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DIVISION II

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STATE OF WASHINGTON
BY  DEPUTY

No. 37187-1-II
COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

ALPACAS OF AMERICA, LLC,

Appellant,

vs.

JAMES AYERS

Respondent

ALPACAS OF AMERICA, LLC'S REPLY BRIEF

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I. INTRODUCTION

After Appellant Alpacas of America (“AOA”) submitted its opening brief, Respondent James Ayers submitted his motion on the merits, which motion this Court denied. Mr. Ayers has not submitted a response brief, but this Court has accepted Mr. Ayers’s motion on the merits as his response brief.

Mr. Ayers’s response does not address AOA’s arguments: (1) the doctrine of merger provides that the dispute resolution clause in a superceding contract governs, rather than the clause in a superceded contract; (2) in contractual arbitration, the arbitrator’s subject matter jurisdiction arises from the agreement of the parties; (3) a party may raise the issue of lack of subject matter jurisdiction at any time in the proceedings; (4) when an arbitrator lacks subject matter jurisdiction, his award is void; and (5) a court must vacate an arbitrator’s award that contains errors of law on the face of the award. AOA’s arguments are thus unopposed. This Court should not let Mr. Ayers’s misdirection confuse the clear legal issues presented by AOA’s appeal.

Just as he did in the hearing before the Trial Court, Mr. Ayers’s

response raises issues not before this Court.¹ Mr. Ayers says: (1) AOA commenced its action against Mr. Ayers in bad faith; (2) the arbitrator's errors were mere "scrivener's errors," not errors of law; (3) the Federal Arbitration Act governs the case; (4) Mr. Ayers did not waive his right to arbitrate under the original sales contract by entering into two subsequent exchange contracts; (5) the two exchange contracts had warranty terms that were substantively unconscionable; and (6) this appeal is frivolous. Although these issues are not before this Court and although Mr. Ayers refers to items in his "Appendix" that are not part of the record, AOA will reply to the issues Mr. Ayers raised.

II. ARGUMENT

A. AOA Did Not Commence Its Action in Bad Faith

Mr. Ayers argues that AOA commenced its action against him in bad faith, because AOA sued Mr. Ayers in Thurston County Superior

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At the hearing on Mr. Ayers's Motion for Proper Venue, Mr. Ayers spontaneously produced an unauthenticated copy of the original, superceded sales contract, but not the first superceding exchange contract or the second superceding exchange contract. CP 151. Pointing to the original, superceded sales contract, Mr. Ayers argued that the contract matter should be before an arbitrator in Snohomish County. *Id.* That issue was not before the Trial Court that day.

Court and did not produce to the Trial Court seven sales contracts with seven promissory notes that, Mr. Ayers alleges, conferred jurisdiction on an arbitrator in Snohomish County. Besides being completely outside the record in this appeal, this issue misstates the original case. AOA's complaint had nothing to do with any of those seven sales contracts nor the seven promissory notes. CP 04-08. AOA did not sue on these contracts at all. The dispute resolution clauses in those contracts and promissory notes are therefore immaterial.

Mr. Ayers also alleges bad faith because AOA did not sue on those contracts or on the promissory notes, but only for the amount that Mr. Ayers refused to pay for boarding his alpaca Super Nova at AOA's ranch (even though the promissory note that Mr. Ayers attached as Appendix 2 (not in the record) is stamped "paid"). AOA simply did not sue under any of the seven contracts or promissory notes referred to by Mr. Ayers. His invitation to misdirection is itself bad faith and arguably sanctionable.

B. The Arbitrator's Errors Were No Mere "Scrivener's Errors;" They Were Errors Of Law

Mr. Ayers argues that the only error the arbitrator made was a scrivener's error, not an error of law. The so-called "scrivener's error" illuminates the most fundamental error of law on the face of the award.

CP 202. The arbitrator awarded damages based upon an alpaca Mr. Ayers did not own! In his original award, the arbitrator had awarded \$10,000 to Mr. Ayers because the arbitrator found that the replacement alpaca, Ato, was of less value than one in the original animal's, Super Nova's, price range. CP 157-58; RP 10/26/07 at 11. However, Mr. Ayers no longer owned or possessed Ato, making Ato's value or alleged lack thereof immaterial. It did appear that the arbitrator was confused as to which alpaca Mr. Ayers owned, since he held in his award, "Mr. Ayers has had the use of the alpacas for the intervening period and will retain ownership of Ato 1019 after this award." CP 157.

If indeed the arbitrator had made such a mistake *of fact*, then RCW 7.04A.240(1)(b) would apply. That statute allows the court to modify or correct the award if the "arbitrator has made an award on a claim not submitted to the arbitrator and the award may be corrected without affecting the merits of the decision upon the claims submitted." Since Mr. Ayers no longer owned Ato, he could not make a claim to the arbitrator based on Ato's value. If the arbitrator *had* mistakenly thought that Mr. Ayers owned Ato, and had thought that Mr. Ayers' claim was based thereon, then, indeed, his award would have been "on a claim not

submitted to the arbitrator,” and the Trial Court could have modified the award by simply deleting that portion of the decision awarding damages based upon the value of Ato.

Not sure what the arbitrator had done, the Trial Court remanded the matter back to the arbitrator, the judge saying, “I want the arbitrator to consider what I believe may very well be a mistake as far as facts It involves the two different alpacas, and that is whether or not the arbitrator was mistaken as to which alpaca was in the possession of Mr. Ayers He seems to think that it was Ato” (RP 11/02/07 at 9). In his amended award, the arbitrator showed that he had *not* made a mistake of fact, but a mistake of law, referring to it as “AMENDMENT OF AWARD TO CORRECT SCRIVENER ERROR” (CP 202). He amended it pursuant to RCW 7.04A.240(1)(a), the section that (along with RCW 7.04A.200(4)(a)) allows the arbitrator himself to correct an “evident mistake in the description of a . . . thing . . . referred to in the award.” CP 202. The amended award read: “Mr. Ayers has had the use of the alpacas for the intervening period and will retain ownership of ~~Ato-1019~~ Supernova after this award” (emphasis as in original). *Id.*

This designation of the amendment as a correction of a “scrivener’s

error,” the reference to RCW 7.04A.240(1)(a), and the amendment itself, which merely struck out “Ato 1019” and substituted “Supernova” in its place, shows that the arbitrator *knew very well* that Mr. Ayers did not own Ato. As such, he made no mistake of fact, and no mere “scrivener’s error.” He made a mistake *of law*. If Mr. Ayers does not own Ato, but Super Nova, where is the injury if, as the arbitrator found, the “replacement alpaca, Ato 1019, was not of quality comparable to an alpaca in Supernova’s price range”? CP 157. There is no injury. Where there is no injury, there can be no remedy. The arbitrator made a mistake of law in awarding Mr. Ayers \$10,000, which award was based solely on how much less the arbitrator found Ato to be worth than Super Nova.

Had Mr. Ayers retained Ato, there may have been an injury (the arbitrator felt Mr. Ayers’s expert’s valuation of Ato at \$1,000 was credible, though it contradicted Mr. Ayers’s own valuation of Ato at \$45,000-\$50,000 at the time of his divorce), but Mr. Ayers did not choose to keep Ato. He exchanged him for Super Nova, after begging AOA:

I would like to exchange Atotonilco NT 1019 TBS back for Super Nova D550. I know that I will be losing a great deal of money because Atotonilco is worth twice as much as Super Nova, but I need a female. I know that she is not breed and may never be breed, but that a chance I’m willing to take.

CP 138. Having exchanged him, he no longer had a claim based on Ato.

The award to Mr. Ayers based on the value of an animal he did not own was not the only error of law the arbitrator made. He also held that in the case of mutual mistake of fact, “the trier should try to do equity to correct the mistake to the extent practicable.” The remedy for mutual mistake of fact is not for the trier to “equitably” rewrite the contract, but rescission. Matter of Marriage of Schweitzer, 132 Wn.2d 318, 328, 937 P.2d 1062 (1997). In fact, the parties themselves had already rescinded the original contract when they exchanged the alpacas!

Another error of law was the arbitrator’s failure to apply the doctrine of judicial estoppel, which estops Mr. Ayers from alleging before the arbitrator that Ato was worth anything less than he testified in his divorce proceedings. Cunningham v. Reliable Concrete Pumping, Inc., 126 Wn. App. 222, 224-25, 108 P.3d 147 (2005). The arbitrator’s failure to apply the doctrine of judicial estoppel is clear from the face of the award, where he held that Ato was worth less than an animal in Super Nova’s price range. CP 157.²

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Mr. Ayers valued Ato at \$45,000-\$50,000 in his divorce proceedings. The arbitrator refused to hold Mr. Ayers to his original valuation of Ato, to which Mr. Ayers swore in his divorce proceedings, but accepted Mr.

Yet another error of law was the arbitrator creating a new contract term. He held that both parties “breached the sales contract by failing to properly inspect Supernova [sic] before the sale.” CP 157. There is no such term in the original contract. CP 130-31.

There are even more errors of law in the amended award. The arbitrator explained that his award was based on his finding that “the entire claim arises from the breach of the 2002 original sales contract. . . . [T]he seller breached its duty to provide a breedable female alpaca that was worth the \$21,500 purchase price.” CP 202-03. But the original contract itself contemplated this possibility of infertility and provided a remedy, which Mr. Ayers exercised: exchange. It was an error of law for the arbitrator to ignore the remedy in the original sales contract, and an error of law for the arbitrator to ignore the fact that Mr. Ayers *exercised* that remedy: he exchanged Super Nova for Ato. Mr. Ayers and his then wife sought a male alpaca that they could breed to the female alpacas they already owned; they asked for and received Ato in the exchange.

It was also an error of law for the arbitrator to find that Super Nova was not worth her \$21,500 purchase price. At the arbitration, Mr. Ayers

Ayers’s expert’s valuation at \$1,000.

produced no evidence as to Super Nova's worth (CP 218), and the entire award is based on the value of Ato, whom Mr. Ayers no longer owned.

Another error of law in the amended award was the arbitrator's finding that the waiver of warranty provisions in the first and second exchange contracts were unconscionable. CP 203. First, the terms are not unconscionable, and second, even if they were, AOA did not enforce them, but allowed Mr. Ayers to keep exchanging alpacas despite having no further contract rights to do so.

This finding of unconscionability ignored the circumstances surrounding the first and second exchange contracts. As to the first exchange contract, AOA did not hold Mr. Ayers to the warranty clause, but allowed him to exchange Ato back for Super Nova. A contract term cannot be unconscionable if the parties do not abide by it. As to the second contract, AOA only agreed to the second exchange after Mr. Ayers insisted on it in writing and accepted all risk of Super Nova's infertility:

I would like to exchange Atotonilco NT 1019 TBS back for Super Nova D550. I know that I will be losing a great deal of money because Atotonilco is worth twice as much as Super Nova, but I need a female. I know that she is not breed and may never be breed, but that a chance I'm willing to take.

CP 138. A waiver of warranty term cannot be unconscionable if the parties only entered into the contract based on Mr. Ayers's voluntary *and informed* assumption of all risk!

Mr. Ayers argues that in the absence of an error of law on the face of the award, the arbitrator's award will not be vacated or modified. Davidson v. Hensen, 135 Wn.2d 112, 118, 954 P.2d 1327 (1998). Here, however, there were errors of law on the face of the award. The arbitrator exceeded his authority and lacked subject matter jurisdiction. The Trial Court should have vacated the award pursuant to RCW 7.04A.230(1)(d). It was error not to do so.

C. If the Federal Arbitration Act Applies in this Case, the Arbitrator Lacks Subject Matter Jurisdiction and Made Errors of Law Justifying Vacation Under the FAA as well as Under Washington Law

Mr. Ayers obliquely raised the issue of whether the Federal Arbitration Act ("FAA") applies in this case, by citing to Kamaya Co., Ltd. v. American Property Consultants, Ltd., 91 Wn. App. 703, 959 P.2d 1140 (1998), *rev. den.* 137 Wn.2d 1012, 978 P.2d 1099 (1999), a case that applies the FAA. Neither party raised the issue of the FAA before the Trial Court, nor before the arbitrator, but AOA will reply nonetheless.

exists.” Lowden v. T-Mobile USA, Inc., 512 F.3d 1213, 1217 (9th Cir. 2008), *citing* First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995). The relevant state-law contract principle here is the doctrine of merger. “[W]hen parties adopt a written agreement as the expression of their intentions, that instrument becomes the contract, and all negotiations and understandings previous thereto become merged into the agreement.” Dix Steel Co. v. Miles Constr., Inc., 74 Wn.2d 114, 118, 443 P.2d 532 (1968). When Mr. Ayers and AOA entered into the second exchange contract, that instrument became *the contract*, and both the first exchange contract and the original sales contract were merged into the second exchange contract.

In the second exchange contract, the dispute resolution clause provided that the Thurston County Superior Court had jurisdiction over any dispute that arose, but gave AOA the option to submit the matter to arbitration. AOA never did so. Therefore, jurisdiction was properly with the Thurston County Superior Court. Under the FAA, the arbitration agreement contained in the original sales contract was *invalidated* by the contract doctrine of merger. The original sales contract *merged* into the first exchange contract, which *merged* into the second exchange contract,

giving jurisdiction to the Thurston County Superior Court. The arbitrator did not have subject matter jurisdiction to hear the case. Mr. Ayers's caselaw supports this position: he argues that a contractual dispute is arbitrable unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Kamaya, 91 Wn. App. at 714. Here, there is no *arbitration clause* in effect; the arbitration clause in the original sales contract was superceded by the dispute resolution clause in the second exchange contract that gave jurisdiction to the Thurston County Superior Court.

Since that is so, if the Trial Court had been applying the FAA, it should have vacated the award, just as it should have under Washington law. In Coast Trading Co., Inc. v. Pacific Molasses Co., the Ninth Circuit Court of Appeals vacated an arbitration award "as being contrary to remedies provided in the contract and as beyond the authority of the arbitrators under the submission." 681 F.2d 1195, 1198 (9th Cir. 1982). Here, the governing contract, the second exchange contract, vested the Thurston County Superior Court with jurisdiction. The arbitrator had *no authority* under the agreement to hear the case.

The Ninth Circuit noted that an arbitration award "will not be

shielded from judicial scrutiny intended to insure that the award is grounded on the agreement of the parties and the issues they present for resolution.” *Id.* (Implicit in the Ninth Circuit’s ruling is the axiom that subject matter jurisdiction can be raised at any time, even in the case of arbitration. The parties had already participated in arbitration when one challenged the authority of the arbitrators). Here, Mr. Ayers’s and AOA’s agreement presented *no issues* to the arbitrator for resolution. If this Court applies the FAA, it should vacate the award for the arbitrator’s lack of subject matter jurisdiction just as it should under Washington law.

Even if the award were not void for the arbitrator’s lack of subject matter jurisdiction, had the Trial Court been applying the FAA, it still should have vacated the award because the arbitrator “exceeded [his] powers.” 9 U.S.C. § 10(a)(4). “Arbitrators exceed their powers in this regard not when they merely interpret or apply the governing law incorrectly, but when the award is completely irrational or exhibits a manifest disregard of the law.” Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 997 (9th Cir. 2003) (internal citations and quotations omitted). Manifest disregard of the law means that “the arbitrators recognized the applicable law and then ignored it.” Luong v.

Circuit City Stores, Inc., 368 F.3d 1109, 1112 (9th Cir. 2004). In addition, “an arbitrator’s failure to recognize undisputed, legally dispositive facts may properly be deemed a manifest disregard for the law.” Coutee v. Barington Capital Group, L.P., 336 F.3d 1128, 1133 (9th Cir. 2003).

Here, the arbitrator was briefed on the doctrines of merger and of judicial estoppel, both of which he ignored. Most importantly, the arbitrator failed to recognize the fact that Mr. Ayers owned Super Nova, not Ato. Mr. Ayers was not injured even if, as the arbitrator held, Ato was not worth as much as an animal in Super Nova’s price range. This may properly be deemed a manifest disregard for the law. Moreover, the arbitrator failed to recognize the fact that Mr. Ayers twice exchanged the animals, exercising his legal remedies and then some! This, too, is a manifest disregard for the law. If this Court applies the FAA, it should vacate the award pursuant to 9 U.S.C. § 10(a)(4) for the arbitrator’s manifest disregard for the law, just as it should under Washington law for the errors on the face of the award.

D. Mr. Ayers Waived the Right to Arbitrate by Entering Into the First and Second Exchange Contracts

Mr. Ayers argues that waiver of the right to arbitrate under a contract occurs only where a party’s conduct is inconsistent with any intent

but to forgo arbitration. Civil Service Com'n of City of Kelso v. City of Kelso, 137 Wn.2d 166, 171, 969 P.2d 474 (1999); Lake Washington Sch. Dist. No. 414 v. Mobile Modules Northwest, Inc., 28 Wn. App. 59, 61, 621 P.2d 791 (1981). These cases are concerned with a party's conduct once a demand for arbitration has been made. Here, however, Mr. Ayers's waiver of the right to arbitrate occurred not after he demanded arbitration (which, under the second exchange contract, he had no option to do), but years earlier, when he entered into the first and second exchange contracts.

By entering into the first exchange contract, Mr. Ayers and AOA replaced the original sales contract, which was merged into the first exchange contract. The dispute resolution clause in the original sales contract provided for arbitration in Snohomish County, CP 131, and that in the first exchange contract provided for arbitration in Washington state, CP 133. Next, Mr. Ayers and AOA entered into the second exchange contract, which became *the contract*, merging both the original sales contract and the first exchange contract into itself. The dispute resolution clause in this contract conferred jurisdiction on the Thurston County Superior Court, giving AOA the option (which it never exercised) to submit the matter to arbitration. CP 140. By entering into this second

exchange contract, Mr. Ayers waived all rights to demand arbitration under either the original sales contract or the first exchange contract. While the caselaw cited by Mr. Ayers is not applicable to *this* waiver – far preceding Mr. Ayers’s improper demand for arbitration, made without notice and pursuant to a superceded contract – it supports AOA’s position.

Mr. Ayers’s conduct was indeed inconsistent with any intent but to forgo arbitration. Recall the circumstances surrounding the second exchange contract. Mr. Ayers had written to AOA, begging AOA to exchange the animals one more time (a right not available under the first exchange contract), and accepting all risk of Super Nova’s infertility:

I would like to exchange Atotonilco NT 1019 TBS back for Super Nova D550. I know that I will be losing a great deal of money because Atotonilco is worth twice as much as Super Nova, but I need a female. I know that she is not breed and may never be breed, but that a chance I’m willing to take.

CP 138. Mr. Ayers, despite his protestations to the contrary, is a person fully capable of negotiating contract terms with AOA. *See, e.g.*, the stud services contract that Mr. Ayers attached as Appendix 8. Although not in the record, this contract contains numerous handwritten amendments to the printed terms, indicating that Mr. Ayers and AOA negotiated those terms and changed them, likely at Mr. Ayers’s behest. Had Mr. Ayers

wished to include binding arbitration in the second exchange contract, he could have negotiated that term with AOA and could have included it. However, for whatever reason, he chose not to do so.³ By entering into the second exchange contract, Mr. Ayers waived the right to demand arbitration, consistent with the intent to forgo arbitration.

While Mr. Ayers talked about his own waiver of the right to demand arbitration, he completely failed to respond to AOA's argument that AOA did not waive the right to raise the issue of the arbitrator's lack of subject matter jurisdiction by participating in the arbitration. Instead, he cited to caselaw from this Court that supports AOA's position. Mr. Ayers argues that an arbitrator's powers are governed by the agreement to arbitrate. Anderson v. Farmers Ins. Co. of Washington, 83 Wn. App. 725, 923 P.2d 713 (1997). This argument is correct, but there is no agreement to arbitrate here, because the second exchange contract provides for jurisdiction with the Thurston County Superior Court.

Moreover, this case, Anderson, is on point and supports AOA's

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In the stud services contract, where Mr. Ayers *did* negotiate and make changes to the contract terms, the dispute resolution clause is even more limited. It vests jurisdiction completely with the Thurston County Superior Court and does not give AOA the option to demand arbitration. While negotiating other contract terms, Mr. Ayers left the dispute resolution clause alone! Appendix 8 to Ayers's Response.

position. In Anderson, the parties went to arbitration where a panel of arbitrators issued an award, after which the Trial Court confirmed the award. 83 Wn. App. at 728-30. After being barred from raising the issue before the Trial Court of whether the arbitrators' authority was limited by policy language, the appellant raised the same issue on appeal to this Court. *Id.* at 730. (Here, of course, AOA raised the issue of the arbitrator's lack of subject matter jurisdiction before the Trial Court *and* on remand to the arbitrator.) This Court held, "although an appellate court will usually not consider issues unless first presented to the trial court, jurisdictional questions are an exception to the rule." *Id.*

This Court, then, treated all jurisdictional question *the same*, admitting no difference when the jurisdiction was that of an arbitrator, whose authority is derived from the parties' agreement, rather than of a court, whose authority is constitutional and statutory. In contrast, the Trial Court believed there *was* a difference, and thought that a party could waive the issue of subject matter jurisdiction by participating in an arbitration.

RP 11/02/07 at 8-9. This was error.

On the issue of jurisdiction, this Court held:

An arbitrator's powers are governed by the agreement to arbitrate. The ensuing award must not exceed the authority established in the agreement. If the arbitrators exceed their authority under the

agreement, the award is deemed void and the court *has no jurisdiction to confirm it* under RCW 7.04.150 [now RCW 7.04A.230(1)(d)]. Thus, [appellant] may raise the jurisdictional issue for the first time on appeal.

Id. at 730-31 (internal citations omitted, emphasis added). Here, the dispute resolution clause did not provide for arbitration, but vested jurisdiction with the Thurston County Superior Court (giving AOA the option to demand arbitration, which AOA never did). The arbitrator therefore had *no* authority under the agreement. By hearing the case and by issuing the award, the arbitrator “exceeded” his absolute lack of authority. Where the arbitrator exceeds his authority, the “award is deemed void” and the Trial Court had no jurisdiction to confirm it under RCW 7.04A.230(1)(d); the Trial Court erred in doing so. AOA did not waive the issue of subject matter jurisdiction by participating in the arbitration. This Court should deem the award void and vacate it.

E. The Waiver of Warranty Language is Not Unconscionable

Mr. Ayers argues that the waiver of warranty language in both the first and the second exchange contracts is substantively unconscionable. Substantive unconscionability is where a clause or term in the contract is alleged to be one-sided or overly harsh. Nelson v. McGoldrick, 127 Wn.2d 124, 131, 896 P.2d 1258 (1995). In fact, ““Shocking to the

conscience' 'monstrously harsh' and 'exceedingly calloused' are terms sometimes used to define substantive unconscionability." *Id.* The warranty language in the two exchange contracts is none of those things.

In commercial settings like this one, the doctrine of unconscionability is governed by statute and caselaw. "When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination." RCW 62A.2-302(2). "The doctrine of unconscionability involves scrutiny of all the circumstances surrounding the transaction in question." Christiansen Bros., Inc. v. State, 90 Wn.2d 872, 877, 586 P.2d 840 (1978).

What is the commercial setting, purpose, and effect of the waiver of warranty language? The first exchange contract governed the circumstances under which Mr. Ayers exercised the remedy afforded him in the original sales contract. Super Nova had failed to conceive and AOA had warrantied a breedable female; the remedy was that Mr. Ayers could exchange her for an animal of equal quality. He chose a male, Ato.

Under these circumstances, it is entirely reasonable to have waiver of warranty language: Mr. Ayers was exercising his remedy, and AOA did

not want to be in the position where Mr. Ayers was returning to AOA for multiple exchanges. Therefore, the waiver of warranty language was neither “shocking to the conscience,” “monstrously harsh,” or “exceedingly callous.” Moreover, the *effect* of the term was nil. Even though the first exchange contract offered no remedies or further exchanges, when Mr. Ayers begged and pleaded to exchange Ato for Super Nova one more time (after he had received no females in his divorce to whom he could breed Ato), AOA agreed. A contract term cannot be unconscionable if the parties do not observe it!

Likewise, in the second exchange contract, where Mr. Ayers was exchanging the animals a *second* time, it is entirely reasonable to have waiver of warranty language. While AOA had not shown much gumption in standing up to Mr. Ayers, perhaps this time AOA really would hold Mr. Ayers to the contract and not allow him to exchange the animals a *third* time. Therefore, the waiver of warranty language was neither “shocking to the conscience,” “monstrously harsh,” or “exceedingly callous.” Furthermore, AOA only agreed to enter into the second exchange contract in reliance on the letter that Mr. Ayers had sent to AOA expressly accepting all risk of Super Nova’s infertility:

I would like to exchange Atotonilco NT 1019 TBS back for Super

Nova D550. I know that I will be losing a great deal of money because Atotonilco is worth twice as much as Super Nova, but I need a female. I know that she is not breed and may never be breed, but that a chance I'm willing to take.

CP 138. If Mr. Ayers was accepting all risk of Super Nova's infertility, then how can waiver of warranty language – where AOA was expressly *not* warranting that Super Nova would be breedable – be unconscionable?

It is not clear why Mr. Ayers is choosing to argue this issue. He may have hoped to convince this Court that both exchange contracts in their entirety were unconscionable, and hoped that this Court would throw them out, leaving the arbitration provision in the original sales contract standing as the operative dispute resolution clause. However, even if Mr. Ayers *could* show that the waiver of warranty language were unconscionable, he has not alleged that any other term in either contract is unconscionable, including the dispute resolution clauses! Therefore, even if this Court were to strike the waiver of warranty provisions in both exchange contracts, the dispute resolution clauses would stand. The arbitrator would still lack subject matter jurisdiction, pursuant to the second exchange contract. Moreover, the arbitrator made sufficient errors of law in both his original award *and* the amended award that AOA has shown statutory grounds for vacation, even if this Court deems that the

arbitrator did not err as to unconscionability.

F. This Appeal is Not Frivolous

In his conclusion, Mr. Ayers argues that this appeal is frivolous and seeks sanctions under RAP 18.9(a). This appeal is not frivolous. “An appeal is frivolous ‘if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.’” In re Marriage of Zier, 136 Wn. App. 40, 49, 147 P.3d 624 (2006). AOA has made good legal arguments based on binding caselaw and supported with copious citations to the record, and this Court should overrule the Trial Court and vacate the arbitrator’s award for his lack of subject matter jurisdiction and the errors of law on the face of the award. Mr. Ayers, on the other hand, chose not to respond to AOA’s arguments but raised issues not before this Court. This Court should find his response frivolous, and should impose sanctions on Mr. Ayers pursuant to RAP 18.9(a).

III. CONCLUSION

In AOA’s opening brief, AOA made good legal arguments, to none of which Mr. Ayers responded. Mr. Ayers raised his own issues, tangential to the issues on appeal, but to all of which AOA has replied.

Katy Kuchno certifies and declares as follows:

1. I am a legal assistant at Cushman Law Offices, P.S. I am over the age of 18, and not a party to this action.

2. On August 25th, 2008, I sent via ABC Legal Messengers, for next day business delivery/filing, Appellant's Opening Brief to:

Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402

3. On August 25th, 2008, I sent via certified U.S. Mail, a copy of the above-described document to:

James Ayers
P.O. Box 322
Penrose, Colorado 81240

DATED at Olympia, Washington this 25th day of August, 2008.

Katy Kuchno
Katy Kuchno

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COURT OF APPEALS
DIVISION II
08 AUG 26 PM 1:59
STATE OF WASHINGTON
BY [Signature]
DEPUTY