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THURSTON COUNTY, WASH.

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**SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY**

CHARLES KELLOGG, dba BRITISH
NORTHWEST LAND-ROVER
COMPANY, a sole proprietorship,

Plaintiff,

v.

JOEL COMER and "JANE DOE"
COMER, husband and wife,

Defendants.

No.

08-2-01716-5

COMPLAINT FOR MONEY DUE

COMES NOW Plaintiff, through its attorneys Jon E. Cushman and Cushman Law Offices, P.S.,
and for its Complaint against Defendants, states and alleges as follows:

1. Plaintiff Charles Kellogg, dba British Northwest Land-Rover Company, is a sole
proprietorship and has performed all prerequisites necessary to bring this lawsuit. Charles Kellogg
resides in Thurston County, Washington. British Northwest Land-Rover Company is located in and
conducts business in Thurston County.

2. Defendants Joel Comer and "Jane Doe" Comer are husband and wife and residents of
California. All acts performed by Joel Comer were done for the benefit of the marital community. Joel
Comer conducted business with Charles Kellogg, dba British Northwest Land-Rover Company in
Thurston County, Washington.

3. Venue and jurisdiction are proper before this Court.

4. On November 26, 2007, British Northwest Land-Rover Company entered into a contract

1 to repair a Long wheel base 1978 Land-Rover, V.I.N. # LBCAH2AA119362, a vehicle owned by Mr.
2 Comer.

3 5. Mr. Comer has failed to pay for all the repairs. The total amount that is owed is
4 \$8,063.17.

5 WHEREFORE having stated its claims and causes of action, Plaintiff prays for the following
6 relief:

7 1. For a judgment against Defendants Joel Comer and "Jane Doe" Comer in the amount of
8 \$8,083.17 plus pre-judgement and post-judgement interest;

9 3. For attorneys fees and costs; and

10 4. For such other and further relief as this Court deems just and equitable.

11 DATED this 21st day of July, 2008.

12 CUSHMAN LAW OFFICES, P.S.

13
14 By 

15 Jon E. Cushman, WSBA #16547

16 Ryan W. Gunn, WSBA #39312

17 Attorneys for Plaintiff
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THURSTON COUNTY, WASH.
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6 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

7 CHARLES KELLOGG, dba BRITISH
8 NORTHWEST LAND-ROVER COMPANY, a
9 sole proprietorship,

Plaintiff,

10 vs.

11 JOEL COMER and "JANE DOE" COMER,
12 husband and wife,

13 Defendants.
14

NO. 08-2-01716-5

FIRST AMENDED ANSWER,
AFFIRMATIVE DEFENSES, AND
COUNTERCLAIMS

15 Defendants Joel and "Jane Doe" Comer ("Comer"), by and through their attorneys of
16 record, Eisenhower & Carlson, PLLC, answer plaintiff's Complaint for Money Due
17 ("Complaint"), assert affirmative defenses, and allege counterclaims as follows:

18 **I. ANSWER**

19 1. In response to paragraph 1 of plaintiff's Complaint, Comer is without sufficient
20 information to admit or deny the allegations in the first 2 sentences. As for the last sentence,
21 while plaintiff may conduct some of his business in Thurston County, Washington, based on his
22 statements and website plaintiff conducts business well beyond the State of Washington.

23 2. In response to paragraph 2 of plaintiff's Complaint, Comer admits that he is
24 married and denies the remaining allegations.

25 3. Paragraph 3 of plaintiff's Complaint is a legal conclusion to which no response is
26 required. To the extent a response is required, Comer denies the allegations.

AMENDED ANSWER, AFFIRMATIVE DEFENSES
AND COUNTERCLAIMS - 1

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EISENHOWER & CARLSON, PLLC
Washington Mutual Tower
1201 Third Avenue, Suite 1650
Seattle, WA 98101
Tel. 206.382.1830
Fax 206.382.1920

1 12. Plaintiff's claims may be barred in whole or in part due to discharge.

2 13. Comer reserves the right to amend, add, or remove affirmative defenses as
3 discovery unfolds. Additionally, Comer reserves the right to amend and supplement this
4 Answer.

5 **III. COUNTERCLAIMS**

6 **A. FACTS**

7 1. Counterclaimant Joel Comer ("Mr. Comer") is an individual who resides in
8 Kentfield, California.

9 2. Mr. Comer owns a 1978 Land Rover (the "Land Rover"). In 2007, Mr. Comer
10 decided to refurbish the Land Rover.

11 3. Mr. Comer searched the Internet for businesses that specialize in refurbishing and
12 servicing Land Rovers. Mr. Comer's search led him to British Northwest Land-Rover Company
13 ("British Northwest Land-Rover"), which is the business trade name for the business owned and
14 operated by Charles D. Kellogg.

15 4. British Northwest Land-Rover business is located in Olympia, Thurston County,
16 Washington.

17 5. British Northwest Land-Rover's website proclaimed that Kellogg is an expert in
18 refurbishing and servicing Land Rovers and actively solicited business from would-be
19 consumers such as Mr. Comer. Among other things, British Northwest Land-Rover's website
20 represents that British Northwest Land-Rover "save[s] prospective owners from headache and
21 disaster.....all over the United States, Canada, and Central America."

22 6. Mr. Comer communicated with British Northwest Land-Rover via telephone and
23 email regarding the potential scope of work and cost associated with British Northwest Land-
24 Rover refurbishing the Land Rover. Kellogg advised Mr. Comer that he and his company were
25 "the best there is in the United States" for handling this type of work.
26

1 7. Mr. Comer's paramount concern was the Land Rover's engine. British Northwest
2 Land-Rover advised Mr. Comer that it would inspect the engine and advise Mr. Comer regarding
3 the need for a complete overhaul as opposed to the installation of a new engine—a less costly
4 option.

5 8. In November 2007, British Northwest Land-Rover emailed a written
6 "Authorization" to Mr. Comer in California. The Authorization, prepared by British Northwest
7 Land-Rover, estimated costs at \$6,000.00 - \$8,000.00 based on preliminary findings but
8 qualified such estimate as a "wild guess". The Authorization stated that Mr. Comer was relying
9 on British Northwest Land-Rover's "expertise and judgment" to bring the Land Rover up to
10 "very good operating condition" and "first-class operating condition". The Authorization ends
11 with a representation that as of November 18, 2007, the estimate is now "considered unrealistic
12 and will certainly need to be revised upwards. . ." British Northwest Land-Rover never provided
13 an updated written estimate.

14 9. Based on British Northwest Land-Rover's representations and warranties
15 regarding its experience, expertise, and the scope of his proposed inspection, Mr. Comer
16 executed the Authorization. Thereafter, with British Northwest Land-Rover's referral and
17 assistance, Mr. Comer shipped the Land Rover to British Northwest Land-Rover in Olympia,
18 Washington.

19 10. British Northwest Land-Rover held the Land Rover for more than three months,
20 invoicing Mr. Comer nine times for services allegedly rendered and parts allegedly installed.
21 British Northwest Land-Rover delivered the invoices to Mr. Comer in California, and Mr. Comer
22 timely paid the invoices, often returning a check via Federal Express in order to expedite
23 payment. In all, Mr. Comer paid British Northwest Land-Rover approximately \$35,000.00
24 pursuant to invoice.

25 11. By late February 2008, British Northwest Land-Rover claimed to have completed
26 refurbishment of the Land Rover. On or about March 1, 2008, Mr. Comer took receipt of the

1 Land Rover in California. Mr. Comer immediately began experiencing problems with the Land
2 Rover, including, but not limited to, oil and gas leaks.

3 12. British Northwest Land-Rover referred Mr. Comer to another Land Rover
4 specialist named Auto Europa British & European Repair ("Auto Europa"), located in San
5 Francisco, California.

6 13. A mechanic at Auto Europa inspected Mr. Comer's Land Rover, reviewed British
7 Northwest Land-Rover's invoices, and advised Mr. Comer that much of the work for which Mr.
8 Comer had been billed and had paid was either not done or was poorly performed. In fact, Auto
9 Europa advised that some of British Northwest Land-Rover's work caused additional damage to
10 the Land Rover.

11 14. Mr. Comer has incurred costs in excess of \$15,000.00 to complete and/or correct
12 the work for which he paid British Northwest Land-Rover. To date, in spite of Mr. Comer's
13 request, British Northwest Land-Rover has refused to refund any of the money paid pursuant to
14 the above-referenced invoices.

15 **B. FIRST COUNTERCLAIM: FRAUD IN THE INDUCEMENT**

16 15. Mr. Comer realleges paragraphs 1 through 14.

17 16. British Northwest Land-Rover made oral and written representations to Mr.
18 Comer regarding its experience, expertise, and the scope of work likely necessary to refurbish
19 the Land Rover in order to induce Mr. Comer to sign the Authorization.

20 17. British Northwest Land-Rover knew—in fact encouraged—Mr. Comer to rely on
21 such representations while knowing the falsity or ignorance of such representations' truth.

22 18. British Northwest Land-Rover made such representations intending that Mr.
23 Comer rely thereupon and execute the Authorization.

24 19. Mr. Comer relied upon British Northwest Land-Rover's representations, unaware
25 of their falsity. As a consumer with little, if any, expertise in the refurbishment of Land Rovers,
26 Mr. Comer was entitled to rely upon British Northwest Land-Rover's representations.

AMENDED ANSWER, AFFIRMATIVE DEFENSES
AND COUNTERCLAIMS - 5

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1 20. As a result of his reliance upon British Northwest Land-Rover's false
2 representations, Mr. Comer executed the Authorization and was consequently damaged thereby
3 in an amount to be proven at trial.

4 **C. SECOND COUNTERCLAIM: NEGLIGENCE**

5 21. Mr. Comer realleges paragraph 1 through 20.

6 22. British Northwest Land-Rover had a duty to Comer to use ordinary care and to
7 perform its services in a manner in which an ordinary prudent person engaged in repair of
8 automobiles would have performed the services under the same or similar circumstances.

9 23. British Northwest Land-Rover failed to perform its services in a manner in which
10 an ordinary prudent auto-repair person would when British Northwest Land-Rover failed to
11 perform certain services for which it billed (and for which Mr. Comer paid), when Kellogg
12 performed other services poorly and in a manner inconsistent with industry standards, and when
13 British Northwest Land-Rover performed services that caused damage to the Land Rover.

14 24. British Northwest Land-Rover's negligence proximately caused damages to Mr.
15 Comer in an amount to be proven at trial including, but not limited to, costs incurred in repairing
16 British Northwest Land-Rover's defective work and performing services for which British
17 Northwest Land-Rover billed but did not perform.

18 **D. THIRD COUNTERCLAIM: PER SE VIOLATION OF THE CONSUMER**
19 **PROTECTION ACT, RCW 19.86**

20 25. Mr. Comer realleges paragraphs 1 through 24.

21 26. British Northwest Land-Rover operates an automotive repair facility as defined in
22 the Automotive Repair Act, Chapter 46.71 RCW ("ARA").

23 27. British Northwest Land-Rover engaged in unlawful acts or practices under the
24 ARA by failing to provide a true estimate of costs and services before commencing work, by
25 failing to obtain Mr. Comer's consent to exceed the initial written estimate before commencing
26 work, and/or by retaining Mr. Comer's payment for services that British Northwest Land-Rover
did not actually perform.

AMENDED ANSWER, AFFIRMATIVE DEFENSES
AND COUNTERCLAIMS - 6

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1 28. By violating the ARA, British Northwest Land-Rover committed a *per se*
2 violation of the Washington Consumer Protection Act, Chapter 19.86 RCW ("CPA").

3 29. Under the CPA, Mr. Comer is entitled to damages resulting from British
4 Northwest Land-Rover's violation of the CPA in an amount to be proven at trial, treble damages
5 up to \$10,000.00, and his reasonable attorney's fees and costs incurred in prosecuting this claim.

6 **E. FOURTH COUNTERCLAIM: VIOLATION OF THE CONSUMER**
7 **PROTECTION ACT, RCW 19.86**

8 30. Mr. Comer realleges Paragraphs 1 through 29.

9 31. British Northwest Land-Rover advertises that its restorations demonstrate
10 meticulous workmanship and the highest standards available.

11 32. By failing to perform all of the services contracted for and/or by performing
12 services in a manner that damaged the Land Rover, British Northwest Land-Rover engaged in an
13 unfair or deceptive act or practice.

14 33. British Northwest Land-Rover's unfair or deceptive act or practice impacts the
15 public interest.

16 34. British Northwest Land-Rover's unfair or deceptive act or practice occurred in
17 trade or commerce.

18 35. British Northwest Land-Rover's unfair or deceptive act or practice directly and
19 proximately caused damage to Mr. Comer in an amount to be proven at trial.

20 36. Under the CPA, in addition to damages, Mr. Comer is entitled to an award of
21 treble damages up to \$10,000.00, plus his reasonable attorney's fees and costs incurred in
22 prosecuting this claim.

23 **F. FIFTH COUNTERCLAIM: BREACH OF CONTRACT**

24 37. Mr. Comer realleges paragraphs 1 through 36.

25 38. British Northwest Land-Rover contracted to perform certain services and to install
26 certain parts on the Land Rover in exchange for Mr. Comer's pledge to pay for such services and
parts.

AMENDED ANSWER, AFFIRMATIVE DEFENSES
AND COUNTERCLAIMS - 7

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Fax: 206 382 1920

1 39. Mr. Comer timely paid British Northwest Land-Rover approximately \$35,000.00
2 for services and parts allegedly provided and installed.

3 40. Upon receipt of the Land Rover, Mr. Comer determined that British Northwest
4 Land-Rover had billed for (and Mr. Comer had paid for) services not performed and parts not
5 installed.

6 41. As a direct result of British Northwest Land-Rover's breach of contract, Mr.
7 Comer has been damaged in an amount to be proven at trial.

8 **IV. PRAYER FOR RELIEF**

9 WHEREFORE, having fully answered plaintiff's Complaint, asserted affirmative
10 defenses, and alleged counterclaims, Comer requests the following relief:

11 1. An Order dismissing British Northwest Land-Rover's claims with prejudice and
12 without costs;

13 2. A judgment against Charles D. Kellogg, individually, and d/b/a British Northwest
14 Land-Rover Company, for fraud in the inducement, negligence, per se violation of the Consumer
15 Protection Act, violation of the Consumer Protection Act, and breach of contract.

16 3. An award of Comer's attorney's fees and costs incurred in defending against
17 British Northwest Land-Rover's Complaint pursuant to RCW 4.84.185 and/or CR 11, or as may
18 be allowed by other statute, contract or equity;

19 4. An award of treble damages up to \$10,000.00 pursuant to the Consumer
20 Protection Act; and

21 5. For such further relief as this Court deems equitable and just.

22 DATED this 12th day of February, 2009.

23 EISENHOWER & CARLSON, PLLC

24
25 By: 

26 Mike S. DeLeo, WSBA #22037
L. Clay Selby, WSBA #26049
Attorneys for Defendants Comer

AMENDED ANSWER, AFFIRMATIVE DEFENSES
AND COUNTERCLAIMS - 8

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VERIFICATION

Joel Comer declares and states as follows:

I am one of the defendants and the counterclaimant herein. I have read the foregoing First Amended Answer, Affirmative Defenses, and Counterclaims, know the contents thereof, and believe the same to be true.

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

DATED at KENTFIELD, California this 5~~th~~ day of February, 2009.


Joel Comer

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The Honorable Richard D. Hicks

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

CHARLES KELLOGG, dba BRITISH
NORTHWEST LAND-ROVER COMPANY, a
sole proprietorship,

Plaintiff,

vs.

JOEL COMER and "JANE DOE" COMER,
husband and wife,

Defendants.

NO. 08-2-01716-5

AFFIDAVIT OF FACSIMILE
SIGNATURE

STATE OF WASHINGTON)
County of Pierce) ss.

MARSHA J. REIDBURN, being first duly sworn upon oath, deposes and says:

1. I am a legal assistant at the law firm of Eisenhower & Carlson, PLLC and make
this affidavit pursuant to GR 17(a)(2), based upon my own personal knowledge and review of
this firm's records and files.

2. On Thursday, February 5, 2009, I received via facsimile the executed page nine
for the foregoing **Amended Answer, Affirmative Defenses and Counterclaims** from Joel
Comer.

3. I believe the signature of Joel Comer is a true and correct signature pursuant to

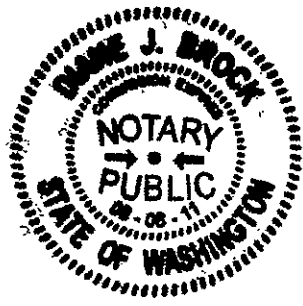
AFFIDAVIT OF FACSIMILE SIGNATURE - 1

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the review of my files.

Marsha J. Reidburn
MARSHA J. REIDBURN

SUBSCRIBED AND SWORN to before me on this 5th day of February, 2009.



Diane J. Brock
Name: Diane J. Brock
Notary Public in and for the State of
Washington, residing at: TACOMA
My Appointment Expires: 8-8-11

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THURSTON COUNTY, WASH.
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EXPEDITE
 Hearing is set:
Date:/Time:
Calendar/Judge: Civil/Hicks

**SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY**
CHARLES KELLOGG d/b/a BRITISH
NORTHWEST LAND-ROVER COMPANY, a
sole proprietorship
Plaintiff,

vs.

JOEL COMER and "JANE DOE" COMER,
husband and wife,
Defendants.

NO. 08-2-01716-5

ANSWER TO COUNTERCLAIM

Plaintiff Charles Kellogg d/b/a British Northwest Land-Rover Company, by and through his attorney Ben D. Cushman of Cushman Law Offices, P.S., answers Defendants' Counterclaim as follows:

I. RESPONSE TO DEFENDANTS' ANSWER

In response, Plaintiff realleges the allegations in his Complaint.

II. ANSWER TO AFFIRMATIVE DEFENSES

As to Defendants' Affirmative Defenses, Plaintiff denies them all.

III. ANSWER TO COUNTERCLAIMS

- 1. Admit.
- 2. Admit.
- 3. Deny for lack of knowledge.

ANSWER TO COUNTERCLAIM - 1

CUSHMAN
LAW OFFICES, P.S.
ATTORNEYS AT LAW

924 CAPITOL WAY SOUTH
OLYMPIA, WASHINGTON 98501
(360) 534-9183 FAX: (360) 956-9795

- 1 4. Admit.
- 2 5. Admit.
- 3 6. Admit contact; Deny balance for lack of knowledge.
- 4 7. Deny.
- 5 8. Admit quoted language; Deny description of presentation and characterization of
- 6 document.
- 7
- 8 9. Deny reliance; Admit shipping.
- 9 10. Deny full payment; Admit balance.
- 10 11. Admit return of vehicle; Deny balance.
- 11 12. Admit referral for inspection purposes.
- 12 13. Deny for lack of knowledge.
- 13 14. Deny.
- 14 15. Reallege the answers above
- 15 16. Deny.
- 16 17. Deny.
- 17 18. Deny.
- 18 19. Deny.
- 19 20. Deny.
- 20 21. Reallege the answers above.
- 21 22. Deny undue economic loss rule.
- 22 23. Deny.
- 23 24. Deny.
- 24 25. Reallege the answers above.
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- 26. Admit.
- 27. Deny.
- 28. Deny.
- 29. Deny.
- 30. Reallege the answers above.
- 31. Admit.
- 32. Deny.
- 33. Deny.
- 34. Deny.
- 35. Deny.
- 36. Deny.
- 37. Reallege the answers above.
- 38. Admit.
- 39. Deny full and timely payment.
- 40. Deny.
- 41. Deny.

As to Defendants' Prayer for Relief, Plaintiff denies it in its entirety.

AFFIRMATIVE DEFENSES

- 1. Failure to state a claim in tort under the economic loss rule.
- 2. Defendants' claims are barred by the Doctrine of Laches.
- 3. Speculation of evidence.
- 4. Offset for breach of Contract.
- 5. Fault of nonparty/injury by nonparty.

- 1 6. Waiver of warranty and other claims by unauthorized work.
- 2 7. Failure to satisfy conditions precedent to contract claims.
- 3 8. Failure to mitigate.
- 4 9. Self-inflicted injury.

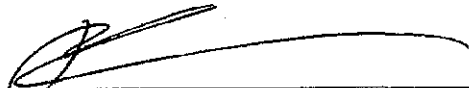
5 PRAYER FOR RELIEF

6 Plaintiff prays for the following relief:

- 7 1. The relief sought in the Complaint in this matter.
- 8 2. For dismissal of Defendants' counterclaims.
- 9 3. For fees and costs as allowed under the Contract and pursuant to RCW 4.84.250 - .300.
- 10 4. For such other and further relief as may be granted by the Court.

11 DATED this 21st day of May 2009.

12 CUSHMAN LAW OFFICES, P.S.

13 

14 Ben D. Cushman, WSBA # 26358
15 Attorney for Plaintiff