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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON  
COURT OF APPEALS, DIVISION II: No. 56658-3-II

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AURC III, LLC, an Oregon limited liability company,

Respondent,

v.

POINT RUSTON PHASE II, LLC, a Washington limited liability company, POINT RUSTON, LLC, a Washington limited liability company, CENTURY CONDOMINIUMS, LLC, a Washington limited liability company, THE SHOPS AT POINT RUSTON I, LLC, a Washington limited liability company, PR RETAIL, LLC, a Delaware limited liability company, PR BUILDING 11/9, LLC, a Washington limited liability company, POINT RUSTON THEATRE, LLC, a Washington limited liability company; PR MAIN STREET RETAIL, LLC, a Delaware limited liability company; and RAINIER PROPERTY SERVICES, LLC, a Washington limited liability company,

Appellants.

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OPPOSITION TO PETITION FOR REVIEW

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## I. INTRODUCTION

Following binding arbitration, the arbitrator issued a final award requiring Petitioners to pay Respondent \$11,499,489.57 in interest and attorney's fees stemming from an active loan. Importantly, the final arbitration award held that all Petitioners were jointly and severally liable under RCW 119.40, the Uniform Voidable Transactions Act despite the fact that only one Petitioner is the borrower.

Respondent moved to confirm the arbitration award for two reasons. First, to enter judgment on the monetary portion of the award. Second, for collateral estoppel regarding the defenses Respondents raised because the principal of the loan was not yet due and a second lawsuit arising out of the same facts and transactions would likely be necessary.

Petitioners did not attempt to pay the arbitration award or judgment until after the superior court orally ruled that it would enter judgment. Following the oral ruling, but before entry of the

written judgment, Petitioners paid the judgment. Petitioners argued that payment of the judgment should prevent both entry of judgment and confirmation of the arbitration award that could be used for collateral estoppel in a future lawsuit.

Both the superior court and the court of appeals rejected Petitioner's arguments; which do not give rise to Supreme Court review.

First, Respondent acknowledges that the court of appeals here declined to follow the Division III case of *Kenneth W. Brooks Trust A v. Pacific Media, LLC* ("*Brooks Trust A*"), 111 Wn. App. 393, 44 P.3d 938 (2002)). However, as discussed in further detail below, declining to follow *Brooks Trust A* does not create a direct split between the divisions of the court of appeals.

Second, as the court of appeals noted, "[a]ttaching the arbitrator's interim and final awards merely identified the awards the superior court was confirming, nothing more or less." Slip Op. at 9. Petitioners fail to show that there is no authority to do so.

## II. RESTATEMENT OF ISSUES

### A. Issue One

May a superior court enter an order and judgment confirming an arbitration award where the judgment debtor pays the monetary portion of the award after the court's oral ruling but before the court signs the order?

### B. Issue Two

May a superior court attach an arbitrator's award to its order confirming that award?

## III. RESTATEMENT OF THE CASE

### A. Point Ruston Attempted to Escape Its Debts to AURC

In 2013, Respondent AURC loaned Defendant PR Phase II \$66 million to develop the Point Ruston area in Tacoma. CP at 57-58. PR Phase II breached numerous obligations under the loan documents and failed to make required interest payments. *Id.* at 61-65. As of March 31, 2021, PR Phase II owed \$5,677,854 in current interest and an additional \$5,291,161 in default interest on the note. *Id.* at 69.

On April 16, 2020, AURC sued PR Phase II, Point Ruston, LLC, and all of the various Point Ruston-related entities that Defendants had used to try to obscure assets and deflect creditors like AURC. CP at 1. For simplicity, AURC hereon refers to these entities (excluding Defendant Rainier Property Services, LLC) as “Point Ruston.”

**B. AURC Prevailed in Binding Arbitration of the Dispute Over Unpaid Interest**

AURC and Point Ruston arbitrated their dispute before Arbitrator George A. Finkel from June 21 through 25, 2021. CP at 56. The arbitrator issued an “Interim Award” on July 22, 2021 that summarized the parties’ dealings and contracts and Point Ruston’s breaches of those contracts. *Id.* at 56-79. The Interim Award awarded AURC “\$10,969,015 in Current Interest and Default Interest through March 31, 2021, jointly and severally against” all of the Point Ruston Defendants. *Id.* at 78. The Interim Award did not fully resolve *all* disputes between the parties,

because it assessed only interest against Point Ruston—Point Ruston still owed the full principal amount of the loan to AURC.<sup>1</sup>

The arbitrator issued a subsequent “Final Award” on August 23, 2021 that “incorporated by reference” the full Interim Award and awarded AURC an additional \$434,287.75 in attorneys’ fees, \$96,686.82 in costs, \$24,846.90 in arbitrator administrative fees and expenses, and \$49,400 in arbitrator compensation. CP at 51-54.

Point Ruston does not dispute that it was required to pay all the amounts from the Arbitrator’s Interim and Final Awards.

**C. AURC Moved for an Order Confirming the Arbitration Award from the Superior Court**

After obtaining the Arbitrator’s “Final Award” in its favor, AURC promptly moved to confirm the award in the superior court pursuant to RCW 7.04A.220. CP at 80. Though the parties

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<sup>1</sup> AURC filed a new lawsuit against the Point Ruston entities on November 23, 2022 seeking to recover all remaining obligations on the loan, including the full principal balance. That matter is currently pending the Pierce County Superior Court, case number 22-2-10332-4.

disputed the proper post-judgment interest rate and the likely impact of the judgment on future litigation, both parties agreed that the arbitration award should be confirmed and judgment entered. Verbatim Report of Proceedings (“VRP”) (9/10/2021) at 9. Point Ruston agreed, “that the only thing left for the Court to do is confirm the award and enter a Final Judgment.” CP at 90-91; VRP (9/10/2021) at 9. The court ultimately continued the hearing for two weeks, requesting additional briefing on the finality of the awards. VRP (9/10/2021) at 10.

At the next hearing on AURC’s ministerial motion to confirm the award, argued on September 24, 2021, Point Ruston argued that the superior court should not attach the arbitrator’s actual “Interim Award” or “Final Award” being confirmed to the order because “it is not this Court’s role to delve into or approve the ‘reasons’ for the award.” CP at 310. Point Ruston proposed that the superior court instead select specific individual pages of the arbitrator’s awards and confirm only those pages with actual monetary figures on them. *Id.* at 315-16. When pressed for how

a confirmation of the arbitrator’s full “awards,” rather than pieces of those awards would prejudice Point Ruston, its attorney made clear the actual challenge: “There is findings in there that I completely disagree with. I believe if I had a rational or a general way to appeal that, I could show that they are unsupported in the record.” VRP (9/24/2021) at 10. Point Ruston did not explain how attaching the awards to the order confirming them would require the court to “delve into” or approve “the reasons” for the award—all parties agreed that substantive review of the arbitrator’s decision would be inappropriate.

The superior court rejected Point Ruston’s argument and ruled that it would attach the awards to the order confirming those awards, but that it wished to add additional language (requested by Point Ruston) to the order and intended to formally enter the written order the following Monday, September 27, 2021. VRP (9/24/2021) at 14-15.

Suddenly, after the superior court had announced its ruling but before it had entered its written order, Point Ruston tendered

a check for the award amounts to AURC and filed a motion to dismiss the confirmation proceeding for lack of subject matter jurisdiction. CP at 341. Notably, Point Ruston had made no effort to pay the award between its issuance on August 23 and the superior court’s confirmation hearing a month later. Nakedly seeking only to avoid entry of an adverse judgment, Point Ruston argued that because “there is nothing left for the court to decide,” the case should be dismissed. *Id.* at 342. To avoid entry of judgment prior to hearing on its motion, Point Ruston also moved for an order shortening time, alleging that the “matter is time sensitive and of great importance to Defendants.” *Id.* at 346.

The superior court accurately summarized Point Ruston’s gamesmanship:

Let me ask this, though. The dispute is settled because of my ruling, thought, right?—the ruling that I made on Friday [September 24], which was oral—but I wanted to put it into writing—is what ends the dispute, and now you are basically saying, ‘Judge, don’t enter the ruling that ended the dispute.

VRP (9/28/2021) at 9. The superior court denied both Point Ruston's motion to shorten time and its motion to dismiss. CP at 360, 510. It entered its order confirming the arbitration award, attaching both the Interim Award and the Final Award, and entered judgment on October 8, 2021. CP at 512, 516.

**D. The Court of Appeals Affirmed in Full and Awarded AURC Its Reasonable Attorneys' Fees**

Point Ruston appealed, arguing that the superior court was jurisdictionally required to grant its motion to dismiss and that it constituted reversible error for the superior court to attach the arbitration awards to its ruling. Br. of Appellant. Division II of the Court of Appeals affirmed the superior court in full and awarded AURC its reasonable attorneys' fees pursuant to the parties' loan agreement. *AURC III, LLC v. Point Ruston Phase II, LLC*, Case No. 56658-3-II (Slip Op.) at 10-11.

As to Point Ruston's mootness arguments, the court held that RCW 7.04A.220 imposes a "mandatory duty" on superior courts to confirm an arbitration award unless a statutory

exemption applies. *Id.* at 6. In this case, none did. *Id.* Because AURC was “statutorily entitled” to “a written confirmation order” under RCW 7.04A.220, Point Ruston’s payment of the award amount could not moot the case. *Id.* at 8. Notably, the Court of Appeals also held that, even if policy considerations could override the mandatory language of RCW 7.04A.220 (as Division III permitted in *Kenneth W. Brooks Trust A v. Pacific Media, LLC* (“*Brooks Trust A*”), 111 Wn. App. 393, 44 P.3d 938 (2002)), such considerations were not present here. Slip Op. at 8 n.4. Thus, though the Court of Appeals “decline[d] to follow” *Brooks Trust A*, its opinion was clear applying the analysis of that case would not change the outcome. *Id.*; *see infra*.

As to the attachment of the awards, the court held that “[t]he superior court did not err by attaching the arbitrator’s interim and final arbitration awards to the court’s order confirming the arbitration award.” *Id.* at 10. It provided an in-depth analysis of the singular case relied on and taken wholly out of context by Point Ruston, observing that the case “does not

preclude a superior court from attaching an arbitration award that includes an arbitrator's reasoning to an order confirming the arbitration award." *Id.*

Point Ruston now seeks review from this Court.

#### **IV. ARGUMENT**

This Court accepts review of a court of appeals decision per the standards of RAP 13.4(b). Those standards provide for review "only (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) if a decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b).

Point Ruston does not allege that (1) or (3) apply at all to either of its two proposed issues. Instead, it argues that the court of appeals' decision "is in conflict with" published case *Brooks*

*Trust A*, 111 Wn. App. at 393, and whether superior courts may attach arbitration awards to their ministerial orders confirming those awards “involves an issue of substantial public interest that should be determined by the Supreme Court.” Neither standard of review is met in this matter. This Court should deny Point Ruston’s Petition and award AURC its reasonable attorneys’ fees for filing this answer.

**A. The Court of Appeals Decision Declining to Follow *Kenneth A. Brooks Trust A Does Not Create A Direct Split Between the Divisions of the Court of Appeals***

The bulk of Point Ruston’s argument for Supreme Court is because the court of appeals states, “We decline to follow *Brooks Trust* because policy considerations cannot overcome the plain language of a statute.” Slip Op. at 7. In its ruling, Division II of the court of appeals exercised its authority to disregard Division III case *Kenneth W. Brooks Trust A v. Pac. Media, LLC* (“*Brooks Trust A*”), 111 Wn. App. 393, 44 P.3d 938 (2002).

But that does not put its decision in direct conflict with *Brooks Trust A* because the outcome of this matter would be the

same even if the court of appeals here followed *Brooks Trust A*. As the court of appeals noted, even under *Brooks Trust A*'s analysis, Point Ruston would still lose. Whether pursuant to the mandatory language of RCW 7.04A.220 that the court of appeals relied upon, or to the policies underlying *Brooks Trust A*, Point Ruston cannot show that the superior court committed any reversible error by confirming the arbitration award.

Under RCW 7.04A.220, when a party files “a motion with the court for an order confirming” an arbitration award, “the court shall issue such an order unless the award is modified or corrected under RCW 7.04A.200 or 7.04A.240 or is vacated under RCW 7.04A.230.” Where none of the express statutory grounds under RCW 7.04A.220 apply, “[t]he confirming court does not have collateral authority to go behind the face of the award.” *Price v. Farmers Ins. Co. of Wash.*, 133 Wn.2d 490, 496-97, 946 P.2d 388 (1997). “A confirmation action is no more than a motion for an order to render judgment on the award previously made by the arbitrators pursuant to contract. If the court does not

modify, vacate, or correct the award, the court exercises a mere ministerial duty to reduce the award to judgment.” *Id.* at 497.

The court of appeals ruled that *Brooks Trust A* had erred by “prioritize[ing] policy considerations over the plain language of the statute” and rendering the mandatory duty for a superior court to confirm an arbitration award as subject to modification for policy reasons relating to judicial economy. Slip Op. at 7. But the court was also clear that “if the policy considerations in *Brooks Trust* are applied to this case, those same policy considerations support affirming the superior court’s confirmation of the arbitration award.” Slip Op. at 8 n.4. (emphasis added).

In *Brooks Trust A*, “the judicial economy and practical efficiencies [were] apparent” because the defendant’s “prompt payment peremptorily satisfied any need for judgment and effectively brought the underlying controversy to a close.” *Id.* In the face of overwhelming judicial efficiency, the court of appeals held that “a trial court *may* deny a motion to confirm an

arbitration award and dismiss the underlying claim” on mootness grounds. *Id.* at 400 (emphasis added). *Brooks Trust A* did not hold dismissal would *ever* be required—only that, in the specific circumstances of that case—dismissal did not merit reversible error.

In this case, in contrast, Point Ruston “did not oppose confirmation of the award,” but only rushed to pay the award after the superior court had “clearly expressed its intention to confirm the award” before the written order was entered. Slip Op. at 8 n.4. “By the time Point Ruston started the payment process, the parties and the superior court had already participated in most of the formalities, delays, expenses, and vexation of litigation.” *Id.* Under Point Ruston’s analysis, a party to any proceeding may avoid entry of an adverse judgment by litigating a matter to its conclusion and then scrambling to write a check between the court’s decision and entry of its written order.

This case does not present an appropriate set of facts to resolve any differences of opinion among divisions of the courts

of appeals. If the court of appeals was correct in this matter, RCW 7.04A.220's language is mandatory and superior courts *must* confirm the award, even where it has already been paid. If *Brooks Trust A* was correct, superior courts may, where doing so promotes policies of "judicial economy and practical effect," dismiss a moot motion to confirm an arbitration award. 111 Wn. App. at 398-99. In either case, as the court of appeals explained, Point Ruston loses.

Here, as noted by the superior court, it was the superior court's very ruling on the confirmation motion that prompted payment of the award. VRP (9/24/2021) at 9. Point Ruston's weekend scramble to pay its obligations before the court could enter a formal order against it, followed by multiple additional motions and delays, did not serve any definition of "judicial economy." Rather, Point Ruston prevented finality in the case and extended the proceedings for additional weeks, requiring additional briefing, argument, and delay.

As the court of appeals noted, the same policy considerations relied upon by *Brooks Trust A* “support affirming the superior court’s confirmation of the arbitration award” because “[b]y the time Point Ruston started the payment process, the parties and the superior court had already participated in most of the formalities, delays, expenses, and vexation of litigation.” Slip Op. at 8 n.4.

**B. A Party May Not Moot a Case Between a Superior Court’s Decision and Formal Entry of that Decision**

The Court of Appeals simply did not issue the decision that Petitioners challenged. It did not “determine[] that the Superior Court was required to enter a moot judgment confirming the award.”

**C. A Superior Court May Attach an Arbitrator’s Award to an Order Confirming That Award**

Next, AURC contends that what specific portion of an arbitration award a superior court chooses to attach to its order confirming that award presents an “issue of substantial public interest that should be determined by the Supreme Court.” RAP

13.4(b)(4). Point Ruston has not shown that either the superior court or court of appeals committed error of any kind, much less the attachment of a document to a ministerial order constitutes an issue worth that of Supreme Court review.

Point Ruston argues that a superior court commits reversible error when it attaches an arbitrator's award to its order confirming that award. The court of appeals understandably rejected this argument, holding that "[a]ttaching the arbitrator's interim and final awards merely identified the awards the superior court was confirming, nothing more or less." Slip Op. at 9. "*Westmark* does not preclude a superior court from attaching an arbitration award that includes an arbitrator's reasoning to an order confirming the arbitration award." *Id.* at 10.

Point Ruston repeatedly identifies "award" as a "term of art," but never identifies what the "term of art" means or includes. *See* Pet. for Review at 2, 5, 14. Instead, it relies exclusively on a single court of appeals case: *Westmark Props., Inc. v. McGuire* ("*Westmark*"), 53 Wn. App. 400, 766 P.2d 1146

(1989). *Westmark* had nothing to do with what document or portion of a document a superior court may attach to a confirmation order. *Id.* Instead, it held that an arbitrator’s inclusion of “random observations” or reasoning in its award does not subject that reasoning to judicial scrutiny. *Id.* at 403-04.

The court of appeals summarized *Westmark* in affirming the superior court in this case. Slip Op. at 9-10. In *Westmark*, the party who lost at arbitration presented the court “with a four-volume report of proceedings, all exhibits, and a line-by-line—almost word-by-word—analysis of the arbitrator’s three-page letter.” 53 Wn. App. at 402. The court declined to “review [the] arbitrator’s decision on the merits.” *Id.* Instead, any grounds for vacation of an arbitrator award must be based in the relevant statute and “must appear on the face of the award.” *Id.* The court held that a review of the arbitrator’s “random observations” contained in the letter with the award would be beyond the scope of appropriate judicial review under the then-relevant arbitration statute. *Id.* at 403.

AURC agrees with Point Ruston’s lengthy exposition on the role of arbitration and its general immunity from judicial review. *See* Pet. for Review at 13-15. As Point Ruston states, “[a]rbitration’s desirable qualities would be heavily diluted, if not expunged, if a trial court reviewing an arbitration award were permitted to conduct a trial *de novo*.” *Id.* at 14. That is exactly why Point Ruston’s demand that the superior court independently review and carve up the arbitrator’s award, confirming some portions and refusing to confirm others, is completely untenable. Instead, RCW 7.04A.220 directs that “the court *shall* issue” an order confirming the arbitration award unless it is modified or corrected under the corresponding statutes. (emphasis added). *Westmark* holds that the arbitrator award’s reasoning is unreviewable by the court; not that the court should not confirm the full award.

Point Ruston’s fundamental misread of *Westmark* and token RAP 13.4(b)(4) analysis do not justify intervention by the Supreme Court. This Court should deny review.

**D. AURC is Entitled to Its Reasonable Attorneys' Fees and Costs for This Answer**

“If attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals, and if a petition for review to the Supreme Court is subsequently denied, reasonable attorney fees and expenses may be awarded for the prevailing party’s preparation and filing of the timely answer to the petition for review.” RAP 18.1(j). Because AURC obtained an award of its reasonable attorneys’ fees after prevailing at the court of appeals, Slip Op. at 10-11, this Court should award AURC its fees and expenses before this Court if review is denied pursuant to RAP 18.1(j).

**V. CONCLUSION**

This Court should deny Point Ruston’s Petition for Review

This Answer contains 3,517 words, excluding those portions exempted from word count by RAP 18.17(b).

Respectfully submitted this 8th day of May, 2023.

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**SMITH ALLING, P.S.**

**May 08, 2023 - 3:34 PM**

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