

NO. 37124-3 II

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

KENNETH W. WEGELEBEN,

Appellant

vs.

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

Respondents.

RESPONDENT'S OPENING BRIEF

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I. STATEMENT OF THE ISSUES

- 1. Under the Federal Arbitration Act, 9 U.S.C. §2, did the Trial Court Properly Decide to Grant Defendant Truck Town's Motion to Compel Arbitration When the Vehicle Order Agreement Contained an Arbitration Provision?**
- 2. Under Washington's Uniform Arbitration Act, 7.04A RCW, did the Trial Court Properly Decide to Grant Defendant Truck Town's Motion to Compel Arbitration When the Vehicle Order Agreement Contained an Arbitration Provision?**
- 3. Did the Trial Court Properly Decide on Defendant Truck Town's Motion to Compel Arbitration that the Enforceable Arbitration Clause Required Arbitration of Consumer Protection Claims?**
- 4. Did the Trial Court Properly Decide that the Arbitration Agreement Was Not Unconscionable or Void as Against Public Policy When the Plaintiff is Unable to Show Grounds for Revocation Because the Arbitration Agreement Was Clear, Conspicuous and Separately Executed?**

II. STATEMENT OF THE CASE

A. SUBSTANTIVE FACTS

On or about June 22, 2007, plaintiff Kenneth W. Wegeleben, purchased a 1981 Jeep from defendant Dave Barcelon's Truck Town, Ltd. ("Truck Town"). CP 43-46. Plaintiff and defendant signed a Vehicle Order agreement, whereby plaintiff agreed to pay a \$7,500.00 down payment towards the purchase price of the vehicle, leaving a balance of \$3,357.24, which plaintiff elected to finance with Kitsap Bank. CP 43-46.

Plaintiff signed the Vehicle Order agreement, and separately signed, acknowledged and agreed to a dispute resolution provision contained prominently on the front side of the Vehicle Order agreement, which states:

All disputes (any and all legal and equitable claims) between the Parties and/or their employees, agents, and assigns (herein after referred to as the Parties) shall be determined by binding arbitration in accordance with the laws of the State of Washington at a time and place determined by the arbitrator. If the Parties are not able to agree upon a single arbitrator within ten (10) days following demand therefore, then the arbitrator shall be appointed by a Court in the State of Washington that would have, but for Arbitration as provided herein, jurisdiction over the case matter. Each party shall pay one-half of the arbitrator's fees and costs, unless one Party is ruled the prevailing party by the arbitrator, in which case the arbitrator, subsequent to the arbitration itself, may award the prevailing Party the arbitrator's fees and costs and the prevailing Party's attorneys fees and costs. The Parties recognize, acknowledge and agree that the designated arbitrator will be an independent individual, not affiliated or related to either, who is a licensed lawyer or retired Judge applying the substantive law of the applicable jurisdiction, and that any dispute between the Parties will not be heard and decided by a Judge or jury, except as provided for herein. The Parties waive any right to a Class Action, provided however, that if this waiver is determined to be unenforceable, then this Dispute Resolution provision is inapplicable and the Class Action shall be heard before the appropriate Federal or State Court. Notwithstanding the above, in the interest of promoting prompt resolution, the following actions, and no other, may be commenced in the appropriate State, County, or Federal Court: (i) replevin actions through the granting and action on (or denial of) an order of replevin and then transferred to arbitration, (ii)

action for money due on an NSF check or promissory note (in the event of a counterclaim the entire matter shall be transferred to arbitration), and (iii) actions over which a bankruptcy court has exclusive jurisdiction, provided however, that if any or all of these exceptions are determined by a Court or Arbitrator, before which the matter is raised, as rendering unenforceable this Dispute Resolution provision, then these exclusions shall not apply and all such matters shall be arbitrated. **These Dispute Resolution provisions shall survive termination of this Agreement between Purchaser(s) and Dealer.**
CP 46 (emphasis added).

The Vehicle Order agreement also contains a Financing Condition provision which states:

IF A RETAIL INSTALLMENT CONTRACT OR NOTE AND SECURITY AGREEMENT IS SIGNED IN CONJUNCTION WITH THIS BUYER'S ORDER (COLLECTIVELY, THE "AGREEMENT"), THE AGREEMENT IS BINDING UPON EXECUTION, PROVIDED HOWEVER, THAT THE DEALER WILL HEREAFTER ASSESS THE BUYER'S CREDITWORTHINESS AND IF THE DEALER DOES NOT HEREAFTER APPROVE FINANCING ON ACCOUNT OF THE BUYER'S CREDITWORTHINESS AND SUBSEQUENTLY NOTIFIES BUYER OF SUCH DISAPPROVAL, THIS AGREEMENT IS VOID, AND ALL FUNDS AND ANY TRADE-IN SHALL BE RETURNED TO PURCHASER, SUBJECT, HOWEVER, TO ADJUSTMENT AS FOLLOWS: IF PURCHASER HAS TAKEN POSSESSION OF THE VEHICLE, PURCHASER SHALL IMMEDIATELY RETURN SAID VEHICLE TO DEALER AND PURCHASER SHALL BE LIABLE TO DEALER FOR ALL DAMAGE AND/OR DESTRUCTION TO, ABUSE OF, EXCESSIVE WEAR AND/OR EXCESSIVE MILEAGE ON SAID VEHICLE WHILE IN THE POSSESSION OF PURCHASER. AT THE OPTION OF THE DEALER, ANY SUMS DEPOSITED BY PURCHASER WITH DEALER MAY

BE APPLIED TO THE EXTENT NECESSARY TO COMPENSATE DEALER AND/OR TO PAY THE COST OF REPAIRS FOR ANY DAMAGE, DESTRUCTION, ABUSE, EXCESSIVE WEAR AND/OR EXCESSIVE MILEAGE ON SAID VEHICLE, AND ANY ATTORNEY FEES INCURRED BY DEALER AND OTHER RESOURCES AS MAY BE AUTHORIZED BY LAW.

CP 46 (emphasis added).

Plaintiff Wegeleben, in fact signed a retail installment contract as contemplated in the Vehicle Order agreement. CP 16–19.

B. PROCEDURAL FACTS

On September 11, 2007, plaintiff Wegeleben initiated a lawsuit in Kitsap Superior Court by filing and serving a Complaint alleging two different violations of law, both of which purportedly relate to the transaction in the Vehicle Order. CP 1–20. Plaintiff alleged violations of the Dealers and Manufacturer’s Licensing Act and the Consumer Protection Act. *Id.*

On November 6, 2007, Truck Town filed its motion to compel arbitration, supported by a Declaration of Truck Town’s counsel. CP 36–55. Plaintiff Wegeleben filed his memorandum of law in opposition to motion to compel arbitration on November 14, 2007. CP 56–92. Plaintiff’s declaration contained numerous hearsay statements or statements lacking foundation, and additional statements containing legal

conclusions, and Truck Town moved to strike these statements in its reply in support of its motion to compel arbitration. CP 121–132.

On November 30, 2007, the Honorable Leila Mills of the Kitsap County Superior Court granted Truck Town’s motion to compel arbitration, after full consideration of the factual and legal basis in support of and in opposition to Truck Town’s motion, review of the parties’ pleadings, and the oral argument from plaintiff Wegeleben’s counsel and Truck Town’s counsel. CP 110–112. The Honorable Leila Mills held that it is “clear on the face of the contract as to the dispute resolution process, should there be disputes in this case.” RP 26, ln. 14–19.

III. ARGUMENT

A. **THE TRIAL COURT PROPERLY GRANTED TRUCK TOWN’S MOTION TO COMPEL ARBITRATION PURSUANT TO THE FEDERAL ARBITRATION ACT BECAUSE THERE WAS AN ENFORCEABLE ARBITRATION AGREEMENT BETWEEN THE PARTIES.**

Questions of arbitrability are reviewed de novo. *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 453, 45 P.3d 594 (2002). The Appellant, Mr. Wegeleben, bears the burden of showing that his case is unsuitable for arbitration; as he is the party resisting arbitration. *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 453, 45 P.3d 594 (2002),

citing *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000).

Plaintiff Wegeleben's argues that a motion to compel arbitration is the equivalent to a CR 12 motion to dismiss or a CR 56 motion for summary judgment, and therefore he is entitled to a review of the facts and all reasonable inferences considered in the light most favorable to him (as the nonmoving party). However, Plaintiff Wegeleben cites no authority for his argument that a motion to compel arbitration equates to a CR 12 or CR 56 motion. Contentions unsupported by argument or citation of authority must not be considered on appeal. *Camer v. Seattle Post-Intelligencer*, 45 Wn.App. 29, 36, 723 P.2d 1195 (1986), *review denied*, 107 Wn.2d 1020, *cert. denied*, 482 U.S. 916, 107 S.Ct. 3189, 96 L.Ed.2d 677 (1987).

1. The Federal Arbitration Act Favors Arbitration Agreements and Controls in This Case Because the Vehicle Order Agreement Contained A Written Arbitration Agreement and the Transaction Involved Commerce.

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, was enacted "to reverse the longstanding judicial hostility to arbitration agreements...and to place arbitration agreements upon the same footing as other contracts." *Al-Safin v. Circuit City Stores, Inc.*, 394 F.3d 1254, 1257

(9th Cir. 2005). Section two of the FAA provides that written arbitration agreements “in any...contract evidencing a transaction involving commerce...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. Section two is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state or substantive or procedural policies to the contrary. *Scott v. Cingular Wireless*, 160 Wn.2d 843, 858, 161 P.3d 1000 (2007) (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.* 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)). Courts must indulge every presumption in favor of arbitration. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.* 460 U.S. 1, 25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983).

In the present case the FAA applies because the Vehicle Order agreement is a contract involving commerce which contains an agreement to arbitrate. Plaintiff Wegeleben entered into a transaction with Truck Town for the purchase of a 1981 Jeep. CP 43-46. The transaction involved a motor vehicle which is inherently mobile and able to cross state lines. Instrumentalities of interstate commerce, such as cars, trains, airplanes and railroads, retain the inherent potential to affect commerce. See *United State v. Bishop*, 66 F.3d 569, 588-90 (3d Cir. 1995). The Supreme Court has held that Congress’ 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. *Citizens Bank v. Alaabco, Inc.*, 539 U.S. 52, 56, 123 S.Ct. 2037, 156 L.Ed.2d 46 (2003). The business of purchasing and selling motor vehicles in the aggregate certainly impacts interstate commerce and is subject to numerous aspects of federal control. Therefore, the FAA applies to this transaction between Plaintiff Wegeleben and Truck Town because it involved a transaction involving commerce.

In addition, there is clear evidence that a valid arbitration agreement was present in the Vehicle Order agreement, and that both parties agreed to comply with the terms of the arbitration agreement to resolve any disputes that might arise between them. The language of the dispute resolution provision of the Vehicle Order agreement states in pertinent part that:

All disputes (any and all legal and equitable claims) between the Parties and/or their employees, agents, and assigns (herein after referred to as the Parties) shall be determined by binding arbitration in accordance with the laws of the State of Washington at a time and place determined by the arbitrator. CP 46.

The dispute resolution provision was contained in the Vehicle Order agreement in a prominent location, and was separately executed by

Plaintiff Wegeleben. The Vehicle Order agreement therefore contains an agreement to submit to arbitration, which is valid, irrevocable, and enforceable, pursuant to 9 U.S.C. § 2. Thus, the trial court properly determined that a valid agreement to arbitrate existed when granting Truck Town's motion to compel arbitration.

2. The Federal Arbitration Act Permits Courts to Determine Whether an Arbitration Agreement Exists and Does Not Permit the Court to Consider Challenges to the Validity of the Contract as a Whole.

There is a dispute between Plaintiff Wegeleben and Truck Town as to whether the courts or an arbitrator should determine the issues presented in this case. Truck Town advocates that the parties' agreement to arbitrate all disputes between them requires an arbitrator to determine these issues. Meanwhile, Plaintiff Wegeleben clouds the issue with arguments involves the validity of the Vehicle Order agreement itself and whether the agreement constitutes a conditional contract. Plaintiff Wegeleben argues that Truck Town violated Washington's bushing statute, RCW 46.70.180(4), and that a violation of the bushing statute would invalidate the Vehicle Order agreement and the dispute resolution provision requiring arbitration. *See* Appellant's Brief p. 34.

Setting aside for a moment the errors in Plaintiff's analysis, these are issues that are not properly before the Court and are extraneous to the determination of the sole issue of whether arbitration is required to determine the issues in this matter. Plaintiff Wegeleben requested the trial court, and now this Court, to interpret the Vehicle Order agreement as a whole. However, Plaintiff Wegeleben's argument is circular and impermissibly invites the Court to engage in a decision on the merits of the case as a basis for determining the threshold issue of whether the case is subject to resolution by arbitration.

The law is clear regarding decisions of arbitrability; the courts are only to determine whether the agreement to arbitrate is enforceable, and is not to consider the merits of the case including issues relating to the validity of the whole contract. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006). If there is an enforceable agreement to arbitrate, all other issues shall be determined by the arbitrator. *Id.*

In *Buckeye Check Cashing, Inc. v. Cardegna*, the United States Supreme Court decided whether a court or an arbitrator should consider a claim that a contract containing an arbitration provision is void under the FAA. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 442, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006)(plaintiffs challenged validity of a

check-cashing agreement which contained arbitration agreement on grounds that contract contained usurious interest rates in violation of state consumer protection laws). The *Buckeye* court recognized two types of challenges to the validity of arbitration agreements, the first challenges specifically the validity of the agreement to arbitrate, and the second challenges the contract as a whole (e.g., agreement was fraudulently induced, illegality of one contract provision renders entire contract invalid). *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006).

The *Buckeye* court held that (1) as a matter of substantive federal arbitration law, the arbitration clause in a contract is severable from the remainder of the agreement, regardless of state severability rules, (2) unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance, and (3) this arbitration law applies in state as well as federal courts. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006). Therefore, under the FAA, courts should only consider challenges to the validity of the arbitration clause itself. On the other hand, challenges to the validity of the contract as a whole should be determined by the arbitrator. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444–46, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006).

Therefore, a court need only review the provision of the Vehicle Order agreement concerning arbitration, and need not, and in fact, must not consider the agreement as a whole.

The relevant facts presented in this case are substantially similar to those in *Buckeye*, in that the plaintiff attempted to invalidate the entire contract containing the arbitration agreement. In addition, this case is similar to *Buckeye* because the agreement between the parties represents the entire relationship between the two parties. In *Buckeye*, the relationship between the check-cashing service and its customer was limited to a single check-cashing transaction. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 442, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006). Here, the relationship between Truck Town and Plaintiff Wegeleben is limited to a single transaction for the purchase of a motor vehicle.

Additionally, the arbitration agreement between the parties is broad and intended to cover all potential disputes between the parties. In *Buckeye*, the arbitration provision stated that “any claim, dispute or controversy...arising from or relating to this Agreement....or the validity, enforceability, or scope of this Arbitration Provision or the entire Agreement, shall be resolved...by binding arbitration.” *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 442, 126 S.Ct. 1204, 163

L.Ed.2d 1038 (2006). In the this case, the dispute resolution provision of the Vehicle Order agreement states “all disputes (any and all legal and equitable claims) between the Parties and/or their employees, agents, and assigns (herein after referred to as the Parties) shall be determined by binding arbitration.” CP 46. Here, the parties to the Vehicle Order agreement did not seek to limit the use of arbitration to issues only pertaining or arising from the agreement, but contemplated the use of arbitration for all potential disputes.

While this Court has applied the holding of the *Buckeye* court in other cases, with factually distinguishable circumstances, *see Nelson v. Westport Shipyard, Inc.*, 140 Wn. App. 102, 163 P.3d 807 (2007)(involving the interpretation of Shareholder Agreement with arbitration provision), the factual background of this case is similar to the facts of *Buckeye* and warrants the application of the *Buckeye* holding to these facts.

In this case, Plaintiff Wegeleben challenges the validity of the entire contract alleging that violations of RCW 46.70.180(4) invalidate the entire Vehicle Order agreement between the parties. *See* Appellant’s Brief p. 34. However, following the holding of *Buckeye*, those challenges should only be addressed in arbitration, and are not the proper subject of the court’s consideration. *Buckeye Check Cashing, Inc. v. Cardegna*,

546 U.S. 440, 445–46, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006). Thus, Plaintiff Wegeleben’s argument concerning the validity of the Vehicle Order agreement is not a proper subject for a court’s consideration on the issue of whether the case is subject to arbitration.

Therefore, the trial court properly reviewed the dispute resolution provision of the Vehicle Order agreement and determined that the parties agreed to resolve all disputes between them by binding arbitration. RP 26. The decision of the trial court should be affirmed for the above reasons.

3. The Vehicle Order Agreement is Not Automatically Invalidated if Truck Town Violated Washington’s Bushing Statute

As argued above, the validity of the contract as a whole is not a proper issue for this Court’s determination on the issue of arbitrability. Plaintiff Wegeleben misconstrues the purpose of Truck Town’s motion to compel arbitration. The motion did not, as Plaintiff argues, seek a decision on whether “a binding contract with Wegeleben [had] ever been timely formed in compliance with RCW 46.70.180(4).” See Appellant’s Brief p. 27, 38. Instead, Truck Town moved pursuant to RCW 7.04A.060 for the court to decide whether an agreement to arbitrate exists; and there is an agreement to arbitrate contained within the Vehicle Order agreement.

However, it should be noted that the statutory language of RCW 46.70.180(4) does not expressly state or imply that the contract between a consumer and a motor vehicle dealer is invalidated in the event a bushing violation occurs. In the event a bushing violation occurs, it becomes a matter to be dealt with by the Department of Licensing. Plaintiff Wegeleben cites no authority in support of his allegation that a violation of RCW 46.70.180(4) automatically invalidates a contract between the dealer and consumer. *See* Appellant's Brief p. 34.

In addition, even if the Court were to determine that the Vehicle Order agreement between the Parties was subsequently terminated by a violation of RCW 46.70.180(4), the express language of the dispute resolution provision states that "these Dispute Resolution provisions shall survive termination of this Agreement between Purchaser(s) and Dealer." CP 46. The parties therefore agreed to use arbitration for the resolution of all disputes even in the event the agreement was terminated.

THE TRIAL COURT PROPERLY GRANTED TRUCK TOWN'S MOTION TO COMPEL ARBITRATION PURSUANT TO WASHINGTON'S UNIFORM ARBITRATION ACT BECAUSE THERE WAS AN ENFORCEABLE ARBITRATION AGREEMENT BETWEEN THE PARTIES.

In the event, the Court determines that the Federal Arbitration Act does not apply to these facts, the Court should still affirm the trial court's

decision to compel arbitration pursuant to Washington law. Washington has a strong public policy favoring the arbitration of disputes, similar to that expressed by Congress in the FAA. *Mendez v. Palm Harbor Homes*, 111 Wn. App. 446, 454, 45 P.3d 594 (2002). The purpose of arbitration is to avoid the formalities, the expense, and the delays of the court systems. *Id.* citing *Barnett v. Hicks*, 119 Wn.2d 151, 160, 829 P.2d 1087 (1992).

Pursuant to Washington's Uniform Arbitration Act, RCW 7.04A *et seq.*, the trial court "shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate." RCW 7.04A.060(2). Washington's statutory language is similar to that in the FAA, when the statute states: "An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of contract." RCW 7.04A.060(1).

Defendant Truck Town's motion for an order to compel arbitration was brought pursuant to RCW 7.04A.070(1), which states:

On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement...the court shall proceed summarily to decide the issue [if the refusing party opposes the motion]. Unless the court finds that there is no enforceable agreement to arbitrate, **it shall order the parties to arbitrate.**

RCW 7.04A.070(1) (emphasis added).

In this case, an enforceable agreement to submit to arbitration exists, contained in the Vehicle Order agreement, and the trial court properly ordered the parties to arbitrate pursuant to RCW 7.04A.070(1). RP 25.

In an action to compel arbitration, the threshold question of arbitrability is for the court. *Meat Cutters Local #494 Affiliated with Amalgamated Meat Cutters and Butcher Workmen of North America v. Rosauer's Super Markets, Inc.*, 29 Wn. App. 150, 154, 627 P.2d 1330, review denied 96 Wn.2d 1002 (1981). The court has no concern with the merits of the controversy when construing the agreement. *Id.* The sole inquiry is whether the parties bound themselves to arbitrate the particular dispute. *Id.* If the dispute can fairly be said to involve an interpretation of the agreement, the inquiry is at an end and the proper interpretation is for the arbitrator. *Id.*

The Court has enumerated four principles that guide the determination of whether the parties agreed to submit a particular dispute to arbitration:

- (1) the duty to submit a matter to arbitration arises from the contract itself;
- (2) the question of whether the parties have agreed to arbitrate is a judicial one unless the parties clearly provide otherwise;
- (3) a court should not determine the underlying merits of a dispute in determining the arbitrability of an issue; and

(4) arbitration of disputes is favored by the courts.
*Tacoma Narrows Constructors v. Nippon Steel-Kawada
Bridge, Inc.*, 138 Wn. App. 203, 214, 156 P.3d 293 (2007).

In the present case, there is clear evidence that the parties bound themselves to arbitrate any and all disputes that might arise between them. The language of the dispute resolution provision of the Vehicle Order agreement states in pertinent part that:

All disputes (any and all legal and equitable claims) between the Parties and/or their employees, agents, and assigns (herein after referred to as the Parties) shall be determined by binding arbitration in accordance with the laws of the State of Washington at a time and place determined by the arbitrator. CP 46.

The Vehicle Order agreement therefore contains an agreement to submit to arbitration, which is valid, enforceable, and irrevocable pursuant to RCW 7.04A.060(1). In addition, the Truck Town properly submitted the question of arbitration before the Honorable Leila Mills in its motion to compel arbitration. The trial court's decision to grant Truck Town's motion to compel arbitration aligns with the principles the court has outlined for such decisions, and furthers the public policy in favor of arbitration of disputes. Thus, the trial court properly determined that a valid agreement to arbitrate existed when granting Truck Town's motion to compel arbitration and its decision should be affirmed.

C. **DID THE TRIAL COURT PROPERLY DECIDE ON TRUCK TOWN'S MOTION TO COMPEL ARBITRATION THAT**

**THE ENFORCEABLE ARBITRATION CLAUSE COVERED
CONSUMER PROTECTION CLAIMS?**

As argued above, the court may only properly consider challenges to the arbitration provision itself. The main challenge that Plaintiff Wegeleben brings to the validity of the arbitration provision is that Consumer Protection Act claims are not subject to arbitration relying upon the long overruled case of *Wineland v. Marketex*, 28 Wn. App. 830, 627 P.2d 967 (1981) overruled by *Garmo v. Dean, Witter Reynolds, Inc.*, 101 Wn.2d 585, 681 P.2d 253 (1984).

In Washington, it is well settled that Consumer Protection Act (CPA) and other statutory claims are subject to arbitration under the FAA. *Mendez v. Palm Harbor Homes*, 111 Wn. App. 446, 454, 45 P.3d 594 (2002). The *Mendez* court also held that CPA and other statutory claims are generally amendable to arbitration under Washington's Uniform Arbitration Act, chapter 7.04 RCW. *Mendez v. Palm Harbor Homes*, 111 Wn. App. 446, 457, 45 P.3d 594 (2002).

If any doubts or questions arise with respect to the scope of the arbitration agreement, the agreement is construed in favor of arbitration unless the reviewing court is satisfied the agreement cannot be interpreted to cover a particular dispute. *Mendez v. Palm Harbor Homes*, 111 Wn. App. 446, 456, 45 P.3d 594 (2002). In *Mendez*, the arbitration agreement was broad and extended arbitration to "all matters and issues of fact and/or

law.” *Mendez v. Palm Harbor Homes*, 111 Wn. App. 446, 456, 45 P.3d 594 (2002). In this case, the Vehicle Order agreement dispute resolution provision clearly states that “all disputes (any and all legal and equitable claims) between the Parties and/or their employees, agents, and assigns (herein after referred to as the Parties) shall be determined by binding arbitration.” Thus, interpreted in a manner favorable to arbitration, the Vehicle Order agreement covers all of Plaintiff Wegeleben’s claims, statutory or contractual, just as the arbitration agreement in *Mendez* did. *See Mendez v. Palm Harbor Homes*, 111 Wn. App. 446, 456, 45 P.3d 594 (2002).

Therefore, the trial court properly determined that all causes of actions brought by Plaintiff Wegeleben, including Consumer Protection Act claims, were subject to arbitration pursuant to the terms of the Vehicle Order agreement when it granted Truck Town’s motion to compel arbitration. The trial court’s decision should be affirmed by this Court.

D. PLAINTIFF WEGELEBEN IS UNABLE TO SHOW THAT THE ARBITRATION CLAUSE WAS UNCONSCIONABLE OR OTHERWISE REVOCABLE BECAUSE THE ARBITRATION PROVISION WAS CLEAR, CONSPICUOUS AND SEPARATELY EXECUTED.

“An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that

exists at law or in equity for the revocation of contract.” RCW 7.04A.060(1). Plaintiff Wegeleben is unable to show that there is any ground at law or in equity to revoke this contract for unconscionability, for being void as against public policy, or any other reason.

The existence of an unconscionable bargain is a question of law for the courts, and courts generally recognize two categories of unconscionability, substantive and procedural. *Mendez v. Palm Harbor Homes*, 111 Wn. App. 446, 458–59, 45 P.3d 594 (2002). Substantive unconscionability occurs when contract terms are one-sided or overly harsh. *Mendez v. Palm Harbor Homes*, 111 Wn. App. 446, 459, 45 P.3d 594 (2002). Procedural unconscionability appears when an irregularity taints the process of contraction formation. This has been described as the lack of a meaningful choice including whether each party had a reasonable opportunity to understand the terms of the contract and whether the important terms were hidden in a maze of fine print. *Mendez v. Palm Harbor Homes*, 111 Wn. App. 446, 459, 45 P.3d 594 (2002)(internal citations omitted).

Plaintiff Wegeleben has suggested that the arbitration provision is unconscionable because it would allow the parties to resolve these issues in arbitration which would not result in a court opinion to establish a precedent. *See* Appellant’s Brief p. 44. Plaintiff’s argument is

unsupported by any legal citation. Contentions unsupported by argument or citation of authority must not be considered on appeal. *Camer v. Seattle Post-Intelligencer*, 45 Wn.App. 29, 36, 723 P.2d 1195 (1986), *review denied*, 107 Wn.2d 1020, *cert. denied*, 482 U.S. 916, 107 S.Ct. 3189, 96 L.Ed.2d 677 (1987).

Plaintiff Wegeleben also suggests that the arbitration provision is unconscionable because it constitutes a waiver of his jury right. *See* Appellant's Brief p. 45. Plaintiff Wegeleben suggests that the arbitration provision must contain certain minimum disclosures in order to be a valid jury waiver, however, Plaintiff again fails to support this argument with reference to any legal precedent. *See* Appellant's Brief p. 46–47. The only cases cited by Plaintiff state that the waiver of the right to a jury trial must be “voluntary, knowing and intelligent.” *City of Bellevue v. Acrey*, 103 Wn.2d 203, 207, 691 P.2d 957 (1984). Plaintiff's waiver of a right to a jury trial by his agreement to the Vehicle Order agreement requiring arbitration meets this standard.

The Vehicle Order agreement contained an arbitration clause that expressly indicated that all disputes between the parties would be subject to binding arbitration. CP 46. The provision is conspicuously located on the front of the Vehicle Order agreement. CP 46. The arbitration provision also states that “any dispute between the Parties will not be

heard and decided by a Judge or jury, except as provided herein.” CP 46. Plaintiff Wegeleben separately signed this provision indicating his review and voluntary acceptance of this provision. Therefore, Plaintiff was made aware of the arbitration provision and undertook a voluntary, knowing and intelligent decision in agreeing to arbitrate all disputes with Truck Town.

Plaintiff has failed to establish that the arbitration provision in the Vehicle Order agreement was either substantively or procedurally unconscionable. Therefore, the agreement to arbitrate is enforceable and valid pursuant to the statute, and it is proper to submit Plaintiff’s claims to arbitration.

E. REQUEST FOR ATTORNEY’S FEES AND EXPENSES INCURRED ON APPEAL PURSUANT TO RAP 18.1.

Respondent, Truck Town, respectfully requests that this Court award its attorney’s fees, expenses and costs incurred in the defense of this appeal pursuant to RAP 18.1(a), (b). This request for attorney’s fees is authorized by a attorney’s fee provision in the Vehicle Order agreement between the parties signed June 22, 2007. The contract states in pertinent part:

ATTORNEYS’ FEES. In the event that either the Customer or the dealer shall seek the services of an attorney as a result of the breach of this agreement by the other party, the prevailing party in any legal action or arbitration shall be entitled to reimbursement of attorney’s fees and cost incurred as a result of the other party’s breach. Further, in the event that the Dealer makes claim

against Customer for any sum due Dealer at lease signing/delivery, or in the event Customer files for bankruptcy, Dealer shall be able to collect any and all attorney's fees incurred by Dealer with respect to such proceeding, including by not limited to seeking relief from stay or seeking reaffirmation of any debt.

Appendix A.

Furthermore, contractual provisions for attorneys' fees are statutorily authorized pursuant to RCW 4.84.330, which states:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract or lease which is entered into after September 21, 1977. Any provision in any such contract or lease which provides for a waiver of attorney's fees is void.

As used in this section "prevailing party" means the party in whose favor final judgment is rendered.

Therefore, pursuant to the Vehicle Order agreement, RCW 4.84.330, and RAP 18.1, Truck Town respectfully requests that the Respondent be awarded all of its attorney's fees, costs and expenses incurred in the defense of this appeal.

IV. CONCLUSION

Based upon the foregoing, Truck Town respectfully requests that this Court affirm the trial court's order compelling arbitration.

Truck Town was entitled to an order compelling arbitration because (1) the parties specifically agreed to arbitration for resolution of any disputes in the terms of the Vehicle Order agreement; (2) the arbitration agreement is valid, irrevocable, and enforceable; (3) Plaintiff's allegations of bushing violations are not permissible in determining the issue of arbitrability because they exceed the appropriate scope of the court's determination on the issue of arbitrability; (4) Plaintiff has failed to establish that the arbitration clause is unconscionable, void as to public policy, or otherwise avoidable when the arbitration provision is clear, conspicuous and executed separately by the Plaintiff. Additionally, Plaintiff Wegeleben failed to introduce any evidence that indicates this matter is unsuitable for arbitration. And finally, the public policy of encouraging the arbitration of disputes will be undermined if the Court permits a party to an arbitration agreement to unilaterally compel litigation through the courts at great expense to the other party. To allow this increases the risk of expensive and protracted litigation, which is exactly what the parties attempted to eliminate by contracting for arbitration

DATED this 2nd day of July, 2008.

DAVIES PEARSON, P.C.

Michael Smith
BRIAN M. KING, WSB # 29197
MICHAEL T. SMITH, WSB# 38746
Attorneys for Respondent

CERTIFICATE OF SERVICE

On July 2, 2008 a copy of Respondent's Opening Brief was served on:

David B. Trujillo
Law Office of David B. Trujillo
3805 Tieton Drive
Yakima, WA 98902

Tracy E. DiGiovanni
The Shiers Law Firm
600 Kitsap Street, Suite 202
Port Orchard, WA 98366-5397

by placing it in an envelope, addressed as indicated, then sealed it and deposited it with sufficient postage fully prepaid thereon in a receptacle of the United States Postal Service within Pierce County, Washington, before the hour of midnight.

Signed at Tacoma, Washington on 2nd day of July, 2008.

Kristin Neff
KRISTIN NEFF
Legal Assistant to Brian M. King

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APPENDIX A

VEHICLE ORDER

DAVE BARCELON'S TRUCK TOWN LTD
 4701 AUTO CENTER BLVD
 BREMERTON WA, 98312-
 (360) 377-2620

Stock Number...: 19057 Date: 06/22/2007
 Buyer's Name...: KENNETH W WEGELEBEN
 Cobuyer's Name: _____
 Address: 5608 RICHEY RD
 City: YAKIMA St.: WA Zip: 98908
 Ph.: (509) 952-9963 Wk. Ph.: ()

I hereby agree to purchase from you, under the terms and conditions specified here, on the reverse, and on associated documents signed by me, the following:

Year...: 01 Make: AMERICAN MOTOR
 Model.: CJ5 Body: M/T 4X4 2D
 Color.: BLACK Miles: 62,907
 Vin#....: 1JCCM85A8BT038433

Plate# : 370RUX Tabs.: 01/01/2007
 Title Brands/Comments (if applicable):
 REBUILT JUNK SALVAGE/REBUILT DESTROYED

*NOTICE TO BUYER REGARDING AIRBAGS ON THIS VEHICLE:
 _____ an on/off switch* has been installed on the airbag(s)

_____ the airbag(s) have been deactivated*

The owner of the vehicle may be required to spend up to \$150.00 for repairs if the vehicle does not meet the vehicle emission standards. Unless expressly warranted by the motor vehicle dealer, the dealer is not warranting that this vehicle will pass any emission tests required by federal or state law. Please sign your full name.

X Kenneth W Wegleben

Description of Trade # 1

Vehicle: _____
 Vin#....: _____
 Miles...: 0 Plate# : _____
 Trade Allow . . . \$ 0.00
 Payoff Estimate \$ 0.00
 Trade Lienholder: _____

Description of Trade # 2

Vehicle: _____
 Vin#....: _____
 Miles...: 0 Plate# : _____
 Trade Allow . . . \$ 0.00
 Payoff Estimate \$ 0.00
 Trade Lienholder: _____

* Purchaser acknowledges that the payoffs and/or lien balances on each of the trade-in vehicles as described above is only an estimated figure, subject to verification and confirmation from the lienholder as to the exact dollar amount. In the event the payoff/lien balance exceeds the above-stated amount, such additional amount shall be added to the total cash price of the vehicle and shall be paid to the dealer on request or added to the amount being financed.

X _____
 SIGNATURE (DO NOT INITIAL)

Listed Selling Price \$ 11,666.70
 Adjusted Negotiated Price \$ 9,865.00
 Products & Services N/A
 Service Contract \$ N/A
 Sales Tax on Service Contract \$ N/A
 _____ \$ N/A
 Trade # 1 Allow \$ 0.00
 Trade # 2 Allow \$ 0.00
 Taxable Subtotal \$ 9,865.00
 State Sales Tax \$ 877.99
 _____ \$ N/A
 Title Fees \$ 79.25

ESTIMATED vehicle Excise tax, License, Title, and Registration Fees, Bank Title Lien Release

Fee of \$ _____
 (including \$3 arbitration fee on new cars)
 (After 1/1/98 \$2.50 Dealer Administration Fee) \$ N/A

DOCUMENT SERVICE FEE \$ 35.00
 Trade Payoff # 1 Estimate \$ 0.00
 Trade Payoff # 2 Estimate \$ 0.00
 _____ \$ N/A
 _____ \$

Net Trade Equity (if Negative show as 0) \$ 0.00

Down Payment \$ 7,500.00 ✓
 \$ _____
 \$ _____
 \$ _____

Total Cash Down \$ 7,500.00

Balance Due /
 Amount Financed \$ 3,357.24

DISPUTE RESOLUTION All disputes (any and all legal and equitable claims) between the Parties and/or their employees, agents, and assignees (hereinafter referred to as the Parties) shall be determined by binding arbitration in accordance with the laws of the State of Washington at a time and place determined by the arbitrator. If the Parties are not able to agree upon a single arbitrator within ten (10) days following demand therefore, then the arbitrator shall be appointed by a Court in the State of Washington that would have, but for Arbitration as provided for herein, jurisdiction over the matter. Each Party shall pay one-half of the arbitrator's fees and costs, unless one Party is ruled the prevailing Party by the arbitrator, in which case the arbitrator, subsequent to the arbitration itself, may award the prevailing Party the arbitrator's fees and costs and the prevailing Party's attorneys fees and costs. The Parties recognize, acknowledge and agree that the designated arbitrator will be an independent individual, not affiliated or related ther, who is a licensed lawyer or retired Judge applying the substantive law of the applicable jurisdiction, and that any dispute between the Parties not be heard and decided by a Judge or jury, except as provided for herein. The Parties waive any right to a Class Action, provided however, that this waiver is determined to be unenforceable, then this Dispute Resolution provision is inapplicable and the Class Action shall be heard before the appropriate Federal or State Court. Notwithstanding the above, in the interest of promoting prompt resolution, the following actions, and no other, may be commenced in the appropriate State, County, or Federal Court; (i) replevin actions through the granting and action on (or denial of) an order of replevin and then transferred to arbitration, (ii) action for money due on an NSF check or promissory note (in the even of a counterclaim the entire matter shall be transferred to arbitration), and (iii) actions over which a bankruptcy court has exclusive jurisdiction, provided however, that if any or all of these exceptions are determined by a Court or Arbitrator, before which the matter is raised, as rendering unenforceable this Dispute Resolution provision, then these exclusions shall not apply and all such matters shall be arbitrated. These Dispute Resolution provisions shall survive termination of this Agreement between Purchaser(s) and Dealer.

Buyer's Signature *[Signature]* Co-Buyer's Signature _____

FINANCING CONDITION - IF A RETAIL INSTALLMENT CONTRACT OR NOTE AND SECURITY AGREEMENT IS SIGNED IN CONJUNCTION WITH THIS BUYER'S ORDER (COLLECTIVELY, THE "AGREEMENT"), THE AGREEMENT IS BINDING UPON EXECUTION, PROVIDED HOWEVER, THAT THE DEALER WILL HEREAFTER ASSESS THE BUYER'S CREDITWORTHINESS AND IF THE DEALER DOES NOT HEREAFTER APPROVE FINANCING ON ACCOUNT OF THE BUYER'S CREDITWORTHINESS AND SUBSEQUENTLY NOTIFIES BUYER OF SUCH DISAPPROVAL, THIS AGREEMENT IS VOID, AND ALL FUNDS AND ANY TRADE-IN SHALL BE RETURNED TO PURCHASER, SUBJECT, HOWEVER, TO ADJUSTMENT AS FOLLOWS: IF PURCHASER HAS TAKEN POSSESSION OF THE VEHICLE, PURCHASER SHALL IMMEDIATELY RETURN SAID VEHICLE TO DEALER AND PURCHASER SHALL BE LIABLE TO DEALER FOR ALL DAMAGE AND/OR DESTRUCTION TO, ABUSE OF, EXCESSIVE WEAR AND/OR EXCESSIVE MILEAGE ON SAID VEHICLE WHILE IN THE POSSESSION OF PURCHASER. AT THE OPTION OF DEALER, ANY SUMS DEPOSITED BY PURCHASER WITH DEALER MAY BE APPLIED TO THE EXTENT NECESSARY TO COMPENSATE DEALER AND/OR TO PAY THE COST OF REPAIRS FOR ANY DAMAGE, DESTRUCTION, ABUSE, EXCESSIVE WEAR AND/OR EXCESSIVE MILEAGE ON SAID VEHICLE, AND ANY ATTORNEY FEES INCURRED BY DEALER AND OTHER RESOURCES AS MAY BE AUTHORIZED BY LAW.

NOTICE TO THE BUYER: DO NOT SIGN IN THE SPACES BELOW UNTIL: 1. You have read the entire order front and back; 2. All spaces intended for the agreed terms have been filled; 3. You have first examined and signed the Implied Warranty Statement and/or any other document associated with warranty information on the purchased vehicle; 4. You understand the information you see on the FTC Buyer's Guide for this vehicle is part of this contract, and the information on the FTC Buyer's Guide overrides any contrary provisions in the contract of sale; 5. You have received a copy of the FTC Buyer's Guide; 6. If the estimated charges of title fees above are low, purchaser shall pay on demand the difference and if over-estimated, dealer shall refund the difference.

By signing, the buyer certifies that he/she is 18 years of age or older and acknowledges that he/she has read and understood the terms and conditions and has received a true copy of this order. This order and any associated written and signed documents comprise the entire agreement between the parties, and no verbal agreements will be legally binding upon the buyer or seller.

Buyer's Signature *[Signature]* Date 06/22/2007 Salesperson(s) _____

Cobuyer's Signature : _____ Date 06/22/2007 LAWRENCE T. WRIGHT

Accepted By *[Signature]* Date 06/22/2007 LOBATTO, CARL J.

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1. PURCHASER'S WARRANTIES CONCERNING THE FOLLOWING WARRANTIES CUSTOMER MAKES THE FOLLOWING WARRANTIES CONCERNING THE TRADE-IN VEHICLE(S) LISTED ON THE FRONT SIDE OF THIS DOCUMENT:

A. That the vehicle has not been involved in any collision resulting in any body or chassis damage, and does not contain any hidden mechanical defects or hidden defects of the body or chassis;

B. That other than the creditor lien for the stated payoff balance, the title to the trade-in vehicle is free and clear of any other liens or encumbrances, and that purchaser is the registered owner of said vehicle and agrees to deliver to Dealer satisfactory evidence of title to said vehicle;

C. That the mortgage of title for said vehicle does not contain any brand or comment, including but not limited to "REBUILT", "WATERGATE", "JUNK", "DESTROYED", "NON-CONFORMING", "LEMON" OR "FLOOD".

D. That the engine(s) is/are intact and have not been deployed, deactivated, tampered with, repaired, or otherwise altered in any way, and no airbag "on/off switch" has been installed.

It is further understood and agreed that the order on the reverse side hereof is subject to the following terms and conditions which have been mutually agreed upon.

ADDITIONAL TERMS AND CONDITIONS

ADDITIONAL TERMS AND CONDITIONS

It is further understood and agreed that the order on the reverse side hereof is subject to the following terms and conditions which have been mutually agreed upon:

1. PURCHASER'S WARRANTIES. CUSTOMER MAKES THE FOLLOWING WARRANTIES CONCERNING THE TRADE-IN VEHICLE(S) LISTED ON THE FRONT SIDE OF THIS DOCUMENT.

- A. That the vehicle has not been involved in any collision resulting in any body or chassis damage, and does not contain any hidden mechanical defects or hidden defects of the body or chassis;
- B. That other than the creditor lien for the stated payoff balance, the title to the trade-in vehicle is free and clear of any other liens or encumbrances, and that purchaser is the registered owner of said vehicle and agrees to deliver to Dealer satisfactory evidence of title to said vehicle;
- C. That the certificate of title for said vehicle does not contain any brand or comment, including but not limited to "REBUILT", "SALVAGE", "JUNK", "DESTROYED", "NON-CONFORMING", "LEMON" OR "FLOOD"
- D. That the airbag(s) is/are intact and have not been deployed, deactivated, tampered with, repaired, or otherwise altered in any way, and no airbag "on/off switch" has been installed.
- E. That the trade-in vehicle has not been determined to have an uncorrected non-conformity or serious safety defect as the result of any final determination, adjudication or settlement in Washington or any other state;
- F. That the vehicles emission control equipment is intact, standard to the vehicle, and that no part of the system has been removed or altered.
- G. That the vehicle has never sustained flood or water damage.
- H. That the odometer has not been replaced, rolled back or otherwise tampered with, and that the mileage reflected on the odometer is the actual mileage on the vehicle.

Customer acknowledges that the Dealer is relying on the foregoing warranties and that without such warranties, Dealer would not be purchasing trade-in vehicle(s). Customer further acknowledges that a breach of any of the foregoing warranties entitles Dealer to rescind this purchase order and/or to recover from the undersigned purchaser any damages sustained by Dealer resulting from said breach, including attorney's fees and costs.

THE DOLLAR AMOUNT SPECIFIED AS THE TRADE-IN ALLOWANCE MAY BE RENEGOTIATED AND ADJUSTED IN THE EVENT THAT: (1) THE PURCHASER FAILS TO DISCLOSE THAT THE CERTIFICATE OF OWNERSHIP OR CERTIFICATE OF TITLE FOR THE TRADE-IN VEHICLE HAS BEEN BRANDED FOR ANY REASON, INCLUDING BUT NOT LIMITED TO, ITS STATUS AS A "REBUILT", "SALVAGE" OR "LEMON LAW REPURCHASE" VEHICLE; OR (2) THE TRADE-IN VEHICLE HAS SUBSTANTIAL PHYSICAL DAMAGE OR A LATENT MECHANICAL DEFECT WHICH OCCURRED BEFORE THE DEALER TOOK POSSESSION OF THE VEHICLE AND WHICH COULD NOT HAVE BEEN REASONABLY DISCOVERABLE AT THE TIME THE ORDER, OFFER OR CONTRACT WAS MADE; OR (3) THERE ARE EXCESSIVE ADDITIONAL MILES ON THE TRADE-IN VEHICLE(S) OR THERE IS A DISCREPANCY IN THE MILEAGE AS DEFINED IN RCW 46.70.180(4)(b).

2. **PRICE CHANGES.** The manufacturer has reserved the right to change the list price of new motor vehicles without notice, and in the event that the list price of the new car ordered hereunder is so changed, the cash delivered price, which is based on the list price effective on the day of delivery, will govern this transaction. If the cash delivered price is increased as a result of the manufacturer's change in the list price, Customer may, if dissatisfied with such increased price, cancel this order.
3. **CHANGE OF DESIGN.** The manufacturer has the right to make any changes in the model or design of any accessories and/or parts of any new motor vehicle at any time without notice. In the event of any such changes, neither dealer nor manufacturer shall be obligated to make corresponding changes in the motor vehicle covered by this order, either before or subsequent to the delivery of such vehicle to the purchaser.
4. **DELAYS IN DELIVERY.** Dealer shall not be liable for failure to deliver or delay in delivering the vehicle covered by this order where such failure or delay is due or caused, in whole or in part, by the manufacturer, accidents, strikes, fires or other causes beyond the control of the Dealer.
5. **FACTORY WARRANTY.** If any new or used vehicle is subject to an existing manufacturer's warranty, that warranty is made by the manufacturer only and runs directly from the manufacturer to the purchaser.
6. **LIMITATION ON WARRANTIES.** On used motor vehicles, Dealer makes no express warranties except as may be set forth in any written limited warranty granted to the purchaser. As to the implied warranties of merchantability and fitness, the same shall be modified, disclaimed, or excluded as provided in a separate writing furnished to purchaser by Dealer in the form of a Limited Warranty or a Disclaimer of Warranties. The terms of such Limited Warranty or Disclaimer of Warranties shall control and thereby affect any implied warranties, and such terms and conditions are hereby made a part of this order and are incorporated herein by reference. Further the applicability of any existing manufacturer's warranty on the used motor vehicle, if any, shall be determined solely by the terms of such warranty.
7. **PURCHASER'S OBLIGATIONS.** Purchaser shall execute an odometer disclosure statement pertaining to purchaser's trade-in vehicle(s) as required by law. Purchaser agrees and acknowledges that any misrepresentation on said odometer statement will constitute a breach of this agreement by the purchaser and entitles Dealer to pursue all remedies allowed by law or, at Dealer's option, to cancel this agreement. Further in the event the vehicle purchase referred to in this order is to be financed, the purchaser herein, before or at the time of delivery of the vehicle ordered, and in accordance with the terms and conditions of payment indicated on the front side of this order, agrees to execute a retail installment contract or security agreement for the purchase of such vehicle

8. **SECURITY INTEREST.** The purchaser hereby grants the Dealer a security interest in the subject vehicle and in all additions, accessories, and all proceeds of insurance covering its loss, damage, or destruction, and all service contracts and mechanical breakdown policies pertaining thereto. The security interest created hereby secures the payment of all debt purchaser owes to Dealer pursuant to and/or arising under this order, including but not limited to the purchase price of the subject vehicle. This Security Interest is retained by Dealer notwithstanding assignment of Financing Contract (including the separate security interest therein).
9. **ATTORNEY'S FEES.** In the event that either the Customer or the dealer shall seek the services of an attorney as a result of the breach of this agreement by the other party, the prevailing party in any legal action or arbitration shall be entitled to reimbursement of attorney's fees and cost incurred as a result of the other party's breach. Further, in the event that the Dealer makes claim against Customer for any sum due Dealer at lease signing/delivery, or in the event Customer files for bankruptcy, Dealer shall be able to collect any and all attorney's fees incurred by Dealer with respect to such proceeding, including but not limited to seeking relief from stay or seeking reaffirmation of any debt.
10. **CONTROLLING LAW/VENUE.** This agreement shall be construed in accordance with the laws of the state of Washington in any suit, action, or other proceeding arising out of this agreement, the parties agree that the venue of any such suit, action or proceeding shall be the county in which the Dealer's principal place of business is located.

Buyers Order back
Rev 07/05