, a charge for Defendants’ B&O tax, and a charge for sales tax on the B&O tax.”² The record before this Court does not support Camp and Lithia’s unsubstantiated allegations.

Generally, this Court’s review is limited to those issues actually ruled upon by the Superior Court. *See* RAP 2.5 (appellate courts may refuse to review errors not raised in the trial court, with exception of

¹ *See* Appendix A (case docket for *Johnson v. Camp Automotive, Inc.*, Spokane Superior Court Case No. 05-2, available from the Washington courts website at: http://dw.courts.wa.gov/index.cfm?fa=home.casesummary&casenumber=05-2-05059-9&searchtype=sNumber&crt_itl_nu=S32&cc=INJ&fd=2005-10-19).

² *See* Appendix B (Complaint for Declaratory and Injunctive Relief and Unjust Enrichment Damages) at ¶ 1.3.

jurisdictional and constitutional issues and failure to establish facts upon which relief may be granted); *Walker v. Munro*, 124 Wn.2d 402, 414, 879 P.2d 920 (1994) (Washington courts do not issue advisory opinions). Moreover, “[o]n review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court.” RAP 9.12.

Appleway similarly claimed, without the benefit of a supporting record, that Class members *may* have negotiated whether the B&O tax should be “backed out” or *may* have negotiated a price cut to offset the B&O tax. *See, e.g.*, Appellants’ Br. at 47–48. The Superior Court correctly held that individual negotiations with consumers — or what both Appleway and Amici characterize as “disclosure” — were irrelevant to the issue of whether assessing and collecting B&O tax directly from consumers violates Washington law. *See* RP 56:18–21 (8/13/04 Hearing) (“You might have the absolutely best disclosure policy you can imagine and it doesn’t make an illegal practice legal.”). Similarly, this Court should reject Camp and Lithia’s attempt to deflect attention from the real issue here: whether levying the B&O tax directly on consumers is contrary to Washington law.

Amici’s unsubstantiated attempts to supplement the record are improper and irrelevant.

B. Amici Fail to Show That the Superior Court Abused its Discretion By Certifying the Class Pursuant to CR 23(b)(2)

Camp and Lithia do not dispute that the Superior Court’s class certification ruling was a fact-dependent determination, reviewed by this

Court for abuse of discretion. See Supplemental Br. of Respondent/Appellee Herbert Nelson at 16 (citing *Lacey Nursing Ctr., Inc. v. Dep't of Revenue*, 128 Wn.2d 40, 47, 905 P.2d 338 (1995)). Rather, Camp and Lithia claim that the Superior Court misinterpreted Washington case law interpreting CR 23(b)(2) when it certified the Class. While Camp and Lithia's argument generally mirrors that of Appleway, it makes two additional points which must be addressed.

First, Camp and Lithia appear to argue that Mr. Nelson should have sought certification of "a class of *prospective* purchasers." See Amici Curiae Br. at 4 (emphasis added). But, a class of *prospective* purchasers of vehicles from Appleway — assuming that such a class could be identified — would likely have no standing to pursue any claim against Appleway, given that they had suffered no injury. Moreover, such a class would likely have no standing to seek declaratory relief as to the illegality of Appleway's business practice given that any controversy between Appleway and *prospective* purchasers would be highly speculative at best. The unidentifiable class composed solely of prospective purchasers who might suffer harm from illegal B&O assessments in the future that Camp and Lithia proposes simply makes no sense.

Second, Camp and Lithia focus on language in the Court of Appeals' decision in *Sitton v. State Farm Mut. Auto. Ins. Co.* they suggest requires plaintiffs seeking CR 23(b)(2) certification to establish that plaintiffs seek a "group remedy." See Amici Curiae Br. at 6 (citing *Sitton*, 116 Wn. App. 245, 63 P.3d 198 (2003)). Camp and Lithia argue that because individual Class members may receive individual awards of

monetary relief, any remedy sought by the class is not a “group remedy” as called for by *Sitton*. *See id.*

Amici’s reading of *Sitton* and the legal principles underlying that decision are incorrect. Camp and Lithia seem to confuse “individual” claims and damages with “individualized” claims and damages. The “incidental damages” rule laid down in *Sitton* forbids the latter, but not the former. And, based on the record before it, the Superior Court held that determination of Class members’ damages here does not turn on individualized factual or legal issues. *See* RP 103:20 – 104:2 (8/13/04 Hearing) (“Here my interpretation is what’s being requested is: Here’s a class member, here’s the documentation they signed. Here is the item on the B&O line and the B&O ‘sales tax.’ That is the damage and in my view it is fairly simple and easy to ascertain. It would not preclude a (b)(2) certification or require a (b)(3) certification.”).

The authoritative treatise on class action practice supports this reading of CR 23(b)(2). *See* Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 4.17 (4th ed. 2002) (“Monetary relief ‘predominates’ under Rule 23(b)(2) . . . when the monetary relief being sought is less of a group remedy and instead depends more on the varying circumstances and merits of each potential class member’s claim.”).

The Superior Court did not abuse its discretion when it certified the Class pursuant to CR 23(b)(2), based on the facts in the record and on Washington case law. Amici provide this Court with no reason to conclude that the Superior Court’s class certification decision should be reversed.

III. CONCLUSION

Mr. Nelson respectfully requests that the Court affirm the Superior Court's summary judgment and class certification orders, and remand this case to the Superior Court with instructions that this matter proceed consistent with those orders.

RESPECTFULLY SUBMITTED this 6th day of October, 2006.

TOUSLEY BRAIN STEPHENS PLLC

By: 

Kim D. Stephens, WSBA #11984

Max E. Jacobs, WSBA #32783

Kimberlee L. Gunning, WSBA #35366

PHILLABAUM, LEDLIN, MATHEWS &
SHELDON, PLLC

Brian S. Sheldon, WSBA #32851

421 W Riverside Ave., Ste. 900

Spokane, Washington 99201-0418

509.838.6055

CERTIFICATE OF SERVICE

I, Juliet Albertson, declare and say as follows:

1. I am a citizen of the United States and resident of the state of Washington, over the age of 18 years, not a party to the above-entitled action, and am competent to be a witness herein. My business address and telephone number are 1700 Seventh Avenue, Suite 2200, Seattle, Washington 98101, 206.682.5600.

2. On October 6, 2006, I caused a true and correct copy of the foregoing document to be personally delivered to the following parties in the manner indicated at the addresses listed below.

Brian S. Sheldon
PHILLABAUM, LEDLIN, MATHEWS &
SHELDON, PLLC
421 West Riverside Ave., Suite 900
Spokane, WA 99201-0418
Fax: 509.625.1909

- U.S. Mail, postage prepaid
- Hand Delivered via Messenger Service
- Overnight Courier
- Facsimile
- Electronic Transmission

Co-Counsel for Respondent/Appellee

Stephen M. Rummage
DAVIS WRIGHT TREMAINE LLP
1500 Fourth Ave., Suite 2600
Seattle, WA 98101

- U.S. Mail, postage prepaid
- Hand Delivered via Messenger Service
- Overnight Courier
- Facsimile
- Electronic Transmission

and

Gregg R. Smith
GREGG R. SMITH, ATTORNEY AT LAW
905 West Riverside Ave., Suite 409
Spokane, WA 99201-1099
Fax: 509.838.3955

- U.S. Mail, postage prepaid
- Hand Delivered via Messenger Service
- Overnight Courier
- Facsimile
- Electronic Transmission

and

Daniel F. Katz
Luba Shur
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, NW
Washington D.C. 20005
Fax: 202.434.5029

- U.S. Mail, postage prepaid
- Hand Delivered via Messenger Service
- Overnight Courier
- Facsimile
- Electronic Transmission

Attorneys for Petitioners/Appellants

Jill D. Bowman
STOEL RIVES LLP
600 University St., Ste. 3600
Seattle, WA 98101-3197
Fax: 206-386-7500

- U.S. Mail, postage prepaid
- Hand Delivered via Messenger Service
- Overnight Courier
- Facsimile
- Electronic Transmission

*Attorneys for Amici Curiae Camp
Automotive, Inc. and Lithia
Motors, Inc.*

Kimberley Hanks McGair
FARLEIGH WITT
121 SW Morrison St., Ste. 600
Portland, OR 97204
Fax: 503.228.1741

- U.S. Mail, postage prepaid
- Hand Delivered via Messenger Service
- Overnight Courier
- Facsimile
- Electronic Transmission

*Attorneys for Amicus Curiae
Charter Communication LLC*

Michael B. King
Linda B. Clapham
LANE POWELL PC
1420 5th Ave Ste 4100
Seattle, WA 98101-2338
Fax: 206.223.7107

- U.S. Mail, postage prepaid
- Hand Delivered via Messenger Service
- Overnight Courier
- Facsimile
- Electronic Transmission

*Attorneys for Amicus Curiae
Association of Washington
Business*

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

EXECUTED at Seattle, Washington, this 6th day of October, 2006.



Juliet Albertson

APPENDIX A



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Superior Court Case Summary

Court: Spokane Superior
Case Number: 05-2-05059-9

Sub	Docket Date	Docket Code	Docket Description	Misc Info
1	10-19-2005	SMCMP	Summons & Complaint	
2	11-10-2005	NTAPR ATD0001	Notice Of Appearance Swindler, Geoffrey D.	
2.1	02-14-2006	ORTSC	Order To Show Cause 03-15-2006 @ 9 Am	
2.1	02-14-2006	ORTSC JDG0035	Order To Show Cause Judge Ellen Kalama Clark Id#70	
3	02-22-2006	NTSBC	Notice Of Substitution Of Counsel 03-15-2006 @ 9 Am	
3	02-22-2006	NTSBC JDG0035	Notice Of Substitution Of Counsel Judge Ellen Kalama Clark Id#70	
4	03-13-2006	ORTSC JDG0035	Order To Show Cause Judge Ellen Kalama Clark Id#70	05-17-2006TF
5	03-14-2006	AFSR	Affidavit/declaration Of Service 3-7-2006 Camp Automotive Inc	
6	03-23-2006	DCLR	Declaration Svr 03-16-06	
7	05-16-2006	MMATH	Memorandum Of Authorities Support	
8	05-16-2006	MT	Motion Stay Proceedings	
9	05-16-2006	ORSP	Order For Stay Of Proceedings	

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Contact Information

Spokane Superior
1116 W Broadway Ave, Rm 300
Spokane, WA 99260-0350
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509-477-5714[Fax]
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9	05-16-2006	ORSP JDG0035	Order For Stay Of Proceedings Judge Ellen Kalama Clark Id#70	

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APPENDIX B

OCT 19 2005

THOMAS R. FALLQUIST
SPOKANE COUNTY

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2
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7
8 IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR SPOKANE COUNTY

9 MARCIA JOHNSON and THERON
10 JOHNSON, a married couple, on their behalf
and on behalf of all others similarly situated,

11 Plaintiffs,

12 v.

13 CAMP AUTOMOTIVE, INC., a Washington
14 Corporation, d/b/a CAMP CHEVROLET
15 CADILLAC, and LITHIA MOTORS, INC.,
an Oregon Corporation, individually, and as
16 representatives of a class of motor vehicle
dealers in Washington State itemizing and
charging B&O Tax and B&O Sales Tax,

17 Defendants.
18

CLASS ACTION

NO.

05205059-9

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF AND
UNJUST ENRICHMENT DAMAGES

19
20 Plaintiffs Marcia Johnson and Theron Johnson bring this action on their behalf and on
21 behalf of all other similarly situated individuals and entities for declaratory and injunctive relief
22 and for incidental monetary damages against Defendants and the Defendant Class who itemize
23 and collect the Washington State Business and Occupation Tax ("B&O Tax") on the sale of
24 motor vehicles, parts, merchandise, or services in Washington State.
25
26

1 **I. FACTUAL BACKGROUND**

2 1.1 On July 10, 2004, Plaintiffs Marcia Johnson and Theron Johnson purchased a
3 vehicle from Camp Automotive, Inc., d/b/a Camp Chevrolet Cadillac ("Camp Automotive") in
4 Spokane, Washington. Upon information and belief, Defendant Camp Automotive is a wholly-
5 owned subsidiary of Defendant Lithia Motors, Inc.

6 1.2 After agreeing on the vehicle price with Defendants' sales agents, Defendants
7 drafted a purchase agreement, which added to the sales price of the vehicle, among other
8 things, a charge for Defendants' B&O Tax, and a charge for sales tax on the B&O Tax ("B&O
9 Sales Tax").

10 1.3 Upon information and belief, Defendants and the Defendant Class itemize and
11 collect B&O Tax and B&O Sales Tax on all transactions, including the sale of cars, parts,
12 merchandise, and service. Upon information and belief, Defendants and the Defendant Class
13 itemize and collect B&O Tax and B&O Sales Tax in a concerted and systematic manner.

14 1.4 Defendants and the Defendant Class are prohibited by statute from itemizing
15 and collecting B&O Tax and B&O Sales Tax from Plaintiffs and the Plaintiff Class.

16 **II. PARTIES**

17 2.1 Plaintiffs:

18 2.1.1 Marcia Johnson and Theron Johnson are husband and wife residing in
19 Spokane County, Washington. Mr. and Mrs. Johnson purchased an automobile from
20 Defendants Camp Automotive and Lithia Motors, Inc., in Spokane County, Washington.

21 2.2 Defendants:

22 2.2.1 Camp Automotive, Inc., is a Washington corporation doing business as
23 Camp Chevrolet Cadillac.

24 2.2.2 Lithia Motors, Inc., is an Oregon corporation doing business in the state
25 of Washington. Upon information and belief, Lithia Motors, Inc. wholly owns and controls
26 Camp Automotive, Inc.

1 Inc., conducts business through its wholly-owned subsidiary companies or franchisees,
2 including Camp Automotive. Defendants maintain regular and continuous contacts with the
3 state of Washington.

4 3.4 Venue is proper in Spokane County because the acts alleged herein occurred in
5 whole or in part in Spokane County, Washington, because the Camp and Lithia Defendants do
6 business in this county and because the Defendant Class acted in a concerted and systematic
7 manner to illegally itemize and collect B&O Tax and B&O Sales Tax from Plaintiffs and the
8 Plaintiff Class.

9 3.5 Plaintiffs and the Plaintiff Class assert no federal question. The amount in
10 controversy as to Plaintiffs and to each member of the Plaintiff Class does not equal or exceed
11 \$75,000, exclusive of interest and costs. More than two-thirds of all Plaintiff Class members,
12 as well as the primary Defendants, are citizens of Washington State. In addition, the
13 controversy involves a question of the application of Washington state law.

14 IV. CLASS ACTION ALLEGATIONS

15 A. Plaintiff Class

16 4.1 Plaintiffs bring this class action lawsuit on their behalf and on behalf of all
17 others similarly situated as members of a proposed Plaintiff Class pursuant to CR 23(a) and
18 CR 23(b)(2). This action satisfies the numerosity, commonality, typicality, and adequacy
19 requirements of CR 23(a). Class requirements under CR 23(b)(2) are met because Defendants
20 and the Defendant Class have acted or refused to act in concert and systematically on grounds
21 generally applicable to the Plaintiff Class, thereby making final injunctive relief or
22 corresponding declaratory relief appropriate with respect to the class as a whole.

23 4.2 The Plaintiff Class is defined as:

24 All individuals and entities from whom Defendants and the
25 Defendant Class itemized and collected B&O Tax on the sale of
26 motor vehicles, parts, merchandise, or service in the state of
Washington. Excluded from the Class are Defendants and the
Defendant Class, any entity in which Defendants have a
controlling interest, any entity which has a controlling interest in

1 Defendants, and Defendants' legal representatives, assigns, and
2 successors. Also excluded from the Class are: Appleway
3 Chevrolet, Inc., d/b/a Appleway Subaru/Volkswagen/Audi,
4 Appleway Advertising, Appleway Audi, Appleway Automotive
5 Group, Appleway Chevrolet Leasing, Appleway Group, Appleway
6 Mazda, Appleway Mitsubishi, Appleway Subaru, Appleway
7 Towing, Appleway Toyota, Appleway Volkswagen, East Trent
8 Auto Sales, Lexus of Spokane, Opportunity Center, TSP
9 Distributors, and AutoNation, Inc. Also excluded are the judge to
10 whom this case is assigned and any member of the judge's
11 immediate family.

12 4.3 Claims for personal injury are specifically excluded from the Plaintiff Class.

13 4.4 The Plaintiff Class is comprised of thousands of individuals and entities, making
14 joinder impracticable. The disposition of the claims of these Plaintiff Class Members in a
15 single class action will provide substantial benefits to all parties and to the Court.

16 4.5 The claims of the representative Plaintiffs are typical of the claims of the
17 Plaintiff Class in that the representative Plaintiffs, like all Plaintiff Class Members, purchased
18 goods or services from Defendants and were charged a direct B&O Tax and a B&O Sales Tax
19 for those goods and services. It was and is illegal for Defendants to itemize and collect a B&O
20 Tax and B&O Sales Tax from Plaintiffs and Plaintiff Class Members. The representative
21 Plaintiffs, like all Plaintiff Class Members, have been damaged by Defendants' misconduct in
22 that they have been illegally charged and have paid Defendants' B&O Tax and B&O Sales Tax.
23 The factual and legal bases of Defendants' misconduct are common to all Plaintiff Class
24 Members, and represent common and systematic practices resulting in injury to all members of
25 the Plaintiff Class.

26 4.6 There are numerous questions of law and fact common to Plaintiffs and the
Plaintiff Class, including the following:

4.6.1 Whether Defendants illegally itemized and collected their B&O Tax and
B&O Sales Tax from Plaintiffs and the Plaintiff Class;

4.6.2 Whether Defendants should be declared financially responsible for
notifying all Plaintiff Class Members of the illegality of their acts, and for reimbursing

1 Plaintiffs and the Plaintiff Class all amounts collected as B&O Tax and B&O Sales Tax,
2 together with 12% interest per annum from date of collection, attorneys' fees, and costs;

3 4.6.3 Whether Defendants should be ordered to disgorge, for the benefit of the
4 Plaintiff Class, all or part of the ill-gotten monies they received from itemizing and collecting
5 B&O Tax and B&O Sales Tax, and to make full restitution to Plaintiffs and members of the
6 Plaintiff Class;

7 4.6.4 Whether Defendants should be enjoined from continuing to collect B&O
8 Tax and B&O Sales Tax from the Plaintiff Class.

9 4.7 Plaintiffs will fairly and adequately protect the interests of the Plaintiff Class.
10 Plaintiffs have retained counsel with substantial experience in prosecuting consumer class
11 actions. Plaintiffs and their counsel are committed to prosecuting this action vigorously on
12 behalf of the Plaintiff Class, and have the financial resources to do so. Neither Plaintiffs nor
13 their counsel have any interests adverse to those of the Plaintiff Class.

14 4.8 As a result of Defendants' misconduct, Plaintiffs and members of the Plaintiff
15 Class have suffered incidental damages to the extent they have wrongfully paid B&O Tax and
16 B&O Sales Tax. Because of the relatively small size of the typical damages, and because most
17 Plaintiff Class Members have only relatively modest resources, it is unlikely that individual
18 Plaintiff Class Members could afford to seek recovery against Defendants on their own. This is
19 especially true in light of the size and resources of Defendants. A class action is therefore
20 likely to be the only means for Plaintiff Class Members to recover from Defendants for the
21 damage they have caused, and is superior to other available methods for the fair and efficient
22 adjudication of the controversy. Class treatment of common questions of law and fact would
23 also be superior to multiple individual actions or piecemeal litigation in that class treatment will
24 conserve the resources of the courts and the litigants, and will promote consistency and
25 efficiency of adjudication.
26

1 **B. Defendant Class**

2 4.9 Plaintiffs bring this action against the named Defendants, individually and as
3 representatives of a proposed Defendant Class pursuant to CR 23(a) and CR 23(b)(2). This
4 action satisfies the numerosity, commonality, typicality, and adequacy requirements of
5 CR 23(a). Class requirements under CR 23(b)(2) are met because Defendants and the
6 Defendant Class have acted or refused to act systematically, on grounds generally applicable to
7 the Plaintiff Class, thereby making appropriate final injunctive relief or corresponding
8 declaratory relief with respect to the Plaintiff Class as a whole.

9 4.10 The Defendant Class is defined as:

10 All motor vehicle dealers who itemized and collected B&O Tax
11 and/or B&O Sales Tax on the sale of motor vehicles, parts,
12 merchandise, or service in the state of Washington. Excluded from
13 the Defendant Class are: Appleway Chevrolet, Inc., d/b/a
14 Appleway Subaru/Volkswagen/Audi, Appleway Advertising,
15 Appleway Audi, Appleway Automotive Group, Appleway
16 Chevrolet Leasing, Appleway Group, Appleway Mazda, Appleway
17 Mitsubishi, Appleway Subaru, Appleway Towing, Appleway
18 Toyota, Appleway Volkswagen, East Trent Auto Sales, Lexus of
19 Spokane, Opportunity Center, TSP Distributors, and AutoNation,
20 Inc.

21 4.11 Upon information and belief, the Defendant Class is comprised of hundreds of
22 entities, making joinder impracticable. The disposition of the claims of these Defendant Class
23 Members in a single class action will provide substantial benefits to all parties and to the Court.

24 4.12 The defenses of the representative Defendants are typical of the claims of the
25 Defendant Class in that the representative Defendants, like all Defendant Class Members,
26 itemized and collected B&O Tax and a B&O Sales Tax directly from consumers for goods and
services. It was and is illegal for Defendants to itemize and collect a B&O Tax and B&O Sales
Tax from Plaintiffs and Plaintiff Class Members. The conduct of the representative
Defendants, like that of all Defendant Class Members, damaged Plaintiffs and all members of
the Plaintiff Class in that they were illegally charged and have paid Defendants' B&O Tax and
B&O Sales Tax. The factual and legal bases of Defendants' misconduct are common to all

1 Defendant Class Members, and represent common and systematic practices resulting in injury
2 to all members of the Plaintiff Class.

3 4.13 There are numerous questions of law and fact common to Defendants and the
4 Defendant Class, including the following:

5 4.13.1 Whether Defendants and the Defendant Class illegally itemized and
6 collected their B&O Tax and B&O Sales Tax from Plaintiffs and the Plaintiff Class;

7 4.13.2 Whether Defendants and the Defendant Class should be declared
8 financially responsible for notifying all Plaintiff Class Members of the illegality of Defendants'
9 and the Defendant Class's acts, and for reimbursing Plaintiffs and the Plaintiff Class all
10 amounts collected as B&O Tax and B&O Sales Tax, together with 12% interest per annum
11 from date of collection, attorneys' fees, and costs;

12 4.13.3 Whether Defendants and the Defendant Class should be ordered to
13 disgorge, for the benefit of the Plaintiff Class, all or part of the ill-gotten monies they received
14 from itemizing and collecting B&O Tax and B&O Sales Tax, and to make full restitution to
15 Plaintiffs and members of the Plaintiff Class;

16 4.13.4 Whether Defendants and the Defendant Class should be enjoined from
17 continuing to itemize and collect B&O Tax and B&O Sales Tax from the Plaintiff Class.

18 4.14 The claims against Defendants are typical of the claims against the Defendant
19 Class in that Defendants and the Defendant Class itemize and collect B&O Tax and B&O Sales
20 Tax from the Plaintiff Class. In addition, the defenses of Defendants are typical of the defenses
21 of the Defendant Class in that Defendants and members of the Defendant Class are all similarly
22 situated and have the same incentive and ability to raise the same defenses. Defendants also
23 have the incentive and ability to adequately protect the interests of the Defendant Class because
24 they share the same incentive and ability to acquire competent counsel.

25 4.15 Plaintiffs and the Plaintiff Class allege that the systematic misconduct of
26 Defendants and the Defendant Class has caused Plaintiffs and the Plaintiff Class incidental

1 damages to the extent they have wrongfully paid B&O Tax and B&O Sales Tax. Class
2 treatment of common questions of law and fact would be superior to multiple individual actions
3 or piecemeal litigation in that class treatment will conserve the resources of the courts and the
4 litigants, and will promote consistency and efficiency of adjudication.

5 **V. FIRST CLAIM FOR RELIEF**
6 **(Declaratory and Injunctive Relief)**

7 5.1 Plaintiffs hereby incorporate by reference the allegations contained in the
8 preceding paragraphs of this Complaint.

9 5.2 Defendants' and the Defendant Class's systematic itemization and collection of
10 B&O Tax and B&O Sales Tax from Plaintiffs and the Plaintiff Class are contrary to the laws of
11 the state of Washington because they are in violation of RCW 82.04 *et seq.*

12 5.3 Specifically, Defendants' and the Defendant Class's practice violates
13 RCW 82.04.500, which provides in pertinent part:

14 [B&O] Tax Part of Operating Overhead.

15 It is not the intention of this chapter that the taxes herein . . . be
16 construed as taxes upon the purchasers or consumers, but that such
17 taxes shall be levied upon and collected from the person engaging
18 in the business activities . . . and that such taxes shall constitute a
19 part of the operating overhead of such persons.

20 5.4 A controversy exists between Plaintiffs, the Plaintiff Class, Defendants, and the
21 Defendant Class as to whether Defendants' and the Defendant Class's itemization and
22 collection of B&O Tax and B&O Sales Tax from consumers are contrary to the laws of the
23 state of Washington.

24 5.5 Plaintiffs and the Plaintiff Class are parties whose financial interests are affected
25 and have suffered injury as a result of Defendants' and the Defendant Class's illegal
26 itemization and collection of B&O Tax and B&O Sales Tax. Plaintiffs and the Plaintiff Class
will continue to be affected by Defendants' and the Defendant Class's systematic practice
unless the Court provides declaratory relief.

1 7.7 Grant Plaintiffs and the Plaintiff Class leave to amend these pleadings to
2 conform to the evidence produced at trial; and

3 7.8 Award such other and further relief as may be deemed just and equitable by the
4 Court, pursuant to RCW 7.24.080, including attorneys' fees and costs as allowed by law.

5
6 DATED this 19 day of October, 2005.

7 PHILLABAUM, LEDLIN, MATTHEWS &
8 SHELDON, PLLC

9
10 By: 
11 Brian S. Sheldon, WSBA #32851

12 TOUSLEY BRAIN STEPHENS PLLC

13
14 By: 
15 Kim D. Stephens, WSBA #11984
16 Max E. Jacobs, WSBA #32783

17 Attorneys for Plaintiffs
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