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Court of Appeals  
Division III  
State of Washington**

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IN THE COURT OF APPEALS, DIVISION 3, STATE OF WASHINGTON

SETH BURRILL PRODUCTIONS INC. Plaintiff-Respondent

V.

REBEL CREEK TACKLE INC., Defendant-Appellant

CASE # 35572-1-III

DEFENDANT-APPELLANT REBEL CREEK TACKLE INC.'S REPLY  
BRIEF

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## TABLE OF CONTENTS

INTRODUCTION	1
LAW AND ARGUMENT	7
1.First, Second and Third Counterstatements	7
2.Counerstatements 4 and 5	13
3.Responding to SBP's Argument	22
CONCLUSION	25

TABLE OF AUTHORTIES – CITED CASES

Benton County v. Zink, 191 Wn.App. 269, 276 361 P.3d 801 (Div. 3 2015) fn10, 15, 31	4, 7, 14
Cle Elum Bowl, Inc. v. North Pacific Ins. Co., Inc., 96 Wn.App. 698, 702, 981 P.2d 872 (Div. 3 1999) fn 10, 15, 31	4,7, 14
<i>Davis v. General Dynamics Land Systems</i> , 217 P.3d 1191, 152 Wn.App. 715, 718-19 Para 6 and 9 (Wash.App. Div. 2 2009) fn 9,16, 30, 37	4, 8, 14, 18
<i>Everett Shipyard v. Puget Sound Environmental Corp</i> , 155 Wn.App. 761 (Div 1 2010) fn 17, 30, 37, 38	8, 14, 18, 19
<i>Guile v. Ballard Cmty. Hosp.</i> , <u>70 Wn.App. 18, 25,</u> <u>851 P.2d 689</u> (1993) fn 21	11
<i>Haller v. Wallis</i> , 89 Wash.2d 539, <u>573 P.2d 1302</u> (1978) fn 8	4
<i>Hill v. Department of Labor &amp; Indus.</i> , 90 Wash.2d 276, <u>580 P.2d 636</u> (1978) fn 8	4
Landstar Inway, Inc. v. Samrow, 181 Wn.App. 109, 120, 325 P.3d 327 (Div. 2 2014) fn 21, 27	11, 13
<i>Marcus &amp; Millichap Real Estate Inv. Servs. of Seattle, Inc. v.</i> <i>Yates, Wood &amp; MacDonald, Inc.</i> , 192 Wn.App. 465, 369 P.3d 503 (Div. 1 2016) fn 21	10, 11
<i>Mitchell v. Kitsap County</i> , 59 Wn.App. 177, 183-84,797 P.2d 516 (Div. 2 1990) fn 8	4
Mount Adams School Dist. v. Cook, 150 Wn.2d 716, 719, 81 P.3d 111 (2003) fn 10, 15, 31	4, 7, 14
Nguyen v. Sacred Heart Medical Center, 97 Wn.App. 728, 731, 987 P.2d634 (Div. 3 1999) fn 21, 27	11, 13
Pederson v. Potter, 103 Wn.App. 62, 68, 11 P.3d 833 (Div. 3 2000) fn 13	5
<i>Protect the Peninsula's Future v. City of Port Angeles</i> , <u>175 Wn.App. 201,</u> 219, 304 P.3d 914 fn 36	17

Richardson v. Danson, 44 Wn.2d 760, 762-63 270 P.2d 802 (1954), fn 3	2
Safeco Ins. Co. of America v. Hirschmann, 52 Wn.App. 469,471, 760 P.2d 969 (Div. 1 1988) fn 10	4
Seely v. Gilbert, 16Wash.2d 611, <u>134 P.2d 710</u> (1943) fn 8	4
Skimming v. Boxer, 119 Wn. App. 748, 754, 82 P.3d 707, 710 (Div. III 2004) fn 45	25
Smith v. Safeco Ins. Co., 150 Wn.2d 478, 483, 78 P.3d 1274 (2003) fn 10, 15, 31	4, 7, 14
Tiger Oil Corp. v. Yakima County, 158 Wn.App. 553, 561-62 para 12, 242 P.3d 936 (Div.3 2010) fn21,27	11, 13
Washington State Physicians Ins. Exch. & Ass'n v Fisons Corp., 122 Wn.2d 299, 338, 858 P.2d 1054, 1075 (1993) fn 45	25
West v. Wash. Ass'n of County Officials, 162 Wn.App. 120, 135, 252 P.3d 406 (2011) fn 36	17

TABLE OF AUTHORTIES – CITED STATUTES & RULES

RCW § 7.70A.080. fn 11, 40	5, 23
RCW 7.04A.060(2) fn 17, 20, 37	8, 10, 18
CR 11 fn 36	17

## INTRODUCTION

RCT and SBP entered into a License Agreement in June, 2010<sup>1</sup>. The Agreement contained an Arbitration Provision which in part required SBP to have sold 15,000 units in 5 years. An Arbitration in 2013 extended the time to 6 years. At the sixth year anniversary on June 1, 2016 RCT and SBP were in an appeal in Division III Court of Appeals.

On June 1, 2016 Counsel for RCT filed a notice of breach and a Declaratory Judgment stating that SBP had failed to sell 15,000 units and that the LICENSE AGREEMENT was Terminated. The Declaratory

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<sup>1</sup> CP 40

Judgment was filed in the Court of Appeals and in the Spokane County Superior Court case from which the Appeal was pending<sup>2</sup>. The Declaratory Judgment asserted a claim and was a pleading<sup>3</sup>. **Counsel for SBP Answered, denied that the LICENSE AGREEMENT was Terminated, Admitted that SBP had not sold the required number of units** and alleged as defense that SBP's failure to sell was the fault of RCT<sup>4</sup>.

The character of SBP's Response in this appeal is indicated by the Lee & Hayes time records provided with the Affidavit of Kyle Nelson<sup>5</sup>. The time records<sup>6</sup> state the strategy and detail the research for the Response. Two entries were made in the time record entry for 07/06/17; one was made by attorney JCL(Lynch) stating "confer re strategy for attack of Motion for Declaratory Relief. Mr. Lynch spend 0.2 hours in developing the "attack strategy" for the Response. The second entry was made by KDN(Nelson) where 1.8 hours were spent

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<sup>2</sup> CP 99 SBP counsel's letter stating "In addition, your Motion for Declaratory Judgment of Termination of License Agreement, filed with the Spokane County Superior Court on June 1, 2016,...".

<sup>3</sup> Richardson v. Danson, 44 Wn.2d 760, 762-63 270 P.2d 802 (1954)

<sup>4</sup> CP 98 and CP 121 Letters from SBP Attorney.

<sup>5</sup> CP 356-360.

<sup>6</sup> CP 359-369

for "Research and draft correspondence to Floyd Ivey re pursuit of cr 11". The "attack strategy" of Lynch was CR 11 with the first step being SBP counsel Nelson's Memorandum Opposing the Motion for Summary Judgment and asserting it Cross Motion for CR 11 Sanctions<sup>7</sup>.

Of specific interest in the preparation for the SBP Response is the research done as shown at CP 356 on July 25, 26 and 28; 4.84.185 re: expenses for opposing frivolous; standard for rule 11; pleadings and statements of attorneys as evidence.

Of specific interest is what was not researched namely: 1.) where an arbitration provision exists who it is that determines if a dispute is determined in arbitration or at court; 2.) is a Declaratory Judgment pursued by a Motion for Summary Judgment properly before the court; 3.) What is permitted in Declarations as evidence of disputed material facts?

SBP's Response, page 1, regarding unadjudicated claims denies that SBP counsel has admitted the failure to make required sales and that RCT "claims" that the LICENSE AGREEMENT is Terminated by that failure. SBP contends "no claim" without citation and that the letters from SBP counsel, Response page 1, admitting that required

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<sup>7</sup> CP 136 referencing SBP's advice and warning of CR 11 on July 6, 2017

sales had not been made but denying that SBP counsel's letters were binding<sup>8</sup>.

Also at page 1 SBP Response states that "nevertheless, [the issue] was subject to mandatory arbitration under the parties' license agreement. The word "mandatory" is not found in the arbitration provisions of the LICENSE AGREEMENT. SBP's research failed to find that in Washington State it is the trial court which determines whether a dispute is determined in court or by arbitration<sup>9</sup>.

The RCT Declaratory Judgment with the SBP counsel's letters Answering with admission and assertion of a defense makes the SBP v. RCT Superior Court case ripe for a Motion for Summary Judgment relying on ample Division III and Supreme Court authority <sup>10</sup>.

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<sup>8</sup> Admissions of counsel are binding on their client. *Mitchell v. Kitsap County*, 59 Wn.App. 177, 183-84, 797 P.2d 516 (Div. 2 1990); *Hill v. Department of Labor & Indus.*, 90 Wash.2d 276, 580 P.2d 636 (1978) (attorney's knowledge of material facts is imputed to client); *Haller v. Wallis*, 89 Wash.2d 539, 573 P.2d 1302 (1978) (absent a showing of fraud or collusion, a client is bound by his/her attorney's settlement of his/her claims even though such settlement is contrary to the client's instructions); *Seely v. Gilbert*, 16 Wash.2d 611, 134 P.2d 710 (1943).

<sup>9</sup> CP 331 lines 16-20 in RCT's Proposed Order – *Davis v. General Dynamics Land Systems*, 217 P.3d 1191, 152 Wn.App. 715, 718-19 Para 6 and 9 (Wash.App. Div. 2 2009)

<sup>10</sup> *Benton County v. Zink*, 191 Wn.App. 269, 276 361 P.3d 801 (Div. 3 2015); *Mount Adams School Dist. v. Cook*, 150 Wn.2d 716, 719, 81 P.3d 111 (2003); *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 483, 78 P.3d 1274 (2003); *Cle Elum Bowl, Inc. v. North Pacific*

This Appeal is unusual in having an Arbitration Award favoring RCT occurring prior to the filing of the RCT Opening Brief. The Arbitrators Award is not appealable<sup>11</sup>. SBP's dispute of the Award attempts an appeal the Arbitrator Award, as seen in the SBP contention that the trial court did not Order the case be sent for Arbitration.

However, Arbitrator Cochrane stated that:

"The Spokane Superior Court Judge, the Honorable Anthony Hazel, did not rule on the license termination issue but rather *stated in his opinion that the dispute over the License Agreement was to be determined by arbitration* since the agreement contained an arbitration clause. ...<sup>12</sup> (Emphasis added)

The Arbitration Award is final and barred by res judicata<sup>13</sup>.

SBP concluded at Response page 1 that "there was no pleading with respect to the claim made, and because numerous issues were in material dispute.." This SBP assertion of disputed material facts also

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Ins. Co., Inc., 96 Wn.App. 698, 702, 981 P.2d 872 (Div. 3 1999); Safeco Ins. Co. of America v. Hirschmann, 52 Wn.App. 469,471, 760 P.2d 969 (Div. 1 1988).

<sup>11</sup> RCW § 7.70A.080. There is no right to a trial de novo on an appeal of the arbitrator's decision.

<sup>12</sup> CP 348-49

<sup>13</sup> Pederson v. Potter, 103 Wn.App. 62, 68, 11 P.3d 833 (Div. 3 2000).

challenges of the Award. The Arbitrator's Award reveals no disputed material facts. The Award is based solely on the SBP failure to sell the required number of units. The "...numerous issues..." assertion is also directly repudiated by SBP's declarations which failed to meet evidentiary standards in "suggesting" possible actions by RCT in interfering with sales by SBP.

The disputes with the Award, not knowing that the trial court determines if arbitration or court, the denial of the evidence from the SBP counsel's letters – these acts by SBP were instruments of the "attack strategy". They misdirected the court, were baseless and improper and improper for an unworthy purpose. The "attack strategy" misled SBP counsel Nelson. The "attack strategy" was an CR 11 assault on RCT and counsel.

The trial court erred in not analyzing the arbitration provisions to determine if the dispute was a dispute to be addressed by arbitration. The assertion of other material issues of fact, wholly without consideration in the Arbitration, were misleading and baseless. The failure to make the sales was the only issue needed for the Arbitration Award.

## LAW AND ARGUMENT

### I.RCT Replies to SBP's COUNTERSTATEMENT OF ISSUES

Preliminarily, it is noted that much of SBP's Response rehashes irrelevant history of RCT and SBP from at least 2013 through 2018 and it appears that neither SBP counsel nor the trial court had reviewed RCT's Proposed Order which was filed with the court on August 16, 2017<sup>14</sup>.

RCT's Proposed Order, CP 328, set forth findings, all of which have evidentiary support, and conclusions regarding; 1.) whether the issue of Termination of the LICENSING AGREEMENT was an issue subject to Arbitration; 2.) the identification of the person or entity which would determine if the issue was subject to arbitration, and; 3.) if determined by the court if the issue would be decided in the then existing Motion for Summary Judgment.

1.First, Second and Third Counterstatements: the assertion that no claims were before the trial court is incorrect as seen if research of Washington Law is undertaken<sup>15</sup>. Error occurred with the

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<sup>14</sup> CP 328

<sup>15</sup> Benton County v. Zink, 191 Wn.App. 269, 276 361 P.3d 801 (Div. 3 2015); Mount Adams School Dist. v. Cook, 150 Wn.2d 716, 719, 81 P.3d 111 (2003); Smith v. Safeco Ins. Co., 150 Wn.2d 478, 483, 78 P.3d 1274 (2003); Cle Elum Bowl, Inc. v. North Pacific Ins. Co., Inc., 96 Wn.App. 698,

trial courts failure to consider who determines if a dispute is decided by arbitration or by the court. An analysis of the arbitration provision in the LICENSE AGREEMENT shows that there was no cure for the failure to sell the required units by June 1, 2016 . The issue should have been concluded in court via the Motion for Summary Judgment. This conclusion is supported by the Arbitrator's Award.<sup>16</sup>.

The Court of Appeals reviews questions of arbitrability de novo and determines the arbitrability of the dispute by examining the arbitration agreement between the parties. If the court can fairly say that the parties' arbitration agreement covers the dispute, the inquiry ends because Washington strongly favors arbitration. If arbitration is ordered the court stays the pending superior court case<sup>17</sup>. SBP's "attack strategy" led the court to error. The process of *Davis*, supra footnote 9 and *Everett*

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<sup>16</sup> CP 331 lines 16-20 in RCT's Proposed Order – *Davis v. General Dynamics Land Systems*, 217 P.3d 1191, 152 Wn.App. 715, 720 Para 9 (Wash.App. Div. 2 2009) stating " Although the Arbitration Agreement covers certain employment claims Davis may have against General Dynamics, **it does not cover claims arising out of his time as a contract worker** before he applied for employment with General Dynamics. **Thus, we cannot fairly say that the Arbitration Agreement covers his claims** as they do not relate to his employment with General Dynamics. *Heights*, 148 Wash.App. at 403, [200 P.3d 254](#).

<sup>17</sup> *Davis v. General Land Systems*, 152 Wn.App. 715, 718, 217 P.3d 1191 (Div. 2 2009); *Everett Shipyard v. Puget Sound Environmental Corp*, 155 Wn.App. 761 (Div 1 2010; RCW 7.04A.060(2) (" The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.)

*Shipyard v. Puget Sound Environmental Corp*, 155 Wn.App. 761 (Div 1 2010) should be affirmed by Division III. Division III should hold that the trial court's denial of the RCT Motion for Summary Judgment and grant of the SBP Motion for CR 11 sanctions was error. Division III should hold that the denial of the RCT Motion for CR 11 was error. The court should order that sanctions be imposed on SBP in the amount asserted against Ivey plus interest at statutory rates.

The court in Washington State determines if an issue is subject to arbitration pursuant to an Arbitration Provision or is to be resolved in court. This topic is addressed in the RCT Opening Brief, page 17 re: CP 331-332 Finding 3. There was no cure for the failure to sell the required number of units<sup>18</sup>. Division III has addressed, during a prior appeal, the issue of cure in the pertinent LICENSE AGREEMENT as follows:

The Division III Court of Appeals Opinion of April 11, 2017, addressed the Arbitration provisions of the License Agreement stating:

Contrary to Rebel's argument, Burrill has not waived arbitration by seeking appointment of a receiver. The arbitration provisions of the

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<sup>18</sup> Paragraph 8.3: "No cure period is required, except as may be otherwise provided in this AGREEMENT, if: (a) this AGREEMENT sets forth specific deadline dates for the obligation allegedly breached; or (b) this AGREEMENT otherwise states that no cure period is required in connection with the termination in question. (Emphasis added)

parties' license agreement apply only to "a BREACH of any provision of this AGREEMENT" that is not cured. See CP at 151 (License Agreement, 11 8.2-8.5).<sup>19</sup>

The trial court erred in not finding that the dispute was not subject to cure and thus not to be sent to arbitration but was to be decided at the trial court. This issue was addressed in RCT counsel's first statements to the court:

"Your Honor, I believe there are three different matters that you will rule on today; one of them is the summary judgment brought by Rebel Creek to be granted, if not in the Superior Court then is it to be referred to arbitration,...(RP 3/lines 21-24)

Again, in argument the statutory requirement is addressed requiring that the court is to decide if a dispute is subject to arbitration and if not then to be decided in the court at RP 8/line 24-page 9/line 7<sup>20</sup>.

At RP 8/lines 2-7 RCT counsel continues discussion of the decision to arbitrate or decided at the trial Court. Specifically addressed was *Marcus & Millichap Real Estate Inv. Servs. of Seattle, Inc. v. Yates, Wood & MacDonald, Inc.*, 192 Wn.App. 465, 369 P.3d 503 (Div. 1 2016) holding that when arbitration is challenged regarding a dispute that both

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<sup>19</sup> CP 23

<sup>20</sup> Citing RCW 7.04(a).060(2) which required the court to decide arbitration or court.

trial and appellate court must apply Motion for Summary Judgment principles<sup>21</sup>.

RCT's Declaratory Judgment and Motion for Summary Judgment asserted that SBP had breached the LICENSE AGREEMENT requiring sales of 15,000 units by June 1, 2016. Summary judgment is proper if no genuine issue of material fact remains and the moving party is entitled to a judgment as a matter of law. CR 56(c). After the moving party submits adequate evidence, the nonmoving party must set forth specific facts rebutting the moving party's contentions and disclosing that a genuine issue of material fact exists.

The trial court erred in failing to find that SBP did not respond to the Motion for Summary Judgment with evidence of material facts<sup>22</sup>.

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<sup>21</sup> In Marcus, at 473 "... the procedure ... [of] RCW 7.04A.070... both trial and appellate courts... apply... summary judgment principles when ... an agreement to arbitrate is challenged.... [¶10] When reviewing an order granting summary judgment this court " perform[s] the same inquiry as the trial court." (Cites omitted) Summary judgment is proper if " the pleadings, depositions, ...[etc]...show ...no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c); see also *Owen*, 153 Wn.2d at 787. [¶11] In determining whether a genuine issue of material fact exists, we must " assume facts most favorable to the nonmoving party." (citations omitted)... The nonmoving party " must set forth specific facts that sufficiently rebut the moving party's contentions" and " may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value." (citations omitted) ( " **A declaration that contains only conclusory statements without adequate factual support does not create an issue of material fact that defeats a motion for summary judgment.**" (citing *Guile v. Ballard Cmty. Hosp.*, 70 Wn.App. 18, 25, 851 P.2d 689 (1993))).

<sup>22</sup> *Tiger Oil Corp. v. Yakima County*, 158 Wn.App. 553, 561-62 para 12, 242 P.3d 936 (Div. 3 2010); *Nguyen v. Sacred Heart Medical Center*, 97 Wn.App. 728, 731, 987 P.2d

The Arbitrator's Award<sup>23</sup>, was an unappealable award by a Tribunal concluding that there was a claim asserted by RCT.

SBP's defenses and attempted assertions of material facts in the Motion for Summary Judgment are contrasted with SBP's assertions in the Arbitration. The Motion for Summary Judgment was heard on August 18, 2017 and the Arbitration was commenced within 10 days. The Arbitrator's Award was issued on January 22, 2018. In the Motion for Summary Judgment SBP counsel only offered suppositions<sup>24</sup> and the contention that RCT was the cause of SBP's failure to make sales. These included Mr. Nelson's declaration misrepresenting that RCT was found to be selling the LICENSED product with no evidence stated and in part relying on the Declaration of Seth Burrill<sup>25</sup>. Specifically noted is Mr. Burrill's use of terms "...Rebel **may be selling..**" and "These sales, **if attributable to Rebel...**"<sup>26</sup>. The Declarations of SBP Counsel and that of Mr. Burrill were void of evidentiary value not setting forth one material issue of

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634 (Div. 3 1999); Landstar Inway, Inc. v. Samrow, 181 Wn.App. 109, 120, 325 P.3d 327 (Div. 2 2014);

<sup>23</sup> 346-352.

<sup>24</sup> CP 161, 151 and CP 299; page 7 and at page 45-40 pf RCT's Opening Brief; .

<sup>25</sup> CP 151

<sup>26</sup> CP 151

fact and thereby failing to resist the RCT Motion for Summary Judgment<sup>27</sup>.

Determining the answer of “whether arbitration or trial court” is by the process of *Marcus*, footnote 19, being the path for the trial and appellate court leads to the conclusion that the trial court erred. The trial court did not realize the evidentiary value of the SBP admissions<sup>28</sup> and did not realize the evidentiary failure of the Declarations of Nelson and of Burrill<sup>29</sup>.

The trial court erred in sending the case to arbitration and in denying RCT’s Motion for Summary Judgment.

2.Counterstatements 4 and 5 – re: CR 11. SBP counsel Nelson’s response to the RCT Declaratory Judgment and Motion for Summary Judgment was to consult with another attorney to reach the conclusion that there was no legal basis for the Motion for Summary Judgment and to formulate the “attack strategy”. Attorney Nelson told RCT counsel as much and advised that the Lee and Hayes firm

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<sup>27</sup> *Tiger Oil Corp. v. Yakima County*, 158 Wn.App. 553, 561, 242 P.3d 936 (Div. 3 2010); *Nguyen v. Sacred Heart Medical Center*, 97 Wn.App. 728, 731, 987 P.2d 634 (Div. 3 1999); *Landstar Inway, Inc. v. Samrow*, 181 Wn.App. 109, 120, 325 P.3d 327 (Div. 2 2014);

<sup>28</sup> CP 98, 121

<sup>29</sup> CP 161, 151 and CP 299; page 7 and at page 45-40 pf RCT’s Opening Brief; .

would only resist with a CR 11 against RCT and Ivey. The SBP counsel did not cite Washington authority such as is cited by RCT at footnote 10. And SBP counsel also provides evidence of the research that was and was not made through the Affidavit of Kyle Nelson, CP 356-60.

The research on 7/28 regarding Arbitration law and license subject to mandatory arbitration are considered. Did that those 2.9 hours not encounter *Davis* or *Everett, supra*<sup>30</sup>? Was there no research re: Declaratory Judgments and Motions for Summary Judgments? The "strategy for attack" considered on 7/6/17 with letters following to Ivey re: the CR 11 defense were lacking in references to case or statute. How did the research fail to find the many instances where Declaratory Judgments and Motions for Summary Judgment were heard and decided<sup>31</sup>?

The Nelson Affidavit evidenced the dollar amount for the work done in preparation for the "attach strategy" in directing the drafting, thinking, researching of CR 11, preparing for argument and attending

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<sup>30</sup>*Davis v. General Land Systems*, 152 Wn.App. 715, 718, 217 P.3d 1191 (Div. 2 2009); *Everett Shipyard v. Puget Sound Environmental Corp*, 155 Wn.App. 761 (Div 1 2010); RCW 7.04A.060(2) (" The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.)

<sup>31</sup> *Benton County v. Zink*, 191 Wn.App. 269, 276 361 P.3d 801 (Div. 3 2015); *Mount Adams School Dist. v. Cook*, 150 Wn.2d 716, 719, 81 P.3d 111 (2003); *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 483, 78 P.3d 1274 (2003); *Cle Elum Bowl, Inc. v. North Pacific Ins. Co., Inc.*, 96 Wn.App. 698,

and arguing on August 18, 2017 to be some \$13,000 or thereabouts.<sup>32</sup>

Much of the effort undertaken in the SBP preparation for August 18, 2017 was allocated to stating the entire history of RCT and SBP<sup>33</sup>: the arbitrations, the appeals to Division III and to the Supreme Court. That background was set forth and is irrelevant to this Appeal.

But in the Affidavit, CP 356 – 360 SBP counsel Nelson also advises the court of his background and contemporaneously, via the time records, suggests that research done was limited and not regarding decisions to arbitration or court, the binding nature of counsel's letters and briefs, the requirement to stay if arbitration is the court's choice and the process of considering Motions for Summary Judgment. Certainly, by August 16, 2017 SBP counsel had the RCT Proposed Order which recited law, findings, and conclusions. SBP, rather than considering *Davis and Everett*, supra, SBP continued with its "attack strategy" via CR 11.

It is noted that that the SBP Proposed Order was stated to have been delivered to the court on 8/16/2017<sup>34</sup>. However, the proposed order is seen to be dated and stamped 8/17/17.

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<sup>32</sup> CP 356-360

<sup>33</sup> Exhibits A through K, CP 174-approximately 282 provide the history of RCT and SBP from 2012 through 2017.

<sup>34</sup> CP 360

The Affidavit setting forth SBP Counsel's background discloses significant credentials yet SBP counsel improperly and in violation of CR 11 submitted the Declaration of Seth Burrill and applied his signature to the Declaration of Kyle Nelson, CP 161, setting forth unsupported allegations: at CP 162 paragraph 8 refers to collusion and direction by attorney Ivey are without evidentiary support; at CP 165 paragraph 19 refers to RCT "surreptitiously began selling on or before June 8, 2016" and "may have been undisclosed funds or parties in interest" are without evidentiary support<sup>35</sup>; at CP 167 paragraph 27 the statements "On June 8, 2016, Rebel was discovered to be selling inventory created from the modified molds...", "This was a surprise because Rebel did not disclose any existing inventory...", "The product Rebel was selling...", "SBPI discovered infringing sales in Richland...", "**It is believed** this is inventory held over by Rebel and not disclosed..." are all statements made without evidentiary support, which are unsupportable, which are made as a matter of "belief" but which are made for the improper purpose of characterizing RCT and Counsel as actors in undertaking improper actions, at CP 167

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<sup>35</sup> The Lee & Hayes letter at CP 248 identifies sales at Ranch & Home without evidence of any involvement with RCT. The letter also, CP 249, admits that SBP failed to make sales required by the License.

paragraph 28, the statement “...if it discovers that Rebel continues to attempt to sell...undisclosed inventory...” is without evidentiary support,; at CP 169 paragraph 33 the statement that this [superior court case] has concluded was not true. Mr. Nelson finalizing and editing of the Declarations of Kyle Nelson and Seth Burrill on 8/3/17 is conspicuous as each is crafted from allegations, “if’s”, beliefs, conclusions and other evidentiarily inadequate “thought”. Each of the foregoing statements made by SBP counsel are made without evidence and are made for the explicit purpose of persuading the court to sanction attorney Ivey and for the purpose of leading the court to error. Assertions in a Declaration are required to be made with knowledge of supporting evidence. No such evidence exists. These Declaration statements were largely baseless and were made for an improper CR 11 purpose as unverified and unverifiable support of the SBP CR 11 motion<sup>36</sup>.

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<sup>36</sup> CR 11 addresses two types of filings-(1) baseless filings and (2) filings made for an improper purpose. *West v. Wash. Ass'n of County Officials*, [162 Wn.App. 120](#), 135, [252 P.3d 406](#) (2011). A filing is baseless if it is "(a) not well grounded in fact, or (b) not warranted by (i) existing law or (ii) a good faith argument for the alteration of existing law." *Id.* If a party files a baseless motion, the superior court may impose sanctions upon motion or "upon its own initiative." CR 11(a). The superior court is not required to impose sanctions for every CR 11 violation. *Protect the Peninsula's Future v. City of Port Angeles*, [175 Wn.App. 201](#), 219, [304 P.3d 914](#), review denied, [178 Wn.2d 1022](#) (2013). Also, the court may deny a request for sanctions without entering findings on whether or not a CR 11 violation occurred. *Id.*

The Declaration of Kyle Nelson, CP 161, at paragraphs 34 and 35 rehash history unrelated to the issues of deciding whether a dispute is for arbitration or for the court and whether the RCT Motion for Summary Judgment had merit. The Declaration at CP 170 paragraphs 36, 37 and 38 offers the conclusory statement that Ivey would continue to harass and retaliate, that Mr. Nelson advised Ivey of the pertinent law with that advise void of the identification of case or statute, and of the factual and legal errors in the combined Declaratory Judgment and Motion for Summary Judgment. Mr. Nelson's comments in paragraphs 36, 37 and 38 are conclusory, made without supporting evidence and are self-serving.

On August 15, 2017, RCT counsel emailed its Proposed Order to SBP counsel Nelson. The proposed order recited cases directing the process in sending a dispute or to court for resolution<sup>37</sup>. SBP counsel apparently did not review the Proposed Order by his silence or lack of awareness of the process to be undertaken in the decision of where to decide disputes - arbitration or court. This is concluded since counsel

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<sup>37</sup>*Davis v. General Land Systems*, 152 Wn.App. 715, 718, 217 P.3d 1191 (Div. 2 2009); *Everett Shipyard v. Puget Sound Environmental Corp*, 155 Wn.App. 761 (Div 1 2010); RCW 7.04A.060(2) (" The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.)

would have known of the process had he reviewed the Proposed Order. When the court orders a case to Arbitration the underlying Superior Court Case is stayed<sup>38</sup>. SBP's asserted a lack of knowledge regarding the procedure in determining whether to arbitrate or to determine a dispute in court as noted in the Report of Proceedings where a stay of the Superior Court case would be required if the dispute was sent to arbitration(RP 32):

MR. IVEY: I'm just saying that the Court[if this matter is sent to arbitration] then here **stays this case pending the outcome of that arbitration**. THE COURT: Counsel, [referring to SBP counsel]what is your position on that? **MR. NELSON: I'd object. Not sure what the legal basis would be** and, secondly, the Court just ruled —(Emphasis added)

RCT contends that SBP has failed to support its CR 11 “attack” on Ivey. This Court should hold that the trial court erred in awarding CR 11 sanctions against Ivey, should reverse the CR 11 Order against Ivey and should award CR 11 sanctions in favor of RCT.

## II.ADDRESSING SBP'S STATEMENT OF THE CASE

SBP's Statement of the Case largely repeats the history found in the SBP counterstatement of the issues. RCT relies primarily on the RCT response to SBP's counterstatement of the issues.

SBP is seen to continue asserting unsupported allegations:

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<sup>38</sup> *Everett Shipyard v. Puget Sound Environmental Corp*, 155 Wn.App. 761 (Div 1 2010).

1.SBP's Response at page 8 paragraph b. headlines stating "*RCT and Mr. Ivey are found in contempt of court.*" The statement is false and represents a baseless statement per CR 11 rules. 2.SBP's Response at page 10 states in part ..."RCT seemed to have unlimited resources to litigate matters making no economic sense." Citing to SBP Response footnote 53 which states that attorney Ivey brought a WSBA Grievance against attorney Lynch which was closed without further investigation. This reference to a Grievance is not relevant to the appeal or to "no economic sense." And SBP does not reveal the decisions made by Disciplinary Counsel. This Response is baseless and is made for an improper purpose.

At the SBP Response section 3.a. SBP addresses the disposition of the RCT Declaratory Judgment and Motion for Summary Judgment commencing at page 11. SBP reiterates the arguments found in the SBP counterstatement of the issues.

At Response page 12 SBP's statement that "the Motion [for Summary Judgment] was unrelated to any claim or pleading" ignores the Declaratory Judgment and Motion for Summary Judgment and the case law cited by RCT supporting the existence of claims. SBP relies on its Motion for CR 11, and the evidentiary inadequate Declarations

of Nelson and Burrill<sup>39</sup>. The existence of claim is addressed by RCT in this Reply in the response to SBP's Counterstatement.

The award by the trial court of CR 11 sanctions against Ivey is indicated at page 12 to have been the result of the SBP contention that the Declaratory Judgment and Motion for Summary Judgment were not claims before the trial court. This issue has been addressed in the RCT response to the Counterstatements. SBP does not cite authority to support its contention.

At Response 4. Page 13, SBP states that RCT claimed termination of the License Agreement as of June 1, 2016. SBP admits that the Arbitration commenced on or about August 28, 2017 found that SBP had been on notice of termination of the License Agreement as of June 21, 2016 and that the Arbitration Decision and Award terminated the License Agreement and awarded RCT the \$17,293.62 royalty payment which RCT had previously rejected.

SBP then concludes that that the award of the royalty payment was the only event not already concluded – Counsel for RCT reads the SBP statement as stating that SBP asserts that the License Agreement was already terminated, prior to the August 28, 2017 Arbitration

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<sup>39</sup> CP 134-35; CP 151 and CP 161.

Demand and that the Arbitration was only to obtain the owed Royalties.

At section 5. Regarding the RCT appeal, SBP asserts that the appeal was simply a continuation of harassment and retaliation. SBP here contends that the award of sanctions against attorney Ivey is not related to the claims before the trial court and the court's decisions in denying the Motion for Summary Judgment and in denying the RCT motion for CR 11 sanctions and in granting the SBP CR 11 motion. The Arbitration Award has Terminated the LICENSE AGREEMENT. But the cost of the Arbitration has been imposed on RCT. That cost has been necessitated by SBP's CR 11 "attack strategy" leading the trial court to error. The CR 11 strategy has been baseless and an improper act and has led to this added litigation. The improper acts by SBP have burdened the Honorable Court which is always impacted by the Motion Docket. CR 11 sanctions should be awarded against SBP.

### III. Responding to SBP's Argument

At Response page 14-16 the issues of "no claim" have been addressed in the response to SBP's Counterstatements 1, 2 and 3. The trial court erred in not granting the RCT Motion for Summary

Judgment.

At Response page 16 a. SBP contends that a Declaratory Judgment was not filed with the Superior Court. Here SBP disputes the Arbitration Award<sup>40</sup> and the SBP knowledge of the filing in Superior Court<sup>41</sup>.

At Response page 19 paragraph 2. SBP's assertion that material issues were in dispute ignores the Award and the inadequacy of the Declarations of Nelson and Burrill<sup>42</sup>. The Arbitrator's Award makes no reference to assertion of Material Facts by SBP<sup>43</sup>.

At Response page 21 SBP contends that attorney statements are not admissible. This contention has been addressed herein and in RCT's Opening Brief<sup>44</sup>.

At Response page 22-24 SBP addresses the "arbitration or at court" issue. SBP again refutes the Arbitrator's finding that the matter was ordered to Arbitration. This issue is also addressed by repeated reference to *Davis and Everett*, supra and to the Arbitration provision.

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<sup>40</sup> RCW § 7.70A.080. There is no right to a trial de novo on an appeal of the arbitrator's decision.

<sup>41</sup> CP 99

<sup>42</sup> CP 151, 161

<sup>43</sup> CP 346-352

<sup>44</sup> CP 98 and CP 121 and footnote 4 herein

At Response 23 and 25 SBP states that “the trial court found the License Agreement “requires binding arbitration of all disputes...”. The trial court did not undertake the *Davis, supra* analysis, there is no “mandatory” requirement. The trial court erred in making this finding.

At Response Section C. page 25 SBP states that the trial court did not order the parties to arbitrate. SBP’s assertion seeks to appeal the Arbitrator’s Award which states at CP 358-59 “...the Honorable Anthony Hazel ...stated in his opinion that the dispute over the License Agreement was to be determined by arbitration...”. *Everett, supra*, requires that the case be stayed if arbitration. See footnote 36. The trial court erred in not staying the Superior Court case. SBP cites CP 32 which does not state what is stated by SBP.

At Response section D. SBP supports the court’s award of CR 11 sanctions. The baseless and improper Declarations of Nelson and Burrill and the CR 11 “attack strategy” pursued by SBP are addressed in the Reply regarding SBP’s counterstatements 1, 2 and 3. The court erred in imposing CR 11 sanctions on Ivey. The court erred in not granting the RCT Motion for CR 11 sanctions.

At Response 24 SBP fails to observe that the obligation to sell a

required number of units is controlled by a fixed and final date having no cure. The court's failure to consider *Davis*, supra resulting in error.

At Response 25 SBP again disputes the Arbitration Award which held that the trial court ordered this matter to Arbitration.

At Response 27 the court having not consider law at footnotes 9, 10, 17 abused its discretion and manifestly ruled on unreasonable and untenable grounds<sup>45</sup>. The filing by RCT was grounded in law and fact and filed for proper purposes. The award was error<sup>46</sup>.

At Response 28-30 SBP reiterates much of its argument which has been addressed in the foregoing.

At Response 31 is the contention that RCT did not articulate improper conduct by SBP. SBP's "attack strategy", failed Declarations and failure to find and apply the law supports the conclusion of the court's error.

RCT requests an award of attorney fees pursuant to statute.

Respectfully submitted October 15, 2018.



Attorney for RCT, WSBA 6888

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<sup>45</sup> Washington State Physicians Ins. Exch. & Ass'n v Fisons Corp., 122 Wn.2d 299, 338, 858 P.2d 1054, 1075 (1993).

<sup>46</sup> Skimming v. Boxer, 119 Wn. App. 748, 754, 82 P.3d 707, 710(Div. III 2004).

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AFFIDAVIT OF SERVICE

I hereby declare, under penalty of perjury under the laws of the State of Washington, that on October 15, 2018 I made service of the foregoing pleading or notice on the party/ies listed below in the manner indicated:

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**October 15, 2018 - 12:31 PM**

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**Superior Court Case Number:** 13-2-01982-0

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