CASE # 35572-1-III 97539-6

IN THE COURT OF APPEALS, DIVISION 3, STATE OF WASHINGTON

REBEL CREEK TACKLE INC., Petitioner

v.

SETH BURRILL PRODUCTIONS INC. Respondent

PETITION FOR REVIEW

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APPENDIX

A. IDENTITY OF PETITIONERS

Petitioner Rebel Creek Tackle Inc. seeks review of the decision terminating review set forth in Part B, the Unpublished Opinion in .

B. COURT OF APPEALS DECISION

The Court of Appeals, Division III, issued its unpublished opinion on July 11, 2019. It is set forth in the Appendix as Exhibit A.

C. ISSUES PRESENTED FOR REVIEW

a.JUDICIAL AUTHORITY, MOOTNESS, CR 11 SANCTIONS: Where a dispute regarding a Licensing Agreement which included a provision for arbitration, was commenced in 2012 in Spokane County Superior Court Case 13-2-01982-0 by a Motion per R.C.W. 7.04A.220 for conversion of an Arbitration Award to a Superior Court Order and Judgment, and where Case 13-2-01982-0 was not commenced by summons, complaint et al, and

where a Judgment was entered by the Spokane County Superior Court enforcing the Licensing Agreement as amended with said amendment requiring certain performance by June 1, 2016 and,

where multiple Motions were filed and decided by the trial court in Case 13-2-01982-0 in 2013 and 2015 and

where Petitioner for Discretionary Review motioned, in Case 13-2-01982-0 in 2017, regarding the same Licensing Agreement and Judgment and the performance required by the Judgment by June 1, 2016;

did the trial court have JUDICIAL AUTHORITY to determine arbitrability per R.C.W. 7.04A.060 and *Davis,* infra fn. 1 or was Petitioner to commence a new cause of action and

where the trial court decided that the Petitioner was required to commence a new cause of action, denied Petitioner's motion and imposed CR 11 SANCTIONS against Petitioner for its Motion being brought without a new cause of action, and

where the trial court's Denial of Petitioner's motion was appealed to Division III and an Arbitration commenced and was concluded and an Arbitration Award Terminating the License Agreement was rendered while the appeal was pending and

where Division III determined that the Arbitration Award terminating the License Agreement rendered MOOT issues of the trial court determining arbitrability with either referral to Arbitration or issues to be determined in the trial court;

did the issues of JUDICIAL AUTHORITY regarding Case 13-2-01982-0, arbitrability re: referral to arbitration or determination in the trial court or the requirement of a new cause of action, the Denial of Petitioner's Motion, the imposition of CR 11 SANCTIONS create issues of

"substantial public interest" and or suggest "conflict with a decision of the Supreme Court or a decision of another Court of Appeals",

requiring Division III to consider said issues despite its determination of MOOTNESS?

b.Where required performance within a specified time was not performed and where prior Motions for Contempt, for Injunction, and for Receiver had been heard and where by *Davis*, infra, and R.C.W. 7.04A.060 directed the trial court to decide arbitrability and the trial court held that Petitioner was required to commence a new cause of action without reference to arbitrability

and where the trial court's case law and statutory direction was presented to the trial court and Respondent in Petitioner's Proposed Order and was argued to the trial court during the hearing, was Petitioner's decision to bring the Motion within "the bounds of a decision a reasonable person could make" was it not "patently clear that [the] claim [had] absolutely no chance of success" and where a reviewing court had held that the arbitrability decision making process required of the trial court was moot, is it necessary that the Petitioner's Petition for Discretionary Review be heard, *Skimming, infra*.

c.Where an appeal depends from a Spokane County Superior Court Case 13-2-01982-0 and the Division III Unpublished Opinion states that:

"To obtain relief, RCT needed to initiate a new cause of action (which has since been done)" and where in fact Case 13-2-01982-0 remained active and no new case has been opened, has the parenthetical "(which has since been done)" indicate that Division III engaged in ex parte contacts and or a supplementation of the record.

d.Where the trial court, upon denying the Petitioner's Motion for Summary Judgment[1], imposed a CR 11 SANCTION against Petitioner, and on appeal the Court of Appeals confirmed the sanction referring , to colloquy between counsel and the court, without citation to the Report of Proceeding and where said or similar colloquy between the court and counsel does not exists and which is not found in the Report of Proceeding, Clerk's Papers or Memorandum or any pleading, and where the Report of Proceeding records substantively different colloquy between counsel and the Court

[1] Petitioner's Motion for Summary Judgment, Exhibit D Appendix

re: the basis for Petitioner's Motion for Cr 11 sanctions against Respondent, should the colloquy be considered on appeal regarding its recitation of a basis for the Petitioner's Motion for CR 11 sanctions and for the contention that Cr 11 sanctions imposed were not reasonably imposed?

e.MOOTNESS: Where, in Spokane County Superior Court case 13-2-01982-0, following the trial court's denial of Petitioner's motion and the trial court's imposition of Cr 11 sanctions against Petitioner's counsel, an Arbitration is commenced and concluded with the Arbitrator's Award being issued before the conclusion of the appeal of the order denying Petitioner's motion and where issues at the trial court pertaining to Petitioner's motion focused on the basis for the trial court's imposition of Cr 11 sanctions, the Court of Appeals holds that issues regarding the denial of Petitioner's motion are moot and not considered on appeal, should the Court of Appeals nevertheless have determined wether the legal issues involved were both issues of substantial public interest to be considered and decided and issues of substance regarding the imposition of CR 11 sanctions rather than deciding that the issues were moot?

f.AUTHORITY OF THE TRIAL COURT: Where Spokane County Superior Court case 13-2-01982-0 was initiated by a Motion, per R.C.W. 7.04A,220, for an Order and Judgment depending from an Arbitration Decision in 2012, and where the trial court granted Judgment and, during subsequent years heard and ruled on motions in 2013 and 2015, did the trial court in 2017 have the authority to hear and decide Petitioner's Motion for Summary Judgment depending from the same 2012 Judgment.

g.AUTHORITY OF THE TRIAL COURT:Where Petitioner, in Spokane County Superior Court case 3-2-01982-0, which was commenced by Motion per R.C.W. 7.04A.220 following an Arbitrator's Award involving a License Agreement subject to arbitration, was the trial court to determine arbitrability or should the trial court order that a new cause of action was required and, so, would the trial court's refusal, to order whether the issues on Summary Judgment were to be decided by trial court or by arbitration, be in opposition to existing Washington state statutes and case law?

D. STATEMENT OF THE CASE

Petitioner Rebel Creek Tackle Inc or RCT, and Respondent Seth Burrill Productions Inc. or SBP, entered into a licensing agreement in 2010 authorizing Respondent to sell Petitioner's patented devices. A dispute in 2012 was resolved in favor of Respondent in an AAA Arbitration. Respondent commenced Spokane County Superior Case 13-2-01982-0, with a Motion under R.C.W. 7.04A.220 for the entry of a judgment confirming the 2012 Arbitration Decision.

The 2012 Arbitration Decision amended a licensing provision to require certain performance by June 1, 2016. The trial court entered Judgment enforcing the licensing agreement as amended. In 2013 the trial court, in Case13-2-01982-0, considered and granted Motions for Contempt and for Injunction. In 2015 the trial court, in Case 13-2-01982-0, granted a Motion for the appointment of a Receiver. The Order granting the appointment of a receiver was appealed by Petitioner. While the appeal was pending the June 1, 2016 deadline for Respondent's performance passed evidence that the performance had not occurred. Petitioner

gave notice to the Respondent that the required sales had not been made, that the Licensing Agreement was terminated and Petitioner filed a Declaratory Judgment in the Appeal asserting the Respondent's asserting the Termination of the Licensing Agreement. Respondent's attorney, admitted in email and mail to Petitioner's attorney that Respondent had not performed and blamed, without recitation of the events, the Respondent's failure on Petitioner.

In 2017 Petitioner moved in Case 13-2-01982-0 for Summary Judgment for Termination of the License Agreement. The Licensing Agreement contained an arbitration provision. The Declaratory Judgment was within the Motion for Summary Judgment Appendix of Exhibits as filed in Case13-2-01982-0. The trial court did not consider arbitrability, held that a new cause of action was required, denied Petitioner's Motion and granted the Cr 11 sanctions.

The 2017 trial court denial of the Motion was appealed and the Division III Opinion is now the subject of this Motion for Discretionary Review. Appendix Exhibit A.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

This case involves the interrelation between a trial court, its role relative to deciding whether issues are decided in arbitration or by the trial court, how an Arbitration Award is converted to a Judgment, the authority of the trial court regarding a Superior Court case, Mootness and the application of Cr 11 sanctions.

The issues may be infrequently encountered by counsel, trial court or the appellate court. Issues of judicial authority, mootness, and sanctions are encountered with evidence of unfamiliarity, confusion and lack of comprehension of the trial court's role relating to judicial authority, Arbitration and the application of Cr 11.

THE TRIAL COURT AND ARBITATION: None of the Respondent, the trial court nor Division III recognize the role of the trial court in determining arbitrability. Petitioner's Proposed Order[2], served prior to the August 18, 2017 hearing, recited statute and case law regarding who decides whether arbitration or trial court. The trial court had the responsibility for determining arbitrability, and it erred in ruling that a new cause of action was obviously required.. [3]

Petitioner addressed the trial court role re: who decides in colloquy[4] and did so in the initial minutes of the MSJ hearing at RP 3/20-24 as follows:

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MR. IVEY: May it please the Court and Counsel.
Your Honor, I believe there are three different matters that you
will rule on today; one of them is the summary judgment brought by
Rebel Creek to be granted, if not in the Superior Court then is it
to be referred to arbitration,
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The trial court did not abide by R.C.W. 7.04A.060 or *Davis*, supra footnote 2. Division III agreed at Unpublished Opinion pages 11-12[5] stating : RCT lacked a proper basis for filing a summary judgment motion because the motion was not tied to any existing legal claims.

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[2] Petitioner's Proposed Order, CP 328-340 Appendix Exhibit C

[3] CP 328-340 Appendix Exhibit C from Clerks Papers.; Davis v. General Dynamic Land Systems 152 Wn.App 715, 217 P.3d 1191 (Div 2, 2009) and for stay Everett Shipyard, Inc. v. Puget Sound Environmental Corp 155 Wn.App. 761, 231 P.3d 200(Div 1, 2010); *Peninsula Sch. Dist. No. 401 v. Pub. Sch. Employees of Peninsula,* 130 Wash.2d 401, 413, **924 P.2d 13** (1996); **RCW 7.04A.060** (" The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate."). The trial court had the responsibility for determining arbitrability, …".

[4] RP 3/22-24; 7/22-8/1; 23/16-20; 24/18-20; 27/6-10; 27/16-18; 28/25-29/5;32/18-22; R.C.W. 7.04A.070 citing Davis v. General Dynamic Land Systems 152 Wn.App 715, 217 P.3d 1191 (Div 2, 2009) and for stay Everett Shipyard, Inc. v. Puget Sound Environmental Corp 155 Wn.App. 761, 231 P.3d 200(Div 1, 2010)

[5] Division III Unpublished Opinion Appendix Exhibit A

Division III was in error in affirming the trial court and should be reversed.

The Respondent, trial court and Division III error in thinking that if arbitration there was not going to be new litigation and not a case commenced by Motion as did Case 13-2-01982-0.

A Superior Court Case implicitly confers authority to the trial court to engage all means necessary to carry that authority into effect. R.C.W 2.28.150 confers procedural authority on courts to adopt any suitable mode of proceeding to carry out a statutory directive where none is specifically pointed out and jurisdiction is otherwise conferred upon the court.[6]

Division III comments that RCT's motion is not supported by authenticated exhibits. Nevertheless, the trial court's option, if not decided in the trial court because of authentication, was to Order the case to Arbitration.

The court considered but did not Order Arbitration[7] but Arbitration commenced within one week and concluded with an Arbitrator's Award on January 22, 2018.

Division III, Opinion page 12, states without cite to authority that"

"RCT lacked a viable basis for requesting CR 11 sanctions against counsel for SBP. [and]… counsel for RCT simply stated that it was entitled to prevail on the merits of its request to terminate the Agreement. This does not come close to meeting the criteria for CR 11 sanctions…."

The reference "[counsel] simply stated that it was entitled to prevail…]" has no citation. But, the viable basis for Petitioner's requesting CR 11 sanctions is recognized in the

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[6] R.C.W. 2.28.150; re Marriage of Langham and Kolde, 153 Wn.2d 553, 560, 106 P.3d 212 (2005);Abad v. Cozza, 128 Wn.2d 575, 588, 911 P.2d 376 (1996)Primark, Inc. v. Burien Gardens Associates, 63 Wn.App. 900, 906, 823 P.2d 1116 (Div. 1 1992); In re Marriage of Langham and Kolde, 153 Wn.2d 553, 560, 106 P.3d 212 (2005):

[7] RP 3-7, 9, 12, 14-17, 19, 22-24, 27-31 etc where the court orders stay of Case 13-2-01982-0 and reconsiders.Report of Proceeding Appendix Exhibit B

Respondent's failure to find, by Respondent's own research or by reference to the research provided to Respondent and the trial court in Petitioner's Proposed Order[8],

Respondent had no awareness of the Motion practice following an arbitration by arguing that new litigation was required with discovery and by admission that Respondent had no awareness of the court ordered stay when a case is Ordered to Arbitration by Respondent's statement re: stay when responding the court's question[9]:

"Counsel, what is your position on that? Counsel "I'd object. Not sure what the legal basis would be and…".

And Division III illustrated no awareness of arbitrability by its statement that: "A party's pleadings are not subject to CR 11 sanctions simply because they are unsuccessful….CR 11 is aimed at preventing baseless filings that are not grounded in fact or law. RCT failed to provide any explanation of how SBP's court filings (which were ultimately successful) failed to meet this standard.[10]

Division III's statement illustrates the baselessness of Respondent's filings in being without grounding in fact or law as unaware of the court's role in arbitrability. Footnote 1. Division III's statement that Respondent's "court filings (which were ultimately successful) …", stated by Division III without citation, illustrates the misunderstanding by Division III re: arbitrability.

The trial court duty to determine arbitrability makes reasonable Petitioner's motion, eliminates frivolousness and the basis of imposing CR 11 sanctions.

[8] CP 328-334 Appendix Exhibit C from Clerks Papers.
[9] RP 27/lines 7-10 Report of Proceedings Appendix B
[10] Division III Decision page 11-12 Appendix Exhibit A

Spokane County Superior Court Case 13-2-01982-0 was commenced with Respondent's Motion under R.C.W. 7.04A.220. The Court entered an Order and Judgment rendering the Arbitrator's Award into a Spokane County Superior Court Judgment. That Superior Court Judgment was forever subject to the jurisdiction of the trial court until the case is concluded by an order. The trial court was thereby empowered to engage all means necessary to carry out that Judgment.

Case 13-2-01982-0 has a Motion Practice History: In 2013 Respondent brought a Motion for Contempt and a Motion for an Injunction. The trial court exercised its authority and granted the Motions. In 2015 Respondent brought a Motion for Appointment of Receiver. The Superior Court trial court granted the Motion.

While the Appeal of the Order Appointing Receiver was pending June 1, 2016 arrived which was the date in the Judgment in Case 13-2-01982-0 when Respondent was contractually required to have completed certain performance. Petitioner gave notice to SBP of Termination of Licensing Agreement and filed a Declaratory Judgment.

After the Appeal regarding Receivership was concluded in 2017, Petitioner brought a Motion for Summary Judgment in Case 13-2-01982-0, seeking Termination of the License.

While Respondent had brought Motions, Petitioner's motion was not perceived as allowed without commencement of a new cause of action. Neither Respondent, trial court nor Division III viewed the Petitioner's Motion to be subject to the jurisdiction of the trial court.

The authority of R.C.W. 2.28.150, R.C.W. 7.04A.060 and 7.04A.220 was not considered. The Respondent's understanding and misunderstanding was clarified in colloquy by Respondent

counsel's comment[11] that Case 13-2-01982-0 had commenced in 2012 with a complaint and answer and his advice to the trial court that what was required was the filing of a new lawsuit with filing fee, cover sheet, etc.[12]

The issue of "who decides, where an arbitration provision exists, if a dispute is decided in arbitration or in trial court" was addressed directly and specifically in colloquy at the opening of the MSJ hearing. The issue was briefed by the Petitioner in the Proposed Order[13] with suggested Findings, Conclusions and Decisions with cited authority.

Nevertheless, the trial court's ruling that new litigation was required and would have been recognized by an attorney of reasonable experience rendered this Motion frivolous with such an obvious flaw deserving of Cr 11 sanction.[14] The trial court erred in making this ruling.

MOOTNESS: The Division III unpublished opinion in this matter held moot the case substance regarding arbitrability Petitioner's Motion for Summary Judgment. The mandate for the trial court to decide arbitrability was disregarded yielding a result directly conflicting with existing Washington State case and statute law.

[11] RP 28/lines 9-19; 29/lines 6-9 Appendix

[12] RP page 6/line 5; 11/15-21; 13/25; 14/7-9; 15/1-2; 15/7-12; 16/18-20; 19/1-6; 21/5-6; 16/23-17/4; 17/15-16; 24/line 25; 26;19-22; 29/6-9; 31/18-32/5; 29/32

[13] Petitioner's Proposed Order - CP 328-34; Exhibit C' Proposed Order on Defendant's (Petitioner's) Motion for Termination of the LICENSEE AGREEMENT; CP 331 lines 16-20 in Petitioner's Proposed Order – *Davis, supra* 152 Wn.App. 715(Div. 2 2009); *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 16 P.3d 617 (2001)

[14] RP 17/20-21; 18/23-19/1; 25/1-6; 25/19-22; 26/17-24; 25/23-24;

Division III overlooked and refused comprehend arbitrability. The imposition of Cr 11 sanctions result from the trial court's failure to consider *Davis*, supra, and *Evertt*, supra resulting in the conclusion that Petitioner's Motion was flawed justifying Cr 11 sanctions.

Respondent advises that sanctions of approximately $29,000 will be sought. The fact that there was an arbitrability issue requiring a decision of arbitration or trial court and the imposition of Cr 11 sanctions causes Petitioner to urge that, regarding MOOTNESS:

> "However, the court will make an exception to this rule and address a [this] moot case "…[since]… it can be said that matters of continuing and substantial public interest are involved."[15]

Arbitration was discussed in colloquy with the trial court with suggestions that arbitration might or was being ordered. In light of the discussion regarding the availability of Arbitration Petitioner raised the issue of the staying of Case 13-2-01982-0 if arbitration was ordered. In colloquy Petitioner's counsel drew the court's attention to the requirement that a superior court case be stayed if the trial court's decision was to be refer the case to Arbitration. Neither Respondent counsel or the trial court to grasped the significance[16] of the options held by the trial court with this clear in light of the court's inquiry of Respondent counsel's thoughts on the matter of the Petitioner's counsel's advice of authority requiring stay if arbitration was the result. Respondent counsel didn't know the basis for the suggestion that Stay would be

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[15] . Eyman v. Ferguson, 433 P.3d 863 (Div. 2 2019)

[16] RP 27/lines 16-18.

ordered.[17] Petitioner concluded that neither Respondent counsel nor the trial court had reviewed RCT's Proposed Order[18] and that neither were aware of the trial court and arbitrability.

DIVISION III'S SUPPLEMENTATION OF RECORD ON APPEAL: Petitioner observes with interest and concern Division III's supplementation of the Record evidenced in the Unpublished Opinion as follows:

First – Division III Opinion at 11, Exhibit A Appendix: "To obtain relief, RCT needed to initiate a new cause of action (which has since been done). It was not appropriate to attempt to piggyback off of an unrelated, preexisting case."

The statement "(which has since been done) is wrong. Case 13-2-01982-0 is not closed and a new cause of action, a new case, has not been initiated. What was the source of the "(which has since been done)" conclusion. Was it from a discussion, the review of a pleading or email, from a teleconference? Who would know other than a trial judge or attorney or clerk or court reporter?

Has Division III engaged in an ex parte communication? A communication which bolsters the "notion" that a new cause of action is what was required? A communication or record inspection or a lunch supporting the need for a "new cause of action" with that need flying in the face of the R.C.W. 7.04A.220 Motion commencing the Superior Court involvement with an Arbitration Award? No "new cause of action" with summons, complaint et al needed here.

Second—At Opinion 11-12 Division III states:

[17] RP 27/lines 9-10.
[18] CP 328-340 Appendix Exhibit C from Clerks Papers.

"Finally, RCT lacked a viable basis for requesting CR 11 sanctions against counsel for SBP. When the superior court pressed counsel for RCT to explain its sanctions motion, counsel for RCT simply stated that it was entitled to prevail on the merits of its request to terminate the Agreement. This does not come close to meeting the criteria for CR 11 sanctions. A party's pleadings are not subject to CR 11 sanctions simply because they are unsuccessful. Instead, as set forth above, CR 11 is aimed at preventing baseless filings that are not grounded in fact or law. RCT failed to provide any explanation of how SBP's court filings (which were ultimately successful) failed to meet this standard.

Division III does not cite to the Record on Appeal for the statement that "RCT simply stated that it was entitled to prevail on the merits of its request to terminate the Agreement."

The Statement does not consider the colloquy at RP 23/line 5 to page 24/line20 where counsel's comments to the trial court support the contention that Respondent's pleadings and arguments were for the improper purpose of requiring the bringing of motion, appearance and argument while the breach of contract was admitted, the denial of facts admitted by Respondent's counsel Jeffrey Smith, urging that there were no claims left while Respondent had notice, seen in the record on appeal. (RP 23/5-15). Further, at RP 24/9-20, counsel addressed the Respondent's filing Declarations in response the Petitioner's Motion for Summary Judgment which were speculative and not made with evidentiary sufficiency to present a disputed material fact. Who or what was the source for this Division III erroneous comment?

Case 13-2-01982-0 remains. A Motion, separate from that of concern in this Petition for Discretionary Review but which regards the same issues, was set for May 17, 2019 was denied and has been appealed.

However, Petitioner arrives at the conclusion that Division III and the trial court would deem these Cr 11 issues as failing in that they do not engage the Respondent's and trial court's and Division III's conclusion that new litigation is required and that the trial court has somehow lost its "authority to use all means needed to judge" existing case 13-2-01982-0.

CR 11 SANCTIONS*:* The purpose of CR 11 is to prevent baseless filings. *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994); *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 219, 829 P.2d 1099 (1992); *Bryant*, 119 Wn.2d at219-20. The court must assess "whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified." *Id*. at 220. A court should impose sanctions only when it is "patently clear that a claim has absolutely no chance of success." *Skimming v. Boxer*, 119 Wn. App. 748, 755, 82 P.3d 707 (2004). CR 11 sanctions are reviewed for abuse of discretion. *Id*. at 754. and an award will not be reversed unless "its order is manifestly unreasonable or based on untenable grounds." *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). This standard is met only when the order falls outside the bounds of a decision a reasonable person could make. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997).

PETITIONER'S MOTION WAS REASONABLE-NOT PATENTLY CLEAR ABSOLUTLY NO CHANCE OF SUCCESS: Petitioner's Motion sought the trial courts confirmation of the Arbitrator's Award and the order Terminating the License Agreement. And, if not then referral to Arbitration. Petitioner's Motion and Memorandum directed the trial court to the arbitration provisions denying arbitration unless cure was allowed. The failure of certain

performance was a condition not curable. Respondent proffered declarations without evidentiary soundness. The trial court could have ruled for Petitioner. The trial court could have ordered arbitration.

The CR 11 sanctions were not proper and this Division III decision should be reversed.

CONCLUSION: Following the denial of RCT's Motion, Petitioner commenced Arbitration with the Decision Terminating the License Agreement. Before the Arbitrator were the same parties, the same License Agreement and the same License provision requiring performance as required by June 1, 2016 and the Superior Court Judgment entered in 2012. The Arbitrator's Decision was that performance had not occurred and that the Licensing Agreement was Terminated.

Respondent has continued sales regardless of the Arbitrator's Termination of the Licensing Agreement. In May, 2019, Petitioner moved to have the trial court reduce the Arbitrator's Decision to a Spokane County Superior Court Order and Judgment and to enjoin SBP from continuing sales following the Termination. Before the trial court in May 2019 were the same parties RCT and SBP, the same Licensing Agreement, the same 2012 Judgment, and a new Arbitration Decision Terminating the Licensing Agreement. The trial court had the same authority in case 13-2-01982-0 as existed since 2012 when other judges considered and ruled on Motions for Contempt, Injunction, Receivership, the Judge in May 2019 had a Motion to consider and rule on.

Court of Appeals Division III is aware that the order denying the May 2019 Motion for Order and Judgment has been appealed to Division III.

The Division III comment at Opinion page 10 refers to the May 2019 appearance in Case 13-2-01982-0 as procedurally unrelated to the present Motion for Discretionary Review but which Petitioner will present to the Supreme Court via a Motion to Consolidate when this Petition for Discretionary Review has been filed and the Clerks Papers are filed with Division III in the matter currently pending before Division III.

The refusal of the trial court, in May 2019, to grant Petitioner's Motion with that Order appealed leaves the Federal Court and Patent Infringement as an unwelcomed, expensive and burdensome option to encouraging Respondent to abide by the Termination of the Licensing Agreement.

The Division III page 10 comment regarding the May 2019 Motion concluding that RCT "…needed to initiate a new cause of action (which has since been done)." And that " It was not appropriate to attempt to piggyback off of an unrelated, preexisting case." is made without citation to any authority. The unsubstantiated conclusion suggests that the authority of the Spokane County Superior Court in case 13-2-01982-0 no longer exists – with this conclusion made with no reference to any case or statute supporting the expiration or elimination or non-existence of continuing judicial authority exerted by the implied powers provision of R.C.W. 2.28.150 as addressed in *Primark*, supra, and conveyed by the court's long engagement with case 13-2-01982-0.

The "no piggyback" comment sounds whimsical when contrasted with the Supreme Court's statement that "…the plain language of RCW 2.28.150 provides that once jurisdiction is

established, the court may adopt "any suitable process or mode of proceeding ... which may appear most conformable to the spirit of the laws."[19]

The potential for this "implied power of judicial jurisdiction to continue in case 13-2-01982-0 is significant for the Supreme Court's consideration of the reasonableness of the trial courts imposition of sanctions for counsel's bringing of the Motion for Summary Judgment in case 13-2-01982-0.

Petitioner asks the Washington State Supreme to grant this Petition for Discretionary Review.

Respectfully submitted this 12th day of August, 2019.

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[19] City of Seattle v. Guay, 150 Wn.2d 288, 297-98, 76 P.3d 231 (2003)

AFFIDAVIT OF SERVICE

I hereby declare, under penalty of perjury under the laws of the State of Washington, that on , August 12, 2019 I made service of the foregoing pleading or notice on the party/ies listed below in the manner indicated:

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July 11, 2019

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CASE # 355721
Seth Burrill Productions, Inc. v. Rebel Creek Tackle, Inc.
SPOKANE COUNTY SUPERIOR COURT No. 132019820

Counsel:

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Washington Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact that the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. RAP 12.4(b). Please file the motion electronically through the court's e-filing portal or if in paper format, only the original need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of the opinion (may also be filed electronically or if in paper format, only the original need be filed). RAP 13.4(a). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates each is due. RAP 18.5(c).

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST:btb
Attachment

c: **E-mail** Honorable Anthony D. Hazel

FILED
JULY 11, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

SETH BURRILL PRODUCTIONS, INC., a Washington corporation, Respondent, v. REBEL CREEK TACKLE, INC., a Washington corporation, Appellant.	)	No. 35572-1-III UNPUBLISHED OPINION

PENNELL, A.C.J. — Rebel Creek Tackle, Inc. appeals orders from the Spokane County Superior Court denying summary judgment and imposing CR 11 sanctions. We affirm the orders on review and award attorney fees and costs to Seth Burrill Productions, Inc.

BACKGROUND

Rebel Creek Tackle, Inc. (RCT) was formed to handle the business affairs of a fishing lure that came to be known as the "'Bud's Diver.'" *Seth Burrill* II, slip op. at 2.[1]

[1] Unless otherwise noted, background facts are drawn from this court's two prior decisions in this matter, *Seth Burrill Prods., Inc. v. Rebel Creek Tackle, Inc.*, No. 32119-3-III (Wash. Ct. App. July 7, 2015) (*Seth Burrill* I) (unpublished), https://www.courts.wa.gov/opinions/pdf/321193.unp.pdf, and *Seth Burrill Prods., Inc., v. Rebel Creek Tackle, Inc.*, No. 34401-1-III (Wash. Ct. App. Apr. 11, 2017) (*Seth Burrill* II) (unpublished), https://www.courts.wa.gov/opinions/pdf/344011_unp.pdf.

RCT licensed Seth Burrill Productions, Inc. (SBP) as "the exclusive producer and distributor of the lures, granting it 'full, unrestricted use of the injection molds,'" which were later sent to Plastic Injection Molds, Inc. (PIM), for production in Richland, Washington. *Seth Burrill* I, slip op. at 1-2.

The 2010 license agreement (Agreement) between RCT and SBP required SBP to sell 15,000 units within the first five years of the Agreement, and thereafter sell at least 3,000 units per year. The Agreement specified that if SBP did not meet these sales expectations, RCT could terminate the Agreement by written notice within 30 days of the five-year anniversary date, or, thereafter, by 30 days' notice.

Due to conflicts between the parties, RCT unilaterally terminated the Agreement in 2012 and started distributing the fishing lures produced by PIM. SBP brought a breach of contract action and, in May 2013, an arbitrator determined that RCT breached the Agreement and entered an award that reinstated the Agreement, with modifications, and provided damages. Some of the modifications to the Agreement included that (1) SBP was to have use of the injection molds, (2) RCT was to "'cooperate in the transfer and/or delivery of said molds as requested by [SBP],'" *Seth Burrill* I, slip op. at 2 (alteration in original), and (3) the expiration date for termination of the Agreement was extended from May 31, 2015, to May 31, 2016, such that the Agreement became a six-year contract

instead of a five-year contract. A month later, SBP successfully obtained an order confirming the arbitration award, pursuant to RCW 7.04A.220 and RCW 7.04A.250, in Spokane County Superior Court cause number 13-2-01982-0.

Shortly after prevailing in arbitration, SBP contacted PIM to get the injection molds transferred for the lures, but because the molds were RCT's property, PIM would not provide SBP the molds without permission. After unsuccessfully attempting to contact RCT, SBP contacted RCT's counsel who refused to agree to the transfer of the molds, told PIM to not give SBP the molds, and told SBP that he no longer represented RCT. After further unsuccessful attempts to contact RCT, SBP filed a motion for contempt in the superior court, which then determined RCT intentionally violated the court order confirming the arbitration award, and imposed remedial sanctions. RCT appealed, and this court found RCT's appeal was without any merit, affirmed the superior court's contempt finding, and awarded attorney fees and costs for the appeal to SBP.

Despite this court's ruling, SBP was unable to collect from RCT on its judgment, so SBP "offered to forgo a portion of the judgment amount and release other claims against [RCT] in exchange for partial payment of the judgment and assignment of the molds," and the patent assets. *Seth Burrill* II, slip op. at 3. SBP also wanted to engage in discovery of RCT's assets. Ultimately, RCT expressed no desire to accept SBP's offer,

which led to SBP's motion "for an order authorizing supplemental proceedings to determine the extent of [RCT's] nonexempt property available to satisfy the judgment." *Id*. Later on, when SBP served RCT with written discovery requests authorized by the superior court, RCT's answers provided that "it did not have a current bank account, an insurance policy, a corporate minute book, or financial statements and had not filed income tax returns or made a profit between 2010 and 2013." *Id*. at 4. RCT claimed that the only assets it owned were the fishing lure molds, its patent assets, its Agreement with SBP, and an application for rights outside of the United States.

Due to SBP's concerns about ever collecting on its judgment, in the spring of 2016, SBP filed a motion in superior court "to appoint a general receiver for [RCT] and order [RCT] to assign the patent and molds to the receiver." *Id*. at 5. The superior court granted SBP's motion for a receivership. RCT immediately filed a notice of appeal and moved in the superior court for a stay of the receivership. RCT then paid a large cash sum into the registry of the superior court and filed a notice of supersedeas, but the superior court denied RCT's motion for stay.

RCT moved for discretionary review of the order denying a stay of the receivership. It also filed a motion for stay in this court. Appellate review commenced after our commissioner ruled that the receivership order was appealable as a matter of

right. The commissioner also stayed the receivership during the pendency of the appeal.

While this matter was on appeal, RCT's counsel prepared a motion for declaratory judgment of termination of the Agreement, dated June 1, 2016. The motion bears no case number, but it is captioned as a pleading for the Court of Appeals.[2] The body of the motion states it has been "filed in both the Court of Appeals and in the Spokane County Superior Court." Clerk's Papers at 73. This representation is misleading. The motion was filed with this court as part of the then-pending appeal. However, it was not directly filed with the superior court. Instead, the motion was merely e-mailed to the superior court. *Id*. at 79-80. A copy of the motion only made its way into the superior court file as part of the appellate record from the prior appeal.

The substance of RCT's declaratory judgment motion alleged that SBP had breached the Agreement by failing to sell 15,000 Bud's Diver units by June 1, 2016 (the date specified in the arbitration award). RCT's motion claimed it was noted for hearing on June 2, 2016. *Id*. at 73. The record on review does not show that such a hearing ever occurred.

[2] The top caption of the pleading reads, "IN THE COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON." Clerk's Papers at 73. The pleading is entitled "APPELLANT'S MOTION FOR DECLARATORY JUDGMENT OF TERMINATION OF LICENSE AGREEMENT AND FOR HEARING ON AN EMERGENCY BASIS ON JUNE 2, 2016." *Id*.

In a decision dated April 11, 2017, this court determined the superior court did not abuse its discretion in granting SBP's motion to appoint a receiver, affirmed the order appointing the receiver and the superior court's refusal to assess RCT's post-judgment claim to setoffs, and awarded SBP attorney fees and costs. A mandate was filed terminating review of the case on May 11, 2017.

Shortly after issuance of the mandate, the superior court entered orders terminating the receivership and disbursing the cash funds held in the court's registry. The court's orders resolved the parties' dispute regarding the initial arbitration award and contempt sanction. The court orders provided that SBP was to file a satisfaction of judgment with the superior court after receiving the disbursement. However, no satisfaction of judgment was filed.

On July 6, 2017, RCT filed a motion for summary judgment in the superior court. The motion purported to relate to the motion for declaratory judgment that had been filed with the Court of Appeals in June 2016. RCT's motion requested a declaration that the Agreement was terminated and that rights and access to Bud's Diver be returned to RCT. RCT's motion was not supported by any authenticated documents. Instead, RCT appended a series of unsworn exhibits to its memorandum of authorities in support of summary judgment.

After RCT filed for summary judgment, SBP contacted RCT's counsel requesting that RCT withdraw its motion as it was not grounded in fact or law, and SBP notified RCT that if it was not going to withdraw its motion, SBP would pursue CR 11 sanctions against RCT's counsel.

RCT declined to withdraw its motion for summary judgment, and SBP filed a memorandum opposing RCT's motion and a separate motion for CR 11 sanctions against RCT's counsel. In its response to SBP's opposition to summary judgment and motion for CR 11 sanctions, RCT argued its motion for declaratory judgment was proper since the original superior court case had not yet been dismissed. RCT also requested CR 11 sanctions against SBP.

The superior court denied RCT's motions for summary judgment and for CR 11 sanctions. The court granted SBP's motion for CR 11 sanctions. In its oral ruling, the superior court explained that the main issue with RCT's summary judgment motion was that there were no pleadings tied to RCT's claims. The court imposed $4,500 in CR 11 sanctions. Payment was to be made by counsel for RCT to counsel for SBP as recoupment for having to defend the summary judgment motion.

After the superior court made its ruling, RCT requested that it stay the case since the matter would proceed to arbitration. The superior court initially granted RCT's

request for a stay, but after reconsideration it denied RCT's request. In doing so, the superior court stated that it did not make a ruling as to whether the parties' dispute must go to arbitration and that the parties agreed that arbitration was an available option. The superior court further explained its CR 11 sanctions were also due to the frivolousness of RCT's countermotion for CR 11 sanctions against SBP.

Shortly after the superior court's ruling, RCT filed a claim for arbitration. An arbitration decision and award was entered on January 22, 2018, and filed in the superior court on May 9, 2018. The arbitration decision granted RCT its requested relief and ruled that the Agreement was terminated due to SBP's failure to meet sales target requirements. The arbitrator also awarded RCT payment for outstanding royalties in an amount that had already been offered by SBP prior to the arbitration. The arbitration decision concluded that RCT and SBP would share equally in the payment of arbitration fees and costs, and neither party would be awarded attorney fees or costs.

During the interim of the arbitration proceedings, RCT appealed the superior court's decision on RCT's motion for summary judgment and the CR 11 sanctions.

ANALYSIS

Summary judgment and motion to stay

RCT contends the superior court erred in denying its motion for summary judgment because SBP failed to sell the required units under the Agreement, which allowed for termination of the Agreement, and the superior court failed to consider and decide which forum was required to hear these issues. RCT further argues that when the superior court found the Agreement and termination issue should proceed to arbitration, the superior court abused its discretion in declining to stay the case.

RCT's challenge to the superior court's summary judgment ruling, ruling on arbitrability, and motion for stay have been rendered moot by the outcome of arbitration. Arbitration has taken place despite the denial of a stay and that forum has settled the issues of whether SBP breached the Agreement and owed RCT royalties. This court cannot provide further relief. Thus, the substantive issue of whether RCT should have prevailed on its summary judgment motion and motion to stay are not issues that require appellate resolution.

CR 11 sanctions

The purpose of CR 11 is to prevent baseless filings, filings made for improper purposes, and abuses of the judicial system. *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d

448 (1994); *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 219, 829 P.2d 1099 (1992). If a party engages in such conduct, the court can impose an appropriate sanction. CR 11(a). A baseless filing is one not supported by the facts or existing law. *Bryant*, 119 Wn.2d at 219-20. In awarding sanctions for a baseless filing, the court must assess "whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified." *Id*. at 220. Because CR 11 sanctions have a potential chilling effect, a court should impose sanctions only when it is "patently clear that a claim has absolutely no chance of success." *Skimming v. Boxer*, 119 Wn. App. 748, 755, 82 P.3d 707 (2004).

A superior court's decision to impose CR 11 sanctions is reviewed for abuse of discretion. *Id*. at 754. This is a deferential standard. We will not reverse a superior court's CR 11 decision unless "its order is manifestly unreasonable or based on untenable grounds." *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). An order meets this standard only if it falls outside the bounds of a decision a reasonable person could make. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997).

The superior court's CR 11 sanctions against counsel for RCT were justified for several reasons. First, as noted by the superior court, RCT lacked a proper basis for filing

a summary judgment motion because the motion was not tied to any existing legal claims. SBP initiated the superior court case in order to confirm an arbitration decision and to hold RCT in contempt for failing to abide by the decision. RCT's request for declaratory relief was factually and legally unrelated to these issues. RCT may have had a justifiable desire for a declaratory judgment, confirming termination of the Agreement. It may have also been legally defensible to argue that the declaratory judgment was not subject to arbitration. But these substantive issues are beside the point. To obtain relief, RCT needed to initiate a new cause of action (which has since been done). It was not appropriate to attempt to piggyback off of an unrelated, preexisting case.

Second, RCT's motion for summary judgment was not supported by properly authenticated exhibits. CR 56(e); *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 141, 331 P.3d 40 (2014). Counsel for SBP repeatedly advised counsel for RCT of the problems with its filings, but RCT simply ignored the issue.

Finally, RCT lacked a viable basis for requesting CR 11 sanctions against counsel for SBP. When the superior court pressed counsel for RCT to explain its sanctions motion, counsel for RCT simply stated that it was entitled to prevail on the merits of its request to terminate the Agreement. This does not come close to meeting the criteria for CR 11 sanctions. A party's pleadings are not subject to CR 11 sanctions simply because

they are unsuccessful. Instead, as set forth above, CR 11 is aimed at preventing baseless filings that are not grounded in fact or law. RCT failed to provide any explanation of how SBP's court filings (which were ultimately successful) failed to meet this standard.

Not only was the superior court justified in imposing CR 11 sanctions, the sanctions were also reasonable in scope. SBP initially requested $13,000 in sanctions, based on the time incurred responding to RCT's motion. But the superior court only imposed $4,500, explaining that it was a reasonable attorney fee recoupment. This was an adequate exercise of discretion.

ATTORNEY FEES AND COSTS

Both RCT and SBP request attorney fees on appeal pursuant to RAP 18.1 and RAP 18.9(a). RAP 18.9(a) "permits an appellate court to award a party attorney fees as sanctions, terms, or compensatory damages when the opposing party files a frivolous appellate action." *Advocates for Responsible Dev. v. W. Wash. Growth Mgmt. Hrgs. Bd.*, 170 Wn.2d 577, 578, 245 P.3d 764 (2010). "An appeal is frivolous 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." *Id*.

We find RCT's appeal frivolous and, as a result, SBP is entitled to attorney fees as sanctions under RAP 18.9(a).[3] Counsel for RCT has inaccurately represented the manner in which it filed the motion for declaratory judgment, as set forth above. The declaratory motion was never properly filed as a superior court motion, requesting action by the superior court.[4] In addition, even if the declaratory judgment motion had been filed with the superior court, the motions for declaratory judgment and summary judgment would still have been improper as they were unrelated to any pending claims for relief in the superior court. RCT received fair warning of the deficiencies in its filings from both SBP and the superior court. Yet RCT persisted with this appeal and has never provided a tenable response to the procedural flaws outlined by SBP and the superior court. Instead, RCT's briefing is devoted to the issues of arbitrability and whether the parties' Agreement had been terminated—issues that were rendered moot by the arbitration

[3] It necessarily follows that RCT is not entitled to attorney fees or costs.

[4] The motion for declaratory judgment is not included in the record on review, except as an unsworn exhibit to RCT's motion for summary judgment. In response to SBP's claim that RCT's motion was never filed, RCT has merely cited a letter received from counsel for SBP, stating, "'In addition, your Motion for Declaratory Judgment of Termination of License Agreement, filed with the Spokane County Superior Court on June 1, 2016, . . . [.]'" Appellant's Reply Br. at 2 n.2. This citation to correspondence does not constitute proof of filing. This court has had to engage in an independent review of court records in order to discern whether and how the declaratory judgment motion was filed.

decision that was issued in RCT's favor prior to filing of RCT's opening brief.

CONCLUSION

The orders on appeal are affirmed. SBP shall be awarded reasonable attorney fees and costs on appeal, subject to its timely compliance with RAP 14.4 and RAP 18.1(d).

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, A.C.J.

WE CONCUR:

Korsmo, J.

Siddoway, J.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

COUNTY OF SPOKANE

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SETH BURRILL PRODUCTIONS, INC., a Washington Corporation,	)	COA Cause No. 355721
Plaintiff(s),	)	Cause No.
v.	)	13-2-01982-0
REBEL CREEK TACKLE, INC., a Washington Corporation,	)	
Defendant(s).	)	

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BEFORE: THE HONORABLE TONY D. HAZEL

DATE: AUGUST 18, 2017

A P P E A R A N C E S

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(AUGUST 18, 2017.)

(MORNING SESSION; 10:10 A.M.)

MR. NELSON: Good morning, Your Honor.

Kyle Nelson for the plaintiff. This set Seth Burrill Productions, Inc. v. Rebel Creek Tackle, Case No. 13-2-01982-0.

There are three motions before the Court this morning; first there is defendant Rebel Creek Tackle's motion for summary judgment, plaintiff Seth Burrill Production's motion for CR 11 sanctions, and Rebel Creek Tackle's countermotion for CR 11 sanctions.

At this point, I'd ask the Court for guidance on how you'd like to proceed.

THE COURT: Let's proceed with the first in time motion, which is Mr. Ivey's summary judgment motion.

MR. NELSON: Thank you, Your Honor.

THE COURT: Thank you. And you can certainly address your motions for sanctions in your response, they're intertwined.

MR. NELSON: Thank you.

MR. IVEY: May it please the Court and Counsel.

Your Honor, I believe there are three different matters that you will rule on today; one of them is the summary judgment brought by Rebel Creek to be granted, if not in the Superior Court then is it to be referred to arbitration, is there a ruling on a CR 11 motion brought by Seth Burrill, and is there

a ruling on a CR 11 motion brought by Rebel Creek.

In this matter a license agreement was entered in 2010, it had a deadline for sale of 15,000 units by June 1st, 2016, sales were not made, notice was given and the notice was given to the parties in accordance with Provision 6.1 of the agreement that the sales have not been made. Notice was given, a declaratory judgment, and any subsequent letter that was all done within 30 days on the June 1st, 2016 deadline. It was admitted that the sales had not been made by counsel, Jeffrey Smith, and now unless there is some excuse for Seth Burrill to not be terminated, then the Court should enter the summary judgment today brought by Rebel Creek.

So the standard for summary judgment is the non-moving party cannot demonstrate a genuine issue of material facts, not just facts, but material facts then the summary judgment will be granted. That's *Mahoney*, 107 Wn.2d 679. In this case the plaintiff asserted that 15,000 sales were not made with the proof in the letters from Seth Burrill's attorney, Jeffrey Smith, and the plaintiff asserts that that failure was totally the fault of the defendant and also asserts that notice was not properly given before May 31st, 2016.

These are assertions but they are not subject to materiality for the purpose of summary judgment. The letters submitted that were made that enter into evidence from SPI from Seth Burrill's counsel are binding on the client and that's been

briefed by Rebel Creek in both the original motion in this case and in the reply. It is established by those letters that the plaintiff did not make the sales. The contention of the sales were not made that were due to the faults of the defendant is based on a history of arbitration and appeals, and the one arbitration and two appeals decisions were made by the arbitrator and an award was made. Whether that award was given an additional one year in which to make these sales, the appeals have been concluded. The contention of the notice is improper and based on dicta from the arbitrator as a brief. Factual issues are not material for summary judgment purposes. The factual issue raised by the plaintiff do not establish that there are material issues to be decided.

And so that advances to the issue of whether this Court has the authority to handle this matter as a controversy that is subject to the Court's judgment.

THE COURT: Counsel, just to go back. Will you restate what you said just previously. I think I was confused. It appeared you were articulating the standard for summary judgment and I felt like you stated it opposite of my understanding.

MR. IVEY: In *HSC v. Lu* at 113 Wn.App. 511, these assertions made by the plaintiff, this is a sentence from that case --

THE COURT: This is your summary judgment, correct?

MR. IVEY: This is the non-moving party's burden, this is Seth Burrill's burden. They are not essential issues that's

material for summary judgment purposes. The issue raised are not material by the plaintiff in this case to resist summary judgment.

THE COURT: All right. So you don't believe that given the context of litigation that they would have a defense or even an arguable defense that their inability to complete the contractual terms was not contributed to your client, you don't think that would be allowed in court?

MR. IVEY: That is correct.

THE COURT: Why?

MR. IVEY: Well, they would have to re-litigate the entire arbitration to come up with the reasons to support the idea. The purpose here is to have 15,000 sales made between the date the license agreement was filed and signed in 2010 and June 1, 2016. There are things that happened in that period of time that prevented that so the entire time Seth Burrill Productions had access to the molds, the entire time through the time of the arbitration, through the time of the appeals, there was never a time in which they did not have access to the molds.

So the issue is in order to now take this to the Court for further litigation they would to have go back in and say to the Court, here's the facts of the arbitration and they're not going to be able to do that.

THE COURT: Correct. I understand that, but I'm also trying to ascertain how foreseeable it is that your summary judgment

will prevail from your perspective.

Is it your position that there's no disputed facts?

MR. IVEY: It is. A letter from attorney Jeffrey Smith, now Judge Smith, says that sales were not made by June 1st of 2016. Two letters from him confirmed that the sales were not made and he provides that in relation to a defense.

THE COURT: But do you not believe it's a disputed fact that their failure to get the quota articulated by contract is disputed as to whether it's their fault or your fault, whether there was a breach of contract?

Do you think that's disputed?

MR. IVEY: No, I do not think it's disputed. The matter of the issue that is raised is a nonmaterial issue because the facts of the arbitration would be what this plaintiff would have to reply upon that would cause them to not make the sales. That's been gone through arbitration and the arbitrator made a final award of monetary and additional time so there's been no time in which they did not have access to the molds. There's been no time in which they were not able to fully pursue their sales and they had an additional year in which to do that.

THE COURT: Okay.

MR. IVEY: If it is not a matter of summary judgment then the issue is whether or not this could be decided in Superior Court or arbitration and under RCW 7.04(a).060(2), the Court is to decide whether an arbitration agreement exists or if they

counter the subject to an agreement to arbitrate.

The controversy is described in *Marcus*, 192 Wn.App. 465, and in *Marcus* the controversy was a commission dispute, two parties both had different ideas as to the amount that was to be paid in commissions. That was the nature of the controversy. In this case it is agreed that 15,000 were not sold by the appropriate date. There is no controversy as to that point.

Come then to the matter of this being brought to the Court's attention late in litigation. This case was started in 2013 or 2014, and it wasn't until June 1st, 2016, that this case became ripe and ready for any contention and that's when the declaratory judgment was filed.

THE COURT: Why wasn't it filed sooner, Counsel?

MR. IVEY: Because it wasn't the claimant until June 1st, 2016. That was the time by which --

THE COURT: A year ago, right?

MR. IVEY: A year ago, yes.

THE COURT: Why wasn't it filed sooner?

MR. IVEY: We were in Court of Appeals by that time.

THE COURT: When was the Court of Appeals case concluded?

MR. IVEY: In May -- this year, April.

THE COURT: May of '17.

MR. IVEY: Yes.

THE COURT: Okay. Thank you for answering that.

MR. IVEY: In the matter of not being brought sooner, and

Burrill relies on *Kirby* and *Dewey*, in both of those cases the allegations that they raised late in litigation were known fully at the start of litigation. Not so in this case. In this case, there was no awareness on June 1st, 2016, failure to make the sales until July 1st, 2016, you don't know the case has been in litigation since 2014.

So in this case the fault on the part of the defendant for not making 15,000 sales is, No. 1, is in the arbitration which was included with the award an additional one year, so they were given time to cure anything that could be, that would be of interest to the plaintiff. The appeals were decided and supersedeas bonds were disbursed so there's no issue left from a standpoint of the payment of the judgment.

Mr. Jeffrey Smith negotiated the agreement to ensure that there was continued access to the molds and there was no proof -- and then there was also allegations made that Rebel Creek was making sales in competition with the plaintiff and there was no proof of that. That was shown by the declaration of Burrill where he says there may have been something, if there was something, there is no proof there were ever any sales and there were no sales made during this time.

So there's no dispute regarding those issues. The matter of this going to arbitration or back to litigation would be prejudicial to the defendant, it would be costly, time consuming but in contemplating the litigation if it was the

fault of the defendant the sales were not made then who would be giving the testimony. Well, the testimony is already in the court's record here in the two letters from Mr. Smith and now we have to come back and say, Mr. Smith, did you write these letters? Judge Smith, did you write these letters? This is what we'd be doing. We'd be questioning a judge about letters already in the file that the Court has in front of it.

And we know the answers are going to be, yes, I wrote those letters and I knew I had the spreadsheets, I had the knowledge, I knew at the time on May 27th, 2016, that would be three days before the deadline to make the sales, he knew at that time there was royalties owing, almost $10,000 owing to the defendant. So he had all the information at that time.

The issue raised about the fault of not making sales are tactical efforts that have been made to cast the doubt and concern and confusion into the record. They were there to require briefing, research, argument, and yet they are not material because the --

THE COURT: Let me stop you there and just ask a couple of questions.

So your summary judgment is essentially asking me to rule whether Burrill is in violation of the contract on its terms, correct?

MR. IVEY: No. The summary judgment is asking you to order the license agreement was terminated on June 1st, 2016.

THE COURT: Understood, because they breached the contract?

MR. IVEY: Yes.

THE COURT: Okay that's the issue?

MR. IVEY: It is.

THE COURT: Material to that issue wouldn't you agree as to whether a court, if that were to be litigated, wouldn't you agree that it's a relevant issue and material fact as to whether your client's conduct contributed to their delay? Don't you think they would have that ability in court to raise that issue?

MR. IVEY: I would say the fact is illustrated to not be the case by the materials we've received in this matter. For example, --

THE COURT: That's not my question.

If this case played out in trial on the issue that you brought before the Court for summary judgment, don't you believe that they would be able to argue that your client's conduct contributed to their inability to fulfill the obligations of the contract, therefore, they could argue that that's your breach of contract? Do you believe that that would be argued?

MR. IVEY: I do not believe that.

THE COURT: Do you think the Court would exclude that?

MR. IVEY: I do think the Court would exclude based on the very fact that those issues were already resolved in

arbitration in 2015. They would have to go back and try to reassert those issues. They would have to go back and say their were sales made and we've argued and demonstrated here they have no evidence of that whatsoever.

THE COURT: But you're asking me to rule on it as a matter of law?

MR. IVEY: I am.

THE COURT: Okay. All right. Thank you, Mr. Ivey.

Mr. Nelson.

MR. NELSON: Morning, Your Honor.

Kyle Nelson for plaintiff. The owners of Seth Burrill Productions are here today. In the back row you can see Seth Burrill and his wife, Jean Burrill. They actually took time off work to be here today. They wanted to be here to show that they're serious in how they handle this matter and also demonstrate that Seth Burrill Productions is not a large company. Sometimes if you see a corporation on a pleading you might assume they're a faceless corporation but really this is a small business of Seth, Jean, and Seth's mom. They have full-time jobs; Seth works at River City Salt Services and Jean at Liberty Mutual.

So the history of this case is that there was a -- I'll ask the Court to move me along if I'm repeating anything -- Seth was a full-time fishing angler and had a TV show in the mid-2000s on FOX Sports Northwest, the Sportsman Channel, and even

on WILD TV in Canada. So in line with this, he has a few products and he was selling them along with his TV show, he had the Side Winder and the product in this case which is called Buzz Diver. That was a result of an exclusive patent license between Rebel and Burrill. When you have an exclusive patent license what that means is even the owner of the patent is excluded from making that product. Well, Burrill had this product exclusively and they were producing it in a company in Richland, Washington, called Precision Injection Molding or PIM for short. At a certain point Rebel decided that it was going to modify the mold and start producing its own product at PIM.

THE COURT: Counsel, just for your edification, I am pretty familiar. I reviewed the file really thoroughly so I just want you to use your time efficiently. I definitely understand the context or the nature of the dispute.

MR. NELSON: Thank you, Your Honor.

THE COURT: I appreciate you bringing it to my attention. Not every Friday is the same, I don't have the same hours to dedicate but I did dedicate quite a bit of time to this motion.

MR. NELSON: Absolutely, and everything is in the record so I'll move on.

Mr. Ivey and Rebel filed this motion in late June or July. I don't have it in front of me but in July I reviewed this motion along with an attorney at my law firm, Lee and Hayes, and we determined there was no legal basis for this motion so I

wrote a letter to Mr. Ivey asking him to withdraw this motion. At that point he could have withdrawn this motion and no fees would have been incurred. So to Mr. Ivey's issue that we're trying to create more costs by going arbitration, that's simply not the case. We're actually trying to conserve on costs in this case. Nonetheless, the motion was not withdrawn.

There's four main legal points why this motion cannot be granted as a matter of law. First, there's no pending claims or counterclaims before the Court. Last night I was reviewing some of the filings in this matter and I want to direct the Court to Exhibit F, the Declaration of Kyle Nelson. Exhibit F is the Court of Appeal's decision in this matter. The Court's aware that a receiver was appointed to marshal the assets of the company, sell the assets to satisfy the judgment. Rebel insisted at the trial court before Judge Cozza that it was entitled to a trial on setoffs to determine whether it could satisfy the judgment less the amount of money that my client has an exclusive license he has to pay them. Well, that went up on appeal and so the Court of Appeals sat on that issue. The Court of Appeal says, "We find no legal basis for Rebel's proposed procedure for determining the "differential" or, as later requested, for entertaining a declaratory judgment claim." We find no legal basis for entering a declaratory judgment claim. The Court went on to say at Page 15, "There is not regular procedure that we can pretend permits what Rebel

was asking the trial court do here. Claims asserted in the complaint and answer were resolved by a final judgment in 2013. It is too late to amend Rebel's answer or treat it as if it was amended." Lastly, the Court concludes, "Rebel does not explain how asserting a new claim for relief in the case below, three years after judgment, was legally possible."

The Court of Appeals has already ruled on this issue and it's the law of the case; but, nonetheless, it's a time-honored tradition you have notice pleading, you have discovery, you have a pretrial conference, pretrial hearings, and you have a hearing on the merits. Well, that's all happened at arbitration. You can't amend a pleading later and if you do want to amend a pleading you have CR 15 to do so, which hasn't been evoked in this case.

I'm going to move on from that point because I think it's clear the Court feels it ruled on this point and it wouldn't make sense to allow Rebel to have -- if you have an open case and you continue to assert any dispute between the parties, no cases -- they would rarely end in commercial disputes if that were the case.

So that's the first issue which was raised to Rebel.

THE COURT: Let me ask you this one question.

In looking at the file do you believe the case was technically closed?

MR. NELSON: The case is not technically closed. In

consulting with my colleagues, cases actually don't make it this far very often. Usually there's some type of stipulated dismissal or settlement. I don't believe I'm under any duty to dismiss the case. Dismissal is something that happens before trial, if there's some kind of stipulated dismissal. There's nothing to dismiss. What I would file is a satisfaction of judgment, just a formal confirmation that we've gotten all the money we're owed.

THE COURT: And it was filed in this case?

MR. NELSON: It has not been filed in this case.

I've been consistently beaten to the punch with other motions I've been dealing with on this case, so waiting to get all that -- I wouldn't file a satisfaction of judgment until we get all these claims resolved.

So now we have these outstanding issues. As soon as these are issues I'll file a simple, we've gotten everything we're owed under the agreement.

The second remaining issue is that this agreement between the parties and every issue is subject to mandatory arbitration. Now, I have the provision from the agreement and you can see that there's a dispute resolution and so the way it works --

THE COURT: Let me just ask you this, do you believe that if they pursue their claim at this time arbitration would be available to them?

MR. NELSON: Arbitration is available.

THE COURT: That's your position?

MR. NELSON: We've insisted on arbitration and we've never wavered from that.

THE COURT: Thank you.

MR. NELSON: This is in the record, but I'll just touch on it quickly; that in Washington, Court's favor arbitration, strong presumptions. There has to be expressed language that an issue is not subject to arbitration or it's presumed to be subject to arbitration.

I think the record is clear that Exhibit A of my Declaration has the license agreement between the parties; that there's a series of escalating steps you discuss, you discuss any issues, provide notice, have the opportunity to concur, and then to dispute resolution. The only dispute resolution method is arbitration in this matter.

THE COURT: Counsel, for time purposes let's go to your CR sanctions.

MR. NELSON: Thank you, Your Honor.

CR 11 allows a party to bring a motion to prevent a party from bringing baseless filings.

THE COURT: Where I'll be particularly interested in hearing is the distinction between granting sanctions that discuss attorney fees and recoupment of attorney fees versus punitive sanctions and what the various standards are. I'm hoping you

can shed light on that.

MR. NELSON: We're not asking for any punitive sanctions in this case, we're only asking for recoupment of attorney fees.

THE COURT: In the amount of $1,500.

MR. NELSON: No, I have an affidavit if the Court --

THE COURT: What is the amount you're requesting?

MR. NELSON: $13,000.

THE COURT: How did you get to that figure, again?

MR. NELSON: That figure is a true and accurate accounting of all my time incurred since I sent Mr. Ivey a letter asking him to withdraw his motion. I have an affidavit and complete time entry itemized, things that were done on this case.

THE COURT: Was that in your first response or second response?

MR. NELSON: It was prepared last night, Your Honor. Would you like me to present it?

THE COURT: Yes, please. I was wondering. I thought I read everything so I was confused by that.

What was your request in the brief, Counsel, 1,500?

MR. NELSON: I didn't make a request in my briefing. In a proposed order I asked for attorney fees with a blank in it.

THE COURT: Thank you, Counsel.

MR. NELSON: So there are three basis on a Rule 11 you can award sanctions; one, if the motion is not grounded in fact; second, if it's not grounded in law; and third, if it's filed

for an improper purpose. Here the Court can reply exclusively on the second. The first and second basis which is not grounded in fact and law, we've gone over the fact that Court of Appeals already ruled on this issue and you can't assert claims after a judgment has been collected. Secondly, because this issue is clearly subject to mandatory arbitration; and, third, and this is one that was discussed at length is there's no authenticated or admissible evidence. If you look at the pleadings filed by Rebel there's not a single declaration filed. As matter of law without a declaration none of the evidence could be authenticated. I've cited cases that state you have to authenticate all evidence or it can't be decided in a summary judgment context. Secondly, none of it's admissible because it hasn't been authenticated, and so I'd ask the Court to strike the all the recitation of facts of counsel because none of it is supported by the record.

THE COURT: You would agree, though, making the determine in this case as to whether it is appropriate for summary judgment and whether or not sanctions would apply, it's still relevant to the record to submit arguments made.

MR. NELSON: I would ask to strike for evidentiary purposes but it's stricken for purposes of determining CR 11 is what I would ask.

THE COURT: Okay.

MR. NELSON: I guess I'm making my record --

THE COURT: As part of the summary judgment ruling.

MR. NELSON: Yes. Thank you, Your Honor.

THE COURT: Sorry.

MR. NELSON: I will try to stay on just the CR 11 at this point. I'd given Mr. Ivey notice that none of the evidence was authenticated, he didn't make an attempt to authenticate any of it. Statements of attorneys are not evidence especially in a summary judgment context.

The Court had raised questions about whether there are disputed facts. I think Mr. Ivey raises arguments which are not grounded in law or fact continually in this case, and that brings us to the third basis which is that these motions continue to harass my client. Even in the past six months there's been a series of about six motions we've had to defend. At the Court of Appeals he asked the Court of Appeals after they awarded an opinion in our favor to dismiss the case at the trial court before an award of attorney's fees, we had to defend against that. He filed three separate motions on that continually amending. At this court when he was remanded back and there was a court-appointed receiver we had to defend against a motion that tried to award us less than the Court of Appeals few days ago said we were entitled to.

So at this point, it's becoming harassing having to respond to meritless motions and CR 11 is designed to protect the judicial process and when you're continually having to spend

attorney fees on a small business and take time off work, it's harassing. So these motions are filed for an improper purpose.

Secondly, these motions are retaliatory. We filed a good-faith effort, we conducted plenty of legal research on issues in this case. The obviousness of you can't bring a claim after judgment has been satisfied and the Court of Appeals already informed Rebel of that. They filed a countermotion for CR 11 sanctions against me arguing that we had brought our motion for an proper purpose. Our purpose is just to -- and I think my letter demonstrates that I gave him notice and offered an opportunity to withdraw his pleading. Our purpose is to save money. We're not trying to run up fees but when someone brings a dispositive motion we have to defend it, we have to make a record, we have to honor the Court system by fully pleading all these issues. Because this is a summary judgment, it's a dispositive motion and we're forced to defend and file lengthy pleadings.

And then the last issue and a lot of the history of this case which I briefed is, we don't take CR 11 sanctions lightly. The record shows we've tried everything in this case. We've advised Mr. Ivey of applicable law in advance, we've summarily defeated his motions in court, we've obtained attorney fee awards, we've retained a contempt award, and we've warned him and given him an opportunity to withdraw his motion, and said we were going to file sanctions. So, at this point, there's

nothing that we can do any more other than continue to do a good job and represent our client prevailing on motions, but CR 11 is the proper vehicle, it's not taken lightly. At this point, it's the proper vehicle to ensure we're not wasting other people's time, other attorney's time, where the Court should be hearing other meritorious motions. I don't think I have any time left but if the Court is going to --

THE COURT: One question for you. Do you agree that around May 2017 in that general area is when the Court of Appeals concluded?

MR. NELSON: Yes, Your Honor.

And on that point, arbitration could have been sought at any point in this case. A new case could have been filed at any point. If Rebel reviewed the law they would have seen they could have filed in this case, there was no reason to wait because they could have filed a new case. The Court of Appeals decision wouldn't bar that, that was just whether they collected on a judgment. It wouldn't have any bearing on whether the license had been terminated. It wouldn't have been a compulsory counterclaim, they could have filed an arbitration. We would have no reason to block it, we'd have no legal basis to block it. Maybe we could have moved to stay but it would still be pending so it's really irrespective that this finished in May.

THE COURT: Thank you.

MR. NELSON: And I understand Mr. Ivey didn't argue the CR 11 against myself but I'd reserve any time if I need to respond to that.

THE COURT: Thank you, Counsel.

Mr. Ivey, your motion to proceed for CR 11 sanctions.

MR. IVEY: Well, in this case counsel has just argued that there are no claims left and yet he's ready to go to arbitration so, obviously, in his mind there's no claims left for this argument with this Judge but he's ready to take the same claim to arbitration.

It's clear that there was a declaratory judgment filed and the Court of Appeals made decisions only on the amount of the judgment that was issued through arbitration back in 2014. So the matter of there being no claim made is quite apparently incorrect and it's stated only for the purpose of dragging us in here to make these arguments. But I think if the Court sees that there is a claim left and that it be done here in this court and resolved or in arbitration, in either event the work done by the attorneys in this matter largely have applied both to this matter being in Superior Court or in arbitration.

THE COURT: Mr. Ivey, why do you believe that CR 11 sanctions are appropriate on the opposing party?

MR. IVEY: In every instance what counsel wants to do is go back and re-litigate the arbitration. That's already been done, we've already had the final award. It is now the matter

of trying to cause this counsel to come in to make arguments why that would not happen.

THE COURT: What have they done that would merit this Court to impose sanctions upon them, defend the summary judgment? What action have they taken? For their filing of CR 11 sanction motion?

I'm trying to distinguish what conduct you're attributing to the other side that is sanctionable, what are you alleging?

MR. IVEY: I'm alleging that No. 1, they would refute that 15,000 units had been sold where we had admission made already by Jeffrey Smith.

THE COURT: So their response to your summary judgment you believe is sanctionable?

MR. IVEY: The whole matter, they have denied there was evidence produced on some number of sales, the type of no notice of it in evidence, their responses have been in addition then to raise the issues that did not rise to the level of materiality for purpose of summary judgment or to a level of the controversy in this Court's decision as whether to conduct this matter in Superior Court or in arbitration.

THE COURT: Thank you. I appreciate it. The Court's ready to rule.

The Court will deny your summary judgment motion and there's a number of issues with your summary judgment motion, Mr. Ivey. One is that there's no pleadings. I would agree with opposing

counsel's position, there's no pleadings with respect to the claim you're making, and I think any attorney that's practiced for a reasonable period of time it would be foreseeable that your summary judgment motion that you filed would fail, and for that reason I find that your summary judgment motion is frivolous.

However, the Court's also mindful of this. Some of the criticism of filing the motion had to do with the case being closed or shutdown or that it was improper to file a motion in this case to have the Court consider it and the Court finds looking in the file there was no clear, I guess order in the court not to file additional pleadings. And, in addition, the Court will accept the explanation as to why this was filed a year later in resolving the issue of whether you submitted your summary judgment for improper purpose, retaliatory manner. The Court will accept Mr. Ivey's position that in May of 2017 the appeal concluded and there wasn't much time later that you brought this issue forth.

Again, your summary judgment, however, I don't see how a reasonable attorney could see it prevailing given that there are a number of issues that would be in material dispute and given that there's no connection with the pleadings.

And the Court, again, previously found your summary judgment motion to be frivolous, I am going to impose CR sanctions on Mr. Ivey but only in the amount of attorney fee

recovery related to the cost of defending the motion. I'm going to put that amount to what I believe is reasonable and therefore impose $4,500 attorney fee recoupment to be paid by Mr. Ivey to Mr. Nelson to defend this motion.

And what else would you like on the record at this time?

MR. NELSON: Your Honor, on the record I'd like a ruling on the countermotion for CR 11 sanctions.

THE COURT: Denied. Thank you.

MR. NELSON: Thank you, Your Honor.

Your Honor, may I hand up a proposed order?

THE COURT: You may.

And, specifically, for the record of the material issue I should probably identify. There are several material issues that would clearly and foreseeably be disputed, the motion for summary judgment essentially asks this Court to make a ruling as to whether one party breached the contract and/or the contract was therefore terminated, and if a lawyer is contemplating that summary judgment they would foresee how the litigation would play out and any reasonable lawyer would conclude that Burrill would at least be able to raise the defense regarding whether Rebel Creek's actions contributed to the reason why that contract wasn't able to be filled due to a ten-month postponement and the potential for unlawful competition with respect to the competing products.

MR. IVEY: Your Honor, this matter then is returned to

arbitration and the Court in this case is required to stay this case.

THE COURT: Looks like both parties are in agreement that arbitration is preserved. Both parties adopted that position in argument.

MR. IVEY: I'm just saying that the Court then here stays this case pending the outcome of that arbitration.

THE COURT: Counsel, what is your position on that?

MR. NELSON: I'd object. Not sure what the legal basis would be and, secondly, the Court just ruled --

THE COURT: It's a new allegation. I think it is separate and at this late in the game it's essentially a counterclaim. It's coming at such a late stage in this case that it appears to be a separate cause of action that's not related to the pleading before the Court in this lawsuit.

MR. IVEY: I've got the citation here, Your Honor. If the Court orders the parties to arbitrate the Court must stay the proceedings under *Everett Shipyard* at 155 Wn.App. 761.

THE COURT: And your position, Counsel?

MR. NELSON: The cases cited by Rebel have to do with issues prior to judgment on the merits. So if you look at all Rebel case citations they make sense when the merits having not been decided. The merits of this have been decided.

So sometimes in a case one of the issues will be subject to arbitration and so there would be a contract claim and a

Consumer Protection Act claim, they go to arbitration on the contract claim the Court is going to stay the rest of the proceedings, wait for arbitration to conclude, then come back and decide the Consumer Protection Act claim.

In this instance, there's noth -- I don't want to rehash all the cases but --

THE COURT: If the Court did stay based on arbitration, what potential harm can come to your client?

MR. NELSON: The harm is we're going to go to arbitration, we're going to come back under this case number and, truthfully, I don't know what type of motion you would file but it would be something that Seth Burrill would have to fight against. We'd have to come back and have the same arguments that there's no pending case. This case is done. The clerk is going to close this case and there's really no reason to leave it open other for some type of procedure mechanism that's not available. Unless he can articulate some type of -- I would ask the Court to reserve on this because there's nothing that I know of that would allow that to happen.

THE COURT: Mr. Ivey, do you have an issue with the Court reserving on the issue?

MR. IVEY: Reserving meaning that it will be stayed. That's what I understand it to mean.

THE COURT: Well, your purpose of staying --

MR. IVEY: Once the arbitration is completed then it has to

come back to this Court to have it converted to a Spokane County Superior Court judgment. That's what the purpose of staying the -- when the Court sends it to arbitration it leaves it open, we come back to be converted to a Superior Court judgment.

MR. NELSON: Your Honor, I'd object. There would have to be a new case filed and there would have to be a new filing fee, a new civil cover sheet, new pleadings, complaint that make a lot of these issues go away.

MR. IVEY: Here then is why the expense of litigation is so expensive.

THE COURT: Here's how the Court will rule.

Based on the fact that the appeal ended in 2017, the Court was originally concerned with the timing of the filing since there was a year, but that was answered successfully today.

I'll stay the hearing for arbitration.

MR. IVEY: That would be an annotation to the order then?

THE COURT: Yes.

MR. NELSON: Would you like me to retrieve your order, Your Honor?

THE COURT: Yes, please. Thank you.

Counsel, if you find an incredibly compelling authority you're welcome to bring a motion to reconsider.

MR. NELSON: May I have the order and then I'll annotate it quickly.

MR. IVEY: Just adding the sentence should be sufficient, is what the Court and counsel are suggesting?

THE COURT: I'm not sure, to be honest.

MR. NELSON: Your Honor, if I may, I would like to get this signed. I'm just going to add a sentence really quick that the...

THE COURT: Do you think the parties will agree on the ultimate order or do you anticipate conflict? The reason I'm asking is perhaps if you think it's an agreed order summarizing the Court's findings today then I would just ask, as a courtesy, that perhaps you could step away from the table and allow other parties to come.

MR. IVEY: I need to read it.

THE COURT: All right.

(Court In Recess.)

The issue we are discussing is whether the Court is ruling that this matter is stayed pending arbitration. I conferred with my client and I'd like to make a record, if the Court would allow.

THE COURT: Sure.

MR. NELSON: Seth Burrill Productions objects to this and would like to ask the Court to reconsider this ruling because the language "stayed pending arbitration" would not give my client the opportunity to bring further motions before this Court should there be a need because arbitration has not been

commenced. So in typical circumstances arbitration has already been commenced then you make a motion to stay. So regardless, one way or the other, we don't know if arbitration is going to occur. So there's that issue.

I need to file a satisfaction of judgment in this Court. That language would not allow me to do that and a lot of this case has to do with procedural issues. We're really having a lot of problems with that, and I think a fresh start is really needed so we're not wasting time in front of the Court and time on procedural issues like what happens when you amend, can you have a second complaint, what happens five years later, is it part of the same conduct. The parties really need a fresh start and I don't think a stay would serve judicial economy well or the parties.

THE COURT: Thank you.

Mr. Ivey, your brief response and I'm going to limit you roughly to 60 seconds.

MR. IVEY: Mr. Nelson is incorrect. It is the Court's duty first to decide if it's going to be determined in court or arbitration. If it decides arbitration then the Statute 7.04A.070, if the Court orders parties to arbitrate it must stay the proceedings. The order that then presented is defective. It says that I, the attorney, would have to ask your permission to bring any motions in this case. Item 5 has to be stricken, there's no basis for that whatsoever. The

Court has to add in this then that the Court ordered arbitration and the controversy be decided in arbitration and it orders arbitration and that the sanctions are ordered, the matter is to be decided by arbitration, and the case is stayed pending arbitration.

THE COURT: Thank you.

The Court, again, will grant your motion for reconsideration regarding; the stay of the case pending arbitration and correct the record that was previously made. It's not really before the Court as to whether this matter will go to arbitration or not and the Court acknowledged in argument that both parties had the same position with respect to whether arbitration was available to the parties, the Court already declared that the summary judgment was inappropriate.

So the Court will reconsider its motion, deny Mr. Ivey's request to stay the matter for arbitration since it's not really determined and the Court has not made a ruling as to whether this case shall go to arbitration or not.

The Court simply corrects its previous record to reflect that that Court is mindful that both parties' positions as stated in oral argument was that arbitration they felt was available to them and that was a consistent position between the parties.

The Court wants to further correct the record with respect to the CR 11 sanctions that were ordered against Mr. Ivey that

included only attorney fees. Part of the reason for ordering the CR 11 sanctions and attorney fees against Mr. Ivey also had to do with the frivolous nature of Mr. Ivey's own CR 11 sanctions countermotion against Burrill. During oral argument Mr. Ivey was not able to point to any improper purpose with respect to any conduct that could be reasonably described as improper on behalf of the Burrill party, and so that was part of the reason why the Court imposed attorney fees in this case and ruled on CR 11. Both the foreseeability of the failure to prevail on summary judgment and the improper request by Mr. Ivey for CR 11 sanctions against Burrill constitute a separate and independent basis to impose CR 11 sanctions against Mr. Ivey.

That will conclude our record.

MR. NELSON: Permission to approach with the order.

THE COURT: You may, thanks.

MR. IVEY: Your Honor, the matter of this order in Item 5 requiring leave of Court to file any further motions, I ask that paragraph be struck.

THE COURT: I will "x" that out. I will "x" that out, but if there's frivolous motions you should expect sanctions, Mr. Ivey, and I'll just leave it at that.

What paragraph is that?

MR. IVEY: Paragraph 5.

THE COURT: All right. The Court has stricken that out.

MR. NELSON: Your Honor, there is a blank in the order for the number of days. I have not filled that in for how many days for the attorney fees award to be paid.

Plaintiff has no position.

THE COURT: How much time do you need, Mr. Ivey?

MR. IVEY: 30 days.

THE COURT: I'll indicate 30 days.

MR. NELSON: No objection. Thank you.

THE COURT: Thank you.

(Proceedings Concluded.)

C E R T I F I C A T E

I, TAMMEY L. MCMASTER, do hereby certify:

That I am an Official Court Reporter for Spokane County Superior Court, sitting in Department No. 6, at Spokane, Washington;

That the foregoing proceedings were taken on the date and time as shown on the cover page hereto;

That the foregoing proceedings are a full, true and accurate transcription of the requested proceedings, duly transcribed by me or under my direction.

I do further certify that I am not a relative of, employee of, or counsel for any of said parties, or otherwise interested in the event of said proceedings.

DATED this 3rd day of January, 2018.

Tammey McMaster

Tammey McMaster, CCR No. 2751
Official Court Reporter
Spokane County, Washington

FILED

JUL - 6 2017

Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

CN: 201302019820
SN: 109
PC: 2

IN THE SPOKANE COUNTY SUPERIOR COURT, STATE OF WASHINGTON

SETH BURRILL PRODUCTIONS, INC., a Washington corporation, Plaintiff vs. REBEL CREEK TACKLE, INC., a Washington corporation, Defendant	SPOKANE COUNTY SUPERIOR COURT 13-2-01982-0 DEFENDANT'S MOTION FOR SUMMARY JUDGMENT FOR DEFENDANT'S MOTION FOR DECLARATORY JUDGMENT MOTION FOR SUMMARY JUDGMENT Set for Hearing August 18, 2017, 9a.m.

TO THE CLERK AND TO: Kyle Nelson Attorney and Plaintiff.

Motion for Summary Judgment of Defendant's Motion for Declaratory Judgment of Termination of License Agreement. This Motion is supported by Defendant's Memorandum of Authorities and the files and records of the court herein. The Motion is set for Hearing on August 18, 2017.

Respectfully submitted July 5, 2017.

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AFFIDAVIT OF SERVICE

I hereby declare, under penalty of perjury under the laws of the State of Washington, that on July 5, 2017 I made service of the foregoing pleading or notice on the party/ies listed below in the manner indicated:

Kyle D. Nelson LEE & HAYES, PLLC 601 W. Riverside Ave., Suite 1400 Spokane, WA 99201 509 324 9256 fax: 509 323 8979	__ US Mail __Facsimile __Hand Delivery __Overnight Courier _x_Email
Spokane County Superior Court 1116 W. Broadway Ave. Spokane WA 99260	_x_ US MAIL _x_ EMAIL(JOHNDept6) __ HAND DELIVERY
Court of Appeals Division III Clerk's Office Fax: 509-456-4288	__Fax __ HAND DELIVERY
Kevin O'Rourke Southwell & O'Rourke PS 421 W Riverside Ave Ste 960 Spokane, WA 99201-0402 kevin@southwellorourke.com	__Email

DATED: July 5, 2017

Floyd E. Ivey, WSBA #6888
Attorneys for Defendant
REBEL CREEK TACKLE, INC.
Case No. 13-2-01982-0

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FILED

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CN: 201302019820
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PC: 112

IN THE SPOKANE COUNTY SUPERIOR COURT, STATE OF WASHINGTON

SETH BURRILL PRODUCTIONS, INC., a Washington corporation, Plaintiff vs. REBEL CREEK TACKLE, INC., a Washington corporation, Defendant	SPOKANE COUNTY SUPERIOR COURT 13-2-01982-0 DEFENDANT'S MOTION FOR SUMMARY JUDGMENT FOR DEFENDANT'S MOTION FOR DECLARATORY JUDGMENT MEMORANDUM OF AUTHORITIES Noted for hearing August 18, 2017

I. STATEMENT OF FACTS

1. Rebel Creek Tackle Inc. (hereafter RCT) and Seth Burrill Productions Inc. (hereafter SBP) entered into a License Agreement executed on June 1, 2010 **(Exhibit 1)**. SBP, as Licensee, was given the exclusive right to sell RCT's fishing device.

2. Paragraph 6.1 of the License Agreement states that "In the event that LICENSEE fails to sell a total of fifteen thousand (15,000) units of the ROYALTY BASE PRODUCTS within the first five (5) years of this AGREEMENT, then LICENSOR may terminate this AGREEMENT

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by written notice to LICENSEE within thirty (30) days of the five (5) year **anniversary** of this AGREEMENT."

3. In an Arbitration, concluding with a FINAL AWARD on May 2, 2013, the time allowed for the sale of 15,000 units was extended to "within the first six (6) years of this AGREEMENT..." (Exhibit 2 p3 Commentary and p4 stating "Accordingly, I make the following FINAL AWARD in favor of Claimant and against Respondent: subparagraph 3 stating "The Contract is re-instated in its entirety. The Contract shall be modified in Sections 6.1 and 6.2 thereof, where any reference to "five (5) years" shall be changed to "six (6) years"). **Exhibit 2.**

4. SBP sought and received, on June 7, 2013, an ORDER CONFIRMING ARBITRATION AWARD AND ENTRY OF JUDGMENT AND PERMANENT INJUNCTION in the present Spokane County Superior Court case #13-2-01982-0. The ORDER included at page 2, paragraph 4b and at page 7 paragraph 2 the statement "The License Agreement is reinstated in its entirety and Sections 6.1 and 6.2 thereof, wherein any reference to "five (5) years" shall be changed to "six (6) years."**(Exhibit 3)**

5. Thus, on June 1, 2016, Paragraph 6.1 of the License Agreement was "In the event that LICENSEE fails to sell a total of fifteen thousand (15,000) units of the ROYALTY BASE PRODUCTS within the first six (6) years of this AGREEMENT, then LICENSOR may terminate this AGREEMENT by written notice to LICENSEE within thirty (30) days of the six (6) year **anniversary** of this AGREEMENT." The six (6) year **anniversary** was June 1, 2016.

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6. SBP sought and received, in this Spokane County Superior Court case #13-2-01982-0, on June 7, 2013, an ORDER CONFIRMING ARBITRATION AWARD AND ENTRY OF JUDGMENT AND PERMANENT INJUNCTION.

On April 15, 2016 SBP filed a **Motion for the Appointment of a Receiver.**

On May 27, 2016 SBP Counsel advised RCT Counsel that Royalties owing were $9,559.86 which was an amount insufficient for the sale of 15,000 units to have occurred. Accordingly RCT gave written Notice to SBP on June 1, 2016 in filing, in the current Spokane County Superior Court Case 13-2-01982-0, its **Motion for Declaratory Judgment of Termination of the License Agreement. Exhibit 4** page 24 in the Declaratory Judgment exhibits email from SBP counsel of May 27, 2016 regarding $9,559.86 owing in Royalties through the first quarter of 2016. **(Exhibit 4).**

Now, on July 5, 2017, RCT notes its Motion for Summary Judgment of its Motion for Declaratory Judgment. RCT asserts that this motion is in accord with CR 13, CR 56, LCR 13 and LCR 56 and that it was not justiciable until June 1, 2016. That is, SBP's failure to sell 15,000 units by June 1, 2016 rendered, on June 1, 2016, (1) ... an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive. *DiNino v. State*, 102 Wash.2d 327, 330-31, 684 P.2d 1297 (1984).

RCT addresses this issue further in II.ARGUMENT AND LAW following.

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7. THIS SUPERIOR COURT CASE IS THE PROPER FORUM FOR RCT'S MOTION FOR SUMMARY JUDGMENT AND DECLARATORY JUDGMENT OF TERMINATION OF THE LICENSE AGREEMENT: The License Agreement provides for Arbitration when a breach is curable. The contractual burden to have sold 15,000 units by the sixth anniversary is not curable. License Agreement Subsections 8.1 through 8.6 do not provide for Arbitration of a breach of the obligation which is not curable.

8. THE FACTS OF THE LICENSE AGREEMENT ARBITRATION PROVISIONS: In response to SBP's Motion for Receiver, RCT asked the Trial Court to determine Royalties owing to RCT. The Court of Appeals Opinion of April 11, 2017, addressed the Arbitration provisions of the License Agreement stating:

> Contrary to Rebel's argument, Burrill has not waived arbitration by seeking appointment of a receiver. **The arbitration provisions of the parties' license agreement apply only to "a BREACH of any provision of this AGREEMENT" that is not *cured*. *See* CP at 151 (License Agreement, ¶¶ 8.2–8.5). Rebel's claim for nonpayment of royalties** and alleged capital investments **is subject to the license agreement's arbitration provisions, but Burrill's request for a receivership in aid of collecting a judgment was not. Since the request for a receiver was not covered by any contractual agreement to arbitrate, Burrill did not act inconsistently with a right to arbitrate by moving in the trial court for appointment of a receiver.**

Since cure is not provided for the failure to sell 15,000 units by the sixth anniversary on June 1, 2016, RCT does not act inconsistently with a right to arbitrate by moving in the trial

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court for the Termination of the License Agreement. See Argument and Law following re: Arbitration.

9. SBP counsel's letter of June 10, 2016 **(Exhibit 5)** contained the admission that the requisite 15,000 units had not been sold at page 2/paragraph 3 stating

"Moreover, the criteria for termination of the License is number of units sold. **The only reason SBPI was unable to sell the required number of units is entirely due to the actions of RCTI,** for which the Superior Court found them in contempt, and the Court of Appeals affirmed. Had RCTI cooperated from the time the Arbitration Award was confirmed and the Judgment Ordered, and adhered to the Permanent Injunction, SBPI would have easily met the requirement. RCTI cannot intentionally ignore a Permanent Injunction issued by the court which in turn created a deficit in units produced and sold, and then invoke the termination criteria. (Exhibit 5)

10. SBPI Counsel's contention, at page 2 of **Exhibit 5**, that sales of 15,000 were not made because of acts of RCTI is countered by SBPI Counsel's advice in **Exhibits 6 and 6A**, Plaintiff's Motion for Remedial Sanctions of October 13, 2013 (filed October 15, 2013 page 2/paragraph 4) Exhibit 6 and Counsel's Declaration of Jeffrey R. Smith of like dates (Exhibit 6A, page 2/paragraph 5), states that Counsel had successfully negotiated with PIM for the manufacture of diver devices at an agreed cost. SBPI then had from approximately June 11, 2013 through June 1, 2016 within which to sell 15,000 units as required by the Agreement at 6.1. (Exhibits 5, 6 and 6A). But SBP had previously already had access and production from the molds via PIM commencing from June 1, 2010.

11. RCT first gave notice of Termination of the Agreement by filing the Motion for Declaratory Judgment on June 1, 2016 and by contemporaneously serving the Motion on SBPI counsel by email as seen by SBPI counsel's reference in the letter Exhibit 5/page 2 second

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paragraph. At Exhibit 5/page 2 second paragraph SBP Counsel acknowledges receipt of the Motion for Declaratory Judgment and argues that such notice was required to be given during the thirty days preceding the "six (6) years" prior to May 31, 2016 (Exhibit 2/Commentary at page 3). There the Arbitrator, in dicta, concluded that Notice of Termination was to precede the six (6) year anniversary. The Arbitrator omitted any reference to this conclusion in the Final Award (Exhibit 2) and no reference to the timing of Notice is made by the Spokane County Superior Court Judge entering the Judgment with the exception of that within the attached Arbitration Final Award. **Exhibit 3.**

12. RCT Counsel, in light of the existence of the present case and the representation of SBPI by Lee & Hayes counsel Jeffrey Smith, did not personally contact SBPI with the Notice of Termination but did so via filing the Motion for Declaratory Judgment and the contemporaneous service by email on attorney Jeffrey Smith as Representative of SBPI. Notice to SBP counsel is effectively notice to the SBP. Following receipt of the June 10, 2016 letter from SBPI counsel (Exhibit 5) counsel for RCT did personally contact Mr. Seth Burrill of SBPI with its letter of June 21, 2106 thereby again giving Notice of Termination. **Exhibit 7**

13. In RCT's letter of June 21, 2016 (Exhibit 7), at page 2/paragraphs 5 and 6, RCT noted that Counsel for SBPI had admitted to the failure to sell 15,000 units, that Counsel was alerted to the RCT assertion that "Sales made following June 1, 2016 are not authorized." And further that SBPI was unauthorized to either advertise or sell Bud's Diver and was unauthorized to use the trademark of "Bud's Diver". **Exhibit 7.**

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14. SBPI counsel responded on July 6, 2016 to the RCT second Notice of Termination asserting that the Notice of Termination within the Motion for Declaratory Judgment (Exhibit 4) was ineffective, that the Notice was required to be given during the 30 days preceding the "six (6) year anniversary" and that the failure to sell the required number of units was entirely due to the actions of RCT. **(Exhibit 8)**

15. CONCLUSIONS RE: MATERIAL FACTS:

a. It is an established Material Fact, supported by SBP Counsel's admissions, that SBP failed to sell 15,000 units by June 1, 2016 as required by the Agreement 6.1 as seen Exhibit 5 and Exhibit 8.

b. It is an established Material Fact, that RCT Counsel gave written Notice of Termination "…within thirty (30) of the six (6) year anniversary of this AGREEMENT as established by SBP Counsel in Exhibit 1B; Exhibit 5, p2 paragraph 2 and Exhibit 8, page 1 paragraph 2 and as established by RCT in Exhibit 4 comprising the Motion for Declaratory Judgment and Exhibit 7 RCT Counsel's letter of June 21, 2016 to SBP and SBP's Counsel.

c. It is an established Material Fact that SBP had production access the to the Molds from inception of the Agreement on June 1, 2010 and from June 11, 2013 through June 1, 2016 and that the License Agreement provision 8.6 sets forth the only circumstances excusing the failure to sell 15,000 units and thereby preventing Termination of the Agreement as follows:

8.6 Neither PARTY shall be liable in damages or have the right to terminate this AGREEMENT for any delay or default in performing hereunder **if such delay or default is caused by conditions beyond its control including, but not limited to, Acts of God, Government restrictions (including, but not limited to, the denial or cancellation of any**

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export or other necessary license), wars, insurrections, financial depressions, and/or any other cause beyond the reasonable control of the PARTY whose performance is affected.

II. ARGUMENT AND LAW

1. **THE TERMINATION OF THE LICENSE AGREEMENT:** The License Agreement, Exhibit 1, paragraph 6.1 states:

6.1 LICENSOR and LICENSEE agree that it is difficult to predict the market for the ROYALTY BASED PRODUCTS. **In the event that LICENSEE fails to sell a total of fifteen thousand (15.000) units of the ROYALTY BASE PRODUCTS within the first five (5) years of this AGREEMENT, then LICENSOR may terminate this AGREEMENT by written notice to LICENSEE within thirty (30) days of the five (5) year anniversary of this AGREEMENT.**

The License Agreement was executed June 1, 2010. The term regarding Termination was changed to six (6) years of the anniversary of June 1, 2010, on June 1, 2016, in an Arbitration in 2013 as seen in the Arbitrator's Final Award **Exhibit 2.**

The License Agreement was executed on June 1, 2010. The anniversary of the License Agreement is on June 1 of each succeeding year. (Webster's Ninth New Collegiate Dictionary *Anniversary: 1. The annual recurrence of a date marking a notable event. 2. The celebration of an anniversary.)*

The six (6) year anniversary of the License Agreement was June 1, 2016. Written Notice of Termination was given to SBPI Counsel, by email Exhibit 1A, on June 1, 2016 of the filing of a Motion for Declaratory Judgment, **Exhibit 3,** on June 1, 2016 in the litigation of the present case of SBPI v. RCT in Spokane County Superior Court by the filing of the RCT Motion for Declaratory Judgment (**Exhibit 4**) and by letter to SBPI on June 21, 2016 (**Exhibit 7**) mailed to the address for SBP in paragraph 11 of the License Agreement.

The June 1, 2016 Notice of Termination is found at Exhibit 4 page 2 stating:

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HENCE, IN ACCORDANCE WITH THE LICENSE AGREEMENT PARAGRAPH 6.1, THE APPELLANT/LICENSOR TERMINATES THIS AGREEMENT BY THIS WRITTEN NOTICE TO RESPONDENT/LICENSEE WITHIN THIRTY DAYS OF THE SIX YEAR ANNIVERSARY OF THE AGREEMENT.

Counsel for SBPI suggests that the communication by email of this Notice of Termination to SBPI Counsel is non-compliant with the required direct service on SBPI. However, service on Counsel is effective service on Counsel's client SBPI. The United States Supreme Court held as follows:

It is a general rule that notice to the attorney is notice to his client; that this rule applies to all notices arising in the progress of a case, or as to other matters in which the relation of attorney and client exists at the time of the notice, and it applies not only to knowledge acquired by the attorney in the particular transaction, but to knowledge acquired by him in a prior transaction in which he acquired material information, if the information was so precise and definite that it is or must be present to his mind and memory in the last transaction. *The Distilled Spirits*, 11 Wall. 356, 20 L.Ed. 167; Pom. Eq. Jur. § 672; *Wittenbrock v. Parker*, 102 Cal. 93, 36 P. 374, 24 L. R. A. 197, 41 Am. St. Rep. 172. Cited in *Deering v. Holcomb*, 26 Wash. 588, 597, 67 P. 240 (1901).

Thus the Notice of Termination communicated to SBPI counsel, Exhibit 5/page 2 second paragraph, and found in the RCT Motion for Declaratory Judgment was effective communication to SBPI.

A second Notice of Termination was given by RCT Counsel's letter to SBP and SBP's Counsel on June 21, 2016 Exhibit 7.

2. **THE ARBITRATOR'S DICTA:** Counsel for SBPI asserts as authority the Arbitrator's Obiter Dictum, in Commentary at Exhibit 3 page 3, in contending that May 31 is the

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anniversary date referenced in paragraph 6.1 of the License Agreement. The Arbitrator also commented that Notice of Termination must be given in the 30 days preceding May 31 of the year when termination is sought.

Counsel for SBP asserted that the Arbitrator's comments regarding Termination were binding authority at Exhibit 5 page 2 paragraph 2 and Exhibit 8 page 1 paragraph 3. However, the issues addressed by the Arbitrator's comments were not litigated, not briefed, not argued and are not relevant to the arbitration or the Arbitrator's Final Award.

The Arbitrator's use of the word "Commentary" is a clue that his comments were made only in passing. The Arbitrator's thought that the date of concern would be May 31, 2016 ignores the date established by the License Agreement paragraph 6.1 which is the "anniversary" of the License Agreement of June 1 of each succeeding year.

The Arbitrator does not include the reference to May 31, 2016 in the Final Award. The Arbitrator's references to May 31, 2016 and giving notice of termination are dicta and …

"not binding authority on the issues in this case." *Young for Young v. Key Pharmaceuticals, Inc.*, 130 Wn.2d 160, 184, 922 P.2d 59 (1996); A statement is dicta when it is not necessary to the court's decision in a case" and as such is not binding authority. *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn.App. 201, 215, 304 P.3d 914, *review denied*, 178 Wn.2d 1022, 312 P.3d 651 (2013); statements made in passing are dicta *State v. Monfort*, 179 Wn.2d 122, 140, 312 P.3d 637 (2013); analysis is merely dicta where the issue is not argued, *In re Disciplinary Proceeding Against Holcomb*, 162 Wn.2d 563, 588, 173 P.3d 898 (2007).

It is also obvious that the issue of Termination must give the Licensee all latitude in meeting the burden which will be the basis for termination. Thus the conclusion is that Notice of Termination must be given after the time allocated for performance has passed.

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Any argument that Notice is to be given before the critical date has passed is frivolous.

3. **AN ARGUMENT THAT THE REQUISITE NUMBER WERE NOT SOLD IS THE FAULT OF RCT IS WITHOUT BASIS:** Counsel for SBPI asserted in Exhibit 5 page 2 paragraph 3 and Exhibit 8 page 1 paragraph 4 that SBP's failure to sell 15,000 units was the fault of RCT. The fault claimed in Exhibit 5 is that RCT was selling the product in June 2016 and that the alleged sales impeded SBPI in selling. However, SBPI did not reveal any sales by RCT. Exhibits 5 and 8 also assert that SBPI was apparently without the ability to obtain the devices because SBPI did not physically possess and control the molds. Counsel's testimony and letter demonstrates the failure of this contention. Counsel's Motion for Remedial Sanctions, Exhibit 6, states at page 2 paragraph 4 that negotiations were successfully concluded for manufacturing of the device for SBPI by Plastic Injection Molding and Ken Williams by about June 2013. The same admission is found in Counsel's Declaration, Exhibit 6A page 2 paragraph 5, demonstrating that SBP had access to the product from June 2013 through June 1, 2016. SBP also had access to the product from the inception of the Agreement on June 1, 2010. Counsel's testimony eliminates the basis for contending that SBPI was unable to acquire devices and hence was unable to make the 15,000 sales.

4. **SBPI AND COUNSEL WERE ALERTED TO THE EFFECT OF THE TERMINATION IN PROHIBITING SALES FOLLOWING JUNE 1, 2016:** RCT's letter of June 21, 2016(Exhibit 7), at page 2/paragraphs 5 and 6, RCT noted that Counsel for SBPI had admitted to the failure to sell 15,000 units, that Counsel was alerted to the RCT assertion that

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"Sales made following June 1, 2016 are not authorized." And further that SBPI was unauthorized to either advertise of sell Bud's Diver and was unauthorized to use the mark of "Bud's Diver". Exhibit 7.

Manufacturing and sales of the devices comprised willful Patent Infringement following June 1, 2016. SBP is subject to damages and attorney fees for infringement and willful infringement under Federal Law.

5. **THE LICENSE AGREEMENT PROVISION FOR ARBITRATION:** Arbitration is addressed at Paragraphs 8.1 – 8.6 of Exhibit 1.

8.1 states that "All disputes concerning the interpretation or application of this AGREEMENT shall be discussed mutually…."

Paragraph 8.2: "In the event of a BREACH of any provision of this AGREEMENT, the NONBREACHING PARTY shall give the BREACHING PARTY notice describing the BREACH and stating that the BREACHING PARTY has thirty (30) days after notice of the BREACH to cure the BREACH."

Paragraph 8.2 is not pertinent in that there is no cure provided by 6.1. Thirty (30) days for cure is not given per paragraph 6.1(15,000 sold by the sixth anniversary) which is admitted by SBPI Counsel's letter of June 10, 2016)

Paragraph 8.3: "**No cure period is required,** except as may be otherwise provided in this AGREEMENT, if: (a) **this AGREEMENT sets forth specific deadline dates for the obligation allegedly breached;** or (b) this AGREEMENT otherwise states that no cure period is required in connection with the termination in question.

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Paragraph 8.4: "The BREACHING PARTY will be deemed to have cured such BREACH if within the cure period…*No cure provided period per paragraph 8.2.*

Paragraph 8.5: "If cure is not effected either PARTY may give notice requiring dispute resolution. MEDIATION may be used…if they mutually agree…If not resolved…the dispute shall be submitted to ARBITRATION pursuant to the AAA….." *Paragraph 8.5 is not pertinent with no cure and with the specific deadline for the obligation to sell 15,000 units.*

Paragraph 8.6: Neither PARTY shall be liable in damages or have the right to terminate this AGREEMENT for any delay or default in performing hereunder if such delay or default is caused by conditions beyond its control including, but not limited to, Acts of God, government restrictions…, wars, insurrections, financial depressions, and/or any other cause beyond the reasonable control of the PARTY whose performance is affected. *Paragraph 8.6 is without application in that SBP had contractual relationship with Plastic Injection Molding and Mr. Ken Williams from June 2013 through June 1, 2016 and had always obtained the products from Plastic Injection Molding since the execution of the License Agreement on June 1, 2010.*

6. **DECLARATORY JUDGMEMT IS PROPER:** SBP commenced this Spokane County Superior Court action in 2013 in **order to obtain a Superior Court Judgment** derived from an arbitrator's Final Award (Exhibit 2). The Superior Court Judgment was rendered on June 7, 2013 (Exhibit 3). Section 6.1 of the License Agreement, Exhibit 1, noted a production burden on the Licensee SBP in the distant future of June 1, 2016. That distant date, so remote as to not be noticed, required SBP to have sold 15,000 units by June 1, 2016. That burden, in 2013, did not then comprise a justiciable controversy.

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Following the June 7, 2013 Superior Court Judgment, SBP obtained an **Order requiring RCT to deliver plastic injection** molds to SBP. RCT refused to deliver the molds and SBP filed its **Motion to Hold RCT in Contempt** with that Motion granted followed by the first appeal of this case.

On April 15, 2016 SBP filed its **Motion for the Appointment of a Receiver.** The Motion was granted and RCT Moved to Stay.

Prior to the hearing its Motion for Stay RCT filed, on June 1, 2016, its **Motion for Declaratory Judgment.** Thereafter the Superior Court Order Appointing Receiver was stayed launching the second appeal of this case.

The second appeal concluded April 11, 2017 (Exhibit 9) and the Court Of Appeals "remanded for further proceedings." Exhibit 9, page 7/paragraph 3. RCT's Motion for Declaratory Judgment was outstanding. This RCT **Motion for Summary Judgment** for its Motion for Declaratory Judgment is the "further proceedings."

Is there a justiciable issue and is the Motion for Summary Judgment for a Declaratory Judgment of Termination of the License Agreement properly pursued in this Superior Court Case? By June 1, 2016 SBP had not sold 15,000 units subjecting SBP to the License Agreement provision 6.1 allowing RCT to give Notice of Termination of the Agreement.

> For a declaratory judgment controversy to be justiciable, there must exist: (1) ... an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive. *DiNino v. State,* 102 Wash.2d 327, 330-31, **684 P.2d 1297** (1984) (quoting *Clallam Cy. Deputy Sheriff's Guild v. Board of Clallam Cy. Comm'rs,* 92 Wash.2d 844, 848, **601 P.2d 943** (1979)).

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The failure to sell 15,000 units and the following Notice of Termination of the License Agreement of June 1, 2016 resulted in an actual dispute between RCT and SBP which involved interests that are direct and substantial which a judicial determination will render final and conclusive.

Division 1 in *Chew v. Lord,* 143 Wn.App. 807, 814-15, 181 P.3d 25 (Div. 1 2008) addressed the ***Motion for Summary Judgment for a Declaratory Judgment*** noting the issue of compulsory counter-claims and the requisite history required to bring a Declaratory Judgment. Included in the required history is the event when a justiciable controversy arises. In the instant case of SBP v. RCT that event occurred on June 1, 2016 in a Superior Court Case pending from 2013. In *Chew* at 814-15 the court notes the following:

> Whenever an actual controversy exists between the parties and the circumstances indicate that declaratory relief may be an appropriate method for the settlement of the conflict, a counter-claim or a cross-claim for a declaratory judgment will be permitted. Indeed, ***this procedure often may be an efficient way to adjudicate all of the controversies between the parties in one proceeding.*** A counterclaim or a cross-claim seeking declaratory relief, like any other counterclaim or cross-claim is subject to the provisions of Rule 13.... Consequently, if a counterclaim for declaratory relief arises out of the same transaction or occurrence as plaintiff's claim, it is compulsory and Rule 13(a) applies. 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE § 1406, at 31-32 (Civil 2d ed.1990) (footnote omitted).(emphasis added)

> ¶ 13 One exception to the compulsory counterclaim requirement is when the counterclaim has not matured at the time the proponent of the claim serves pleadings. 6 Wright et al., *supra,* § 1411, at 80.

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This [exception] is derived from the language in the rule limiting its application to claims the pleader has "*at the time of serving the pleading.*" A counterclaim acquired by defendant *after* he has answered will not be considered compulsory, even if it arises out of the same transaction as does plaintiff's claim....

This exception to the compulsory counterclaim requirement necessarily encompasses a claim that depends upon the outcome of some *other* lawsuit and thus does not come into existence until the action upon which it is based has terminated.... However, *a counterclaim will not be denied treatment as a compulsory counterclaim solely because recovery on it depends on the outcome of the main action. This approach seems sound when the counterclaim is based on pre-action events and only the right to relief depends upon the outcome of the main action.*

A justiciable controversy exists which arose after SBP filed pleadings in the present case.

CONCLUSION: The deadline obligation of 6.1 does not provide cure and hence there is no opportunity for Arbitration per License Agreements paragraphs 8.2, 8.3 and 8.5. The Court of Appeals remanded to Superior Court for further proceedings. The Motion for Declaratory Judgment remained pending on remand. This Motion for Summary Judgment for Termination of the License Agreement is properly pursued in this case.

RCT requests the following findings and conclusions:

1. That SBP and RCT entered into a License Agreement on June 1, 2010. The Agreement allowed RCT to Terminate the Agreement if SBP did not sell 15,000 units by June 1, 2016. SBP did not sell 15,000 units by June 1, 2016. RCT gave Notice of Termination of the License Agreement to SBP. The License Agreement is Terminated.

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2. SBP possesses plastic injection molds used for the manufacture of the devices included in the License Agreement. SBP will give access to RCT for the inspection of the molds for the determination of the condition of the molds and to ascertain whether or not the molds have been properly maintained and are or are not in condition to allow use. SBP will disclose whether or not any modifications have been made to the molds from the date SBP took possession in 2013 to the date the molds are delivered to RCT.

3. Whether the molds are serviceable or not, SBP will give access to RCT to take possession of the molds. If the molds are not in serviceable condition then the issue of serviceability will be considered by this court for the determination of liability and damages if any.

4. SBP will relinquish its rights to the Trademark "Bud's Diver" by assignment of the Trademark to RCT.

5. SBP will not advertise or sell any of the devices which were identified in the License Agreement. SBP will not contact past or potential distributors of the devices.

6. SBP will make any inventory it has of the Devices available to RCT at a reasonable cost of manufacture and packaging determined, at RCT's option, by invoice evidence from SBP or by RCT's independent determination of what a reasonable cost is for devices and packaging in the condition of the products in the possession of SBP.

7.SBP will disclose the identities of any persons, entities or parties in possession of any of the devices which are held for sale or for any other purpose.

8.SBP will not disclose the Termination of the License Agreement to any person or entity. RCT may state the following to persons or entities with which it will have contact: "Seth

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Burrill Productions Inc. is no longer selling Bud's Divers or products related to the fishing devices which were advertised by and provided by Seth Burrill Productions Inc. and known as Bud's Divers".

Respectfully submitted this 5th day of July, 2017.

IVEY Law Offices, P.S. Corp

Floyd E. Ivey, WSBA #6888
Attorneys for Defendant
REBEL CREEK TACKLE, INC.
Motion for Summary Judgment

AFFIDAVIT OF SERVICE

I hereby declare, under penalty of perjury under the laws of the State of Washington, that on July 5, 2017 I made service of the foregoing pleading or notice on the party/ies listed below in the manner indicated:

Kyle D. Nelson LEE & HAYES, PLLC 601 W. Riverside Ave., Suite 1400 Spokane, WA 99201 509 324 9256 fax: 509 323 8979	___ US Mail ___Facsimile ___Hand Delivery ___Overnight Courier _x_Email
Spokane County Superior Court 1116 W. Broadway Ave. Spokane WA 99260	_x__ US MAIL _x__ EMAIL(JOHN)andMAIL ___ HAND DELIVERY

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Court of Appeals Division III
Clerk's Office Fax: 509-456-4288

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__ HAND DELIVERY

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DATED: July 5, 2017

Floyd E. Ivey, WSBA #6888
Attorneys for Defendant
REBEL CREEK TACKLE, INC.
Case No. 13-2-01982-0

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IN THE SPOKANE COUNTY SUPERIOR COURT, STATE OF WASHINGTON

SETH BURRILL PRODUCTIONS, INC., a Washington corporation, Plaintiff vs. REBEL CREEK TACKLE, INC., a Washington corporation, Defendant	SPOKANE COUNTY SUPERIOR COURT 13-2-01982-0 PROPOSED ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT FOR DEFENDANT'S MOTION FOR DECLARATORY JUDGMENT OF TERMINATION OF LICENSE AGREEMENT

THE Court having considered the files and records herein and having heard argument of counsel for the parties now enters findings and conclusions and Orders, Adjudges and Decrees as follows:

1.FINDINGS OF FACT: The court finds that Defendant Rebel Creek Tackle Inc.'s (hereafter RCT) and Seth Burrill Production Inc. (hereafter SBP) entered into a LICENSE AGREEMENT on June 1, 2010. The court finds that RCT's Motion for Summary Judgment on the Motion for Declaratory Judgment of June 1, 2016, is the request to Terminate the License

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EXHIBIT 15

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Agreement between RCT and SBP. The Court finds that the License Agreement paragraph 6.1, required SBP to have sold 15,000 units by the sixth anniversary of the Agreement or by June 1, 2016 and that, if 15,000 units had not been sold by June 1, 2016 that the Licensor, RCT, had the option to terminate the License Agreement upon giving notice to SBP.

The Court finds, by admissions of counsel for SBP in letters dated June 10, 2016 and July 6, 2016, that 15,000 units were not sold by June 1, 2016. The Court finds that admissions of counsel are binding on their client SBP. *Mitchell v. Kitsap County,* 59 Wn.App. 177, 183-84, 797 P.2d 516 (Div. 2 1990;*Hill v. Department of Labor & Indus.,* 90 Wash.2d 276, 580 P.2d 636 (1978) (attorney's knowledge of material facts is imputed to client); *Haller v. Wallis,* 89 Wash.2d 539, 573 P.2d 1302 (1978) (absent a showing of fraud or collusion, a client is bound by his/her attorney's settlement of his/her claims even though such settlement is contrary to the client's instructions); *Seely v. Gilbert,* 16Wash.2d 611, 134 P.2d 710 (1943) (an attorney's admission in open court that there is no defense to a motion for dismissal is binding on the client).

The Court finds that RCT did give Notice of Termination both by the June 1, 2016 filing of a Motion for Declaratory Judgment in the present case and by a subsequent Notice of Termination mailed June 21, 2106 to SBP and provided to SBP Counsel.

CONCLUSION OF LAW: The Court concludes that the Notice of Termination in the June 1, 2016 filing of a Motion for Declaratory Judgment and that the subsequent Notice of termination mailed June 21, 2106to SBP and provided to SBP Counsel was effective Notice of RCT's Termination of the License Agreement. *The Distilled Spirits*, 11 Wall. 356, 20 L.Ed. 167;

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Pom. Eq. Jur. § 672; *Wittenbrock v. Parker,* 102 Cal. 93, 36 P. 374, 24 L. R. A. 197, 41 Am. St. Rep. 172. Cited in *Deering v. Holcomb,* 26 Wash. 588, 597, 67 P. 240 (1901).

2.FINDING OF FACT: SBP contends that the Notice given by RCT was not timely and was required to be given within 30 days preceding May 31, 2017. The Court finds that the Arbitrator, in concluding the Arbitration and in Commentary that Notice of Termination is given within 30 days preceding May 31, 2016, that the License Agreement section 6.1 requires Notice of Termination to be given if sales of 15,000 units have not been sold by the sixth anniversary of June 1, 2010.

CONCLUSION OF LAW: The Court concludes that the Arbitrator's comments regarding notice to be given prior to May 31, 2016, found in the Commentary, was dicta and not authority regarding notice required for the Termination of the License Agreement. The Court concludes that notice given prior to May 31 would not be not notice given within 30 days of the sixth anniversary of the June 1, 2010 License Agreement; that the sixth anniversary of the June 1, 2010 License agreement fell on June 1, 2016 and that the notice of Termination, given in the Declaratory Judgment of June 1, 2016 and subsequently by letter in July was Notice that complied with the License Agreement section 6.1.

The Arbitrator's references to May 31, 2016 and giving notice of termination are dicta and not…"not binding authority on the issues in this case." *Young for Young v. Key Pharmaceuticals, Inc.,* 130 Wn.2d 160, 184, 922 P.2d 59 (1996); A statement is dicta when it is not necessary to the court's decision in a case" and as such is not binding authority. *Protect the*

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Peninsula's Future v. City of Port Angeles, **175 Wn.App. 201**, 215, **304 P.3d 914**, *review denied*, 178 Wn.2d 1022, 312 P.3d 651 (2013); statements made in passing are dicta *State v. Monfort*, 179 Wn.2d 122, 140, 312 P.3d 637 (2013); analysis is merely dicta where the issue is not argued, *In re Disciplinary Proceeding Against Holcomb,* 162 Wn.2d 563, 588, 173 P.3d 898 (2007).

The Court further concludes that the License Agreement is Terminated unless Termination is excused on grounds asserted by SBP.

3.FINDING OF FACT: SBP contends that arbitration provisions in the License Agreement Arbitration sections 8.1 through 8.6 requires that controversies between RCT and SBP are required to be resolved solely by Arbitration. The court, finds that the Arbitration sections of the License Agreement provide for resolution of a controversy between RCT and SBP when cure is permitted as noted in the Arbitration sections 8.2 and 8.4.

CONCLUSION OF LAW: The Court concludes that the trial court, not an arbitrator, determines the arbitrability of a dispute. *Davis v. General Dynamics Land Systems*, 152 Wn.App. 715, 217 P.3d 1191 (Div. 2 2009); *Godfrey v. Hartford Cas. Ins. Co.,* 142 Wash.2d 885, 896, 16 P.3d 617 (2001).

The court concludes that the Termination provision of section 6.1 is final and not subject to cure as determined by the Arbitration section 8.3 which sets forth the specific deadline date of six years from the anniversary of the License Agreement for the required selling of 15,000 units.

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The Court Concludes that under RCW 7.04A.070(6), if the court orders the parties to arbitrate, **the court must stay** the proceedings pending arbitration. *Everett Shipyard, Inc. v. Puget Sound Environmental Corp.,* 155 Wn.App. 761, 231 P.3d 200 (Div. 1 2010).

CONCLUSION OF LAW:The Court concludes that the License Agreement obligation of section 6.1 to have sold 15,000 units by the sixth anniversary of June 1, 2010 and the admitted failure of SBP to have sold 15,000 units by June 1, 2016 is not a controversy required to be addressed by Arbitration. The Court further concludes that the License Agreement is Terminated unless Termination is excused on additional grounds asserted by SBP.

4.FINDING OF FACTS: SBP asserts that SBP failed to sell 15,000 units by June 1, 2016 solely by the fault of RCT and Ivey and that the fault of RCT and Ivey comprise grounds which are within the parameters of section 8.6 of the License Agreement. SBP asserts facts of issues addressed in an Arbitration between RCT and SBP in 2012-13 and by RCT's withholding of the transfer of plastic injection molds to the physical possession of SBP causes the License Agreement Section 8.6 to excuse SBP from Termination: Section 8.6 precludes termination if the event allowing termination arises form grounds defined by Section 8.6 of the License Agreement. Section 8.6 precludes termination where:

"such delay or default is caused by conditions beyond its control including, but not limited to **Acts of God, Government restrictions (including, but not limited to. the denial or cancellation of any export or other necessary license), wars, insurrections, financial depressions. and/or any other cause beyond the reasonable control of the PARTY whose performance is affected**."

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The Court finds that SBP contends that RCT interfered with the transfer of plastic injection molds from PIM, an injection mold company, to an unknown injection mold company of SBP's choice such as to relieve SBP from the right of Termination. The Court finds that while RCT resisted the transfer of the molds that SBP's counsel had negotiated with PIM to produce the product. SBP also asserts that issues in the 2012-13 Arbitration were resolved by the Arbitrator's FINAL AWARD by a monetary award and by giving SBP an additional year within which to have sold 15,000 units. Plaintiff's Motion for Remedial Sanctions of October 13, 2013 (filed October 15, 2013 page 2/paragraph 4) Exhibit 6 and Counsel's Declaration of Jeffrey R. Smith of like dates (Exhibit 6A, page 2/paragraph 5), states that Counsel had successfully negotiated with PIM for the manufacture of diver devices at an agreed cost.

CONCLUSION OF LAW: The Court concludes that the issues resulting in the Arbitration were addressed in the Arbitrator's FINAL AWARD and that said issues, being resolved by a monetary award and the grant of an additional one year within which to sell the 15,000 units eliminates RCT's and Ivey's acts as causes of SBP's failure to have sold 15,000 units by June 1, 2016. The Court concludes that actions by RCT and or Ivey did not deprive SBP of access to the molds for production purposes and that the negotiations of SBP's counsel Smith were successful in assuring SBP's access to the molds. The Court concludes that the acts contended by SBP by RCT and RCT Counsel Ivey do not fall within the realm of acts found in Section 8.6 comprising "Acts of God, Government restrictions (including, but not limited to. the denial or cancellation of any export or other necessary license), wars, insurrections, financial depressions. and/or any other cause beyond the reasonable control of the PARTY whose

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performance is affected" and that the acts asserted do not excuse SBP from the Termination of the License Agreement.

ORDER: The Court, having considered the Findings of Fact and the Conclusions Of Law and having concluded that the License Agreement at Section 6.1 required SBP to have sold 15,000 units by June 1, 2016, that SBP had not sold 15,000 units by June 1, 2016, that the controversy between RCT and SBP's failure to sell 15,000 units by June 1, 2016 is subject to a specific deadline date in section 8.3 and is not required by the License Agreement to be settled by Arbitration and that the causes of SBP's failure to sell 15,000 by June 1, 2016 was not actions or acts of RCT or RCT Counsel Ivey now **ORDERS, ADJUDGES AND DECREES THAT** the RCT Motion for Summary Judgment of the Declaratory Judgment be and hereby is **GRANTED AND THEREBY TERMINATES THE LICENSE AGREEMENT BETWEEN RCT AND SBP OF JUNE 1, 2010 AND THAT SAID TERMINATION IS EFFECTIVE JUNE 1, 2016.**

5.The Court additionally finds that the plastic injection molds were removed by SBP from PIM to a location unknown to RCT. The Court finds that whether or not SBP has maintained the molds in serviceable and productive condition is unknown to RCT. The Court **ORDERS** that SBP will, by September 18, 2017, advise RCT of the location of the molds, will make the molds available for an inspection; that RCT will schedule a hearing with the court if the molds are contended by RCT to have been damaged and, regardless of the condition of the molds that SBP will make available the molds to be removed by and into the possession of RCT

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by September 18, 2017.

6.The Court additionally finds that that on May 27, 2016 SBP Counsel Smith advised RCT Counsel that Royalties owing through the first quarter of 2016 were $9,559.86. The Court finds that royalties admitted to be owing to RCT have not been paid.

The court ORDERS that Judgment be and is hereby entered against SBP and in favor or RCT for the sum of $9,559.86 for royalties owing up to May 27, 2016.

The Court finds that royalties owing for the 2nd quarter of 2016 were not paid to RCT and that Judgment is entered against SBP and in favor of RCT for the sums owing for the 2nd quarter of 2016.

7. The Court additionally finds that SBP has used the Trademark "Bud's Diver" in selling the products under the License Agreement.

The court ORDERS that SBP will relinquish its rights to the Trademark "Bud's Diver" by assignment of the Trademark to RCT. SBP will not advertise or sell any of the devices which were identified in the License Agreement. SBP will not contact past or potential distributors of the devices.

8.The Court additionally finds that Inventory of the products held or owned by SBP will be made available to RCT, at RCT's option, at a reasonable cost of manufacture and packaging determined, at RCT's option and by invoice evidence from SBP or by RCT's independent determination of what a reasonable cost is for devices and packaging in the condition of the products in the possession of SBP.

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9.The Court additionally finds that others may possess inventory or hold product for sale. The Court ORDERS that SBP will disclose the identities of any persons, entities or parties in possession of any of the devices which are held for sale or for any other purpose.

10.The Court ORDERS that SBP will not disclose the Termination of the License Agreement to any person or entity. RCT may state the following to persons or entities with which it will have contact: "Seth Burrill Productions Inc. is no longer selling Bud's Divers or products related to the fishing devices which were advertised by and provided by Seth Burrill Productions Inc. and known as Bud's Divers".

11.REGARDING RCT'S COUNTER MOTION FOR CR 11 SANCTIONS: The Court finds that RCT asserts that SBP's Arguments and Averments are for Improper Purposes as follows:

a.SBP's re-litigation of the 2012 Arbitration is distracting, time consuming, requires research, is irrelevant to the issue of Termination of the License Agreement and is a tactic used for an improper purpose as a CR 11 violation, (RCT'S Reply, page 6/lines 12-14);

b.Making the assertion of recently discovered *inventory hidden from SBP* after being specifically addressed by the Arbitrator is pursuit of argument requiring research, is time consuming and costly and has been made by SBP for a wrongful CR 11 purpose, RCT's Reply page 7/lines 12-15.

c.The "dearth" of facts and evidence is illuminated by the Declaration of Seth Burrill in Support of Plaintiff's Motion for CR 11 Sanctions. At paragraphs 25 and 26 the Court will find

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that there is no fact to support the alleged sales. CR 11 requires that the counsel signing the pleading knows that there is a factual basis for the assertion. RCT Reply page 8/lines 7-9.

d. SBP's assertion that RCT sold product in 2016 based on the "may be" and "if attributable" phrases in pleadings signed or submitted by counsel are without evidentiary substance and must be disregarded by the Court. Here the pleadings are submitted in support of the Motion for CR 11 Sanctions. These assertions comprise a tactic of attempting to introduce an element of wrongdoing without factual support. The tactic is for an improper SBP purpose and violates CR 11.

e. The extent of argument expended by SBP regarding ABANDONMENT has been presented by SBP with the intent to mislead the court. SBP's attorneys ABANDONMENT assertion was meant to characterize RCT as reckless in its acts in causing the loss of an asset which SBP contended should be obtained by SBP as part payment of the Judgment owing. Patent attorneys in Lee & Hayes were available to tell that the filing of a Petition would cause the word ABANDONED to be removed. The continued assertion has no relevance to this Motion for Summary Judgment, the Motion for Declaratory Judgment, the failure to sell 15,000 units, is argument merely for the improper CR 11 purpose of requiring RCT to expend time in replying to the SBP Response and was made for an improper purpose per CR 11. RCT Reply page 11/lines 1-9;

f. SBP's comments that "Your motion is not grounded in fact, it is certainly not warranted by existing law or a good faith argument, it fails to comprehend basic rules of evidence, is filed for an improper purpose, and is continued harassment of our client, " from

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Exhibit K of the SBP Response do not give guidance to RCT in making argument in opposition or in reciting and relying on law in opposition. The Declaration of Mr. Nelson, and Exhibits, as either a Response to the Motion for Summary Judgment or in support of a Motion for violation of CR 11 letters are conclusory, unsupported by fact or law and must be disregarded by the court. *King County Dept. of Adult and Juvenile Detention v. Parmelee,* 254 P.3d 927, 162 Wn.App. 337 (Wash.App. Div. 1 2011); *Meyer v. University of Washington,* 719 P.2d 98, 105 Wn.2d 847 (Wash. 1986). RCT Reply page 12/lines 18 – page 13/line 2.

g.SBP's assertion that arbitration is the only route for a judicial determination that the License Agreement is Terminated is a clear statement that SBP intends to again return to the expense and time required for arbitration thereby subjecting RCT to expense. This willingness is evidenced of a pattern and practice also seen from the 2012 Arbitration where SBP's claim that Mr. Burrill was the inventor of the device patented by RCT was found by the Arbitrator to be false at SBP's Response Exhibit B in the Arbitrator's Final Award Commentary, 4th paragraph, "The evidence in the case does not support a finding that Claimant or its representative is entitled to "inventor status" as alleged." The contention of inventorship was false in 2012, was then contended for a wrongful purpose without factual basis as are the many "fact less" contentions in the SBP Response which are prohibited by CR 11; RCT Reply page 12/lines 18-25

h. Much of Mr. Nelson's Declaration is conclusory, made without personal knowledge and is irrelevant to issues pertinent to the Breach of Section 6.1 of the License Agreement and supports the contention that SBP's assertion of the CR 11 Motion is for an improper purpose and is violative of CR 11. RCT Reply page 16/line 25-page 17/line 2. *Baldwin v. Silver*, 165

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Wn.App. 463, 471 269 P.3d 284 (Div. 3 2011) (Court may not consider conclusory statements contained in the nonmoving party's affidavits.)

i. The Declaration of Mr. Seth Burrill is a recitation of irrelevant difficulties in start up business, is conclusory, e.g., regarding RCT selling product in 2016 with no evidence provided, is submitted as a tactical pleading occupying judicial and attorney time while being irrelevant to the issues of not selling 15,000 units and is submitted for an improper CR 11 purpose. The Declarations of Mr. Nelson and of Mr. Burrill should not be considered by the court. RCT Reply page 17/lines 3-8.

Regarding RCT's Motion for Sanctions for violation of CR 11 for improper purposes the Court concludes that SBP's actions were for improper purposes and violative of CR 11 and now ORDERS that SBP is sanctioned in an amount to be submitted to and considered by the Court.

DONE IN THIS _____ DAY OF AUGUST, 2017,

_____
THE HONORABLE JUSTICE HAZEL

Presented by Floyd E. Ivey,
Attorney for the Defendant

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AFFIDAVIT OF SERVICE

I hereby declare, under penalty of perjury under the laws of the State of Washington, that on , August 29, 2017 I made service of the foregoing pleading or notice on the party/ies listed below in the manner indicated:

Kyle D. Nelson LEE & HAYES, PLLC 601 W. Riverside Ave., Suite 1400 Spokane, WA 99201 509 324 9256 fax: 509 323 8979	___ US Mail ___Facsimile ___Hand Delivery ___Overnight Courier _x_Email
Spokane County Superior Court 1116 W. Broadway Ave. Spokane WA 99260	___ US MAIL ___ EMAIL(JOHN) ___ HAND DELIVERY
Court of Appeals Division III Clerk's Office Fax: 509-456-4288	___Fax ___ HAND DELIVERY
AAA	_x__Email

DATED: August 29, 2017

Floyd E. Ivey, WSBA #6888
Attorneys for Defendant
REBEL CREEK TACKLE, INC.
Case No. 13-2-01982-0

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