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SUPREME COURT OF THE STATE OF WASHINGTON

COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION III

102126-7

Spokane County Superior Court Case No. 20-2-02570-32

BIOCHRON, INC., et al,

Appellant/Petitioner,

v.

BLUE ROOTS, LLC,

Respondent.

APPELLANT/PETITIONER BIOCHRON, INC.'S PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Biochron, Inc., ("Biochron") asks this Court to accept review of the decision designated in Part II.

II. COURT OF APPEALS' DECISION

On May 25, 2023, the court of appeals held that "*mostly play[ing] defense*" for fifteen months after losing a motion to compel arbitration does not constitute a waiver of the right to arbitrate. Biochron, Inc. v. Blue Roots, LLC, No. 38834-4-III, 2023 WL 3638293, 529 P.3d 464, 473 (Wn. Ct. App. May 25, 2023).

III. ISSUE PRESENTED FOR REVIEW

"*Simply put, we hold that a party waives a right to arbitrate if it elects to litigate instead of arbitrate.*" Jeoung Lee v. Evergreen Hosp. Med. Ctr., 195 Wn.2d 699, 705, 464 P.3d 209, 213 (2020) (quoting Otis Hous. Ass'n, Inc. v. Ha, 165 Wn.2d 582, 588, 201 P.3d 309, 312 (2009)). Yet the court of appeals held that "*mostly play[ing] defense*" for a year and a half after losing a motion to compel arbitration

does not constitute a waiver of the right to arbitrate even though Blue Roots only moved to compel arbitration for a second time after it lost a substantive motion for preliminary injunction and was on the precipice of losing a heated discovery battle over its QuickBooks files. Biochron, Inc. v. Blue Roots, LLC, 529 P.3d 464 (Wn. Ct. App. May 25, 2023). Blue Roots did not appeal the denial of its first motion to compel arbitration. After the motion was denied, Blue Roots abandoned any intent to arbitrate. It engaged in extensive written discovery including months long letter campaigns for supplementation, agreed to attend mediation but failed to produce documents promised prior to mediation (resulting in the cancelation thereof), actively participated in depositions, filed a motion for preliminary injunction, filed a stipulated motion for instruction, filed a motion for oral argument, opposed a motion to compel, filed a motion to continue trial because Blue Roots needed more time "*to conduct written discovery, depositions, and*

prepare for trial" opposed Biochron's two motions for summary judgment, and otherwise sought to preserve its claims against Biochron in preparation for trial. (CP 514-722; 739-54; 807-21; 913-39; 951-83; 1095-1210; 1226-57; 1261-1312; 1597-1602). Yet the court of appeals perfunctorily concluded Blue Roots' "*mostly defensive posture is not inconsistent with an intent to arbitrate the dispute.*" Biochron 529 P.3d at 473. Should this Court review and correct the court of appeals' decision on waiver of the right to arbitrate which conflicts with prior decisions of this Court?

IV. STATEMENT OF THE CASE

This case is about Blue Roots' failed acquisition of Biochron. (CP 107-09). Blue Roots approached Biochron about a potential acquisition. (CP 39 at ¶ 7). As negotiations progressed, the parties signed a Memorandum of Understanding ("MOU"), wherein the parties committed to negotiate a future asset purchase

agreement. (CP 40 at ¶ 9; CP 49-52).

After attempting to negotiate a binding asset purchase agreement and product purchase agreement, Allan Holms declared an impasse in the negotiations. (CP 312). Despite the MOU constituting only a commitment to enter into a future agreement, Blue Roots filed an arbitration demand with AAA relying on the MOU's "*DISPUTE RESOLUTION*" provision, which provides:

> *The Parties will resolve any discrepancy of interpretation on an amicable basis and with the utmost good will and cooperation. In the event of any irresolvable disagreement between the parties, the parties agree to submit to arbitration via the AMERICAN ARBITRATION ASSOCIATION, to be conducted in the City of Spokane, Washington.*

(CP 51).

Biochron filed suit asking that the trial court enjoin Blue Roots from proceeding with arbitration because the MOU was not a contract. (CP 330). Thereafter, Blue Roots brought its first motion to compel arbitration. (CP 360-62). The trial court heard oral argument on Blue Roots' motion

on October 23, 2020, and denied the same. (CP 461-62). (See also, generally, Supplemental Verbatim Report of Proceedings ("SRP"), filed Dec. 27, 2022).

After the trial court denied Blue Roots' motion to compel arbitration, Blue Roots failed to exercise its right to appeal that denial. RAP 2.2(a)(3). Instead, signaling an unequivocal intent to forego the right to arbitrate, Blue Roots filed an answer and plead the same claims set forth in its arbitration demand as counterclaims against Biochron on November 18, 2020. (CP 65-85; 469-90). Consistent with that intent, Blue Roots drafted and propounded *four* sets of interrogatories and requests for production on Biochron and the individual counterclaim defendants. (CP 1313 at ¶ 3; 1313-1515). Blue Roots also propounded requests for admission that same day. Id. Counsel for the parties engaged in extensive discussions over supplementation of discovery and took or scheduled depositions of all individuals directly involved with the

parties' dispute. Id.

Thereafter, Blue Roots filed a Motion for Preliminary Injunction, affirmatively requesting that the trial court order Biochron to return its alleged trade secret marijuana plants and grow processes. (CP 514; CP 517-86). That motion required the trial court to decide whether Blue Roots' grow process and marijuana plants were trade secrets and whether Biochron had misappropriated the same. Id. Continuing to engage in litigation, Blue Roots opposed Biochron's first partial summary judgment motion on February 12, 2021, requesting that the trial court dismiss Blue Roots' claims against the individual owners of Biochron, and Blue Roots stipulated to a protective order on March 18, 2021. (CP 758-70; CP 1663); (CP 785-95).

Eventually, the parties agreed to mediate in May of 2021—although that mediation did not come to fruition due to Blue Roots failure to produce promised QuickBooks records needed to vet Blue Roots claimed damages. (CP

1321-74).

Continuing to prepare for trial and abandoning any intent to arbitrate, Blue Roots filed its disclosure of lay and expert witnesses on July 2, 2021, delineating its anticipated *trial* witnesses. (CP 1664 at ¶ 8). Additionally, Blue Roots noted the depositions of Kevin Rudeen, Bart Bennett, Biochron's expert, Richard Present, Biochron employee, Nathan Brown, and Biochron's accountant, Scott Kramer. (CP 1353-77).

Indeed, as Blue Roots continued to prepare for the parties' April 2022 trial, on December 3, 2021, Blue Roots filed a supplemental brief opposing Biochron's pending motion for partial summary judgment. (CP 1068-94; CP 1664 at ¶ 12). On December 6, 2021, Blue Roots supplemented its witness disclosures to include additional witnesses it expected to call at *trial*. (CP 1664 at ¶ 13). On January 28, 2022—less than three months before trial—Blue Roots filed its rebuttal witness disclosure. (CP 1664 at

¶ 17).

Further illustrating its intent to litigate its claims and prepare for trial, on January 28, 2022, Blue Roots requested a trial continuance, representing to the trial court that it needed "*more time ... to conduct written discovery, depositions, and prepare for trial.*" (CP 1281). By Blue Roots' own account, "*[t]hroughout the pendency of this case, the parties have aggressively litigated various issues. . . there [are] well over 100 pleadings contained in the court file in the matter. . . [and Blue Roots was] involved in substantial supplemental briefing regarding Blue Roots' Motion for Preliminary Injunction Re: Misappropriation of Trade Secrets, along with Plaintiffs' Motion for Partial Summary Judgment Re: Individual Liability. The parties submitted over 250 pages of supplemental briefing and accompanying documents, including three Expert Reports (one for Plaintiff and two for Blue Roots). . . the parties have exchanged various sets*

of written discovery and Plaintiffs have conducted four depositions. . . the individuals we [Blue Roots] wish to depose include . . . Bart Bennett, Kevin Rudeen, John Gillingham, and Plaintiffs' marijuana expert . . . we have diligently prepared for trial. This includes the supplemental briefing and depositions described above . . ." (CP 1261-1279). Importantly, at that time—just three months before trial—it had been fifteen months since the trial court denied Blue Roots' motion to compel arbitration, and up to that point Blue Roots gave no indication that it desired to do anything other than litigate its claims. Id.

Two weeks after losing its motion for preliminary injunction asking for the return of its alleged trade secrets on January 26, 2022, and fifteen months after it lost its initial motion to compel arbitration, when Blue Roots had to be certain it would lose Biochron's motion to compel and be required to produce its QuickBooks files, Blue Roots

filed a *renewed* motion to compel arbitration on February 14, 2022. (CP 1575-96). Despite filing the renewed motion Blue Roots continued to demonstrate it did not actually intend to arbitrate. On February 25, 2022, in its response to Biochron's motion for partial summary judgment regarding dismissal of all counterclaims arising from trade secret misappropriation, Blue Roots asserted *new* affirmative theories of relief. (CP 1608-34). Indeed, as it prepared for trial, Blue Roots abruptly, and for the first time, asserted that it formed a partnership with Biochron. Id.

The trial court heard oral argument on Blue Roots' *renewed* motion on March 11, 2022. (See generally RP 1-50). The trial court cited to Blue Roots' preceding motion to compel arbitration sixteen months prior stating that it would not supersede the trial court's prior order denying the motion to compel arbitration. (RP 45:5-9). In turn, the trial court denied Blue Roots' *renewed* motion to compel

arbitration. Id.

On April 1, 2022, Blue Roots filed a notice of appeal to Division III, appealing the trial court's denial of its *renewed* motion to compel arbitration. (CP 1870-79). On May 25, 2023, Division III remanded with directions for the trial court to compel arbitration holding that Blue Roots did not waive its right to arbitration by failing to appeal the initial denial as a matter of right and litigating for fifteen months thereafter as "*Blue Roots mostly played defense . . . [and] this mostly defensive posture is not inconsistent with an intent to arbitrate the dispute.*" Biochron, 529 P.3d at 473.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The court of appeals erroneously created a new standard under Washington law that if a party raises the right to arbitrate then "*mostly play[s] defense*" it can litigate or change forum on a whim —regardless of the level of its engagement in litigation, the amount of time it "*plays*

defense", and the prejudice suffered by the opposing party. Biochron, 529 P.3d at 472-74. The court of appeals' erroneous holding conflicts with this Court's prior holdings and warrants review under RAP 13.4(b)(1).

The Court of Appeals Misapplied this Court's Holdings in *Ha, Townsend, and Jeoung Lee.*

"The right to arbitration is waived by conduct inconsistent with any other intent . . ." Ha, 165 Wn.2d at 588. And as astutely cited by the court of appeals, *"[t]o show a party has acted inconsistently with its right to arbitrate, the opposing party must show 'that as events unfolded, the party's conduct reached a point where it was inconsistent with any other intention but to forgo the right to arbitrate.'"* Biochron, 529 P.3d at 472 (quoting River House Dev., Inc. v. Integrus Architecture, PS, 167 Wn. App. 221, 238, 272 P.3d 289 (2012)). To determine whether a party waived its right to arbitrate, courts consider: (1)

knowledge of an existing right to compel arbitration[1]; (2) acts inconsistent with that right; and (3) prejudice. Lee, 195 Wn.2d at 705 (2020).

1. Blue Roots' Conduct Evidences its Intent to Litigate—Not Arbitrate—its Claims.

Rather than closely examine Blue Roots' acts that were inconsistent with an intent to arbitrate and the timing thereof the court of appeals summarily determined that, "*Blue Roots mostly played defense to Biochron's two partial summary judgment motions and its motion to compel discovery. The only affirmative motions Blue Roots filed were an unsuccessful motion to return its property and purported trade secrets, and a later motion to continue the trial date and associated deadlines.*" Biochron, 529 P.3d at 473. This reasoning completely obliterates the second prong of the waiver of arbitration

[1] This factor is not at issue on appeal—only factors (2) and (3) are at issue on appeal. Biochron, 529 P.3d 464 (Wn. App. 2022).

analysis as it fails to analyze Blue Roots aggressive litigation and the fact that Blue Roots only renewed its motion to compel arbitration after it lost its motion for preliminary injunction asking the trial court to order Biochron to return its alleged trade secret grow processes and marijuana plants. (CP 1221-23; 1593-96). This oversimplification also ignores that the renewed motion was brought just before Blue Roots was ordered to produce its QuickBooks files, something it had been refusing to do for nearly a year despite claiming damages of over $1 million without providing documentation to support such damages. (CP 1313-1515; 1603-05).

This Court's decisions in Ha, Townsend, and Lee all evidence that Blue Roots actions reached the point where they were inconsistent with any other intention than to forego the right to arbitrate.

In Ha, a commercial tenant defended against an unlawful detainer action by raising an option contract that

contained an arbitration clause. 165 Wn.2d at 585-86. After a writ of restitution was issued to the landlord, the tenant sent a letter to the landlord demanding arbitration pursuant to the option contract. Id. at 586. When the landlord resisted, the tenant filed a motion to compel arbitration under a separate cause number. Id. The trial court denied the motion to compel arbitration finding that the right to seek arbitration under the option no longer existed. Id. On review, this Court held the tenant waived its right to arbitrate by presenting the same issue – whether it had successfully exercised the option – in the unlawful detainer action. Id. at 588. Having lost that issue, the tenant could not later seek to relitigate it in a different forum. Id.

Unlike the tenant in Ha, Blue Roots filed an arbitration demand then moved to compel arbitration at the outset of the present litigation. (CP 65-85; 360-62). Yet, just like the tenant in Ha, Blue Roots conduct indicated

an intent to forgo its right to arbitrate when it admittedly engaged in aggressive litigation and sought to have the same issue, whether it has trade secrets and is entitled to the immediate return thereof decided by the trial court. (CP 65-85; 514-722). Having lost that issue, Blue Roots renewed its motion to compel arbitration. (CP1221-23; 1575-96). "*Arbitration may be waived by the parties by their conduct.*" Ha, 165 Wn.2d at 588. Blue Roots waived arbitration by its conduct and it cannot now seek to relitigate these same issues in arbitration which is exactly what it intends to do. (CP 65-85).

The court of appeals erred in likening Blue Roots' conduct in this litigation to that of the builder and parent companies in Biochron, 529 P.3d at 473 (citing Townsend v. Quadrant Corp., 173 Wn.2d 451, 454-55, 268 P.3d 917 (2012)). There, immediately after the lawsuit was filed the builder moved to stay proceedings and compel arbitration and the parent companies moved for summary judgment

asking for a determination that they had no connection to the plaintiffs or their houses. Townsend, 173 Wn.2d at 454. Upon losing that motion the parent companies and builder again moved to compel arbitration pursuant to the purchase and sale agreement. Id. at 455. The conduct of the builder and parent companies is contrary to Blue Roots' conduct further demonstrating that Blue Roots abandoned its intent to pursue arbitration as its conduct solely evinced an intent to litigate. (CP 1261-79). Once the parent companies were found to have a connection with the plaintiffs the parent companies immediately joined the builder in moving to compel arbitration. Townsend, 173 Wn.2d at 463. Conversely, here, once Blue Roots' motion to compel arbitration was denied it completely abandoned its intent to arbitrate and aggressively litigated for fifteen months before renewing its motion to compel arbitration as soon as it lost a significant motion for preliminary injunction which also happened to be on the eve of being

compelled to produce its QuickBooks files. (CP 1221-23; 1575-96).

This is not a situation where Blue Roots immediately appealed the denial of its motion to compel arbitration or where Blue Roots attempted to resolve this matter. Instead, Blue Roots chose not to appeal its motion to compel arbitration and then actively and aggressively litigated as set forth herein for over a year and half before suddenly renewing its motion when it needed a change of forum in the hopes of obtaining a different outcome. If Blue Roots conduct is the equivalent of the parent companies in Townsend then any party who initially moves to compel arbitration and is denied that relief can litigate for as long as they deem prudent and renew the motion to compel arbitration once litigation definitively goes against them. While Division I held that there is no bright line rule and that the facts of each case must be analyzed to determine

whether a party has waived its right to arbitrate[2], this Court must draw the line at aggressively litigating for fifteen months only to renew a motion to compel arbitration on the eve of being ordered to produce damning evidence and just after losing a significant motion for preliminary injunction.

The court of appeals analysis of Lee was likewise flawed as it failed to identify the procedural and substantive similarities that should have resulted in the same outcome. The court of appeals reasoned that participating in discovery and litigation was inconsistent with a right to arbitrate. Biochron, 529 P.3d at 472. Yet, when presented with these same facts here, the court of appeals found that so long as a party immediately raises a right to arbitrate and so long as the court determines that inconsistent acts constitute "playing defense" such

[2] Biochron, 529 P.3d at 472 (citing Berman v. Tierra Real Est. Grp., LLC, 23 Wn. App. 2d 387, 400, 515 P.3d 1004 (2022)).

inconsistent acts have no bearing on the second factor of the waiver analysis. Id. at 473. A party must be able to waive its right to arbitrate by taking acts inconsistent with such a right even after raising it.

In Lee "*the parties engaged in discovery and litigation for approximately nine months without seeking [arbitration,] mediation or awaiting a decision from this court in another case .... Through its conduct, Evergreen chose to litigate rather than arbitrate.*" Lee, 195 Wn.2d at 707–08 (emphasis added). Likewise, here, Blue Roots chose to litigate rather than arbitrate by engaging in comprehensive discovery and aggressive litigation. (CP 1261-79). The court of appeals decision is inconsistent with Lee because Blue Roots fully and completed immersed itself in discovery and litigation for fifteen months without reference or mention of pursuing arbitration.

In short, the court of appeals determined that so long as a party moves to compel arbitration at the outset of

litigation any actions it takes thereafter, until it renews its motion to compel arbitration, are merely "*defensive*" and not evidence of an intent to relinquish its right to arbitrate. This rule cannot stand. It will cause uncertainty for litigants, reward forum shopping, waste judicial resources, and cost parties engaging in litigation with a party who acts inconsistent with its right to arbitrate unnecessary time and expense.

Between October 23, 2020—when the trial court denied Blue Roots' Motion to Compel Arbitration—and February 14, 2022—when Blue Roots filed its *Renewed* Motion to Compel Arbitration—Blue Roots filed its Answer and asserted the same claims it plead in its Arbitration Demand as counterclaims against Biochron, indicating its intent to develop its own legal theories against Biochron and litigate the dispute. (CP 469-90). Consistent with that intent, Blue Roots continued to develop its own theories by propounding four sets of interrogatories and requests for

production. (CP 1313 at ¶ 3; 1313-1515). As often occurs during the discovery process, the parties disagreed over what was, and was not, discoverable. In turn, counsel for the respective parties exchanged voluminous correspondence regarding supplementing the parties' discovery requests—all to prepare for trial. Id. The parties even attempted to mediate—not arbitrate—their dispute in May of 2021—albeit unsuccessfully due to Blue Roots failure to turn over its QuickBooks files. (CP 1321-74; CP 1330-32).

Even after renewing its motion to compel arbitration Blue Roots, for the first time, asserted new theories of relief, arguing that its dealings with Biochron formed a partnership, as a matter of law. (CP 1620-24). Blue Roots' preparation and assertion of new theories of relief demonstrates its intent to litigate, not arbitrate, its claims.

Yet the court of appeals completely disregarded Blue Roots' exhaustive participation in litigation, passively

characterizing it as "*mostly play[ing] defense.*" Applying this flawed rationale, an unsuccessful litigant who lost a motion to compel arbitration at the outset of suit—like Blue Roots—may abandon its intent to arbitrate and force an opposing party—like Biochron—to litigate a dispute for years, including up to trial (and exhaustive preparation for the same) before abruptly demanding arbitration again. According to the court of appeals' flawed standard, Blue Roots need only survive and advance through litigation to preserve its once raised and dismissed right to arbitration.

2. Compelling Arbitration Prejudices Biochron.

The court of appeals incorrectly framed the issue of waiver as "*whether Blue Roots waived its right to arbitrate depends on whether Biochron is prejudiced by Blue Root's delay in renewing its motion to compel arbitration.*" Biochron, 529 P.3d at 472. The issue is not solely whether Biochron was substantially prejudiced (it was) but whether Blue Roots acted inconsistent with an intent to arbitrate, as

it did. As aptly pointed out by the concurring opinion by the court of appeals, waiver requires no showing of prejudice. The second element discussed above is a true waiver analysis – looking for implied or express conduct that evinces relinquishment of the right to arbitration. Prejudice is its own separate element of the waiver of the right to arbitration analysis; yet the test in and of itself melds the concepts of waiver and estoppel.

Prejudice, as it relates to compelling arbitration, can be found when a party delays invocation of the right to arbitrate and causes the opposing party to incur unnecessary delay or expense. Lee, 195 Wn.2d at 708. "*No bright line defines this second type of prejudice—neither a particular time frame nor dollar amount automatically results in such a finding—but it is instead determined contextually, by examining the extent of the delay, the degree of litigation that has preceded the invocation of arbitration, the resulting burdens and expenses, and the*

other surrounding circumstances." Steele v. Lundgren, 85 Wn. App. 845, 859, 935 P.2d 671 (1997) review denied 133 Wn.2d 1014 (1997)(quoting Kramer v. Hammond, 943 F.2d 176, 179 (2d Cir.1991)).

In Lee, the court held that "*granting the motion to compel arbitration this late in litigation would cause severe prejudice to the Plaintiffs. The Court of Appeals has found that an unnecessary delay or expense can support a finding of waiver of the right to compel arbitration.*" Lee, 195 Wn.2d at 708.

The court of appeals ignored this Court's reliance on Steele in Lee, unjustifiably minimizing the extent of prejudice sustained by Biochron if it is compelled to arbitrate a dispute it fifteen months actively litigating. Indeed, the court of appeals determined Biochron is not prejudiced because (1) incurring attorney fees and costs alone does not support a prejudice argument; and (2) the trial court erred in granting summary judgment on Blue

Roots' trade secret claim, thus, Biochron must litigate Blue Roots' trade secret claim in either arbitration or at trial. Biochron, 529 P.3d at 474.

The court of appeals cited to Wiese v. CACH, LLC, 189 Wn. App. 466, 481 (2015) to support its reasoning that attorney fees and costs, "*without more*", do not support a claim of prejudice. Biochron, 529 P.3d at 474. However, the court in Wiese dealt with a remarkably dissimilar situation to Biochron's. 189 Wn. App. at 481. The party opposing arbitration in Wiese attempted to claim attorney fees and costs incurred in a *separate* action as the prejudice justifying denial of arbitration in a *subsequent* proceeding. Id. That alone, the court of appeals determined did not constitute sufficient prejudice. Id. That is not the context here. Biochron is not claiming prejudice solely by way of attorney fees and costs—although such fees and costs are

substantial[3], as Blue Roots waited until two months before trial to compel arbitration. (CP 1593-96). The court in Wiese stated that attorney fees and costs, "*without more*", do not justify a finding of prejudice. Here, there is much more prejudice to Biochron than attorney fees alone.

Indeed, compelling Biochron to arbitration "*this late in litigation*"[4], while simultaneously allowing Blue Roots to completely abandon its unsuccessful theories in favor of asserting its newfound (and unpled) partnership theory, requires Biochron to relitigate the issue of an enforceable agreement between it and Blue Roots—an issue Blue Roots initially lost on at the trial court level.[5]

Moreover, aside from its initial motion to compel arbitration, Blue Roots gave no subsequent indication that

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[3] As of January 2022, Biochron's fees and costs were over $140,000. (CP 1478-1515).
[4] Jeoung Lee, 195 Wn.2d at 708.
[5] Jeoung Lee, 195 Wn.2d at 708 (Forcing a party to relitigate an issue it successfully litigated in a subsequent arbitration proceeding supports a finding of prejudice.)

it intended to arbitrate, rather than litigate, this dispute. Instead, after Blue Roots' initial motion to compel arbitration was denied, both parties began the "*costly and lengthy*" journey that is litigation. Hill, 179 Wn.2d at 54. Because Blue Roots asserted counterclaims against Biochron, Biochron aggressively sought to defend against those counterclaims, incurring substantial attorney fees and costs in the process. In turn, evidencing its intent to litigate its claims, Blue Roots opposed Biochron's dispositive motions to preserve its counterclaims and bolster its case before trial. By holding that Biochron suffers no prejudice because its own aggressive strategy caused it to incur attorney fees and costs, the court of appeals effectively penalizes Biochron for defending itself against Blue Roots' counterclaims—something it rewards Blue Roots for by preserving its right to compel arbitration years later. The court of appeals' holding creates an irresolvable conflict with this Court's prior holdings, and

accordingly, this Court may grant Biochron's Petition for Review.

This analysis completely ignores all the other orders entered by the trial court. The court of appeals reasoned that "*all of the trial court's previous rulings are arguably void for lack of authority.*" Biochron 529 P.3d at 474. What value then, if any, do these decisions have? Is Blue Roots now allowed to relitigate its motion for preliminary injunction on the same set of facts? What about the discovery rulings, can Blue Roots now take the opposite stance? Must new protective orders be entered? The uncertainty moving forward abounds. Yet the court of appeals once again used revisionist history to oversimplify the litigation before the trial court finding only that "*the trial court made two significant rulings. The first dismissed all of Blue Roots' counterclaims against Mr. Gillingham and some of its counterclaims against Mr. Bennett and Mr. Rudeen. But during oral argument*

before this panel, Blue Roots said it was not seeking to overturn that ruling." Biochron, 529 P.3d at 474.

The court of appeals found that the trial court did not have authority to make the rulings it made. But for Blue Roots' concession that the first summary judgment ruling was not being challenged, would the court of appeals ruling have been different? This noncommittal decision on the trial court's authority leaves more questions than answers for the parties as they proceed to litigation. This is yet another reason this Court should accept review and find that the court of appeals' decision conflicts with prior decisions of this Court. A litigant cannot raise a right to arbitrate, abandon that intent by not timely appealing, then aggressively litigate for fifteen months and reclaim the right to arbitrate after losing a substantial and significant motion for preliminary injunction. These actions not only reek of forum shopping, but significantly undercut the authority of the trial court thereby creating

confusion for the immediate parties (as noted above) and mistrust for future litigants in similar circumstances.

3. Contrary to this Court's Holding in *Hill*—Analyzing Whether a Litigant Plays "*Defense*" or "*Offense*" to Determine if that Litigant Waives its Right to Arbitration Improperly Incentivizes Increased Litigation Expenses.

"*When the trial court declines to compel arbitration, that decision is immediately appealable because [otherwise] the party seeking arbitration must proceed with costly and lengthy litigation ... at which time [appealing the order denying arbitration] is too late to be effective.*" Hill v. Garda CL Northwest, Inc., 179 Wn.2d 47, 54, 308 P.3d 635, 638 (2013). The court of appeals ignored this Court's rationale in Hill and held that Blue Roots did not waive its right to arbitration because it "*mostly played defense*" and "*[that] mostly defensive posture is not inconsistent with an intent to arbitrate the dispute.*" Biochron, 529 P.3d at 473. The court of appeals' oversimplified rationale is faulty and rife for abuse.

The Court of Appeals' rationale, if adopted by this Court, would mean that litigants could, using a "*primarily defensive posture*", effectively prolong litigation for as long as their claims survive—likely by arguing genuine issues of material fact exist, drastically increase the costs of litigation, and abruptly move to compel arbitration when litigation yields unfavorable results. That, according to the court of appeals, preserves one's right to arbitration. This is not an efficient or effective use of the judicial process or judicial resources, and directly conflicts with this Court's directive in Hill to avoid "*costly and lengthy litigation*" by immediately appealing an order denying arbitration as a matter of right. Hill, 179 Wn.2d at 54.

Here, the trial court denied Blue Roots' Motion to Compel Arbitration on October 23, 2020. (CP 461). Blue Roots could have (but failed to) appealed that decision within thirty days thereafter as a matter of right. RAP 2.2(a)(3). Instead, Blue Roots aggressively participated in

litigation for fifteen months, abandoning its intent to arbitrate this dispute until two months before trial. (CP 1593-96). By that point, it was, and is, too late. Hill, 179 Wn.2d at 54. By accepting Biochron's petition for review, this Court can correct the court of appeals' conflict with prior decisions of this Court and affirm that forum shopping will not be rewarded.

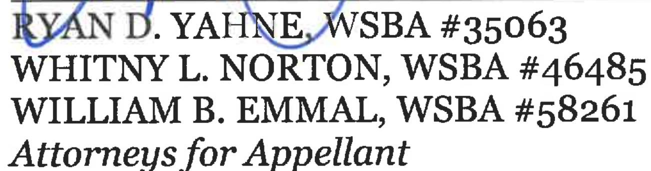
VI. CONCLUSION

This document contains 5,044 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 23rd day of June 2023.

Respectfully Submitted,

PISKEL YAHNE KOVARIK, PLLC.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of June 2023, I caused to be served a true and correct copy of the foregoing document to the following:

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