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No. 99715-2

**SUPREME COURT
OF THE STATE OF WASHINGTON**

HTP, INC.,
a Washington corporation,

Appellant,

v.

JC AVIATION INVESTMENTS, LLC,
a Washington limited liability company; and

HYTECH POWER, LLC,
a Washington limited liability company,

Respondents.

**ANSWER OF RESPONDENT HYTECH POWER, LLC
TO PETITION FOR REVIEW**

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I. INTRODUCTION

Respondent HyTech Power, LLC (“HyTech”) respectfully submits that the Petition for Review filed by Petitioner HTP, Inc. (“HTP”) should be denied. HTP has failed to meet the standard for acceptance of review under RAP 13.4(b).

HyTech is a Washington limited liability company. It has two members, HTP and Respondent JC Aviation Investments, LLC (“JCAI”). It is managed by a five-member board of directors, two of whom are appointed by HTP and three of whom are appointed by JCAI. Since the spring of 2020, HyTech has had no employees and no active business operations. It is insolvent and unable to pay its creditors. JCAI is its largest creditor.

On May 12, 2020, JCAI filed its petition for appointment of a general receiver for HyTech (pursuant to RCW 7.60.025) and for judicial dissolution (pursuant to RCW 25.15.274).

On June 16, the superior court denied HTP’s motion to compel arbitration (CP 1626). That same day, the superior court granted HyTech’s motion for a preliminary injunction against HTP (and others), enjoining it from engaging in unauthorized activities on HyTech’s behalf (the “Preliminary Injunction”) (CP 1631).

Thereafter, HTP (1) appealed the order denying its motion to compel arbitration and (2) sought discretionary review of the Preliminary Injunction.

On March 1, 2021, the Court of Appeals issued its Unpublished Opinion (“Opinion”), which is the subject of HTP’s Petition (*see* Petition, Appendix A). The Opinion consists of two essential parts, as reflected in the last sentence: “we [1] affirm the denial of the motion to compel arbitration and [2] deny discretionary review of other issues.” Opinion, p. 20.

This Answer addresses those aspects of the Opinion, and of HTP’s Petition, relevant to the Preliminary Injunction. Specifically, this Answer addresses “part 1” of the Opinion as it relates to the Court of Appeals’ ruling that HyTech was not required to seek injunctive relief in arbitration and addresses “part 2” of the Opinion as it relates to the Court of Appeals’ ruling that HTP otherwise failed to satisfy the RAP 2.3(b) requirements for discretionary review of the Preliminary Injunction. Simply put, the Preliminary Injunction should remain in force and HTP has offered no viable grounds for this Court to revisit its issuance.

On all other issues, HyTech defers to JCAI’s Answer and adopts JCAI’s reasoning and analysis as its own.

This Court should decline HTP’s invitation to review the Court of Appeals’ March 1, 2021 Opinion because HTP has failed to meet the threshold requirements for acceptance of review set forth in RAP 13.4(b).

II. RESTATEMENT OF THE ISSUE

Whether HTP has failed to meet the threshold requirements of RAP 13.4(b) governing this Court’s acceptance of discretionary review

because HTP has not shown that the Court of Appeals' Opinion, as it relates to the superior court's Preliminary Injunction:

- (1) is in conflict with a decision of the Supreme Court;
- (2) is in conflict with a published decision of the Court of Appeals;
- (3) involves a significant question of law under either the state or federal constitution; or
- (4) involves an issue of substantial public interest.

III. STATEMENT OF THE CASE

In an effort to minimize duplication and streamline the Court's consideration of the issues, HyTech hereby adopts and incorporates by this reference the Facts set forth in JCAI's Answer, supplemented by the following chronology of key events:

- **March 6, 2020** – Pursuant to Action by Written Consent, HyTech board of directors suspends employment of all employees until such time HyTech obtained sufficient resources to resume operations (CP 1201)
- **April 9** – Recognizing that a third party had funded continued employment of three HyTech employees – without approval of the HyTech board – the HyTech board unanimously resolves to retroactively reinstate the employment of those three employees from March 6 to April 17, when they would again be terminated (CP 1202)
- **May 12** – JCAI files its Petition for Order Appointing General Receiver and Decree of Dissolution (CP 1)
- **May 12** – Henry Dean, HTP's designated HyTech board member, informs the HyTech board that HTP was funding

efforts to set up beta tests of HyTech equipment and technology with a third party, notwithstanding the board's suspension of employment of all HyTech employees. Mr. Dean advised that he and HTP would continue to pursue these opportunities "even if you sue me" (CP 1202-3)

- **May 20** – At a duly-called HyTech board meeting, Mr. Dean states that beta testing of HyTech's equipment and technology was ongoing with a third party in Texas, in violation of HyTech's board decisions and the LLC Agreement (CP 1203)
- **May 27** – HyTech files the Motion of HyTech Power, LLC, for Temporary Restraining Order and Setting Hearing on Preliminary Injunction (CP 672)
- **May 29** – HTP files its Motion to Compel Arbitration (CP 798), amended on June 1 (CP 937)
- **June 3** – HyTech files the Motion of HyTech Power, LLC for Preliminary Injunction (CP 1182)
- **June 4** – Superior court commissioner issues TRO (CP 1312)
- **June 9** – HyTech files its Answer to Petition for Order Appointing General Receiver and Decree of Dissolution and Crossclaim Against Co-Defendant HTP, Inc., for Injunctive Relief Pursuant to RCW 7.40.020 (CP 1360)
- **June 16** – Superior court issues Order Denying HTP, Inc's Motion to Compel Arbitration (CP 1626)

On **June 16**, the superior court also entered the Preliminary Injunction (CP 1631). As reflected therein, the superior court found that HTP and Mr. Dean (one of the HTP-appointed HyTech board members), had engaged in, and threatened to continue engaging in, impermissible *ultra vires* acts, usurping the HyTech board's authority to manage the

business. On that basis, the superior court enjoined any such further activities:

8. HTP and Dean have effectively usurped the authority of HyTech's board of directors by conducting HyTech's business operations after the board suspended operations. HTP and Dean will continue to conduct HyTech's business operations unless enjoined from doing so by process of law.
9. There have been three prior unsuccessful or inconclusive beta tests in the field. Continued beta testing before HyTech resolves software issues may undermine and damage HyTech's reputation and business prospects.

...

NOW, THEREFORE, it is hereby ORDERED as follows:

1. HTP, Inc., its appointee to the HyTech board of directors Henry Dean, and all affiliates, employees, agents, and others, are restrained and enjoined from conducting HyTech's business operations or using any of HyTech Power, LLC's products, assets, contact lists, and any other proprietary information in any way.

(CP 1632-3.)

On **October 5**, HTP (1) appealed the superior court's order denying its motion to compel arbitration and (2) sought discretionary review of the Preliminary Injunction.

On **March 1, 2021**, the Court of Appeals issued the Opinion that is the subject of HTP's Petition (Petition, Appendix A).

IV. ARGUMENT

The Court should reject the Petition for Review, including as it relates to HTP's challenges to the Preliminary Injunction.

In its Opinion, the Court of Appeals (1) affirmed the superior court's denial of HTP's motion to compel arbitration, specifically ruling that Section 12.13(e) of HyTech's operating agreement authorized HyTech to seek injunctive relief in court and (2) denied discretionary review of all of HTP's other challenges to the Preliminary Injunction.

HTP's Petition fails to establish that any aspect of the Court of Appeals' Opinion relating to the Preliminary Injunction warrants this Court's further attention. In particular, HTP has not met the requirements for this Court to accept review, as set forth in RAP 13.4(b):

A petition for review will be accepted by the Supreme Court only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Because none of these considerations apply here, review should be denied.

A. The Court of Appeals’ Ruling that Section 12.13(e) of HyTech’s Operating Agreement Permitted HyTech to Seek Injunctive Relief in Court Does Not Implicate Any of the RAP 13.4 Considerations

The Court of Appeals ruled that the HyTech operating agreement permitted HyTech to seek injunctive relief from the superior court and did not require that HyTech could only seek such relief in arbitration. The court’s analysis turns on the specific language in Section 12.13(e) of the HyTech operating agreement, which allows a party the option “in its sole discretion” to seek injunctive relief either from a judge or from an arbitrator. HTP’s Petition ignores the language of Section 12.13(e) entirely. Having failed to address the Court of Appeals’ actual analysis of the language in Section 12.13(e), HTP also fails to identify any of the considerations in RAP 13.4 that would permit review, or reversal, of the Court of Appeals’ construction of that provision.

Section 12.13(e) of the HyTech operating agreement provides that “[i]n lieu of seeking injunctive relief before a court, either party may, in its sole discretion, seek and obtain an injunction from the arbitrator.”

CP 164. The Court of Appeals concluded that this provision permitted HyTech to seek injunctive relief from the superior court or an arbitrator, “in its sole discretion”:

Read to give each term meaning, section 12.13(e) allows each party the choice, “in its sole discretion,” to “seek and obtain an injunction from the arbitrator” instead of “seeking injunctive relief before a court.” Although section 12.13(c) provides that an arbitrator “shall have the same authority to award remedies and damages as provided to a judge and/or jury,” that grant of authority to an arbitrator does not itself restrict the parties to injunctive relief from an arbitrator only.

Allowing either party the discretion to seek injunctive relief from an arbitrator, who has clear authority to grant an injunction, does not create ambiguity or uncertainty about the scope of arbitration. Thus, the court did not err by concluding the LLC agreement did not compel arbitration of HyTech's request for injunctive relief.

Opinion, pp. 14-15.

The Court of Appeals' construction of the contractual language in Section 12.13(e) of HyTech's operating agreement does not conflict with a decision of the Court of Appeals or a decision of this Court.

RAP 13.4(b)(1)-(2). HTP offers no contrary argument.

The Court of Appeals' construction of the contractual language in Section 12.13(e) also does not involve a significant constitutional question or an issue of substantial public interest. RAP 13.4(b)(3)-(4). Again, HTP offers no contrary argument.

Sophisticated parties are entitled to reach a private agreement amongst themselves that allows for any request for injunctive relief to be submitted to a judge or an arbitrator. There is no broader principle at stake here that merits this Court's attention and resources. For these reasons, and those articulated by JCAI in its Answer, this Court should not accept review of the Court of Appeals' decision to affirm the superior court's order denying HTP's motion to compel arbitration.

B. The Court of Appeals' Denial of HTP's Request for Discretionary Review of the Preliminary Injunction Does Not Implicate Any of the RAP 13.4 Considerations

While a superior court's denial of a motion to compel arbitration is subject to an appeal as a matter of right under RAP 2.2, the issuance of a

preliminary injunction is subject only to discretionary review under RAP 2.3. See, e.g., *League of Women Voters of Washington v. King County Records, Elections & Licensing Servs. Div.*, 133 Wn. App. 374, 384, 135 P.3d 985, 990 (2006), *as modified* (July 26, 2006) (preliminary injunction is an interlocutory order).

Having determined that HyTech was within its contractual rights to seek injunctive relief in court (rather than in arbitration), the Court of Appeals proceeded to deny HTP's request for discretionary review of all "other issues" relating to the superior court's issuance of the Preliminary Injunction: "Because HTP fails to satisfy the standards for discretionary review, we deny review of other issues." Opinion, p. 1.

In its Petition, HTP raises three arguments why the Court of Appeals should have accepted discretionary review of the Preliminary Injunction. HyTech addresses each in the following paragraphs; none satisfies the standard for accepting review set forth in RAP 13.4(b).

First, HTP argues that the Court of Appeals "never addressed whether the trial court was required to stay the proceedings once HTP requested the dispute by [sic] compelled to arbitration." Petition, p. 16. However, the Court of Appeals did address this issue, concluding that HTP "fails to demonstrate a reviewable error" (Opinion, p. 15) and therefore "declines to review this alleged error" (Opinion, p. 16). HTP does not explain how this aspect of the Opinion involves any of the considerations listed in RAP 13.4(b).

Second, HTP argues that the Court of Appeals “never addressed whether a state trial court should defer to an arbitrator any decisions regarding provisional remedies when a claim is arbitrable.” Petition, p. 17. In support, HTP cites to *Simula, Inc. v. Autolive, Inc.*, 175 F.3d 716 (9th Cir. 1999) and its progeny. Petition, pp. 17-18.

In *Simula*, the Ninth Circuit found that the District Court did not abuse its discretion when it denied a motion for a preliminary injunction after granting a motion to compel arbitration. *Simula*, 175 F.3d at 726; *see also Greenpoint Technologies, Inc. v. Peridot Associated S.A.*, C08-1828 RSM, 2009 WL 674630, at *3 (W.D. Wash. Mar. 11, 2009) (“once a court determines that all disputes are subject to arbitration pursuant to a binding arbitration clause, it is improper for a district court to grant preliminary relief”) (citing *Simula*). However, the operative facts are quite different here, where the superior court issued the Preliminary Injunction after denying HTP’s motion to compel arbitration. *I.e.*, this is not a situation in which the court “determine[d] that all disputes are subject to arbitration” but then nevertheless proceeded to grant preliminary relief. Moreover, even if *Simula* supported HTP’s position and conflicted with the Court of Appeals’ analysis (it does not), the existence of such federal caselaw would not qualify as one of the gatekeeping considerations governing this Court’s acceptance of review under RAP 13.4(b)(1)-(4).

Third, HTP argues that the Court of Appeals never considered whether the superior court had subject matter jurisdiction to issue the Preliminary Injunction. Petition, p. 19. While HTP fails to identify where

in the record it raised this specific issue, in its Petition, HTP cites a few older out-of-state cases for the proposition that a party cannot obtain injunctive relief against a co-defendant without first filing a cross-claim. *Id.* As with the last argument discussed above, HTP's perceived conflict between the Opinion and the cited non-Washington authority does not trigger RAP 13.4(b). But more importantly, the fatal flaw with this argument is that the superior court issued the Preliminary Injunction on June 16, 2020 (CP 1626), one week after HyTech filed its cross-claim against HTP, on June 9 (CP 1360). Thus, while HTP appears to imply that the requirements of RAP 13.4(b)(3)-(4) might be met because "[s]ubject matter jurisdiction is constitutional and a matter that is of great public importance," the actual chronology of events confirms that the superior court did have jurisdiction at the time it issued the Preliminary Injunction. And that is true even under the out-of-state authorities offered by HTP.

Accordingly, HTP has failed to identify any material consideration warranting review under RAP 13.4(b).

V. CONCLUSION

For the foregoing reasons, HyTech respectfully submits that this Court should decline to accept review of the Court of Appeals' March 1, 2021 Opinion or otherwise disturb the Preliminary Injunction that remains in place for HyTech's protection.

DATED this 10th day of June, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury according to the laws of the State of Washington that on this date she caused to be served a copy of the foregoing ANSWER of respondent hytech power, llc to PETITION FOR REVIEW *via Electronic Mail* on the following:

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