

FILED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AUG 9 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

BESTWAY (USA), INC.; et al.,

Nos. 18-16228
18-17040

Plaintiffs-Appellees,

D.C. No. 4:17-cv-00205-HSG
Northern District of California,
Oakland

v.

LEONARD GREGORY SCOTT; EUREKA
INVENTIONS LLC,

ORDER

Defendants-cross-claimants-
Appellees,

PIETRO P.A. SGROMO,

Defendant-Appellant,

and

WAGMORE & BARKLESS LLC,

Defendant.

BESTWAY (USA), INC.; et al.,

No. 19-15709

Plaintiffs-Appellees,

D.C. No. 4:17-cv-00205-HSG

v.

PIETRO P.A. SGROMO,

Defendant-Appellant,

and

WAGMORE & BARKLESS LLC,

Defendant,

EUREKA INVENTIONS LLC; LEONARD
GREGORY SCOTT,

Defendants-cross-claimants.

BESTWAY (USA), INC.; et al.,

No. 19-15797

Plaintiffs-Appellees,

D.C. No. 4:17-cv-00205-HSG

v.

PIETRO P.A. SGROMO,

Defendant-Appellant,

and

WAGMORE & BARKLESS LLC; et al.,

Defendants.

Before: WALLACE, CANBY, and TASHIMA, Circuit Judges.

We treat Sgromo's filing (Docket Entry No. 81 in Appeal No. 18-16228; Docket Entry No. 58 in Appeal No. 18-17040; Docket Entry No. 52 in Appeal No. 19-15709; Docket Entry No. 48 in Appeal No. 19-15797) as a motion to recall the mandate and deny the motion.

No further filings will be entertained in these closed cases.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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AUG 2 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

BESTWAY (USA), INC.; et al.,

No. 18-16228

Plaintiffs-Appellees,

D.C. No. 4:17-cv-00205-HSG
Northern District of California,
Oakland

v.

PIETRO PASQUALE-ANTONI SGROMO,

ORDER

Defendant-Appellant,

and

WAGMORE & BARKLESS LLC; et al.,

Defendants.

Before: Peter L. Shaw, Appellate Commissioner.

On July 2, 2018, the district court entered an order denying appellant's motion to compel arbitration and granting the cross-claimants' motion for summary judgment. The only portion of the July 2, 2018 order that is immediately appealable is the portion of the order denying appellant's motion to compel arbitration. *See Britton v. Co-op Banking Group*, 916 F.2d 1405, 1409 (9th Cir. 1990) (court of appeals has jurisdiction to review interlocutory order denying motion to compel arbitration); *see also* Fed. R. Civ. P. 54(b); *Chacon v. Babcock*, 640 F.2d 221, 222 (9th Cir. 1981) (order is not appealable unless it disposes of all claims as to all parties or judgment is entered in compliance with rule); *Frank*

Briscoe Co., Inc. v. Morrison-Knudsen Co., Inc., 776 F.2d 1414, 1416 (9th Cir. 1985) (order disposing of fewer than all claims or parties is not appealable absent express determination from district court that there is no just reason for delay under Rule 54(b)). Therefore, the scope of this appeal is limited to a review of that portion of the district court's July 2, 2018 order denying appellant's motion to compel arbitration.

A review of this court's docket reflects that the filing and docketing fees for this appeal remain due. Within 21 days after the date of this order, appellant shall pay to the district court the \$505.00 filing and docketing fees for this appeal and file in this court proof of such payment or file in this court a motion to proceed in forma pauperis. Failure to pay the fees or file a motion to proceed in forma pauperis shall result in the automatic dismissal of the appeal by the Clerk for failure to prosecute. *See* 9th Cir. R. 42-1.

The Clerk shall serve a Form 4 financial affidavit on appellant.

The briefing schedule established previously remains in effect.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

AUG 23 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

BESTWAY (USA), INC.; et al.,

Plaintiffs - Appellees,

v.

LEONARD GREGORY SCOTT and
EUREKA INVENTIONS LLC,

Defendants-cross-claimants
- Appellees,

PIETRO P.A. SGROMO,

Defendant - Appellant,

and

WAGMORE & BARKLESS LLC,

Defendant.

No. 18-16228

D.C. No. 4:17-cv-00205-HSG
U.S. District Court for Northern
California, Oakland

ORDER

BESTWAY (USA), INC.; et al.,

Plaintiffs - Appellees,

v.

LEONARD GREGORY SCOTT and
EUREKA INVENTIONS LLC,

No. 18-17040

D.C. No. 4:17-cv-00205-HSG
U.S. District Court for Northern
California, Oakland

Defendants-cross-claimants
- Appellees,
PIETRO P.A. SGROMO,
Defendant - Appellant,
and
WAGMORE & BARKLESS LLC,
Defendant.

BESTWAY (USA), INC.; et al.,

No. 19-15709

Plaintiffs - Appellees,

D.C. No. 4:17-cv-00205-HSG
U.S. District Court for Northern
California, Oakland

v.
PIETRO P.A. SGROMO,

Defendant - Appellant,

and

WAGMORE & BARKLESS LLC,

Defendant,

EUREKA INVENTIONS LLC and
LEONARD GREGORY SCOTT,

Defendants-cross-
claimants.

BESTWAY (USA), INC.; et al.,

No. 19-15797

Plaintiffs - Appellees,
v.
PIETRO P.A. SGROMO,
Defendant - Appellant,
and
WAGMORE & BARKLESS LLC; et
al.,
Defendants.

D.C. No. 4:17-cv-00205-HSG
U.S. District Court for Northern
California, Oakland

The electronically-filed document filed on August 23, 2022 and entitled "Petition for Rehearing En Banc" will not be considered because of this court's August 9, 2022 order stating that no further filings will be accepted in this closed case.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Howard Hom
Deputy Clerk
Ninth Circuit Rule 27-7

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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7 BESTWAY (USA), INC., et al.,

8 Plaintiffs,

9 v.

10 PIETRO PASQUALE-ANTONI SGROMO,
11 et al.,

12 Defendants.

Case No. 17-cv-00205-HSG

AMENDED JUDGMENT

13 Having ordered the funds distributed and discharged the interpleader, see Dkt. No. 107,
14 and awarded attorneys' fees and costs to Plaintiffs, the Court enters this amended judgment as
15 follows:

- 16 1. Plaintiffs Bestway (USA) Inc., Bestway (Hong Kong) International Ltd., and
17 Bestway Inflatables and Material Corporation's (collectively, "the Bestway
18 Companies" or "Plaintiffs") having brought this interpleader action to determine
19 who owns certain royalties, which are currently in escrow and flow from two
20 license agreements ("Royalty Payment"), are deemed innocent stakeholders of such
21 Royalty Payment; and the Bestway Companies are discharged from this matter
22 upon depositing with the registry of the Court the Royalty Payment, reduced by the
23 fees and costs awarded to the Bestway Companies under their granted fees motion,
24 as described below.
- 25 2. Within 30 days of the entry of this Judgment, the Bestway Companies shall deposit
26 with the registry of the Court the present value of the Royalty Payment, accrued
27 under the '440 Patent License Agreement and the Slide License Agreement,
28 reduced by the \$82,541.70 in fees and costs awarded to the Bestway Companies

1 under their granted fees motion, *see* Dkt. No. 144.

2

3 3. The Royalty Payment deposited with the registry of the Court shall be disbursed in

4 accordance with this Court's findings on summary judgment that Defendant Scott

5 was at the time of the '440 Patent License Agreement, Dkt. No. 79-6, the owner of

6 all right, title, and interest to U.S. Patent No. 7,046,440; that Defendant Eureka was

7 the owner of all rights with respect to the products that are the subject of the Water

8 Slide License Agreement, Dkt. No. 79-7, at the time that the Water Slide

9 Agreement was entered; and that Defendants Scott and Eureka are entitled to all

10 royalties accrued under the '440 Patent License Agreement and the Water Slide

11 License Agreement, subject to the above-referenced reduction for fees and costs

12 awarded to the Bestway Companies under their granted fees motion.

13

14 4. The Bestway Companies and their past, present, and future parents, subsidiaries,

15 affiliates, successor, predecessors, assignees, agents, producers, servants,

16 employees, officers, directors, principals, representatives, attorneys, and insurers

17 are hereby released and discharged from all liability by Defendants Pietro

18 Pasquale-Antonio Sgromo (a/k/a Peter Anthony Sgromo), Wagmore & Barkless

19 LLC, Leonard Gregory Scott, and Eureka Inventions LLC or any other entity

20 claiming an interest, on account of all claims pertaining to the Royalty Payment.

21

22 5. To the fullest extent provided by 28 U.S.C. § 2361, Defendants are permanently

23 and perpetually restrained and enjoined from filing or prosecuting any claim in any

24 federal or state court pertaining to the Royalty Payment.

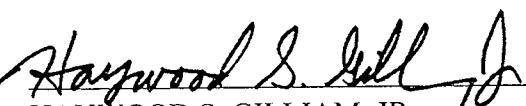
25 Per the Court's May 14, 2019 order, Dkt. No. 153, all deadlines imposed by the amended

26 judgment remain stayed until after all appeals have been resolved in this case.

27

28 **IT IS SO ORDERED.**

Dated: 5/31/2019


26

27 HAYWOOD S. GILLIAM, JR.
28 United States District Judge

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7 BESTWAY (USA), INC., et al.,
8 Plaintiffs,
9 v.
10 PIETRO PASQUALE-ANTONIO
11 SGROMO, et al.,
12 Defendants.

Case No.17-cv-00205-HSG

**ORDER DENYING MOTION TO
COMPEL ARBITRATION; GRANTING
MOTION FOR SUMMARY JUDGMENT**

Re: Dkt. No. 79, 82

13 Pending before the Court in this interpleader action is a motion to compel arbitration by
14 Defendant Pietro Pasquale-Antonio Sgromo (“Sgromo”), Dkt. No. 82, and a motion for summary
15 judgment by Defendants-Crossclaimants Leonard Gregory Scott (“Scott”) and Eureka Inventions
16 LLC (“Eureka”) (collectively referred to as “Crossclaimants”), Dkt. No. 79. For the reasons set
17 forth below, the Court **DENIES** Sgromo’s motion and **GRANTS** Crossclaimants’ motion.¹

18 **I. BACKGROUND**

19 Plaintiffs Bestway (USA), Inc.; Bestway (Hong Kong) International Ltd.; and Bestway
20 Inflatables and Material Corp. (collectively referred to as “Plaintiffs”) bring this interpleader
21 action to determine who owns certain royalties. *See* Dkt. No. 1 (Complaint or “Compl.”) at 1.
22 They name four Defendants in the Complaint: Scott, Eureka, Sgromo, and Wagmore & Barkless
23 LLC (“W&B”). Plaintiffs seek a determination regarding who is entitled to past royalty payments
24 which are currently in escrow and flow from two license agreements. *See id.* at 11 (prayer for
25 relief). Scott and Eureka subsequently filed a cross-claim against Sgromo and W&B, seeking an
26 order declaring that they were entitled to the royalties and that they owned the intellectual property

27
28 ¹ The Court finds this matter appropriate for disposition without oral argument and the matter is
deemed submitted. *See* Civil L.R. 7-1(b).

1 in the license agreements. Dkt. No. 35 at 8 (prayer for relief).

2 A. Facts

3 Scott, the sole member of Eureka, formerly had a “personal and professional relationship”
4 with Sgromo. Dkt. No. 79-5 (Declaration of Leonard Gregory Scott, or “Scott Decl.”) ¶¶ 1-2. In
5 early 2013, Sgromo owned two sets of intellectual property rights: one for a “3-D vision system
6 for swimming pools” (U.S. Patent No. 7,046,440, or “the ’440 Patent”), and one for an “inflatable
7 landing” that attached to a water slide. Scott Decl. ¶ 3. In June 2013, Sgromo “offered to transfer
8 his ownership rights in the intellectual property to Eureka,” as a way to repay Scott for money he
9 had given or loaned to him over the course of their relationship. *See id.* ¶ 4. In furtherance of that
10 offer, Sgromo’s lawyer formed Eureka, with Scott as its sole member. *See id.* Sgromo also
11 “served as a consultant to Eureka,” and “had full authority to enter into license agreements with
12 third parties on Eureka’s behalf.” *Id.*

13 Before the formation of Eureka, Sgromo “file[d] the paperwork necessary to assign and
14 record the assignment of the ’440 Patent” to Eureka and Scott. *Id.* ¶ 5; *see also* Dkt. No. 79-1
15 (Declaration of Thomas E. Moore III, or “Moore Decl.”), Ex. A (patent assignment dated June 19,
16 2013 listing Scott as receiving party for ’440 Patent). Eureka became a legal entity on June 25,
17 2013. *See Scott Decl.* ¶ 5. In the meantime, Sgromo negotiated a license agreement for the ’440
18 Patent on Eureka’s behalf with Plaintiffs,² which was executed on August 20, 2013. *Id.* ¶ 6; *see*
19 *also id.*, Ex. A (“’440 Patent License Agreement”). As relevant here, the ’440 Patent License
20 Agreement named Plaintiffs as the Licensee, *see* ’440 Patent License Agreement at 1, and
21 represented that Scott was “the lawful owner” of the ’440 Patent rights, *id.* ¶ 13(A). The
22 agreement also stated that “Licensee agrees to pay to Eureka . . . [a] royalty of five percent (5%) of
23 net sales of the licensed products by licensee or its sublicensees in the territory, reportable and
24 payable on a calendar quarter basis.” *Id.* ¶ 5(B) (caps removed); *see also id.* (listing Eureka’s
25 banking information).

26 On June 17, 2014, again on behalf of Eureka, Sgromo entered another license agreement

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2 Scott does not specify which of the three Plaintiffs Sgromo worked with, referring only to “Bestway.”

1 with Plaintiffs, this one involving the inflatable landing for a water slide. Scott Decl. ¶ 7; *see also*
2 *id.*, Ex. B (“Water Slide License Agreement”). As relevant here, the Water Slide License
3 Agreement named Plaintiffs as the licensee, and represented that Eureka was the “sole and
4 exclusive owner of all rights . . . in certain technology involving the use of an inflatable landing
5 attached to the beginning of a children’s backyard water slide.” Water Slide License Agreement at
6 1. The agreement also stated that Eureka, the licensor, “shall be paid a royalty equaling three
7 percent (3%) of the net sales derived by the Licensee for the sales of the Product with a maximum
8 of \$225,000 in Royalties per year.” *Id.* ¶ 3(a) (caps removed); *see also id.* ¶ 3(c) (stating that
9 royalties were to be “calculated and paid quarterly,” and listing Eureka’s banking information).

10 In February 2015, a disagreement arose between Sgromo and Plaintiffs regarding “the
11 exclusivity of the two license agreements, among other things.” Scott Decl. ¶ 8. Under the
12 direction of Sgromo, Eureka filed suit against Plaintiffs Bestway (USA), Inc. and Bestway (Hong
13 Kong) International, Ltd. *See id.*; Moore Decl., Ex. B (complaint). After Scott and Sgromo’s
14 relationship “ended badly” in July 2015, *see* Scott Decl. ¶¶ 2, 10, Scott “took charge” of that
15 lawsuit against Plaintiffs, which eventually settled on October 21, 2015, *id.* ¶ 11. Prior to the
16 settlement, however, Sgromo had begun to make his own claims to the royalties governed by the
17 two license agreements, and “initiated binding arbitration against” Scott. *See id.* ¶¶ 11-12. As a
18 result, Eureka’s settlement with Plaintiffs “provided that Bestway would put the royalties into
19 escrow pending the outcome of the arbitration.” *Id.* ¶ 11. Sgromo and Scott attended mediation in
20 April 2016, but Sgromo “became too erratic to continue with the mediation process,” and
21 ultimately “refused to participate further in the arbitration process and abandoned it.” *Id.* ¶ 12.

22 Effective May 31, 2017, Plaintiffs terminated the ’440 Patent License Agreement. *Id.* ¶ 15.
23 All royalties were reported as of January 15, 2017. *See id.* Effective August 15, 2017, Plaintiffs
24 terminated the Water Slide License Agreement. *Id.* ¶ 16. Scott “executed an assignment of [his]
25 and Eureka’s rights in the water slide to Bestway on September 26, 2017,” and was intended to
26 “receive a last quarterly royalty report for the sales of Bestway products under the [Water Slide

27
28

1 License Agreement] by April 15, 2018.” *Id.*³

2 **B. Procedural Posture & Sgromo’s Motion to Compel Arbitration**

3 Plaintiffs filed the Complaint on January 13, 2017. Dkt. No. 1. Scott and Eureka filed an
4 answer and their crossclaim on May 8, 2017. Dkt. No. 35. Neither Sgromo nor W&B answered
5 the Complaint.

6 On December 6, 2017, Plaintiffs, Scott, and Eureka filed a joint request for entry of default
7 against Sgromo and W&B, due to the latter’s “fail[ure] to appear or otherwise respond to the
8 complaint.” Dkt. No. 62 at 2.⁴ The Clerk declined to enter default on December 7, 2017. Dkt.
9 No. 65. Plaintiffs, Scott, and Eureka subsequently filed an administrative motion under Civil
10 Local Rule 7-11 with the Court, styled as a joint motion for entry of default, on the same grounds.
11 See Dkt. No. 73. In response, the Court set a telephonic conference for January 30, 2018, at which
12 counsel for Plaintiffs, Scott, and Eureka agreed that Scott and Eureka would file a motion for
13 summary judgment to resolve the interpleader rather than seek a default judgment. See Dkt. No.
14 75.

15 On March 5, 2018, Crossclaimants filed their motion for summary judgment. Dkt. No. 79
16 (“Mot.”). Neither Sgromo nor W&B filed an opposition. Crossclaimants did not file a reply brief.
17

18 ³ This September 2017 assignment of the rights to the inflatable landing occurred after
19 Crossclaimants filed their answer in May 2017, which presumably moots their request for
20 declaratory relief with respect to the ownership of this intellectual property. In any event, in their
21 motion for summary judgment, Crossclaimants seem concerned only with establishing ownership
22 of the intellectual property *at the time the license agreements were entered*. See Mot. at 8.
23 Accordingly, this is the question that the Court will determine, and nothing in this Order is meant
24 to alter the separate assignment of rights mentioned by Scott in his declaration. See Scott Decl. ¶
25 16.

26 ⁴ Sgromo, who is proceeding pro se, has unsuccessfully sought relief from the Court twice over
27 the course of this action, his failure to answer notwithstanding. See Dkt. No. 50 (denying
28 Sgromo’s motion for summary judgment); Dkt. No. 80 (denying Sgromo’s motion to transfer the
action). Sgromo also appealed the Court’s denial of his motion for summary judgment, *see* Dkt.
No. 51, which the Ninth Circuit summarily dismissed for lack of jurisdiction given the
interlocutory nature of the Court’s order, *see* Dkt. No. 62. Sgromo has also filed a number of
frivolous motions in this action. *See, e.g.*, Dkt. No. 64 (“Notice of Right to Sue”); Dkt. No. 66
(request by Sgromo to reconsider dismissing the action). Finally, the Court notes that Sgromo has
consistently and improperly purported to represent W&B, despite the fact that he is not an
attorney. *See In re Am. W. Airlines*, 40 F.3d 1058, 1059 (9th Cir. 1994) (per curiam)
 (“Corporations and other unincorporated associations must appear in court through an attorney.”);
Civil L.R. 3-9(b) (“A corporation, unincorporated association, partnership or other such entity
may appear only through a member of the bar of this Court.”).

1 On May 31, 2018, the Court took the motion under submission and vacated the scheduled hearing.
2 Dkt. No. 81. That same day, Sgromo filed a “Notice of Arbitration Filed and Further
3 Reconsideration of This Court to Dismiss the Action with Prejudice” (“Notice”), claiming that this
4 dispute fell within the scope of a previously-unmentioned arbitration agreement. Dkt. No. 82. On
5 June 1, 2018, the Court ordered Plaintiffs, Scott, and Eureka to show cause “why, if the Court
6 were to construe [Sgromo’s motion] as a motion to compel arbitration, such a motion should not
7 be granted.” Dkt. No. 83. Plaintiffs, Scott, and Eureka filed their responses on June 15, 2018.
8 *See* Dkt. Nos. 84 (Scott and Eureka’s response), 86 (Plaintiffs’ redacted response).⁵

9 **II. LEGAL STANDARD**

10 Summary judgment is proper when a “movant shows that there is no genuine dispute as to
11 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).
12 A fact is “material” if it “might affect the outcome of the suit under the governing law.” *Anderson*
13 *v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). And a dispute is “genuine” if there is evidence
14 in the record sufficient for a reasonable trier of fact to decide in favor of the nonmoving party. *Id.*
15 But in deciding if a dispute is genuine, the court must view the inferences reasonably drawn from
16 the materials in the record in the light most favorable to the nonmoving party, *Matsushita Elec.*
17 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986), and “may not weigh the evidence
18 or make credibility determinations,” *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997),
19 *overruled on other grounds by Shakur v. Schriro*, 514 F.3d 878, 884-85 (9th Cir. 2008). If a court
20 finds that there is no genuine dispute of material fact as to only a single claim or defense or as to
21 part of a claim or defense, it may enter partial summary judgment. Fed. R. Civ. P. 56(a).

22 With respect to summary judgment procedure, the moving party always bears both the
23 ultimate burden of persuasion and the initial burden of producing those portions of the pleadings,
24 discovery, and affidavits that show the absence of a genuine issue of material fact. *Celotex Corp.*
25 *v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party will not bear the burden of proof on
26 an issue at trial, it “must either produce evidence negating an essential element of the nonmoving

27
28 ⁵ Sgromo filed a response that same day, *see* Dkt. Nos. 87, 88, which the Court did not request and
therefore does not consider.

1 party's claim or defense or show that the nonmoving party does not have enough evidence of an
2 essential element to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins.*
3 *Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). Where the moving party will bear the
4 burden of proof on an issue at trial, it must also show that no reasonable trier of fact could not find
5 in its favor. *Celotex*, 477 U.S. at 325. In either case, the movant "may not require the nonmoving
6 party to produce evidence supporting its claim or defense simply by saying that the nonmoving
7 party has no such evidence." *Nissan Fire*, 210 F.3d at 1105. "If a moving party fails to carry its
8 initial burden of production, the nonmoving party has no obligation to produce anything, even if
9 the nonmoving party would have the ultimate burden of persuasion at trial." *Id.* at 1102-03.

10 "If, however, a moving party carries its burden of production, the nonmoving party must
11 produce evidence to support its claim or defense." *Id.* at 1103. In doing so, the nonmoving party
12 "must do more than simply show that there is some metaphysical doubt as to the material facts."
13 *Matsushita Elec.*, 475 U.S. at 586. A nonmoving party must also "identify with reasonable
14 particularity the evidence that precludes summary judgment," because the duty of the courts is not
15 to "scour the record in search of a genuine issue of triable fact." *Keenan v. Allan*, 91 F.3d 1275,
16 1279 (9th Cir. 1996). If a nonmoving party fails to produce evidence that supports its claim or
17 defense, courts must enter summary judgment in favor of the movant. *Celotex*, 477 U.S. at 323.

18 III. DISCUSSION

19 Crossclaimants contend that there is no triable issue of fact with respect to the two salient
20 issues: (1) which parties are entitled to the royalties being held in escrow by Plaintiffs; and (2)
21 which parties were the rightful owners of the intellectual property governed by the '440 License
22 Agreement and the Water Slide License Agreement at the time those agreements were entered.
23 See Mot. at 7. The Court agrees. As a preliminary matter, however, the Court addresses
24 Sgromo's belatedly-filed Notice.

25 A. The Court Construes Sgromo's Belatedly-Filed Notice As a Motion to Compel 26 Arbitration, and Denies the Motion.

27 Sgromo styles his Notice as presenting two issues, one of which is "[w]hether this court
28 should reconsider its previous decision to quash service and dismiss this action with prejudice in

1 its entirety.” Notice at 3. While it is unclear what Sgromo refers to in mentioning a “previous
2 decision to quash service,” the gravamen of the motion is that “[t]he disputes between Sgromo et
3 al. and Scott et al. are governed by a separate arbitration agreement.” *Id.* (citation omitted). The
4 Court accordingly construes Sgromo’s filing as a motion to compel arbitration. Specifically,
5 Sgromo purports to proffer seven arbitration agreements—six between him and Plaintiffs, and one
6 between him and Scott—that mandate arbitration of the instant dispute. *See id.* Plaintiffs and
7 Crossclaimants counter, as relevant here, that Sgromo has waived any right to compel arbitration
8 by virtue of his litigation conduct. *See* Dkt. No. 84 at 5-8 (Crossclaimants’ argument); Dkt. No.
9 85 at 7-8 (Plaintiffs’). The Court agrees with Plaintiffs and Crossclaimants, and denies Sgromo’s
10 motion.

11 Whether a party has waived its right to arbitrate by its litigation conduct is a question “for
12 judicial determination unless the parties clearly and unmistakably provide otherwise.” *Martin v.*
13 *Yasuda*, 829 F.3d 1118, 1123 (9th Cir. 2016) (citing *Howsame v. Dean Witter Reynolds, Inc.*, 537
14 U.S. 79, 83 (2002)). The burden of proving that a party has waived its right to arbitrate in this
15 way is a heavy one. *See id.* at 1124 (citation omitted). “[A] party seeking to prove waiver of a
16 right to arbitration must demonstrate (1) knowledge of an existing right to compel arbitration; (2)
17 acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration
18 resulting from such inconsistent acts.” *Id.* (citation omitted).

19 Here, the Court assumes (without deciding) that the seven purported arbitration agreements
20 cited by Sgromo apply to the dispute at hand, in order to reach the parties’ arguments that he
21 waived his right to arbitrate. The Court also finds that the broad, vague language in each of those
22 agreements does not “clearly and unmistakably” provide that the question of waiver is to be
23 determined by an arbitrator rather than a court. *See* Notice at 3. Turning to the question of waiver
24 under *Martin*, the Court finds that Sgromo’s litigation conduct plainly evinces a waiver of his right
25 to compel arbitration in this action. First, Sgromo clearly had “knowledge of an existing right to
26 compel arbitration”: he attached to his Notice a “Demand for Arbitration Form” naming Plaintiffs,
27 *see* Notice, Ex. A, and previously initiated binding arbitration against Scott, only to later abandon
28 the effort, *see* Scott Decl. ¶¶ 11-12. Second, his conduct has been wholly “inconsistent with that

1 existing right,” even setting aside his abandonment of the previous arbitration with Scott. For
2 example, when Plaintiffs brought this interpleader action, Sgromo sought several forms of relief
3 (i.e., summary judgment and transfer), which the Court denied. *See* Dkt. Nos. 50, 80. He then
4 represented to Plaintiffs that he no longer intended to participate in this action—apparently as a
5 matter of principle—and never filed an answer.⁶ In keeping with that approach, Sgromo did not
6 respond to Crossclaimants’ motion for summary judgment, which they filed on March 5, 2018—
7 although he did file his motion to compel *after* the Court took the summary judgment motion
8 under submission on May 31. Last, Sgromo’s “inconsistent acts” would prejudice Plaintiffs and
9 Crossclaimants. If this Court compelled arbitration, the resources expended on this lawsuit by
10 Plaintiffs and Crossclaimants would be wasted because of Sgromo’s unreasonable delay—and
11 Plaintiffs would be no closer to an answer with respect to their interpleader.

12 In short, Sgromo has spent more than 16 months litigating this case since he first sought
13 permission to file electronically in February 2017, *see* Dkt. No. 10, and only now—on the eve of
14 summary judgment—does he seek to compel arbitration. Granting his motion at this juncture
15 would, simply put, be unfairly prejudicial to Plaintiffs and Crossclaimants, and would reward his
16 evasive litigation conduct. Accordingly, the motion is denied.

17 **B. Crossclaimants’ Undisputed Evidence Establishes, on Its Face, Their
18 Entitlement to the Royalties at Issue.**

19 Turning to Crossclaimants’ motion for summary judgment, the salient evidence they
20 proffer is the ’440 Patent License Agreement and the Water Slide License Agreement. On their
21 face, the agreements plainly establish that Eureka is entitled to any royalties flowing from the ’440
22 Patent License Agreement and the Water Slide License Agreement. *See* ’440 Patent License

23
24 ⁶ In Plaintiffs’ and Crossclaimants’ joint motion for entry of default, the parties represented that
25 Sgromo “confirmed he would not be filing an answer in this case,” Dkt. No. 73 at 4, and “has also
26 expressly stated his refusal to defend the case on the merits,” *id.* at 5. As support, the parties
27 attached an email by Sgromo, dated November 10, 2017, in which he indicated that he did not
28 intend to file an answer. *See* Dkt. No. 73-1 (Declaration of Thomas E. Moore III in Support of
Parties’ Joint Administrative Motion to Enter Default), Ex. B (stating that “[w]hat Bestway
chooses to do with those royalties has no impact on me” and asserting “[t]here is no jurisdiction in
[California]”). Seventeen days later, in another email, Sgromo expressly stated, “I am not giving
[this] action any more time. . . . In a nutshell, [I] do not have to even answer anything anymore
and will not.” *Id.*, Ex. C.

1 Agreement ¶ 5(B); Water Slide License Agreement ¶¶ 3(a), 3(c). They also establish that Scott
2 owned the '440 Patent at the time of the '440 Patent License Agreement and that Eureka owned
3 the inflatable landing design at the time of the Water Slide License Agreement. *See* '440 Patent
4 License Agreement ¶ 13(A); Water Slide License Agreement at 1; *see also* Moore Decl., Ex. A
5 (patent assignment); Scott Decl. ¶¶ 4-7. Critically, this evidence is undisputed, given Sgromo's
6 refusal to meaningfully respond to Crossclaimants' motion and W&B's failure to appear in this
7 action altogether. Nor is there any challenge with respect to the authenticity of Crossclaimants'
8 evidence.

9 In this case, Crossclaimants have surpassed the requirements of their burden of production
10 by proffering evidence that, on its face, establishes entitlement to the royalties and ownership of
11 the intellectual property. *See Celotex*, 477 U.S. at 323. Sgromo and W&B, in contrast, have
12 failed to respond to Crossclaimants' motion altogether, and as a result have not met their
13 obligation under Rule 56 to "produce evidence to support [their] claim." *See Nissan Fire*, 210
14 F.3d at 1103. While failure to file an opposition is not grounds for granting summary judgment,
15 the Court finds that in these circumstances, Crossclaimants have met their "affirmative duty under
16 Rule 56 to demonstrate [their] entitlement to judgment as a matter of law." *See Martinez v.*
17 *Stanford*, 323 F.3d 1178, 1182 (9th Cir. 2003); *see also Celotex*, 477 U.S. at 323 (holding that
18 where nonmoving party fails to produce evidence that supports its claim, courts must enter
19 summary judgment in favor of movant).

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1 **IV. CONCLUSION**

2 For the foregoing reasons, the Court **DENIES** Sgromo's motion to compel arbitration and
3 **GRANTS** Crossclaimants' motion. Plaintiffs are directed to file a proposed order and judgment
4 distributing the subject funds in accordance with this order no later than July 11, 2018. This order
5 terminates as moot Docket Number 73.

6 **IT IS SO ORDERED.**

7 Dated: 7/2/2018

8
9
10 
11 HAYWOOD S. GILLIAM, JR.
12 United States District Judge

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Attorneys for Defendants
Bestway (USA), Inc. and
Bestway (Hong Kong) International Ltd.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

EUREKA INVENTIONS, LLC,) Case Number: 15-CV-701-JSW
Plaintiff,)
v.)
BESTWAY (USA), INC., BESTWAY) ORDER GRANTING
(HONG KONG) INTERNATIONAL LTD.) STIPULATION OF DISMISSAL
Defendants.)

BESTWAY (USA), INC., BESTWAY)
(HONG KONG) INTERNATIONAL LTD.,)
Counterclaimants,)
v.)
EUREKA INVENTIONS, LLC,)
Counterclaim-Defendant.)

Plaintiff and Counterclaim Defendant Eureka Inventions, LLC (“Eureka”), and Defendants and Counterclaimants Bestway (USA), Inc. and Bestway (Hong Kong) International Ltd. (collectively, “Bestway”), have entered into a Settlement Agreement (“Agreement”) effective as of the 21st day of October, 2015.

Therefore, Eureka and Bestway (collectively, the “Parties”) stipulate and agree, subject to an Order of the Court dismissing Eureka’s claims against Defendant with prejudice, that:

1. Eureka’s Complaint against Bestway is dismissed with prejudice.
2. Bestway’s counterclaims against Eureka are dismissed with prejudice.
3. The Court set aside the Default entered against Eureka by this Court on July 29, 2015.
4. Each party shall bear its own attorneys fees, expenses, and costs.

STIPULATED AND AGREED TO:

/s/Jennifer Ishimoto

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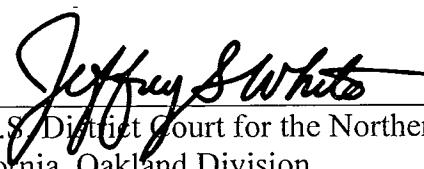
Attorney for Eureka Inventions, LLC

/s/Uleses C. Henderson

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Telephone: (949) 502-2870

*Attorney for Bestway (USA), Inc. and
Bestway (Hong Kong) International Ltd.*

So ORDERED and SIGNED this 9th day of November, 2015.



Judge U.S. District Court for the Northern District
of California, Oakland Division

**Service of this Order will be made electronically
on all ECF-registered counsel of record via email
generated by the court's ECF system.**

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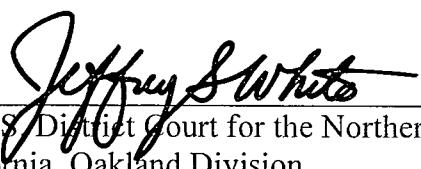
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Judge U.S. District Court for the Northern District
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**Additional material
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Clerk's Office.**