SUPREME COURT OF WASHINGTON
Case No. 102126-7

COURT OF APPEALS OF WASHINGTON
DIVISION III, Case No. 38834-4-III

BIOCHRON, INC., a Washington corporation, *et al.*,

Petitioners for Discretionary Review,

v.

BLUE ROOTS, LLC, a Washington limited liability company,

Respondent for Discretionary Review.

RESPONDENT BLUE ROOTS, LLC'S ANSWER TO PETITION FOR DISCRETIONARY REVIEW TO SUPREME COURT OF WASHINGTON

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I. IDENTITY OF RESPONDENT

Blue Roots, LLC ("Blue Roots") was the original Appellant in Division Three of the Court of Appeals and now the Respondent on this Petition for Discretionary Review brought by Biochron, Inc., *et al.* (collectively "Biochron"). Blue Roots respectfully requests that the Petition be denied as Division Three correctly remanded this matter for arbitration and held Blue Roots did not waive the right to arbitrate based upon a detailed analysis of the specific facts presented. *See Biochron, Inc. v. Blue Roots, LLC*, 529 P.3d 464 (Wash. Ct. App. 2023). Biochron ignores Division Three's clear application of settled law, and instead cherry-picks quotes from Division Three's Opinion that Respondent "mostly played defense" and had a "mostly defensive posture." Biochron's feigned position that Division Three's Opinion is contrary to Supreme Court precedent is merely a delay tactic to avoid arbitration. Biochron does not raise any meritorious reason for discretionary review and instead repeats its

previously unsuccessful arguments. *See* RAP 13.4(b).

II. COURT OF APPEALS DECISION

On May 25, 2023, Division Three of the Court of Appeals issued the Published Opinion entitled *Biochron, Inc. v. Blue Roots, LLC*, 529 P.3d 464 (Wash. Ct. App. 2023). In relation to waiver, Division Three held that "Biochron is unable to meet its heavy burden of showing that Blue Roots waived its right to arbitrate." *Blue Roots*, 529 P.3d at 467. In this vein, Division Three reasoned: "Blue Roots filed a demand for arbitration and twice moved the trial court to compel arbitration. These actions are consistent with a desire to arbitrate." *Id.* In relation to potential prejudice to Biochron, Division Three noted that it would reverse the summary judgment dismissal of Blue Roots' misappropriation of trade secrets claim(s) for arbitration, and therefore, Biochron "would have had to litigate the trade secrets claim in one forum or the other." *Id.* at 468. As such, Division Three

"remand[ed] with directions to the trial court to compel arbitration." *Id.* at 478.

III. STATEMENT OF THE CASE

This is a complex commercial case involving the failed acquisition of Biochron, Inc. ("Biochron") by Blue Roots, LLC ("Blue Roots"). (*See, e.g.*, Clerk's Papers ("CP") at 469-490.) In May 2019, Blue Roots and Biochron entered into the Memorandum of Understanding ("MOU") regarding the acquisition and relationship of the parties. (CP 628-631.)

The MOU is four pages and contains ten Sections, along with a Schedule A, and should be consulted as necessary. (*See* CP 628-631.) The "Dispute Resolution" Section of the MOU contains an arbitration clause, which provides:

> The Parties will resolve any discrepancy of interpretation on an amicable basis and with the utmost good will and cooperation. In the event of any irresolvable disagreement between the parties, the parties agree to submit to arbitration via the AMERICAN ARBITRATION ASSOCIATION, to be conducted in the City of Spokane, Washington.

(CP 630.)

Following the execution of the MOU, Blue Roots began operating in Biochron's facility in June 2019 pursuant to the agreement. (CP 622; CP 677.) Shortly thereafter, the parties adopted "a product purchase agreement" that was subsequently documented in an internal joint venture agreement. (CP 622.) As part of this structure, Blue Roots implemented its cannabis strains, clones, and grow process(es) into Biochron's facility and operations. (CP 622; CP 642; CP 678-679; CP 1022.) Additionally, Blue Roots and Biochron opened a joint bank account for the joint venture's operating expenses. (CP 1024.) Blue Roots also expended substantial funds to update and improve Biochron's facility, operations, and grow process. (CP 608-609; CP 622-623; CP 640-641; CP 748; CP 996-1000; CP 1008-1010.) In January 2020, Blue Roots manifested and delivered cultivars / mother plants for its staple strains to Biochron pursuant to the parties' ongoing business relationship, the MOU and joint venture, and the parties' course of conduct partnership. (*See, e.g.*, CP 623.)

Under the "Exclusive Dealings Period" of the MOU, Blue Roots purchased all cannabis product harvested from Biochron during the joint venture. (CP 623; CP 1023.) The MOU also called for Blue Roots to remit to Biochron "a payment equal to 10% of the month's net profit generated by Blue Roots, LLC for a period of ten years." (CP 629.) Consistent with the MOU, Blue Roots made such payments during their business dealings. (CP 623; CP 1024-1025.) Similarly, the MOU provides that: "Beginning June 1, 2019 Bart Bennett will receive a salary of $5,000 per month as a manager of Blue Roots, LLC." (CP 629.) Mr. Bennett received his salary during the parties' joint venture. (CP 622.)

Despite Blue Roots funding operating costs for various months into the future, the parties' business venture was dissolved. (CP 623-624.) To this day, Biochron continues to compete against Blue Roots by selling its cannabis to wholesalers. (CP 1028-1029; CP 595-598; CP 624.)

On September 18, 2020, this litigation was commenced by Plaintiffs Biochron, Inc., Kevin Rudeen, Bart Bennett, and John Gillingham to prevent Blue Roots from compelling arbitration pursuant to the MOU. (*See* CP at 1-11.) On October 9, 2020, Blue Roots filed a Motion to Compel Arbitration and Plaintiffs filed a Motion for Preliminary Injunction to enjoin the same. (CP 360-362; CP 313-329.) On October 27, 2020, the trial court entered an Order Denying Defendant's Motion to Compel Arbitration, along with an Order Granting Plaintiffs' Motion for Preliminary Injunction. (CP 461-468.) Neither Order was issued "with prejudice." (*See id.*) The Order Granting Plaintiffs' Motion for Preliminary Injunction enjoined Blue Roots from proceeding with arbitration "until further order of this Court." (CP 468.)

On December 31, 2020, Blue Roots submitted a Motion for Preliminary Injunction requesting the trial court enjoin ongoing misappropriation of its trade secrets by Plaintiffs. (*See* CP 514-586.) Based upon the various judicial

reassignments, new counsel, and other delays, the parties submitted supplemental briefing regarding Blue Roots' Motion for Preliminary Injunction in Fall 2021. (*See* CP 807-821; CP 916-939.) Following a January 14, 2022 hearing, the trial court entered an Order Denying Blue Roots' Motion for Preliminary Injunction on January 26, 2022. (CP 1221-1223.) On January 28, 2022, Blue Roots submitted a Notice reserving its right to seek arbitration. (CP 1258-1260.)

On February 11, 2022, Plaintiffs filed their Motion for Partial Summary Judgment Re: Trade Secret Misappropriation. (CP 1516-1567.) On February 14, 2022, Blue Roots brought its Renewed Motion to Compel Arbitration. (CP 1575-1596.) On March 17, 2022, the trial court entered the Order Denying Blue Roots' Renewed Motion to Compel Arbitration and Order Granting Plaintiffs' Motion for Partial Summary Judgment Re: Trade Secret Misappropriation. (CP 1865-1869.)

On April 1, 2022, Blue Roots filed its Notice of Appeal. (CP 1870-1879.) Division Three issued the Published Opinion discussed in detail elsewhere herein on May 25, 2023. *Blue Roots,* 529 P.3d 464. Biochron timely filed its Petition for Discretionary Review to this Court.

IV. ARGUMENT

Pursuant to RAP 13.4(b)(1), a petition for review may be accepted by the Supreme Court "[i]f the decision of the Court of Appeals is in conflict with a decision of the Supreme Court." The crux of Biochron's Petition is that Division Three "erroneously created a new standard under Washington law" pertaining to waiver of the right to arbitrate. (Am. Pet. at p. 11.) According to Biochron, this new standard is that:

> [I]f a party raises the right to arbitrate then "mostly play[s] defense" it can litigate or change forum on a whim—regardless of the level of its engagement in litigation, the amount of time it "plays defense," and the prejudice suffered by the opposing party.

(*Id.* at pp. 11-12.) As explained herein, Biochron misconstrues Division Three's Opinion, which did not err or conflict with any precedent. Discretionary review is not warranted.

A. The Court of Appeals Correctly Applied Clear Precedent in a Factually Intensive Waiver Analysis.

Whether a party has waived the right to arbitration is reviewed "'de novo.'" *Blue Roots*, 529 P.3d at 472 (quoting *Jeoung Lee v. Evergreen Hosp. Med. Ctr.,* 195 Wn.2d 699, 705, 464 P.3d 209 (2020)). Washington courts consider three factors in a waiver analysis: "'(1) knowledge of an existing right to compel arbitration, (2) acts inconsistent with that right, and (3) prejudice.'" *Blue Roots*, 529 P.3d at 472 (quoting *Lee*, 195 Wn.2d at 705). "The party asserting waiver 'has a heavy burden of proof.'" *Blue Roots*, 529 P.3d at 472 (quoting *River House Dev., Inc. v. Integrus Architecture, P.S.,* 167 Wn. App. 221, 237, 272 P.3d 289 (2012)); *accord Berman v. Tierra Real Estate Grp., LLC*, 23 Wn. App. 2d 387, 399-400, 515 P.3d 1004 (2022) ("Waiver of a contractual right to arbitration is

disfavored, and a party seeking to establish such a waiver has a 'heavy burden of proof.'").

In general, "Washington has a strong public policy that favors arbitration." *David Terry Investments, LLC-PRC v. Headwaters Dev. Grp. Ltd. Liab. Co.*, 13 Wn. App. 2d 159, 161, 463 P.3d 117 (2020). That is, "Washington courts apply a 'strong presumption in favor of arbitrability,' and '[d]oubts should be resolved in favor of coverage.'" *Marcus & Millichap Real Estate Inv. Servs. of Seattle, Inc. v. Yates, Wood & MacDonald, Inc.*, 192 Wn. App. 465, 474, 369 P.3d 503, 507 (2016) (quoting *Peninsula Sch. Dist. No. 401 v. Pub. Sch. Emps. of Peninsula,* 130 Wn.2d 401, 414, 924 P.2d 13 (1996)). As such, "[a]ny doubts concerning . . . a defense of . . . waiver . . . should be resolved in favor of arbitration." *Wiese v. Cach, LLC*, 189 Wn. App. 466, 474, 358 P.3d 1213 (2015) (internal quotations omitted).

Division Three correctly applied legal precedent of this Court and the Court of Appeals in a factually intensive waiver

analysis. In this vein, the doctrine of *stare decisis* requires the Court of Appeals to follow applicable legal precedent of the Supreme Court of Washington. *See State v. Gearhard*, 13 Wn. App. 2d 554, 562, 465 P.3d 336, 339 (2020) ("Once our Supreme Court has decided an issue of state law, that interpretation is binding on this court."). The purpose of *stare decisis* is to provide stability in the law, allowing for predictability in court rulings and avoiding unnecessary judicial activism. *See In re Stranger Creek & Tributaries in Stevens Cnty.*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970) (the purpose of *stare decisis* is "to accomplish the requisite element of stability in court-made law"). Division Three's role is merely to apply precedent and not create new law. *See id.* The entire appellate system would collapse if every in-depth factual analysis by the Court of Appeals were subject to discretionary review if a litigant disagrees with the outcome.

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1. Blue Roots Did Not Engage in Significant Acts Inconsistent With the Right to Arbitrate.

The first factor Division Three considered was whether Blue Roots engaged in "'acts inconsistent with [the right to arbitrate].'" *Blue Roots*, 529 P.3d at 472 (quoting *Lee*, 195 Wn.2d at 705). Determining whether a party engaged in conduct inconsistent with the right to arbitration "'depends on the particular facts of the case and is not susceptible to bright line rules.'" *Blue Roots*, 529 P.3d at 472 (quoting *Berman*, 23 Wn. App. 2d at 400). In turn, this factor is established if the opposing party demonstrates "'that as events unfolded, the party's conduct reached a point where it was inconsistent with any other intention but to forgo the right to arbitrate.'" *Blue Roots*, 529 P.3d at 472 (quoting *River House Dev.*, 167 Wn. App. at 238).

As indicated by Division Three, "engaging in discovery is not inconsistent with arbitration, in which discovery is also available." *Blue Roots*, 529 P.3d at 472. Moving for summary judgment likewise does not necessarily waive the right to

arbitrate. *See Townsend v. Quadrant Corp.*, 173 Wn.2d 451, 463, 268 P.3d 917 (2012) (parties timely moved to compel arbitration after court denied motion for summary judgment). As such, responding to a summary judgment motion brought by an opposing party is not an act inconsistent with the right to arbitrate. *See id* at 463. Similarly, as a preliminary injunction only seeks to maintain the *status quo*, moving for a preliminary injunction is not an act inconsistent with arbitration. *See Nw. Gas Ass'n v. Washington Utilities & Transp. Comm'n,* 141 Wn. App. 98, 115-16, 168 P.3d 443 (2007) (the purpose of a preliminary injunction is "to preserve the status quo until the trial court can conduct a full hearing on the merits" and "the trial court does not reach or resolve the merits of the issues"); *see also Verbeek Properties, LLC v. GreenCo Envtl., Inc.*, 159 Wn. App. 82, 90, 246 P.3d 205 (2010) (party did not waive right to arbitrate through preliminary attempt to remove lien). In this vein, Washington's Uniform Arbitration Act ("UAA"), Chapter

7.04A RCW, expressly provides the right to seek "Provisional Remedies" does not waive the right to arbitrate:

> Before an arbitrator is appointed and is authorized and able to act, the court, upon motion of a party to an arbitration proceeding and for good cause shown, may enter an order for provisional remedies to protect the effectiveness of the arbitration proceeding to the same extent and under the same conditions as if the controversy were the subject of a civil action.

RCW 7.04A.080(1).

In the situation at hand, Division Three held that "Biochron is unable to meet its heavy burden of showing that Blue Roots waived its right to arbitrate." *Blue Roots*, 529 P.3d at 467. Division Three succinctly reasoned that "Blue Roots filed a demand for arbitration and twice moved the trial court to compel arbitration," noting that "[t]he actions are consistent with a desire to arbitrate." *Id.* Later in the Opinion, Division Three elaborated:

> Blue Roots did not equivocate or delay in asserting its right to arbitrate. It filed a demand for arbitration before any litigation commenced. When Biochron filed this suit to enjoin arbitration, Blue Roots promptly asserted its right

> to arbitrate. When that was unsuccessful, Blue Roots mostly played defense to Biochron's two partial summary judgment motions and its motion to compel discovery. The only affirmative motions Blue Roots filed were an unsuccessful motion to return its property and purported trade secrets, and a later motion to continue the trial date and associated deadlines.

Id. at 473. Division Three did not err and Biochron did not meet its heavy burden of establishing waiver.

2. Biochron is Not Prejudiced Via Arbitration Pursuant to the Clear Terms of the MOU.

Division Three also analyzed any alleged "prejudice" to Biochron associated with arbitration. *Blue Roots*, 529 P.3d at 472. "'[A]n effective attempt to use arbitration to relitigate a motion that was lost on the merits can support a finding of substantive prejudice.'" *Blue Roots*, 529 P.3d at 474 (quoting *Lee*, 195 Wn.2d at 708). However, "'[i]ncurring legal expenses inherent in litigation, without more, is insufficient evidence of prejudice to justify a finding of waiver.'" *Blue Roots*, 529 P.3d at 474 (quoting *Wiese*, 189 Wn. App. at 481).

Here, Division Three held that "Biochron is not prejudiced by Blue Roots's delay in renewing its motion to compel arbitration." *Blue Roots*, 529 P.3d at 468. In this vein, Division Three reasoned that it "would have reversed the trial court's ruling" granting summary judgment dismissal of Blue Roots' misappropriation of trade secrets claims, and therefore, Biochron "would have had to litigate the trade secrets claim in one forum or the other." *Id.* Division Three further noted that "Biochron was on notice that Blue Roots sought to arbitrate their dispute before Biochron incurred [legal] expenses." *Id.* at 474. As such, "[t]o the extent Biochron incurred additional expenses due to Blue Roots's delay in reasserting its right to arbitration, Biochron fails to show that expense was due to Blue Roots's conduct instead of its own offensive litigation, including two motions for partial summary judgment." *Id.*

As recognized by Division Three, at the time Blue Roots submitted its Renewed Motion to Compel Arbitration, Blue Roots was not attempting to relitigate a motion in arbitration

that it lost in front of the trial court. *See Blue Roots*, 529 P.3d at 472-74. As indicated above, a request for a preliminary injunction is a provisional remedy that only seeks to maintain the *status quo*, while the trial court is expressly precluded from reaching the merits of the dispute. *See Nw. Gas Ass'n,* 141 Wn. App. at 115-16; *accord* RCW 7.04A.080(1). Division Three did not err and Biochron failed to meet its heavy burden to establish waiver. *See Blue Roots*, 529 P.3d at 472-74.

Nor does Judge Fearing's concurrence assist in Biochron's Petition. In the concurrence, Judge Fearing wished to identify the difference between waiver and estoppel:

> Strictly defined, waiver describes the act, or the consequences of the act, of one party only, while estoppel exists when the conduct of one party has induced the other party to take a position that would result in harm if the first party's act were repudiated. . . . Estoppel involves some element of reliance or prejudice on the part of the party asserting estoppel. . . . Waiver requires no reliance.

Blue Roots, 529 P.3d at 481 (Fearing, J. concurring) (citations omitted). However, even under this standard Judge Fearing

"agree[d] with the majority's astute analysis and implied ruling that Blue Roots never intentionally relinquished the right to arbitration." *Id.* Judge Fearing further noted "all Washington decisions, if not also all foreign decisions, meld the two concepts in the context of arbitration." *Id.*

In the Petition, Biochron further argues that it engaged in "exhaustive preparation" for trial and Blue Roots' renewed request was in essence made on the eve of trial. (Am. Pet. at p. 23.) However, Biochron fails to note that it only opposed Blue Roots' continuance request to the extent it sought to continue the discovery cutoff, while Biochron agreed to continue the trial date. (*See* CP 1303-1312.) Biochron's feigned prejudice is insufficient to establish waiver.

B. The Court of Appeals Did Not Misapply *Otis Hous. Ass'n, Inc. v. Ha*, 165 Wn.2d 582, 201 P.3d 309 (2009); *Townsend v. Quadrant Corp.*, 173 Wn.2d 451, 268 P.3d 917 (2012); and/or *Jeoung Lee v. Evergreen Hosp. Med. Ctr.*, 195 Wn.2d 699, 464 P.3d 209 (2020).

Biochron disingenuously asserts that "[t]his Court's decisions in *Ha*, *Townsend*, and *Lee* all evidence that Blue

Roots actions reached the point where they were inconsistent with any other intention than to forego the right to arbitration." (Am. Pet. at p. 14.) This is not the case.

1. Biochron Cites *Ha* for the First Time in its Petition, Nevertheless Division Three's Opinion is Not Inconsistent Therewith.

For the first time in its Petition for Review, Biochron cites to *Otis Hous. Ass'n, Inc. v. Ha*, 165 Wn.2d 582, 201 P.3d 309 (2009). In general, a litigant may not raise an issue to the Supreme Court of Washington that was not presented to the Court of Appeals. *See State v. Halstien,* 122 Wn.2d 109, 130, 857 P.2d 270 (1993) ("An issue not raised or briefed in the Court of Appeals will not be considered by this court."); *accord In re Ruiz-Sanabria*, 184 Wn.2d 632, 642 n. 9, 362 P.3d 758 (2015). The purpose for this rule is to allow the lower court to address the applicable issue and correct any alleged error before it occurs. *See id.* As such, Biochron should be precluded from relying upon *Ha* as a basis for discretionary review as it did not argue the case below.

Nevertheless, Division Three's Opinion is in no way inconsistent with *Ha*. In *Ha*, this Court held that a litigant waived the right to compel arbitration pursuant to an option agreement by not raising the right during a show cause hearing in an unlawful detainer action related to the option agreement. 165 Wn.2d at 584-85. As indicated by the *Ha* Court, "'a party to a lawsuit who claims the right to arbitration must take some action to enforce that right within a reasonable time.'" *Id.* at 588 (quoting *Lake Washington Sch. Dist. No. 414 v. Mobile Modules Nw., Inc.*, 28 Wn. App. 59, 64, 621 P.2d 791 (1980)). As such, the *Ha* Court reasoned:

> OHA's conduct of submitting its claim that it exercised its option as a defense to the unlawful detainer action was completely inconsistent with an intent to arbitrate. We hold that OHA did waive any claim it may have had to arbitrate by presenting the same issue—whether it had successfully exercised the option to purchase—before the unlawful detainer court.

Ha, 165 Wn.2d at 588. As such, the *Ha* Court held "[h]aving lost that issue, it may not later seek to relitigate the same issue in a different forum." *Id.*

Despite no citation to *Ha*, Division Three noted that "'[a]n effective attempt to use arbitration to relitigate a motion that was lost on the merits can support a finding of substantial prejudice.'" *Blue Roots*, 529 P.3d at 474 (quoting *Lee*, 195 Wn.2d at 708). Division Three reasoned that "ordering arbitration will not prejudice Biochron" as "the grant of partial summary judgment dismissing Blue Roots's misappropriation of trade secrets claims" was erroneous and would be reversed. *Id.* at 468. Further, Division Three noted that "Biochron filed this suit to enjoin Blue Roots from proceeding with its arbitration demand" in the first place and Blue Roots' request for a preliminary injunction was merely "an unsuccessful motion to return its property and purported trade secrets." *Id.* at 473-74. This reasoning is entirely consistent with *Ha*.

2. The Court of Appeals Correctly Applied *Townsend*.

Next, Biochron argues that Division Three's Opinion was inconsistent with and misapplied *Townsend v. Quadrant Corp.*, 173 Wn.2d 451, 268 P.3d 917 (2012). In *Townsend*,

this Court held that no waiver occurred when litigants "moved to compel arbitration after the trial court denied their motion for summary judgment." 173 Wn.2d at 463. The *Townsend* Court noted "'a party to a lawsuit who claims the right to arbitration must take some action to enforce that right within a reasonable time.'" *Id.* (quoting *Ha*, 165 Wn.2d at 588). As such, no waiver occurred when the litigants "moved to compel arbitration promptly after the superior court denied their motion for summary judgment based on their assertion that they had no connection to the lawsuit." *Townsend*, 173 Wn.2d at 463.

In addition to citing *Townsend* multiple times, Division Three also conducted the following in-depth analysis:

> [I]n *Townsend,* two families sued their home builder and its parent companies. . . . The builder moved to stay the proceedings and compel arbitration per its contracts with the families, while the parent companies moved for summary judgment on the basis they had no connection to the plaintiffs or their houses. . . . After the superior court denied the motions and consolidated the suit with those of two more families, the builder and its parent companies

> again moved to compel arbitration. . . . The superior court again denied the motion, concluding there were issues of fact as to whether the families' contracts with the builder were enforceable.
>
> After concluding that the enforceability of the contract was an issue for the arbitrator because the families challenged the contracts as a whole rather than the arbitration clause, . . . our Supreme Court found that the parent companies had not waived their right to arbitrate by first moving for summary judgment. . . . They had promptly moved to compel arbitration after their motion for summary judgment, which did not evince an intent to waive arbitration.

Blue Roots, 529 P.3d at 473 (citations omitted).

In applying *Townsend* to the dispute at issue, Division Three noted that: "As in *Townsend*, [Blue Roots'] mostly defensive posture is not inconsistent with an intent to arbitrate the dispute." *Blue Roots*, 529 P.3d at 473. Division Three further noted:

> When Biochron filed this suit to enjoin arbitration, Blue Roots promptly asserted its right to arbitrate. When that was unsuccessful, Blue Roots mostly played defense to Biochron's two partial summary judgment motions and its motion to compel discovery. The only affirmative motions Blue Roots filed were an unsuccessful motion to return its property and

> purported trade secrets, and a later motion to continue the trial date and associated deadlines.

Id. The Opinion is not inconsistent with *Townsend.*

3. The Court of Appeals Correctly Applied *Lee.*

Biochron further argues that Division Three misapplied *Jeoung Lee v. Evergreen Hosp. Med. Ctr.*, 195 Wn.2d 699, 464 P.3d 209 (2020). In *Lee*, the Court held that the litigant (employer) waived the right to compel arbitration as "it did not move to compel [arbitration] until the third iteration of the complaint even though the complaint had almost identical claims throughout" and the litigant "opposed [the other party's] motion to continue the trial because it was ready to go to trial." 195 Wn.2d at 708. In addition, the *Lee* Court noted prejudice was present as "to compel arbitration would give [the litigant] the opportunity to relitigate class certification on which it lost." *Id.*

In addition to citing to *Lee* for rule statements, Division Three also provided the following analysis:

> In *Lee*, an employee filed a putative class action lawsuit against her former employer. . . . As an affirmative defense, the employer asserted that the employee had failed to exhaust the grievance and arbitration process under her collective bargaining agreement, but it did not move to compel arbitration until the employee filed her second amended complaint, nearly one year after she filed her initial complaint. . . . In the meantime, the employer had unsuccessfully opposed class certification, sought dismissal of the case, engaged in discovery, and opposed the employee's motion to continue trial on the basis it was prepared for trial, all without moving to compel arbitration. . . . The trial court denied the motion to compel arbitration in part because the parties had been litigating the same issues for months, and the employer had not previously sought to enforce its right to arbitration.
>
> Our Supreme Court affirmed, noting that while the employer listed arbitration in its answer, it participated in discovery and litigation and did not move to compel arbitration "until the third iteration of the complaint." . . . The court also pointed to the fact that when the employee moved to continue trial, the employer opposed the continuance because it was ready to go to trial. . . . In addition to the employer acting inconsistently with its right to arbitrate, arbitration would severely prejudice the employee because she had spent a large amount of money on the litigation and it would give the employer the opportunity to relitigate class certification, an issue on which it had lost.

Blue Roots, 529 P.3d at 472-73 (internal citations omitted).

Following the analysis of *Lee*, Division Three reasoned that "unlike in *Lee* . . . , Blue Roots did not equivocate or delay in asserting its right to arbitrate." *Blue Roots*, 529 P.3d at 473. That is, Blue Roots "filed a demand for arbitration before any litigation commenced" and "promptly asserted its right to arbitrate." *Id.* Additionally, Division Three noted "unlike the plaintiff in *Lee*, Biochron was on notice that Blue Roots sought to arbitrate their dispute before Biochron incurred [legal] expenses." *Id.* at 474. Further unlike in *Lee*, Blue Roots was not attempting to seek arbitration of an issue that it previously lost in front of the trial court. *See id.* at 471-74.

Division Three's Opinion correctly applied *Lee*.

C. The Court of Appeals Opinion is Not Inconsistent with the Right to Seek Interlocutory Review of the Denial of Arbitration.

Finally, Biochron argues that Division Three's Opinion "is not an efficient or effective use of the judicial process or judicial resources, and directly conflicts with this Court's directive in [*Hill v. Garda CL Nw., Inc.*, 179 Wn.2d 47, 54,

308 P.3d 635 (2013)] to avoid 'costly and lengthy litigation' by immediately appealing an order denying arbitration as a matter of right." (Am. Pet. at p. 32.) Nevertheless, Division Three correctly reasoned that the analysis is one of waiver, as opposed to exhaustion of a potential remedy. *See Blue Roots*, 529 P.3d at 473-74.

In this vein, Division Three noted that denial of the first motion to compel arbitration "was immediately appealable under RAP 2.2(a)(3)." *Blue Roots*, 529 P.3d at 473. However, Division Three further reasoned that "it is not enough that Blue Roots failed to exhaust a potential remedy, Biochron must show that Blue Roots's actions were inconsistent with any other intention but to forego the right to arbitrate." *Id.* In other words, Division Three held that the analysis was still one of waiver. *See id.*

In addition to the overall context of the litigation (*i.e.*, that it was initiated by Biochron to stop arbitration), the record had substantially evolved since Blue Roots' first motion to

compel arbitration in the form of various evidence regarding the parties' relationship and ratification of the MOU containing the arbitration clause. (CP 608-609; CP 621-623; CP 640-642; CP 678-679; CP 748; CP 996-1000; CP 1008-1010; CP 1022-1025.) Biochron's argument further does not take into account the interlocutory procedural nature of a motion to compel arbitration. *See Marcus & Millichap*, 192 Wn. App. at 473 ("both trial and appellate courts act properly by applying familiar summary judgment principles when the validity of an agreement to arbitrate is challenged under RCW 7.04A.070"); *accord In re Estate of Jones*, 170 Wn. App. 594, 604–05, 287 P.3d 610 (2012) (denial of a motion for summary judgment does not implicate the doctrines of *stare decisis*, law of the case, and/or *res judicata*).

Additionally, the *Townsend* Court implicitly addressed a renewed motion to compel arbitration without concerning itself with the lack of an appeal of the first denial under RAP 2.2(a)(3). *See Townsend*, 173 Wn.2d at 454-55 ("Shortly after

Quadrant received notice of the lawsuit, it filed a motion to stay proceedings and compel arbitration. . . . The superior court denied [this] motion[]. . . . Quadrant again moved to compel arbitration and WRECO and Weyerhaeuser sought similar relief."). Division Three's Opinion is not in error.

V. CONCLUSION

Based on the foregoing, Blue Roots respectfully requests that this Court deny Biochron's Petition for Discretionary Review. Pursuant to RAP 18.17(b) and (c)(10), I hereby certify that this Answer to Petition for Review contains approximately 4,993 words, as calculated by the word processing software used to prepare this brief and exclusive of those exempt therefrom.

RESPECTFULLY SUBMITTED July 14, 2023.

ETTER, McMAHON, LAMBERSON,
VAN WERT & ORESKOVICH, P.C.

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DECLARATION OF SERVICE

The undersigned certifies, under penalty of perjury of the laws of the State of Washington, that I am now and at all times herein, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein. On the date given below, I caused to be served in the manner noted copies of the foregoing document upon the following parties:

Whitny L. Norton
Ryan D. Yahne
William B. Emmal
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Spokane, WA 99201

- ☐ U.S. Mail
- ☐ Facsimile
- ☒ E-Mail - via WA Courts
- ☒ Via Hand Delivery

EXECUTED this 17th day of July, 2023 in Spokane, Washington.

By: Jodi Dineen
Jodi Dineen

ETTER, MCMAHON, LAMBERSON, VAN WERT & ORESKOVICH, P.C.

July 17, 2023 - 3:51 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	102,126-7
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