

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. ASSIGNMENT OF ERROR ON CROSS APPEAL 2

 A. Issue Presented 2

III. STATEMENT OF THE CASE 3

IV. ARGUMENT 11

 A. Discussion of the Proper UCC Sale of Goods Analysis. 13

 1. Contracts Were Formed When Rudd Shipped the Products
 Ordered by TFC 14

 2. Post-Contractual Terms on Invoices Are Not a Part of the
 Agreement 15

 3. "Battle of Forms" Analysis 23

 4. Additional UCC Arguments for Upholding the Trial Court's
 Rulings. 33

 a. Rudd's Invoices Cannot Disclaim Its Express Warranties. .. 33

 b. Rudd's Remedy Exclusions are Unenforceable Because They
 Fail Their Essential Purpose. 33

 B. Rudd's Warranty Disclaimers and Remedy Exclusionary
 Provisions Are Unconscionable and Unenforceable Under
 the "Berg" Rule 35

 C. The Trial Court Erred when it made a Finding that Rudd
 had not Waived its Affirmative Defense of Improper Venue. 39

V. CONCLUSION 49

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Berry v. Ken M. Spooner Farms, Inc.</i> , 59 U.C.C. Rep. Serv.2d 443 (W.D. Wash. 2006)	23
<i>Coastal Industries, Inc., v. Automatic Steam Products Corp.</i> , 654 F.2d 375 (5th Cir. Unit B Aug. 1981)	16
<i>Dassault Falcon Jet Corp. v. Oberflex, Inc.</i> , 909 F. Supp 345 (D. N.C. 1995).....	31
<i>Diamond Fruit Growers, Inc. v. Krack Corporation</i> , 794 F.2d 1440 (9th Cir. 1986).....	25
<i>Glyptal Inc. v. Engelhard Corp.</i> , 801 F. Supp. 887 (D. Mass. 1992) ..	15
<i>Mid-South Packers, Inc. v. Shoney's Inc.</i> , 761 F.2d 1117 (5 th Cir. 1985)	28
<i>Step-Saver Data Systems, Inc. v. Wyse Technology</i> , 939 F.2d 91 (3d. Cir. 1991).....	22
<i>Tacoma Boatbuilding Co. v. Delta Fishing Company</i> , 28 U.C.C. Rep. Serv.2d 26 (W.D. Wash. 1980)	34
<i>Western Recreational Vehicles, Inc. v. Swift Adhesives, Inc.</i> , 23 F.3d 1547 (9th Cir. 1994)	18, 19, 33
<i>Wiencken v. Mill-Rite Sash & Door Co., Inc.</i> , 71 B.R. 500 (Bankr. Ore 1987).....	26, 27

OTHER STATE CASES

<i>American Parts Co., Inc. v. American Arbitration Association</i> , 154 N.W.2d 5 (Mich. 1967)	16
<i>Herzog Oil Field Service, Inc. v. Otto Torpedo Company</i> , 570 A.2d 549 (Pa. 1990).....	28
<i>Lorbrook Corp. v. G & T Industries, Inc.</i> , 562 N.Y.S.2d 978 (1990) ..	31
<i>Nat'l Machinery Exchange, Inc. v. Peninsular Equipment Corp.</i> , 431 N.Y.S.2d 948 (1980)	31
<i>Offen, Inc. v. Rocky Mountain Construction, Inc.</i> , 765 P.2d 600 (Colo. 1988).....	28
<i>Rangen, Inc. v Valley Trout Farms, Inc.</i> , 658 P.2d 955 (Idaho 1983) ..	28
<i>Resch v. Greenlee Bros. & Co.</i> , 381 N.W.2d 590 (Wis. 1985)	28
<i>TRWL Financial Establishment v. Select Int'l, Inc.</i> , 527 N.W.2d 573 (Minn. 1995)	31

WASHINGTON STATE CASES

<i>American Nursery Products, Inc. v. Indian Wells Orchards</i> , 115 Wn.2d 217, 797 P.2d 477 (1990).....	36, 37, 38
<i>Berg v. Stromme</i> , 79 Wn.2d 184, 484 P.2d 380 (1971).....	37, 38, 39
<i>Butler v. Joy</i> , 116 Wn. App. 291, 65 P.3d 671 (2003).....	45, 46
<i>Cox v. Lewiston Grain Growers</i> , 86 Wn. App. 357, 936 P.2d 1191 (1997).....	34, 35, 39
<i>Dobias v. Western Farmers Ass’n</i> , 6 Wn. App. 194, 491 P.2d 1346 (1971).....	30
<i>Hartwig Farms, Inc. v. Pacific Gamble Robinson Co.</i> , 28 Wn. App. 539, 625 P.2d 171 (1981).....	11, 15, 17, 18, 19, 32
<i>King v. Snohomish County</i> , 146 Wn.2d 420, 47 P.3d 563 (2002).....	42, 44, 45
<i>Lybbert v. Grant County</i> , 141 Wn.2d 29, 1 P.3d 1124 (2000).....	42
<i>M.A. Mortenson Co. v. Timberline Software Corp.</i> , 140 Wn.2d 568, 998 P.2d 305 (2000).....	12, 20, 21, 22, 23
<i>Morgan Bros., Inc. v. Haskell Corp.</i> , 24 Wn. App. 773, 604 P.2d 1294 (1979).....	19
<i>Puget Sound Financial, LLC v. Unisearch, Inc.</i> , 146 Wn.2d 428, 47 P.3d 940 (2002).....	12, 20, 21, 36
<i>Raymond v. Fleming</i> , 24 Wn. App. 112, 600 P.2d 614 (1979).....	43
<i>Rottinghaus v. Howell</i> , 35 Wn. App. 99, 666 P.2d 899 (1983).....	18, 19, 20, 30, 39, 40
<i>Schroeder v. Fageol Motors, Inc.</i> , 86 Wn.2d 256, 544 P.2d 20 (1975).....	38
<i>Travis v. Washington Horse Breeders Ass’n</i> , 111 Wn.2d 396, 759 P.2d 418 (1988).....	33

STATUTES

ORS 72.2070.....	27
RCW 4.12.020(3).....	41
RCW 4.12.025(3).....	41
RCW 62A.2-101.....	12, 13
RCW 62A.2-201.....	15, 16
RCW 62A.2-201(2).....	16
RCW 62A.2-201(3)(b).....	16

RCW 62A.2-201(3)(c).....	16
RCW 62A.2-206.....	18
RCW 62A.2-206(1).....	14
RCW 62A.2-206(1)(b).....	14
RCW 62A.2-207.....	22, 23, 29, 32
RCW 62A.2-207(1).....	27
RCW 62A.2-207(2).....	30, 32
RCW 62A.2-305.....	16
RCW 62A.2-313.....	5
RCW 62A.2-314.....	5
RCW 62A.2-315.....	5
RCW 62A.2-316.....	33
RCW 62A.2-719(2).....	34
RCW 62A.2-725(1).....	41
RCWA 62A.2-207.....	26

OTHER AUTHORITIES

5 C. Wright & A. Miller, <i>Federal Practice and Procedure</i> § 1344 (1969).....	43
J. White & R. Summers, <i>Uniform Commercial Code</i> § 1-1 (3d ed. 1988).....	24
J. White & R. Summers, <i>Uniform Commercial Code</i> § 1-5 (3d ed. 1988 & Supp. 1991).....	15

I. INTRODUCTION

This appeal will require the Court to engage in a careful review and application of Washington's version of the Uniform Commercial Code (UCC) which is codified in Title 62A.2 RCW relating to a sale of goods between merchants. In the simplest of terms, Rudd Company, Inc. ("Rudd") is asking this Court to ignore applicable Washington UCC statutes and case law and to re-impose the common law "last shot" rule which was long ago banished from existence by the UCC. In this case, Rudd seeks to impose unilaterally warranty disclaimers, remedy exclusionary clauses and venue provisions that were contained on the back of invoices that were mailed to Tacoma Fixture Company ("TFC") many days, and in some cases nearly two weeks, after the parties entered into their oral contracts and after the paint products were shipped and delivered to TFC.

Rudd takes the position that by simply mailing an invoice to TFC long after the oral contracts have been fully performed, Rudd can impose unilaterally contractual terms on TFC that were admittedly never discussed, negotiated or agreed to by the parties. Rudd's position is contrary to the UCC and Washington law. If the Court were to adopt Rudd's position, the protections afforded persons and businesses under

the UCC would be stripped away and sellers of products would be free to resume the abusive practices that led, in part, to the adoption of the UCC which was intended to facilitate commercial transactions between parties on an equal playing field. Rudd trumpets the holdings of two relatively recent Washington cases as being an indicator that the well established law applicable to UCC cases has shifted dramatically over the years. However, TFC will establish that the two cases relied upon by Rudd either do not apply or are limited to the specific facts presented in those cases. More importantly, the two cases relied upon by Rudd do not, and cannot, repeal the applicable UCC statutes that must guide this Court during its consideration of this appeal.

II. ASSIGNMENT OF ERROR ON CROSS APPEAL

The trial court erred by including a specific finding in its order denying Rudd's Motion to Dismiss for Improper Venue that Rudd had not waived its affirmative defense of improper venue.

A. Issue Presented.

a. Did the trial court err by including a specific finding in its order denying Rudd's Motion to Dismiss for Improper Venue that Rudd had not waived its affirmative defense of improper venue when the undisputed evidence before the court supports a finding that Rudd by its

actions and conduct, unrelated to discovery efforts, waived its affirmative defense of improper venue?

III. STATEMENT OF THE CASE

Background History. TFC is a cabinet manufacturing company located in Tacoma, Washington. Rudd is a paint manufacturing company located in Seattle, Washington. Both parties have acknowledged that they are “merchants” under the UCC. In approximately 2001, TFC began to purchase paint and coating products from Rudd for use in its cabinet manufacturing business. CP 293.

Paint and Coating Failures. TFC experienced significant problems with Rudd’s paint and coating products. Wood cabinets manufactured out of clear maple and cherry wood and coated with a clear conversion varnish product discolored and turned an orange color. TFC began receiving some customer complaints about the discoloration problems approximately one month after the cabinets were manufactured and continued to receive complaints for a period of approximately two years from the date the cabinets were manufactured. CP 292. In addition, cabinet doors and drawers fronts manufactured out of MDF (medium density fiberboard) with a pigmented conversion varnish product cracked and “crazed”. TFC began receiving some customer

complaints about the paint cracking approximately one month after the cabinets were manufactured and continued to receive complaints for a period of approximately three years from the date the cabinets were manufactured. CP 292. The clear discoloration problems involved approximately 50 separate building projects and the cracking problems involved approximately 100 separate building projects. The projects were located in Washington, California, Oregon, Hawaii, Idaho and Nevada. CP 292.

Rudd refused to accept any responsibility for the problems and Rudd maintained there was nothing wrong with the products or finishing systems it recommended and supplied. Rather, Rudd indicated that the problems were caused by problems with over-catalyzation, improper mixing, and improper application of the products, all of which Rudd claimed were TFC's responsibility. CP 292. Based on Rudd's assurances that Rudd's products and finishing systems were not the cause of the problems, TFC continued to purchase Rudd's products to remanufacture the cabinets with the defective coatings and to manufacture new cabinets. However, the coatings on these cabinets soon failed as well. In some cases, TFC remanufactured cabinets 2 or 3 times. CP 292-93.

As a result of these problems, TFC was forced to remanufacture the cabinets that experienced coating failures at considerable costs. TFC has spent approximately \$1,000,000 out of pocket in connection with repairing the cabinets with the defective coatings. TFC intends to prove that it has incurred direct, incidental and consequential damages in the range of \$4,000,000. TFC lost several of its largest customers and a significant portion of its business. The problems caused by the defective paint and coating products nearly put TFC out of business. CP 293, 300.

Claims Assert by TFC Against Rudd. TFC's lawsuit against Rudd alleges, among other things, violations of the UCC as follows: (1) breach of contract and/or breach of express warranties under RCW 62A.2-313; (2) breach of implied warranties of merchantability under RCW 62A.2-314; and (3) breach of implied warranties of fitness for a particular purpose under RCW 62A.2-315. CP 1-7. Importantly, the claims and remedies sought by TFC are those that are statutorily mandated by the UCC in sale of goods cases.

Description of the Parties' Contracting Process. TFC would in most circumstances place orders for Rudd's products by telephone. In addition, some orders may have been placed by TFC via fax. CP 299.

After receiving the telephone or fax order, Rudd would arrange for the product to be shipped from Rudd's Seattle manufacturing facility to TFC's facility in Tacoma. Neither Rudd nor TFC issued any type of written purchase orders, acknowledgments or confirmations after the orders were placed, and before the products were shipped and delivered to TFC. CP 299.

Rudd originally asserted in its Motions, based on the sworn testimony of its President, that Rudd's invoices were always delivered with the products. CP 108, 166, 190. This simply wasn't true and TFC submitted uncontraverted evidence that the standard practice followed by Rudd throughout the 3-year period was to mail the invoices to TFC many days after the products had already been shipped and delivered to TFC. CP 297-98. TFC provided the trial court with copies of bills of lading and packing slips that definitively established that Rudd did not even mail the invoices until many days after the products were delivered. In some cases, the invoices were not mailed for more than 10 days after the products had been delivered. With mailing time, that would mean the invoices were not received by TFC for approximately 2 weeks after the products were delivered. CP 297-98. Rudd was forced to concede this critical fact during the hearing on the Motions and a specific finding to

this effect was included in the trial court's orders. CP 496, 499. In fact, in the face of TFC's undisputed evidence counsel for Rudd acknowledged to the trial court that Rudd's claims to have delivered the paint along with invoices was "misleading." RP. 20, ln 18-25. When the invoices were received, they were routed to TFC's finishing manager so he could verify that the products were received as reflected in the invoices.¹ Once the quantities were confirmed, the invoices were routed to accounting for payment. The invoices were then stuck in a file. The terms on the back side of the invoices were never the subject of any discussions and TFC never agreed to such terms. CP 300.

It should also be noted that Rudd claims in its appeal brief that ". . . Rudd delivered the materials to TFC and sent (usually separate from the raw materials themselves) an invoice" Rudd's Appellate Brief, p. 6. (*citing* CP 299)(emphasis added). Although Rudd had an opportunity to do so at the Motions hearing, Rudd failed to provide any evidence to controvert TFC's evidence that Rudd's invoices were always

¹ TFC denies Rudd's statement that: "TFC admits that each invoice was received and carefully reviewed by its shop manager . . . and approved by him prior to being forwarded to TFC's accounting department for payment." Rudd's Appellate Brief, at 13. In fact, the record is quite clear that TFC's manager only verified receipt of the products. Nothing further can or should be inferred from this fact.

mailed after the goods had been shipped and delivered to TFC. As such, the Court should disregard Rudd's unsubstantiated claim that Rudd may have sent some invoices with the shipments of paint as there is no evidence in the record to support this claim.

Importantly, it is also undisputed that Rudd and TFC never discussed, negotiated or agreed to any of the terms on the back of the invoices now being relied upon by Rudd. CP 299-300. Rudd conceded this fact in its Motion for Summary Judgment. CP 179; RP. 31, ln 8-10. The orders entered by the trial court also included a specific finding to this effect. CP 496, 499.

Relevant Procedural Facts Relating to TFC's Cross Appeal.

TFC commenced this lawsuit against Rudd on January 5, 2005. During the first 3 months of this case, counsel for Rudd and counsel for TFC exchanged a series of letters relating to Rudd's claim that the venue provision on the back of the invoices required that this action be filed in King County. CP 424, Ex A. TFC responded that terms on the back of the invoices were not a part of the parties' agreement under the *Hartwig Farms* case which is the controlling precedent for sale of goods cases. Rudd indicated that if TFC would not agree to voluntarily change venue to King County that Rudd would pursue a motion for change of venue.

However, Rudd never filed such a motion until May 5, 2006. In fact, since the exchange of the correspondence during the first 3 months of this case, the parties never even discussed the issue of venue and the parties proceeded with their litigation efforts as if venue was proper and would remain in Pierce County. CP 424, Ex A.

On or around May 11, 2005, Rudd filed a Jury Demand. Rudd's act of filing a Jury Demand is inconsistent with its claim of improper venue. CP 424, Ex B.

Pursuant to the Pierce County Local Rules ("PCLR"), TFC and Rudd also discussed and agreed upon the date of a settlement conference before Judge Steiner. The court then issued a Notice to TFC and Rudd confirming the parties' agreed upon date for the settlement conference before Judge Steiner on October 13, 2005. CP 425, Ex C.

On September 22, 2005, Rudd filed a Motion for Continuance of Trial. Rudd's argument at that time was that this case should have been assigned to the complex track and not the standard track. As such, Rudd sought a continuance of the trial date which was originally scheduled for January 4, 2006. The court granted Rudd's motion and issued a new case schedule reflecting a new trial date of August 1, 2006. There was no mention in Rudd's Motion for Continuance of any concern or objection

about improper venue and Rudd's request to the court to reassign this case to a complex track case schedule is inconsistent with its claim that venue is improper. CP 425, Ex D.

Once the case was reassigned to the complex track, a new case schedule was issued by the court. Once again, pursuant to the PCLRs TFC and Rudd discussed and agreed upon a new date for the settlement conference before Judge Steiner. The court then issued a second Notice to TFC and Rudd confirming the parties' agreed upon date for the settlement conference before Judge Steiner on May 23, 2006. CP 425, Ex E.

In late April of 2006, counsel for TFC and Rudd engaged in discussions and negotiations relating to Rudd's request for a change in the case schedule. These discussions were the subject of correspondence between counsel for TFC and Rudd. CP 425-26, Ex. F. Ultimately, the parties were able to discuss and agree upon certain limited changes to the case schedule. At the time that TFC and Rudd were negotiating the terms of the Stipulation and Order Amending Case Schedule, Rudd had already filed its Motion for Summary Judgment (which was filed on April 21, 2006). Rudd's Motion for Summary Judgment sought affirmative relief from the court and Rudd's Motion did not include any

claims or arguments relating to improper venue. CP 425-26, Ex F. Further, at no time during the discussions about amending the case schedule did Rudd's counsel give any indication that Rudd would be filing a motion to dismiss for improper venue. In fact, the discussions that took place were that the parties would proceed with the settlement conference before Judge Steiner on May 23, 2006, and that there would be no change in the August 1, 2006 trial date, both of which were very important factors in TFC's decision to agree to an amended case schedule. CP 425-26, Ex F. Again, Rudd's actions and conduct are entirely inconsistent with the argument it made that venue in Pierce County is improper.

On May 5, 2006, the Court entered the Order Amending Case Schedule which was based on a stipulation between the parties. CP 426. Quite surprisingly, Rudd then filed its Motion to Dismiss for Improper Venue on the very same day. CP 426.

IV. ARGUMENT

Boiled down to its essence, this Court is being asked to decide whether *Hartwig Farms, Inc. v. Pacific Gamble Robinson Co.*, 28 Wn. App. 539, 625 P.2d 171 (1981) is still good law and applicable to the facts of this case or whether, as Rudd asserts, more recent decisions by

the Washington Supreme Court have effectively overruled *Hartwig Farms*. Rudd argues that the Washington Supreme Court's rulings in *Puget Sound Financial, LLC v. Unisearch, Inc.*, 146 Wn.2d 428, 47 P.3d 940 (2002) and *M.A. Mortenson Co. v. Timberline Software Corp.*, 140 Wn.2d 568, 998 P.2d 305 (2000) supplant the analysis adopted by the court in *Hartwig Farms* and that a new analysis is now required in all sale of goods cases. This Court should rule that *Hartwig Farms* is still good law and is applicable to this case.

Rudd correctly acknowledges that this case is a "sale of goods" case under RCW 62A.2-101 *et seq.*, Washington's version of the UCC. However, after taking an initial step down the path of a proper UCC sale of goods analysis, Rudd inexplicably leaps to the conclusion that the invoices at issue in this case are a part of the parties' agreement and then focuses entirely on the issue of unconscionability. Rudd fails to engage in the analysis required by the UCC in order to determine whether any, some or all of the terms on the back of the invoice even become a part of the parties' agreement. TFC believes that when a proper UCC analysis is applied, the Court will never reach the unconscionability issue.

The trial court properly rejected Rudd's argument when it held that the analysis set forth in *Hartwig Farms* is still valid and applicable to

the facts of this case. This Court has an important opportunity to (1) affirm that *Hartwig Farms* is still good law, and (2) provide additional guidance as to the proper application of the Washington Supreme Court's recent rulings in *Puget Sound Financial* and *Mortenson* to this case and other sale of goods cases that may be brought by parties in the future.

A. Discussion of the Proper UCC Sale of Goods Analysis.

Both parties have acknowledged that this action involves a sale of goods between merchants and is governed by RCW 62A.2-101 *et seq.* Therefore, TFC will discuss the proper analysis that is applicable to Rudd's Motions.

The first step of a proper UCC analysis is to determine whether the terms on the back of the invoice are even a part of the contract between the parties. Rudd skipped this important first step of the analysis and simply assumed that the terms on the back of the invoices were automatically a part of the parties' agreement because the invoices were mailed by Rudd to TFC. In other words, Rudd believes because it "fired the last shot" by mailing an invoice purporting to set forth the terms of the parties' oral agreement, that the terms on the back of the invoice are automatically a part of the parties' agreement, even though (1) the invoices were mailed days after the goods were shipped and

delivered to TFC and (2) the parties never discussed, negotiated or agreed to the terms on the back of the invoices.

TFC believes that a proper UCC analysis requires a finding that none of the terms on the back of the Rudd's invoices are a part of the contract between the parties.

1. Contracts Were Formed When Rudd Shipped the Products Ordered by TFC.

The Court must determine the point at which TFC and Rudd entered into a contract. Under the undisputed facts of this case, this determination is quite easy and uncontroversial. RCW 62A.2-206(1) provides as follows:

Unless otherwise unambiguously indicated by the language or circumstances . . . (b) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or nonconforming goods”

RCW 62A.2-206(1)(b) (emphasis added).

After receiving the telephone or fax orders from TFC, Rudd would promptly ship the products to TFC. CP 299. Therefore, according to the specific language in RCW 62A.2-206(1)(b), the contract was formed at the time Rudd actually shipped the products to TFC. *See*

also, *Hartwig Farms*, 28 Wn. App. at 541 (oral agreement for sale was made at the time a telephone order for seed was placed); *Glyptal Inc. v. Engelhard Corp.*, 801 F. Supp. 887, 893 (D. Mass. 1992) (citing J. White & R. Summers, *Uniform Commercial Code* § 1-5 (3d ed. 1988 & Supp. 1991)).

2. Post-Contractual Terms On Invoices Are Not a Part of the Agreement

At the time the oral contracts were entered into between Rudd and TFC, the terms of the contract between the parties consisted of the type of products and the quantity of products. In an effort to “bootstrap” the terms of the invoice into the parties’ agreement for the purpose of escaping liability otherwise imposed by the UCC, Rudd argues that without the invoice there would be no writing memorializing the contract which is in contradiction to one of the primary tenants of the UCC Statute of Frauds. Rudd’s Appellate Brief, at 10-11. Rudd’s argument demonstrates a basic lack of understanding of the UCC Statute of Frauds found in RCW 62A.2-201.

As an initial matter, there is no Statute of Frauds problem in this case because both parties have acknowledged in their respective pleadings that the parties entered into a series of contracts which is one

of the exceptions to the Statute of Frauds. *See* RCW 62A.2-201(3)(b); *see also*, RCW 62A.2-201(3)(c) (payment exception to the Statute of Frauds).

However, more fundamentally, pursuant to RCW 62A.2-201(2) Rudd's invoices supply the writing requirement necessary to avoid a Statute of Frauds problem. Although Rudd's invoices may satisfy the writing requirements of RCW 62A.2-201 that does not mean that the terms on the back of the invoices automatically become a part of the contract between the parties. *See American Parts Co., Inc. v. American Arbitration Association*, 154 N.W.2d 5, 11 (Mich. 1967) (the only effect of section 2-201 is to take away from the party who fails to answer the defense of the statute of frauds); *Coastal Industries, Inc., v. Automatic Steam Products Corp.*, 654 F.2d 375, 378 fn. 3 (5th Cir. Unit B Aug. 1981). In addition, it should be noted that the UCC specifically acknowledges that open price terms are acceptable and that price can be determined under the UCC in a number of ways. *See* RCW 62A.2-305.

Since this case does not involve a dispute over the description, quantities or price of the products purchased by TFC, and the parties admittedly entered into a series of oral contracts, Rudd's Statute of Frauds argument simply has no relevance to the required UCC analysis.

Further, enforcing an admitted series of oral contracts between the parties hardly constitutes “manufacturing a contract out of whole cloth” as is alleged by Rudd. Rudd’s Appellate Brief, at 19.

Having dispensed with Rudd’s Statute of Frauds argument, the relevant discussion should turn to the issue of whether post-contractual terms contained on the back of Rudd’s invoices that are mailed after the goods are shipped and delivered, and which were never discussed, negotiated or agreed to, can be a part of the parties’ agreement. The court in *Hartwig Farms* has previously reviewed this issue and determined that terms on an invoice sent after a contract was formed are to be excluded from the contract. *Hartwig Farms* involved the validity of a disclaimer contained on an invoice issued after a contract had been made. As in our case, the orders were placed primarily by telephone. The court in *Hartwig Farms* stated that: “A disclaimer which is made after a sale is completed cannot be effective because it was not a part of the bargain between the parties.” *Hartwig Farms*, at 543 (emphasis added). The court noted that (1) the sale of seed was an oral contract, (2) the invoice which contained the disclaimer language was sent after the sale was complete, and (3) there was no discussion or agreement between the parties concerning the disclaimer. As such, the court ruled

that: “Any disclaimer on Tobiasson’s invoice was unbargained for and thus not effective to exclude any warranty.” *Id.* The court’s ruling in *Hartwig Farms* is entirely consistent with the plain language of RCW 62A.2-206.

Rudd attempts to distinguish *Hartwig Farms* by arguing that the invoice with additional terms in that case was sent after a confirmation of sale was signed by the seed broker which did not include the additional terms. Rudd’s Appellate Brief, at 22. This is a distinction without a difference and the analysis required to be undertaken is the same in either situation.

Hartwig Farms has been followed in many other cases. For example, in *Western Recreational Vehicles, Inc. v. Swift Adhesives, Inc.*, 23 F.3d 1547 (9th Cir. 1994), the Ninth Circuit Court of Appeals, applying Washington law, ruled that warranty disclaimers included on sales invoices and product data sheets sent after the sale is completed cannot be effective because the terms were not a part of the bargain between the parties. *Id.*, at 1554 (*quoting Rottinghaus v. Howell*, 35 Wn. App. 99, 103, 666 P.2d 899 (1983) and *citing Hartwig Farms*, at 543) (emphasis added). The Ninth Circuit Court stated that: “Western and Swift never discussed, much less negotiated, the disclaimers. Moreover,

Swift added most of the disclaimers after the sale, on invoices delivered with Adhesive shipments. The disclaimers are, as a result, invalid under the Washington ‘negotiation’ rule.” *Western Recreational Vehicles*, at 1554.

In *Rottinghaus v. Howell*, 35 Wn. App. 99, 666 P.2d 899 (1983), the court ruled that both warranty disclaimers and remedy exclusionary provisions which are made after a sale is completed cannot be effective because it was not a part of the bargain between the parties. *Rottinghaus*, at 103 (citing *Hartwig Farms*, at 543). Although *Rottinghaus* involved a written confirmation of an oral telephone order as opposed to an invoice, the case is instructive as to the question of when the oral contract was made and how terms that are attempted to be slipped in after the contract was formed will not find their way into the parties’ agreement. Similarly, in *Morgan Bros., Inc. v. Haskell Corp.*, 24 Wn. App. 773, 604 P.2d 1294 (1979), the court found that provisions on an invoice sent after the products had already been delivered that included a remedy exclusionary clause were not a part of the parties’ agreement. *Morgan Bros.*, at 775, 781-82 (insertion of a clause on the reverse side of an invoice materially limiting the buyer’s remedies,

which is received by the buyer following delivery of the goods, does not satisfy the good faith test of RCW 62A.2-103(b)).

The core legal principle that is established by *Hartwig Farms*, *Western Recreational Vehicles*, *Rottinghaus* and *Morgan Bros.* which remains intact today is that warranty disclaimers, remedy exclusionary clauses and venue provisions contained on invoices or written confirmations sent after the contract has been formed do not become a part of the parties' agreement. Since the invoices involved in this case were mailed many days after the products had already been shipped and delivered to TFC, and the terms on the back of the invoices were never discussed, negotiated or agreed to, the terms on the back of Rudd's invoices are not a part of the parties' agreement. The Court should affirm the trial court's rulings in this regard.

Rudd attempts to force the terms of the invoices into the parties' agreement by arguing that the Court should employ the "layered" contract analysis used in *Puget Sound Financial v. Unisearch, Inc.*, 146 Wn.2d 428, 47 P.3d 940 (2002) and *M.A. Mortenson Co. v. Timberline Software Corp.*, 140 Wn.2d 568, 998 P.2d 305 (2000). However, *Puget Sound Financial* simply does not apply to this case because *Puget Sound Financial* dealt with a services contract and it is not a "sale of goods"

case. In fact, the court in *Puget Sound Financial* made it clear that its ruling did not apply to sale of goods cases. *Puget Sound Financial*, at 443. More importantly, the Court's ruling in *Puget Sound Financial* acknowledges that *Hartwig Farms* is still the controlling precedent when dealing with a sale of goods case. *Id.* Therefore, while Rudd questions the precedential value of *Hartwig Farms* because it is a "25 year old holding", the Washington Supreme Court in *Puget Sound Financial* has itself affirmed that *Hartwig Farms* is still good law.

With respect to the *Mortenson* case, while the Washington Supreme Court used the "layered contract" analysis in a UCC sale of goods case, the issue in *Mortenson* was focused on whether the terms of a separate software licensing agreement (commonly referred to as a "shrinkwrap licence") was binding on the parties, which was an issue not previously addressed under Washington law.

However, the facts of *Mortenson* are significantly different than the facts in our case. For example, the purchase order issued by Mortenson made it clear that the purchase order was not an integrated contract and that the parties contemplated other agreements relating to the software at issue. *Mortenson*, at 573. In addition, the software was delivered to Mortenson with a licensing agreement on the outside of the

software package, and on the inside cover of an instruction manual, and was wrapped around each protection device shipped to Mortenson. Further, the first screen that appeared when the software program was used referenced the terms of the license agreement. *Id.* at 574. Finally, Mortenson had also previously agreed to a software license with the same company relating to an earlier version of the software. *Id.*, at 581. It should also be noted that the Court in *Mortenson* hints that it may have reached a different conclusion had Mortenson been a “merchant” since RCW 62A.2-207 specifically addresses when additional terms become a part of a contract between merchants. *Id.*, at 582 fn.9; *see also, Step-Saver Data Systems, Inc. v. Wyse Technology*, 939 F.2d 91 (3d. Cir. 1991) (informative discussion on the policy issues relating to UCC sale of goods cases).

It is clear that the Court in *Mortenson* was dealing with an issue not previously decided in Washington relating to software licenses and the enforceability of “shrinkwrap licenses.” Further, the Court specifically acknowledged that *Mortenson* was a case about contract formation, not contract alteration. *Mortenson*, at 582. As such, *Mortenson* is clearly distinguishable on its facts and the court should

reject Rudd's argument that the "layered contract" analysis should be extended to our case.

Rudd also relies upon *Berry v. Ken M. Spooner Farms, Inc.*, 59 U.C.C. Rep. Serv.2d 443 (W.D. Wash. 2006) as support for its argument that the terms on its invoices are a part of the parties' agreement. As an initial matter, the *Berry* case has no precedential value on this Court. Further, a review of the *Berry* case reveals that the facts of that case are quite different from the undisputed facts of our case. *Berry* involved issues of "trade usage" which are not at issue in our case; the buyer had the opportunity to review the exclusionary provisions on several occasions and before shipment; and the exclusionary clauses were printed in red ink on the boxes of raspberry plants delivered to the buyer. Importantly, the court in *Berry* did not apply a 2-207 analysis which TFC believes is required under the UCC. *Id.* In fact, it is TFC's position that the court in *Berry* erred by relying on the *Mortenson* case. For these reasons, TFC believes that *Berry* is factually distinguishable and has no application to our case.

3. "Battle of Forms" Analysis

Although the trial court's orders were based on the arguments made in the preceding sections, an analysis under RCW 62A.2-207

would lead to the same conclusion that the warranty disclaimer, remedy exclusionary clauses and venue provisions are not a part of the agreement. This analysis is commonly referred to as the “battle of forms.” The UCC was adopted to help deal with problems in the sale of goods context, one of which is the “battle of forms.” Often times, after receiving the buyer’s purchase order, the seller will issue a written confirmation of the agreement which contains the terms that the seller wants to apply to the sale and a dispute arises over what terms govern the parties’ agreement. Prior to the enactment of the UCC, the common law contract doctrine called the “mirror image rule” held that any acceptance of an offer had to be the “mirror image” of the offer. Otherwise, the different terms would be viewed as a rejection of the initial offer and a counteroffer. As such, under the common law, sellers and buyers were known to engage in the practice of sending the last written document prior to acceptance of the goods in an attempt to secure terms which were more favorable to it. This became known as the “last shot” rule which generally always favored the seller. See J. White & R. Summers, *Uniform Commercial Code* § 1-1 (3d ed. 1988).

UCC 2-207 was drafted in order to deal with these problems. As noted by the Ninth Circuit Court of Appeals in *Diamond Fruit Growers, Inc. v. Krack Corporation*, 794 F.2d 1440 (9th Cir. 1986):

One of the principles underlying section 2-207 is neutrality. If possible, the section should be interpreted so as to give neither party to a contract an advantage simply because it happened to send the first or in some cases the last form. *See* J. White & R. Summers, § 1-2 at 26-27. Section 2-207 accomplishes this result in part by doing away with the common law's "last shot" rule.... At common law, the offeree/counter-offeror gets all of its terms simply because it fired the last shot in the exchange of forms. Section 2-207(3) does away with this result by giving neither party the terms it attempted to impose unilaterally on the other."

Diamond Fruit Growers, at 1444 (emphasis added). The Court's opinion in *Diamond Fruit Growers* contains an instructive discussion of the policy implications of 2-207.

Before proceeding with the "battle of forms" analysis, TFC needs to address Rudd's assertion that the "battle of forms" analysis does not apply because Rudd's invoice is the only "form" at issue and that there is no competing form to analyze. Rudd's Appellate Brief, at 23. It is not surprising that Rudd seeks to avoid a UCC 2-207 analysis because such an analysis requires the exclusion of the warranty disclaimers, remedy

exclusionary clauses and venue provisions from the parties' agreement. Notably, Rudd fails to provide any legal authority to support its argument. Furthermore, Rudd overlooks or chooses to ignore the clear intent of 2-207 as reflected in the drafters' Official Comments. Comment 1 of UCC 2-207 states as follows:

1. This section is intended to deal with two typical situations. The one is the written confirmation, where an agreement has been reached either orally or by informal correspondence between the parties and is followed by one or both of the parties sending formal memoranda embodying the terms so far as agreed upon and additional terms not discussed.

RCWA 62A.2-207, Official Comment 1 (emphasis added). Therefore, it is clear that even where only one party sends a formal memorandum following an oral agreement, the 2-207 analysis still applies. As such, the Court should flatly reject Rudd's invitation to skip the statutory analysis required by 2-207.

TFC's research revealed that there are a couple of ways to analyze invoices that are sent after an oral agreement has been entered into by the parties. For example, in *Wiencken v. Mill-Rite Sash & Door Co., Inc.*, 71 B.R. 500 (Bankr. Ore 1987), the court ruled that an invoice containing an exclusion of remedies on the back of the invoice

that accompanied the goods was not a “written confirmation” within the meaning of ORS 72.2070 (Oregon’s version of 2-207). The court reached this conclusion on the basis that sending an invoice with the goods or after the goods were sent “is not within a reasonable time of making the oral agreement” which is required by ORS 72.2070.² *Wiencken*, at 503. RCW 62A.2-207(1) contains this same “within a reasonable time” requirement.

TFC believes that the analysis used by the court in *Wiencken* is consistent with the analysis used by the court in *Hartwig Farms* and the trial court. In fact, given the fact the Rudd did not mail its invoices until days, and in some cases more than a week after delivery of the paint, the facts of this case provide an even more compelling argument that Rudd’s invoices should not be considered “written confirmations” under 2-207. If the Court were to adopt this approach, the Court would not need to proceed with the 2-207 analysis.

However, other courts have elected to treat post-contractual invoices as “written confirmations” and employed a 2-207 analysis in

² It is clear that Rudd’s invoices do not constitute an “acceptance” under 2-207 as Rudd’s act of shipping the paint was the acceptance pursuant to RCW 62A.2-206(1)(b); *see also, American Parts Co., Inc. v. American Arbitration Association*, 154 N.W.2d 5, 15 (Mich. 1967) (seller’s attempt to

order to determine whether the terms on the invoices became a part of the contract. *See, Mid-South Packers, Inc. v. Shoney's Inc.*, 761 F.2d 1117, 1122-23 (5th Cir. 1985) (invoices sent on the day following each shipment should be considered “written confirmation” of the parties’ agreement and not “expressions of acceptance”); *Rangen, Inc. v Valley Trout Farms, Inc.*, 658 P.2d 955, 961-62 (Idaho 1983) (seller’s shipment of fish food was the act of acceptance of the purchase orders and additional terms found in a post-contractual invoice was run though a 2-207 analysis); *Resch v. Greenlee Bros. & Co.*, 381 N.W.2d 590, 592-93 (Wis. 1985) (even if an invoice that was shipped with the machine or sent shortly after shipment can be a “written confirmation” under 2-207(1), the invoice may not materially alter the contract); *Offen, Inc. v. Rocky Mountain Construction, Inc.*, 765 P.2d 600, 601 (Colo. 1988) (invoices sent after oral contract constituted written confirmations and are run through the 2-207 analysis); *Herzog Oil Field Service, Inc. v. Otto Torpedo Company*, 570 A.2d 549, 550 (Pa. 1990) (invoice sent after day of delivery of goods constitutes a written confirmation and is subject to the 2-207 analysis).

include “conditional assent” language in a post-contractual written confirmation is ineffective).

Therefore, even if the Court determines that Rudd's post-contractual invoices constitute "written confirmations" under 2-207, the terms on the invoice are subject to the 2-207 analysis.

Washington's version of UCC 2-207 is codified in RCW 62A.2-207. RCW 62A.2-207 provides, in part, as follows:

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

RCW 62A.2-207 (emphasis added).

Under Washington law, it is clear that the warranty disclaimers and remedy exclusionary provisions on the back of Rudd's invoices

would be considered “material alterations” to the contract and would be excluded from the contract. In *Rottinghaus*, the court specifically held that both warranty disclaimers and remedy exclusionary provisions contained on written confirmation forms sent after the contract was formed constitute material alterations and are excluded from the contract. *Rottinghaus*, at 106. Importantly, the court noted that it didn’t make a difference whether the disclaimers and exclusions were on written confirmations, invoices (as in *Hartwig Farms*) or on labels attached to containers (as in *Dobias v. Western Farmers Ass’n*, 6 Wn. App. 194, 491 P.2d 1346 (1971)). The key issue is whether the parties contracted for the limitations. *Rottinghaus*, at 106.

Therefore, pursuant to RCW 62A.2-207(2), the Court should rule that the warranty disclaimers and remedy exclusionary provisions on the back of Rudd’s invoices are considered material alterations and must be excluded from the contract.

TFC did not find any Washington UCC cases that addressed the issue of whether the venue provisions on the back of Rudd’s invoices would also be considered a material alteration. However, courts in other jurisdictions have so ruled and TFC believes that the Court should adopt those court rulings that have found unbargained for venue or forum

selection provisions to be a material alteration of an agreement. *See, Nat'l Machinery Exchange, Inc. v. Peninsular Equipment Corp.*, 431 N.Y.S.2d 948, 948-49 (1980) (provision on the back of an invoice sent after the parties had reached an oral agreement requiring jurisdiction for any disputes to be in New York was a material alteration of the parties' agreement and would not be enforceable under UCC 2-207); *Lorbrook Corp. v. G & T Industries, Inc.*, 562 N.Y.S.2d 978, 980 (1990) (choice of forum clause on the back side of a purchase order would have been a material alteration of the parties' agreement under UCC 2-207); *TRWL Financial Establishment v. Select Int'l, Inc.*, 527 N.W.2d 573, 578 (Minn. 1995) (forum selection clause included on a confirmatory memorandum was a material alteration of the parties' agreement and that it was to be excluded from the contract pursuant to UCC 2-207); *Dassault Falcon Jet Corp. v. Oberflex, Inc.*, 909 F. Supp 345, 352 (D. N.C. 1995) (choice of law provision on an invoice and purchase order sent after an oral contract was a material alteration and did not become a part of the parties' agreement).

Given the undisputed fact that there was never any discussions, negotiations, or agreement between TFC and Rudd relating to any of the terms on the back of the invoice, the Court should rule that the venue

provision on the back of Rudd's invoices would be a material alteration of the agreement. Therefore, pursuant to RCW 62A.2-207(2) such terms are not a part of the agreement between TFC and Rudd.

Rudd places heavy emphasis on the fact that Rudd provided 775 invoices to TFC over a three year period. However, the analysis undertaken under RCW 62A.2-207 is the same regardless of whether 1 invoice was mailed or 775 invoices were mailed. In each and every instance, the material terms on the back of Rudd's invoices would automatically be excluded from the contract by operation of law (RCW 62A.2-207(2)). In fact, in *Hartwig Farms* the seed company made a similar argument that because the seed broker had accepted invoices for 15 years that a course of dealing had been established. The court rejected this argument and stated:

The code does not imply disclaimers; in fact, disclaimers are not favored in the law. Thus, RCW 62A.2-207 should not be used to supply the negotiated agreement required for an effective disclaimer. Merely because [the seed broker] had notice of the disclaimer's language does not mean it agreed to it.

Hartwig Farms, at 544. In addition, the court stated that:

There was nothing in the dealings between [the seed company] and [the seed broker] from which an assent to the disclaimer

could be inferred, and no course of dealing to which to refer to establish one.

Id., at 547 (emphasis added). Therefore, the fact that Rudd mailed 775 invoices to TFC over a 3 year period is irrelevant to the analysis.

4. Additional UCC Arguments for Upholding the Trial Court's Rulings.

a. Rudd's Invoices Cannot Disclaim Its Express Warranties.

Rudd's attempt to rely on its invoices to disclaim the express warranties it gave to TFC are ineffective pursuant to RCW 62A.2-316. *See also, Western Recreational Vehicles*, 23 F.3d at 1554, fn. 7 (citing *Travis v. Washington Horse Breeders Ass'n*, 111 Wn.2d 396, 759 P.2d 418, 422 (1988)).

In this case, the undisputed evidence is that Rudd made certain express warranties to TFC. CP 293-94. Therefore, as a matter of law, the Court can and should conclude that the disclaimer of warranties on the back of Rudd's invoices are ineffective to disclaim the express warranties made by Rudd.

b. Rudd's Remedy Exclusions are Unenforceable Because They Fail Their Essential Purpose.

If required, the Court has another basis upon which it may invalidate Rudd's remedy exclusionary provisions that applies to the facts of this case. In *Cox v. Lewiston Grain Growers*, 86 Wn. App. 357, 936 P.2d 1191 (1997), the court stated that even if the exclusionary clause at issue was conscionable, it would be unenforceable if it "fails its essential purpose." *Cox*, at 370. The facts in *Cox* are similar to the facts before this Court in that the defects in the winter wheat seeds were latent defects that could not be discovered until the seeds were planted and it did not produce an adequate crop as warranted. The court in *Cox* stated: "A limitation of remedies fails its essential purpose when the defect is latent and non-discoverable upon reasonable inspection." *Id.*; *See also*, RCW 62A.2-719(2) which provides as follows: "Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in [Title 62A RCW]."

Rudd argues that the ruling in *Cox* is in conflict with the court's ruling in *Mortenson* which in turn relied on the analysis set forth in *Tacoma Boatbuilding Co. v. Delta Fishing Company*, 28 U.C.C. Rep. Serv.2d 26 (W.D. Wash. 1980). TFC does not believe there is a conflict between these cases. In *Cox*, the disclaimer of warranties and limitation of remedies provision were contained in a post-contractual "delivery

ticket” shipped with the goods. Importantly, the terms on the delivery ticket were never discussed or agreed to and were not a part of the parties’ agreement. *Cox*, at 362. In contrast, *Mortenson and Tacoma Boatbuilders* involved disclaimers which the court determined were actually a part of the parties’ agreement. In fact, in *Tacoma Boatbuilders*, the disclaimer provision actually was contained in the agreement agreed to by the parties. In the latter cases, the court was simply acknowledging that the parties are free to allocate unknown risks. The key distinction in these cases is that in *Cox*, the disclaimer was unbargained for. Therefore, TFC believes that *Cox* is applicable to this case.

B. Rudd’s Warranty Disclaimers and Remedy Exclusionary Provisions Are Unconscionable and Unenforceable Under the “Berg” Rule

For the reasons set forth above, TFC believes that the Court never has to reach the point where it has to perform an analysis of whether the warranty disclaimer and remedy exclusionary clauses are unconscionable. However, if the Court does in fact perform such an analysis, TFC believes that the Court would conclude that these provisions are also unconscionable and unenforceable as a matter of law.

Rudd relies on *Puget Sound Financial* which provides a description of the development of the unconscionability analysis. However, it is important to note, again, that *Puget Sound Financial* is not a “sale of goods” case. The court specifically stated it was applying a UCC type analysis by analogy in order to answer an issue that had not previously been raised in the context of a service contract. *See, Puget Sound Financial*, at 440, fn. 14. *Puget Sound Financial* does not alter the prior unconscionability analysis used in sale of goods cases.

Importantly, the court in *Puget Sound Financial* actually acknowledged that the legal analysis undertaken by the court in *American Nursery Products, Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 797 P.2d 477 (1990) applied to “consumer transactions involving warranty disclaimers and in commercial transactions for the sale of goods where there is sufficient evidence of unfair surprise.” *Puget Sound Financial*, at 439 (emphasis added).

As a starting point, the Court should take notice that the facts of *American Nursery* are significantly different than the facts in our case. In *American Nursery*, the parties (1) “entered negotiations”, (2) “drafted proposed contracts”, (3) revised the proposed contract terms, and (4) actually entered into a 6-page contract which contained, among other

terms, clauses disclaiming certain warranties and excluding the recovery of incidental or consequential damages. *American Nursery*, at 219-20. In stark contrast, in our case there were no negotiations, drafting of contracts, reviewing and revising proposed contracts, or any written contract at all. With this clear distinction in mind, TFC will now proceed with a discussion of the applicable unconscionability analysis.

While the court in *American Nursery* stated that: “Exclusionary clauses in purely commercial transactions, such as the one at hand, are prima facie conscionable”, it is important to understand the context in which this statement is made. *American Nursery*, at 222. In *American Nursery* the contract signed by the parties actually contained the exclusionary provision. No written contract exists in our case and no negotiations, discussions or agreements were reached on any of the terms on the back of Rudd’s invoices.

The court in *American Nursery* discusses the “*Berg* rule” which provides that in order to uphold an exclusionary clause in the consumer sales context, “the clause must be ‘explicitly negotiated between buyer and seller’, and the remedies being excluded must be ‘set forth with particularity.’” *Id.*, at 223 (citing *Berg v. Stromme*, 79 Wn.2d 184, 196, 484 P.2d 380 (1971)). Notably, the court in *American Nursery*

acknowledges that the “Berg rule” has been extended to certain commercial transactions to prevent “unfair surprise to the detriment of one of the parties.” *Id.* (citing *Schroeder v. Fageol Motors, Inc.*, 86 Wn.2d 256, 262, 544 P.2d 20 (1975)). The court in *American Nursery* goes on to announce that: “. . . only those commercial transactions with sufficient indicia of unfair surprise in the negotiations should be subject to the Berg rule.” *Id.* at 224. Further clarifying its ruling, the court states that: “Consistent with this position, we have refused to apply the *Berg* requirements to negotiations between competent persons dealing at arm’s length, with no claim of an adhesion contract, when the contract contains a specific disclaimer and when the contract language is clear.” *Id.*, at 224. Because the court believed that the facts in *American Nursery* did not have sufficient indicia of unfair surprise, the court concluded that the “stricter *Berg* rule [was] not warranted.” *Id.*

While the facts of *American Nursery* may not have had sufficient “indicia of unfair surprise,” the case before this Court certainly does. It is undisputed that the parties never discussed, negotiated or agreed to the terms on the back of the invoice. In addition, the contracts between the parties were formed at the time Rudd shipped the products to TFC. Further, the invoices were not mailed until many days after the products

had been delivered. These undisputed facts are exactly the type of facts which demonstrate an “indicia of unfair surprise.” As such, the stricter “*Berg* rule” clearly applies to our case.

Under the “*Berg* rule”, in order to survive an unconscionability argument, (1) the clause must be “explicitly negotiated between buyer and seller” and (2) the remedies being excluded must be ‘set forth with particularity.” *Berg*, 79 Wn.2d at 196 (emphasis added); *see also Cox v. Lewiston Grain Growers*, 86 Wn. App. at 368-69; *Rottinghaus v. Howell*, 35 Wn. App. at 103-04, 107. Since it is undisputed that the parties did not “explicitly negotiate” the warranty disclaimer and remedy exclusionary provisions, the Court should rule as a matter of law that these provisions are unconscionable and unenforceable.

Because the stricter “*Berg* rule” clearly applies to this case due to the undisputed lack of negotiation and unfair surprise present in this case, the Court does not need to engage in further analysis under the substantive unconscionability and procedural unconscionability tests typically applied in commercial cases that don’t qualify for the “*Berg* rule”.

C. The Trial Court Erred when it made a Finding that Rudd had not Waived its Affirmative Defense of Improper Venue.

TFC does not believe that the Court will ever reach the issue raised in TFC's cross appeal because TFC's appeal will be rendered moot if the Court affirms the trial court's rulings. However, if the Court reverses the trial court's orders, then TFC believes that this Court should rule as a matter of law that Rudd, by its actions and conduct which were inconsistent with its claims of improper venue, waived that defense and the case should proceed in Pierce County Superior Court.

In connection with Rudd's Motion to Dismiss for Improper Venue, the trial court made a specific finding that Rudd had not waived its affirmative defense of improper venue.³ This finding was included in the Court's order. CP 496. Although this finding played no part in the trial court's decision to deny Rudd's Motions, in the remote chance that the trial court's orders denying Rudd's Motions are reversed, this finding could have a significant impact on TFC due to a statute of limitations issue. For example, if on appeal this Court determines that the venue provision on the back of the invoices is a part of the parties' agreement, on remand the trial court could conceivably dismiss this case for

³ The trial court made the following statement in support of its finding at the Motions hearing: "It is clear to me that Rudd has not waived the venue defense in this matter because of the discovery that they have undertaken." RP. ln 9-11. Actually, TFC's waiver argument was based on Rudd's actions and conduct that were unrelated to discovery issues.

improper venue (as opposed to transferring venue to King County). In light of the UCC's four year statute of limitation found in RCW 62A.2-725(1) and the time required to process this appeal, a significant portion of TFC's claims could be barred by the statute of limitations. Therefore, once Rudd filed its Motion for Discretionary Review, TFC felt it was necessary to file its own Notice for Discretionary Review seeking an appeal of this limited issue in order to protect its interests.

TFC believes that the trial court should have found that Rudd waived its right to rely upon its affirmative defense of improper venue through its actions and conduct, which are unrelated to engaging in discovery efforts.

Before proceeding with its argument, TFC wants to put the issue of venue in the proper context. Since the terms on the invoices were not a part of the parties' agreement, TFC had every right to commence its action against Rudd in Pierce County. Rudd, a Washington corporation, was admittedly doing business in Pierce County since it supplied TFC with paint and coating products. As such, pursuant to RCW 4.12.020(3) and RCW 4.12.025(3), venue is proper in Pierce County and TFC had the undeniable right to elect which county it wanted to file its lawsuit in. While venue may also be appropriate in King County since Rudd also

does business there, there is nothing improper about TFC proceeding with this action in Pierce County.

In a relatively recent case, the Washington Supreme Court has specifically applied the waiver doctrine to exclude a similar CR 12(b) affirmative defense. In *King v. Snohomish County*, 146 Wn.2d 420, 47 P.3d 563 (2002), the Court ruled that a party can by its actions and conduct waive an affirmative defense asserted under Civil Rule 12(b). The Court in *King* specifically found that “a defendant may waive an affirmative defense if either (1) assertion of the defense is inconsistent with defendant’s prior behavior, or (2) the defendant has been dilatory in asserting the defense.” *King*, at 424 (emphasis added). In this context, the Court stated that “the doctrine of waiver is sensible and consistent with the policy and spirit behind our modern day procedural rules, which exist to foster and promote ‘the just, speedy, and inexpensive determination of every action.’” *King*, at 424 (quoting, *Lybbert v. Grant County*, 141 Wn.2d 29, 39, 1 P.3d 1124 (2000) and CR 1). The Court in *King* also stated that the doctrine of waiver is “designed to prevent a defendant from ambushing a plaintiff during litigation either through delay in asserting a defense or misdirecting the plaintiff away from a defense for tactical advantage.” *Id.* (citing, *Lybbert*, at 40). In addition,

the Court in *King* stated that for sound policy reasons an answer should not preserve an asserted defense in perpetuity. The Court stated that: “Allowing a defendant to preserve any and all defenses by merely citing an exhaustive list does not foster the just, speedy, and inexpensive resolution of an action that we called for in *Lybbert*.” *Id.*, 426.

Further guidance on the issue of waiver can be found in *Raymond v. Fleming*, 24 Wn. App. 112, 600 P.2d 614 (1979). In *Raymond*, the court stated that: “A defendant’s conduct through his counsel, however, may be ‘sufficiently dilatory or inconsistent with the later assertion of one of these defenses to justify declaring a waiver.’” *Id.*, at 115 (*quoting* 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1344, at 526 (1969)).

TFC acknowledges that Rudd asserted the improper venue defense in its Answer. Therefore, TFC is not taking the position that Rudd was “dilatory in asserting the defense.” Rather, TFC asserts that Rudd’s Motion to Dismiss for Improper Venue was entirely inconsistent with Rudd’s prior actions and conduct taken after asserting the venue defense and that Rudd’s actions and conduct provides evidence of a clear intent to proceed with litigation in Pierce County.

Although *King* involved an issue relating to a claim filing requirement, the Court's ruling is instructive. In *King*, a young boy was injured in a county park. His parents filed a complaint in the county superior court within three years after the accident. *King*, at 422-423. One month after the complaint was filed the county answered and raised 11 affirmative defenses, including claim filing. *Id.* What followed were 45 months of litigation and discovery, with each party moving for summary judgment. *Id.* Applying the common law doctrine of waiver, the Court in *King* found that the county had not been dilatory in asserting the defense since it had been included in the county's answer. *Id.* at 424. However, the Court also found that the county's motion for summary judgment, which did not include the notice claim defense, was inconsistent with the later motion for dismissal. *Id.* at 425. Importantly, the Court stated that:

[A]lthough the County was not required to consolidate all of its defenses into its summary judgment motion, it did argue for summary judgment on grounds unrelated to claim filing without ever mentioning claim filing. After listing its original defenses in the answer, the County did not raise claim filing again or seek dismissal on that basis until three days before trial, nearly four years after the Kings' complaint was filed.

This behavior is inconsistent with the County's claim filing defense.

Id.

Likewise, in *Butler v. Joy*, 116 Wn. App. 291, 65 P.3d 671 (2003), a patient filed a lawsuit against a doctor for damages due to negligent medical care. In that case, however, the summons was never properly served. *Id.*, at 292. The defendant, moved for summary judgment dismissal within a month of the filing of the complaint. *Id.* at 292-93. In the motion, the defendant contended that the plaintiff's complaint presented no issue of fact as to negligence, liability, or causation, but it did not mention the defect in service of process. *Id.* at 292-94. Several months later, after the first summary judgment was voluntarily dismissed, the defendant again moved for summary judgment, this time based on insufficient service of process and expiration of the statute of limitations. *Id.* at 293. Consistent with the holding in *King*, the court in *Butler* held that the defendant was not dilatory in raising the defense because the defense was raised in the defendant's answer. *Id.* at 298. On the other hand, the defendant filed a summary judgment motion within the 90-day tolling period, agreed to strike the motion only after the tolling period had run, and engaged in discovery before finally asserting the defense when it was too late,

because of the statute of limitations, for the plaintiff to properly serve the defendant. *Id.* In addition, the discovery was not directed toward determining whether additional facts supported the defense of insufficient service. *Id.* Thus, the court held the defendant waived the defense.

Under the legal analysis employed by the courts in *King* and *Butler*, the fact that Rudd filed its Motion for Summary Judgment seeking affirmative relief from the Court without mentioning improper venue defense may be sufficient by itself to support a finding that Rudd waived its improper venue defense. Rudd filed its Motion for Summary Judgment on April 21, 2006. On May 5, 2006, Rudd then filed its Motion to Dismiss for Improper Venue. While the motions were both noted for the same date, it cannot be questioned that Rudd filed its Motion for Summary Judgment 2 weeks before it got around to filing its Motion to Dismiss. Rudd cannot seek affirmative relief from the Court in its Motion for Summary Judgment and then two weeks later be heard to complain to the Court that venue is improper. However, TFC does not merely rely upon Rudd's filing of a Motion for Summary Judgment to support its waiver argument.

As described in the Statement of Relevant Procedural Facts Relating to TFC's Cross Appeal above, Rudd engaged in the following

actions and conduct all of which are inconsistent with its belated assertion that venue in Pierce County was improper.

1. In the first three months of this case, Rudd initially threatened TFC with a motion to change venue if TFC did not consent to a voluntary transfer of the case to King County, and then abandoned its demands and began to fully prosecute its case in Pierce County.

2. Rudd filed a Jury Demand.

3. Pursuant to the Pierce County Local Rules, TFC and Rudd discussed and agreed upon the date of a settlement conference before Judge Steiner which settlement conference was the subject of the Court's Notice confirming the parties' settlement conference before Judge Steiner on October 13, 2005.

4. On September 22, 2005, Rudd filed a Motion for Continuance of Trial arguing that the case should have been assigned to the complex track and not the standard track. The court granted Rudd's motion and then issued new case schedule reflecting a new trial date of August 1, 2006.

5. After the new case schedule was issued by the court, TFC and Rudd discussed and agreed upon a new date for the settlement conference before Judge Steiner. The court then issued a second Notice

to TFC and Rudd confirming the parties' settlement conference before Judge Steiner on May 23, 2006.

6. In late April of 2006, counsel for TFC and Rudd engaged in discussions and negotiations relating to Rudd's request for a change in the case schedule. Ultimately, the parties were able to discuss and agree upon certain limited changes to the case schedule which was documented in a Stipulation and Order Amending Case Schedule that was drafted by Rudd's counsel.

7. At the time that TFC and Rudd were negotiating the terms of the Stipulation and Order Amending Case Schedule, Rudd had already filed its Motion for Summary Judgment. At no time during the discussions about amending the case schedule did Rudd's counsel give any indication that Rudd would be filing a motion to dismiss for improper venue. In fact, the discussions that took place were that the parties would proceed with the settlement conference before Judge Steiner on May 23, 2006, and that there would be no change in the August 1, 2006 trial date, both of which were very important factors in TFC's decision to agree to an amended case schedule.

Rudd's actions and conduct are sufficient to support a ruling that Rudd waived its affirmative defense of improper venue. Therefore, if

this Court determines that the venue provisions are a part of the parties' agreement, then the Court should rule as a matter of law that Rudd has waived its affirmative defense of improper venue which would allow this case to proceed in Pierce County Superior Court. Alternatively, the Court could require the trial court to transfer venue to King County in order to avoid the harsh result a dismissal could have on TFC due to the UCC statute of limitations.

V. CONCLUSION

TFC believes that a proper UCC analysis under the facts of this case will lead this Court to conclude that none of the terms on the back of Rudd's invoices are a part of the agreement between TFC and Rudd because (1) Rudd attempted to impose the terms unilaterally on TFC by sending invoices after the contracts were fully performed and (2) the terms were never discussed, negotiated or agreed to. Alternatively, even under a 2-207 analysis, the warranty disclaimers, remedy exclusionary clauses and venue provisions would constitute material alterations of the parties' oral agreement and such provisions would be excluded from the parties' agreement. The Court should affirm the trial court's orders and send a clear message that *Hartwig Farms* is still good law and that Washington is not re-adopting the "last shot" rule which would be

contrary to Washington's UCC statutes and existing case law.

RESPECTFULLY SUBMITTED this 21st day of February,
2007.

INSLEE, BEST, DOEZIE & RYDER, P.S.

By Eric C. Frimodt
Eric C. Frimodt
W.S.B.A. #21938
Attorneys for Respondent/Cross Appellant
Tacoma Fixture Company

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of February, 2007, I caused to be served true and correct copies of the foregoing Response to Appellate Brief of Rudd Company, Inc. and Brief of Cross Appellant Tacoma Fixture Company on the court and counsel as follows:

Clerk of the Court
Court of Appeals, Division II
950 Broadway, #300 MS TB-06
Tacoma, Washington 98402
[Via Messenger]

Counsel for Defendant/Petitioner Rudd Company, Inc.

Richard L. Martens
Mark W. Conforti
Martens + Associates | P.S.
705 Union Station
705 Fifth Avenue South, Suite 140
Seattle, Washington 98104-4436
[Via Messenger]

FILED
07 FEB 22 PM 1:43
STATE OF WASHINGTON
DEPUTY

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

DATED THIS 22nd day of February, 2007.

Kathleen Moakley
Kathleen Moakley