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No. No. 64441-6-I

Court of Appeals, Division I
of the State of Washington

In Re the marriage of:

Janie L. Block, Respondent,

and

Dennis L. Block, Appellant

~~BRIEF OF APPELLANT~~

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COURT OF APPEALS
DIVISION I
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JANIE L. BLOCK

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Responsive Argument.

A. Respondent's wrongly argues that the Commissioner had authority to order the parties back to arbitration, contrary to the Judge's March 3, 2009 ruling and case law.

Janie first asserts that it is common to have disputes over minor issues in final documents and that Mr. Block failed to submit a red-lined or marked up copy of the proposed orders with his objection. Mr. Block did not "red-lined" them as both documents were received in hard copy and portable document format (pdf documents are not subject to relining as Dennis was not the maker of these documents). However, this argument of Janie's does not negate the fact that Dennis was clear in his objection that such documents were not in conformance with the rulings by the court on March 3, 2009 and did not incorporate all of the former rulings of the Arbitrators and agreements.

The Brief of Respondent admits to the many changes that they had incorporated without agreement, although it is also manifest that Janie wrongfully believed these arbitrary changes were *de minimis* and she believed that Dennis in objecting to her changes was being merely argumentative. Dennis went to great lengths to demonstrate each and every

change that was arbitrarily made without a court ruling, an agreement, or an arbitration ruling, in the four documents submitted for final pleading to his attorney.(CP 212-217)

Janie asserted that such changes were submitted to Dennis months prior, and that Dennis had had months to object; however, Janie submitted no proof of such submittal of these documents to Dennis or his attorney. (CP 206 Lines 10 -16). Dennis asserts that these documents were never previously given to him and flatly refutes this claim as this is the first time he hears this allegation by Janie. Dennis cannot speak to whether or not Janie sent such documents to the Arbitrator, however, he was clear in his objection that the parenting plan was completely new and that he had not seen it before the motion had been set for final presentation on July 20, 2009. (CP 214, LN 3-6).

Janie, then argues that Commissioner Bedle had jurisdiction because allegedly Dennis “agreed” to these final issues being submitted to arbitration, although later in her brief, Janie submits that the Arbitrator did not exceed his boundaries by acting contrary to the Section X provision of the CR2A

agreement, which demanded an automatic ceasing of his authority because he was “ordered to arbitrate.”.

It is unclear to which argument Janie is asking this court to adopt. Is she saying Dennis agreed to the arbitration of three issues that he strenuously argued with Commissioner Bedle on July 20, 2009 or is she saying that the Arbitrator was ordered to arbitrate the three remaining issues? Logic dictates that one or the other, not both? Dennis submits it was neither.

It should be noted that no order was entered on July 20, 2010 mandating that the arbitrator re-hear the issues again that are now up on appeal with this court. (CP 131 docket # 107-119). Without such an order on the record, there is no way that the Arbitrator, who was not present at the July 20, 2009 hearing, could believe he was ordered to arbitrate further and it was up to the Arbitrator to seek a new written agreement from the parties expanding his duties beyond the plain language of Section X. The arbitrator did not obtain a new order.

It is further argued that even with an order, unless it was an agreed order allowing further arbitration, the Arbitrator was prevented from acting further under section X as his authority ended with the entry of final pleadings.

Furthermore, no litigant gives up their rights merely by stopping an argument at a hearing when it becomes manifest that Court is going to adopt that litigant's argument or rationale.

In this case, although faced with no motion and a new set pleadings never before seen by Dennis, with limited time to respond, Dennis submitted everything he could to the court to assist them in his belief that such pleadings were: (1) not in accordance with the March 3, 2010 ruling of Judge Fair; (2) not in accordance with the Arbitrator's previous ruling; and, (3) not in accordance with the parties agreement.

While it can be argued that Dennis should have sought revision by a Judge under our State Constitution that allows for revision of all Court Commissioner decisions, revision typically is merely a further additional expense to the client and the Court endorses the Court Commissioner's decision. Further, in Snohomish County the Court Commissioner hearings are recorded, whereas the Civil Motions Judge Calendar for revisions is not recorded.¹

¹ There is no local rule or administrative rule that can be cited for the lack of recording devices on the Snohomish County Civil Motions Judge Calendar. It is becoming more common in Snohomish County for low income litigants to directly appeal a

It should be strongly noted that throughout the hearing, Dennis agreed with Commissioner Bedle's statements and concerns that the pleadings were in fact, not final and in dispute and therefore the parties should be setting the matter for trial. (RP1 pg 2 line 1-5 and RP1-pg 3, line 18 through pg 4 line 8).

Dennis submitted case law in his Opening Brief for this appeal which held that it was an error for a court to enter final pleadings in a dissolution matter but then to also then bifurcate out for ruling later issues regarding property. Property issues are to be final and are not subject to modification and therefore demands final ruling at the time of final entry of pleadings.

Janie has not demonstrated in her Responsive Brief that the cases and rules submitted by Dennis in his Opening Brief were either bad law or improperly applied. The Respondent's Brief is filled with case law dealing with disputes over contracts held at "arm's length" or issues between legal entities and strangers. A dissolution is a significantly unique and different type of litigation. The parties are often, as they are in this case, tied together by the bonds of parenthood.

wrongful Court Commissioner decision because transcript costs from the tapes are far less expensive than hiring a court reporter and ordering the transcription.

Regardless of the outcome of this litigation, Janie and Dennis will have to forever deal with each other in one form or another. They cannot merely walk away and never see each other again when this litigation is over like the parties in the cases submitted by Janie. There will always be the phone calls to each other's homes and events to attend together. There are the exchanges as the children are transferred up to three times a week between the parents in this case, where they will have to see each other and speak to one another about their children.

Most importantly, the young special needs boy, Karsten, will more likely than not, require both parents to be actively involved for the rest of his and/or their lives.

The Courts are aware of this uniqueness and should follow the laws and cases, whenever possible, of dissolutions applying the often similar and unique facts of dissolutions.

B. Respondent is incorrect in asserting that the Arbitrator had the authority to act because he was ordered to do so.

As stated above, no order was entered on July 20, 2009 ordering the Arbitrator to act. The plain language of Section X does not say that the Arbitrator's powers will continue upon court order. It clearly states that unless by agreement of the

parties in writing, the powers of the Arbitrator ceases automatically upon the entry of final pleadings.

The question is therefore, whether the documents entered on July 20, 2009 were not final pleadings and therefore the Arbitrator still had the powers to act, or if they were final pleadings did the Arbitrator, who drafted this Section X, exceed his authority?

In this case, the pleadings entered on July 20, 2009 are indisputably final and almost immediately upon the entry of the final documents, although there was no order entered, Ms First, attorney for Janie submitted everything to Mr. Shipman and informed him that he was ordered to proceed.

The Arbitrator, instead of contacting the parties and demanding that he get a written agreement from the parties, submitted a letter ruling a month after the hearing of July 20, 2009. Needless to say, Dennis and his attorney were surprised first by the quickness of the response by the Arbitrator but, more importantly, by this complete turn-around of the Arbitrator's decisions in August, 2009 from his previous decisions. Especially, his June 18, 2009 decision on Attorney fees where the language used by the Arbitrator to support no

fees in June, is almost word for word the same in August to support a very substantially large amount of attorney fees.

The fees awarded by the Arbitrator awarded were confusing at best. Not only because of the fact that the same basis for no fees was used in June to award them in August, as stated above, but more importantly because the record was devoid of evidence to base such a finding for attorney fees.

There was no financial documentation given to the Arbitrator, not even a billing by Janie substantiating her attorney fees. No finding of intransigence had been made either by the court or by the Arbitrator. No ruling of contempt. No finding for need and ability.

In fact, there has been no financial documentation submitted by Janie since just prior to the Meditation on October 22, 2008 so it is extremely disconcerting as to how the Arbitrator reached his conclusions as to the basis for his ruling. (CP 129-133 is the docket from 2-26-09 through 10-9-2009).

In short, how was Dennis going to fight a ruling which is already clouded by the fact that that file is sealed, but one in which the information is also completely non-existent?

The only answer was to allow Dennis the time to bring together his case, his motion to vacate the Arbitrator's ruling. Clearly, to Dennis, going back to the Arbitrator was futile and a waste of his attorney's time and his already limited funds.

C. Respondent's Argument that the Court was mandated to adopt the Arbitration award on October 20, 2009 is incorrect as there were other options available to the Court.

Dennis should have been allowed ninety (90) days to bring a proper motion to vacate an arbitration award when it was brought to the court's attention on October 20, 2009 that such a right was allowed under RCW 7.04A.230.

Janie cites RCW 7.04A.200 holding that Commissioner Bedle was mandated to confirm or vacate the award and was left without any other choice. This is an incorrect statement.

First, as argued in the Dennis' opening brief, it would not have prejudiced Janie to hold off 30 days when Dennis' attorney requested the right to act under RCW 7.04A.230. This statute clearly allows 90 days for the purposes of seeking a vacation of the award by the court.

Janie and her attorney assert that Dennis was mandated to bring a motion to correct, change or modify the award first to the arbitrator within 20 days of the award and because he had

failed to do so, he is forever barred from further action by citing RCW 7.04A.220.

This argument fails for two reasons. First, if this were a mandatory requirement, then Ms First, failed to bring such a motion herself to the Arbitrator within the 20 day time frame when the Arbitrator ruled first on January 21, 2009 the amount of the CDs to be \$1,510.10 and no pre-judgment interest was awarded on these CDs.

Then, the argument fails again on July 20, 2009 on the issues of Attorney fees, when Janie failed to bring this exact same procedure when the Arbitrator had ordered no Attorney fees on Jun 18, 2009.

Therefore, Janie, who had Commissioner Bedle send back to the Arbitrator the three issues that he had already ruled upon on July 20, 2009 had far exceeded this 20 day limitation for modify or objecting to the Arbitrator's ruling. Instead, Janie just ignores the previous rulings and Judge Fair's ruling because she was unhappy with the ruling.

Second, the plain language of this statute is permissive. Dennis was not mandated to go back to the Arbitrator prior to bringing his motion to vacate within the 90 days.

Nowhere in these statutes do you find that Dennis' right to bring his motion under RCW 7.04A.230 is dependent upon RCW 7.04A.200. A plain reading of this statute demonstrates that RCW 7.04A.200 is permissive and not a precondition to bringing a motion to vacate an Arbitrator's ruling.

There were other remedies available to the court. For example, after strenuous argument and the court mandating that Dennis reply would be a motion to vacate (seemingly solely for the purpose of summarily dismissing it), under RCW 7.04A.200 (4), the Court could have sent it back to the Arbitrator for clarification.

RCW 7.04A.200 (4) cites in full:

If a motion to the court is pending under RCW 7.04A.220, 7.04A.230, or 7.04A.240, the court may submit the claim to the a(a) Upon the grounds stated in RCW 7.04A.240(1) (a) or (c);

(b) Because the arbitrator has not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or

(c) To clarify the award.

(5) An award modified or corrected under this section is subject to RCW 7.04A.220, 7.04A.230, and 7.04A.240.

Although, Dennis would have not wanted to have these issues arbitrated, clearly Commissioner Bedle had such authority.

Finally, although Commissioner Bedle failed in following the court's ruling of March 3, 2009 by fully implementing Judge Fair's ruling on July 20, 2009, nothing prevented the court from rectifying its own mistake on October 20, 2009 and order that the March 3, 2009 Order be followed.

The Respondent further argues that in fact the Objection submitted to the Motion to Confirm the arbitration award was in fact, a Motion to Vacate under RCW 7.04A.230 and therefore Dennis conceded his motion was such and therefore, Commissioner Bedle had the authority to dismiss it. This argument is circular and the logic of it fails.

In reading the Objection submitted by Dennis for the October 20, 2009 hearing (CP 10-133—only 123 pages and almost all of it previously filed items attached for assistance to the court not the 135 pages of objections as cited by Janie in the Respondent's brief), it is true that Dennis objects to the entry of the Arbitration award but it was not until October 20, 2009, at the hearing ,that Counsel for Dennis raised the issue that he

should be allowed the additional time to submit a proper motion which is evident to the Court at that time.

The motion before Commissioner Bedle was brought upon the regular family law calendar in Superior Court, which by Snohomish County Rules, allows 12 days calendar days notice. Dennis had only 6 days (as his response was due by noon five court days prior to the hearing under the Snohomish County Local Rules) to respond to the motion. It was only after his response was filed did Mr. Block's attorney discover the right to bring the motion properly under RCW 7.04A.230 and therefore, the first time he could argue this issue was at the hearing on October 20, 2010.

It is an incorrect statement to tell this court that the attorney for Dennis agreed with the court that the objection was a motion to vacate as Janie states in footnote 6 on page 9 of her brief. If the report of the proceedings is read in whole, it is clear that Dennis attorney was asking for time to bring a motion, not to convert his motion.

It was only after a substantial time of arguing with the court that Dennis' attorney gave up. Just because an attorney stops arguing with the court their position when it is manifest

that the court is not willing to adopt the argument, does not mean that the attorney and their client should then be denied their rights under the law and the statutes of this state or their right to an appeal. Janie's argument fails.

The motion on October 20, 2009 was exactly sixty (60) days out and thirty (30) days was plenty of time for Dennis to thoroughly research and present a motion on the merits for vacation of the arbitration award without prejudice to Janie.

Instead, Commissioner Bedle ordered that day in court that the objection submitted by Dennis be deemed a motion to vacate, thereby prejudicing Dennis from bringing his own thoroughly researched and proper presented motion on the merits.

D. Attorney Fees

It is argued by the Respondent that that basis for attorney fees on Appeal should be intransigence. The Respondent cites *In re the Marriage of Wallace*, 111 Wn.App. 697, 708; 45 P.3rd 1131 (2002), *rev. denied*, 148 Wn.2nd 1011 (2003), to support their claim for such fees. In the *Wallace* case, the husband not only committed several acts of fraudulent transfers to family members in the attempt to hide community

assets, the court also entered written findings, as required, to justify the fees for intransigence.

In the case at hand, the only possible statement of conversion of community funds in reference to the CDs, was made at the October 20, 2009 hearing by Commissioner Bedle, as dicta, and no order was entered to reflect such a finding, (Counsel for Ms Block misstates this fact to this court as Mr. Block has never been found to have converted any community assets and in fact, Ms First is the one who drafted the order of October 20, 2010. It is certain that if there had been a finding of conversion, Ms First would have hand-written the order this finding. To state so now is disingenuous at best).

More importantly is the fact that at no time has Counsel received a finding for intransigence and at no time has any lower court found Mr. Block to have been intransigent.

In the *Wallace* Case the Appellate court held that Mr. Wallace had been found to have been intransigent at the trial level and therefore, concluded that Mr. Wallace was continuing the same pattern on appeal. The *Wallace* Court stated that:

Under RCW 26.09.140, “the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in

addition to statutory costs.” As an independent ground we may award attorney fees and costs based on intransigence of a party, demonstrated by litigious behavior, bringing excessive motions, or discovery abuses. Gamache v. Gamache, 66 Wash.2d 822, 829-30, 409 P.2d 859 (1965); Eide v. Eide, 1 Wash.App. 440, 445-46, 462 P.2d 562 (1969). If intransigence is established, we need not consider the parties' resources. In re Marriage of Crosetto, 82 Wash.App. 545, 564, 918 P.2d 954 (1996). Randy has demonstrated his intransigence at trial. To appeal the result justifies an attorney fees award to Tina on appeal. In re Marriage of Mattson, 95 Wash.App. 592, 606, 976 P.2d 157 (1999) (“[A] party's intransigence in the trial court can also support an award of attorney fees on appeal.”).

We award Tina attorney fees in addition to statutory costs based both on her need and Randy's intransigence; the commissioner of this court is to set the amount upon appropriate application, considering both bases of the award.

In re Marriage of Wallace, 111Wn.App at 709. Therefore, this court held that because of the intransigence at the trial level, Mr. Wallace’s appeal appeared to be more of the same.

The Respondent further by citing to *Skimming v. Boxer*, 119 Wn.App. 748, 756; 82 P.3rd 707 (2004) and RCW 4.84.185 that the Appeal sought by the Appellant is wholly without merit and frivolous in nature. Yet, nothing in the record below supports this claim and it is only the histrionic wailings of unfairness and misstatements of facts made by the Respondent that are submitted to support such claim.

For example, the claim that Ms Block is “wholly dependent” upon Mr. Block is a manifest untruth. It is well demonstrated that Ms Block has lived with her boyfriend, who has been supporting her, since long before the Mediation on October 22, 2008. It has also been fully demonstrated that Ms Block has refused to work although Mr. Block was forced to pay for her retraining and Ms Block abused this opportunity by charging substantially more on the community credit card for such training and did not disclose it to Mr. Block that she had done so although the court orders at that time limited the amount she was to use. In short, contempt of a court order.

Another example, is the statement that Dennis has failed to cooperate is also completely false. Dennis has been the only one to completely follow the court orders in this case. At each juncture, Dennis has had to fend off legal actions brought by Janie, often times without an effort by Janie or her attorney to seek a compromise before seeking such court intervention.

A good example of this is the bringing of the July 20, 2009 hearing without a motion or pray for relief. Janie asserts in her Reply this hearing, that although Dennis is correct that

there had in fact been several changes to the Parenting plan submitted to the Court for this hearing that Dennis had been in possession of the parenting plan since April 14, 2009. This is completely a false statement as the first time Dennis and his attorney saw the parenting plan was attached to the calendar note and Ms First had completely redrafted it with only 6 calendar days to respond.

Dennis properly objected to the many changes made (in this and many other documents submitted for final pleadings) and that Janie dismisses Dennis' objections as minor and not of consequence, thereby demonstrating the demeanor in which Dennis has been treated by both Janie and Ms First throughout this action. (CP 206 line 4 though 207 line10).

Another example of one of the highly inflammatory and untrue statements made by Janie is in this same pleading to the court telling them that Dennis's attorney had been sanctioned by this court. Although Dennis' attorney did in fact pay \$100.00 for being a day late on his Appellant brief, Janie's attorney clearly used this minor incident as fuel to flame a fire in the court's mind against Dennis. (CP 206 line 1).

But the best example of misapplication of the facts by

Janie and her attorney is the one regarding the family home. This home was temporarily ordered to be held in possession of Ms Block and the Appellant was ordered to pay the mortgage. At mediation, Ms Block, *for the first time*, gives the house back to Dennis who then, upon moving back in, a year after he left, learned that the house had sat abandoned for several months.

After learning he could not refinance the house as quickly as the Mediation agreement required, *he was left with only the option to place the house on the market to sell as required in the mediation CR 2A agreement.* The parties were to cooperate with the sale, yet Ms Block ignored the real estate agents attempts to contact her repeatedly. Even still, Mr. Block listed the home and had kept the home on the market without interruption from March 31, 2009 to date as required.

There is nothing in the record that demonstrates that Mr. Block did anything regarding the sale of the house to prevent it from selling. It is certainly not his fault that the housing market tanked these past couple of years and it is not his fault that the property is located in a remote area with several homes for sell around him.

It is true that Ms Block brought a motion recently to

appoint a special master to great expense to the parties. Not because Mr. Block would not cooperate, but because Mr. Block would not agree to a distress sale price of over a \$100,000.00 less as demanded by Ms Block. Mr. Block, after dealing with the sale of the house for over a year without the cooperation of Ms Block opposed allowing Ms Block to arbitrarily force the house to be sold out of spite at rock bottom prices below the value of the home. It was, and is, his asset as well.

Prior to the motion sought by Janie, Mr. Block submitted several CMAs and an appraisal of the property and they were rejected by Janie. However, after the appointment of the special master, the agent hired by the special master agreed with Mr. Block's choice of valuation of the property and the special master listed it in accordance with the new agent, also suggested by Mr. Block. Therefore, in Dennis' opinion, a special master was only an additional expense for the parties. His choice of agent and listing price were both collaborated by the Special Master and the Agent.

The whole of the argument on Appeal in *Skimming* was whether or not the prevailing party would be allowed attorney fees. In this case, there has been no prevailing party either

determined by the Superior Court or yet by this court.

The County denied the claim as “not well grounded in fact or in law, [and] completely devoid of any merit.” CP at 357. Mr. Skimming sued Spokane County and Francine Boxer nonetheless. He claimed three causes of action: (1) defamation; (2) infliction of emotional distress (either intentionally or negligently); and (3) violation of certain civil rights. CP at 4-5. Spokane County raised a number of affirmative defenses, including immunity under former RCW 4.24.510.

The County asked Mr. Skimming's counsel to sign a stipulated order of dismissal. He refused. The County and Ms. Boxer moved for summary judgment. Mr. Skimming requested a continuance. The court denied the request for a continuance and dismissed his complaint

Skimming v. Boxer, 119 Wn.App. 748 at 753.

Therefore, this argument that Mr. Block brought either appeal frivolous should be disregarded.

Respondent's attorney fee request is not supported by the record or the Brief of Respondent and should be denied.

E. Respondent waives their right to object to the Report of the Proceedings and therefore their motion submitted previously to this court should be stricken.

Janie brought an unfounded motion to strike the Report of Proceedings based upon the recordings and transcriptions not being “official.” While Dennis sufficiently rebutted Janie's

position in the response to the motion, Janie has waived that objection by references to that Report of Proceedings.

F. Conclusion

Several errors occurred by both Commissioner Bedle and by the Arbitrator in this case. Commissioner Bedle erred when on July 20, 2009 he entered final pleadings but sent three issues back to arbitration for rulings.

This error is manifest by the case law submitted by the Appellant in his opening brief with this appeal. Respondent has not cited to one family law case to rebut this requirement of the court to not bifurcate family law final pleadings and not finalize issues regarding the marital property.

More importantly, at no point does the Respondent demonstrate that Commissioner Bedle had the authority or jurisdiction (either on July 20, 2009 or on October 20, 2009) to overrule what Judge Fair had ruled on March 3, 2009 when that court ruled that all of the arbitration rulings were to be entered with the final pleadings.

The Appellant in his objections for the July 20, 2009 and October 20, 2009 hearings clearly cited to the fact that the three items requested by Janie had already been ruled upon

previously by the Arbitrator on January 21, 2009, and June 18, 2009, and that the request being made by Janie at both hearings were not in accordance with either the Arbitrator's prior rulings or the March 3, 2009 ruling of Judge Fair.

Commissioner Bedle then further erred when he ignored the plain language of the CR2A agreement which mandated that the Arbitrator's role ceased automatically when the court entered final documents on July 20, 2009.

Commissioner Bedle also erred on October 20, 2009 when he denied Dennis' request for the full ninety (90) days for the opportunity to bring a proper motion to vacate the Arbitrator's ruling as allowed under the statute. The Court was not mandated to enter and confirm the ruling of the Arbitrator and the statutes cited above demonstrates that the Commissioner could have either continued the hearing to allow the proper time to bring Dennis's motion (as 30 days more would not have prejudiced Janie) or the Court could have sent the items back to the Arbitrator or the court could have just followed the ruling of Judge Fair in her March 23, 2009 Order.

The Arbitrator also erred and went beyond his boundaries when he ignore the CR2A plain language which

extinguished his authority. As the drafter of this document, he was fully aware that he had no authority to rule on any issue after the final pleadings had been entered unless agreed to in writing. A court order does not equate an agreement between the parties. Furthermore, there was no court order on July 20, 2009 so in this case, there was neither an agreement nor a court order as asserted by Janie.

Finally, the Arbitrator erred when he expanded his boundaries (acted outside the confines of his position per the CR2A agreement) when he changed his previous rulings without explanation and he awarded excessive attorney fees against Dennis which appear to be punitive in nature as well as fees to Janie to fight Dennis on appeal in which it is the sole domain of the Appellate court to award fees for an appeal.

In conclusion, in the first linked appeal (No. 63244-2-I), Dennis asked this court to rule that Judge Fair erred and did not follow the legal standards for enforcing a CR2A agreement under the rules of this state that mandate a summary judgment hearing and or a evidentiary hearing to support a summary judgment.

If this Court holds that the CR2A agreement was valid, Dennis seeks as the sole purpose of this appeal, that this Court remand to the Superior Court the direction to amend the Final Pleadings of July 20, 2009 to incorporate the March 3, 2009 ruling of Judge Fair which directs that the arbitration awards shall be included in final pleadings which would therefore include the January 21, 2009 ruling dictating that the amount of the CDs is \$1515.10 with no prejudgment interest and the June 18, 2009 award which held that there was to be no further attorney fees awarded to either party.

If this Court holds in the linked case that the CR2A agreement is not enforceable, then the arbitrator's rulings are moot and this matter should be set for trial and revert back to temporary orders which were entered in March, 2008.

Respectfully submitted August 9, 2010



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