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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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

Respondent Seth Burrill Productions, Inc. ("SPB") and our Washington Courts have been forced repeatedly to respond to pointless litigation pursued by counsel for Appellant Rebel Creek Tackle, Inc. ("RCT"). This appeal is no different.

For $240, this appeal would be moot. Spokane County Superior Court Judge Cooney instructed counsel for RCT to file a new Case Number in order to present RCT's Motion to Confirm ("Motion to Confirm"). [CP 459-462] Instead of heeding the Order and paying $240 to file the new case, counsel for RCT filed this appeal – even though (i) costs of the appeal exceed $240 to each party, and (ii) RCT gains nothing even if it "wins" the appeal. It makes no sense.

This is RCT's fourth appeal ("Appeal Four") emanating from Spokane County Case No. 13-2-01982-0, filed by SBP to record an arbitration award. Each of RCT's first three appeals was found frivolous. *See Seth Burrill Productions, Inc. v. Rebel Creek Tackle, Inc.*, Case No. 35572-1-III, July 22, 2019 Respondent Seth Burrill Production Inc.'s Cost Bill and Affidavit of J. Christopher Lynch in Support of Fees and Costs on Appeal ("Lynch Aff.") at ¶¶ 9-10, 13-15, 18-20.

Appeal Four is likewise frivolous. A telling example: counsel for RCT paid a $500 sanction ordered by the Division III Commissioner in order to file RCT's Opening Brief late. [February 7, 2020 Commissioner's Ruling]. $500 is more than the $240 filing fee to comply with the Order being appealed.

RCT gains nothing by filing its Motion to Confirm under one case number rather than another case number. RCT gains nothing by "winning" this appeal. By contrast, if RCT loses this appeal, RCT again risks attorneys' fees being awarded against it.

Substantively, RCT's Opening Brief makes no compelling argument that the Superior Court abused its discretion. RCT's Opening Brief cites to no statutes or cases that compel reversal.

Finally, RCT's underlying Motion to Confirm is moot and substantively inappropriate. The Motion to Confirm could never be granted, regardless the case number in which it might be presented. The Motion to Confirm is futile, and, thus, Appeal Four is inappropriate.

SBP respectfully requests that this Court (i) affirm the trial court's denial of RCT's Motion to Confirm; (ii) deny RCT's request for attorneys' fees; (iii) find this Appeal Four frivolous; (iv) sanction counsel for RCT, including by personal monetary sanctions to be paid forthwith, and by a prohibition against filing additional litigation against SBP or its principals relating to the Exclusive License; and (v) award SBP its full attorneys' fees and costs pursuant to RAP 18.9(a) for having to defend a frivolous appeal.

II. COUNTERSTATEMENT OF ISSUES

At pages 7-10 of its Opening Brief, RCT identifies three Assignments of Error. As SBP understands RCT's three Assignments of Error, SBP posits them as follows:

1. The superior court properly exercised its discretion to deny RCT's request to entertain confirming an arbitration award in the wrong

case, even if the superior court was unaware of statutory authority that might have allowed the superior court to entertain RCT's request.

2. The superior court properly exercised its discretion to deny RCT's request to entertain confirming an arbitration award in the wrong case, even if the superior court had statutory authority to entertain RCT's request.

3. The superior court properly exercised its discretion to deny RCT's request to entertain confirming an arbitration award in the wrong case, even if the superior court could have devised procedures under statutory authority in order to entertain RCT's request.

III. STATEMENT OF THE CASE

A. Factual background

SBP's Opposition to RCT's Motion to Confirm presents a detailed recitation of the facts. [CP 194-203]. That detailed recitation is summarized below.

1. The invention and Exclusive License

Mr. and Mrs. Osborn invented a diver fishing lure ("the diver") and formed RCT for business affairs relating to the diver. [CP 386-387].

Counsel for RCT, Mr. Ivey, procured U.S. Patent Nos. 7,654,031 and 9,615,561 (collectively, "the Patent Assets") for Mr. and Mrs. Osborn. [CP 387].

RCT granted SBP (also a family-owned business) an exclusive license ("the Exclusive License") under the Patent Assets to make and sell the diver. [CP 386-387].

In spite of the Exclusive License, RCT made and sold its own divers in competition with SBP. Counsel for RCT also improperly terminated the Exclusive License. [CP 387-388].

2. Arbitration One brought by SBP

SBP commenced Arbitration One under the Exclusive License, which calls for arbitration under the Commercial Rules of the American Arbitration Association ("AAA") and the Federal Rules of Civil Procedure. [CP 387-389].

The Arbitrator ruled for SBP (the "Arbitration One Award"). SBP was awarded nine points of remedy, including monetary damages, attorneys' fees, and injunctive relief. [CP 1-12].

3. The 2013 Case

RCT and its counsel did not comply with the Arbitration One Award. Consequently, SBP commenced Spokane County Superior Court Case No. 13-2-01982-0 ("the 2013 Case") to confirm the Arbitration One Award. The Arbitration One Award was confirmed and recorded as a judgment ("the Judgment"). [CP 1-12]. RCT and its counsel did not comply with the Judgment.

Consequently, SBP brought a Motion for Contempt in the 2013 Case. The Motion for Contempt was granted ("the Contempt Ruling"). [CP 23-25].

4. Appeal One – appeal of the Contempt Ruling

Despite being in contempt, counsel for RCT appealed the Contempt Ruling ("Appeal One") (Div. III Case No. 32119-3). Division III ruled for

SBP in Appeal One, finding it frivolous, sanctioning counsel for RCT, and awarding SBP attorneys' fees. [CP 389].

Despite being in contempt, counsel for RCT filed a Petition for Discretionary Review of Appeal One ("Petition One"). *Seth Burrill Production, Inc. v. Rebel Creek Tackle, Inc.*, Case No. 92085-1. On January 6, 2016, The Washington Supreme Court denied Petition One. [CP 389].

5. Appeal Two – appeal of the Receiver Ruling

Counsel for RCT claimed RCT had no assets and refused to participate in Supplemental Proceedings. Consequently, SBP brought a Motion to Appoint a Receiver to attach and sell the Patent Assets, which was granted ("the Receiver Ruling"). [CP 26-36]

Counsel for RCT appealed the Receiver Ruling ("Appeal Two") (Div. III Case No. 34401-1). Division III ruled for SBP in Appeal Two, finding it frivolous and awarding SBP attorneys' fees. [CP 390; May 11, 2017 Mandate].

6. Appeal Three – appeal of the Sanctions Ruling

Counsel for RCT then brought a "Motion for Summary Judgment" in the 2013 Case, even though the 2013 Case included no Complaint or Counterclaim by either party. [CP 57-58]. The "Motion for Summary Judgment" was denied, and counsel for RCT was sanctioned under CR 11 for filing and pursuing it (the "Sanctions Ruling"). [CP 184-187].

Counsel for RCT appealed the Sanctions Ruling ("Appeal Three") (Div. III Case No.35572-1). Division III ruled for SBP in Appeal Three,

finding it frivolous and awarding SBP attorneys' fees as Sanctions under RAP 18.9(a). [July 11, 2019, Unpublished Opinion]

Division III has yet to rule on the amount of those sanctions, however, because counsel for RCT filed a Petition for Discretionary Review of Appeal Three ("Petition Two") (Wash. State Supreme Court Case No. 97539-6), delaying entry of the sanctions. [Div. III Case No. 35572-1, August 13, 2019 RCT Petition for Discretionary Review].

The Washington Supreme Court denied Petition Two, awarding SBP attorneys' fees. The Supreme Court fee ruling is $14,750 and is limited under RAP 18.1(j) to SBP's time spent preparing its Answer to Petition Two. [Wash. Supreme Court No. 97539-6, January 14, 2020 Clerk's Ruling Setting Amount of Attorney Fees and Expenses]. The Supreme Court invited SBP to submit its time spent responding to counsel for RCT's Motion to Extend Time to Division III in Appeal Three, which SBP has done. [*Id.*]

Counsel for RCT filed a Motion to Modify the Supreme Court attorneys' fees award, delaying both the fee award in Petition Two from the Washington Supreme Court and the fee award in Appeal Three from Division III. [*Id.*, January 31, 2020 RCT Motion to Modify Award of Attorney Fees]. The Supreme Court has yet to rule on counsel for RCT's Motion to Modify, and, thus, Division III has yet to rule on the sanctions in Appeal Three.

Counsel has abused Appeal Three to delay final resolution of the Sanctions Ruling for more than two years.

7. Arbitration Two

The Arbitration One Award extended SBP's rights under Exclusive License for one year to help compensate for RCT's numerous violations of it. But, retaining the Exclusive License required cumulative minimum sales by SBP. Regrettably, fighting RCT's litigation barrage deprived SBP of sufficient resources to globally market the diver to meet the minimum sales.

Thus, RCT filed Arbitration Two to terminate the Exclusive License for failure to meet the minimum sales. Arbitration Two was conducted on a written record, without live hearing or witnesses.

SBP acknowledged that it did not meet the minimum sales, but asked the Arbitrator to extend the Exclusive License to make up for RCT's litigation barrage. [CP 391-393]. The Arbitrator was empathetic, but declined to extend the Exclusive License, which was terminated under its terms. SBP returned the molds to RCT. [CP 197-203].

RCT was essentially awarded nothing: (i) the royalties that RCT had previously refused to accept from SBP, and (ii) no attorneys' fees (the "Arbitration Two Award"). SBP immediately paid the entirely of the Arbitration Two Award – the same money counsel for RCT had previously refused to accept from SBP under the Exclusive License. [CP 376-378; 379-385].

With return of the molds and full payment of the award, SBP considered Arbitration Two concluded.

8. RCT's Motion to Confirm the Arbitration Two Award

But, despite the Arbitration Two Award being fully paid, despite the molds being returned, despite the passage of more than one year, and despite the point of Arbitration to resolve disputes privately without use of the court system, counsel for RCT brought a Motion to Confirm the Arbitration Two Award in the 2013 Case (the "Motion to Confirm"). [CP 194-203]. RCT's Motion to Confirm requests a Judgment against SBP and numerous items of injunctive relief. [*Id.*][1]

AAA conducts different types of arbitrations for different fees. In Arbitration One, SBP paid AAA's required filing fee to request injunctive relief as well as money damages and both were awarded.

By contrast, in Arbitration Two, RCT did not pay AAA's required filing fee to request injunctive relief. In the Arbitration Two Award, only money damages were awarded – the same royalties RCT previously refused to accept. No attorneys' fees were awarded. No injunctive relief was awarded, nor could it have been, given the form of Arbitration elected by RCT. [CP 197-203].

Despite that the Arbitration Two Award includes no injunctive relief, RCT's Motion to Confirm includes numerous requests for injunctive relief. [CP194-203].

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[1] The 2013 Case is also where counsel for RCT improperly filed its "Motion for Summary Judgment" which led to the Sanctions Ruling and frivolous Appeal Three.

Even if RCT had paid for an AAA Arbitration requesting injunctive relief, no injunctive relief was warranted. SBP immediately returned the molds and paid the Arbitration Two Award in its entirety. SBP has done nothing unlawful to enjoin.

SBP opposed RCT's Motion to Confirm on procedural and substantive bases. [CP 352-275].[2] Judge Cooney deferred ruling on the substance of RCT's Motion to Confirm, ruling on procedural grounds that counsel for RCT could not mount its effort to confirm the Arbitration Two Award in the 2013 Case ("the Wrong Case Ruling"). [CP 459-462]. Judge Cooney ordered counsel for RCT to file RCT's own Case Number in which to bring its Motion to Confirm. [*Id.*]

Instead of paying the $240 to heed Judge Cooney's Order, counsel for RCT filed this Appeal Four.

9. Appeal Four – appeal of the Wrong Case Ruling

Counsel for RCT continues his campaign of litigation harassment with this Appeal Four, which is not well founded in facts or law.

Counsel for RCT has already been sanctioned (the Sanctions Ruling) for meritless procedure filed in the 2013 Case. [CP 184-187]. What "downside" is there to RCT in heeding Judge Cooney's Order and filing its Motion to Confirm in a new case rather than the 2013 Case? The only

[2] For example, as discussed *infra*, RCT's Motion to Confirm requests injunctions for alleged patent infringement, but state courts have no power to act in an area of exclusive federal jurisdiction. 28 U.S.C. § 1338(a).

"downside" is the requirement to file a new Superior Court filing fee, which is $240.

Instead, counsel for RCT traveled from Kennewick to Spokane for an oral argument to insist that the Motion to Confirm be filed in the 2013 Case instead of a new case.

Counsel for RCT could have filed the new case that very day in that very building, as Judge Cooney ordered him to do. Instead, counsel for RCT chose to file this Appeal Four.

Appeals include administrative fees to the parties, such as the requirement to pay for the Clerk's Papers. Here, the charge for Clerk's Papers as requested by counsel for RCT exceed the $240 new case filing fee. .

The only explanation is that counsel for RCT is engaged in continued, unethical, litigation harassment that is presumed to not be the result of informed consent of the principals of RCT. Washington Rules of Professional Conduct 1.2(a), 1.4(b), and 2.1 require that counsel only act under informed consent of a client.

10. Counsel for RCT is sanctioned in Appeal Four

Proof that counsel for RCT is engaged in unethical conduct is shown by sanctions awarded against RCT's attorney in the Division III Commissioner's Ruling dated February 7, 2020.

As with Appeal One, Petition One, Appeal Two, Appeal Three, and Petition Two, counsel for RCT has delayed this Appeal Four by not complying with due dates and by filing motions to extend time.

For example, in Appeal Three, counsel for RCT filed eleven Motions, causing months of delay. [July 22, 2019 Lynch Aff.] In this Appeal Four, counsel for RCT has filed seven Motions, including five Motions to Extend Time, again causing months of delay. Washington Rules of Professional Conduct 1.3, 3.1, and 3.2 require attorneys to be diligent and to expedite matters without frivolous motions and appeals.

On February 5, 2020, Division III heard oral argument on RCT's final Motion to Extend Time. On February 7, 2020, the Division III Commissioner ruled that counsel for RCT had abused the rules of appellate procedure. Counsel for RCT was ordered to pay a sanction from his own funds of $500 to be allowed to file his untimely Opening Brief. [February 7, 2020 Commissioner's Ruling].

On February 8, 2020, counsel for RCT sent a check on his law firm account payable to "Seth Burrill" (i.e. not to the entity SBP) for $500. SBP immediately requested a replacement check payable to SBP, the party in this Appeal Four. To date, after three written requests, counsel for RCT has not issued any check to SBP.

The $500 sanction is more than the $240 fee for filing a new case. Filing a new case would allow RCT's Motion to Confirm to be entertained immediately. Appeal Four offers only a chance to present the Motion to Confirm. It makes no sense.

Mr. and Mrs. Osborn have no reason to care if the Motion to Confirm is filed in one case or another. We cannot imagine Mr. and Mrs. Osborn gave informed consent under RPC 1.2(a) and RPC 1.4(b) to

authorize pursuit of this Appeal Four with its potential for an adverse attorneys' fees ruling.

11. RCT gains nothing by winning Appeal Four.

"Winning" Appeal Four is *worse* for RCT than not having filed it at all. RCT's Motion to Confirm includes several requests for injunctive relief. [CP 194-203].[3] Injunctions require irreparable injury.

RCT cannot make a credible claim for irreparable injury. RCT chose to file this Appeal Four, including filing five Motions to Extend Time, when it could have sought immediate relief by heeding Judge Cooney's Order to start a new case.

The Motion to Confirm, and this Appeal Four, are not presented to advance interests of RCT; they are part of a pattern of harassment by counsel for RCT.

IV. ARGUMENT

A. The trial court did not abuse its discretion in denying to entertain RCT's Motion to Confirm.

This Court reviews discretionary rulings under the abuse of discretion standard: "Under this standard of review, a trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds." *Dix v. ICT Group,* 160 Wn.2d 826, 833, 161 P.3d 1016 (2007).

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[3] As demonstrated *infra*, those requests for injunctive relief are improper (i) because they are not an aspect of the Arbitration Two Award for which confirmation is sought, (ii) because a superior court lacks subject matter jurisdiction to rule on federal patent infringement allegations, and (iii) because the record is insufficient to support any injunctive relief for reasons including that SBP is in full compliance with the law.

Here, Judge Cooney was within his discretion in issuing the Wrong Case Ruling. Evidence was reviewed. Oral argument was had. A written ruling issued.

RCT's Opening Brief does not contest that evidence was reviewed, that oral argument was had, or that a written ruling issued. RCT's Opening Brief does not contest any of findings of the ruling. RCT's Opening Brief (pages 15-18) quotes from the ruling, highlighting why the superior court exercised its discretion to deny entertaining RCT's Motion to Confirm.

Consequently, abuse of discretion analysis favors SBP because the facts and the reasons for the ruling appear to be uncontested. The superior court did not abuse its discretion and no facts or legal authority are presented otherwise.

B. The trial court did not err in the manner suggested by RCT's Assignments of Error 1, 2, and 3.

RCT cites RCW 2.28.150 for the proposition that a court may adopt a novel process or mode of proceeding if it conforms to the spirit of applicable laws. But RCT cites no authority that RCW 2.28.150 requires the superior court to entertain RCT's Motion to Confirm.

RCT's three assignments of error each are similar. They seem to be: (i) the superior court was unaware of statutory authority which might have permitted it to entertain RCT's Motion to Confirm; (ii) the superior court had statutory authority which might have permitted it to entertain RCT's Motion to Confirm; and (iii) the superior court could have devised procedures to permit itself to entertain RCT's Motion to Confirm.

All three of RCT's Assignments of Error are pinned to RCW 2.28.150, but RCW 2.28.150 is permissive, not mandatory. Judge Cooney acted within his discretion, even if RCW 2.28.150 could have permitted him to entertain RCT's Motion to Confirm.

There is no authority that RCW 2.28.150 requires a trial court to entertain a motion to confirm an arbitration award under an old case number involving the same parties. Consequently, analysis under RCW 2.28.150 favors SBP.

C. RCT's cited authority does not compel reversal of the Wrong Case Ruling.

RCT's Opening Brief lists eight Washington cases in its Table of Authorities. Three of those eight cases, however, are not cited in the body of the brief.[4]

RCT's Opening Brief does not explain how any of those eight cases shows that Judge Cooney had no discretion to deny entertaining RCT's Motion to Confirm. Indeed, each of RCT's eight cases supports the position that Judge Cooney *did* have discretion to act as he did, especially because RCT was ordered to adopt the alternative procedure to file a new case. Each of the eight cases is addressed briefly below in the alphabetical order of RCT's Table of Authorities:

Case One: *Abad v. Cozza,* 128 Wn.2d 575, 911 P.2d 376 (1996) affirmed use of a superior court DUI deferred prosecution program, even

[4] The other five cases each are cited on page 14 of RCT's Opening Brief, and not on pages 15 and 16 as indicated in RCT's Table of Authorities.

though the program included obligations on the defendant that exceeded, but were not inconsistent with, the statutory obligations for deferred prosecution. *Abad* affirmed the superior court's discretion to impose rules that were within the spirit of the applicable law, and that were not directly afoul of the applicable law. 128 Wn. 2d at 589.

Abad supports SPB because it shows the range of discretion a superior court judge has, even externally to the boundaries of operative statutes, if not inconsistent with those statutes.

Case Two: *Eagle Systems, Inc. v. Employment Security Department*, 181 Wn. App. 455, 326 P.3d 764 (Division II, 2014) affirmed dismissal of a Motion to Show Cause where the moving party "did not properly commence a lawsuit in the superior court". 181 Wn. App. at 459. The moving party invoked RCW 2.28.150 on appeal, but Division II ruled that RCW 2.28.150 "does not confer jurisdiction on the superior court".

Eagle Systems supports SBP because it shows that RCW 2.28.150 does not force a superior court to entertain every motion, especially if the motion is procedurally irregular and filing a new case is the proper alternative.

Case Three: *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 937 P.2d 154 (1997) affirmed adult cabaret ordinances as constitutional. *Ino Ino* ruled that the lower court did not abuse its discretion by not entertaining a late-filed Motion to Amend, especially one that was futile. 132 Wn.2d at 142.

Ino Ino supports SBP because it shows the discretion of a superior court to reject untimely motions, especially if futile. RCT's Motion to Confirm, as demonstrated below, is futile.

Case Four: *In re Cross*, 99 Wn.2d 373, 662 P.2d 828 (1983) involved a disabled person involuntarily committed for treatment. The disabled person argued for release from commitment, and by the time of the appeal, she had been released. The Supreme Court found her appeal to be moot. 99 Wn.2d at 376-77. The Supreme Court rejected an argument that RCW 2.28.150 compelled some different result:

> The statute is applicable only if (1) jurisdiction is otherwise conferred on the court, and (2) no course of proceeding is specifically pointed out. Neither of these conditions is satisfied here. Moreover, even if these conditions were satisfied, the mode of proceeding adopted by the Court Commissioner was not that 'most conformable to the spirit of the laws.'

Id. at 380. The Supreme Court ruled that the "mode of proceeding most conformable" required dismissal of the requested revocation proceeding and required filing a new standard commitment proceeding. *Id.* at 380-81.

In re Cross supports SBP because even if RCW 2.28.150 somehow applies, the lower court may nevertheless reject an unorthodox pleading and require filing a new case. In other words, Judge Cooney properly exercised his discretion, especially by ordering use of the alternative of filing a new case.

Case Five: *Landenberg v. Campbell*, 56 Wn. App. 701, 784 P.2d 1306 (Division II, 1990) affirmed a superior court ruling that a district court

did not have authority to appoint a special prosecutor. The government cited RCW 2.28.150 on appeal, but Division II did not find it helpful: "the statute is strictly procedural in nature and does not confer upon district courts the substantive authority to appoint a prosecuting attorney." 56 Wn. App at 701.

Landenberg supports SBP because it shows that RCW 2.28.150 does not require a superior court to adopt an unorthodox procedure suggested by a party, just because the unorthodox procedure is not otherwise expressly unlawful.

Case Six: *Rogoski v. Hammond*, 9 Wn. App. 500, 513 P.2d 285 (Division I, 1973) affirmed a pre-judgment writ of attachment of real property. The property owner argued that RCW 2.28.150 required that the trial court devise additional due process prior to entry of the writ, but Division I disagreed. "RCW 2.28.150 is broad enough to permit [the additional process requested by the property owner.] Nothing in the statute requires that a court take a narrow and grudging view of its application if by doing otherwise [in not permitting the additional requested process]." 9 Wn. App. at 504. In other words, the procedure used by the superior court was proper, even though the aggrieved party had suggested a lawful alternative procedure.

Rogoski supports SBP because it shows that RCW 2.28.150 does not require that a superior court be required to adopt any unorthodox procedure suggested by a party, even if the requested procedure is not unlawful.

Case Seven: *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 157 P.3d 831 (2007) held that talk radio support of a tax initiative was not

an “in-kind political contribution” required to be disclosed by the Political Action Committee (“PAC”) of the initiative. The lower court had issued an injunction to the PAC requiring the disclosure, but the Supreme Court ruled that the broadcasts fell under the statutory media exception to required disclosures.

San Juan County supports SBP because it shows how cases are decided by judges exercising discretion subject to review by appellate courts for abuse, clear error, or incorrect legal conclusions.

Case Eight: *Washington Trucking Associations v. Employment Security Department,* 188 Wn.2d 198, 393 P.3d 761 (2017) affirmed dismissal of a civil rights complaint against state employees. New employment taxes were assessed by the state against trucking companies. Instead of following the “normal state tax appeals process”, the trucking companies sued the state employees for alleged civil rights violations. 188 Wn.2d at 202. The superior court dismissed the claims, requiring the petitioners to “challenge the tax assessments through the state tax appeals process.” *Id*. The Supreme Court affirmed.

Washington Trucking supports SBP because it shows that a lower court has discretion to dismiss a lawsuit if the plaintiff is not following proper procedure, even if there is not a statute directly on point covering that procedure as applied to the immediate factual situation.

D. RCT’s Motion to Confirm is futile

Judge Cooney’s Order was made on procedural grounds, not substantive grounds. As SBP explained to Judge Cooney, RCT’s Motion to

Confirm is substantively improper, for several reasons. CR 352-374. Consequently, RCT's Appeal Four is futile, which weighs against any application of RCW 2.28.150. *Ino Ino*, 132 Wn.2d 103, 937 P.2d 154.

E. RCT's Motion to Confirm is untimely

The Exclusive License requires arbitration of disputes by the American Arbitration Association "in conformity with the Federal Rules of Civil Procedure." [CP 240]. Those AAA rules contemplate that the Federal Arbitration Act (Title 9 U.S.C.) controls.

Applications to confirm arbitration awards to be made within one year of issuance:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within <u>one year</u> after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award . . .

9 U.S.C. § 9 (emphasis supplied).

The Arbitration Two Award issued on January 22, 2018 [CP 234]; the deadline to apply for confirmation was January 22, 2019. RCT's Motion to Confirm was filed on April 9, 2019, 77 days too late to be timely under 9 U.S.C. § 9. Consequently, RCT's Motion to Confirm should be denied and, thus, is futile.

F. RCT's Motion is Moot

Even if RCT's Motion to Confirm is somehow timely despite 9 U.S.C. § 9, the motion is moot because the Arbitration Two Award is fully satisfied.

The Arbitration Two Award awarded RCT $17,293.62 in past royalties, plus $375 as a portion of arbitration costs. [CP 233]. On February 22, 2018, SBP tendered a check to counsel for RCT for $17,293.62 in past royalties and $375 in arbitration costs in full satisfaction of the Arbitration Two Award. [CP 243-246]. Despite the full satisfaction, RCT's Motion to Confirm demands a judgment for $17,293.62. [CP 342-346].

RCT cites no authority that the superior court has jurisdiction to confirm an arbitration award that has already been fully satisfied and thus could not mature into an operative judgment. Any judgment that could issue would be subject to an immediate satisfaction of judgment, which would be pointless and a waste of "scarce judicial resources." *Brooks Trust A v. Pac. Media LLC*, 111 Wn. App. 393, 399-400, 44 P.3d 938, 942 (Div. III 2002) (satisfaction of judgment rendered confirmation of award moot) (citing *Orwick v. Seattle*, 103 Wn.2d 249, 252-53, 692 P.2d 793 (1984) (reasoning trial court properly dismissed claim because it was moot); *see also, e.g.*, *Stewart Title Guaranty Co. v Tilden*, 2003 WY 31, ¶ 9, 64 P.3d 739 (2003) (holding a trial court may deny a confirmation motion when satisfaction renders the controversy moot); *Murphy v Nat'l Union Fire Ins. Co.*, 438 Mass. 529, 533, 781 N.E.2d 1232 (2003); *Derwin v. Gen. Dynamics Corp.*, 719 F.2d 484, 491-493 (First Cir. 1983) (affirming the trial court's denial of confirmation of the award because award had been satisfied).

The court in *Brooks Trust* recognized that use of the word "shall" requires a trial court's confirmation of an arbitration. *Brooks Trust*, 111 Wn.

App. at 398-399 (discussing RCW 7.04.150 repealed by 2005 c 433 § 50). The new statute on which RCT relies, RCW 7.04A.220, includes the same use of the word "shall." However, just like the facts here, the proposed order in *Brooks Trust* to confirm an arbitration award reflected that the award had been satisfied. *Id.* at 399. *Brooks Trust* recognized that the trial court, in denying a request to confirm the arbitration award, "[i]n terms of judicial economy and practical effect, . . . efficiently precluded the time and expense of judgment preparation, presentation, and satisfaction." *Id.* The "prompt payment peremptorily satisfied any need for judgment and effectively brought the underlying controversy to a close." *Id.* Therefore, the Court of Appeals found that "confirmation and judgment were pointless" and that the trial court did not err in dismissing the matter because "satisfaction of the arbitration award had rendered the controversy moot." *Id.*

The same analysis applies here. The Arbitration Two Award issued on January 22, 2018. SBP fully satisfied the Arbitration Two Award more than two years ago—on February 22, 2018. There is no reason to go through the procedural hurdle to confirm the award, enter a judgment, and then enter a satisfaction of that judgment. *Brooks Trust* recognized such futility. *Id.* at 399.

Arbitration is a private matter, with the benefits of privacy unless the state legal system is required to react to recalcitrance of a party in that private setting. RCT was recalcitrant in its refusal to pay the Arbitration One Award, and thus SBP was justified in filing the 2013 Case to confirm

and enforce it. But SBP has fully satisfied the Arbitration Two Award and has not been recalcitrant.

SBP fully complied with the Arbitration Two Award more than two years ago. There is no public policy benefit of publicly recording a private arbitration award that is already satisfied. Consequently, RCT's Motion to Confirm should be denied and, thus, is futile.

G. RCT's Motion to Confirm is federally preempted by the United States Patent Act

RCT's Motion to Confirm requests an injunction under its Patent Assets. Patents have a constitutional basis (Article 1, Section 8, Clause 8 of the United States Constitution) and Congress has claimed adjudication of patent rights as exclusively federal. 28 U.S.C. § 1338(a). This Court lacks jurisdiction to enforce United States Patents or to enter any order granting relief under the United States Patent Act. *Id.*

Only a United States District Court can enter an order enjoining infringement of a United States Patent. Indeed, here, the Arbitration Two Award did not grant any injunctive relief, nor could it have. [CP 233]. Consequently, RCT's Motion to Confirm should be denied and, thus, is futile.

H. SBP's accused sales are lawful under the first sale doctrine

RCT's Motion to Confirm asks the superior court to confiscate SBP's repurchased diver inventory that SBP had already made, already sold, and on which SBP had already paid contractual royalties to RCT. RCT's injunction request is directly against the "first sale doctrine" of

patent law. The first sale doctrine is an intuitive, inherent part of every purchase of patented goods: once a patented device is initially sold, the patent rights in that device are "exhausted", allowing the buyer to use, rent, repair, or re-sell the device for any price, without compensating the patent owner. *See PNY Tech., Inc. v. SanDisk Corp.*, No. C-11-04689 YGR, 2012 U.S. Dist. LEXIS 55965, at *5 (N.D. Cal. Apr. 20, 2012) ("A patent holder may not collect a 'double royalty,' that is, collect a royalty from both a licensee and a purchaser of the licensee's product under the same patent for the same patented product without violating the patent exhaustion doctrine."). *See, e.g.*, *ExcelStor Tech., Inc. v. Papst Licensing GMBH & Co., KG*, 541 F.3d 1373, 1374 (Fed. Cir. 2008).

RCT's Motion to Confirm requests that SBP be enjoined from re-selling devices that SBP accumulated for its inventory by buying them from a third-party distributor. SBP already paid all royalties to RCT on that inventory [CP 381], so the first sale doctrine applies. Consequently, RCT's Motion to Confirm should be denied and, thus, is futile.

I. SBP's marketing is lawful

SBP's marketing of its devices is entirely truthful. SBP owns the BUD'S DIVER trademark. [CP 381]. Nothing is false. No one is confused. There is no evidence otherwise. SBP's disclaimer language alerts consumers that "[a]s of January 22, 2018 SBP Inc. d/b/a AX Tackle is no longer an authorized licensee to manufacture the diverting diver it has sold under its BUD'S DIVER trademark. AX Tackle purchased its remaining limited original inventory of diverting divers from an authorized third-party

distributor, and resell the diver in the same condition as it was in when it was first sold to AX Tackle."

Unfair competition claims require falsities. To be actionable, those falsities need to drive purchasing decisions. RCT's Motion to Confirm demonstrates no evidence of any falsity, or how any alleged falsity is material, or how any alleged falsity influenced a purchasing decision, or how RCT lost a sale from any alleged falsity. RCT's Motion to Confirm presented no admissible testimony on any of these points. [CP 221-335]. Consequently, RCT's Motion to Confirm should be denied and, thus, is futile.

J. RCT's Appeal Four is frivolous

Under RAP 18.1(a) and RAP 18.9(a), SBP respectfully requests that this Court sanction RCT and its counsel, and award SBP it costs and attorneys' fees. 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. Wash. Growth Mgt. Hearings Bd., 170 Wn.2d 577, 578, 245 P.3d 764 (2010) (citations omitted).

RCT has advanced no reasonable theory that can support an abuse of discretion by Judge Cooney or error. RCT's brief is not grounded in fact or law.

Counsel for RCT must be held accountable for presenting no debatable issues. *Kinney v. Cook*, 150 Wn. App. 187, 195, 208 P.3d 1 (Div. III 2009) (citation omitted).

Finally, SBP requests sanctions from Division III in order to give SBP authority under RAP 18.1(j) to request attorneys' fees from the Supreme Court if counsel for RCT loses this Appeal Four and files another Petition for Discretionary Review.

V. CONCLUSION

Counsel for RCT is engaged in a continuing pattern of litigation harassment benefitting no one but himself. This Appeal Four is no different – it makes no sense.

SBP respectfully requests that this Court (i) affirm the trial court's denial of RCT's Motion to Confirm; (ii) deny RCT's request for attorneys' fees; (iii) find this Appeal Four frivolous; (iv) sanction counsel for RCT, including by personal monetary sanctions to be paid forthwith, and by a prohibition against filing additional litigation against SBP or its principals

relating to the Exclusive License; and (v) award SBP its full attorneys' fees and costs pursuant to RAP 18.9(a) for having to defend a frivolous appeal.

Respectfully submitted this 9th day of March, 2020.

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I HEREBY CERTIFY that on the 9th day of March, 2020, a true and correct copy of the foregoing was e-mailed to:

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J. Christopher Lynch

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