

No. 355721-X-III

FILED

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

SETH BURRILL PRODUCTIONS, INC., Respondent

v.

REBEL CREEK TACKLE INC., Appellant

RESPONDENT SETH BURRILL PRODUCTIONS, INC.'S
RESPONSE BRIEF

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I. INTRODUCTION

Over the last seven years, Respondent Seth Burrill Productions, Inc. (“SPBI”) has been forced to expend unnecessary time and expense to enforce court orders against Appellant Rebel Creek Tackle, Inc. (“RCT”), to obtain a contempt order, sanctions, and to oppose baseless filings and multiple appeals. This appeal is no different.

After losing its second appeal, RCT’s counsel provided SPBI’s counsel with a motion for summary judgment it intended to file in Spokane County Superior Court—but not in a case where it had filed a complaint. Upon receipt, SBPI’s counsel informed RCT’s counsel, Floyd Ivey, the motion was procedurally improper because there were no adjudicated pending claims. SBPI’s counsel also advised RCT’s counsel that the motion was not supported by authenticated evidence and, nevertheless, was subject to mandatory arbitration under the parties’ license agreement. For those reasons, SBPI’s counsel forewarned Floyd Ivey not to file the summary judgment motion, to avoid CR 11 sanctions for SBPI having to oppose a frivolous, improper motion not grounded on fact or law.

Nevertheless, Floyd Ivey filed the motion, and did not withdraw it.

The trial court agreed with SBPI, and denied RCT’s summary judgment motion. The court reasoned that any reasonable attorney would foresee RCT’s motion would fail because there was no pleading with respect to the claim made, and because numerous issues were in material

dispute. The trial court also found RCT's summary judgment motion and countermotion for CR 11 sanctions against SBPI frivolous.

RCT asks this Court to overturn the trial court's decision denying RCT's summary judgment motion, denying RCT's CR 11 countermotion, and granting SBPI's CR 11 motion against RCT's counsel, Floyd Ivey.

Finally, the trial court explicitly chose not to order the matter into arbitration. Yet, RCT also appeals "'the roundabout' Order Sending the Case to Arbitration." There is no such order. RCT later chose to arbitrate because a license agreement between the parties requires it.

Notwithstanding, RCT also asks this Court to determine whether the trial court erred sending the matter to arbitration – which it explicitly did not – and declining to stay the lower court action.

This Court should (i) affirm the trial court's denial of RCT's motion for summary judgment and countermotion for CR sanctions, and (ii) affirm the trial court's decision to grant CR 11 sanctions against Floyd Ivey for filing the frivolous motions. Respectfully, this Court should also (i) deny RCT's request for fees on appeal, and (ii) grant SBPI its attorney fees and costs for having defend another frivolous retaliatory filing by Mr. Ivey.

II. COUNTERSTATEMENT OF ISSUES

1. The trial court properly denied RCT's request for summary judgment for declaratory relief because there was no pleading or claim to adjudicate and because there were material issues in dispute.
2. The trial court did not err in deciding the License Agreement requires binding litigation.
3. The trial court did not err in denying to stay the case because it did not order the parties to arbitrate.
4. The trial court did not err in granting SBPI's motion for CR 11 sanctions because it found RCT's summary judgment motion and countermotion for sanctions frivolous.
5. The trial court did not err in denying RCT's countermotion for CR 11 sanctions because RCT could not articulate any improper conduct by SBPI.

III. STATEMENT OF THE CASE

A. Factual background.

Allen Osborn invented a diver fishing lure, and formed RCT to handle the ensuing business affairs. CP 195. RCT's counsel, Floyd Ivey, filed a patent application for the lure for RCT, identified as U.S. Patent No. 7,654,031 ("the '031 Patent"), which issued on February 2, 2010.¹

In 2009, Mr. Osborn approached Seth Burrill to work together to produce a similar "diver-plus-diverter" fishing apparatus, branded as "Bud's Diver."² In December 2009, Mr. Ivey filed a patent application on the diver-plus-diverter, U.S. Patent Application No. 12,641,291 (the "'291 Application").³

On June 1, 2010, RCT granted Mr. Burrill's company, SBPI, a family-operated business, an exclusive license to produce and distribute the Bud's Diver in exchange for royalties on each sale.⁴ Prototypes and molds were ordered, and SBPI created advertising and packaging materials using SBPI's "Bud's Diver" trademark.⁵ SBPI spent considerable time setting up the Bud's Diver sales.⁶

In the License Agreement, RCT represented that it owns the '031 Patent and the '291 Application.⁷ RCT never disclosed to SBPI, however,

¹ CP 162 at ¶ 162.

² CP 152.

³ CP 162 at ¶ 4.

⁴ CP 152 at ¶ 3; CP 175-180; CP 217; RP 12.

⁵ CP 152-153; *see also* CP 62.

⁶ CP 153 at ¶ 5(f).

⁷ CP 175.

that RCT did not own those patent assets.⁸ Those assets were owned by Mr. and Mrs. Osborn and had never been assigned to RCT. *Id.* For years, SBPI paid royalties to an entity that did not own the licensed rights on an abandoned patent application.⁹

B. Procedural history.

Regrettably, the License Agreement was a losing proposition for both parties.¹⁰ RCT's tactics and litigation abuses overwhelmed SBPI's business, wasting more time and money than either party ever might have expected to gain.¹¹ Given the tortuous litigation between the parties, it is necessary to highlight some of those tactics because the current appeal follows a nearly identical pattern of abuse.

The initial months under the License Agreement were ordinary.¹² The molds were housed at Plastic Injection Molding, Inc. ("PIM") in Kennewick.¹³ SBPI ordered and paid for parts from PIM.¹⁴ Under the License Agreement, SBPI sold products and sent royalties and sales records to RCT under the License Agreement.¹⁵ Apparently, RCT was unsatisfied and took matters into its own hands.¹⁶

⁸ CP 189.

⁹ *See* CP 219. The License Agreement is silent about trademarks. CP 175-180.

¹⁰ *See* CP 153-159.

¹¹ CP 158 at ¶ 27; CP 159 at ¶¶ 30-31.

¹² CP 152 at ¶ 5.

¹³ *Id.*

¹⁴ CP 153 at ¶ 5(e).

¹⁵ CP 175-180; CP 198.

¹⁶ CP 162 at ¶ 7.

RCT secretly worked with PIM to change the molds to a new design.¹⁷ Old parts became incompatible with new parts, rendering SBPI's already-purchased inventory useless.¹⁸ RCT also secretly ordered product from PIM in violation of SBPI's exclusivity.¹⁹ RCT made counterfeit packages for its rogue devices, using nearly identical copies of SBPI's copyrighted material in its promotion and packaging.²⁰ The counterfeiting was blatant. *Id.* RCT sold the counterfeit product using SBPI's trademark, "Bud's Diver", and copyrighted material in its promotion and packaging.²¹

Presumably to justify RCT's sales, Mr. Ivey notified SBPI in 2012 that RCT was unilaterally terminating the License Agreement.²²

1. SBPI commences Arbitration One, and wins.

Frustrated, SBPI commenced arbitration for breach of contract, as required under the License Agreement ("Arbitration One").²³ On May 2, 2013, Arbitrator James S. Craven ruled for SBPI in Arbitration One.²⁴ The Final Award of the Arbitrator:

- (i) found RCT in material breach of the License Agreement;
- (ii) reinstated the License Agreement;
- (iii) found RCT in violation of state and federal statutes;
- (iv) awarded SBPI monetary damages;

¹⁷ CP 162 at ¶ 8; CP 153 at ¶ 6.

¹⁸ CP 162 at ¶ 8.

¹⁹ *See id.*

²⁰ CP 163 at ¶ 9.

²¹ CP 154 at ¶ 6.

²² CP 190; CP 196.

²³ *Id.*; *see also* CP 189-193.

²⁴ CP 191.

- (v) enjoined RCT from further tortious behavior, including interfering with the License Agreement;
- (vi) extended the License Agreement due to RCT's tortious behavior;
- (vii) ordered RCT's principals to assign RCT the intellectual property rights that SBPI was paying royalties for under the License Agreement;
- (viii) ordered RCT to make the molds available to SBP; and
- (ix) awarded SBPI its full costs and attorneys' fees.²⁵

RCT filed a motion for reconsideration, but the arbitrator denied RCT's motion.²⁶

- a. *RCT fails to comply with the Arbitration One Final Award.*

Despite the arbitration finality, RCT did not comply with the Final Award.²⁷ The Judgment was not paid.²⁸ The attorneys' fees and costs were not paid.²⁹ The injunctive relief was not honored.³⁰ The molds were not transferred. *Id.* RCT continued to sell its counterfeit devices.³¹

For over four years, and despite the Final Award directing RCT not to do so, RCT continued its tortious behavior, compounding it with an avalanche of bad faith litigation tactics including failing to pay a \$100,000-

²⁵ CP 192-193.

²⁶ CP 191.

²⁷ CP 196.

²⁸ CP 218.

²⁹ *Id.*

³⁰ CP 196.

³¹ CP 248-250.

plus judgment.³² SBPI has prevailed at each stage, but none of it was necessary or appropriate (or helpful to RCT).³³

b. *RCT and Mr. Ivey are found in contempt of court.*

Following Arbitration One, RCT refused to allow SBPI to have access to the molds at PIM.³⁴ Mr. Ivey instructed PIM not to provide the molds, despite the Final Award ordering access.³⁵

Left without recourse, SBPI paid a filing fee to record the Final Award as a Judgment in Spokane County Superior Court case number 13-2-01982-0 (the “Superior Court Action”).³⁶ SBPI then moved for contempt.³⁷ The Superior Court found that RCT had intentionally violated the Order and Judgment confirming the Final Award, and issued an order finding contempt, and awarding SBPI costs and attorneys’ fees.³⁸

2. RCT appeals the trial court’s contempt order, and loses.

Despite still being in contempt, RCT appealed the contempt ruling to this Court (“Appeal One”).³⁹ RCT had paid none of the Judgment, and none of the attorneys’ fees from the contempt order.⁴⁰ In Appeal One, this Court found RCT failed to demonstrate “the contempt was in any manner untenable,” and awarded SBPI attorneys’ fees and costs:

³² See CP 216-218.

³³ SBPI surmises that Mr. and Mrs. Osborn may be unaware of the multi-year litigation folly and may have never authorized it.

³⁴ CP 196.

³⁵ *Id.*

³⁶ CP 217.

³⁷ *Id.*

³⁸ CP 256-258.

³⁹ See CP 195-200.

⁴⁰ See CP 196.

. . . RCT has appealed from a finding of contempt, while conceding all of the essential facts establishing that it intentionally violated a court order. . . . Thus, RCT has not presented any debatable issue and **this appeal is completely without merit**. SBP is awarded its costs and attorneys' fees for this appeal[.]⁴¹

a. *RCT unsuccessfully appeals to the Supreme Court.*

Despite *still* being in contempt, RCT petitioned the Washington Supreme Court for review of Appeal One confirming the Superior Court's contempt finding.⁴² The Supreme Court declined to grant review.⁴³

Although SBPI now had access to the molds, RCT still refused to pay the Judgment and the attorneys' fees awards of the Superior Court and this Court.⁴⁴ The contempt litigation was concluded, but RCT remained in contempt.⁴⁵

b. *SBPI attempts to collect its Judgment through receivership.*

SBPI then sought supplemental proceedings to discover RCT's assets.⁴⁶ Mr. Ivey represented RCT had no current bank account and its only assets were the molds, patent and patent application, the License Agreement, and an application for rights in Canada and the European Union.⁴⁷ Therefore, SBPI offered to take an assignment of the patent assets

⁴¹ CP 199-200 (emphasis added).

⁴² See *Seth Burrill Productions, Inc. v. Rebel Creek Tackle*, 184 Wn.2d 1029, 364 P.3d 120 (2016).

⁴³ *Id.*

⁴⁴ CP 218.

⁴⁵ See *id.*

⁴⁶ *Id.*

⁴⁷ CP 219.

to release the Judgment.⁴⁸ But, RCT would not negotiate or pay the Judgment.⁴⁹

Consequently, SBPI initiated procedures to levy on RCT's patent assets through the appointment of a receiver, which would assign the patent assets to the receiver, and then auction the patent assets.⁵⁰ SBPI brought, and the Superior Court granted, a motion for appointment of a receiver in the Superior Court Action.⁵¹

Without missing a beat, on May 2, 2016, RCT appealed the appointment of the receiver to this Court ("Appeal Two").⁵²

3. RCT appeals the appointment of a receiver, and loses.

RCT would not pay the Judgment (or the Superior Court and this Court's attorneys' fees awards), yet RCT seemed to have unlimited resources to litigate matters making no economic sense.⁵³ Appeal Two is another example.⁵⁴

Without any explanation as to the origin, following the supplemental proceedings revelation about RCT's insolvency, RCT somehow paid \$103,000 in the Superior Court Action and filed a notice of supersedeas bond to support Appeal Two.⁵⁵

⁴⁸ CP 220.

⁴⁹ CP 220-221.

⁵⁰ *Id.*

⁵¹ CP 221-222.

⁵² CP 216-234.

⁵³ Indicative of RCT's bad faith tactics, during Appeal Two, Mr. Ivey brought a Bar Grievance to the Washington State Bar Association against Lee & Hayes attorney J. Christopher Lynch. CP 152. The WSBA closed the baseless Bar Grievance without further investigation. *See id.*

⁵⁴ CP 216-234.

⁵⁵ CP 222.

Notably, even if RCT had somehow “won” Appeal Two, RCT would still owe all the money.⁵⁶ That is, RCT’s assets would still be vulnerable to levy.

Nevertheless, again this Court ruled for SBPI on April 11, 2017, affirming the appointment of a receiver in Appeal Two.⁵⁷ And, again, this Court awarded SBPI its attorneys’ fees and costs:

We agree with Burrill that Rebel challenged the court’s receivership order without addressing any provision of RCW 7.60.025(1) on which Burrill relied, did not attempt to identify an abuse of discretion by the trial court, and made arguments unsupported by law. We **award Burrill reasonable attorney fees and costs on appeal . . .**⁵⁸

After RCT lost Appeal Two, this Court’s mandate allowed for the release of the supersedeas bond funds to SBPI.⁵⁹ SBPI was finally paid.⁶⁰

a. *Mr. Ivey is sanctioned in the Superior Court Action.*

SBPI’s Superior Court Action to confirm the Final Award as a Judgment, and to find RCT in contempt, was resolved by final judgment in 2013.⁶¹ Nevertheless, RCT brought a Motion for Summary Judgment for Motion for Declaratory Judgment in the Superior Court action on July 6, 2017 (the “Motion”).⁶²

⁵⁶ Appeal One was identical: even if RCT had “won” Appeal One, RCT would still owe all the money.

⁵⁷ CP 216-234.

⁵⁸ CP 232 (emphasis added).

⁵⁹ CP 233; *see also* CP 2-4, 12-14.

⁶⁰ RP 16.

⁶¹ CP 217; CP 230.

⁶² CP 18-19; CP 20-131.

SBPI requested RCT withdraw the Motion because it was procedurally improper given no operative pleading existed.⁶³ Mr. Ivey declined.⁶⁴ SBPI opposed and moved for the imposition of sanctions for, among other reasons, filing the Motion unrelated to any claim or pleading.⁶⁵ RCT counter-moved for sanctions against SBPI for opposing its Motion.⁶⁶

The Honorable Anthony Hazel denied RCT's Motion for Summary Judgment because it was procedurally improper.⁶⁷ Judge Hazel granted SBPI's Motion for Sanctions, awarding attorneys' fees.⁶⁸ The Order required that the sanction be paid by Mr. Ivey, not RCT.⁶⁹ Judge Hazel also denied RCT's Countermotion for Sanctions.⁷⁰

After losing and paying sanctions to SBPI, Mr. Ivey and RCT could have stopped litigating and simply collected royalties. However, Mr. Ivey rejected a \$17,293.62 royalty remission from SBPI and, instead, initiated a second arbitration to seek termination of the License Agreement.⁷¹

⁶³ CP 171-172; CP 26-270.

⁶⁴ *See* CP 264.

⁶⁵ CP 134-135; CP 136-150; *see also* CP 151-160; CP 161-270.

⁶⁶ CP 291.

⁶⁷ CP 341-344.

⁶⁸ *Id.*

⁶⁹ *Id.* at CP 343.

⁷⁰ CP 342.

⁷¹ CP 263-265; CP 349.

4. RCT commences Arbitration Two to terminate the License Agreement and to seek a royalty payment it previously rejected from SBPI.

In Arbitration Two, RCT claimed it terminated the License Agreement as of June 1, 2016.⁷² Many of the same issues raised by RCT in Arbitration Two had already been decided in Arbitration One.⁷³ Despite that Arbitrator Thomas D. Cochran found RCT's "acts and activities" were "troublesome," he also found SBPI was on notice of termination of the License Agreement as of June 21, 2016.⁷⁴ The Decision and Award terminated the License Agreement, and awarded RCT the \$17,293.62 royalty payment it rejected merely one month earlier.⁷⁵

Even though RCT "won" – *for the first time* – Arbitration Two, RCT received the royalty payment SBPI previously tendered that RCT rejected.⁷⁶ In other words, akin to Appeal One and Appeal Two, RCT was in the same position it would have been, had it not rejected the royalty in the first place.⁷⁷

5. RCT appeals, in part, the CR 11 sanctions against its attorney, Floyd Ivey.

Rather than ending the pattern of harassment and retaliation against SBPI, during the pendency of Arbitration Two, RCT appealed Judge Hazel's order denying its Motion and countermotion for sanctions, and

⁷² CP 349.

⁷³ CP 348 at ll. 7-8.

⁷⁴ CP 350 at ¶¶ 4, 7.

⁷⁵ Compare CP 309 and CP 311-312, with CP 351.

⁷⁶ *Id.*

⁷⁷ *Id.*

awarding SBPI's sanctions against Mr. Ivey ("Appeal Three").⁷⁸ Like Appeal One and Appeal Two, Appeal Three is not in RCT's interests. The sanctions are against Mr. Ivey personally, and the "summary judgment" claim was adjudicated in Arbitration Two. Unfortunately, SBPI's fees and costs to respond to Appeal Three have already exceeded the amount of sanction amount Judge Hazel awarded.⁷⁹

SBPI is again forced to divert its resources to participate in Appeal Three for no sensible economic reason.

IV. ARGUMENT

A. The trial court properly denied RCT's request for summary judgment for declaratory relief.

This Court reviews summary judgment orders de novo. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080, 1086 (2015). Summary judgment is only appropriate when "no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.* (citations omitted).

The trial court denied RCT's Motion for Summary Judgment for Motion for Declaratory Judgment ("Motion") for two reasons: there were "no pleadings" to adjudicate and there were "a number of issues . . . in material dispute."⁸⁰ RCT has advanced no argument to alter that decision.

⁷⁸ See CP 341-344.

⁷⁹ CP 343.

⁸⁰ RP 24-25.

1. The trial court did not err in denying RCT’s motion for summary judgment for declaratory judgment because it was procedurally improper.

RCT filed its Motion for declaratory judgment without pleadings of any kind still existing in the lower court action.⁸¹ There was no operative complaint, counterclaim, or other claims pending against any party, only an open docket.⁸² RCT’s Motion was substantively flawed and procedurally improper because it asked the trial court to adjudicate a claim that did not exist.⁸³

“A party who does not plead a cause of action or theory of recovery cannot finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along.” *Evergreen Moneysource Mortg. Co. v. Shannon*, 167 Wn. App. 242, 256, 274 P.3d 375, 382 (Div. III 2012) (citation omitted). Washington Superior Court Civil Rule 7 provides “[t]here shall be a complaint and an answer” In turn, claims for relief “shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which the pleader deems the pleader is entitled. Relief in the alternative or of several different types may be demanded.” *Berge v. Gorton*, 88 Wn.2d 756, 762, 567 P.2d 187 (1977). In other words, “[a] complaint, even under Washington’s liberal rules of pleading, is

⁸¹ CP 18-131; RP 24-25.

⁸² Prior to RCT filing its Motion, the only remaining housekeeping task was a satisfaction of a judgment to be filed by SBPI related to an order granting SBPI a \$119,777.65 judgment and receiver’s fees. *Compare* CP 12-14, *with* CP 18-131. *See also* RP 24-25; RP 15-16.

⁸³ CP 20-131; RP 24-25.

required to contain direct allegations sufficient to give notice to the court and the opponent of the nature of the plaintiff's claim." CR 15(d) governs supplemental pleadings, but it does not apply here because there were no pleadings to supplement.

This is not mere pedantry. Washington's Civil Rules do not support RCT's request to add a claim for declaratory relief after the conclusion of a matter or to bring summary judgment on a claim never pled. If a party could file a motion for summary judgment in any empty open docket at any time, without a pending claim, that would obliterate the need for pleading notice, sidestep the entire discovery process, and allow litigants to seek adjudication on a whim without notice of the claim to the other party.

- a. *RCT has never brought a claim for declaratory judgment.*

Here, RCT continues to represent it had a viable declaratory judgment claim when it filed its summary judgment motion.⁸⁴ The record is devoid of the Superior Court motion for declaratory judgment pleading RCT claims it filed in the Superior Court Action. Similarly, RCT alleged in its summary judgment motion that on June 1, 2016, it filed in the "current Spokane County Superior Court Case 13-2-01982-0, its Motion for Declaratory Judgment of Termination of the License Agreement."⁸⁵ As support, RCT cited to exhibit four of its Motion.⁸⁶ That exhibit is a Motion

⁸⁴ See Brief for Appellant at 16.

⁸⁵ CP 22.

⁸⁶ CP 22 (*citing* CP 73).

for Declaratory Judgment of Termination of the License Agreement with a Court of Appeals caption, not a Superior Court caption or file stamp.⁸⁷ RCT maintained the same position at oral argument.⁸⁸

RCT has never filed a claim for declaratory judgment or motion for declaratory judgment in the Superior Court case, nor in either of the two prior appeals before this Court.^{89,90} Yet, *even if* RCT had filed a motion for declaratory judgment, that motion would have been improper because RCT has never pled a claim for declaratory judgment.⁹¹

Either RCT (1) forgot it never asserted a declaratory judgment claim; (2) forgot it never followed through filing its purported motion for declaratory judgment in Superior Court; and (3) forgot it never filed the same in this Court, or RCT is hoping to slide by without asserting a pleaded claim at any cost. Regardless, at every turn, SBPI continues to suffer financially and emotionally for RCT's shortcomings and filing abuses.

- b. *This Court already counseled RCT it could not seek redress for a claim it never pled.*

RCT sought summary judgment after the trial court had already concluded all pending matters in the case and on a claim RCT had never

⁸⁷ CP 73.

⁸⁸ RP 4.

⁸⁹ The record shows on June 1, 2016, RCT's counsel provided undersigned counsel's firm with what appears to be a courtesy copy of a motion for declaratory judgment. CP 49-51. The Superior Court docket for case number 13-2-01982-0 reflects no such filing.

⁹⁰ See *Seth Burrill Productions, Inc. v. Rebel Creek Tackle, Inc.*, No. 321193 (Div. III 2013) ("Appeal One"); *Seth Burrill Productions, Inc. v. Rebel Creek Tackle, Inc.*, No. 344011 (Div. III 2016) ("Appeal Two").

⁹¹ See CR 7(a).

pled.⁹² There were no claims to adjudicate on summary judgment. There was no conceivable procedure for doing what RCT did. And, RCT knew it.⁹³

In adjudicating Appeal Two, this Court was asked to decide whether the trial court erred in rejecting RCT's lawyer's tender of the differential between a judgment and setoffs.⁹⁴ Importantly, this Court found "no legal basis for Rebel's proposed procedure for determining the 'differential' or, as it later requested, for entertaining a declaratory judgment claim."⁹⁵ As this Court explained "[t]here is no regular procedure that we can pretend permits what Rebel was asking the trial court do here. Claims asserted in the complaint and answer were resolved by a final judgment in 2013. It is too late to amend Rebel's answer or treat it as if it was amended."⁹⁶ Less than three months after this Court's decision in Appeal Two, RCT filed its motion for summary judgment for declaratory judgment anyway.⁹⁷

The trial court did not err when it denied RCT's motion for summary judgment because there were "no pleadings" to adjudicate with respect to RCT's claim.⁹⁸

⁹² CP 8-10; CP 20-131; CP 230 (claims resolved by final judgment in 2013).

⁹³ CP 230.

⁹⁴ CP 228-229.

⁹⁵ CP 229.

⁹⁶ CP 230 (emphasis added); *see also* RP 14-15.

⁹⁷ *Compare* CP 216-234; *with* CP 20-131.

⁹⁸ RP 24-25 (reasoning "any attorney that's practiced for a reasonable period of time it would be foreseeable that [RCT's] motion would fail"); *see also* CP 12-14; 342-344.

2. The trial court properly denied RCT’s motion for summary judgment because material issues were in dispute.

Assuming arguendo, even if RCT had a viable claim to adjudicate at summary judgment, the trial court did not err when it determined “a number of issues that would be in material dispute . . .” preclude summary judgment.⁹⁹

Because the standard of review is de novo, the appellate court must “engage in the same inquiry as the trial court.” *Ellis v. City of Seattle*, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000) (quoting *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 92–93, 993 P.2d 259 (2000)). Importantly, “all facts submitted and reasonable inferences therefrom must be viewed in the light most favorable to the nonmoving party.” *Trimble*, 140 Wn.2d at 93.

“[S]ummary judgment is appropriate where there is ‘no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.’” *Elcon Const., Inc. v. E. Washington Univ.*, 174 Wn.2d 157, 164-65, 273 P.3d 965 (2012) (quoting CR 56(c)). “A material fact is one that affects the outcome of the litigation.” *Owen v. Burlington N. Santa Fe R.R. Co.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005) (citation omitted).

The trial court did not err when it reasoned numerous issues would be in material dispute had there been a connection with the pleadings.¹⁰⁰ In doing so, the court explained one of the obvious issues precluding

⁹⁹ RP 25; *see also* CP 342-344.

¹⁰⁰ RP 25.

summary judgment is whether RCT's conduct contributed to the reason why SBPI could not meet the sales requirements in the License Agreement.¹⁰¹ Unquestionably, this would affect the outcome. *See Owen*, 153 Wn.2d at 789.

Specifically, SBPI's opposition, supported in part by a signed declaration from its owner, explained it was without inventory for 10 months because RCT's counsel blocked its access to inventory.¹⁰² SBPI's authenticated evidence also showcased unlawful competition problems attributed to RCT, RCT bad-mouthing SBPI to vendors during the relevant period, and the inability to procure inventory, among a litany of other obstacles.¹⁰³ SBPI's statements about the difficulties it faced were made based on its owner's personal knowledge and supported by admissible facts.¹⁰⁴ SBPI's evidence directly supported its argument that RCT's conduct prevented it from complying with the sales quota in the License Agreement.¹⁰⁵ The Court found these issues to be material precluding summary judgment.¹⁰⁶

In contrast, RCT's Motion presented unauthenticated inadmissible evidence.¹⁰⁷ Evidence submitted in a summary judgment proceeding *must* be admissible. *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 141, 331 P.3d 40,

¹⁰¹ RP 26; *see* CP 175-180.

¹⁰² CP 154 at ¶ 7.

¹⁰³ CP 154 at ¶¶ 6-10.

¹⁰⁴ CR 56(e); CP 154-160.

¹⁰⁵ CP 167 (authenticating Exhibit H, CP 247-252).

¹⁰⁶ RP 29.

¹⁰⁷ CP 20-131.

46 (2014) (en banc); CR 56(e). “Unauthenticated or hearsay evidence does not suffice.” *Id.*

RCT’s pleadings and attorney statements in support of its Motion are not admissible.¹⁰⁸ Still, RCT did nothing to remedy its lack of admissible evidence, nor withdraw its Motion.¹⁰⁹ In fact, RCT’s reply brief did not even attempt to address its lack of admissible evidence, nor include a declaration from RCT.¹¹⁰ In this appeal, RCT largely ignores the evidentiary issues precluding summary and the genuine issues of material fact. Instead, RCT argues SBPI’s evidence is conclusory, but fails to cite to any specific testimony or to contrast it with contradictory admissible evidence.¹¹¹

RCT also fails to articulate how the trial court erred. Instead, RCT seems to focus on whether the trial court may have reviewed RCT’s proposed order it declined to adopt and other issues unrelated to whether RCT actually met the CR 56 standard. Because RCT failed to provide any admissible evidence in support of its improper request for summary judgment (on a claim never made), nor refute the properly authenticated evidence proffered by SBPI, this Court should find the trial court did not err in denying summary judgment.

¹⁰⁸ CP 143-147; CP 20-131.

¹⁰⁹ CP 274-294.

¹¹⁰ *Id.*

¹¹¹ Brief for Appellant at 30-35.

B. The trial court did not err in deciding the License Agreement requires binding litigation.

Questions of arbitrability are reviewed de novo by this Court by examining the arbitration agreement between the parties. *Kamaya Co. v. Am. Prop. Consultants, Ltd.*, 91 Wn. App. 703, 713, 959 P.2d 1140 (1998), *review denied*, 137 Wn.2d 1012 (Div. I 1999). Importantly, if the scope of an arbitration clause is debatable or in doubt, the clause is construed in favor of arbitration. *Kamaya*, 91 Wn. App. at 714. “Absent an express provision excluding a particular type of dispute, ‘only the most forceful evidence of a purpose to exclude a claim from arbitration can prevail.’” *ML Park Place Corp. v. Hedreen*, 71 Wn. App. 727, 739, 862 P.2d 602 (Div. I 1993) (quoting *Local Union No. 77, Int’l Bhd. of Elec. Workers v. Pub. Util. Dist. No. 1*, 40 Wn. App. 61, 65, 696 P.2d 1264 (Div. II 1985)). Arbitrability of a claim is a question of law, and the burden of proof is on the party seeking to avoid arbitration. *Townsend v. Quadrant Corp.*, 153 Wn. App. 870, 878, 224 P.3d 818, 824 (Div. I 2009).

First, the trial court did “not ma[ke] a ruling as to whether [the] case should go to arbitration or not.”¹¹² Instead, the trial court explicitly found the License Agreement “requires binding arbitration of all disputes, including the matters raised by [RCT in its motion].”¹¹³ Notably, despite the trial court’s finding, it did not order the matter be arbitrated, like RCT argues.¹¹⁴

¹¹² RP 32.

¹¹³ CP 342 at ¶ 1.

¹¹⁴ CP 342-343; Brief for Appellant at 6.

RCT argues the lower court erred in not considering *Davis*. Brief for Appellant at 24; *Davis v. General Dynamics Land Sys.*, 152 Wn. App. 715, 717, 217 P.3d 1191, 1192 (Div. II 2009). The facts in *Davis* are nothing like what transpired at the lower court in this case. *Id.* at 716. There, the trial court dismissed an amended complaint stating, “I think that by signing [the Arbitration Agreement] [Davis] agreed to the arbitration of all claims arising out of his employment” *Id.* The *Davis*-court ruled that “questions of arbitrability are subject to arbitration.” *Id.* This Court disagreed and found that the trial court, not an arbitrator, decides arbitrability. *Id.* at 719-720.

Davis is misplaced because the trial court here did not find it is an arbitrator’s duty to decide arbitrability.¹¹⁵ Conversely, the trial court explicitly found the License Agreement “requires binding arbitration of all disputes”¹¹⁶ The trial court also noted “both parties had the same position with respect to whether arbitration was available to the parties.”¹¹⁷

RCW also argues the trial court erred because RCW 7.04A.060(2) requires the court to decide whether an agreement to arbitrate exists or a

¹¹⁵ RCT also repeatedly cites *Godfrey v. Hartford Cas. Ins. Co.*, but it is inapposite for the same reason and RCT makes no attempt to show why it is relevant. 142 Wn.2d 885, 902, 16 P.3d 617 (2001). It is not. *Id.* at 900 (finding, in part, an insurance policy provision calling for a trial de novo on damages after the arbitration violates chapter 7.04 RCW, and is therefore unenforceable); CP 342-344.

¹¹⁶ CP 342 at ¶ 1 (emphasis added).

¹¹⁷ RP 32.

controversy is subject to an agreement to arbitrate.¹¹⁸ The trial court decided both:

The patent license agreement entered into by Plaintiff Seth Burrill Productions, Inc. and Defendant Rebel Creek Tackle, Inc. on June 1, 2010, requires binding arbitration of all disputes, including the matters raised by Defendant Rebel Creek Tackle, Inc. in its “Motion for Summary Judgment for Defendant’s Motion for Declaratory Judgment.”¹¹⁹

This Court should find that the trial court did not err in finding that the dispute, over whether SPBI breached the License Agreement requiring termination, is subject to arbitration.¹²⁰ Importantly, if there is *any* doubt as to the scope of Section 8 of the License Agreement, the clause should be construed in favor of arbitration. *Kamaya*, 91 Wn. App. at 714; CP 159.

To that end, RCT argues Section 8 required a cure and, if there is no cure, the dispute must be determined in court.¹²¹ Section 8 contains no “express provision excluding a particular type of dispute” nor any carve out like RCT suggests. *ML Park Place Corp.*, 71 Wn. App. at 739 (citation omitted); CP 179 (Section 8). In fact, Section 8.5 provide arbitration is triggered where “cure is not effected.”¹²² If the parties wanted to specify instances in which arbitration is not available, they could have done so. “Only the most forceful evidence of a purpose to exclude a claim from arbitration can prevail.” *ML Park Place Corp.*, 71 Wn. App. at 739 (internal quotation and citation omitted); *see also Gandee v. LDL Freedom*

¹¹⁸ Brief for Appellant at 1, 20.

¹¹⁹ CP 342.

¹²⁰ CP 179 (Section 8).

¹²¹ Brief for Appellant at 23.

¹²² CP 179.

Enters., Inc., 176 Wn.2d 598, 603, 293 P.3d 1197 (en banc) (2013)

(stating “all presumptions [are] to be made in favor of arbitration”).

In the complete absence of any evidence to the contrary, this Court should find that the trial court did not err when it determined the License Agreement required arbitration.

C. The trial court did not err in denying to stay the case because it did not order the parties to arbitrate.

RCT argues the trial court erred in “sending” the case to arbitration without staying the Superior Court case as required by *Everett*.¹²³

A determination on a motion to stay proceedings is discretionary, and is reviewed only for abuse of discretion. *King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 348, 16 P.3d 45, 50 (Div. I 2000). “A trial court abuses its discretion ‘when its exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons.’” *King County v. Vinci Constr. Grands Projets/Parsons RCI/Frontier-Kemper, JV*, 188 Wn.2d 618, 632, 398 P.3d 1093, 1100 (2017) (quoting *Allard v. First Interstate Bank of Wash., N.A.*, 112 Wn.2d 145, 148, 768 P.2d 998 (en banc) (1989)).

The trial court did not abuse its discretion in denying RCT’s request to stay the case because (1) there was no reason to stay the trial court action and (2) the trial court did not order the parties to arbitrate.¹²⁴

¹²³ Brief for Appellant at 24.

¹²⁴ CP 341-344; RP 32 (denying RCT’s request to stay the matter for arbitration “since it’s not really determined and the Court has not made a ruling as to whether this case shall go to arbitration or not.”).

In the absence of a court-ordered directive to arbitrate, the trial court was within discretion its discretion to not stay the proceedings.

RCT cites *Everett* and RCW 7.04A.070(6) as grounds for finding the trial court erred.¹²⁵ Neither apply. RCW 7.04A.070(6) provides, in part, that “[i]f the court orders arbitration, the court shall on just terms stay any judicial proceeding that involves a claim subject to the arbitration.” (emphasis added). The trial court did not order arbitration.¹²⁶ In fact, the trial court explicitly elected not to order arbitration because it is “not really before the [c]ourt” and the parties indicated arbitration is available.¹²⁷

Similarly, *Everett* is inapposite because it did not turn on whether a court must stay a case when it does not send a case to arbitration, like here. *Everett Shipyard, Inc. v. Puget Sound Envtl. Corp.*, 155 Wn. App. 761, 763, 231 P.3d 200, 201 (Div. I 2010) (reversing court’s ruling that it did not have jurisdiction to enter a dismissal order and judgment following an order to compel arbitration and stay of proceedings).

There is nothing in the record supporting RCT’s argument that the trial court abused its discretion in denying the lower court matter, especially given the Court’s clear language at oral argument and the absence of a court-ordered mandate to arbitrate. Moreover, it did not make

¹²⁵ Brief for Appellant at 7.

¹²⁶ CP 341-344.

¹²⁷ CP 32 (stating the trial court “has not made a ruling as to whether this case shall go to arbitration”); *see also* CP 341-344.

sense to stay the proceedings with nothing left pending, other than SBPI's satisfaction of judgment to be filed.¹²⁸

RCT has not demonstrated the trial court's "exercise of discretion was manifestly unreasonable or based upon untenable grounds or reasons." *King County*, 188 Wn.2d at 632 (internal quotation marks and citation omitted). This Court should find the trial court properly denied RCT's request to stay the proceedings.

D. The trial court did not err in granting SBPI's motion for CR 11 sanctions because it found RCT's summary judgment motion and countermotion for sanctions frivolous.

Decisions either denying or granting sanctions under CR 11 are reviewed for abuse of discretion. *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054, 1075 (1993). "A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds." *Id.* at 339. Under CR 11, it is within the trial court's discretion to award sanctions in the form of reasonable attorney fees or costs where there is a filing not grounded in law or fact, or filed for an improper purpose. *Skimming v. Boxer*, 119 Wn. App. 748, 754, 82 P.3d 707, 710 (Div. III 2004).

This Court acknowledges its "deference accounts for the trial judge's personal and sometimes exhaustive contact with the case." *Id.* (citing *Eugster v. City of Spokane*, 110 Wn. App. 212, 231, 39 P.3d 380 (trial judge is in a better position than an appellate court to decide issues of

¹²⁸ RP 16; *see also* CP 8-10.

this nature) (citation omitted), *review denied*, 147 Wn.2d 1021, 60 P.3d 92 (Div. III 2002); *Miller v. Badgley*, 51 Wn. App. 285, 300, 753 P.2d 530 (Div. I 1988) (stating trial court has “tasted the flavor of the litigation and is in the best position to make these kinds of determinations”) (quotation omitted).

A filing is baseless and subject to sanctions if: (1) it is not grounded in fact; (2) it is not warranted by existing law or a good faith argument to change the law; or (3) it is filed for an improper purpose. CR 11. RCT’s summary judgment motion met all three considerations (though, only one is required).¹²⁹

Here, the trial court “dedicate[d] quite a bit of time to [RCT’s] motion.”¹³⁰ Ultimately, the court opined that sanctions against RCT’s attorney Floyd Ivey were warranted for numerous reasons.¹³¹ First, RCT’s summary judgment motion was frivolous because it is not connected with any pleading or pled claim.¹³² The court reasoned “any attorney that’s practiced for a reasonable period of time it would be foreseeable that [RCT’s] summary judgment motion . . . would fail.” *Id.* The trial court also opined that RCT’s summary judgment was frivolous for a second reason; namely, the court could not “see how a reasonable attorney could see [RCT’s Motion] prevailing given that there are a number of issues that would be in material dispute.” *Id.* The trial court further found there were:

¹²⁹ See CP 147-149.

¹³⁰ RP 13.

¹³¹ RP 25-33.

¹³² RP 25.

several material issues that would *clearly* and *foreseeably* be disputed, and if a lawyer is contemplating that summary judgment they would foresee how the litigation would play out and any reasonable lawyer would conclude that [SBPI] would at least be able to raise the defense regarding whether [RCT's] actions contributed to the reason why that contract wasn't able to be [sic] filled due to a ten-month postponement and the potential for unlawful competition with respect to the competing products.¹³³

The trial court also concluded that sanctions were appropriate because of “the frivolous nature of Mr. Ivey’s own CR 11 sanctions counter-motion against [SPBI].”¹³⁴ RCT’s counsel could not point to any improper purpose supporting its counter-motion for sanctions against SBPI. *Id.* Both of RCT’s motions were subject to sanctions against its attorney for separate and independent bases for imposing CR 11 sanctions.¹³⁵

RCT offers no cognizable argument how the court abused its discretion.¹³⁶ As best as SPBI can decipher, RCT halfheartedly argues CR 11 is not meant to chill an attorney’s creativity in pursuing factual or legal theories.¹³⁷ Completely disregarding CR 7(a) and this Court’s admonition months earlier that “[t]here is no regular procedure that we can pretend permits what Rebel was asking the trial court do here” does not amount to “creativity.”¹³⁸ RCT’s counsel filed the summary judgment motion – despite no claim existed – in the face of the Civil Rules and this Court, and

¹³³ RP 26 (emphasis added).

¹³⁴ RP 33.

¹³⁵ *Id.*

¹³⁶ Brief for Appellant at 25-40.

¹³⁷ *Id.* at 26 (citation omitted), 37.

¹³⁸ CP 230; *see also* RP 14-15.

he refused to withdraw RCT's motion even after SPBI explained its procedural deficiencies.¹³⁹

At every opportunity, SBPI has attempted to curb the abuse, including: (1) appraising Mr. Ivey of the applicable law in advance of judicial intervention (as it did here); (2) summarily defeating Mr. Ivey's motions and legal arguments in court (as it did here); (3) obtaining attorney fee awards where Mr. Ivey's unsupported arguments are defeated (as it did here); (4) obtaining a contempt order against RCT; (5) making reasonable settlement demands; and (6) warning Mr. Ivey that SBPI would seek sanctions if the instant motion is not withdrawn (as it did here).¹⁴⁰

RCT also argues the court erred because its summary judgment motion is meritorious.¹⁴¹ The standard of review for this Court is abuse of discretion, not de novo of the underlying motion. *Washington State Physicians Ins. Exch. & Ass'n*, 122 Wn.2d at 338.

Finally, RCT contends SBPI's counsel made unsupported assertions in its declaration in support of its opposition briefing.¹⁴² RCT also argues SBPI "undertook no discovery" and failed to adopt RCT's misplaced reliance on *Davis* and *Everett* related to arbitration.¹⁴³ None of these quasi-arguments come anywhere close to illustrating how the trial court abused its sound discretion in awarding sanctions against RCT's

¹³⁹ CP 259-270 (letters to RCT's counsel regarding the improper filing and forewarning about CR 11 sanctions).

¹⁴⁰ See CP 131 at ¶ 37; CP 259-270.

¹⁴¹ Brief for Appellant at 29.

¹⁴² Brief for Appellant at 33.

¹⁴³ *Id.* at 37.

attorney for filing a motion where no claim exists and for filing a countermotion for sanction without articulating a single improper purpose attributed to SPBI.

The trial court did not abuse its discretion in awarding sanctions against RCT's attorney.¹⁴⁴

E. The trial court also did not err in denying RCT's countermotion for CR 11 sanctions because RCT could not articulate any improper conduct by SBPI.

The same abuse of discretion standard of review and deference to the lower court applies to CR 11 sanction denials. *Washington State Physicians Ins. Exch. & Ass'n*, 122 Wn.2d at 338; *Skimming*, 119 Wn. App. at 754.

The trial court did not abuse its discretion when it denied RCT's countermotion for CR 11 sanctions against SBPI because RCT could not advance a single reason in its countermotion or at oral argument why SBPI's conduct was allegedly sanctionable.¹⁴⁵ RCT argued SBPI should be sanctioned for opposing its summary judgment motion and seeking sanctions.¹⁴⁶

Now, on appeal, RCT argues that SBPI's declaration in support of its opposition was meant to chill RCT's summary judgment motion and, therefore, was brought for an improper purpose.¹⁴⁷

CR 11 requires more.

¹⁴⁴ RP 18; CP 343.

¹⁴⁵ RP 23-24; CP 291.

¹⁴⁶ CP 24; *see also* CP 291.

¹⁴⁷ Brief for Appellant at 35.

The trial court did not err when it denied RCT's retaliatory countermotions for CR 11 sanctions because opposing a motion is not grounds for sanctions.

F. This Court should award SBPI its attorneys' fees and costs given the frivolousness of this appeal because RCT presents no debatable issues upon which reasonable minds could differ.

Under RAP 18.1(a) and RAP 18.9(a), SBPI respectfully requests this Court award its costs and attorneys. RAP 18.9(a) authorizes this Court to order a party or its attorney who files a frivolous appeal "to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court." "Appropriate sanctions may include, as compensatory damages, an award of attorney fees and costs to the opposing party." *Yurtis v. Phipps*, 143 Wn. App. 680, 696, 181 P.3d 849 (Div III 2008).

An appeal is frivolous (and a recovery of fees warranted) "if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so devoid of merit that there is no possibility of reversal." *Advocates for Responsible Dev. v. W. Washington Growth Mgt. Hearings Bd.*, 170 Wn.2d 577, 578, 245 P.3d 764 (2010) (citing *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 241, 119 P.3d 325 (2005)).

RCT has advanced *no reasonable theories* that can support an abuse of discretion by Judge Hazel or error. RCT's brief is not grounded

in law and, often times, it is grossly mistaken as to fact.¹⁴⁸ Repeatedly, RCT misstates the record and the Report of Proceedings.¹⁴⁹

RCT also raises the same meritless arguments advanced at the trial court level which were – and continue to – lack merit such that there is no possibility of reversal. Moreover, RCT was counseled by this Court against seeking declaratory judgment absent a claim, merely three months before it filed the motion in the trial court.¹⁵⁰

Although the trial court awarded SBPI \$4,500 in sanctions against Floyd Ivey, SBPI spent roughly \$8,500 more in the lower court action defending RCT's motions.¹⁵¹ SPBI, a small family-owned and operated local business, must spend even more money to defend the same issues RCT lost based on the same frivolous arguments it advanced. Respectfully, RCT must be held accountable for presenting no debatable issues upon which reasonable minds could differ. *Kinney v. Cook*, 150 Wn. App. 187, 195, 208 P.3d 1 (Div. III 2009) (citation omitted).

In this instance, the issues on appeal do not even toe the line as to the possibility of reversal because the appeal is meritless. RCT repeatedly cites cases and statutes that do not apply here, and fails to identify any abuse of discretion by the trial court. The purpose of RAP 18.9 is to deter baseless appeals and curb abuses of the judicial system. Respectfully, this

¹⁴⁸ See, e.g., Brief for Appellant at 16 (stating RCT filed Declaratory Judgment in Superior Court on June 1, 2016).

¹⁴⁹ *Id.* at 6 (“result was referral to arbitration”); 19 (stating trial court failed to find issue was subject to arbitration), compare with CP 342 at ¶ 1 (finding issue subject to arbitration).

¹⁵⁰ CP 230.

¹⁵¹ See RP 18, 26; CP 343 at ¶ 4.

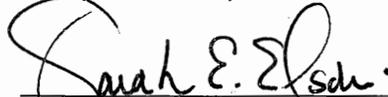
Court should deny RCT's request for fees and expenses and, instead, find RCT's continuation of a meritless claim through appeal entitles SBPI to attorney fees and costs.

V. CONCLUSION

This court should affirm the decision of the trial judge, deny RCT's request for fees on appeal, and grant SBPI its RAP 18.9 attorney's fees and costs in having to defend this frivolous appeal.

Respectfully submitted this 23rd day of July, 2018.

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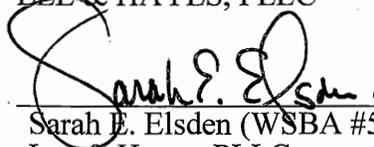
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of July, 2018, a true and correct copy of the foregoing was e-mailed and mailed, postage prepaid in the United States Mail to:

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