No. 345432

SUPREME COURT

OF THE STATE OF WASHINGTON

MICHAEL J. RICCELLI, P.S., ***Appellant,***

v.

DEX MEDIA WEST, INC, ***Respondents.***

APPELLANT MICHAEL J. RICCELLI P.S. PETITION FOR REVIEW

Michael J. Riccelli, WSBA #7492
Attorney for Appellant
400 South Jefferson St., #112
Spokane, WA 99204
(509) 323-1120
e-mail mjrps@mjrps.net

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I. IDENTITY OF PETITIONER

Petitioner Michael J. Riccelli, P.S., (hereinafter, MJRPS) asks this Court to accept review of the Division III Court of Appeal's decisions designated in Part "II" of this petition.

II. DECISIONS BELOW

A copy of the Division III Court of Appeals Order Denying Motion to Modify Commissioner's Ruling, filed January 20, 2017 (Appendix A-1). A copy of the Division III Court of Appeals Commissioner's Ruling, filed October 11, 2016 (Appendix A-2). The Commissioner's Ruling denied the Appeal of MJRPS pursuant to RAP 2.2(a)(3), Decision Determining Action, and, otherwise, RAP 2.3 Discretionary Review, from the trial court's *Order Granting Defendant DEX Media West, Inc.'s Motion to Dismiss Amended Complaint, or in the Alternative, Compel Arbitration* (Appendix A-3), and subsequent *Opinion on Reconsideration* (Appendix A-4). This, where MJRPS filed litigation alleging an adhesion contract in which the arbitration provisions were procedurally and substantively unconscionable, and lack of foundation for arbitration under the Federal Arbitration Act (FAA).

III. ISSUES PRESENTED FOR REVIEW

A. Where a party claims procedural and substantive unconscionability of a written contract's arbitration provisions, is it error for

the court to order arbitration to proceed, staying hearing on the issues of unconscionability until after arbitration has occurred?

B. Where FAA arbitration is the subject, and where the Federal courts have held that issues of unconscionability of an FAA arbitration provision are threshold issues for court's determination, prior to arbitration, may Washington State's Courts disregard this precedent?

C. Where a publishing company: (a) contracts with a local land-line telephone company to assume the land-line company's state regulatory agency required duty to periodically distribute local land line telephone number listings for a single county; (b) subsidizes the cost and profits by attaching yellow page advertising; (c) solicits yellow page advertisers from the local county; and (d) distributes the listings only within that county, is this an economic activity that represents a general practice subject to federal control, or one that bears on interstate commerce in a substantial way, such that FAA arbitration is applicable?

IV. STATEMENT OF THE CASE

A. Procedural Background.

This matter arises from an agreement to provide advertising services by Dex Media West, Inc. ("DEX"), in Spokane County, Washington, for a solo law firm, Michael J. Riccelli, P.S. ("MJRPS"). The agreement was concluded between Michael J. Riccelli of MJRPS and a DEX sales

representative from its local Spokane County sales office. The agreement, the terms and conditions of which are attached as Appendix A-5 (pages 19-21), was for advertising in the DEX telephone book (the Phone Book), historically a single book consisting of white pages residential and business telephone numbers and addresses, and yellow pages advertising. Distribution was in Spokane County, only. However, without notice to MJRPS or other yellow pages advertisers, DEX changed the nature and substance of the product causing MJRPS to file litigation in Spokane County Superior Court. The Amended Complaint (Appendix A-6), made various allegations, including but not limited to the following: that the agreement's arbitration provisions, paragraphs 6, 7 and 9, are unconscionable, unenforceable, and void as against public policy. MJRPS made further claims that were specifically excluded under the arbitration provisions or the grant of authority to the Arbitrator, and which were elements of the claims of unconscionability, such as: (a) that DEX was in violation of Washington's Consumer Protection Act ("CPA"), RCW chapter 19.86; (b) MJRPS was entitled to multiple damages, costs, and reasonable attorney fees; and (c) that MJRPS was entitled to liquidated damages to the extent of the value of the contract payment provisions. Subsequent to commencement of this action, DEX moved the court for dismissal under CR 12, and/or to compel arbitration under the Federal

Arbitration Act (FAA). MJRPS responded stating that: (a) the arbitration provisions of the agreement were unconscionable and unenforceable; (b) the court, not the arbitrator, determines enforceability of the arbitration provisions; and (c) the parties' relationship and agreement does not bear on interstate commerce in a substantial way, and thus the FAA is inapplicable. At the time of hearing, the trial court simply concluded that arbitration under the FAA was appropriate, primarily due to diversity of citizenship between the corporate entities of MJRPS and DEX. The trial court did not address the consconability or validity of the arbitration provisions, and the effect of its various limitations on arbitration and the powers of the arbitrator(s), nor the applicability of the FAA, generally. On Reconsideration, the trial court made various assumptions of facts not in evidence regarding elements of interstate commerce, did not address issues of conscionability of the arbitration provisions, and ordered arbitration to proceed.

MJRPS appealed pursuant to RAP 2.2(a)(3), as a decision determining the action, in that, by ordering arbitration, the trial court effectively dismissed the MJRPS claims, as the arbitration provisions prohibited the arbitrator from hearing them. The matter also merited discretionary review, as:

> "(1) The superior court has committed an obvious error which would render further proceedings useless; (2) The superior court has

committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act; and (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court."

RAP 2.3(b)

The Division III Commissioner's Ruling incorrectly assessed MJRPS's claims of unconscionability as applying to the contract generally, and not the arbitration provisions. The Commissioner determined arbitration should proceed, with conscionability and jurisdictional issues concerning the FAA arbitration provisions reserved for post arbitration:

> **"The superior court stayed proceedings on Riccelli's other issues, including unconscionability, pending arbitration. Upon entry of final judgment, Riccelli has the option to appeal the interstate commerce ruling as well as unconscionability and any other remaining issues should the superior court decide them against it.** Hence, the superior court's decision to compel arbitration does not render further proceedings useless. For the same reason, the decision does not substantially alter the status quo or substantially limit Riccelli' s freedom to act."

Commissioner's Ruling, Filed October 11, 2016 (emphasis added)

B. <u>Facts</u>.

Following are facts as pled by MJRPS in its pleadings on file, and attached as Appendix A-6. Plaintiff is a sole practitioner law firm engaged in plaintiff personal injury representation. DEX publishes and distributes the Spokane, Washington, area (Spokane County) DEX residential and business

sections (white pages) and advertising section (yellow pages) telephone directory (Phone Book); solicits advertising; and collects related revenues in Spokane County, Washington. DEX provides similar services, nationally. MJRPS and DEX (and its predecessors) have had an ongoing relationship for over 20 years in which MJRPS's advertising copy was published on the first one and/or two pages of the "Attorneys" section of the Spokane Phone Book's yellow pages. MJRPS has had a similar relationship with HIBU (formerly Yellow Book). HIBU and DEX are direct competitors in the Spokane regional market for yellow pages advertising revenue.

The MJRPS/DEX relationship goes back one or more iterations of ownership of the DEX trade name, including Qwest DEX. The DEX trade name in the Spokane area is historically associated with regulated land-line telephone entities characterized as local exchange companies (LEC's) such as Century Link, Qwest, U.S. West, and AT&T. Pursuant to regulation (WAC 480-120-251) LEC's have been required to distribute a printed directory of each customer's name, phone number and address, unless omission is requested by the customer. DEX has historically contracted with the AT&T legacy companies to publish and distribute this directory. A new directory was and is required to be printed and distributed every 15 months, at minimum. However, annually has been the norm. According to DEX and

HIBU sales representatives, these respective directories "compete" in homes and businesses for usage. Purportedly, some users prefer one or the other; other users swap directories, as printed. A significant portion of MJRPS's clients have historically originated by way of MJRPS's advertising in the DEX Yellow Pages, and the HIBU's Yellow Pages.

During March of 2014, MJRPS entered into a Billing Agreement with DEX which referenced terms and conditions of contract, during price and advertising program discussions, in the same manner as had been done in all prior years, with the then current Spokane based DEX Sales Representative. As in previous ad placements, Mr. Riccelli signed and initialed documents denoted as "Billing Agreement" referencing terms and conditions, and initialed a statement indicating that the terms and conditions were read, understood and agreed to. However, by course in dealing, contract terms and conditions were never discussed, negotiated, or subject to negotiation. ***All DEX Representatives firmly stated, over the years, that the contract terms were not negotiable.***

After distribution of the Phone Book it was discovered that DEX had distributed only a partial directory, with business white pages listings and yellow pages only. The Phone Book did not contain residential white page listings. Purportedly, a user could obtain a separate residential telephone

directory on request. The nature of this discovery indicated a likelihood that many users probably discarded the incomplete DEX Phone Book in favor of the complete HIBU Phone Book.

By assessment of phone call records, and anecdotal comments and observations from the MJRPS staff, a substantial drop in telephone calls from potential clients to MJRPS occurred since the 2014 distribution of the incomplete, bifurcated DEX Phone Book.

The arbitration provisions are spread between sections 6, 7 and 9. Section 7 purports to limit DEX's liability to the "maximum extent permitted by law" including "contract, tort, strict liability, or otherwise" and further disclaims "all losses, including without limitation loss (sic) profits, indirect, incidental, consequential, special or exemplary damages." This evidences a classic contract of adhesion, where advantages flow to the dominant maker of the contract, DEX, under the color of a state regulated service provider. MJRPS made a CPA Claim. However, paragraph 9 of the agreement purports to restrict any CPA claim, as arbitrators are limited to enforce only those remedies provided for in the agreement. In addition, paragraph 6 limits the award of attorneys' fees and costs in such a manner that only DEX benefits from the agreement: "*Any party who successfully enforces this provision in court is entitled to recover reasonable attorneys' fees and costs spent.*"

Then, DEX carves out for itself an exception to the arbitration clause. In closing paragraph 9, DEX states:

> "Any claim, controversy or dispute seeking to enforce or protect, or concerning the validity of, any of Dex One's intellectual property rights (including without limitation patents, trademarks, trade secrets and copyrights) are not subject to the above provisions regarding binding arbitration."

Paragraph 6 limits the availability of class litigation:

> "No arbitration shall be joined with any other; there is no right ... for any dispute to be arbitrated on a class-action basis ... and ... there is no right ... for any dispute to be brought in a ... representative capacity on behalf of the general public ... ."

Paragraph 9 limits time for notification of errors in the advertisement to one hundred twenty (120) days after first publication. The paragraph also limits damages to a ***discount*** of up to 100% of the price for the ad or listing, a further unilateral benefit to DEX. This is a simple limitation on damages to money paid or to be paid by MJRPS.

V. ARGUMENT

A. The Court Must Consider the Facts as Plead.

As the DEX motion was brought to dismiss under CR 12, or to compel arbitration, the court is to consider the facts as plead, in the light most favorable to the plaintiff, MJRPS, see *Didlake v. State,* 186 Wn. App. 417, 422, 345 P. 3d 43, 45 (2015).

B. In Washington, The Court Decides Whether an Agreement to Arbitrate is Enforceable Prior to Ordering Arbitration

In Washington, "when the validity of the arbitration agreement itself is at issue, the courts must first determine whether there was a valid agreement to arbitrate." *McKee v. AT&T Corp.*, 164 Wn.2d 372, 191 P.3d 845 (2008), also *see Townsend v. Quadrant Corp.*, 173 Wn.2d 451, 458-459, 268 P.3d 917 (2012). The court, not an arbitrator, determines whether the agreement is subject to arbitration. *Saleemi v. Doctor's Assocs.*, 176 Wn.2d 368, 376, 292 P.3d 108 (2013). A preliminary determination must be made by the court as to whether or not the agreement to arbitrate is enforceable. § 5:16 Enforceability of arbitration clauses, 25 Wash. Prac., Contract Law And Practice (3d ed.), citing, in part, *Saleemi* courts, not arbitrators, determine the threshold matter of whether an arbitration clause is valid; *Townsend v. Quadrant Corp.,* 153 Wash. App. 870, 224 P.3d 818 (Div. 1 2009), aff'd on other grounds, 173 Wash. 2d 451, 268 P.3d 917 (2012)

Further, appellate courts engage in de novo review of a trial court's decision granting a motion to compel or deny arbitration, and the party opposing arbitration bears the burden of showing that the agreement is not enforceable. *Satomi Owner's Ass'n. v. Satomi, LLC,* 167 Wn.2d 781, 797; 225 P.3d 213 (2009). Also, **standard contract defenses such as fraud, duress, or unconscionability may render an arbitration provision**

unenforceable. § 5:16 Enforceability of arbitration clauses, 25 Wash. Prac., Contract Law And Practice (3d ed.).

A challenge to the validity of an arbitration agreement can be divided into two kinds. One kind challenges specifically the validity of the arbitration agreement. The other kind challenges the contract as a whole. *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 444, 126 S.Ct. 1204, 163 L. Ed. 2d 1038 (2006). "The court may adjudicate an issue which goes to the making of the agreement to arbitrate." *Id.* at 445. A challenge specifically directed at an arbitration clause is to be decided by the court, not an arbitrator. *McKee* 394-395; *Townsend,*173 Wn.2d 451, 268, 458-459, 268 P.3d 917 (2012).

In the instant case, the Amended Complaint attacks paragraph 6 (the arbitration provision within the agreement) and paragraphs 7 and 9, which are specifically referred to within paragraph 6. Based on the authorities presented above, the court properly adjudicates this dispute prior to ordering arbitration.

C. Under the FAA, Courts Decide Whether an Agreement to Arbitrate is Enforceable Prior to Ordering Arbitration

Federal authority requires a court, when considering ordering parties to engage in FAA arbitration, to resolve issues of unconscionability as preliminary, threshold issues. *See Nagrampa v. MailCoups, Inc.,* 469 F.3d 1257, 1267 (9th Cir. Cal. 2006). "Even the federal preference for the use of arbitration reflected in the FAA will not make an arbitration clause

enforceable if it is substantively or procedurally unconscionable." 25 Wash. Prac., Contract Law And Practice § 5:16 (3d ed.). Further, because unconscionability is defense to contracts generally and does not single out arbitration agreements for special scrutiny, it is a valid reason not to enforce arbitration agreements under Federal Arbitration Act. *Circuit City Stores v Adams*, (2002, CA9 Cal) 279 F3d 889 (2002).

> "Generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements, as can claim that arbitration would be prohibitively expensive; party claiming prohibitive expense bears burden of showing likelihood of incurring such costs if arbitration is pursued."
>
> *Dombrowski v. GMC* (2004, DC Ariz) 318 F Supp 2d 850.

D. <u>The Arbitration's Provisions are Substantively and Procedurally Unconscionable</u>

"**Substantive unconscionability ... may be found in cases where a clause or term in** the **contract is one-sided, overly harsh, or includes a gross disparity**." § 9:6.Unconscionability—Procedural and substantive, 25 Wash. Prac., Contract Law And Practice (3d ed.) (cit. omitted) (emphasis added). The arbitration provisions at issue in this matter are substantively unconscionable and unenforceable as a matter of law. They are, essentially, a severe set of exculpatory provisions in disguise. DEX attempts to limit liability and damages, prevents class action lawsuits and arbitrations, and limits meaningful award of attorney fees and costs to situations only

favorable to DEX. An arbitration clause disguised as an exculpatory provision is void and unenforceable. *McKee*, 164 Wn. 2d at 395.

The one hundred twenty (120) day notice provision is, essentially, a statute of limitation, and is unconscionable and unenforceable as a matter of law. *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 358, 103 P.3d 773 (2004). Similarly, the attorneys' fees and costs provision in the agreement is so one sided as to be unconscionable. It effectively allows DEX to commence an action and collect attorneys' fees and costs while denying advertisers like MJRPS the same rights, as only a party who successfully enforces the arbitration provision in court is entitled to recover reasonable attorneys' fees and costs. Realistically, no advertiser engaged in a dispute with DEX would seek to enforce the arbitration provisions with their attendant limitations on actions, liability and damages, as set forth above.

Similar attempts at limiting punitive damages, class actions and attorneys' fees in an FAA arbitration agreement have been held unconscionable by the Washington Supreme Court

> "As we said in *Scott*, **class action waiver has nothing to do with a valid agreement to arbitrate**. Class actions are often arbitrated. *See Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 453, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003). Class actions actually promote the prime objective of an agreement to arbitrate, which is "'streamlined proceedings and expeditious results.'" *Preston,* 128 S. Ct. at 986 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)). ...

> **Limiting consumers' rights to open hearings, shortening statutes of limitations, limiting damages, and awarding attorney fees have absolutely nothing to do with resolving a dispute by arbitration.** ***Courts will not be so easily deceived by the unilateral stripping away of protections and remedies merely because provisions are disguised as arbitration clauses. The FAA does not require enforcement of unconscionable contract provisions. We adhere to our decision in Scott and hold that HN14 the FAA does not preempt application of Washington consumer protection law.***"
>
> McKee v. AT&T Corp., 164 Wn.2d 372, 395-396, 191 P.3d 845, 857, (2008) (emphasis added)

"**Procedural unconscionability relates to impropriety arising out of the contract formation**. This procedural unconscionability has been described as eliminating a "meaningful choice" in the bargaining process." **Division III has determined procedural unconscionability alone is sufficient to void an agreement.** § 9:6. Unconscionability—Procedural and substantive, 25 Wash. Prac., Contract Law And Practice § 9:6 (3d ed.) citing *Gorden v. Lloyd Ward & Associates, P.C.,* 180 Wash. App. 552, 323 P.3d 1074 (Div. 3 2014) (trial court properly denied motion to compel arbitration where arbitration clause was procedurally unconscionable). Here, DEX occupies a unique position in providing the official, regulatory required land line Phone Book for Spokane County, and offers associated yellow pages advertising on a contract of adhesion "***take it or leave it***" basis. Arbitration provisions, including limitations on scope of arbitration, or authority of the arbitrator are non-negotiable. Procedural unconscionability is the lack of

meaningful choice considering all the circumstances surrounding the transaction. See *Zuver v. Airtouch Communications,* 153 Wn. 2d 293, 303, 103 P.3d 753 (2004). Washington considers three factors to determine whether a contract of adhesion exists: "whether the contract is a standard form printed contract; whether it was prepared by one party and submitted to the other on a take it or leave it basis; and whether there was no true equality of bargaining power between the parties." *Zuver,* 153 Wn. 2d at p. 304.

The DEX agreement is a contract of adhesion. There was no negotiation between the parties as to the terms and conditions of the contract provisions, including arbitration. The contract is a standard form and it is apparent there is no equality of bargaining power between DEX and MJRPS. DEX, in performing specified regulatory obligations, is the only provider of the "official" Phone Book, one associated with the Bell System land line providers. MJRPS had no meaningful choice.

E. <u>The Agreement to Arbitrate in the Instant Case is Not Subject to the FAA Because the Parties Have Not Engaged in a Transaction Bearing on Interstate Commerce.</u>

> "A written provision in any maritime transaction or a contract evidencing a transaction *involving commerce* to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, 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. (Emphasis added).

The words "involving commerce" in section 2 have been interpreted by the United States Supreme Court to mean the functional equivalent of the more familiar term "effecting commerce" which are words of art signaling the broadest permissible exercise of the U.S. Congress's commerce clause power. *Satomi Owners Ass'n. v. Satomi, L.L.C.*, 167 Wn. 2d 781, 798-99, 225 P.3d 213 (2009).

> "Commerce clause power may be exercised in individual cases without showing any specific effect upon interstate commerce ***if in the aggregate the economic activity in question would represent a general practice ... subject to federal control. Only that general practice need bear on interstate commerce in a substantial way."***

Id. at 799. (emphasis added).

Here FAA is not implicated because the economic activity at issue does not bear on interstate commerce in ***any substantial way***. This matter arises from and relates to a contractual relationship in which the execution and performance of the contract was primarily within Spokane County.

A telephone directory in Washington comprised of white pages telephone number listings and yellow pages advertising listings does not constitute interstate commerce. *Thornhill Pub. Co. v. General Tel. & Electronics Corp.*, 594 F.2d 730, 731-733, 1979 U.S. App. Trade Cas. (CCH)

P62, 528 (9th Cir. Wash. 1979).

The *Thornhill* case addresses the complained of application of Federal Anti-Trust laws to publication and distribution of a telephone directory in Washington. *Thornhill* was a publisher of directories. In *Thornhill*, publication of the Phone Books was the focus of the litigation. The *Thornhill* Phone Books were published in Washington. However, the *Thornhill* court also considered the nature of solicitation of local advertising, local collection of revenues, and the local distribution of the directories as indicia for its finding of lack of effect on (interstate) commerce. In this instance, the trial court and the Division III Commissioner presumed the Phone Books were published outside Washington. Unsubstantiated conclusions of fact not in evidence are made about out-of-state users and advertisers. Here, publication of the Phone book is not the central issue. Factually, most incidents of commerce in this matter are internal to Washington, i.e. **Spokane County**: local Dex office; local sales representative; advertiser (MJRPS); price negotiation; and distribution. There is no evidence of distribution outside Spokane County, or of sales from the Phone Book's advertising originating outside Spokane County. The trial court, and the Division III Commissioner incorrectly presumed such. Moreover, consider that: (a) DEX previously accepted the regulatory requirement to print telephone directories pursuant to

"WAC 480-120-251 Directory service." DEX is allowed to piggyback its yellow pages advertising onto the state required telephone white pages directory for its profit, after costs of publication and distribution; and then (b) without notice to advertisers such as MJRPS, **lobbied for and received an amendment to the regulation allowing for a bifurcated directory service, where yellow and white business pages would be subject to "universal" or "saturation" delivery, but residential white pages delivered only on request:**

> "The Commission should permit ILECs and their official publishers the necessary flexibility to adapt to cultural and market changes by eliminating WAC 480-120-251. **There is simply no need to require saturation delivery of residential White Pages directories. Alternatively, the Commission should grant publishers the discretion to distribute print residential White Pages directories only to those who request them."**
>
> (emphasis added). See Ex. A in Washington Utilities and Transportation Committee "Docket UT-120451 Comments of Dex One Corporation" dated December 6, 2013

Dex was successful, and WAC 480-120-251 was amended in 2013 to allow for residential white pages delivery only on request. See WSR 13-09-051. DEX's actions in this regard uniquely underscore a primary intrastate, not interstate, issue of commerce. Phone Book publications in Washington, vis-a-vis DEX, are substantially a function of state regulation, not interstate commerce and not subject to the FAA.

Here, publication of the directory is not central, but the directory as an

advertising medium and its distribution in Spokane County, only, are. The court's focus on a **presumed place of publication** of the DEX directory at issue here is of no substantial importance. It is not the same substantial consideration as in *Satomi*, where construction materials and goods were purchased out-of-state for condominium construction, for FAA arbitration concern. In *Satomi*, supra, financing came from outside Washington, as did condominium purchasers. Here, the physical printing of the Phone Books themselves, are not the primary consideration. The information contained in the Phone Books is of value, as is the area of distribution. There is no substantial "purchasing" or "financing" of Spokane County Phone Books from out-of-state buyers or financial institutions. People don't "live" in a Phone Book, as they do in a residential condominium made from out-of-state supplies. *Satomi* didn't rely on a single factor to determine FAA applicability, but on several. Here, there is only an allegation of out-of-state printing of the DEX Phone Books, while numerous Washington State/Spokane County incidents of commerce and concern. Simply stated, this matter doesn't bear on interstate commerce in any substantial way. Conversely, DEX's voluntary fulfillment of Washington Regulatory obligations should demand alignment with Washington intra state considerations as primary, and exclude FAA application. DEX, in crafting its contract of adhesion, had the discretion

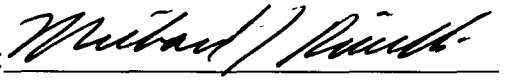
merely to call for arbitration under Washington's provisions, not the FAA, but chose not to.

VI. CONCLUSION

The Division III Court of Appeals committed error by failing to acknowledge the status quo re: challenges to an arbitration agreement. That is, validity of an agreement to arbitrate, when challenged, is a threshold issue to be resolved by the court prior to ordering arbitration. The result limits the freedom of MJRPS to act to avoid the expense and inefficiency of arbitration when the agrement to arbitrate is not valid. The court's actions are in direct conflict with its own decision in *Gordon*, and the Supreme Court's various decisions including *McKee* and *Satomi*. Allowing a trial court to order arbitration before the validity of the agreement to arbitrate is determined, is a departure from the accepted and usual course of judicial proceedings, and calls for the Supreme Court to exercise its revisory jurisdiction.

RESPECTFULLY SUBMITTED this 24th day of February, 2017.

MICHAEL J RICCELLI PS

By: 

Michael J. Riccelli, WSBA #7492
Attorney for Petitioner

DECLARATION OF SERVICE

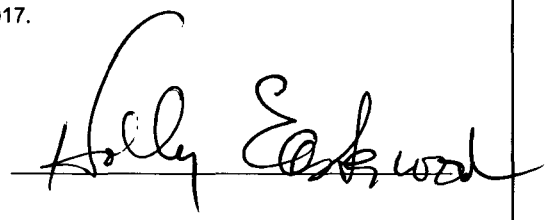
I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Gwendolyn C. Payton and
Ruth Lee Johnson
Lane Powell PC
P.O. Box 91302
Seattle, WA 98111
e-mail: PaytonG@lanepowell.com, JohnsonR@lanepowell.com, seelhoffc@lanepowell.com, and McbrideR@lanepowell.com

____ Overnight Mail
____ U.S. Mail
__✓__ E-Mail
____ Facsimile

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

Dated this 24th day of February, 2017.



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

MICHAEL J. RICCELLI, P.S.,	)	
	)	No. 34543-2-III
Appellant,	)	
	)	
v.	)	
	)	ORDER DENYING
DEX MEDIA WEST, INC.,	)	MOTION TO MODIFY
	)	COMMISSIONER'S RULING
Respondent.	)	

Having considered Appellant's motion to modify the commissioner's ruling of October 11, 2016, and the record and file herein;

IT IS ORDERED the motion to modify the commissioner's ruling is denied.

PANEL: Judges Korsmo, Fearing, Siddoway

FOR THE COURT:

George Fearing

GEORGE FEARING
Chief Judge

The Court of Appeals
of the
State of Washington
Division III

FILED
Oct 11, 2016
Court of Appeals
Division III
State of Washington

MICHAEL J. RICCELLI, P.S., Appellant, v. DEX MEDIA WEST, INC., Respondent.	)	No. 34543-2-III COMMISSIONER'S RULING

Michael J. Riccelli, P.S., has appealed the Spokane County Superior Court's March 4, 2016 Order that compelled arbitration, pursuant to the Federal Arbitration Act, of its action against Dex Media West, Inc., for, *inter alia*, breach of contract for placement of an advertisement for its law office in Dex's phone book. This lawsuit arose in 2014 when Dex decided to print its white pages directory separately from its business directory – an act that Riccelli claimed caused it to lose business because residential

telephone customers would tend to use competing directories that retained both residential and business phone numbers in a combined directory.

Dex now challenges the appealability of that Order. Dex relies upon caselaw that holds that an order that compels arbitration is *not* a final order that is appealable as a matter of right. *See Teufel Const. Co. v. Am. Arbitration Ass'n,* 3 Wn. App. 24, 25, 472 P.2d 572 (1970), citing *All-Rite Contracting Co. v. Omey,* 27 Wn.2d 898, 901, 181 P.2d 636 (1947). In addition, Dex points out that Washington's Uniform Arbitration Act does *not* include an order that compels arbitration in its list of orders that are appealable as a matter of right. *See* RCW 7.04A.280.

The authorities that Dex cites are clear – an order that compels arbitration is not appealable. Riccelli has not offered, and this Court could not locate, any authority to the contrary.

Alternatively, Riccelli contends that this Court should accept discretionary review because the superior court committed obvious error that renders further proceedings useless or probable error that substantially alters the status quo or substantially limits the freedom of a party to act. *See* RAP 2.3(b)(1). Riccelli argues that (1) the Federal Arbitration Act does not apply here because the contract does not involve interstate commerce; (2) the contract is unconscionable and therefore unenforceable; and (3) the effect of the court's decision to compel arbitration is to dismiss its remaining claims

against Dex.

In its order that denied Riccelli's motion for reconsideration, the superior court held that the parties' contract involved interstate commerce. Riccelli had challenged the arbitration clause, which provided for binding arbitration "in accordance with the Federal Arbitration Act, 9 U.S.C. 1-16, not state law." The court ruled that

> [t]he Supreme Court has repeatedly held that arbitration provisions are favored, should be enforced and any doubts resolved in favor of arbitration. While diversity of citizenship is primarily an issue in federal subject matter jurisdiction, many courts have used it as a factor in determining whether a contract falls within the commerce power of Congress through interstate commerce. The contract at issue satisfies not only the diversity of citizenship factor, but, also, the use of out of state materials, products bought and sold from out of state customers and the broad impact of a party's industry on the national economy. *Thornhill Pub. Co., Inc. v. Gen. Tel. & Elecs. Com*, [594 F.2d 730 (9th Cir. 1979)] can be distinguished as stated and *Filson v. Radio Advert. Mktg. Plan. LLC*, [553 F. Supp.2d 1074 (D. Minn. 2008)] better fits the issues in this case.

Memorandum Opinion at 6.

In its motion for discretionary review in this Court, Riccelli charges that "the trial court made various assumptions about place of publication of the directories, users engaging in internet services, etc., for which no evidence exists in the record." Motion at 22. *See* Memorandum Decision at 4-5, at which the court states, as follows:

> The courts have used many factors to determine when a contract "involves commerce" such as: 1) use of out of state materials, 2) products bought from out of state customers, and 3) the broad impact of a party's industry on the national economy. *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 799-803, 225 P.3d 213, 226 (2009). The first two factors are applicable in this case because *it is highly likely that the phone books were made outside of Washington based on the*

> *fact the printer is located in Florida. Moreover, it is exceedingly likely that residents of Washington State will purchase products advertised in the directory by sellers outside of Washington or that the products and services sold in the directory by Washington sellers will be purchased by buyers outside Washington State.* The third factor is important and applies to telephone directories because they were previously a primary way of connecting buyers and sellers of goods or services in interstate commerce.

(Emphasis added.) However, as the trial court observed at page 3 of its memorandum decision, "[t]he burden is on [Riccelli] as he is the party attempting to show that the arbitration agreement is not enforceable." *See Adler v. Fred Lind Manor*, 153 Wn.2d 331, 342, 103 P.3d 773, 780 (2004). And, in any event, the superior court's inferences appear reasonable in light of the cited fact that the publisher of the phone books is located in Florida, and in light of the fact residents and businesses of neighboring communities in the adjacent state of Idaho use such directories. Under this analysis, the Court cannot say that the superior court's ruling constituted obvious or probable error.

The superior court stayed proceedings on Riccelli's other issues, including unconscionability, pending arbitration. Upon entry of final judgment, Riccelli has the option to appeal the interstate commerce ruling as well as unconscionability and any other remaining issues should the superior court decide them against it. Hence, the superior court's decision to compel arbitration does not render further proceedings useless. For the same reason, the decision does not substantially alter the status quo or substantially limit Riccelli's freedom to act.

Accordingly, IT IS ORDERED, the matter is not appealable as a matter of right, nor is it appropriate for discretionary review.

Monica Wasson
Commissioner

HON. ANNETTE S. PLESE

SUPERIOR COURT OF WASHINGTON FOR SPOKANE COUNTY

MICHAEL J. RICCELLI PS, a Washington Professional Service Corporation, Plaintiff, v. DEX MEDIA WEST, INC., Defendant.	No. 15204714-5 ~~[PROPOSED]~~ ORDER GRANTING DEFENDANT DEX MEDIA WEST, INC.'S MOTION TO DISMISS AMENDED COMPLAINT, OR IN THE ALTERNATIVE, COMPEL ARBITRATION

THIS MATTER having come before the Court upon Defendant Dex Media West, Inc.'s Motion to Dismiss Amended Complaint, or in the Alternative, Compel Arbitration ("Motion"), and the Court having duly considered the Motion, Plaintiff's Response, Defendant's Reply, and the files and records herein and the argument of counsel, if any;

NOW, THEREFORE, IT IS:

ORDERED, ADJUDGED and DECREED that the Motion is hereby GRANTED; it is further

ORDERED, ADJUDGED and DECREED that all further proceedings are hereby STAYED pending arbitration consistent with the terms of Exhibit A to the Motion.

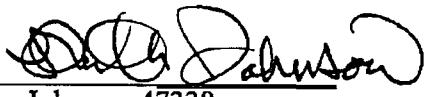
DATED this 4 day of March, 2016.

HONORABLE ANNETTE S. PLESE

LANE POWELL PC
1420 FIFTH AVENUE, SUITE 4200
P.O. BOX 91302
SEATTLE, WA 98111-9402
206.223.7000 FAX: 206.223.7107

Presented by:

LANE POWELL PC

By: 
Ruth Lee Johnson, 47338
Attorneys for Defendant Dex Media West, Inc.

agreed as to form only
Michael J Riedl.
3/4/16 #7492

LANE POWELL PC
1420 FIFTH AVENUE, SUITE 4200
P.O. BOX 91302
SEATTLE, WA 98111-9402
206.223.7000 FAX: 206.223.7107

I certify that this document is a true and correct copy
of the original on file and of record in my office.
ATTEST

MAR 04 2016

TIMOTHY W. FITZGERALD, COUNTY CLERK
COUNTY OF SPOKANE, STATE OF WASHINGTON
BY _____ DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

Michael J. Riccelli	)	
	)	
Plaintiff,	)	
	)	No. 15-2-04714-5
v.	)	
Dex Media West,	)	Opinion on Reconsideration
	)	
Defendant.	)	

BACKGROUND

The Plaintiff, Michael J. Riccelli, is an attorney in Spokane, Washington. The Defendant, Dex Media, is a Delaware corporation specializing in telephone directories throughout the United States, including Washington. The Plaintiff and Defendant had an ongoing, business relationship in which the Plaintiff paid for advertising space in the Defendant's telephone business directory. In March 2014, Plaintiff and Defendant entered into the contract at issue, containing the arbitration clause, for advertising space.

In September 2014, when the telephone directories were distributed, the Plaintiff took issue with the fact that he was not notified that only the business directories were distributed to homes which then had to request the residential telephone directory. This change was a result of Defendant lobbying the Washington Utilities and Transportation Committee to allow DEX to

separate the business and residential phone books. The Plaintiff claimed that the change caused him to lose business and thus he filed a lawsuit against the Defendant requesting the court to declare the arbitration agreement invalid; confirm that the Defendant breached the agreement in distributing only the business directory; and grant the Plaintiff damages for his loss of business. The Defendant moved the Court to stay the suit and compel arbitration with regards to all of the Plaintiffs' issues.

PROCEDURAL HISTORY

On March 4, 2016, both sides were heard in the Superior Court of Spokane, Washington. The Court ruled in favor of the Defendant, enforced the arbitration provision, and stayed the proceeding. Following that ruling, the Plaintiff filed on March 14, 2016 a "Motion for Reconsideration" with regards to the enforceability of the arbitration clause. The Plaintiff argued that the Court made a mistake when it ruled that the case involved interstate commerce, in part, because of the diversity of the citizenship of the parties. That ruling should be upheld, and the case should continue in arbitration.

ISSUE

Is this contract evidence of interstate commerce thus making the FAA applicable as signed in the contract?

ANALYSIS

The FAA applies to arbitration clauses in contracts "...evidencing a transaction *involving commerce...*" 9 U.S.C § 2 (*emphasis added*). This section of the FAA creates federal substantive law as well as federal policy in favor of arbitration agreements. Walters v. A.A.A. Waterproofing, Inc., 120 Wn. App. 354, 357-58, 85 P.3d 389, 391 (2004), review granted, cause remanded, 153 Wn.2d 1023, 108 P.3d 1227 (2005). "Involving commerce" has come to mean

that Congress is signaling its "intent to exercise its commerce power to the full," so that it is covering more than just things "in the flow" of commerce. Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 266, 115 S. Ct. 834, 835, 130 L. Ed. 2d 753 (1995). The scope of the FAA has been expanding, and the legislative history of the FAA "indicates an expansive congressional intent" *Id.* The Supreme Court has held that the broad scope of the commerce clause means that it "may be exercised in individual cases without showing any specific effect upon interstate commerce." Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56-57, 123 S. Ct. 2037, 2040, 156 L. Ed. 2d 46 (2003). The Supreme Court has repeatedly held there is a liberal federal policy that favors arbitration agreements and that any doubt should be resolved in favor of arbitration. *See e.g.* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625, 105 S. Ct. 3346, 3353, 87 L. Ed. 2d 444 (1985), *See also* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 103 S. Ct. 927, 941, 74 L. Ed. 2d 765 (U.S. 1983).

The burden is on the Plaintiff as he is the party attempting to show that the arbitration agreement is not enforceable. Adler v. Fred Lind Manor, 153 Wn.2d 331, 342, 103 P.3d 773, 780 (2004). The Plaintiff argues that "[D]iversity of citizenship pertains to federal court jurisdiction, not the applicability of the FAA," which he argued by citing Colley v. McCullar, 2:15-CV-0170-TOR, 2016 WL 901679, at *2 (E.D. Wash. Mar. 9, 2016). Colley is not about the FAA, but instead the issue was whether the federal court had subject matter jurisdiction based on diversity of citizenship. *Id.* The court held that McCullar was domiciled in Washington and Colley is a Washington corporation. As such, there was no diversity of citizenship between McCullar and Colley. *Id.*

On point is a Minnesota case Filson v. Radio Advert. Mktg. Plan, LLC, in which Filson, a dentist in Minnesota, made a contract for advertisement with Radio Advert. Mktg. Plan (RAMP),

a Pennsylvania corporation. Filson, 553 F. Supp. 2d 1074, 1085-86 (D. Minn. 2008). The services that Filson was to provide were located completely in Minnesota, RAMP was advertising for Filson to a Minnesota audience, for transactions and services taking place only in Minnesota. *Id.* The United States District Court in Minnesota found that the contract did involve interstate commerce in part because of the diversity of the parties to the contract, as well as the fact that communication and payment had crossed state lines. *Id* at 1085.

Many courts that have held that diversity of citizenship is one of the factors that make a contract part of interstate commerce. *See e.g.* Southland Corp. v. Keating, 465 U.S. 1, 15, 104 S. Ct. 852, 860, 79 L. Ed. 2d 1 (1984) ("Yet it is clear beyond question that if this suit had been brought as a diversity action in a federal district court, the arbitration clause would have been enforceable."); *See also* Comanche Indian Tribe Of Oklahoma v. 49, L.L.C., 391 F.3d 1129, 1132 (10th Cir. 2004). ("In this case, 49 has its principal place of business in Illinois, while the Tribe is a federally-recognized Indian Tribe located in Oklahoma. The contracts between the parties therefore relate to and affect interstate commerce."). The diversity of parties is particularly important with an "ongoing commercial relationship involving parties from different states." Mosca v. Doctors Associates, Inc., 852 F. Supp. 152, 154 (E.D.N.Y. 1993). The Supreme Court has gone so far as to say it was Congressional intent that the FAA apply to diversity cases. Dobson, 513 U.S. 265, 271. ("This Court responded by agreeing that the Act set forth substantive law, but concluding that, nonetheless, the Act applied in diversity cases because Congress had so intended.")

The courts have used many factors to determine when a contract "involves commerce" such as: 1) use of out of state materials, 2) products bought from out of state customers, and 3) the broad impact of a party's industry on the national economy. Satomi Owners Ass'n v. Satomi,

LLC, 167 Wn.2d 781, 799-803, 225 P.3d 213, 226 (2009). The first two factors are applicable in this case because it is highly likely that the phone books were made outside of Washington based on the fact the printer is located in Florida. Moreover, it is exceedingly likely that residents of Washington State will purchase products advertised in the directory by sellers outside of Washington or that the products and services sold in the directory by Washington sellers will be purchased by buyers outside Washington State. The third factor is important and applies to telephone directories because they were previously a primary way of connecting buyers and sellers of goods or services in interstate commerce.

In the 1979 case Thornhill Pub. Co., Inc. v. Gen. Tel. & Elecs. Corp., the Ninth Circuit stated "...appellant is not engaged in interstate commerce and that its local telephone directories, produced and distributed within the state of Washington, were not a part of the flow of interstate commerce." Thornhill, 594 F.2d 730, 737 (9th Cir. 1979). This case can be distinguished from the present case in many ways. The most important difference is that Thornhill was dealing with the Sherman Anti-Trust Act and not the FAA. *Id* at 731. In Thornhill, the court was specific in stating that the phonebooks "were printed within the State of Washington and virtually all the supplies were purchased within the state. The directories were then distributed within the State of Washington in the communities they served." *Id.* at 736. Thornhill was a local publisher based in Western Washington and only distributing to a small portion of the state. This is immensely different than a national corporation such as the Defendant which has its principal place of business in Delaware, its publishing offices in Florida and its regional offices in Arizona, California, Massachusetts and Texas. A final important difference is that the court in Thornhill made their decision based on a lack of evidence to support the appellant's position, not a general blanket rule that telephone directories could never be a part of interstate commerce.

Thornhill, 594 F.2d 730 at 738.[1] For these reasons, the Thornhill case does not control and should be distinguished from the case at hand.

CONCLUSION

The arbitration provision in the contract should be enforced because this contract does affect interstate commerce. The Supreme Court has repeatedly held that arbitration provisions are favored, should be enforced and any doubts resolved in favor of arbitration. While diversity of citizenship is primarily an issue in federal subject matter jurisdiction, many courts have used it as a factor in determining whether a contract falls within the commerce power of Congress through interstate commerce. The contract at issue satisfies not only the diversity of citizenship factor, but, also, the use of out of state materials, products bought and sold from out of state customers and the broad impact of a party's industry on the national economy. Thornhill Pub. Co., Inc. v. Gen. Tel. & Elecs. Corp, can be distinguished as stated and Filson v. Radio Advert. Mktg. Plan, LLC, better fits the issues in this case.

For these reasons stated here, the motion for reconsideration is denied and the case will move forward in arbitration.

Dated this 23rd day of May 2016.

Judge Annette Plese

[1] "In an attempt to avoid summary judgment, appellant submitted conclusory and speculative affidavits that fail to set forth specific facts in support of appellant's substantial effect on interstate commerce theory." Thornhill Pub. Co., Inc. v. Gen. Tel. & Elecs. Corp., 594 F.2d 730, 738 (9th Cir. 1979).

CUSTOMER TERMS AND CONDITIONS

1. Definitions. These defined terms shall have the following meaning in this Agreement:

a. "Ads" shall mean all print advertisements including those replicated in print, online or other media, but shall not include Listings. Enhancements to Listings are Ads.
b. "Customer," "you," and "your" shall mean the party, not Dex One, executing this Agreement.
c. "Customer Content" shall mean any and all content you provide to us or publish, including without limitation text, names, domain names, addresses, trade names, trademarks, pictures, animations, likenesses, reproductions, endorsements, data, links, graphics, software, video, music, sound and content on Customer's website.
d. "Agreement" shall mean the Order, these Terms and Conditions and all exhibits, schedules, addenda and amendments attached to or executed pursuant to the Order.
e. "Dex One," "we," "us," and "our" shall mean Dex Media East, Inc. or Dex Media West, Inc., as applicable, Publisher of the Dex® Yellow Pages.
f. "Listing" means all white or yellow pages alphabetical listings of name, address and telephone numbers but does not include enhancements, graphics, photos or extra lines.
g. "Order" shall mean the order for Products executed by the parties to which these Terms and Conditions are incorporated. Order also includes the Acknowledgement Letter you will receive.
h. "Products" shall mean, collectively, the Ads, Listings and Services.
i. "Publication" shall mean any Dex One print or online directory or media in which a Product appears.
j. "Services" shall mean all products and services furnished pursuant to this Agreement other than Listings and Ads.

2. Scope. This Agreement applies to any and all Products on the Order including without limitation the replication of those Products by Dex One in whole or in part in print, online or other media.

3. Automatic Renewal. **We may automatically renew your Products listed on the Order for successive Terms unless you notify us in writing in accordance with Section 5 at least thirty (30) days before: (1) the sales close date of the next issue of the Publication for Ads or Listings or (2) the anniversary of the start date of your Services. The sales close date for each Publication and the start date of your Service are available from your marketing consultant or by calling our Customer Care Center. The cost of any automatically renewed Product will be our then-current standard published rates unless otherwise agreed to in writing.**

4. Term. Subject to automatic renewal as defined in Section 3, the initial term of an Ad or Listing under this Order covers one issue of a print Publication. For Services, the initial term is one year from when we provide the Service or as otherwise agreed to on the Order. Charges are not pro-rated; if you cancel a Product or we suspend a Product as a result of your breach of this Agreement, you must still pay for that Product until the end of the term. We may extend or reduce by up to six months the issue period of a Publication. If the issue period of a Publication is extended, charges for the Products will continue through the extended period. If the issue period is reduced, charges will stop at the end of the reduced period.

5. Termination.
a. Listings. Except for Listings you purchased from Dex One, Listings can only be revised or terminated by contacting your local telephone company. Dex One is not responsible for the content of Listings.
b. Ads and Services. To cancel an Ad prior to the initial Term, your notice must be in writing and received by us at least thirty (30) days before the sales close date of the print Publication listed on the Order. To cancel a Service prior to the initial Term, your notice must be in writing and received by us at least thirty (30) days before the start date of the Service listed on your Order.
c. Notice/How To Contact Us. All notices, including termination notices to us, must be in writing and mailed by U.S. mail or overnight carrier to: Dex One, Customer Care, P.O. Box 3900, Peoria, IL 61614. You may also terminate by sending an email to dexoneinfo@dexone.com. For questions or concerns about this Order; please contact us at the toll-free number for our Customer Care Center on your bill or at 1-800-422-1234.

6. Binding Arbitration. Any claim, controversy or dispute between the parties that arises under or relates to any Product or this Agreement (other than an action pertaining solely to whether or not amounts due hereunder were, in fact, paid and received) shall be resolved by binding arbitration in accordance with Federal Arbitration Act, 9 U.S.C. 1-16, not state law. Such arbitration shall be commenced and conducted under the Commercial Arbitration Rules of the American Arbitration Association ("AAA") and must be initiated by filing a demand for arbitration with AAA. YOU UNDERSTAND THAT ABSENT THIS PROVISION, YOU WOULD HAVE THE RIGHT TO SUE IN COURT AND HAVE A JURY TRIAL. The Arbitration shall occur in the state in which such Ad or Listing appeared, or Service in question was provided unless we mutually agree to another location. The Arbitrator shall apply the substantive law of the state in which the Ad or Listing appeared or the Service in question was provided. The Arbitrator shall limit any remedies to those provided in this Agreement, including Section 7 and 9. Any party who successfully enforces this provision in court is entitled to recover reasonable attorneys' fees and costs spent. To the full extent permitted by law: (1) NO ARBITRATION SHALL BE JOINED WITH ANY OTHER; (2) THERE IS NO RIGHT OR AUTHORITY FOR ANY DISPUTE TO BE ARBITRATED ON A CLASS-ACTION BASIS OR TO UTILIZE CLASS ACTION PROCEDURES; AND (3) THERE IS NO RIGHT OR AUTHORITY FOR ANY DISPUTE TO BE BROUGHT IN A PURPORTED REPRESENTATIVE CAPACITY ON BEHALF OF THE GENERAL PUBLIC OR ANY OTHER PERSONS. Any claim, controversy or dispute seeking to enforce or protect, or concerning the validity of, any of Dex One's intellectual property rights (including without limitation patents, trademarks, trade secrets and copyrights) are not subject to the above provisions concerning binding arbitration.

7. LIMITATION OF LIABILITY. TO THE MAXIMUM EXTENT PERMITTED BY LAW, DEX ONE DISCLAIMS ALL LIABILITY, WHETHER BASED IN CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY OR OTHERWISE, AND FURTHER DISCLAIMS ALL LOSSES, INCLUDING WITHOUT LIMITATION LOSS PROFITS, INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL OR EXEMPLARY DAMAGES ARISING OUT OF OR IN ANY WAY CONNECTED WITH THIS AGREEMENT AND/OR THE PRODUCTS, EVEN IF DEX ONE HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. WITHOUT LIMITING THE ABOVE, DEX ONE'S AGGREGATE LIABILITY ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT AND/OR THE PRODUCTS SHALL IN NO EVENT EXCEED, A CREDIT AGAINST THE AMOUNT YOU AGREED TO PAY FOR THE PRODUCT GIVING RISE TO THE LIABILITY.

8. CONTENT REVIEW WARRANTY. YOU WARRANT THAT YOU WILL REVIEW ALL PRODUCTS IMMEDIATELY UPON THE EARLIER OF (A) WHEN PRESENTED TO YOU BY DEX ONE FOR REVIEW; OR (B) IMMEDIATELY AFTER PUBLICATION, AND TO NOTIFY US IN WRITING OF ANY ERROR IMMEDIATELY UPON DISCOVERY.

9. ERRORS; EXCLUSIVE REMEDY. IF YOU FAIL TO NOTIFY US OF ANY CLAIMS UNDER THIS AGREEMENT WITHIN ONE HUNDRED AND TWENTY (120) DAYS AFTER THE ERROR IS FIRST PUBLISHED OR DISPLAYED, YOU WILL BE DEEMED TO HAVE WAIVED ANY AND ALL CLAIMS. ONCE A PRINT PUBLICATION IS PUBLISHED, IT IS PROHIBITIVELY EXPENSIVE TO CORRECT AN ERROR, AND YOU HEREBY WAIVE ANY RIGHT TO RETRACTION, CORRECTION AND/OR RE-PUBLICATION. THE PRICE FOR THE PRODUCTS PROVIDED ASSUMES THE ENFORCEABILITY OF THIS PROVISION AND REFLECTS A REASONABLE ALLOCATION OF RISK BETWEEN THE PARTIES. IF AN ERROR OCCURS THAT SUBSTANTIALLY DIMINISHES THE VALUE OF A PRODUCT, YOU AGREE THAT THE ERROR ONLY AFFECTS THE VALUE OF THE INDIVIDUAL PRODUCT IN WHICH THE ERROR OCCURRED AND IN NO WAY AFFECTS YOUR PAYMENT OBLIGATION FOR ANY OTHER PRODUCTS (EVEN IF THE PRICE FOR THAT PRODUCT IS "BUNDLED" OR COMBINED WITH OTHER PRODUCTS). FOR SERVICES, YOU AGREE THAT YOUR SOLE AND EXCLUSIVE REMEDY IS FOR US TO CORRECT THE ERROR. FOR ADS AND LISTINGS YOU AGREE THAT YOUR SOLE AND EXCLUSIVE REMEDY FOR ANY ERROR SHALL NOT EXCEED THE FOLLOWING DISCOUNT ON THE PRICE FOR THAT INDIVIDUAL AD OR LISTING:

ERROR	MAX DISCOUNT
Ad or Listing Omitted From Print Publication	100%
Wrong Phone #	up to 100%
(prorated based on how many numbers are in the Ad)	
Business Name Omitted	up to 50%
Business Name Incorrect	up to 25%
Business Address Incorrect	up to 25%

10. INDEMNIFICATION. YOU AGREE TO INDEMNIFY, DEFEND AND HOLD DEX ONE, ITS SUBSIDIARIES, AFFILIATES, OFFICERS, AGENTS, SERVICE PROVIDERS, CO-BRANDERS, AND OTHER PARTNERS AND EMPLOYEES, HARMLESS FROM ANY LOSS, LIABILITY, CLAIM OR DEMAND, INCLUDING REASONABLE ATTORNEYS' FEES, MADE BY ANY THIRD PARTY DUE TO OR ARISING OUT OF (a) ANY CONTENT YOU SUBMIT, MAKE AVAILABLE OR IDENTIFY TO DEX ONE; (b) YOUR VIOLATION OF THIS AGREEMENT, ANY APPLICABLE LAWS, OR THE RIGHTS OF ANY THIRD PARTY; (c) ANY ACT OR OMMISSION OF YOU OR YOUR EMPLOYEES, AGENTS OR CONTRACTS IN CONNECTION WITH THIS AGREEMENT OR THE PRODUCTS.

11. Domain Registration. We will register, own and maintain any Uniform Resource Locator ("URL"), website or domain that we provide pursuant to this Agreement. If you request that we use your existing domain, you agree to transfer management of the domain to a registrar or hosting service we designate. If the URL cannot be transferred or you fail to take the action we request to cause the transfer, then we may choose a URL or domain name on your behalf. In the event a third party disputes your use of a domain name, we may in our sole discretion transfer the domain name to the third party, to you or to an escrow account.

12. Payment Terms. We may require advance payment in full or in part prior to providing any Products. You authorize us to review your credit history to determine whether advance payment is required. You may be billed in installments or for the total amount. Payment, including taxes, is due upon receipt of an invoice. Payments received more than thirty (30) days after the invoice date will incur late fee charges from the invoice date at the lesser of 1.5 % per month or the maximum legal rate. We may apply payments from you, or monies owed to you, toward amounts owed under this Agreement or any other agreement you have with us. You acknowledge and agree that Dex One is authorized to act on payment instructions received by you. By giving us your banking, credit card, debit card or other financial information, you authorize Dex One to initiate debits against your financial account(s) or charge your credit card for amounts authorized by you, whether periodic or one-time payments. This authorization will remain in force until the debts owed to us under this or any other agreement are satisfied or your revoke you authorization in writing. All payments must be made in U.S. dollars, and ACH debits must be made from a business account.

13. Dex One's Remedies. If you or your affiliates fail to meet any obligation set forth in Agreement or any other agreement with us, fail to make a payment when due, or breach any representation or warranty, we may (i) declare the remaining balance of any or all Orders immediately due and payable; (ii) stop providing the Products; (iii) recover our costs in pursuing the remedies provided herein, including collection agency and attorneys' fees; (iv) terminate this Agreement without liability; (v) disconnect or redirect any calls/emails/other actions placed to any or all of the Tracking Numbers/email addresses/business profiles in your Products and/or (vi) pursue any other available legal or equitable remedies. If we receive notice from another party contesting your right to use or display a name, trademark, service mark or other content, in addition to the remedies above, we may, without liability to you, cancel or reject the Products until you have resolved the dispute with the other party to our satisfaction.

14. No Limiting Endorsements. You agree not to include any limiting endorsement on a check or other form of payment. We may cash a check containing a limiting endorsement without affecting your obligations or our rights.

15. Editorial Control. We reserve the sole right to determine the design, content, size, geographic coverage and appearance of our Publications and how, where, how many and when they are published, provided, reissued and displayed. **Without limiting the preceding sentence, the number of copies of a Publication that we deliver and/or the geographic coverage area of a Publication may change substantially from year-to-year, and we may make such changes at any time without notice to you. Please note your Ad size may be smaller than what is noted on your Order.** We reserve the right, but do not assume the obligation, to review the content you submit, make available or identify to Dex One. Any content you provide, make available or identify to Dex One shall comply with our Privacy Policy, Website Terms of Use, Code of Conduct, and Editorial Guidelines which may be updated from time to time and other policies we may develop that are posted on www.dexknows.com. We reserve the right to modify, cancel or reject any Product or any portion thereof at any time for any reason, even if the content was previously accepted.

16. Product Placement. We do not guarantee the placement or positioning of any Product or other content on any page, heading or website and will not provide any adjustments. We reserve the right to determine in our sole discretion the placement and positioning of any Product or other content. The placement and position of a Product or other content may be altered by service providers, search engines or the operation of the Internet.

17. Product Availability. Our acceptance of an Order for any limited inventory Product such as covers, tabs, tiles and banners is subject to availability of that Product. If any Product is discontinued by us or otherwise becomes unavailable for any reason, then at our sole discretion we may terminate the Agreement and refund any advance payments or substitute a Product of comparable value.

18. Proofs. We do not guarantee that we will provide you advance copy sheets or proofs of a Product prior to publication. However, if they are provided in time for modifications, you must notify us in writing immediately of any changes/errors. Colors, photos, typeface or graphics may appear differently in proofs than in the actual Product.

19. Provision of Products. We do not guarantee (a) any specific results from a Product even if we have provided an estimate; (b) the identity of the search engine(s) or other vendors we will use to provide your Products; or (c) the number, consistency, source or quality of any leads, clicks, calls, search or other actions obtained through your Products. If you turn off your telephone, disable your website or otherwise impair our ability to provide the Products, you still are responsible for payments for the term of the Products set forth in the applicable Order.

20. License for Customer Content. By submitting, providing, identifying or otherwise making available to Dex One any Customer Content, you hereby grant to us and our affiliates a worldwide, irrevocable, royalty-free, nonexclusive license to reproduce, use, adapt, modify, publish, translate, publicly perform, publicly display, distribute and create derivative works from such Customer Content in any form in any medium, and we may sublicense all or part of our rights under this license or assign them to third parties. You waive all moral rights with respect to any Customer Content. You also represent and warrant that: (i) you own the Customer Content or otherwise have the right to grant the license set forth in this section; (ii) the use of your Customer Content does not violate the privacy rights, publicity rights, trademark rights, copyrights, contract rights or any other rights of any person; and (iii) your submission, posting, identification or making available of the Customer Content is in compliance with this Agreement. You acknowledge that we do not verify, adopt, ratify, or sanction Customer Content, and you agree that you must evaluate, and bear all risks associated with Customer Content.

21. Other Rights. With the exception of any Customer Content, all tangible and intangible works of any kind in whatever form or media created by us in connection with this Agreement will be our sole and exclusive property. We may, in our sole discretion and at no extra cost to you, publish or display the Products, or other information about your business, in publications, promotional materials and Internet media not otherwise referenced in the Order and these Terms and Conditions apply to the above additional publication or display of the Products or other information about your business. You are solely responsible to register and protect any copyrights or other rights you may have in the Customer Content. You acknowledge that you have directed us to other resources that provide information about your business and we may use that

information for the purposes of providing the Products. Dex One may copy all or portions of your website at any time during the term of this Agreement for purposes of creating and/or delivering a Product, including but not limited to measuring the performance of a Product or tracking consumer behavior through cookies, reverse web proxies or similar technologies.

22. Usage Information. For the purpose of collecting information related to the usage of your Products, we reserve the right to place one or more tracking telephone numbers and tracking URLs in your Products (the "Tracking Number(s)" and "Tracking URL(s)", respectively). The Tracking Number(s) will replace any other telephone number(s) in the Products. We will select the Tracking Number(s) and Tracking URL(s) in our sole discretion. You agree not to use, or allow the use of, the Tracking Number(s) and Tracking URL(s) in any advertisement or for any purpose other than in the Products. We also may collect information related to the usage of your Products without the use of a Tracking Number or Tracking URL. We are the sole owner of all of the usage information generated by the Tracking Number(s), Tracking URL(s), and other methods (the "Usage Information"), including without limitation the source and number of calls and Internet traffic. Any Usage Information we share with you, shall be Confidential and you may not disclose this Usage Information to any third party. We may use the Usage Information for research and promotional purposes. If any payments for Products are conditioned upon one or more types of Usage Information, then we reserve the right in our sole discretion to measure or calculate such Usage Information.

23. Emails. Dex One has the right (but not the obligation) to record, copy, store, and access emails sent to you as part of your Services and to provide access to such emails to you and to third parties authorized by Dex One or you. You acknowledge and agree that you are solely responsible for complying with any and all legal requirements related to (a) the recording and storage of and access to the emails; and (b) the privacy of health-related or personally-identifiable information in the emails.

24. Social Media Service. If you receive a social media or related Service ("Social Media Service") from Dex One, then you authorize Dex One to establish, post content to, maintain, modify, and access third-party websites and other social media properties (the "Social Media Properties") on your behalf. You agree to comply with any requirements or terms of use of the Social Media Properties, including requirements related to Dex One's access to the Social Media Properties on your behalf. Dex One is not responsible for monitoring the content on Social Media Properties. In addition to any other provisions in these Customer Terms and Conditions, you agree (a) that Dex One shall have no liability to you or any third party for any content posted by Dex One to the Social Media Service or any other act or omission by Dex One; and (b) to indemnify, defend, and hold harmless Dex One from any all claims related to the Social Media Service and/or Dex One's actions on your behalf.

25. Warranties. You represent and warrant: (a) that you are authorized to advertise and publicly display the requested business, product or service and all Customer Content, (b) that the Customer Content is truthful and not misleading, (c) that you are in compliance with all laws and licensing requirements relating in any manner to the goods or services included in your Products, (d) that you have and will maintain all professional licenses, degrees or specialties appearing in your Products; (e) that the Products, as reviewed by you, comply with the regulations for your business/profession; (f) that your Products comply with all applicable laws, orders, codes and regulations, including but not limited to laws governing internet advertising; (g) that you will be solely responsible for any transactions initiated through any website to which your Products link; and (h) you will comply with your posted privacy policy. Without limiting any of our other rights or remedies, you agree to notify us immediately in writing at any time that you discover or suspect that any of these representations are not true.

26. Disclaimer of Warranties. THE PRODUCTS ARE PROVIDED ON AN "AS IS" AND "AS AVAILABLE" BASIS WITHOUT WARRANTIES OF ANY KIND, WHETHER EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR NON-INFRINGEMENT. DEX ONE MAKES NO WARRANTY AS TO THE ACCURACY, COMPLETENESS OR RELIABILITY OF ANY PRODUCTS. IF A PRE-PUBLICATION PROOF IS PROVIDED TO YOU, YOU ARE RESPONSIBLE FOR VERIFYING AND REVIEWING YOUR PRODUCTS PRIOR TO ANY PUBLICATION. NO STATEMENTS OR INFORMATION, WHETHER ORAL OR WRITTEN, OBTAINED BY YOU FROM DEX ONE OR THROUGH OR FROM THE DEXKNOWS.COM WEBSITE OR OTHER INTERNET PLATFORMS SHALL CREATE ANY WARRANTY NOT EXPRESSLY STATED HEREIN. NEITHER DEX ONE NOR ANY OF ITS THIRD PARTY PROVIDERS SHALL BE LIABLE FOR ANY ERRORS IN THE PRODUCTS, OR FOR ANY ACTIONS TAKEN IN RELIANCE THEREON. DEX ONE DOES NOT WARRANT THAT THE PRODUCTS WILL BE AVAILABLE, UNINTERRUPTED, OR ERROR-FREE.

27. Privacy Policy. You agree to post a Privacy Policy on your website that discloses the personally identifiable and other information you collect, how you use this information, who you share this information with, and how you safeguard this information. This Privacy Policy shall be consistent with your rights and obligations under this Agreement.

28. Miscellaneous.

a. Force Majeure. Dex One shall not be liable for any delay or failure to perform resulting from causes outside the reasonable control of Dex One such as acts of God, war, terrorism, riots, embargoes, acts of civil or military authorities, fire, floods, accidents, strikes, or shortages of transportation facilities, fuel, energy, labor or materials.

b. Severability. If any provision of this Agreement is found by a court of competent jurisdiction to be invalid, the court shall try to give effect to the parties' intentions as reflected in such provision, and all other provisions of this Agreement shall remain in full force and effect.

c. Assignment. You may not assign any of your rights or obligations without our prior written consent; provided, however, that such consent shall not be required in connection with the sale of all your assets or shares of capital stock or other ownership interests (so long as you provide written notice of such sale to us). In the event of any assignment allowed by the preceding sentence both you and your assignee shall be jointly and severally liable for the timely performance of your obligations. We shall have the sole right to assign our rights and obligations under this Agreement. Any purported assignment made in violation of this provision shall be null and void.

d. Entire Agreement. This Agreement constitutes the entire agreement between you and us and supersedes all prior agreements, whether express or implied, written or oral, with respect to the Products. This Agreement may not be amended nor may any obligations be waived, except in writing signed by you and us. Our marketing consultants are not authorized to amend this Agreement. You warrant that you are not relying on any oral or written representations or promises not included in this Agreement. Some Products have special terms and conditions. If you ordered a Product with special terms and conditions, those special terms and conditions are incorporated into this Agreement by this reference. Sections 6-10, 12-14, 20-22, 25&26 and 28 and any other provision intended by its content will survive termination or expiration of this Agreement.

e. Communications between You and Us. You acknowledge and agree that we and our affiliates, sub-licensees and business partners may, in accordance with applicable law, share information provided by you or contact you (including by, but not limited to, telephone, facsimile or electronic mail communication) related to any Publications or Products you have or we may offer. You agree that telephone conversations between you and us may be monitored and recorded.

f. Electronic Acceptance. If available, you agree and consent to do business with us electronically and may accept this Order by electronic signature, including recorded oral acceptance, in accordance with our approved format. Such oral acceptance shall be deemed a signature pursuant to the ESIGN Act.

COPY
ORIGINAL FILED

DEC 31 2015

SPOKANE COUNTY CLERK

SUPERIOR COURT OF WASHINGTON FOR SPOKANE COUNTY

MICHAEL J RICCELLI PS, a Washington Professional Service Corporation, Plaintiff, v. DEX MEDIA WEST, INC., a Delaware Corporation, Defendants.	CAUSE NO. 15204714-5 AMENDED COMPLAINT FOR BREACH OF CONTRACT AND FOR DECLARATORY RELIEF

I. PARTIES / JURISDICTION / VENUE

1. Plaintiff Michael J Riccelli PS ("MJRPS") is a corporation organized and incorporated under the laws of the State of Washington, located in Spokane County, Washington.

2. Defendant Dex Media West, Inc. ("DEX") is a Delaware corporation authorized to do business in, and doing business in the State of Washington, with offices located in Spokane County, Washington.

3. This matter arises from and relates to a contractual relationship, in which the execution and performance was wholly within Spokane County, Washington.

4. This Court has jurisdiction pursuant to RCW Chapters 2.08 and 7.24.

5. Venue is appropriate pursuant to RCW 4.12.025.

MICHAEL J RICCELLI PS
400 S Jefferson St Ste 112 Spokane WA 99204-3144
Phone: 509-323-1120 Fax: 509-323-1222
E-mail: mjrps@mjrps.net

II. FACTS

1. Plaintiff is an incorporated, small law firm engaged in representing injured parties, in claims for personal injury.

2. DEX publishes and distributes the Spokane County, Washington, area (Spokane Market) DEX residential and business sections (white pages) and advertising section (yellow pages) telephone directory (collectively, "DEX Directory"), solicits advertising, and collects related revenues in Spokane County, Washington. DEX is purportedly wholly or substantially owned by DEX Media, Inc. and/or DEX Media Holdings, Inc., a large national provider of business advertising and marketing products and services.

3. MJRPS and DEX have had an ongoing relationship for several years in which MJRPS advertising copy was published on the first one and/or two pages of the "Attorneys" yellow pages section of the DEX Directory. MJRPS has had a similar relationship and first yellow pages attorney section occupancy with the HIBU (formerly Yellow Book) residential and business telephone directory and yellow pages (collectively, "HIBU Directory"). HIBU and DEX are direct competitors in the Spokane Market for yellow pages advertising revenue. Historically, all Spokane Market telephone directories and yellow pages advertising sections have been in the form of a combined, single book product.

4. The MJRPS/DEX relationship goes back one or more iterations of ownership of the DEX trade name, including Qwest DEX. The DEX trade name in the Spokane area is historically associated with AT&T / Bell Telephone regulated land-line telephone entities and their legacies, characterized as local exchange companies (LEC's). In the Spokane Market, this has recently included Century Link, Qwest, U.S. West, and AT&T.

5. Historically, pursuant to regulation (WAC 480-120-251) LEC's have been required to distribute a printed directory of each customer's name, phone number and address,

MICHAEL J RICCELLI PS
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E-mail: mjrps@mjrps.net

unless omission is requested by the customer. A new directory was and is required to be printed and distributed every 15 months, at minimum. However, annually has been the norm.

6. A significant portion of MJRPS's clients have historically originated by persons referring to MJRPS's advertising in the DEX and HIBU Directories' yellow pages. According to DEX and HIBU sales representatives, these respective directories "compete" in homes and businesses for "shelf space." Purportedly, some users prefer one over the other; other users prefer the latest published directory; and others may retain both . DEX annually distributes new directories in late summer. HIBU distributes their annual directory in late spring.

7. During March of 2014, MJRPS entered into a Billing Agreement with DEX which referenced Terms and Conditions of contract. This was done during advertising program discussions, in the same manner as had been done in all prior years, with the then current DEX Sales Representative. Quantity, size, content, placement, and cost of advertising, was discussed and negotiated. Mr. Riccelli signed and initialed documents denoted as a "Billing Agreement" which referenced "Terms and Conditions," and initialed a statement indicating that the Terms and Conditions were read, understood and agreed to. However, historically, and by course in dealing, contract terms and conditions were never discussed, negotiated, or subject to negotiation. All DEX Representatives firmly stated, over the years, that the contract terms were not negotiable. By pattern and practice DEX Representatives obtain Billing Agreements signed by the advertiser. DEX does routinely publish the advertising and submits billing statements to the advertiser. DEX never provides the advertiser with any form of countersigned contract, or specific acknowledgment thereof.

8. The DEX Directory has a unique marketing position in the minds of many of the public, who associate the publication with the prior AT&T / Bell Telephone LEC's directories. DEX claims that each DEX Directory has a "shelf life" of about three to four years. That is,

MICHAEL J RICCELLI PS
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when a new publication is received, the more recent publications are often not retired, but are placed about in various locations in a home, business, or automobile, for an additional period of time.

9. In all instances of MJRPS's ad placement, DEX sales representatives provided information and materials that both DEX and purported neutral parties had prepared claiming that the DEX Directory had a substantially greater percentage of yellow page usage when compared to other Spokane Market telephone directories, such as HIBU and, at one time, The Black Book. For that reason, DEX's rates charged for ad placement are, and have always been, substantially higher than for its competitors. Further, DEX has always marketed DEX yellow pages advertising as a value added investment, claiming that each dollar cost of advertising returns multiples of that amount in revenue to the advertiser, over time. Further, that research results conclude that size and position of advertising content, within any yellow pages type advertising, directly relate to effectiveness of the advertising, in generating response from potential customers or clients. First position placement in any category is purportedly best, with responses dropping off after that, more precipitously after the third or fourth positions. Position seniority is recognized in and placement. Conversely, when a position is abandoned by an advertiser, all seniority is lost, with any return relegated to last position as to category and size of ad. It is for this reason advertisers continue to repeat their commitments by maintaining size and position, from publication to publication, in good or bad economies. As such, advertisers have been assured by DEX Representatives, and have a reasonable expectation, that prior expenditures are, to some degree, both payment for current value of ad placement, and a surcharge or investment in which a guarantee of their advertising position for succeeding publications and cycles is made. Presumably, the relative value of such advertising will be maintained, over time.

10. Approximately 2 months after a mid September 2014 distribution of the 2014-15

MICHAEL J RICCELLI PS
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E-mail: mjrps@mjrps.net

DEX Directory for the Spokane Market, it was discovered by MJRPS that DEX had distributed only a partial directory, with business white pages phone listings, and yellow pages. A user could, purportedly, obtain a separate residential white pages telephone directory, upon request. The nature of this discovery indicated that it was likely that numerous users had or would dispose of the incomplete DEX Directory, in favor of keeping the complete HIBU Directory. This process likely occurred when a user attempted to find a residential number in the incomplete DEX Directory, was unable to do so, and discarded it in favor of the HIBU Directory, or internet directory services.

11. Subsequently, on behalf of MJRPS, Mr. Riccelli made numerous verbal inquiries of DEX via the Sales Representative, and thereafter, the DEX financial department regarding this discovery, and requested DEX corporate management response. However, no such response was ever provided. Discussions with DEX sales representatives confirmed there had been no study performed by DEX concerning the impact on yellow pages usage of the new, partial directory, and no formal training or guidance was provided DEX sales representatives about informing advertisers of the new program. However, research of the public record substantiates that DEX lobbied the Washington Utilities and Transportation Committee to allow DEX to implement a program in Washington to publish residential white pages directories separate from a combined business white pages and yellow pages directory. Further, that the separate residential telephone directories would not be generally distributed, but would be available to the public only upon request. The basis for this was purported studies that concluded only a small percentage of the public refers to the residential directory, in today's internet and smart phone society. However, in recent attempts to justify DEX's yellow pages advertising rates in the Spokane Market, DEX's sales representatives have frequently stated that the Spokane Market substantially lags behind other, more urban markets, in technology usage. This is stated in response to questions about

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internet search rates versus yellow pages inquiry, for products and services.

12. As a result of the discovery, and thereafter, lack of response to Mr. Riccelli's inquires to DEX management, payment of any contract amounts due DEX for the 2014-15 Yellow Pages advertising program were suspended by MJRPS. MJRPS advised DEX that the contract was disputed and MJRPS assumed the matter would not go to collection. DEX collection department representatives assured Mr. Riccelli that the account would not be turned over to collection. However, the disputed amount was placed with a collection agency by DEX. This resulted in damage to MJRPS' credit rating. Subsequently, several inquiries were made of DEX, both verbally and in writing, by Mr. Riccelli on behalf of MJRPS, to initiate discussions and/or negotiations concerning the whole matter, to no avail.

13. By assessment of records, and anecdotal comments and observations from the MJRPS staff, a substantial drop in telephone inquiry calls from potential MJRPS clients has occurred since the 2014 distribution of the incomplete DEX Directory.

14. Attached as Exhibit A is the purported contract terms and conditions for DEX Yellow Pages for the 2014-15 publication, redacted for price information. MJRPS understands that the price (not contract terms) of all advertising placement by DEX may be subject to negotiation, and, otherwise, that DEX has consistently requested that price information be kept confidential, as proprietary business information.

III. CLAIMS

1. With respect to the 2014-15 DEX yellow pages advertising by MJRPS, DEX had a contractual obligation of good faith and fair dealing to publish agreed upon advertising copy for MJRPS, in a single book publication combining DEX Yellow Pages, and business and residential white pages. DEX breached that obligation. As a result, MJRPS has suffered economic damages that would be difficult to calculate, but which surely are greater than the price

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it agreed to pay DEX for the advertising MJRPS contracted for.

2. When considering: (a) the State of Washington regulatory obligations accepted and undertaken by DEX; (b) the communications, discussions and course in dealings between MJRPS and DEX; (c) the unequal bargaining power between DEX and MJRPS; (d) the harsh one-sidedness of the purported contract terms and conditions; (e) the inclusion of provisions limiting rights of DEX's customers, contrary to Washington law; (f) the lack of meaningful remedy for DEX's customers under the contract terms; (g) DEX's customers' lack of meaningful choice in contracting with DEX; (h) that substantive provisions as to law, rights and remedies are buried in a maze of fine print in the contract terms and conditions; (i) the limitation on recovery of attorneys' fees and costs for DEX's customers; (j) limitations on DEX's liability; (k) limitations on DEX's customers for class action remedies; (l) and that the agreement is one of adhesion, then the agreement is procedurally and substantively unconscionable and otherwise void as against public policy in these respects.

3. The arbitration clause denoted as paragraph 6 of Exhibit A, designates arbitration under the Federal Arbitration Act, 9 U.S.C. §§ 1-15. This provision is void and unenforceable as the transaction between DEX and MJRPS does not constitute interstate commerce as contemplated by the Act, and, therefore, the Act is not applicable.

4. The substantive terms of arbitration consists of paragraph 6 and, by reference therein, paragraphs 7 and 9 of Exhibit A. The substantive terms of arbitration include the egregious terms and conditions referenced in section III 2. above.

5. DEX's conduct complained of herein: constitute unfair and deceptive acts or practices; occurred in trade or commerce in the State of Washington; affect and impact public interest; and caused injury to the business of MJRPS. The conduct of DEX constitutes a violation of Washington's Consumer Protection Act, RCW 19.86. Therefore, multiple damages, costs and

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attorney's fees should be awarded MJRPS.

IV. RELIEF REQUESTED

WHEREFORE, plaintiffs request that the Court:

A. Declare the agreement's arbitration provisions, Exhibit A, paragraphs 6, 7 and 9, to be unconscionable, unenforceable, and void against public policy, and/or inconsistent with Washington's contract and consumer laws, and sever them from Exhibit A.

B. Construe the remaining terms and conditions in a manner consistent with Washington's contract law and public policy.

C. Enjoin DEX from attempting to collect any amount of money pursuant to Exhibit A, as contract payment from MJRPS;

D. Award just compensation to MJRPS for its damages, and in part, determine the contracted cost for MJRPS's advertising in the 2014-15 Directory, had DEX performed, to be a liquidated amount of damages.

E. Award MJRPS multiple damages, applicable costs, and reasonable attorney fees, for DEX's violation of RCW Chapter 19.86, Washington's Consumer Protection Act;

F. Award MJRPS prejudgment interest on the liquidated damages awarded as a result of DEX's breach of its agreement with MJRPS.

G. Grant MJRPS free leave to amend its Complaint to conform to discovery, evidence, and proof of fact during the pendency of this litigation; and

H. Grant MJRPS such other and further relief as the Court may determine just, reasonable, and/or equitable.

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DATED this 31st day of December, 2015.

MICHAEL J RICCELLI PS

By: /Michael J Riccelli/
MICHAEL J RICCELLI, WSBA #7492
Attorney for Plaintiff

DECLARATION OF SERVICE

I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Gwendolyn C. Payton and
Ruth Lee Johnson
Lane Powell PC
P.O. Box 91302
Seattle, WA 98111
JohnsonR@LanePowell.com
PaytonG@LanePowell.com

____ Overnight Mail
__X__ U.S. Mail
__X__ E-Mail
____ Facsimile

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

Dated this 31st day of December, 2015.

/Michael J Riccelli/

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E-mail: mjrps@mjrps.net