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No. 71855-0-I

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

TRACI TURNER,

Plaintiff/Appellant,

v.

VULCAN, INC. *et al.*

Defendants/Respondents.

RESPONSE BRIEF OF RESPONDENTS RAY COLLIVER AND LAURA MACDONALD

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I. INTRODUCTION

Appellant Traci Turner appeals from an order compelling her to arbitrate a dispute between her and her former employer, Respondent Vulcan, Inc., and several of its executives, including Respondents Ray Colliver and Laura Macdonald. Ms. Turner filed her first lawsuit ("*Turner I*") in superior court in September 2011. Vulcan moved to compel arbitration of those claims. Ms. Turner, represented by counsel, opposed that motion, on the grounds that the arbitration provision that Vulcan sought to enforce was "unconscionable." Judge Patrick Oishi rejected that argument and ordered the dispute to arbitration on October 6, 2011.

In defiance of that Order, Ms. Turner filed a duplicative second lawsuit in superior court ("*Turner II*"), bringing the exact same claims that had been ordered to arbitration in *Turner I*, and five "new" claims arising from the same facts and circumstances. In June 2012, Judge Monica Benton ordered all of *those* claims to arbitration, on the grounds that the issue of arbitrability had already been decided in *Turner I* and, alternatively, that Ms. Turner (again) had failed to demonstrate that the arbitration provision was unconscionable.

Ms. Turner did not seek immediate review of that ruling or of the ruling in *Turner I*. The dispute was arbitrated and a final award issued and confirmed on April 1, 2014.

Ms. Turner now challenges the superior court's ruling, rejecting her contention that the arbitration clause was unconscionable. This Court should affirm the superior court for the following reasons:

- Because Ms. Turner waited until after the arbitration was completed to appeal the issue of arbitrability, to prevail in this appeal she must establish error *and* prejudice resulting therefrom. Ms. Turner *barely* addresses the critical issue of prejudice, and utterly fails to demonstrate that she suffered any harm by having to arbitrate.
- Ms. Turner did not come close to meeting her high burden of establishing in *Turner I* that the arbitration provision was unconscionable. Judge Oishi correctly ordered that dispute to arbitration.
- In *Turner II* Judge Benton correctly gave preclusive effect to *Turner I*, rejecting Ms. Turner's attempt to circumvent the prior ruling and ordering that the old and "new" claims be pursued in the already-pending arbitration.
- In *Turner II*, Judge Benton correctly rejected Ms. Turner's unconscionability challenge, as an alternative basis for ordering those claims to arbitration.

Ms. Turner has had her day in court—indeed more than one day—to have her challenge to the arbitration clause heard and decided, by two separate judges. She offers no basis for this Court to disturb those rulings.

II. ISSUES PRESENTED FOR REVIEW

As it pertains to Respondents Colliver and Macdonald, this appeal presents the following issues[1]:

1. Assuming that the superior court erred in compelling arbitration, has Ms. Turner made the requisite showing of prejudice to warrant reversal? No.

2. Assuming that Judge Oishi's October 6, 2011 Order is within the scope of this appeal, did Judge Oishi err in finding that the claims asserted in *Turner I* were subject to mandatory arbitration? No.

3. Did Judge Benton err in holding that the claims ordered to arbitration in *Turner I* could not be re-filed in Ms. Turner's second lawsuit, under principles of preclusion? No.

4. Did Judge Benton err in holding that the five "new" claims Ms. Turner asserted in *Turner II* were subject to mandatory arbitration, for the same reasons that informed Judge Oishi's Order in *Turner I*, as well as preclusion reasons? No.

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[1] Ms. Turner's appeal also challenges rulings related to an award of attorneys' fees in favor of defendant/respondent Vulcan, Inc., and the denial of Ms. Turner's request for fees against Vulcan. Mr. Colliver and Ms. Macdonald did not request attorney's fees, nor did Ms. Turner seek fees from them. Accordingly, they are not involved in the attorney fee portion of the appeal.

III. STATEMENT OF THE CASE

A. Proceedings Before Judge Oishi in *Turner I*.

1. Ms. Turner Signs a Guaranteed Bonus Agreement, Agreeing to Arbitrate in Exchange for Vulcan's Promise to Pay 125% of Her Target Bonus.

Ms. Turner was employed by Vulcan as an "Executive Protection Specialist" for nine months, from January 2011 until she resigned in September 2011. CP 271. Executive Protection Specialists provide protection for Vulcan's Chairman, Paul Allen, and members of his family. CP 271.

In July 2011, Ms. Turner signed a "Guaranteed Bonus Agreement" ("GBA") with Vulcan, pursuant to which: (1) Vulcan guaranteed that she would receive 125% of her "target" bonus (which was otherwise discretionary); and (2) in exchange, Ms. Turner released any then-existing claims she had against Vulcan and its agents and agreed to confidential arbitration for any claims she might have arising out of the GBA and/or her employment at Vulcan. CP 280-82. The guaranteed bonus for 2011 was more than $25,000, subject to proration if her employment ended during the year. CP 280.

2. Despite Her Agreement to Arbitrate Claims, Ms. Turner Brings Five Employment-Related Claims in Superior Court in *Turner I*.

In September 2011, Ms. Turner resigned and filed a lawsuit against Vulcan and several of its executives, including Ray Colliver and Laura Macdonald. CP 37-39. She brought claims for constructive termination, fraud, hostile work environment, "tort," defamation, gender discrimination, harassment and retaliation. *Id.*

Vulcan promptly moved to enforce the GBA and compel arbitration of these indisputably employment-related claims. CP 62-72. Ms. Turner opposed the motion, arguing that the arbitration provision of the GBA should not be enforced because of the scope of the arbitration clause, lack of consideration, lack of mutuality, procedural unconscionability and substantive unconscionability. CP 75-79.

3. Judge Oishi Orders Ms. Turner to Pursue Her Claims in Arbitration.

On October 6, 2011 Judge Oishi entered an Order Granting Vulcan's Motion to Compel Arbitration. CP 95-96. Ms. Turner moved for reconsideration of that ruling, but then voluntarily dismissed *Turner I* before Judge Oishi could rule on that motion. CP 122-25.

B. Early Proceedings Before Arbitrator Carolyn Cairns.

On December 11, 2011 Vulcan commenced an arbitration against Ms. Turner, bringing claims for, *inter alia*, breach of contract and for

declaratory relief on the validity of Ms. Turner's release of claims in the GBA. CP 419-20. In that arbitration Ms. Turner counterclaimed against claimant Vulcan, and brought claims against Mr. Colliver and Ms. Macdonald as cross-respondents. Those claims included: (1) five of the claims that had been ordered to arbitration in *Turner I* (constructive termination, gender discrimination, hostile work environment, retaliation, and defamation); and (2) five "additional" claims arising from the same facts and circumstances (sexual orientation discrimination, age discrimination, intentional infliction of emotional distress, negligent infliction of emotional distress, and willful withholding of wages). CP 38, 1060.

C. Ms. Turner Defies Judge Oishi's Order and Attempts Again to Avoid Arbitration by Filing a Duplicative Lawsuit—*Turner II*—in Superior Court.

In January 2012 Ms. Turner filed another lawsuit in Superior Court—*Turner II*. CP 1-20. The complaint simply repeated the five claims that had been ordered to arbitration in *Turner I*[2]; and asserted five additional claims arising from the same alleged facts[3].

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[2] Gender discrimination, constructive termination, retaliation, hostile work environment and defamation.

[3] Sexual orientation discrimination, age discrimination, intentional infliction of emotional distress, negligent infliction of emotional distress, and withholding of wages.

D. Judge Benton Dismisses *Turner II* and Orders All Claims to Arbitration.

Vulcan and the other defendants moved to have *Turner II* dismissed and the "new" claims ordered to arbitration. They argued that, under principles of res judicata, Judge Oishi's Order in *Turner I* was preclusive in two respects. First, claim preclusion prevented Ms. Turner from re-filing claims that she brought or should have brought in *Turner I*. Second, issue preclusion prevented Ms. Turner from re-litigating the issue of the enforceability of the arbitration provision, after that issue had been "finally" decided by Judge Oishi. CP 250-61

Ms. Turner responded by seeking relief from Judge Oishi's Order under CR 60, and arguing (again) that the court should not compel arbitration because the GBA and/or its arbitration provision were substantively or procedurally unconscionable. CP 590-602. At an April 5, 2012 hearing, Judge Benton denied Ms. Turner's Rule 60 motion and held that Ms. Turner must continue to pursue in the ongoing arbitration the five claims in *Turner II* that simply repeated the dismissed claims from *Turner I*. CP 1483-88; 4239-40. With regard to the five "new" claims asserted in *Turner II*, Judge Benton asked for more briefing on the issues of preclusion and unconscionability. *Id.*

The parties provided additional briefing as requested. On June 8, 2012 Judge Benton issued an Order dismissing the five "new" claims on the grounds that they were precluded under principles of "res judicata and/or collateral estoppel," and on the alternative grounds that the arbitration agreement was "not procedurally or substantively unconscionable." Judge Benton order that these five claims be pursued, along with the five *Turner I* claims, in the pending arbitration. CP 2210-13.

E. The Arbitrator Rules in Favor of Vulcan, Mr. Colliver and Ms. Macdonald.

In the arbitration proceedings, Vulcan, Mr. Colliver and Ms. Macdonald together moved for a declaration regarding the validity of the release of claims included in the GBA. They argued that, because the release was valid, it precluded all of Ms. Turner's claims to the extent they arose on or before the date the GBA was signed (July 26, 2011). Ms. Turner's counsel withdrew from the case, effective September 6, 2012. Ms. Turner proceeded *pro se* until October 17, 2012, when she announced that she was withdrawing from the arbitration. CP 3083.

On October 31, 2012 Arbitrator Cairns ruled that the release was in fact valid and enforceable, leaving Ms. Turner with only her claims that arose between July 26, 2011 (the effective date of the release) and

September 2011 (when she resigned from Vulcan). After a one-day hearing on November 26, 2012, Arbitrator Cairns issued her Findings of Fact, Conclusions of Law and Interim Arbitration Award. CP 3094-3101. She dismissed all of Ms. Turner's claims with prejudice, on the grounds that they were not supported by evidence and had been rebutted by evidence presented by Vulcan, Mr. Colliver and Ms. Macdonald. CP 2236.[4] Those rulings were then repeated in the Arbitrator's Final Award on March 7, 2013. CP 3117-20.

F. The Superior Court Confirms the Dismissal of Ms. Turner's Claims.

Vulcan, Mr. Colliver and Ms. Macdonald moved for confirmation of the award. CP 2214-21. With regard to the dismissal of her claims, Ms. Turner argued that the award should be vacated because the Arbitrator engaged in "misconduct" by refusing Ms. Turner's request for a four-month continuance to find new counsel after her prior counsel withdrew. CP 2597-2619, 3220-46, 4536. On October 30, 2013 Judge Bruce Heller

[4] Arbitrator Cairns also ordered that Ms. Turner refund a portion of bonus payments received from Vulcan, and pay certain attorney's fees. However, these portions of the award did not affect Mr. Colliver or Ms. Macdonald and so will not be addressed here.

entered an order rejecting Ms. Turner's "misconduct" argument and confirming the dismissal of Ms. Turner's claims. CP 3422-27.[5]

IV. ARGUMENT

A. The Challenged Orders Should Be Affirmed Because Ms. Turner Fails to Satisfy the Requirement That She Show Prejudice Resulting From Those Orders.

Ms. Turner did not seek immediate review of either Judge Oishi's or Judge Benton's orders compelling arbitration. As such, to prevail on this appeal, she must demonstrate not only that those orders were made in error, but also that she suffered prejudice as a result of that error. *Saleemi v. Doctor's Assocs., Inc.*, 176 Wn.2d 368, 380 (2013) ("We join the emerging consensus of courts and hold that a party who fails to seek discretionary review of an order compelling arbitration, must show prejudice as a condition of relief from the arbitration award. This approach promotes prime purposes of arbitration, speed and convenience, while allowing the truly aggrieved party to obtain relief."). "Error will not be considered prejudicial unless it affects, or presumptively affects, the outcome of the trial." *Id.* (citations omitted).

In her Opening Brief Ms. Turner addresses this requirement only in passing, and comes nowhere close to satisfying it. Opening Brief at 26.

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[5] Judge Heller remanded the case to the arbitrator to reconsider her ruling regarding attorney's fees. Again, however, that part of the dispute does not involve Mr. Colliver or Ms. Macdonald.

Ms. Turner's sole argument addressed to this central issue is this casual reference:

> To the extent that it is necessary to show prejudice from the Order [compelling arbitration], the harm is evident in the "daunting," "shocking," "overly-harsh" $113,325 in [attorney's] fees against Turner . . .

Id. However, the arbitrator's award of attorney's fees in that amount came well *after* the arbitration ended. Ms. Turner does not even attempt to explain how her ability to advance her interests *during* the arbitration were prejudiced by an attorney's fee award that came afterward.[6] Indeed, Ms. Turner would have faced the very same liability for attorney's fees under her contract with Vulcan, had her claims proceeded in court rather than arbitration. There was no prejudice.

Elsewhere in her brief Ms. Turner refers to the high cost of AAA and arbitrator's fees. But she does not even *argue* that being billed for these fees prevented her from presenting her case to the arbitrator. In fact, Ms. Turner's ability to proceed in the arbitration was never affected by the arbitration fees, and Vulcan ultimately paid for *all* of those fees. CP 3039-42. Ms. Turner also refers to her attorney's withdrawal from the case during the arbitration and her inability to retain new counsel. However, there is no indication whatsoever that these obstacles arose *because* the

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[6] The award was later reduced, on remand to the arbitrator, to $39,524.50. CP 3986.

dispute was in arbitration rather than in superior court, or that Ms. Turner would not have faced the same challenges with respect to securing counsel in a judicial forum.

In light of Ms. Turner's complete failure to show prejudice, this Court should affirm the challenged orders, even if Ms. Turner demonstrated that the orders were made in error. *Saleemi*, 176 Wn.2d at 380. However, as explained below, Judge Oishi and Judge Benton correctly ruled that Ms. Turner's claims had to proceed in arbitration.

B. Judge Oishi Properly Ordered the Claims in *Turner I* to Arbitration.

It does not appear from Ms. Turner's Opening Brief that she intends to challenge Judge Oishi's October 6, 2011 ruling that the arbitration clause in the GBA compelled Ms. Turner to arbitrate the claims she brought in *Turner I*.[7] If she did intend to make that argument, the Court should reject it. Ms. Turner utterly failed to meet her burden of establishing that the arbitration provision was unconscionable. *Zuver v.*

[7] Ms. Turner identified this Order in her Notice of Appeal, but did not assign error to it as required by RAP 10.3(a) (appellant's opening brief should contain "[a] separate concise statement of *each error* a party contends was made by the trial court, together with the issues pertaining to the assignments of error.") (emphasis added).

Airtouch Comm., Inc., 153 Wn. 2d 293, 302 (2013) (party challenging arbitration clause bears burden of demonstrating unconscionability).[8]

An arbitration clause can be either "substantively" or "procedurally" unconscionable. *Id.* "Substantive unconscionability involves those cases where a clause or term in the contract is alleged to be one-sided or overly harsh." *Id.* (citations omitted). "'Shocking to the conscience', 'monstrously harsh', and 'exceedingly calloused' are terms sometimes used to define substantive unconscionability." *Id.* An arbitration provision may be procedurally unconscionable if the party attempting to avoid arbitration lacked any "meaningful choice" in signing the agreement. *Id.*

1. Ms. Turner Failed to Demonstrate Substantive Unconscionability.

In opposing Vulcan's motion to compel arbitration, Ms. Turner *mentioned* the notion of substantive unconscionability, but made no attempt whatsoever to demonstrate—with facts or legal argument—that the requirements of that doctrine had been met. CP 76-78. Judge Oishi

[8] Ms. Turner asserts that in *Turner I* she asked the trial court to allow discovery related to this issue of unconscionability. Opening Brief at 9. That is simply not true. The brief that she cites in support of that assertion does not contain any request for discovery. *See* CP 75-79.

correctly determined that she had failed to meet her burden. *Zuver*, 153 Wn.2d at 302.[9]

2. Ms. Turner Failed to Demonstrate Procedural Unconscionability.

Ms. Turner did attempt to present some evidence in support of her claim of procedural unconscionability. However, the issue of procedural unconscionability was for the arbitrator to decide, not the court. *See* Vulcan Resp. Brief at Section VI-B.

In any event, the evidence Ms. Turner presented fell far short of the standard she was required to meet.

> *At a minimum*, an employee who asserts an arbitration agreement is procedurally unconscionable must show some evidence that the employer refused to respond to her questions or concerns, placed undue pressure on her to sign the agreement without providing her with a reasonable opportunity to consider its terms, and/or that the terms of the agreement were set forth in such a way that an average person could not understand them.

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[9] This Court's review of Judge Oishi's ruling in *Turner I* must be limited to the evidence and argument presented to the trial court prior to that ruling, and should not stray into the arguments that Ms. Turner has developed during the three years that passed between then and the filing of her Opening Brief on appeal. *Filho v. Safra National Bank of N.Y.*, 489 Fed. Appx. 483, 484 (2nd Cir. 2012) (limiting review of district court order compelling arbitration to "the factual record before the district court" on that motion); *Engstrom v. Goodman*, 166 Wn. App. 905, 909 n.2 (2012) (denying respondent's "motion to strike" materials presented *after* the trial court made its ruling, but observing that respondent could simply call the court's attention to those portions of the record that should be excluded from the appellate court's consideration). In any event, as explained in Section D *infra*, even now Ms. Turner is unable to muster convincing arguments regarding substantive unconscionability.

Zuver, 153 Wn.2d at 306-07 (emphasis added). Ms. Turner did not even *contend* that she asked any questions regarding the GBA or arbitration clause, let alone that Vulcan "refused to respond" to any such request. Her only assertion in this regard is that she was given only "24 hours" to review the agreement. CP 622-24. However, she admits that she "did not even read the agreement" before signing it," but instead "simply turned the [GBA] to the last page and signed it." CP 594. Ms. Turner could hardly claim that an alleged "24 hour" deadline prejudiced her ability to review and understand the GBA, when she admitted that she didn't take *one minute* of that 24 hours to read it, ask questions or request additional time. *See Dreher v. Eskco, Inc.*, 2009 WL 2176060 at *16 (S.D. Ohio July 21, 2009) ("the fatal weakness in Plaintiff's assertion of procedural unconscionability is the fact that she did not read the whole Employment Agreement before signing it. Because she failed to read the whole agreement, no issue regarding the meaning or substance of the arbitration provision arose prior to Plaintiff agreeing to the terms of the Employment Agreement as conclusively established by her signature . . . [a party] cannot be excused from complying with the arbitration provision if it simply failed properly to read the contract") (quotations omitted).[10]

[10] The "whole agreement" here was only two and one-half pages long. CP 280-82.

With regard to "undue pressure," Ms. Turner merely stated that she felt she had to sign the agreement to keep her job. However, the fact that an employee feels "pressure" to accede to an employer's demand reflects, at most, a subjective sense that the employer has more bargaining power with regard to that issue. Unequal bargaining power, and the feeling of "pressure" that it might entail, do not vitiate the employee's "meaningful choice" in the matter or render a resulting agreement unconscionable. *Zuver*, 153 Wn.2d at 306-07 ("Indeed, as the Fourth Circuit aptly reasoned, if a court found procedural unconscionability based solely on an employee's unequal bargaining power, that holding 'could potentially apply to [invalidate] every contract of employment in our contemporary economy.'"), *quoting Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 501 (4th Cir. 2002).

Finally, Ms. Turner stated that she "believed [she] would be retaliated against and ultimately fired" if she did not sign the agreement. CP 623. However, a party's subjective belief is not evidence of unconscionability. *See THI of New Mexico v. Patton*, 2012 WL 112216 at *22 (D. N.M. Jan. 3, 2012) ("Nor is Ms. Barry's mere subjective feeling of not being free to decline arbitration terms enough to demonstrate procedural unconscionability. A contract is procedurally unconscionable

only where the inequality is so gross that one party's choice is effectively non-existent.") (quotations omitted).

C. Judge Benton Correctly Held That Judge Oishi's Order Precluded Ms. Turner from Refiling Her *Turner I* Claims in *Turner II*.

Judge Benton held that the doctrines of claim and issue preclusion prevented Ms. Turner from filing in *Turner II* the exact same claims that had been ordered to arbitration in *Turner I*. CP 1483-88, 4239-40, 2212. Not surprisingly, Ms. Turner does not challenge that aspect of Judge Benton's ruling in this appeal.[11]

D. Judge Benton Correctly Held That the Five Purportedly "New" Claims Ms. Turner Brought in *Turner II* Were Likewise Barred By Claim and Issue Preclusion.

Ms. Turner argues that Judge Benton erred in ruling that Judge Oishi's Order in *Turner I* precluded her from filing her five purportedly "new" claims in *Turner II*. Opening Brief at 42-43. She is wrong.

1. Ms. Turner's "New" Claims Were Barred by Claim Preclusion.

The doctrine of claim preclusion forbids a party to re-litigate claims "that were litigated, or might have been litigated, in the prior action." *Martin v. Wilbert*, 162 Wn. App. 90, 94-96 (2011). There was no dispute that Ms. Turner's five "new" claims arose from the very same

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[11] To escape the obviously preclusive effect of *Turner I*, Ms. Turner moved under CR 60 for relief from Judge Oishi's Order. Judge Benton denied that motion, and Ms. Turner does not appeal from that ruling.

facts and circumstances as the claims she brought in *Turner I*: her nine-month employment at Vulcan and alleged misconduct by Vulcan and its agents during that tenure. As such, they were claims that were brought, or could have been brought, in *Turner I*. *See* Vulcan Resp. Brief, Section VI-B-2. Judge Benton correctly rejected Ms. Turner's transparent attempt to evade Judge Oishi's Order compelling arbitration by recasting her *Turner I* claims in *Turner II*. *See Midcontinent Cas. Co. v. Gen. Reinsurance Corp.*, 2009 WL 2588867 at *3 (N.D. Okla. 2009) (rejecting plaintiff's attempt to amend complaint to add a new claim to avoid effect or prior order compelling arbitration because "it appears that plaintiff is attempting to file an amended complaint to avoid arbitrating its proposed [new] claim"; plaintiff must instead pursue that new claim in the arbitration).

2. Ms. Turner's "New" Claims Were Barred By Issue Preclusion.

The doctrine of issue preclusion prevents a party from seeking a second ruling on an issue that has already been decided. Issue preclusion applies where the following four elements are satisfied:

(1) the second action presents an issue that is identical to one presented in the prior action;
(2) there was a final decision rendered in the prior action;
(3) the party against whom the doctrine is asserted is the same party as, or is in privity with, a party to the first action; and
(4) the application of the doctrine will not work an injustice.

In re Disciplinary Proceedings Against Botimer, 166 Wn.2d 759, 770 (2009); *Malland v. State Dept. of Ret. Sys.*, 103 Wn.2d 484, 489 (1985). Where it applies, the doctrine bars re-litigation of any issue that was litigated and decided in the prior action, whether the *claims* in the second action are the same or different from the prior lawsuit. Restatement (Second) of Judgments § 27 (1982).

a. Ms. Turner Concedes That the Parties and Issues Were Identical.

The plaintiff in *Turner II* was the same as the plaintiff in *Turner I,* and in both cases Ms. Turner challenged the conscionability of the same arbitration clause in the same contract. Thus, the first and third elements were plainly met. Ms. Turner does not argue otherwise in this appeal.

b. Ms. Turner Concedes That Application of Preclusion Did Not Work an "Injustice."

There was no "injustice" in limiting Ms. Turner to one full and fair opportunity to litigate the conscionability of the GBA and its arbitration clause. Ms. Turner does not argue otherwise in this appeal.

c. The Court Should Reject Ms. Turner's Argument Regarding "Finality."

Ms. Turner contends that "Judge Oishi's Order was not final" for purposes of preclusion. Opening Brief at 42-43. However, Judge Benton properly rejected that argument, and this Court should do the same here.

The fact that Ms. Turner voluntarily dismissed *Turner I* prior to the formal entry of judgment does not affect this Court's analysis.

d. The Preclusive Effect of *Turner I* on the Arbitrability of the Claims in *Turner II* Was an Issue for the Court, Not the Arbitrator, to Decide.

Ms. Turner contends that the arbitrator—not the court—should have decided the issue of whether Judge Oishi's Order in *Turner I* precluded re-litigation of issues related to the validity of the arbitration clause. Opening Brief at 42. But the only authority she cites for that proposition holds that an arbitrator should decide a preclusion argument *when* that argument seeks to preclude a second lawsuit based on a decision on the merits from a prior suit. *Yakima Cnty. v. Yakima Cnty. Law Enforcement Officers Guild*, 157 Wn. App. 304, 325-28 (2010). It does not suggest that the arbitrator must decide the preclusive effect of a prior judicial ruling on the *procedural* question of arbitrability.

E. Judge Benton Correctly Held In the Alternative That the Arbitration Provision Was Not Unconscionable.

Even assuming *arguendo* that Judge Oishi's Order compelling arbitration in *Turner I* did not preclusively determine the arbitrability of the "new" claims asserted in *Turner II*, Ms. Turner failed to satisfy her burden of demonstrating before Judge Benton in *Turner II* that the arbitration clause was unconscionable.

1. Ms. Turner Did Not Demonstrate in *Turner II* That the Arbitration Clause Was Substantively Unconscionable.

In contrast with her failure even to *argue* the claim of substantive unconscionability before Judge Oishi in *Turner I*, Ms. Turner did present an argument to Judge Benton in this regard in *Turner II*. However, Judge Benton correctly determined that Ms. Turner had not met her burden of demonstrating substantive unconscionability.

As noted above, substantive unconscionability is a difficult standard to meet. An arbitration clause is substantively unconscionable where, for example, it is "shocking to the conscience", "monstrously harsh", or "exceedingly calloused." *Zuver*, 153 Wn. 2d at 302. Ms. Turner raised three points in her attempt to satisfy that burden. None of them has merit.

a. The Confidentiality Provision Does Not Render the Arbitration Clause Unconscionable and, Even If It Did, the Remedy Is To Sever It.

Ms. Turner relies on *Zuver* for the broad proposition that "confidentiality provisions are substantively unconscionable." Opening Brief at 33. However, *Zuver* did not announce such a sweeping rule. Rather, the Court invalidated a particular confidentiality provision in an arbitration clause in an employment agreement between a cellular phone company (Airtouch) and a sales associate. *Zuver*, 153 Wn.2d 293. *Zuver* is distinguishable on two grounds.

First, in reaching its holding the *Zuver* court accepted the employee's argument that the confidentiality provision

> *serves no purpose other than to tilt the scales of justice in favor of the employer* by denying access to any information about other claims against the employer to other potential victims of discrimination.

Id. at 314 (emphasis added). The same cannot be said for the confidentiality provision here. There is simply no comparison between the job of a retail sales associate (Zuver) and Ms. Turner's job as an Executive Protection Specialist for Mr. Allen and his family. Ms. Turner's job required that she be privy to intimate details of the lives and activities of Mr. Allen and his family—details that they have a perfectly legitimate interest in keeping private. Anyone in Ms. Turner's profession would understand this, and Ms. Turner was explicitly apprised of the need for confidentiality when she accepted the job. *See* CP 2359. Unlike in *Zuver*, this confidentiality provision serves a very important and entirely legitimate purpose—a purpose that goes to the heart of the job that Ms. Turner agreed to perform.

Similarly, unlike in *Zuver*, a confidentiality provision in an agreement between an employer and an executive security professional does not inure to the sole benefit of the employer. *Zuver*, 153 Wn.2d at 315 ("The effect of the provision here benefits only Airtouch."). Given

the necessarily sensitive nature of the job of a personal security professional, a potential employer would likely be dissuaded from hiring a candidate with a history of "public" litigation against former employers. It is in the interest of executive protection professionals in Ms. Turner's position—desiring to litigate claims against their former employers—that the details of those claims not be made public by *either* party.[12]

Finally, if the Court finds that the confidentiality provision is substantively unconscionable, the appropriate remedy would be to sever it and thereby enforce the core of the parties' agreement, that is, the agreement to arbitrate. *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 358-59 (2004) (court should sever unconscionable provisions from agreement to arbitrate because it "facilitates the accomplishment of important federal and state public policies favoring arbitration of disputes" while recognizing that unconscionable provisions should not be enforced).

b. The "Loser Pays" Provision Is Not Substantively Unconscionable.

Ms. Turner argues that a "loser pays" provision in an "intellectual property" agreement she entered with Vulcan renders the arbitration

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[12] *McKee v. AT&T Corp.*, 164 Wn.2d 272 (2008) is even more clearly distinguishable. *McKee* involved a confidentiality provision in an arbitration clause buried in a services agreement between a long distance telephone company and its customers. While a confidentiality provision in that context may well be "one-sided or overly harsh," *id.* at 396, it is not in the entirely dissimilar context of the relationship between an executive security specialist and her employer.

clause in the GBA substantively unconscionable because it interfered with Ms. Turner's statutory rights to attorney's fees. Opening Brief at 34-35. This argument fails for several reasons. First, Ms. Turner failed to make this argument before the trial court, and as such has waived it. *Karlsberg v. Otten*, 167 Wn. App. 522, 531-32 (2012). Second, even if this provision were deemed unconscionable, the proper remedy would be to sever it. *Adler*, 153 Wn.2d at 358-59. Third, she has not shown that she was prejudiced by this provision because the arbitrator restricted its application to her non-statutory claims. CP 3099-3100.

c. The So-Called "Unilateral Litigation Option" Is a Misnomer and Is Not Unconscionable.

Ms. Turner argues that the arbitration agreement contains an unconscionable "unilateral litigation option" for Vulcan. Opening Brief at 36. This is simply not true. The clause she challenges here simply states that Vulcan reserves the right to seek "emergency injunctive relief in court *in aid of arbitration* to preserve the status quo pending determination of the merits in arbitration . . ." CP 281 (emphasis added). That clause does nothing more than permit Vulcan to seek injunctive judicial relief *as necessary to enforce the agreement to arbitrate*. It does *not* purport to restrict Ms. Turner's ability to do the same; it does not limit the damages available to Ms. Turner; and it does not allow Vulcan to elect litigation

over arbitration. *Compare Zuver*, 153 Wn.2d at 315 (provision requiring employee, but not employer, to waive exemplary and punitive damages was substantively unconscionable); *Hill v. Garda CL NW, Inc.*, 179 Wn.2d 47, 55 (2013) (provision restricting employees' rights to back pay damages was substantively unconscionable).

2. Ms. Turner Did Not Demonstrate in *Turner II* That the Arbitration Clause Was Procedurally Unconscionable.

Ms. Turner repeats the arguments that she asserted before Judge Oishi in *Turner I*, that the arbitration provision is unconscionable because:

(1) Ms. Turner had only 24 hours to review it before signing; and

(2) Vulcan had more resources (lawyers and human resources professionals) at its disposal from which to obtain advice regarding the GBA. Opening Brief at 38. This procedural unconscionability challenge was for the arbitrator to decide, not the court, because it goes to the validity of the contract as a whole rather than the arbitration clause in particular. Further, these arguments are refuted on the merits in Section IV-B-2, *supra.*

Ms. Turner also argues that the arbitration agreement is procedurally unconscionable because she received no consideration in exchange for her agreement to arbitrate. Opening Brief at 38. This is simply not true. Ms. Turner received a guaranteed bonus of $25,000 in

exchange for agreeing to sign the GBA, in addition to receiving Vulcan's contractual commitment to arbitrate. CP 280. Ms. Turner argues that Vulcan did not establish, with witness testimony, that any portion of the $25,000 payment was specifically in exchange for the agreement to arbitrate. Opening Brief at 39. But a contract does not fail for lack of consideration simply because a party cannot "apportion" the consideration it provided to particular components of the consideration it received.

V. CONCLUSION

For the foregoing reasons, Mr. Colliver and Ms. Macdonald respectfully request that this Court affirm the order(s) compelling arbitration.

DATED this 15th day of October, 2014.

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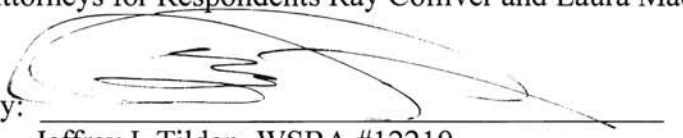
By: 

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the below date, I caused a true and correct copy of this document to be delivered via ABC Legal Services to:

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