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DIVISION II

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STATE OF WASHINGTON  
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DEPUTY

NO. 37124-3-II

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COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON

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KENNETH W. WEGELEBEN

Appellant,

v.

DAVE BARCELON'S TRUCK TOWN, LTD.;  
CONTRACTOR'S BONDING AND INSURANCE COMPANY;  
and KITSAP BANK,

Respondents/Appellees.

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APPELLANT'S REPLY BRIEF

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*RM/R/1/8 11/17*

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I. RESPONSE TO DEFENDANTS' ARGUMENTS:

A. THE ENTIRE PREMISE FOR THE DEFENDANTS' POSITION IS FATALLY FLAWED BECAUSE THE PLAINTIFF WAS AND IS FIRST AND FOREMOST NOT TRYING TO RESCIND, TERMINATE, OR INVALIDATE A PROPERLY FORMED CONTRACT; RATHER, PLAINTIFF IS POINTING OUT THE SIMPLE AND UNDISPUTED FACT THAT A BINDING CONTRACT NEVER FORMED AT ALL.

As Division III just pointed out in the August 5<sup>th</sup>, 2008 Advance Sheets: First and foremost to the validity of any arbitration provision within a contract is the actual formation of a valid contractual relationship. Olson v. Bon, Inc., 144 Wash. App. 627, 633, (2008) ("The duty to arbitrate arises from a contractual relationship. Mutual assent of the parties is an essential element of a valid contract") (citing to Yakima County (West Valley) Fire Prot. Dist. No. 12 v. City of Yakima, 122 Wn.2d 371, 388, 858 P.2d 245 (1993)).

As previously stated in the Appellant Wegeleben's opening brief and now confirmed by the Defendants' Response, the Defendants cannot refute the fact that a binding contract never formed at

all. This is due to the dealer's complete failure to timely provide unconditional acceptance in compliance with RCW 46.70.180(4) and before the customer revoked his purchase offer anyhow. As such, it is meaningless that an arbitration clause was contained within that contract which contract never formed.

The same goes for when the time for providing acceptance or the deadline for exercising an option expires. Otis Housing Association v. Ha, 140 Wash. App. 470, 475 (2007) (where the party seeking to enforce a contractual arbitration clause in a real estate lease option to purchase agreement had **FAILED TO TIMELY EXERCISE THE OPTION** to purchase before the deadline to make the purchase LAPSED, both the option to purchase AND THE ARBITRATION CLAUSE therein, "no longer had any force or effect; thus, it [the arbitration clause] was void.").

As such, the arbitration clause in the

Wegeleben purchase order is patently unenforceable due to the dealer's failure to create any binding agreement in the first place. That is before we even get to the numerous secondary challenges also raised by Plaintiff Wegeleben to the validity of the clause itself, even assuming a binding contract had ever formed.

In this case at bar, the defendant dealer simply failed to exercise its right and obligation to unconditionally accept the Plaintiff Wegeleben's vehicle purchase offer:

(A) prior to the passing of RCW 46.70.180(4)'s 4-day statutory deadline for unconditional acceptance of a VEHICLE purchase offer; and also

(B) prior to plaintiff's revocation of the offer to purchase.

The two circumstances above were both established in the uncontested facts at CP-81-87 making the lack of any formation of any contract

dispositive. The trial court should have found, as a matter of law, that no contract had ever formed in the first place and consequently, the private arbitration clause therein was therefore also void and unenforceable as a matter of law.

Once the time for acceptance had passed, the Defendant had nothing to accept. An offer, unless sooner withdrawn, only stands during the time it was limited to, or if there is no express time limitation is placed on the offer by the offeror, then it stands open for a reasonable period of time, and until the end of that time the offer is regarded as being constantly repeated; but after the expiration of such reasonable time **there is no offer and nothing to withdraw and nothing which the offeree can do to revive the offer or to produce an extension of time for acceptance.** Wax v. Northwest Seed Co., 189 Wash. 212, 64 P.2d 513 (1937).

The gap-filling "reasonable period of time for

acceptance" provisions of the UCC which can sometimes apply to the sale of miscellaneous goods in general, and pursuant to RCW 62A.2-206, simply don't apply to an AUTOMOBILE purchaser offer in particular. For this particular type of sale of goods, there is a mandatory four-day unconditional acceptance deadline set by our legislature under the RCW 46.70.180(4). It is called the anti-bushing law and there is no federal law like it.

The defense argument that a defendant car dealer could illegally force an automobile purchase contract on a customer after the passing of this deadline and get the court to bless it amounted to rewarding a per se CRIMINAL MISDEMEANOR ACT as well as the formation of an illegal contract at the same time - all in violation of RCW 46.70.170. The dealer is not to be rewarded with an enforceable contract and a means of blocking a public trial and affordable and equal access to justice for its refusal and failure to comply with RCW 46.70.

Also, the defendants cannot argue that a reasonable period of time for accepting the Plaintiff's purchase offer exists AFTER Plaintiff Wegeleben completely withdrew his offer anyhow (CP-83). Thus, there is no binding contract that formed between these parties and the defendants had absolutely no right to demand arbitration whatsoever. Nor did the trial court have any basis for ordering arbitration either.

B. RCW 7.04A.060 AND .070(1) PROPERLY MAKE IT THE COURT'S JUDICIAL FUNCTION TO DETERMINE WHETHER A VALID BINDING CONTRACT HAD EVER FORMED AT ALL AND, IF SO, THEN THE COURT ALSO HAD AND HAS THE AUTHORITY AND OBLIGATION TO DECIDE WHETHER THE ARBITRATION CLAUSE THEREIN WAS OR IS ENFORCEABLE.

RCW 7.04A.060 actually required the trial court to determine whether a binding agreement to arbitrate ever formed in the first place. " If the court finds there is no **ENFORCEABLE** agreement to arbitrate, **IT MAY NOT ORDER THE PARTIES TO ARBITRATE.**" RCW 7.04A.070 (emphasis added). Unenforceability includes not just the primary and

fatal problem of the lack of formation of any binding agreement needed to give effect to the arbitration clause therein, but also all the secondary procedural or substantive conscionability problems which can invalidate the arbitration clause even where the contract actually formed.

Our state law under RCW 7.04A.060 clearly allows full judicial scrutiny under State (not Federal law) and the Defendants cannot claim otherwise since their proposed contract papers expressly invoked STATE law (at CP-15, paragraph 10; CP-46, line 2) rather than federal law.

Moreover, the defendants' own motion to compel arbitration expressly requested that the trial court make a ruling in this regard, under the State statute. CP-36-42. It is also beyond argument that under the civil rules of procedure, the Defendants' motion to compel arbitration under RCW 7.04A constituted a CR 12 motion challenging

jurisdiction of the court to try the case any way the motion is viewed. Upon the filing of Wegeleben's declaration in opposition, the CR 12 motion was converted into a CR 56 motion, pursuant to CR 12(c), entitling Wegeleben to all of the most favorable inference on the evidence which evidence was already undisputed. Once the court examined the facts to first determine if a contract had actually formed, the Court still had a second duty and full authority to determine the validity and enforceability of the arbitration clause therein based on the Plaintiff's challenges thereto. Both the Federal Arbitration Act and RCW 7.04A expressly provide that where a contract providing for arbitration is: (1) found to exist; it may nevertheless: (2) still be challenged "upon such grounds as exist at law or in equity for the revocation of any contract." RCW 7.04A.060(1); 9 U.S.C. Section 2.

For examination of this second issue, the

Plaintiff submitted his un-rebutted challenge to the enforceability of that arbitration clause itself (at CP-81-87). This was with regard to conscionability and public policy, and only after he first tried to show the contract hadn't formed.

Until ALL challenges to a demand to compel private arbitration of the Plaintiff's underlying claims are resolved, "the threshold question of arbitrability is for the court." Defendants' Response Brief, page 17 (citing to Meat Cutter Local #494 Affiliated with Amalgamated Meat Cutter and Butcher Workmen of North America v. Rosauer's Super Markets, Inc., 29 Wash. App. 150, 154, 627 P.2d 1330, review denied 96 Wn.2d 1002 (1981)).

If the arbitration clause in a contract is itself procedurally or substantively unconscionable or against public policy, it is unenforceable. Such issues are all ample grounds for the revocation of any contract and therefore any

arbitration clause. Mendez v. Palm Harbor Homes, Inc., 111 Wash. App. 446, 46 P.3d 807 (2002). The unconscionability of the defendant's one-sided adhesion clause, formed in the context of a per se bushing violation of RCW 46.70.180(4), and assuming any contractual formation ever gave such arbitration clause any life, is set forth below.

The Defendant's citation to Buckeye Check Cashing, Inc. v. John Cardegna et al., 540 U.S. 440, 126 S. Ct. 1204, 163 L.Ed.2d 1038 (2006) for the proposition that the trial court and or this appellate court cannot decide all issues affecting arbitrability is incorrect and totally misplaced. Buckeye, is actually not even on point for the case at bar. Buckeye merely held that challenges to the validity of an existing contract as a whole (i.e. - any after the fact attempts to negate a contract which formed but might be invalid), WHERE THERE IS NO CHALLENGE SPECIFICALLY TO THE ARBITRATION CLAUSE ITSELF, must go to the arbitrator.

However, plaintiff Wegeleben isn't trying to invalidate any existing contract. This is because there is no valid contract that ever formed in the first place. The defense fails to consider that Plaintiff's primary challenge goes to formation of the contract as a whole, not to invalidation of the contract itself after formation. Moreover, Plaintiff Wegeleben has not just pointed out the absence of any contract formation, but he has also properly made a direct attack upon the validity of the arbitration clause itself. This makes Buckeye inapplicable on both counts.

Additionally, defendants' citations and arguments about Federal Supremacy all falsely assume and are entirely contingent on whether Congress ever tried to occupy the field of "BUSHING" or ever determined that "bushing" substantially affected interstate commerce or had a substantial affect on vehicles themselves as a component of interstate commerce. That has NEVER

occurred, which distinguishes Washington State from the Feds in creating its own laws and means of dealing with bushing via RCW 46.70.180(4). Even if were otherwise, FAA arbitration is still entirely subject to the exact same Plaintiff's challenges now at bar both to (1) the lack of any contract formation as a whole and also with regard to (2) the validity of the arbitration clause itself.

C. EVEN IF THE FEDERAL ARBITRATION ACT APPLIED, DESPITE THE FACT THAT THE DEFENDANTS' PROPOSED CONTRACTUAL PAPERWORK EXPRESSLY INVOKED STATE, NOT FEDERAL LAW, THE F.A.A. JUST LIKE RCW 7.04A, STILL EXPRESSLY ALLOWS PLAINTIFF'S THRESHOLD CONTRACTUAL FORMATION AND VALIDITY CHALLENGES TO THE APPLICATION AND ENFORCEABILITY OF ANY ARBITRATION CLAUSE TO BE JUDICIALLY DETERMINED BY THE COURT.

THE TRIAL COURT'S FINDING OF ENFORCEABILITY IN SPITE OF PLAINTIFF'S UNCONSCIONABILITY AND PUBLIC POLICY CHALLENGES, WHICH EXPOSED THE SO-CALLED ARBITRATION CLAUSE AS A MERE ANTI-CONSUMER CIVIL DISABLING DISPUTE CLAUSE, WAS AN ERROR OF LAW.

The arbitration clause in this case was a deceptive, one-sided, contract of adhesion with a jury trial waiver buried in the boilerplate and

unsupported by any consideration for contractual validity whatsoever. The defendant dealer wants to have it both ways.

The dealer NEVER bound itself to complete any sale with the Plaintiff or to arbitrating any of its own claims, and never even gave final and unconditional acceptance of the customer's purchaser order to form a binding contract. Only now, after the time for the dealer's acceptance has passed and after the purchaser also has already revoked his offer and demanded his deposit money back, does the dealer suddenly want to try to both have a binding contract and also to demand private arbitration to enforce it as well.

Under the arbitration clause in the case at bar, only the customer has to arbitrate the customer's claims against the dealer but not the other way around. The dealer is expressly given the full advantage of ready access to the courts

for the only two types of claims it would ever have to bring against a breaching customer arising from the proposed transaction: (1) to either to collect money owed from the customer and or (2) to simply get the vehicle back from any non-paying customer, both of which are exempted by the clause.

Additionally, the arbitration clause did NOT clearly disclose that the Plaintiff customer was being switched from a free public trial to a pay for justice by the hour behind closed doors case. Moreover, the customer and the public are deceptively switched in ignorance from the tremendous benefits, deterrent effect and active enforcement incentive of one-way consumer-only fee-shifting to high-risk/claim-chilling reciprocal fee-shifting. All of these enormous financial concessions and advantages are being deceptively taken away from the customer and the public. This is not only without any knowing, voluntary and intelligent waiver, but without any consideration

or offsetting benefit at all.

In Zuver v. Airtouch Communications, Inc., 153 Wn.2d 293, 318 (2004), the Court made clear that arbitration clauses which are one-sided and harsh are substantively unconscionable. Therein, the arbitration remedies blatantly favored and exempted the employer while on the other hand solely blocked the employee from significant legal recourse. It is the same in the case at bar.

The blatant problems with the Defendants' proposed arbitration clause are magnified even more when compared to Discovery Card's arbitration clause at CP-88-92, which, unlike Truck Town's clause, mitigate every possible conscionability and public policy challenge that could be made. It clearly describes exactly what types of disputes it applies to. Then it goes on to do everything it could possibly do to be fair and equal in terms with language addressing all of the issues involved

that need to be considered so that any consumer freely choosing this dispute resolution option will certainly be held to knowingly, intelligently and voluntarily have waived the right to a jury trial. Discovery's clause states that it applies as follows to:

. . . any past, present or future claim or dispute (whether based on contract, tort, statute, common law, or equity) between you and us arising from or relating to your Account . . .

. . .

**IF EITHER YOU OR WE ELECT ARBITRATION NEITHER YOU NOR WE SHALL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR TO HAVE A JURY TRIAL ON THAT CLAIM.**

. . .

**Your Account involves interstate commerce and this provision shall be governed by the Federal Arbitration Act (FAA).**

. . .

**At your written request, we will advance any arbitration filing, administrative and hearing fees . . .**

. . .

**In no event will you be required to pay any fees or costs incurred by us in connection with an arbitration proceeding where such payment or reimbursement is prohibited by applicable law.**

. . .  
**You may reject the Arbitration of Dispute  
section by providing us a notice of  
rejection . . .**

RP-88-92 (Citing to Exhibit A to Declaration of Plaintiff's Counsel, (emphasis added)).

In other words, Discover Card's arbitration clause, unlike Truck Town's clause, clearly states:

1. Exactly what type of claim that it will apply to and what type of claim it wants its customer to know and understand they are waiving the right to a jury trial on - e.g. - it expressly applies to "statutory" claims whereas Truck Town's clause is silent as to RCW 46.70 and RCW 19.86;

2. That the Discover clause is not One-Sided, but is completely reciprocal and adequate consideration is present based on the mutual exchange of fair and equal promises;

3. That interstate commerce is undisputedly involved and therefore the Federal Arbitration Act applies, rather than merely the policies and laws of any state exercising of its police powersto favor public forums like in Wineland v. Marketex,

28 Wash. App.830, 627 P.2d 967 (1981).

4. That the customer will not be denied ACCESS TO JUSTICE by the hour just because they cannot afford it - i.e. - Discover will front the costs so that the claim can be heard;

5. That the customer will not have to fear paying Discover's fees as long as the customer brought a claim that doesn't allow Discover to recover defense fees [Such as RCW 19.86.090 and/or RCW 46.70.190 which provide for one-way fees shifting for consumers only in order to serve the acts policies of promoting and fostering fair and honest commerce in our state by way of encouraging of active private enforcement via the one-way fee shifting within an affordable forum for ready access to justice];

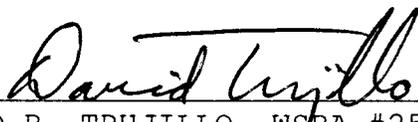
6. That the clause is not a contract of adhesion. If you want to reject the arbitration clause itself, you may freely do so, unlike Truck Town's one-sided, take it or leave it and you're stuck with it clause.

containing an arbitration clause like that of the Discover company sample) dies off for lack of proper and timely acceptance and any arbitration clause therein dies with it.

Second, the arbitration clause at issue was such a one-sided and deceptive, take it or leave it contract of adhesion and unsupported by any consideration that it was and is procedurally and substantively unconscionable and against public policy anyhow. This Court should reverse the trial court's order compelling arbitration whereupon Plaintiff will waste no time seeking summary judgment on the entire case.

Respectfully submitted this 18<sup>th</sup> day of August, 2008.

Attorney for Plaintiff Wegeleben:

  
\_\_\_\_\_  
DAVID B. TRUJILLO, WSBA #25580

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STATE OF WASHINGTON COURT OF APPEALS  
DIVISION II

KENNETH W. WEGELEBEN, a single  
person )

Plaintiff, )

vs. )

DAVE BARCELON'S TRUCK TOWN, )  
LTD.; CONTRACTOR'S BONDING AND )  
INSURANCE COMPANY; and KITSAP )  
BANK, )

Defendants. )

APPEAL NO. 37124-3-II  
CERTIFICATE OF SERVICE

CERTIFICATE

A. I, DAVID B. TRUJILLO, certify that on August 18, 2008, as set forth below, I sent by regular United States Mail, postage prepaid, a copy of: (1) the Appellant's Reply Brief,, and (2) Motion and Declaration for Substitution, and (3) a copy of this Certificate of Service to:

- 1. the attorney of record for the Defendant Dave Barcelon's Truck Town, Ltd. and the Defendant Contractor's Bonding and Insurance Company, Mr. Brian M. King, at Davies Pearson, P.C., 920 Fawcett, P.O. Box 1657, Tacoma, WA 98401; and to:

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