

No. 65365-2

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

VULCAN, INC., a Washington Corporation, VULCAN CAPITAL
PRIVATE EQUITY, INC., a Delaware corporation, and VCPE ORANGE
II, LLC, Delaware limited liability company,

Appellants,

v.

DAVID CAPOBIANCO, an individual, and NAVIN THUKKARAM, an
individual,

Respondents.

BRIEF OF RESPONDENTS
DAVID CAPOBIANCO AND NAVIN THUKKARAM

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I. INTRODUCTION

On July 29, 2009, an Arbitration Panel composed of James Smith, Jr., Judge Robert Alsdorf, and Arthur Harrigan entered a unanimous Arbitration Award substantially in favor of David Capobianco and Navin Thukkaram (the “Claimants”) against their former employer, Vulcan, Inc. and certain Vulcan affiliates. The Arbitration Panel found evidence “overwhelmingly favor[ing]” Claimants’ claim that Vulcan had breached Claimants’ profit-sharing agreements and acted in bad faith by firing Claimants in a convoluted scheme designed to circumvent those agreements. It further concluded that Vulcan owes Claimants cash and profit-sharing worth more than \$20 million (based on \$1.5 billion in profits the Claimants earned for Vulcan during their employment).

After losing, Vulcan attempted to undo the award by moving to disqualify one of the three arbitrators for “evident partiality,” alleging—based on nothing but speculation—that Claimants had recruited Arthur Harrigan during the arbitrator selection process to act as a secret partisan on the Arbitration Panel. A neutral arbitrator, Judge Terry Lukens (whom the parties had selected to decide arbitrator disqualification challenges) held a separate evidentiary proceeding to consider Vulcan’s disqualification motion and denied it—finding Vulcan’s arguments of

actual or apparent partiality “unsupported” and “based on unproven supposition” supported by “no facts.” Ex. 2, CP 56. Undeterred, Vulcan filed a Motion to Vacate the award in King County Superior Court, reasserting its challenge to Mr. Harrigan’s impartiality and also arguing that the Arbitration Panel’s award “makes no sense” and is in “manifest disregard of the law.” CP 122. That motion was heard and denied by Chief Civil Judge Paris Kallas, who reviewed Vulcan’s partiality challenge both under (1) the “deferential” standard of review mandated by the United States Supreme Court and (2) the “independent” standard of review urged by Vulcan, and found that the motion to vacate failed under both standards because “the facts do not create a reasonable impression of partiality.” She also decided that “the Final Arbitration Award does not exhibit “manifest disregard of the law[.]” Ex. 1, CP 584.¹

Despite having lost in three separate proceedings before five arbitrators and judges—and despite having had two unsuccessful independent reviews of its disqualification challenge resulting in factual findings that contradict its position—Vulcan once again seeks a “do over” to avoid the consequences of its scheme. Unfortunately, it does so by

¹ For the Court’s convenience, Claimants have included an appendix with this Brief pursuant to R.A.P. 10.3(8) containing the trial court’s Memorandum Decision as **Exhibit 1**; the Lukens Decision as **Exhibit 2**; the Arbitration Panel’s Arbitration Award as **Exhibit 3**, and an index to the Clerk’s Papers as **Exhibit 4**.

leveling unfounded accusations of misconduct and incompetence at the arbitrators and the trial court. Indeed, Vulcan engages in the same kind of sinister speculation regarding Judge Kallas—suggesting that she did not really do the independent review of the evidence that she said she did—as it does regarding the selection-process contacts between Claimants and Mr. Harrigan.

As explained below, the trial court’s ruling should be affirmed.

II. COUNTER-STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

Claimants are private equity professionals who were hired in 2003 to make investments on behalf of Appellant Vulcan, Inc. and its owner, Paul G. Allen. CP 25. Claimants’ efforts were highly successful, generating investment returns currently valued at more than \$1.5 billion. CP 407. This dispute arose from three profit sharing agreements entered into by Claimants, on the one hand, and Vulcan, on the other (“the Agreements”), which provided that Claimants would share in the profits they generated for Mr. Allen. CP 24.

Because the Claimants’ investment performance was so successful, their profit-sharing rights became highly valuable—so valuable, in fact, that Mr. Allen regretted having agreed to share to the extent he had. Accordingly, in late 2008 Vulcan crafted a plan to terminate the Claimants

in a convoluted manner that was intended to circumvent their profit-sharing rights under the Agreements. At 9:00 a.m. on October 24, 2008, Vulcan terminated the entire private equity team and then simultaneously re-hired four of the lowest-compensated team members. CP 25. The simultaneous firing/rehiring was designed by Vulcan to circumvent certain provisions of the Agreements that were intended to protect the team's compensation rights. CP 31, 34-35. Those provisions required that the unvested profit-sharing rights (referred to as "carry") of a terminated team member would automatically be reallocated to remaining team members. By ensuring that the last team member left "standing" would effectively receive the unvested carry of those terminated before him, this provision ensured that Vulcan would have no incentive to fire successful team members as a way to take their unvested carry for itself.

By firing the entire team simultaneously, Vulcan claimed that there was no "last man standing" and that the team's entire unvested carry, worth more than \$20 million, went to Mr. Allen. Indeed, Vulcan's CEO Jody Patton and Lance Conn, President of Vulcan Capital, both testified that the purpose of the firing/simultaneous rehiring scheme was to "stop the [compensation] plan." CP 31. Accordingly, by executing the scheme as it did, Vulcan attempted to do exactly what the Agreements sought to

prevent: take away the unvested carry of the two most successful team members (the Claimants) and unilaterally transfer it to Mr. Allen. *Id.*

B. PROCEDURAL HISTORY

The Agreements required arbitration of any disputes arising under them. CP 60. Accordingly, after being denied their full profit-sharing, Claimants initiated an arbitration against Vulcan alleging breach of express and implied contract, breach of the covenant of good faith and fair dealing, wrongful termination, and seeking remedies including declaratory relief, compensatory and statutory damages, and attorneys fees. CP 217-28. The arbitration clause in the Agreements required Claimants to appoint one arbitrator, Vulcan to appoint another, and required those two party-appointed arbitrators to select a third arbitrator to complete the Panel. CP 60.

The Agreements at issue in the arbitration are extremely complex. For example, one of the central provisions in the Agreements defines “vesting” of Claimants’ profit-sharing rights as follows:

4.8. Vesting. In the event that the employment of any Contributing Member by Vulcan is terminated for any reason, then (a) for purposes of each Specified Investment made at or subsequent to the date of such termination, such Contributing Member’s Specified Sharing Percentage shall be zero, and (b) for purposes of each Specified Investment made prior to the date of any such termination, the Specified Sharing Percentage of any such Contributing Member shall vest as follows: (i) in the case of Founding Class B Members, (A) 20% shall vest on the date of this Agreement, (B) 15% shall vest upon making such Specified

Investment and (C) 45% shall vest monthly in equal installments over a period of three years from the date such Specified Investment is made until the date of such termination and (ii) in the case of Contributing Members that are not Founding Class B Members, (A) 15% shall vest upon making such Specified Investment and (B) 65% shall vest monthly in equal installments over a period of three years from the date such Specified Investment is made until the date of such termination (the vesting described in this clause (b)(i)(A), (B) and (C) and clause (b)(ii)(A) and (B) shall be hereafter referred to as the “Ordinary Vesting”), provided, in each case, that (x) except as otherwise provided in the following sentence, 20% of any such Specified Sharing Percentage will only vest upon a Disposition or Deemed Disposition of such Specified Investment that is made prior to the date of such termination, (y) if a Contributing Member resigns upon the occurrence of, or within two months following, a Technical Termination, all of such Contributing Member’s Specified Sharing Percentage, other than the portion subject to clause (x) above, shall vest and (z) 100% of any such Specified Sharing Percentage will vest upon a Disposition or Deemed Disposition of a Specified Investment that is made prior to the date of such termination. If any Contributing Member elects by delivery of written notice within 30 days of Technical Termination to the Managing Member to be governed by this provision and (a) remains employed with Vulcan for a period of twelve (12) months following a Technical Termination, (b) resigns at the expiration of such twelve-month period, (c) uses his or her reasonable best efforts during such twelve-month period to create an orderly transition for Specified Investments that have not been the subject to a Disposition consistent with Vulcan’s instructions, and (d) performs such other duties which are generally consistent with such Contributing Member’s current position and prior duties at Vulcan as may be requested by Vulcan, in each case in a manner satisfactory to Vulcan in its discretion, then the 20% of the Specified Sharing Percentage of such Contributing Member that pursuant to the preceding sentence would not otherwise vest until a Disposition or Deemed Disposition of a Specified Investment shall vest at the end of such twelve-month period, provided that such Contributing Member shall also be entitled to the vesting described in clause (y) of the prior sentence at the end of such twelve-month period or in connection with any resignation by such Contributing Member prior to the expiration of such twelve-month period. . . .

CP 485-86 (excerpt from profit-sharing Agreement).

Given this complexity, Claimants were understandably concerned about having an arbitration panel experienced with complex commercial transactions and contracts (including private equity transactions), with the desire and patience to spend time analyzing and understanding these contracts, and with the professional qualifications and intellectual capacity to consider the issues presented. CP 54, 583.

Further, Claimants (who had moved to Seattle from New York to work for Vulcan) were concerned about having arbitrators who would be independent of Paul Allen's and Vulcan's influence in the community. CP 54, 583. Accordingly, in selecting their party-appointed arbitrator, Claimants had pre-selection contacts with potential arbitrators — more extensive than would generally be the case — in an effort to identify candidates who were both qualified and independent. *Id.* Those contacts were conducted pursuant to AAA Rule 18(a), which expressly allows the parties and their counsel to engage in *ex parte* communications with candidates during the arbitrator selection process:

[A] party, or someone acting on behalf of a party, may communicate *ex parte* with a candidate for direct appointment pursuant to Section R-12 in order to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidate's qualifications, availability, or independence in relation to the parties or to discuss the suitability of candidates for selection as a third arbitrator where the parties or party-designated arbitrators are to participate in that selection.

Claimants conducted interviews with several potential arbitrators pursuant to Rule 18(a) and selected Arthur Harrigan as their party-appointed arbitrator. CP 205, 273. Vulcan interviewed and selected Judge Robert Alsdorf, and those two party-appointed arbitrators selected James Smith, Jr. as Chairperson of the Panel. CP 250, 279, 24.

This highly qualified Arbitration Panel committed several months to consideration of the contracts, the law, pre-hearing motions, and evidence submitted by the parties. CP 23-24, 412. It considered lengthy arbitration briefs, heard live witness testimony, and considered extensive documentary evidence in a four-day hearing. *Id.* And on July 29, 2009, the Panel detailed its findings in a 21-page reasoned award (the “Arbitration Award”). Ex. 3, CP 23-43. In that Arbitration Award, it unanimously found in Claimants’ favor that Vulcan had breached the Agreements and also that Vulcan had breached the covenant of good faith and fair dealing. *Id.* at 31-32, 35. The Panel also found in Vulcan’s favor on other counts, dismissing Claimants’ claims for breach of implied contract and wrongful termination, and dismissing Claimants’ claims to severance payments. *Id.* at 34, 37, 39.

Following the reasoned award, Vulcan announced that it would seek to vacate the Panel’s decision. CP 378-80. Vulcan alleged that the “impartiality of the tribunal was compromised” by Claimants’ *ex parte*

contacts with Mr. Harrigan while interviewing him for possible selection as their party-appointed arbitrator—even though AAA Rule 18(a) specifically allows parties and their counsel to communicate *ex parte* with potential party-appointed arbitrators. *Id.* Based on time entries in Mr. Harrigan’s billings (which had been voluntarily provided to Vulcan as part of Claimants’ request for an award of attorney fees and costs), Vulcan sought to disqualify Mr. Harrigan from the Arbitration Panel. *Id.*

The parties had agreed at the outset of the arbitration that any attempt to disqualify an arbitrator would be decided in a separate proceeding by an arbitrator specifically selected for that purpose—Judge Terry Lukens of JAMS—and that Judge Lukens’ decision would be “final.” CP 63. Vulcan took advantage of that provision and filed its “Motion to Disqualify Arbitrator” with Judge Lukens. CP 52.

The parties submitted extensive briefing and evidence to Judge Lukens—Vulcan’s submissions included 47 pages of briefs and 313 pages of supporting exhibits—and on November 30, 2009, Judge Lukens heard oral argument from the parties in a two-hour hearing. CP 52, 9. On January 8, 2010, Judge Lukens denied Vulcan’s Motion to Disqualify in a five-page reasoned decision. CP 52-56. He found that AAA Rule 18(a) expressly permitted *ex parte* selection-process contacts between Claimants and Mr. Harrigan, and he found as a factual matter that Claimants’

communications with Mr. Harrigan were entirely proper under this Rule, as were those between Vulcan and its party-appointed arbitrator Judge Alsdorf. CP 54. Judge Lukens also found that Vulcan had—and waived—an opportunity to learn about the nature of those contacts; that there was nothing to suggest any bias or impartiality “actual or implied” on Mr. Harrigan’s part; and that there was “no evidence of bias or improper influence in the final, unanimous award.” CP 56.

On February 9, 2010, the Arbitration Panel issued its Final Arbitration Award, awarding Claimants damages, declaratory judgments regarding profit-sharing rights, and awarding attorneys fees and costs, and incorporated the Lukens Decision by attaching it as an exhibit to the Final Arbitration Award and making it “a part hereof.” CP 17.

Despite having lost in what was supposed to be a “final” determination on the issue, Vulcan filed its Motion to Vacate in King County Superior Court on March 8, 2010 alleging, once again, that Mr. Harrigan’s contacts with Claimants resulted in “evident partiality” and also alleging that the unanimous award entered by the Arbitration Panel “makes no sense” and exhibits “manifest disregard for the law.” CP 94, 122. The same day, Claimants moved to confirm the Final Arbitration Award and the Lukens Decision. CP 1. Vulcan’s Motion to Vacate and Claimants’ Motion to Confirm were consolidated and assigned to Chief

Civil Judge Paris Kallas. The parties agreed on a briefing schedule and jointly scheduled a hearing before Judge Kallas for March 26, 2010. CP 577-78.

In their briefs and argument to Judge Kallas, the parties fundamentally disagreed about the scope of the trial court's review: Claimants argued that the parties specifically agreed to submit arbitrator disqualification issues to arbitration before Judge Lukens, and thus the trial court was required to review the Lukens Decision under the deferential standard applied to any arbitration decision (CP 580); Vulcan, on the other hand, urged the trial court "to independently assess the merits of the disqualification issue." *Id.*

On the eve of the hearing — and noted for the same day as the motions to vacate and to confirm — Vulcan filed a *conditional* motion for limited discovery ("Conditional Discovery Motion"), in which Vulcan requested leave to conduct discovery "in the event (and *only* in the event)" that the trial court applied the deferential review urged by Claimants; to the extent the trial court conducted an independent review, Vulcan stated, "no discovery is necessary." CP 528, 532, 566, 569.

The parties argued their cross-motions to Judge Kallas on March 26, 2010, and the Court took the matter under advisement. CP 578. On April 6, 2010, the trial court issued an order denying Vulcan's Motion to

Vacate and granting Claimants' Motion to Confirm, along with a 7-page memorandum decision ("Memorandum Decision"). Ex. 1, CP 586-87, 579-85. In that Memorandum Decision, the trial court found that Claimants were correct as to the applicable deferential legal standard; nonetheless, the trial court explained that it had also conducted an independent review of the evidence and found no facts to support a reasonable impression of partiality. *Id.* at 583. Under either standard, she concluded, Vulcan failed to show a basis for vacatur. *Id.* at 583-84.

In addition, the trial court found Vulcan's Conditional Discovery Motion was rendered moot because the trial court "independently considered the partiality challenge and rejects it." *Id.* at 585.

Following entry of the trial court's order and a judgment, Vulcan filed its appeal to this Court. CP 688.

C. CORRECTING VULCAN'S MISSTATEMENTS OF THE RECORD

Before addressing legal arguments, Claimants would like briefly to correct several serious misstatements of the record in Vulcan's brief.

First, Judge Kallas clearly stated three times in her Memorandum Decision that she conducted an independent review of the disqualification

issue,² and she devoted a two-page section of that Decision (entitled “Impartiality Challenge fails under Independent Review”) to explaining her analysis. Ex. 1, CP 583-84.

Nevertheless, Vulcan suggests repeatedly that the trial court did not conduct an independent review:

- “the trial court abdicated its statutory duty to independently assess the impartiality of the arbitrator” (App. Brief at 2);
- “while purporting to conduct an independent review, the [trial] court parroted the ‘no evidence’ conclusion from the [Lukens] disqualification decision” (*id.* at 16);
- the trial court held “seemingly as an after-thought, that even if it had to conduct its own independent analysis of the Award under the FAA, it would find no flaws justifying vacatur” (*id.* at 29); and
- the trial court “treated as gospel the ‘facts’ as stated by Judge Lukens.” *Id.* at 34.

Vulcan’s puzzling refusal to concede that Judge Kallas did what she said she did — conduct an independent review — apparently reflects the devastating effect of that independent review on Vulcan’s appeal.

² “[T]his court has independently reviewed [Vulcan’s] arguments and applicable authority [that “Arbitrator Harrigan’s undisclosed *ex parte* pre-appointment contact requires vacation of the arbitration award”] (Ex. 1, CP 583, lines 10-14); “[T]his court has independently considered the partiality challenge and rejects it for all the reasons stated herein.” (*Id.* at 584, lines 22-23); and “[Vulcan’s discovery] motion is withdrawn if the court conducts independent review of the other disqualification/vacation challenges . . . this court has done so[.]” (*Id.* at 585, lines 5-7).

Second, Vulcan repeatedly accuses the trial court of “ignoring” or “disregarding” specific evidence in the record. In particular, Vulcan accuses the trial court of “ignoring” Mr. Harrigan’s invoices:

- the trial court “ignored the record evidence” and its decision “makes no mention at all of Mr. Harrigan’s invoices” (App. Brief at 2-3);
- the trial court decided “without any effort to address the invoices upon which the motion to vacate was based . . . The word ‘invoice’ does not appear in the trial court’s order.” (*id.* at 16);
- “the court failed even to describe the record facts: There is no mention in the opinion of Mr. Harrigan’s own invoices.” *Id.* at 35 (emphasis in original).

These statements are incorrect. First, the trial court expressly referenced Mr. Harrigan’s invoices (referring to them as “billings”) in the section of her Decision describing her independent review. Ex. 1, CP 584, lines 4-5. Second, the court expressly referred to Vulcan’s evidence regarding “the extent of the pre-appointment contact” (*Id.* at 583)—the only source of which were the invoices.

And importantly, Vulcan completely misconstrues both the invoices themselves and the trial court’s decision. The trial court specifically explained that because *ex parte* contacts with potential arbitrators are expressly permitted under AAA Rule 18(a), Vulcan “must show something more” than what the invoices describe. *Id.* at 583; *see also* Ex. 2, CP 56 (Lukens Decision: Vulcan offers nothing other than

“unproven supposition that something untoward must have occurred during the pre-selection meetings with candidate Harrigan” and “[t]here are no facts presented to support this supposition”).

Third, Vulcan repeatedly and wrongly states that the trial court endorsed *ex parte* discussion of the merits:

- “the court ignored the bright-line prohibition against discussing the merits” (App. Brief at 3);
- the court “arguably mandated counsel for arbitrating parties to affirmatively communicate about the merits with potential arbitrators” (*id.* at 4); and
- the court’s decision would effect a “sea change” in arbitration and “would all but guarantee that hours of undisclosed, merits-based discussion with purportedly neutral arbitrators becomes the new norm in arbitrations.” *Id.* at 29.

This mischaracterizes the trial court’s Decision, which explicitly found that “because *ex parte* contact is not prohibited in the arbitration context, [Vulcan] must show something more”—*i.e.*, discussion of the merits—and found that “this case does not involve . . . discussion of the merits.” CP 584, lines 8-10. The trial court did not endorse *ex parte* discussion of the merits with an arbitrator; rather, it conducted an independent review and found that the merits had not been discussed.³

³ The same is true of the Lukens Decision. Judge Lukens found that “[w]hile [AAA Rule 18(a)] certainly contemplates that no discussion of the merits is permitted . . . the matters discussed in this case fall within the permitted scope of Rule 18(a).” CP 54.

Ironically, these misstatements and distortions, as well as Vulcan’s attacks on the trial court’s decision-making process, are precisely what Claimants had come to expect from their former employer—and it was that expectation that compelled them to spend the time necessary to identify and select a strong and independent arbitrator.⁴

III. ARGUMENT

A. STANDARDS OF REVIEW

This appeal is guided by two separate standards of review: first, the standards applicable to this Court’s review of the trial court decision; and second, the standard of review that courts — including the trial court and this Court — are required to apply when reviewing arbitration decisions.

1. This Court Reviews The Trial Court’s Legal Standard *De Novo*, Its Factual Findings For Clear Error, And Its Denial Of The Discovery Motion For Abuse Of Discretion.

Vulcan’s Brief blithely states in a single sentence that this Court reviews the trial court’s decision *de novo*. App. Brief at 16, citing *Woods v. Saturn Distrib. Corp.*, 78 F.3d 424, 427 (9th Cir. 1996). That is only partially correct. As the *Woods* case explains, this Court reviews the legal standard applied by the trial court *de novo*, but “[f]actual findings

⁴ Throughout this litigation, Vulcan has engaged in a regrettably public attack on the integrity and competence of the arbitrators—sending a copy of its Motion to Vacate to The Seattle Times and the Wall Street Journal within hours of filing it, and accusing Mr. Harrigan in the press of “inexplicable” conduct. CP 409.

underlying the court’s decision will be reversed only for clear error.”⁵

Woods, 78 F.3d at 427 (emphasis added).

Further, a separate standard altogether applies to the trial court’s denial of Vulcan’s Conditional Discovery Motion. That decision would be reviewed for abuse of discretion—if the issue had, in fact, been preserved for appeal; however, Vulcan withdrew the motion when the trial court conducted its independent review of the impartiality challenge, and thus the issue is not preserved for appeal. *See* Section IV.C, *infra*.

2. The Federal Arbitration Act Governs Court Review Of The Final Arbitration Award And The Lukens Decision.

The parties agree that the trial court’s decision whether to confirm or vacate the Final Arbitration Award is governed by the Federal Arbitration Act (“FAA”), which provides that a court “must” confirm an award unless a specific statutory ground for vacatur, modification, or correction is established. App. Brief at 16-17. As the United States Supreme Court has explained:

On application for an order confirming the arbitration award, the court “must grant” the order “unless the award is

⁵ “Clear error” review means that the party challenging a finding of fact “bears the burden of demonstrating the finding is not supported by substantial evidence.” *Nordstrom Credit, Inc. v. Dep’t of Revenue*, 120 Wn.2d 935, 939-40, 845 P.2d 1331 (1993). If substantial evidence supports the finding, it does not matter that other evidence may contradict it, *State v. Camarillo*, 115 Wn. 2d 60, 71, 794 P.2d 850 (1990), as appellate courts do not weigh conflicting evidence. *Reynolds Metals Co. v. Elec. Smith Const. & Equip. Co.*, 4 Wn. App. 695, 699, 483 P.2d 880 (1971).

vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.”

Hall Street Assocs., LLC v. Mattel, Inc., 552 U.S. 576, 587 (2008).

Vacatur, on the other hand, is discretionary.⁶ As the Ninth Circuit recently explained: “[t]he FAA provides that a district court *may* vacate an arbitration award” for one of the four enumerated reasons in Section 10 (including “evident partiality,” arbitrator “misconduct,” or arbitrators “exceeding their authority”). *Rosenfeld v. Gruma Corp.*, ___ F.3d ___, 2010 WL 3194622 (9th Cir. Aug. 13, 2010) (emphasis in original) (contrasting discretionary nature of vacatur under the FAA with mandatory vacatur under California arbitration statute).

Furthermore, the Ninth Circuit repeatedly has emphasized that “[t]he scope of a confirmation proceeding . . . is ‘extremely limited’” (*id.*) (quotation omitted), and has cautioned that:

Possibly because the nature of our review in these cases is so unusual, there may be a tendency for judges, often with the most unobjectionable intentions, to exceed the permissible scope of review and to reform awards in [the judge’s] own image of the equities or the law . . . Under the FAA, however, the reform of arbitration awards, including the severe remedy of vacatur, is limited by those grounds established by Congress in the Act.

Lagstein v. Certain Underwriters, 607 F.3d 634, 647 (9th Cir. 2010).

⁶ Vulcan mistakenly argues in its brief that vacatur is mandatory if a party establishes evident partiality. *See, e.g.*, App. Brief at 36 (“An arbitration award must be vacated for ‘evident partiality’”).

The trial court adhered carefully to that warning, and reviewed the Panel's Award and the Lukens' Decision according to the following limitations:

First, a court has “no authority to re-weigh the evidence’ presented to the arbitration panel.” *Bosack v. Soward*, 586 F.3d 1096, 1105 (9th Cir. 2009). To the contrary, “[w]hether or not the panel’s findings are supported by evidence in the record is beyond the scope of [a court’s] review.” *Id.*

Second, a court does not conduct a *de novo* review of the arbitrators’ findings of fact or conclusions of law, but confines its review to determining whether the parties in fact had an opportunity to arbitrate their claims in the manner they agreed to. *See Wise v. Wachovia Sec., LLC*, 450 F.3d 265, 269 (7th Cir. 2006) (“When parties agree to arbitrate their disputes they opt out of the court system . . .”).

Third, where parties have expressed their intent to arbitrate a particular issue or grievance related to the arbitration itself (such as the issue of arbitrator disqualification), “the court’s standard for reviewing the arbitrator’s decision about that matter should not differ from the standard courts apply when they review any other matter that the parties have agreed to arbitrate.” *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (emphasis in original).

B. THE TRIAL COURT CORRECTLY DENIED VULCAN’S MOTION TO VACATE BECAUSE VULCAN COULD NOT ESTABLISH EVIDENT PARTIALITY OR MISCONDUCT UNDER ANY STANDARD OF REVIEW.

Vulcan attempted to persuade the trial court that Claimants’ *ex parte* selection process interviews of Arbitrator Harrigan constituted both “evident partiality” of an arbitrator under Section 10(a)(2) and arbitrator misconduct under Section 10(a)(3).⁷ The trial court properly rejected each of those arguments.

As explained above, the parties fundamentally disagreed about the proper scope of the trial court’s review of the Lukens Decision. While Claimants argued that the trial court should apply a deferential standard mandated by the United States Supreme Court, Vulcan urged the trial court “to independently assess the merits of the disqualification issue.” CP 580. The trial court decided that Claimants were correct as to the applicable legal standard, but nonetheless reviewed the Motion to Vacate under *both* standards, and found that the motion failed either way.

⁷ Vulcan refers both to “evident partiality” and “arbitrator misconduct” in its papers. While each is a separate ground for vacatur under Section 10(a) of the FAA, Vulcan relies on the same flawed allegations to support both grounds. *See* App. Brief at 29 (“The extensive, substantive, *ex parte* communications among Mr. Harrigan, [Claimants], and their counsel constitute prejudicial misbehavior under § 10(a)(3) and demonstrate evident partiality under § 10(a)(2).”). The arguments in this brief addressing evident partiality are equally applicable to the allegation of misconduct.

1. **Deferential Review: The Trial Court Correctly Concluded That The Supreme Court’s Decision In *First Options of Chicago v. Kaplan* Required Deferential Review Of The Lukens Decision.**

In deciding the appropriate scope of its review, the trial court was guided by the Supreme Court’s decision in *First Options of Chicago v. Kaplan*, 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1996). In that case, the parties disagreed over whether their dispute was in fact arbitrable and also disagreed about who had the power to decide the issue of arbitrability (the arbitrator or the courts). *Id.* at 942. The Court explained:

We believe the answer to the “who” question (i.e., the standard-of-review question) is fairly simple. Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, . . . so the question “who has the primary power to decide arbitrability” turns upon what the parties agreed about *that* matter. Did the parties agree to submit the arbitrability question itself to arbitration? If so, then the court’s standard for reviewing the arbitrator’s decision about *that* matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate. . . . That is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances.

Id. at 943 (internal citations and quotations omitted) (italics in original)

(underlining added). The Court went on to clarify when an “independent” review is appropriate:

If, on the other hand, the parties did *not* agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently. These two answers flow inexorably

from the fact that arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.

Id. (italics in original) (underlining added).

Accordingly, the threshold question presented to the trial court was whether the parties agreed to submit allegations of arbitrator partiality to arbitration. If so, then the trial court’s review “should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate,” *i.e.*, the trial court conducts a deferential review.

a. The parties agreed to arbitrate challenges to arbitrator impartiality before Judge Lukens.

The answer to that threshold question is seemingly clear: the parties agreed to arbitrate allegations of arbitrator partiality. The parties’ Arbitration Protocol plainly provides that:

In the event that a Party seeks to disqualify an arbitrator for one of the reasons set forth in [Commercial Arbitration Rule] 17(a) [including alleged partiality], the Parties agree that a neutral third party shall determine whether the challenged arbitrator shall be disqualified. The neutral third party’s determination on the issue shall be final. For this purpose only, the neutral third party shall be the Honorable Terry Lukens (ret.) . . .

CP 63. Vulcan initiated the arbitration before Judge Lukens knowing that his decision would be “final.” In the trial court, however, Vulcan argued that the arbitration before Judge Lukens was not in fact an arbitration, but

merely “an interlocutory, procedural order” or a “procedural detour” and thus urged the trial court not to afford it any deference. CP 335, 519.

The trial court correctly rejected that argument. It weighed the evidence submitted by both parties, and found as a factual matter that the evidence “fails to support [Vulcan’s] characterization.” CP 580. The trial court noted that “the parties treated the proceeding as an arbitration;” that “Judge Lukens described the proceedings as an arbitration and described himself as an arbitrator;” and that “the parties agreed that a challenge to arbitrator partiality . . . would be decided by Judge Lukens and that his decision would be final.” CP 580-81.

The trial court’s factual finding that the arbitrator disqualification proceeding before Judge Lukens was an arbitration is reviewed for clear error. In other words, Vulcan “bears the burden of demonstrating the finding is not supported by substantial evidence.” *Nordstrom Credit, Inc.*, 120 Wn.2d at 939-40.

The trial court’s finding was based upon substantial evidence: (1) the parties’ Arbitration Protocol (CP 62); (2) the Lukens Decision itself (CP 50); and (3) evidence showing that “the proceeding was treated as an arbitration” with the parties submitting “nearly 50 pages of briefing, over 300 exhibits, and Judge Lukens hear[ing] oral argument on the matter.” CP 581, 413. Indeed, the trial court found:

Likewise, Judge Lukens described the proceedings as an arbitration and described himself as the arbitrator. Judge Lukens sent the parties a notice entitled *Commencement of Arbitration and Notice of Appointment of Arbitrator*. The notice “confirms the appointment of Hon. Terry Lukens (Ret.) as the arbitrator” and further confirms that “this arbitration shall be conducted in accordance with the AAA Commercial Arbitration Rules.” And in his five-page reasoned decision, Judge Lukens describes the proceedings as an arbitration.

CP 581.⁸

Accordingly, Vulcan has failed to show that the trial court’s finding that the Lukens Decision was rendered “in an arbitration” was clearly erroneous.

b. The Lukens Decision is reviewed deferentially regardless of whether it is a “decision” or an “award,” and regardless of whether it was entered “within” the arbitration or in a separate arbitration.

On appeal, Vulcan argues that the Lukens Decision was “an interlocutory decision on a procedural matter, collateral to but rendered within the arbitration” and “not an ‘award.’” App. Brief at 26. Vulcan’s attempt to draw semantic distinctions between an “interlocutory decision” and an “award” is a red herring. The Supreme Court in *First Options* did not distinguish between an arbitrator’s “decision” and an arbitrator’s “award.” To the contrary, the Court held that the “a court must defer to an arbitrator’s arbitrability decision when the parties submitted that matter to

⁸ Judge Lukens sent the notice entitled “Commencement of Arbitration and Notice of Appointment of Arbitrator” to four Vulcan attorneys—Bradley Keller, Joshua Selig, James Savitt, and Stephen Willey. CP 504. None objected to the characterization of the proceeding as an “arbitration” or Judge Lukens as an “arbitrator.”

arbitration.” *First Options*, 514 U.S. at 943 (emphasis added). Indeed, the arbitrability decision at issue in *First Options* was itself a threshold decision “on a procedural matter” that was “rendered within the arbitration.” *See id.* *First Options* expressly addresses “the court’s standard for reviewing [an] arbitrator’s decision” on a matter other than the merits. *Id.* Vulcan cannot credibly argue that it did not agree to arbitrate the challenge to Mr. Harrigan’s impartiality before Judge Lukens or that the Lukens Decision is not an “arbitrator’s decision.”

c. Deferential review does not mean that Vulcan “lost” or “waived” its right to judicial review.

Vulcan argues that the trial court’s deferential review of the Lukens Decision effectively means that Vulcan somehow “lost” or “waived” its right to judicial review. App. Brief at 18, 21. That is not so. “Deferential review” is review—indeed, it is precisely the type of review the parties contracted for and the FAA provides. *See UMass Mem. Med. Ctr., Inc. v. United Food & Commercial Workers Union*, 527 F.3d 1, 6 (1st Cir. 2008) (“despite these exceptions [in Section 10(a)], great deference remains the general mode of approach to judicial review of arbitral awards”).

In the trial court, Vulcan repeatedly misconstrued Claimants’ position by suggesting Claimants were trying “to prevent” the trial court from reviewing the Final Arbitration Award under the FAA, “stripping”

the Court of its authority to review arbitration awards for evident partiality, or “shielding” the Final Arbitration Award from judicial review. CP 332, 335. Now, on appeal, Vulcan is attempting again to misrepresent the effect of its agreement to arbitrate issues of arbitrator impartiality.

Claimants’ position—in the trial court and before this Court—is that when the trial court conducted its review of the Final Arbitration Award, it was required to give the same deference to the findings made by Judge Lukens that it gave to the Panel’s Award. This is so because (1) the parties agreed that Judge Lukens would resolve arbitrator partiality disputes; (2) pursuant to that agreement, Vulcan initiated an arbitration before Judge Lukens that included a full evidentiary hearing; (3) the Supreme Court requires that where parties agree to arbitrate particular issues, arbitrators’ decisions on those issues are entitled to the same deferential review as a decision on the merits; and (4) Vulcan has shown no basis under Section 10(a) for vacating, modifying, or correcting the Lukens Decision.

Vulcan attempts to distinguish *First Options* as “inapposite” by arguing that the Supreme Court was only addressing the parties’ agreement to arbitrate the issue of *arbitrability*, not *impartiality*. App. Brief at 27. This is a distinction without a difference. Both arbitrability and partiality may be grounds for vacatur under Section 10(a) of the FAA

— arbitrability under 10(a)(4) and impartiality under 10(a)(2).⁹ And yet, *First Options* makes clear that if the parties agreed to have “arbitrability” decided by an arbitrator, then the arbitrator’s decision on that issue is subject to deferential review by the trial court—even though Section 10(a)(4) gives courts authority to review awards alleged to exceed the arbitrator’s authority. Vulcan has not explained why arbitrated disputes about arbitrator impartiality under 10(a)(2) should be treated differently than arbitrated disputes over arbitrator powers under 10(a)(4) — because that argument cannot be reconciled with the language of *First Options*.

Taking a different tack, Vulcan cites a handful of cases holding that a party who requests disqualification of an arbitrator during an arbitration is not precluded from reasserting its objections later in a confirmation proceeding before a judicial tribunal. *See* App. Brief at 21-22. These cases actually prove precisely the *opposite* point Vulcan intends them to prove.

All of the cases Vulcan cites were arbitrated before the AAA and involved attempts to disqualify an arbitrator through the AAA’s *administrative* procedure. None involved an *adjudicative* proceeding like the arbitration before Judge Lukens. This distinction is crucial, as is made

⁹ “[W]hen an issue is non-arbitrable,” an arbitrator exceeds his powers under § 10(a)(4) if he decides it. *Klay v. United Healthgroup*, 376 F.3d 1092, 1112 n. 20 (11th Cir. 2004).

clear in the court’s reasoning in one of those cases—*Beebe Medical Center, Inc. v. InSight Health Services Corp.*, 751 A.2d 426 (Del. Ch. 1999). In *Beebe*, the Delaware Chancery Court declined to give deference to a decision on disqualification made by the AAA in the underlying arbitration because there was no evidentiary record supporting the disqualification decision. *See id.* at 430-31. Indeed, the court specifically noted that the “AAA did not hold a hearing” regarding the alleged partiality, but rather issued a “hurried response” to the partiality claim that did “not articulate a basis for [its] decision.” *Id.*

The opposite is true here. Far from the “hurried response” at issue in *Beebe*, the parties provided extensive briefs and evidentiary materials, a lengthy hearing was held, and Judge Lukens issued a well-reasoned five-page opinion containing findings of facts and conclusions of law. CP 52. Moreover, unlike the parties in *Beebe*, Vulcan contractually agreed that disputes regarding arbitrator partiality would be determined by Judge Lukens and that his decision would be “final.” In fact, the *Beebe* court expressly declined to address the appropriate result in a case like this, where the parties agreed to arbitrate issues of partiality. *Id.* at 439.¹⁰

¹⁰ The trial court likewise rejected any comparison to *Beebe*, noting in addition that the parties in *Beebe* were bound by AAA Rule 19 (requiring a party to exhaust remedies before raising the bias issue in a judicial forum), while Claimants and Vulcan expressly negotiated in their Arbitration Protocol that Rule 19 would not apply. CP 582-83. The same distinctions apply to the other cases Vulcan cites for this point.

Accordingly, the trial court's decision to review the Lukens Decision deferentially was well supported—legally and factually. Nevertheless, as the next section of this brief explains, the trial court—at Vulcan's request—also conducted an independent review of Vulcan's impartiality challenge.

2. Independent Review: The Trial Court Conducted An Independent Review Of Vulcan's Arbitrator Impartiality Challenge And Correctly Found No Basis For Vacatur.

As discussed above at Section II.C, Judge Kallas made clear in her opinion that she conducted an independent evidentiary review of Vulcan's claims (and in so doing applied the "reasonable impression" standard as urged by Vulcan).

Nevertheless, and without explanation, Vulcan suggests throughout its brief that the trial court did not conduct an independent review of its challenge to Mr. Harrigan's impartiality. This is a most regrettable misstatement. There is no basis whatsoever for Claimants to suggest that the trial court "purported" to do something that the trial court specifically said it did do, or that the trial court's independent review was "seemingly an after-thought." App. Brief at 16, 29. To the contrary, the trial court did so and found no evidence (or reasonable inference from evidence), nor any relationship or motive, to support a reasonable impression of partiality.

a. The trial court found no evidence to support a “reasonable impression of partiality.”

Vulcan suggests that the trial court “ignored” or “disregarded” specific evidence in the record; and that the trial court “parroted” Judge Lukens’ decision “without any effort to address the invoices on which the motion to vacate was based.” App. Brief at 2-3, 16.¹¹ Vulcan even goes so far as to state misleadingly that “[t]he word ‘invoice’ does not appear in the trial court’s order.” *Id.* at 16.

In fact, the trial court’s decision expressly referenced those invoices (referring to them as “billings” rather than using the word “invoice”). CP 584. Noting that “Arbitrator Harrigan submitted billings for ‘legal services,’” the trial court rejected any inference of partiality from those “billings.” *Id.* Vulcan never attempts to address what both Judge Kallas and Judge Lukens found wanting in their allegations of impartiality: some evidence that the selection process contacts exceeded the permissible bounds of Rule 18(a). Vulcan never truly responds to this infirmity, but instead simply asserts without any evidentiary support that

¹¹ Vulcan complains that Judge Kallas relied on facts found by Judge Lukens and states “that is not how any court resolves factual disputes among litigants.” App. Brief at 34. Vulcan is wrong. That is precisely what courts reviewing arbitration awards are required to do, because courts have “no authority to re-weigh the evidence” presented to the arbitrator. *Bosack*, 586 F.3d at 1105 (“Whether or not the panel’s findings are supported by evidence in the record is beyond the scope of [a court’s] review.”). And yet, at Vulcan’s urging the trial court nonetheless conducted an independent review of Vulcan’s evidence and argument and still rejected its position.

the invoices show that “Mr. Harrigan’s *ex parte* communications with [Claimants] transgressed appropriate boundaries.” App. Brief at 32.

In fact, Mr. Harrigan’s invoices show nothing of the sort. His time entries relating to the appointment process are contained in a single invoice, and they provide in their entirety (at CP 200):

- 11/25/08 Interview with R. Yarmuth. (1.70 hours)
- 12/03/08 Review draft demand again; meet with R. Yarmuth and parties to discuss overview, potential neutral arbitrator, and timing/schedule issues. (1.80 hours)
- 12/04/08 Read draft demand and begin contract review; note questions for clarification of facts. (1.60 hours)
- 12/05/08 Telephone conference with R. Yarmuth with questions re background facts. (.40 hours)

There is, quite simply, nothing in these time records to support Vulcan’s repeated allegation of “hours of merits-based discussion.” *See* App. Brief at 29. Each subject identified—overview, potential neutral arbitrator and timing/schedule issues—is a permissible subject of discussion under Rule 18(a). And, Vulcan never explains why—if Mr. Harrigan were truly providing “secret counsel” to Claimants or “test-driving” their case—both he and Claimants’ counsel would openly describe those meetings in their time entries and then elect to send their invoices to Vulcan.

Instead, Vulcan makes a number of misleading statements that it suggests are drawn from the invoices but in fact are not. For example:

- Vulcan states that “Mr. Harrigan discussed the draft demand at a meeting with Mr. Yarmuth and [Claimants].” (App. Brief at 32). In fact, the invoices say no such thing. The invoices state that meetings occurred, but say nothing about discussion of the draft demand.
- Vulcan misleadingly states that “[Claimants’] counsel reviewed and revised the Demand after each discussion with Mr. Harrigan.” *Id.* In fact, Claimants’ counsel’s invoices show that they reviewed and revised the Demand nearly every day for several weeks until it was filed. CP 204-09. The fact that meetings with Mr. Harrigan and other potential arbitrators occurred during that period does not suggest some causal connection between the contacts with Mr. Harrigan and the review and revision of the Demand.
- Vulcan suggests that “the purpose of these interactions [may have been] to gauge Mr. Harrigan’s receptiveness to [Claimants’] claims (as might be inferred from their parallel interactions with other potential arbitrators).” App. Brief at 33. This is a wholly unsupported inference. Parallel meetings with multiple arbitrator candidates are simply evidence that Claimants communicated with multiple candidates—as is expressly permitted by Rule 18(a). Vulcan’s “inference” of the purpose of those interactions is simply speculation.

Unwarranted and speculative inferences like these are the sole basis of Vulcan’s impartiality challenge: Vulcan somehow infers from the fact of “meetings” and “interactions” between Claimants and Mr. Harrigan that the substance or purpose of those meetings and interactions “must

have been” improper.¹² And yet, as both Judge Lukens and Judge Kallas found, no evidence exists to support those inferences.

b. Vulcan could identify no motive or bias that might have motivated Mr. Harrigan to serve as a secret partisan for Claimants.

Vulcan has repeatedly contended that “any reasonable person” would conclude that Claimants’ selection process interviews with Mr. Harrigan create a “reasonable impression of partiality.” App. Brief at 2; *see also* CP 566. And yet, both Judge Lukens (whom Vulcan specifically *chose* to make such determinations) and Judge Kallas (the Chief Civil Judge of the Superior Court at the time of the hearing on the Motion to Vacate) — both undoubtedly “reasonable persons” — entered factual findings that were precisely to the contrary after reviewing Vulcan’s evidence. Both judges noted that permissible contacts alone do not create a “reasonable impression” of partiality, and instead required Vulcan to show something more—some relationship or motive—that might support an inference of bias. And yet, Vulcan was unable to identify any evidence to support their bald allegation that Claimants’ pre-

¹² Likewise, Vulcan’s attempts to infer improper conduct from Mr. Harrigan’s review of Claimants’ draft Demand for Arbitration (and the Agreements on which the Demand was based) are hollow. Those documents identified the claims being asserted and contained the names of twenty individuals and nineteen entities with some connection to the parties or the dispute—thus enabling an arbitrator candidate to understand the nature of the dispute and to identify potential conflicts. *See* CP 217-28; 160-98. The Demand was still in draft because it had not yet been served at the time of the interviews. CP 228.

selection contacts with Mr. Harrigan, “transgressed appropriate boundaries, delving well into the merits of the case.” App. Brief at 32.

Courts have observed that partiality or bias may arise when there is something “that one could do to curry favor with the other.” *Apusento Garden (Guam) Inc. v. Superior Court of Guam*, 94 F.3d 1346, 1353 (9th Cir. 1996), *cert. denied*, 489 U.S. 1018 (1989). For that reason, cases finding partiality or bias, or the “reasonable impression” thereof, generally involve business relationships (in which an arbitrator might benefit from the arbitration result or from an enhanced relationship with a party or a party’s counsel) or personal/familial relationships (which might bear on an arbitrator’s sympathies). *See, e.g., Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 146 (1968) (business relationship between arbitrator and party was “repeated and significant” and included work on the very projects in dispute); *Morelite Constr. Corp. v. N.Y. City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 83 (2d Cir. 1984) (arbitrator’s father was president of union involved in dispute).

Nothing similar exists—or has ever been alleged—in this case. To the contrary, Vulcan has never been able to identify any relationship creating a motive for Mr. Harrigan to act as a secret partisan on the Arbitration Panel. *See* CP 584 (Memorandum Decision: “[T]his case does

not involve past legal representation, family connections, solicitation of future business, receipt of hospitalities, or discussion of the merits”).

The failure to identify any such relationship or motive means that Vulcan has failed to meet the “heavy burden” of showing evident partiality. *See Williams v. NFL*, 582 F.3d 862, 885 (8th Cir. 2009) (evident partiality requires facts “*objectively* demonstrat[ing] such a degree of partiality that a reasonable person could assume that the arbitrator had *improper motives*”); *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 278 F.3d 621, 626 (6th Cir. 2002) (evident partiality requires “specific facts that indicate *improper motives* on the part of the arbitrator”). Vulcan’s failure to identify any relationship or motive suggesting bias underscores the hollowness of Vulcan’s allegation of evident partiality.

3. The Trial Court Correctly Found That Non-Disclosure Of Selection-Process Contacts Did Not Create A Reasonable Impression Of Partiality.

Vulcan attempts to create an additional basis for finding evident partiality by arguing that even if the selection-process contacts themselves were not sufficient to vacate the award, Mr. Harrigan’s “failure to disclose” them is. App. Brief at 36. Vulcan charges that the selection-process contacts established a “professional or business relationship” between Claimants and Vulcan, and that the failure to disclose that

relationship creates a “reasonable impression of partiality.” *Id.* As evidence of that supposed “relationship,” Vulcan points to the fact that Mr. Harrigan billed Claimants for the time spent during the selection process. App. Brief at 38. This strained argument fails for two reasons.

First, both the trial court and Judge Lukens rejected the non-disclosure argument because Vulcan knew that selection-process contacts had occurred, but declined to seek disclosure of the scope or nature of those contacts. Indeed, at the beginning of the arbitration Vulcan’s own counsel drafted an “Arbitrator Disclosure Form,” which provided that “completion of this Arbitrator Disclosure Form will meet your initial disclosure requirements and allow the parties to weigh your impartiality and independence.” CP 250-51. Nowhere in that form did Vulcan request information about selection-process contacts. The trial court explained:

[T]he challenged non-disclosure is limited to pre-appointment contact; contact that [Vulcan] knew occurred and yet failed to probe in the Arbitrator Disclosure Form. Significantly, not even [Vulcan’s] party-appointed arbitrator disclosed his pre-appointment contact with [Vulcan].

CP 584. Likewise, Judge Lukens found: “the Arbitrator Disclosure Form, largely drafted by [Vulcan], does not ask about pre-appointment contacts” and “Judge Alsdorf, the other party appointed arbitrator, . . . also did not disclose such contacts in his Arbitrator Disclosure Form.” CP 55, 53.

As the trial court explained, the fact that neither Mr. Harrigan nor Vulcan’s party-appointed arbitrator Judge Alsdorf disclosed selection-process contacts on the form shows that “reasonable minds are not offended by the non-disclosure of [the] pre-appointment contact at issue here.” CP 584. In other words, Vulcan failed to show that the nondisclosure created a reasonable impression of partiality.

Second, there is simply no evidence in the record to support Vulcan’s characterization of Mr. Harrigan as having a prior “relationship” with Claimants—and both the trial court and Judge Lukens rejected that characterization. To the contrary, the record shows that the contacts at issue occurred solely regarding Mr. Harrigan’s selection as Claimants’ party-appointed arbitrator pursuant to Rule 18(a). CP 200.

Vulcan attempts to suggest that a “business relationship” existed because Mr. Harrigan billed Claimants for his time spent during the selection process, but as the trial court noted, Mr. Harrigan charged for time spent in the selection process in precisely the same manner he charged his time throughout the arbitration. CP 584. Judge Lukens similarly rejected Vulcan’s argument, making the finding that:

[Vulcan] now argue(s) that a failure to disclose the submission of a bill in the Arbitrator Disclosure Form is failure to disclose a business relationship. Nothing in the Rules prohibits billing for time spent during the interview process.

CP 55 (emphasis added).¹³

Vulcan's non-disclosure argument fails because Mr. Harrigan's nondisclosure of selection-process contacts does not create a "reasonable impression of bias." Indeed, the fact that Mr. Harrigan, Judge Alsdorf, Judge Lukens and Judge Kallas all concluded that disclosure of selection-process contacts was not required is conclusive evidence that "reasonable minds are not offended" by the alleged nondisclosure.

C. THE TRIAL COURT'S DENIAL OF THE MOTION TO VACATE FOR EVIDENT PARTIALITY/MISCONDUCT SHOULD BE AFFIRMED FOR THE ADDITIONAL REASON THAT VULCAN WAIVED ITS OBJECTIONS UNDER THE NINTH CIRCUIT'S DECISION IN *FIDELITY FEDERAL BANK V. DURGA MA CORP.*

A separate and independently sufficient basis exists in the record to affirm the trial court's decision with respect to Vulcan's allegations of evident partiality and misconduct. *See LaMon v. Butler*, 112 Wn. 2d 193, 200-01 (1989) ("[A]n appellate court can sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof, even if the trial court did not consider it."). As Judge Lukens found during the disqualification proceeding, Ninth Circuit law provides that Vulcan waived any right to complain about Mr. Harrigan's alleged failure to

¹³ Vulcan takes an unremarkable principle and stretches it to the point of absurdity when it asserts that "any time money changes hands" between an arbitrator and a party "disclosure must take place." App. Brief at 38, quoting *Crow Constr. Co. v. Brown Assocs.*, 264 F. Supp.2d 217, 225 (E.D. Pa. 2003). That case involved arbitrators who were paid for service in other, undisclosed mediation/arbitrations.

disclose selection-process contacts with Claimants because it knew that such contacts had occurred, it had an opportunity to ask about them, and it elected not to do so. CP 56.

Judge Lukens relied upon on a Ninth Circuit decision arising in a virtually identical situation: *Fidelity Federal Bank v. Durga Ma Corp.*, 386 F.3d 1306 (9th Cir. 2004). In that case, each party named a party-appointed arbitrator and those arbitrators selected a third. After entry of an interim award that imposed damages and left open the issue of attorneys' fees and costs, the losing party (Fidelity) began reviewing time records relating to fees and costs and discovered that the opposing party had both undisclosed *ex parte* communications and undisclosed pre-existing family and financial relationships with its party-appointed arbitrator. Fidelity then sought to vacate the award. *Id.* at 1309.

Even though the contacts and relationships went well beyond selection-process interviews, both the district court and the Ninth Circuit rejected the challenge. As the Ninth Circuit explained, the parties “selected a process for appointing arbitrators whereby each party selected its own arbitrator,” and “[t]hat process put Fidelity on notice” that the opposing party’s appointed arbitrator “was likely to have some personal or professional connection” to the party who selected him. *Id.* at 1312-13. Because Fidelity “did not request a disclosure statement” from the

arbitrator and “did not object to the failure to exchange disclosures,” it “waived its right to seek vacatur on that basis.” *Id.*¹⁴

Moreover, the court found that even though Fidelity did not have “actual knowledge” of the relationships until after the interim award was issued, “the waiver doctrine applies where a party to an arbitration has *constructive knowledge* of a potential conflict but fails to timely object.” *Id.* Fidelity had “constructive knowledge” because some contacts had to have occurred for the other party to select and appoint its arbitrator, leading the court pointedly to highlight “the burden on parties to obtain disclosure statements from arbitrators[.]” *Id.*

While Vulcan has attempted to distinguish *Fidelity* on the ground that the arbitrators in that case were (under a previous version of the AAA rules) presumed to be non-neutral, the Ninth Circuit’s decision does not depend on that fact, and, as Judge Lukens found, “the rationale applies to the present case.” CP 56. Vulcan had constructive notice that Mr. Harrigan communicated with Claimants and/or their counsel because *ex parte* communications were both necessary to accomplish the appointment and specifically permitted by Rule 18(a). Yet, Vulcan never inquired

¹⁴ In *Fidelity*, no disclosure statement was requested. Here, Vulcan did request one, but elected not to ask about the selection-process—an even stronger case for waiver.

about those contacts until after it lost the arbitration—a maneuver courts have long rejected:

[W]here information about an arbitrator is not known in advance, but could have been ascertained by more thorough inquiry or investigation, a post-award challenge suggests that nondisclosure is being raised merely as a “tactical response to having lost the arbitration,” or an inappropriate attempt to seek a “second bite at the apple” because of dissatisfaction with the outcome.

Hobet Mining, Inc. v. Int’l Union, Mine Workers of Am., *supra*, 877 F.

Supp. 1011, 1019 (S.D. W.Va. 1994) (emphasis added).

D. THE TRIAL COURT CORRECTLY DECIDED THAT THE ARBITRATION PANEL DID NOT ENTER AN “IRRATIONAL” AWARD OR “INTENTIONALLY DISREGARD” THE LAW.

Vulcan argues that the trial court should have vacated the Final Arbitration Award for an additional reason: because the arbitrators “exceeded their authority” by entering the Final Arbitration Award in violation of Section 10(a)(4) of the FAA. Vulcan’s burden here is extraordinarily high: “[A]rbitrators exceed their powers in this regard not when they merely interpret or apply the governing law incorrectly, but when the award is completely irrational.” *Kyocera Corp. v. Prudential-Bache Trade Servs.*, 341 F.3d 987, 998 (2003). Put another way, it must be clear from the record “that the arbitrators were aware of the law and intentionally disregarded it.” *Bosack*, 586 F.3d at 1104 (emphasis added).

Vulcan has not shown any such radical, intentional departure by the Arbitration Panel. Rather, it simply seeks to relitigate issues that were extensively briefed, argued, and decided by the Arbitration Panel in Claimants' favor. The Panel committed significant effort to consideration of the contracts, the law, and the evidence submitted by the parties. In addition, because the case was principally a breach of contract case, their determinations were primarily factual: the parties' intent, the meaning of contractual language, the actions taken in performing the contracts, and Vulcan's motives in acting as it did. Notably, the Panel unanimously found that the evidence "overwhelmingly" favored Claimants, and the Panel detailed its findings in a 21-page reasoned award. CP 23 *et seq.*¹⁵

While Claimants respectfully submit that reconsidering the Panel's findings of fact and application of law is beyond the proper scope of this Court's review, it is clear from the Panel's Award that each of Vulcan's specific allegations of legal error are unfounded.

First, contrary to Vulcan's argument that the Panel "awarded [Claimants] a remedy for a breach solely 'as to' other employees, the

¹⁵ It is noteworthy that Vulcan nowhere alleges that it had an inadequate opportunity to brief these issues to the Panel, that it was unable to submit evidence of the merit of its position, or that it was in any way prevented from presenting its best case to the Panel. In fact, Vulcan was represented in the arbitration by Bradley Keller of Byrnes & Keller LLP—one of the most respected trial lawyers in Seattle (whom Vulcan replaced with its current counsel after losing in the arbitration). CP 127, lines 19-20.

Panel expressly found that Vulcan had breached the Agreements as to Claimants. The Panel found that Vulcan breached Section 10.4 of the VEC Agreement by effectively “terminating” or “amending” the plan without the “consent of a Majority in Interest” or the approval of any Participant “disproportionately affected.” CP 32. The breach of that section was a breach “as to” Claimants because they neither consented nor approved the termination/amendment.

Second, Vulcan is simply wrong as a matter of law that the Panel’s Award “disregards and is contrary to the at-will doctrine under Delaware law.” App. Brief at 43. This issue was fully briefed, and the Panel acknowledged that Claimants were at-will employees—indeed it relied upon that doctrine in dismissing Claimants’ wrongful termination claim.¹⁶ CP 37. However, the Panel noted that the breach of contract and covenant of good faith and fair dealing claims arise not “from the termination of their employment, standing alone,” but rather “centers on their rights [to distributions] under the Agreements.” CP 25.¹⁷ In other words, Vulcan

¹⁶ In its effort to characterize the Final Arbitration Award as irrational, Vulcan fails to mention that the Arbitration Panel ruled against the Claimants on several claims. The Panel dismissed Claimants’ claims for breach of implied contract and wrongful termination, as well as contractual claims for additional severance payments. CP 34-39.

¹⁷ Moreover, the “at-will” doctrine does not insulate an employer who terminates an employee in a way that violates the covenant of good faith and fair dealing. *See E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 442 (Del. 1996); *see also* 26

might have had the right to terminate Claimants, but not to circumvent their profit-sharing rights under the Agreements. Indeed, “parties are liable for breaching the covenant [of good faith and fair dealing] when their conduct frustrates the ‘overarching purpose’ of the contract by taking advantage of their position to control implementation of the agreement’s terms.” *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005). That is precisely what Vulcan did here.¹⁸

Third, Vulcan incorrectly argues that the Panel crafted a remedy for Vulcan’s breach of the covenant of good faith and fair dealing that was unavailable under Delaware law. This, too, was briefed and argued before the Panel and Vulcan’s position was rejected. And notably, the same remedy ordered by the Panel was available either for Vulcan’s breach of contract or for its breach of the covenant of good faith and fair dealing, which renders Vulcan’s objection in this regard moot in any event.¹⁹

Causes of Action 175 (“Where an at-will employee has been discharged . . . to deny particular benefits . . . the covenant of good faith and fair dealing may be breached.”).

¹⁸ See also *Dunlap*, 878 A.2d 434 (parties to a contract must “refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the contract,” and “the implied covenant of good faith is the obligation to preserve the spirit of the bargain rather than the letter, the adherence to substance rather than form . . .”) (emphasis in original).

¹⁹ “[T]he standard remedy for breach of contract is based upon the reasonable expectations of the parties *ex ante* . . . [and] is measured by the amount of money that would put the promisee in the same position as if the promisor had performed the contract.” *Duncan v. Theratx, Inc.* 775 A.2d 1019, 1022 (Del. Supr. 2001). The appropriate remedy for breach of the covenant of good faith and fair dealing is fully consistent. See *Pressman*, 679 A.2d at 443.

Fourth, Vulcan’s argument that the Panel “exceeded its powers by finding a breach of Section 10.4 of the VEC Agreement” is incomprehensible—particularly when read next to the Panel’s 21-page Arbitration Award explaining the Panel’s contractual analysis:

Section 10.4 of the Agreement provides that Vulcan cannot amend the VEC Plan without the consent of a Majority in Interest, and further provides that any amendment which would disproportionately affect any Participant must be approved by such Participant. [citations omitted] Here, Vulcan, by simultaneously firing all of the Private Equity Team and then rehiring some, admittedly sought to adversely affect the rights of the Participants in the Plan – i.e., to prevent the operation of the Plan according to its terms, and to substitute a new plan for those it elected to rehire. Both [Vulcan CEO] Jody Patton and Lance Conn [President of Vulcan Capital] testified that the intention of Vulcan’s gambit was to “Stop the Plan.” This action amounted either to a termination of the Plan, which was not permitted under the terms of Section 10.4, or an amendment that was neither approved by a majority of the parties in interest nor agreed to by the individual Participants whose rights were adversely affected, making the termination of Claimants for these purposes a clear and material breach of the VEC Agreement.

CP 32-33 (emphasis added).

In truth, the Arbitration Award is based upon detailed factual findings regarding the parties’ intent, how Vulcan’s actions breached specific terms of the Agreements, and how Vulcan’s actions were intended in bad faith to circumvent the Agreements’ purpose. The Award contains careful contractual analysis; it is not the work of a careless or incompetent

panel of arbitrators. The “completely irrational” standard “is extremely narrow and is satisfied only ‘where [the arbitration decision] fails to draw its essence from the agreement.’” *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1284 (9th Cir. 2009). That was not the case here.

In sum, all of these issues were actively litigated before a respected Arbitration Panel, which considered and properly rejected Vulcan’s arguments in a 21-page reasoned Award that is well-grounded in the Agreements and the law. CP 23 *et seq.*

E. THE TRIAL COURT PROPERLY DENIED VULCAN’S CONDITIONAL DISCOVERY MOTION AS MOOT BECAUSE VULCAN ABANDONED THE MOTION.

Vulcan assigns error to the trial court’s denial of its Conditional Discovery Motion, but fails to mention in its brief that it expressly abandoned that motion in the trial court. Accordingly, the trial court denied it as moot and the issue has not been preserved for appeal.

In its Conditional Discovery Motion, Vulcan argued that if the Court were to adopt Claimants’ proposed standard of deferential review then “the facts underlying Vulcan’ motion to vacate would warrant discovery on that issue” (CP 530), but if the court undertook independent review under the “reasonable impression standard” urged by Vulcan, then “discovery therefore is not necessary.” CP 532 (emphasis added).

Vulcan reiterated in its Reply in support of the Conditional Discovery Motion that it sought discovery only if the trial court applied the deferential standard urged by Claimants; but:

If on the other hand the Court makes its own decision as to whether the undisputed record creates a reasonable impression of partiality, then it is and always has been Vulcan's position that no discovery is necessary: the invoices would give any reasonable person such an impression.

CP 566. And finally, to be sure the trial court understood that discovery was conditioned on the absence of an independent review, Vulcan explained that its motion was made “in the event (and only in the event) that the Court declined to conduct an independent review.” CP 569.

The trial court did precisely what Vulcan asked, and after that independent review, denied the Conditional Discovery Motion as moot:

As [Vulcan] acknowledge[s] ... the motion is withdrawn if the court conducts independent review of the disqualification/vacatur challenge. Because this court has done so, the motion is denied. CP 585.

Now, on appeal, Vulcan attempts to revive its conditional discovery request, despite having received precisely the type of independent review that it earlier stated would render the request unnecessary. This is entirely impermissible. “Where an issue is conceded below, it cannot be raised for the first time on appeal.” *Pye v. Mitchell*, 574 F.2d 476, 480 (9th Cir. 1978). As a result, “[t]he withdrawal of an

objection [before the trial court] is tantamount to a waiver of an issue for appeal.” *CDN, Inc. v. Kapes*, 197 F.3d 1256, 1258-59 (9th Cir. 1999).

Vulcan cannot re-raise its discovery request here on appeal.

Alternatively, if the Court were to find the issue was not waived for appeal, the trial court’s decision should be affirmed under an abuse of discretion standard. *See, e.g., Theis Research, Inc. v. Brown & Bain*, 400 F.3d 659, 666 (9th Cir. 2005) (“We will only find that the district court abused its discretion if the movant diligently pursued its *previous* discovery opportunities.”).

The record clearly shows no such diligence here. Vulcan’s counsel first objected to Petitioners’ selection-process contacts with Mr. Harrigan more than one year ago, CP 379, but Vulcan never made any effort to seek information regarding those contacts until it filed its Conditional Discovery Motion on the eve of the hearing on the Motion to Vacate—despite having had several opportunities to do so. Indeed, Vulcan affirmatively chose not to seek discovery on at least five separate occasions: (1) when Vulcan’s counsel drafted the Arbitrator Disclosure Form; (2) when Vulcan first challenged Mr. Harrigan’s impartiality to the Arbitration Panel on August 20, 2009 (CP 379); (3) when the parties engaged in motions practice before the Panel on the issue of Mr. Harrigan’s impartiality (CP 390-401); (4) in the arbitrator disqualification

proceeding before Judge Lukens (during which Vulcan submitted 313 pages of documentary evidence); and (5) when Vulcan filed its motion to vacate in the trial court. In short, Vulcan failed until the very last moment to seek discovery, and even then did so only on a conditional basis.²⁰

Finally, even if Vulcan had not waived discovery, the trial court did not abuse its discretion because Vulcan cannot satisfy the extremely high showing required of a party seeking post-award discovery:

Because the main purposes of arbitration are to ‘sett[le] disputes efficiently and avoid[] long and expensive litigation,’ a party petitioning for discovery following an award must satisfy a high burden of proof to warrant the time and expense engendered by the discovery process.

Canadian Aviation Simulator Servs., Inc. v. Thales Training & Simulation, Ltd., 2006 WL 1975932 at *5 (S.D.N.Y. 2006). Vulcan conceded in the trial court that it must show “clear evidence of impropriety” to obtain discovery. CP 532. And yet, once again, it could only identify evidence establishing the fact of permissible selection-process contacts. Thus, even if Vulcan had not waived appellate review by conceding that discovery was “not necessary,” and even if Vulcan had not declined numerous discovery opportunities, its Motion was legally insufficient.

²⁰ Post-award discovery is disfavored, as it encourages “a fishing expedition to uncover evidence to lend support to [an] unfounded claim.” *Amicorp Inc. v. Gen. Steel Dom. Sales*, 2007 WL 2890089 at *5 (D. Colo. 2007). That is acutely true here, where Vulcan chose not to seek discovery before Judge Lukens. If a losing party may seek post-award discovery after losing in such a proceeding, no award would ever be final.

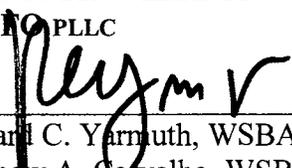
IV. CONCLUSION

The Arbitration Panel decided unanimously—based on “overwhelming” evidence—that Vulcan breached its compensation agreements with Claimants and acted in bad faith by firing them as part of a scheme to circumvent their profit-sharing rights. Since then, Vulcan has challenged arbitrator Arthur Harrigan’s impartiality in two separate proceedings involving two independent factual reviews—and lost both; further, Vulcan has appealed the Panel’s award as “irrational” and in “manifest” disregard of the law—and lost that challenge as well. Vulcan’s appeal should be rejected, and the trial court’s Order affirmed with fees and costs of appeal awarded to Claimants.

Dated: August 30, 2010.

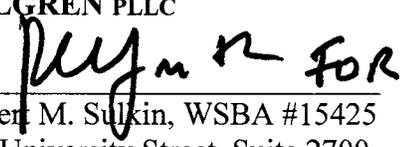
Respectfully submitted,

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No. 65365-2

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

VULCAN, INC., a Washington Corporation, VULCAN CAPITAL
PRIVATE EQUITY, INC., a Delaware corporation, and VCPE ORANGE
II, LLC, Delaware limited liability company,

Appellants,

v.

DAVID CAPOBIANCO, an individual, and NAVIN THUKKARAM, an
individual,

Respondents.

APPENDIX TO

**BRIEF OF RESPONDENTS
DAVID CAPOBIANCO AND NAVIN THUKKARAM**

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EXHIBIT 1:

Trial Court's Memorandum Decision

CP 579-85

FILED
KING COUNTY SUPERIOR COURT WASHINGTON
APR 06 2010
SUPERIOR COURT CLERK
BY MAUREEN ANN BELL
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, COUNTY OF KING

DAVID CAPOBIANCO, an individual; and
NAVIN THUKKARAM, an individual,

Petitioners,

vs

VULCAN, INC., a Washington corporation;
VULCAN CAPITAL PRIVATE EQUITY,
INC., a Delaware corporation; and VCPE
ORANGE II, LLC, A Delaware limited liability
company,

Respondents

CAUSE No. 10-2-09609-4 SEA

MEMORANDUM DECISION ON MOTION
TO CONFIRM AND MOTION TO VACATE

Petitioners move to confirm two arbitration awards: 1) the *Final Arbitration Award* issued on February 9, 2010; and 2) Judge Lukens' *Decision Regarding Disqualification of Arbitrator* issued on January 8, 2010. Respondents, on the other hand, seek to vacate both arbitration awards.

The parties agree the motions are governed by the Federal Arbitration Act (FAA). Under the FAA, a court "must" confirm an award unless "the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." 9 U.S.C. section 9. Sections 10 and 11 provide that an arbitration award may be vacated, modified, or corrected in specific and limited circumstances. At issue here is section 10, which provides that an award may be vacated only in four circumstances:

MEMORANDUM DECISION

ORIGINAL

Judge Paris K. Kallas
King County Superior Court
516 3rd Avenue W 965
Seattle, WA 98104
(206) 296-9105

- 1) where the award was procured by corruption, fraud, or undue means;
- 2) where there was evident partiality or corruption in the arbitrators or either of them;
- 3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- 4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

The parties further agree that these are the only grounds upon which an arbitration award may be vacated, modified, or corrected. *See Hall Street Associates L.L.C. v. Mattel, Inc.*, 552 U.S.576, 587 (2008) (“There is nothing malleable about ‘must grant,’ which unequivocally tells courts to grant confirmation in all cases, except one of the ‘prescribed’ exceptions applies.”).

The parties do not, however, agree about the applicable standard of judicial review regarding the *Disqualification Decision*. Petitioners argue that the disqualification issue was submitted to arbitration before Judge Lukens and thus this court’s review is limited to the deferential review. Respondents disagree and ask this court to independently assess the merits of the disqualification issue in their motion to vacate, a motion not brought before Judge Lukens.

The arguments are addressed below.

Judge Luken’s decision was Rendered in an Arbitration.

Contending that Judge Lukens’ decision was not entered in an arbitration proceeding, Respondents argue that the decision is not entitled to deferential review. The record, however, fails to support Respondents’ characterization.

From the outset, the parties treated the proceeding as an arbitration. In the *Arbitration Protocol*, the parties agreed that a challenge to arbitrator impartiality under AAA Rule 17(a) would be decided by Judge Lukens and that his decision would be final. The *Protocol* provides, in part, as follows:

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(206) 296-9105

1 In the event that a Party seeks to disqualify an arbitrator for one of the reasons set forth in
2 [AAA Rule] 17(a), the Parties agree that a neutral third party shall determine whether the
3 challenged arbitrator shall be disqualified. The neutral third party's determination on the
4 issue shall be final. For this purpose only, the neutral third party shall be the Honorable
5 Terry Lukens[.]

6 (Emphasis added.) And once invoked, the proceeding was treated as an arbitration. The parties
7 submitted nearly 50 pages of briefing, over 300 exhibits, and Judge Lukens heard oral argument
8 on the matter.

9 Likewise, Judge Lukens described the proceedings as an arbitration and described himself
10 as the arbitrator. Judge Lukens sent the parties a notice entitled *Commencement of Arbitration*
11 *and Notice of Appointment of Arbitrator*. The notice "confirms the appointment of Hon. Terry
12 Lukens (Ret.) as the arbitrator" and further confirms that "this arbitration shall be conducted in
13 accordance with the AAA Commercial Arbitration Rules." And in his five-page reasoned
14 decision, Judge Lukens describes the proceedings as an arbitration:

15 THIS MATTER came on for hearing before the undersigned Arbitrator on November 30,
16 2009. All parties were represented by counsel. The Arbitrator reviewed legal
17 memoranda submitted on behalf of the parties, with attached declarations, and heard
18 argument of counsel.

19 *Decision, page 1.*

20 For these reasons, the record plainly reveals that the parties and Judge Lukens treated the
21 proceeding as an arbitration.

22 *The Decision Regarding Disqualification of Arbitrator Must be Reviewed under Section*
23 *10's Deferential Standard*

24 In *First Options of Chicago v. Kaplan*, 514 U.S. 938, 943 (1995), the Court addressed the
25 appropriate standard of review for circumstances in which the parties agree to arbitrate an issue
26 related to the underlying arbitration. The Court holds that in such circumstances "the court's
27 standard for reviewing the arbitrator's decision about *that* matter should not differ from the
28 standard for reviewing the arbitrator's decision about *that* matter should not differ from the

29 MEMORANDUM DECISION

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1 standard courts apply when they review any other matter that the parties have agreed to
2 arbitrate.” *Id.*, at 943 (Emphasis in original). In so holding, the Court expressly cites and relies
3 upon the FAA and Section 10: “That is to say, the court should give considerable leeway to the
4 arbitrator, setting aside his or her decision only in certain narrow circumstances. *See e.g.*, 9
5 *U.S.C. Section 10.*” *Id.* at 943.
6

7 Here, the parties agreed to arbitrate the disqualification matter before Judge Lukens.
8 Having so agreed, this court’s review of Judge’s Lukens’ decision is limited to the deferential
9 review set forth in the FAA. Respondents do not argue that the Judge Lukens, the arbitrator of
10 the *Disqualification Decision*, exhibited corruption, fraud, or any of the other statutory grounds
11 for vacating an arbitrator’s decision under section 10. Thus, this court “must” grant the motion
12 to confirm the *Disqualification Decision*.
13
14

15 The decision in *Beebe Medical Center v. InSight Health Services Corp.*, 751 A.2d 426
16 (1999), does not change this result. The *Beebe* court cited two alternative grounds for its
17 decision, neither one of which apply here. First, the *Beebe* court found the parties were bound by
18 Rule 19 and thus were bound to exhaust the AAA remedies before raising the bias issue for
19 judicial review. In this case by contrast, the parties negotiated an *Arbitration Protocol* in which
20 they agreed that AAA Rule 19 did not apply. Second, in *Beebe*, the AAA “held no hearing
21 despite the fact-intensive nature of the bias issue.” *Id.* at 441. Moreover, the “AAA never told
22 the parties who resolved the bias question or why.” *Id.* at 441. In this case by contrast, the
23 parties submitted extensive briefing and countless documents and Judge Lukens heard oral
24 argument and issued a reasoned decision on the matter. The procedure simply cannot be
25 compared with the *Beebe* procedure. Finally, although not dispositive to this court’s
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27
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29

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516 3rd Avenue W 965
Seattle, WA 98104
(206) 296-9105

1 determination, it must be remembered that *Beebe* is a state court decision, issued under the
2 Delaware's Uniform Arbitration Act.

3 *Impartiality Challenge fails under Independent Review/Motion to Vacate Denied*
4

5 As indicated above, this court concludes that judicial review of the *Disqualification*
6 *Decision* is limited to the deferential standard imposed by Section 10. Assuming solely for the
7 sake of argument, however, that the independent standard applies, the court also rejects
8 Respondents' challenges to the *Disqualification Decision*.
9

10 Respondents argue that Arbitrator Harrigan's undisclosed *Ex Parte* pre-appointment
11 contact requires vacation of the arbitration award under section 10(a)(2) and (3). The challenges
12 have been briefed extensively and this court has independently reviewed the arguments and
13 applicable authority. Rather than repeat the analysis put forward by Petitioners, this court adopts
14 that analysis and authority upon which it rests. A few key points bear mention.
15

16 First, because *Ex Parte* contact is not prohibited in the arbitration context, Respondents
17 must show something more. Respondents attempt to do so by emphasizing the extent of the pre-
18 appointment contact. But this arbitration presented complex contracts, high finances, and a
19 prominent Seattle businessman. These circumstances justify an in-depth pre-appointment
20 process. As Judge Lukens correctly ruled, the pre-appointment time spent with a candidate is
21 case dependent.
22

23
24 Second, there is no evidence before the court of inappropriate conduct during the pre-
25 appointment contact. To the contrary, attorney Yarmouth expressly states:
26
27
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29

MEMORANDUM DECISION

1 At no time were any questions asked of Mr. Harrigan, or was any input received from
2 him, regarding the merits of the dispute. At no time did Mr. Harrigan suggest revisions or
3 provide input to the Demand, and at no time did Mr. Harrigan provide "legal services" to
Claimants or their counsel.

4 And although Arbitrator Harrigan submitted billings for "legal services," this appears to be
5 standard billing format used throughout the arbitration.
6

7 Third, as to the non-disclosure challenge, the cases upon which Respondents rely fail to
8 address the issue at hand. As Judge Lukens correctly ruled, this case does not involve past legal
9 representation, family connections, solicitation of future business, receipt of hospitalities, or
10 discussion of the merits. Rather, the challenged non-disclosure is limited to pre-appointment
11 contact; contact that Respondents knew occurred and yet failed to probe in the *Arbitrator*
12 *Disclosure Form*. Significantly, not even Respondents' party-appointed arbitrator disclosed his
13 pre-appointment contact with Respondents. Whether this constitutes constructive knowledge
14 resulting in waiver (*see e.g. Fidelity Federal Bank v. Durga Ma Corp.*, 386 F.3d 1306 (9th Cir
15 2004) is not the point. Rather, this reveals that reasonable minds are not offended by the non-
16 disclosure of pre-appointment contact at issue here.
17
18

19 Respondents fail to establish the evident-partiality or misconduct standards of the FAA,
20 the facts do not create a reasonable impression of partiality. And to further clarify, in addition to
21 considering the reasonable-impression standard, this court has independently considered the
22 partiality challenge and rejects it for all the reasons stated herein.
23

24 *The Final Arbitration Award does not exhibit "Manifest Disregard of the Law" and it*
25 *does not Exceed the Arbitrators' Powers*
26

27 Respondents next raise several challenges to the Final Arbitration Award. The arguments
28 fail for the reasons stated by Petitioners in the *Joint Opposition to the Motion to Vacate*.
29

MEMORANDUM DECISION

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King County Superior Court
516 3rd Avenue W 965
Seattle, WA 98104
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1
2 Motion to Allow Limited Discovery

3 Respondents' *Motion to Allow Limited Discovery* is denied. As Respondents
4 acknowledge in the *Reply in Support of Motion to Allow Limited Discovery*, the motion is
5 withdrawn if the court conducts independent review of the disqualification/vacatur challenges.
6 Because this court has done so, the motion is denied.
7

8 For all these reasons, the court grants Petitioners' *Motions to Confirm Arbitration Awards*
9 and denies Respondents' *Motion to Vacate*.
10

11
12
13 DATED this 6th day of April 2010.
14

15 

16

Honorable Paris K. Kallas
17 Chief Civil Judge
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29

MEMORANDUM DECISION

EXHIBIT 2:

Lukens Decision

CP 51-58

JAMS
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IN THE MATTER OF THE PRIVATE ARBITRATION BETWEEN:

DAVID CAPOBIANCO and NAVIN THUKKARAM,)	
)	
Claimants,)	No. 1160017635
)	
vs.)	DECISION REGARDING
)	DISQUALIFICATION OF
VULCAN, INC., VULCAN CAPITAL PRIVATE EQUITY INC., and VCPE ORANGE II LLC,)	ARBITRATOR
)	
Respondents)	
_____)	

THIS MATTER came on for hearing before the undersigned Arbitrator on November 30, 2009. All parties were represented by counsel. The Arbitrator reviewed legal memoranda submitted on behalf of the parties, with attached declarations, and heard argument of counsel.

Issue

The sole issue presented for decision is whether one of the party-appointed arbitrators in the underlying action should be disqualified under Rule 17(a) of the American Arbitration Association's Commercial Arbitration Rules (the "Rules").

Discussion

In Article IV.A. of the Arbitration Protocol signed by counsel for the parties, a procedure was adopted for challenging an arbitrator under Rule 17(a) of the Rules. Counsel for the Respondents has filed such a challenge against Mr. Arthur Harrigan, Claimants' appointed arbitrator.

DECISION REGARDING
DISQUALIFICATION OF
ARBITRATOR

The Respondents contend that Mr. Harrigan's pre-appointment meetings with the Claimants and their counsel, and other claimed pre-appointment activities, create at least an impression of bias or impartiality requiring disqualification. Rule 17(a)(i) provides for disqualification for partiality or lack of independence.

The factual basis for the contention of the Respondents is contained in the entries on Mr. Harrigan's pre-appointment billing statements dated January 7, 2009 and February 9, 2009, as well as his Arbitrator Disclosure Form.

In the billing statements Mr. Harrigan details a series of meetings and phone conversations with counsel for the Claimants, meetings with the Claimants themselves, and the review of certain documents including the draft arbitration demand. Mr. Harrigan billed for his time spent in these pre-selection meetings and document review and his billing statement states that the bill is "For Legal Services."

In his Arbitrator Disclosure Form, Mr. Harrigan did not disclose these pre-selection meetings and discussions, although the form did not specifically ask about such activities. It should be noted that counsel for the Respondents had pre-selection contact with Judge Alsdorf, the other party appointed arbitrator, and he also did not disclose such contacts in his Arbitrator Disclosure Form.

There is no basis on which to depose or otherwise inquire of Mr. Harrigan about the nature and extent of these pre-appointment meetings. The only factual information about these meetings and the activities of Mr. Harrigan comes from one of the other participants, Mr. Yarmuth. In his Declaration, he describes the meetings, the nature of the discussions, and Mr. Harrigan's level of participation.

Significantly, Mr. Yarmuth concludes in Paragraph 14 of his Declaration:

At no time were any questions asked of Mr. Harrigan, or was any input received from him, regarding the merits of the dispute. At no time did Mr. Harrigan suggest revisions or provide input to the Demand, and at no time did Mr. Harrigan provide "legal services" to Claimants or their counsel.

DECISION REGARDING
DISQUALIFICATION OF
ARBITRATOR

For the purposes of this matter, this factual recitation must be considered as a verity.

Rule 18(a) permits *ex parte* pre-selection meetings with a candidate arbitrator and expressly allows a party to attend such meetings. The allowable subject matter of those meetings includes the general nature of the controversy, as well as the candidate's qualifications, availability or independence with respect to the parties. While the Rule certainly contemplates that no discussion of the merits is permitted (as contrasted with a non-neutral arbitrator discussed in Rule 18(b)), the matters discussed in this case fall within the permitted scope of Rule 18(a).

For example, Claimants were concerned about the independence of the arbitrator in light of the prominence of the principal of the Respondents and wanted to assure themselves of such independence. This is certainly a permitted inquiry under Rule 18(a).

Respondents also make much of the billings from Mr. Harrigan "For Legal Services." Not only does this appear to be a standard billing format, throughout the arbitration Mr. Harrigan submitted his bills in the same format, even though he was acting as a neutral arbitrator.

In their Reply, Respondents acknowledge the scope of Rule 18(a), but contend that the "extent of the communications and consultations with Mr. Harrigan, and the work he did on his own, far exceed what was necessary or permissible to convey the "general nature of the controversy" to Mr. Harrigan." Rule 18(a), however, does not provide any time limit or other objective criteria for the inquiry, although the AAA Handbook discusses a one hour guideline.

This matter was complex and involved a prominent Seattle businessman. Claimants were entitled to satisfy themselves as to Mr. Harrigan's qualifications and independence, even if that took longer than Respondents' counsel spent with Judge Alsdorf or longer than counsel believe is reasonable. The Handbook commentary, while focusing on a jointly selected arbitrator rather than party

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ARBITRATOR

selected arbitrators, conditions the one hour suggestion with a "presumably" qualification. Clearly the time spent with a candidate is case dependent.

Respondents acknowledge, as they must, that the Arbitrator Disclosure Form, largely drafted by them, does not ask about pre-appointment contacts. The Arbitration Protocol provided that Claimants would appoint one arbitrator and Respondents would appoint one arbitrator. Respondents knew that, under Rule 18(a), both Claimants and Respondents had the right to make inquiries of and meet with candidates.

Respondents, however, now argue that a failure to disclose the submission of a bill in the Arbitrator Disclosure Form is failure to disclose a business relationship. Nothing in the Rules prohibits billing for time spent during the interview process. From the Declaration of Richard Yarmuth it appears to be a fairly standard practice. Yet the Arbitrator Disclosure Form could have been expanded to inquire about all pre-selection contacts, including billing, time spent, subjects covered, etc., but it was not.

The catch-all Question 6 in the Arbitrator Disclosure Form is also important. It asks about "entanglements" with counsel or the parties giving rise to justifiable doubt about impartiality or independence. This is an undefined subjective term, but it is noteworthy that both party-appointed arbitrators answered in the negative, despite having differing levels of discussion about the case during the selection process.

The cases relied on by Respondents largely involved the "entanglements" that Question 6 was intended to capture: Past legal representation of parties or affiliates, family involvement with parties, discussion of future business, discussion of the merits of the case, receipt of "hospitality," and the like. None of that was present here. Here there is mere supposition that something untoward must have happened during the time spent with candidate Harrigan. There is no evidence to support that supposition.

In *Fidelity Federal Bank v. Durga Ma Corp.*, 386 F. 3d. 1306 (9th Cir. 2004) the court considered a similar argument as is raised by Respondents. There the

DECISION REGARDING
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"entanglements" of the arbitrator with the appointing party were significant, but there was no inquiry in the disclosure form about any of those "entanglements." The court found a waiver and affirmed the award. The basis for its conclusion *inter alia* was constructive knowledge of a potential conflict, a failure to inquire, and an absence of a showing of actual bias (there was a unanimous award). 386 F. 3d at 1313.

While *Fidelity* may have involved consideration under the old Rules with a party appointed arbitrator, the rationale applies to the present case. There was constructive knowledge of contacts, there was no inquiry about the nature and extent of the contact with candidates, and no showing of bias, either actual or implied.

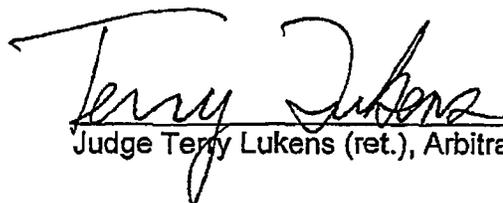
Lastly, Rule 17(a) requires a finding of partiality, not merely an appearance of partiality. I cannot make that finding on the record before me.

Conclusion

Respondents' Motion to Disqualify Arbitrator is based on an unproven supposition that something untoward must have happened during the pre-selection meetings with candidate Harrigan. There are no facts presented to support this supposition. Indeed, the only facts are presented by Mr. Yarmuth who details the nature and extent of the contacts and expressly states that there was no discussion of the merits and no legal services rendered by Mr. Harrigan. In addition, an opportunity was presented to inquire in depth about the nature and extent of the pre-selection process in the drafting of the Arbitrator Disclosure Form, but that opportunity was not taken. There is no evidence of bias or improper influence in the final, unanimous Award.

In short, there is no basis under Rule 17(a) for the disqualification of Mr. Harrigan. The Respondents' Motion to Disqualify Arbitrator is DENIED.

DATED this 4 day of January, 2010.


Judge Terry Lukens (ret.), Arbitrator

DECISION REGARDING
DISQUALIFICATION OF
ARBITRATOR

PROOF OF SERVICE BY EMAIL & U.S. MAIL

Re: Capobianco & Thukkaram vs. Vulcan, Inc., et al
Reference No. 1160017635

I, Michele Wilson, not a party to the within action, hereby declare that on January 8, 2010 I served the attached Decision Regarding Disqualification of Arbitrator on the parties in the within action by Email and by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at Seattle, WASHINGTON, addressed as follows:

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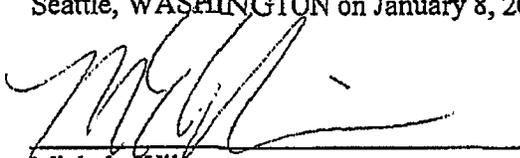
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I declare under penalty of perjury the foregoing to be true and correct. Executed at
Seattle, WASHINGTON on January 8, 2010.

A handwritten signature in black ink, appearing to read 'Michele Wilson', written over a horizontal line.

Michele Wilson
mwilson@jamsadr.com

EXHIBIT 3:

Arbitration Award

CP 23-43

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RECEIVED
JUL 30 2009
YARMUTH WILSDON CALFO PLLC

IN THE MATTER OF THE PRIVATE ARBITRATION BETWEEN:

DAVID CAPOBIANCO and NAVIN)	
THUKKARAM,)	
)	ARBITRATION AWARD
Claimants.)	
and)	
)	
VULCAN, INC., VULCAN CAPITAL)	
PRIVATE EQUITY INC., VCPE ORANGE)	
II LLC,)	
)	
Respondents.)	

I. INTRODUCTION

The arbitration hearing in the above matter was conducted on June 22-25, 2009 in the offices of Danielson Harrigan Leyh & Tollefson, LLP, Seattle, Washington. David Capobianco ("Capobianco") was represented by Richard C. Yarmuth and Matthew A. Carvalho of Yarmuth Wilsdon Calfo. Navin Thukkaram ("Thukkaram") was represented by Robert M. Sulkin of McNaul Ebel Nawrot & Helgren. (Capobianco and Thukkaram are collectively referred to as "Claimants.") Vulcan, Inc., Vulcan Capital Private Equity Inc. and VCPE Orange II LLC (collectively referred to as "Vulcan" or "Respondents") were represented by Bradley S. Keller,

1 Joshua B. Selig and Mika Kitamura of Byrnes & Keller. Jerry Evans, in-house counsel for
2 Vulcan, and Bill McGrath, its General Counsel, were in attendance for Respondents.

3
4 The Arbitration Panel (the "Panel") consisted of Robert H. Alsdorf, Arthur W. Harrigan,
5 Jr. and James A. Smith, Jr. (chairperson).

6 Jurisdiction in this arbitration is conferred by the agreements between Claimants and
7 Respondents. The arbitration was conducted pursuant to an "Arbitration Protocol" entered into
8 by the parties on January 22, 2009, and the American Arbitration Association Commercial
9 Arbitration Rules.

10
11 This reasoned Award is a summary of the basis for the disposition of claims discussed
12 herein. It does not purport to constitute findings of fact and conclusions of law, and it is not
13 intended to include a complete analysis of all of the evidence or legal positions asserted in the
14 arbitration or a complete statement of the details of the analysis underlying the Award. Rather, it
15 provides the parties with a summary of the Panel's reasons for making this Award.

16 II. BACKGROUND

17
18 This is a dispute between David Capobianco and Navin Thukkaram, Claimants, on the
19 one hand, and Vulcan, Inc., Vulcan Capital Private Equity, Inc. and VECP Orange II LLC,
20 Respondents, on the other hand, concerning Claimants' rights under three profit sharing
21 agreements: (1) the Operating Agreement of Vulcan Capital Private Equity Management I LLC
22 (the "PE I Agreement") (Ex. 6); (2) the Operating Agreement of Vulcan Capital Private Equity
23 Management II LLC (the "PE II Agreement") (Ex. 8); and (3) Vulcan Energy Corporation
24 Incentive Compensation Program ("VEC Agreement") (Ex. 3), (collectively the "Agreements").
25 The Agreements created incentive compensation plans which gave Claimants the right to share in
26

ARBITRATION AWARD - 2

1 profits, measured as provided in the Agreements, on investments they made and managed on
2 behalf of Vulcan. Claimants were members of Vulcan's Private Equity Team. David
3 Capobianco joined Vulcan in March-April 2003 and Navin Thukkaram joined Vulcan in May
4 2003. Both were terminated at 9:00 a.m. on October 24, 2008, when Vulcan simultaneously
5 fired the entire Private Equity Team, and then rehired four of its members.
6

7 All parties agree that Capobianco and Thukkaram were at-will employees, and no claims
8 arise in that regard from the termination of their employment, standing alone. Rather, this
9 dispute centers on their rights under the Agreements¹, including the extent to which they were
10 vested at the time of termination entitling them to certain past and future compensation; the
11 extent to which they may be entitled to additional vesting as a result of Respondents' termination
12 of Claimants along with other members of their team, and then rehiring of other team members,
13 which is alleged to be an amendment of the plans in breach of the Claimants' contractual rights;
14 and their entitlement to severance pay as a result of their termination.
15
16

17 III. ANALYSIS OF CLAIMS

18 A. Breach of Contract.

19 Claimants have alleged that Vulcan breached the VEC Agreement. The claims of breach
20 are based on the fact that, since their termination, Vulcan has taken the position that Claimants
21 are only 80% vested for purposes of immediate post-termination distributions and all future
22 distributions. Claimants further argue that, when Vulcan terminated the entire Private Equity
23 Team and then rehired certain members of the Team, it breached Section 10.4 of the VEC
24

25 _____
26 ¹ During the hearing most of the testimony and evidence involved the VEC Agreement (Ex. 3), not the PE I and PE II Agreements (Exs. 6 and 8). There was no material dispute as to the provisions of the PE I and PE II Agreements applicable to the claims at issue in this proceeding.

1 Agreement, Ex. 3. That Section addressed termination and amendment of the VEC Agreement.
2 It provided in part that, to the extent any amendment "would materially alter any of the economic
3 provisions herein" the consent of a "Majority in Interest" was required, and that "any amendment
4 that would adversely and disproportionately affect any Participant relative to any other
5 Participant" would require the "consent of such Participant." Id. "Majority in Interest" was
6 defined as those current and former employees of Vulcan who are Participants in the Plan "with
7 more than one-half of the aggregate Profits Interest" of Participants in the compensation plans
8 arising under the Agreements. Id. at Section 2.1.
9

10
11 Claimants argue that the purpose of the simultaneous termination of the Team and
12 rehiring of certain members under a different compensation arrangement amounted to a breach of
13 Section 10.4. Respondents argue in part that the absolute right to terminate Claimants'
14 employment makes the reason for termination irrelevant, and that the termination and rehiring do
15 not fall within the amendment limitations of Section 10.4.
16

17 The arguments of the parties are best understood in the context of the VEC Agreement,
18 including its negotiation history.

19 Upon his arrival at Vulcan, and working on his own behalf and on behalf of the Private
20 Equity Team, Claimant Capobianco negotiated with Vulcan for team members to receive a share
21 of the profits that were ultimately earned by Respondents on the various Vulcan investments.
22 Capobianco conducted these negotiations primarily with Ms. Jody Allen Patton, President and
23 CEO of Vulcan. The negotiations were protracted and detailed, and are to a significant extent
24 reflected in e-mails. They ultimately resulted in the Agreements and their incentive
25 compensation provisions.
26

ARBITRATION AWARD - 4

1 Vulcan and Capobianco ultimately agreed to employ profit-sharing formulae which
2 established an initial threshold return for Vulcan, under which Vulcan would be permitted to
3 obtain a full return of all sums it had invested plus an additional return of 8% per annum, before
4 any profits were shared with the employees. It was also agreed that, once the threshold return
5 had been achieved, the employees in the Private Equity Team as a group ultimately would
6 become entitled to receive 11% of the post-threshold earnings, with Vulcan retaining 89% of
7 those earnings. Within that 11% portion, each employee was allocated differing shares with the
8 size of these respective shares being established in rough proportion to the employee's overall
9 salary and benefits.
10

11
12 In addition to establishing a system by which shares of varying sizes were allocated to
13 different employees, the parties also agreed that each employee would vest in any share allocated
14 to him or her starting with an initial vest, followed by a time vest that eventually would take the
15 vesting percentage to 80%, and concluding with a final 20% portion (the "Exit Vest") to occur
16 only if the investment were sold while the employee was still working for Vulcan (or was
17 deemed to be sold as provided in the Agreements).
18

19 These profit-sharing formulae applied to all earnings achieved on any given investment
20 program. Once the base return to Vulcan had occurred, they required interim distribution of
21 dividends, interest and any other return on investments still owned by Vulcan, as well as
22 distribution from any earnings on the final sale or other disposition of that investment.
23

24 There was one variation in the language regarding interim distributions that was
25 otherwise common to the various plans. The PE I and PE II Agreements explicitly provided that
26 interim distributions were based on both "vested and unvested" shares. See PE I Agreement,

1 Section 4(b), Ex. 6 and PE II Agreement, Section 4(b), Ex. 8. In contrast, the original VEC
2 Agreement, as more fully discussed below, mentioned only "vested" shares, not unvested shares,
3 with reference to these interim distributions. VEC Agreement, Section 6(a), Ex. 1.
4

5 Claimants argue that they are entitled to post-termination distributions and future
6 compensation under the VEC Agreement as if they are 100% vested. They base this argument on
7 Schedule A, which was an exemplar of distributions included in the May 21, 2007 Amendment
8 to the VEC Agreement, Ex. 3. They further point to a course of dealing with respect to the
9 payment of distributions to them at the 100% vested level prior to their termination that coincides
10 with the exemplar in Schedule A.
11

12 Vulcan argues that the extent to which Claimants were vested at the time of their
13 termination under the VEC Plan was the subject of detailed negotiations prior to entry into the
14 VEC Agreement. In that regard Vulcan emphasizes, inter alia that Section 6(a) of the VEC Plan
15 uses the term "vested," as opposed to the equivalent provisions in the PE I and PE II Agreements
16 (Section 4(b) in each), which use the term "vested and unvested" in such section. Vulcan further
17 urges that the original course of negotiations between the parties in connection with the
18 Agreements shows consideration of this issue, with David Capobianco attempting to obtain
19 immediate vesting for Plan Participants if there was a "not for cause" termination. The evidence
20 shows that Jody Patton and Lance Conn, who negotiated on behalf of Vulcan in connection with
21 the VEC Agreement, rejected the proposal to make post-termination distributions on unvested
22 interests. Vulcan's argument in this regard is consistent with the evidence of the negotiations
23 leading to the execution of the VEC Agreement, but it does not adequately take into account
24 subsequent developments. The VEC Agreement originally entered into by the parties on
25
26

ARBITRATION AWARD - 6

1 February 25, 2005 (Ex. 1), was amended on two occasions, March 31, 2007 (Ex. 2) and, finally,
2 on May 21, 2007 (Ex. 3). An examination of the Agreements as amended, as well as the course
3 of dealing thereunder, demonstrates that the parties negotiated changes to Claimants' rights.
4

5 The controlling VEC Agreement is the May 21, 2007 version, Ex. 3. The Recitals in that
6 Agreement in part state that the Agreement had been previously amended on March 31, 2007 "to
7 reflect certain changes to the definition of 'Plan Asset' and related provisions and to include a
8 new exemplar schedule to the Plan Document to illustrate the operation of certain vesting and
9 allocation provisions of the Plan as of January 31, 2007...." Id. This recitation makes clear that
10 the exemplar was part of the earlier amendment—i.e., it was regarded as a "change" to the VEC
11 Agreement. "Plan Asset" is a defined term including all assets directly or indirectly owned by
12 Vulcan Energy or Vulcan Resources. Id. at Section 2.1. Section 4 of the VEC Agreement
13 governs "Profits Interest Assignments." There was extensive testimony regarding the meaning
14 and application of this provision during the hearing, including the portion of the provision that
15 addresses reallocation of Profits Interest to the other Plan Participants when a member of the
16 Private Equity Team departed.
17

18
19 "Profits Interest" is a defined term in the VEC Agreement. It is "the percentage set forth
20 opposite each Participant's name on Schedule A hereto, as the same may be adjusted as provided
21 in section 4 and subject to vesting as provided in section 5." Id. at Section 2.1.
22

23 The vesting of Profits Interest in the event a Participant is terminated for any reason is
24 controlled by Section 5 of the VEC Agreement. Section 6 of the VEC Agreement is entitled
25 "Incentive Compensation Calculation." Subject to certain conditions, it provides in part as
26 follows: "the Participants shall become entitled to receive, and Vulcan shall make, incentive

ARBITRATION AWARD - 7

1 compensation payments to the Participants in respect of their Profits Interest...based on each
2 Participant's vested Profits Interest at the time of payment...." Id.

3
4 While Vulcan points to the absence of the words "and unvested" after "vested" in Section
5 6, this argument overlooks the fact that, by its own terms, the VEC Agreement had been
6 amended to attach Schedule A which unquestionably lists as "vested" 100%, not just 80%, of the
7 Participants' interests in the various investments. The title of Schedule A(I) is "Example of
8 Reallocation and Vesting of Profits Interest as of February 24, 2008," with "Profits Interest"
9 being a defined term under the Agreement. The attachment of Schedule A as an "exemplar" was
10 one of the stated purposes for amendment of the VEC Agreement listed in the Recitals of the
11 VEC Agreement. Thus, while the opposite may have been true at one time, under Ex. 3, the
12 VEC Agreement dated May 21, 2007, Claimants were entitled to receive distributions with
13 respect to both vested and unvested interests as of the time of their termination. The contract
14 cannot be read as a whole consistently with a contrary conclusion.

15
16 The Panel finds that the VEC Agreement, Ex. 3, construed as a whole under applicable
17 contract principles, is not ambiguous. However, even if it were ambiguous, the Panel finds that
18 the course of dealing under the VEC Agreement overwhelmingly favors Claimants' analysis.
19 The testimony was that over 30 different calculations of employee distributions were made in
20 accordance with the "fully vested" position of Claimants, and not in accord with the position
21 urged by Vulcan. Vulcan argued that these distributions merely reflected its exercise of discretion
22 and an election not to limit compensation by excluding the unvested interest per Vulcan's view
23 of the Agreement—i.e., Vulcan argued that it acted voluntarily so that its conduct should not be
24 considered evidence of the meaning of the VEC Agreement ("No good deed goes unpunished.").

1 On balance, the Panel finds this argument contrary to the weight of the evidence. If Paul
2 Allen and Vulcan had had discretion on this issue, it is more likely than not that there would be
3 evidence of reasoned consideration by Vulcan of its decision-making, on a case-by-case basis,
4 concerning these distributions. It seems unlikely that the identical result would have been
5 reached in each exercise of discretion. Further, if the exemplar were simply an example of the
6 exercise of discretion, there is no apparent reason to include it as part of an "amendment" to the
7 Agreement. Moreover, the behavior of Vulcan in connection with the terminations seems to be
8 inconsistent with its fundamental position. The evidence is that one of Vulcan's reasons for
9 firing the entire Private Equity Team and then rehiring some was to "Stop the Plan" – i.e., to
10 prevent the operation of certain elements of the compensation plan. If Paul Allen had had the
11 level of discretion now urged by Respondents, there appears to be little reason to have taken this
12 action.
13

14
15 The evidence of Vulcan's actions is consistent with Claimants' interpretation of the VEC
16 Agreement and not with Vulcan's. If the Agreement, as amended (including the exemplar), were
17 ambiguous, which the Panel believes it is not, the parties' course of dealing would compel
18 resolution of that ambiguity in favor of Claimants – i.e., at the time they were terminated
19 Claimants were entitled to interim distributions calculated at the 100% rate under the VEC
20 Agreement, not an 80% rate.
21

22 As stated above, Section 10.4 of the Agreement provides that Vulcan cannot amend the
23 VEC Plan without the consent of a Majority in Interest, and further provides that any amendment
24 which would disproportionately affect any Participant must be approved by such Participant. Ex.
25 3 at Section 10.4. Here, Vulcan, by simultaneously firing all of the Private Equity Team and then
26

1 rehiring some, admittedly sought to adversely affect the rights of the Participants in the Plan –
2 i.e., to prevent the operation of the Plan according to its terms, and to substitute a new plan for
3 those it elected to rehire. Both Jody Patton and Lance Conn of Vulcan testified that the intention
4 of Vulcan's gambit was to "Stop the Plan." This action amounted either to a termination of the
5 Plan, which was not permitted under the terms of Section 10.4, or an amendment that was neither
6 approved by a majority of the parties in interest nor agreed to by the individual Participants
7 whose rights were adversely affected, making the termination of Claimants for these purposes a
8 clear and material breach of the VEC Agreement. This action also amounted to an anticipatory
9 repudiation of its contractual obligations, both as to interim distributions and as to "Exit Vest."
10
11

12 The foregoing analysis will govern the remedies available to Claimants based on
13 Vulcan's failure to make post-termination distributions to Claimants at the appropriate level, as
14 well as future interim distributions which will become due and owing under the Agreements and
15 any future "Exit Vest."
16

17 Claimants argue that they should be entitled to be considered 100% vested for all
18 purposes, including the "Exit Vest" provided under the Agreements. Respondents argue that this
19 was the subject of intense negotiations between the parties, and that Claimants' request for an
20 Exit Vest in the event of a not for cause termination was unequivocally rejected by Respondents.
21 The Panel agrees with Respondents' recitation of the facts, but this leaves undetermined the
22 appropriate remedy with respect to Claimants' Exit Vest given that Claimants' termination
23 constituted a breach of contract for the reasons previously explained.
24

25 Damages for breach of contract should place Claimants as nearly as possible in the same
26 financial position they would have been in had the breach not occurred. In addition, where a

1 breach of the covenant of good faith and fair dealing arises in circumstances that are not
2 directly addressed by the contract (see Section III. C., infra), a remedy should reflect an
3 assessment of how the parties would have treated this circumstance if it had been directly
4 addressed. Respondents' termination of all employees, in violation of Sectionf 10.4 of the VEC
5 Agreement, created a factual scenario which was neither contemplated by the VEC Agreement
6 nor addressed by the parties in their negotiations. These two principles have governed the
7 Panel's approach to the determination of damages in this case, including the Exit Vest issue.
8

9
10 Given the wrongful nature of Respondents' conduct, the Panel's right to fashion an
11 appropriate remedy pursuant to the covenant of good faith and fair dealing, and the need to place
12 Claimants as closely as possible in the financial position they would have been in but for
13 Vulcan's breaches of contract, the Panel determines that the Claimants shall be entitled to be
14 treated as if they were still employed for purposes of determination of their Exit Vest. Because
15 Claimants were 80% vested immediately prior to termination, application of this principle results
16 in a determination that they are entitled to 80% of their previously unvested interest (20%), or
17 96% for purposes of the "Exit Vest." The receipt of this percentage of their Exit Vest will not
18 occur until the Exit Vest otherwise would have been due had Claimants remained employed.
19

20 B. Breach of Implied Contract.

21 Claimants have alleged that Vulcan breached an implied contract, including various
22 promises made to Claimants. At the hearing there was considerable evidence of the "social
23 contract" between the parties which was to insure fairness and govern circumstances that were
24 not specifically addressed in the Agreements. While the "social contract" may be relevant to
25 alleged breaches of the covenant of good faith and fair dealing, the Panel finds that the
26

1 agreements at issue herein, including the PE I, PE II and VEC Agreements, all were intensely
2 negotiated. Further, all have integration clauses which provide that the written agreements
3 contain the entire contract between the parties, leaving no room for an argument about other oral
4 promises. See, e.g., the VEC Agreement, Ex. 3, at Section 10.10. In response to questions from
5 the Panel in this regard during final argument, counsel for Claimants conceded that there was no
6 implied contract claim, and the Panel agrees. Accordingly, this claim is dismissed.

7
8 C. Breach of The Covenant of Good Faith and Fair Dealing.

9 Under Delaware law, which applies to the Agreements (see, e.g., the VEC Agreement,
10 Ex. 3, at Section 10.7), the parties are obliged to perform their contract in good faith. The
11 covenant of good faith and fair dealing requires that the parties to a contract must "refrain from
12 arbitrary or unreasonable conduct which has the effect of preventing the other party to the
13 contract from receiving the fruits of the contract." *Wilgus v. Salt Pond Inv. Co., Inc.*, 498 A.2d
14 151, 159 (Del. 1985). Parties are liable for a breach of the covenant when their conduct
15 frustrates the purpose of the contract by taking advantage of their position to control
16 implementation of the contract's terms. *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434,
17 442 (Del. 2005). If a specific circumstance is not treated by a contract, or a specific term which
18 would govern such circumstance is missing, the covenant of good faith and fair dealing allows
19 the court to determine the terms that the parties would have negotiated and agreed to had they
20 foreseen the circumstance. *E. I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 443-44
21 (Del. 1996).² Arguably, Paul Allen's decision to simultaneously terminate the Private Equity
22

23
24
25
26 ² The covenant of good faith and fair dealing as applied to this case is not dissimilar to the "social contract" between
members of the Private Equity team, on the one hand, and Vulcan on the other, referenced during testimony
concerning negotiations. There was substantial testimony that the parties agreed that, in circumstances where issues
(footnote continued...)

1 Team and then rehire certain team members, in an effort to stop the incentive compensation plan
2 and, in effect amend it as to the rehired employees, is such a circumstance.

3
4 Vulcan's admitted intention was to prevent the literal application of the plan that would
5 have occurred had the terminated/rehired team members not been terminated at all. Regardless
6 of whether this was done in an effort to acquire more of the "carry" on investments for Paul
7 Allen or simply to prevent a compensation imbalance while creating an improved plan for the
8 rehired team members (as Vulcan contends), the effect was either to terminate the plan, or to
9 amend the plan, contrary to Section 10.4. The fact that four members of the Private Equity Team
10 immediately were rehired, and now evidently are subject to a different incentive compensation
11 plan, corroborates the Panel's finding as to the purpose of Vulcan's actions. As previously
12 stated, these actions violate Section 10.4. of the VEC Agreement. However, even if these actions
13 were not specifically prohibited by the VEC Agreement, the Panel alternatively finds that
14 Vulcan's actions and omissions constituted a breach of the covenant of good faith and fair
15 dealing and created a situation that is not expressly addressed by the compensation provisions of
16 the VEC Agreement.
17
18

19 A breach of the covenant of good faith and fair dealing under these circumstances allows
20 the Panel to fashion a remedy that reflects how the parties would probably have addressed these
21 circumstances had they expressly dealt with them in the contract. The breach of Section 10.4
22 requires that damages be awarded under the standards applicable to such a breach. Here, it is
23 clear that while Vulcan would not agree during negotiations to an acceleration of the 20% Exit
24

25 _____
(continued from previous page)

26 were not completely addressed by the contract, they would behave fairly in a manner consistent with each other's
best interests.

ARBITRATION AWARD - 13

1 Vest in the event of a not for cause termination, the Claimants also would not have agreed that
2 they would lose their Exit Vest in the event Respondents terminated the entire Private Equity
3 Team in an effort to "stop the plan." Accordingly, the Panel has determined that, if Claimants
4 are treated largely as if they were still employed for purposes of the Exit Vest, the result will
5 place them as closely as possible in the financial position they would have enjoyed but for the
6 breach of Section 10.4 (see, Section III. A., supra) and reflects the probable treatment of this
7 effort to "stop the plan" had the parties addressed it in the Agreement . Thus, the Panel finds that
8 Claimants are entitled to be 96% vested (adding to their existing 80% an additional 16%
9 calculated at 80% of the 20% interest not vested at the time of their termination). Id.
10

11
12 D. Wrongful Termination.

13 Claimants have alleged that their termination by Vulcan was wrongful and tortious. All
14 parties agreed during the hearing on Vulcan's summary judgment claims that claimants' tort
15 claims are governed by Washington law, as opposed to the contractual claims which are
16 governed under the Delaware choice of law provision in the Agreements.
17

18 In *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232, 685 P.2d 1081, 1089 (1984)
19 the Washington Supreme Court, while reaffirming the at will employment doctrine in
20 Washington, found that in situations where an employer had violated a promise of specific
21 treatment under specific circumstances, an employee's termination could be tortious.
22

23 Here, there was no specific promise of treatment in a specific situation by Vulcan to the
24 Claimants which related to or arose from their particular terminations. Indeed, the fact that the
25 Claimants were "at will" was repeatedly affirmed during their hiring, subsequent negotiations
26 and in the Agreements. The fact that their termination was part of Vulcan's efforts to "stop the

1 plans," is a breach of contract as discussed in Section IV. A., supra.

2 The common law tort of wrongful discharge is an exception to the terminable at will
3 doctrine. *Hollenback v. Shriner's Hosp. for Children*, 149 Wn. App. 810, 825, 206 P.3d 337,
4 345 (2009). Here, there is no alleged violation of the Civil Rights Act of 1964, 42 USC §§ 2000,
5 et seq., or the State of Washington's counterpart, the Washington Law Against Discrimination,
6 RCW Chapter 49.60. Similarly, there is no claim for retaliation in connection with Claimants'
7 termination, and no public policy is invoked in the matter before the Panel. As stated in
8 *Hollenback*, the tort of wrongful discharge should be narrowly construed. 149 Wn. App. at 825.
9 The claims here are contractual in nature. The breaches of the employment contract at issue do
10 not relate to the specific circumstances of Claimants' termination. Accordingly, the claims of
11 wrongful discharge per se are denied.
12
13

14 E. Issues Regarding Severance.

15 Claimants contend that there was a clear obligation to make at least one severance
16 payment and that double damages are owed under RCW 49.52.070 based on Respondents'
17 failure to fully honor this obligation. Claimants also contend that two severance payments are
18 owed because severance is referenced in both the VCPE I Agreement and the VCPE II
19 Agreement. (Ex. 6 at Section 4.10; Ex. 8 at Section 4.10.)
20

21 Respondents contend that only a single severance payment is owed ("Claimants are
22 entitled to a single severance from Vulcan (totaling nearly \$1.5 million in aggregate), which they
23 have already received." (Respondents' Arbitration Hearing Brief, at 29.) Respondents contend
24 that there is no evidence that the parties intended to provide for two severance payments despite
25 providing for severance separately in the two agreements, and that a single severance is owed
26

1 because there was a single employment relationship with Vulcan.

2 Both the VCPE I and II Agreements provide that furnishing a release satisfactory to
3 Vulcan is a condition of receiving a severance payment. Claimants did not provide these releases
4 and respondents did not allow claimants to withdraw or otherwise collect moneys from the single
5 severance deposit.
6

7 1. The Claim for Two Severance Obligations.

8 There is no evidence that the parties intended to create multiple severance obligations. In
9 light of the protracted negotiations and attention to detail in drafting the agreements, it is unlikely
10 that the parties would have expressly bargained for two severance payments without leaving
11 some evidence of that intent.
12

13 The overall structure of the agreements is inconsistent with an intent to create two
14 separate severance obligations. The two agreements were created in large measure because of
15 the need to provide for separate incentive compensation obligations relating to different
16 investments. The payment of severance is inherently unrelated to the results of Claimants'
17 performance in making and managing the investments. It is simply a function of the termination
18 of the employment relationship.
19

20 It is far more likely than not that parallel provisions for severance were included in each
21 agreement simply for consistency. The Panel finds that the weight of the evidence strongly
22 supports the view that a single severance payment was intended.
23

24 2. The Condition of a Release.

25 The agreements provide that Respondents' providing a release satisfactory to Vulcan is a
26 condition of obtaining a severance payment.

1 A promise to pay severance would be illusory if an employer could insist upon any form
2 of release it wished as a condition of severance where, as here, the effect would be to release
3 binding obligations to pay other wages and/or to compensate an employee for other material
4 breach. In light of the Panel's determination that Vulcan had materially breached its contract
5 obligations to pay other wages to Claimants, and that Vulcan had also materially breached
6 Section 10.4 and the covenant of good faith and fair dealing, the Panel holds that Vulcan could
7 not validly insist upon a release as a condition of paying severance.
8

9 The Panel finds and concludes that each claimant was entitled to a single severance
10 payment upon termination and that Vulcan did not have the right to condition an otherwise clear
11 obligation to pay severance upon a release of its liability for a material breach of contract.
12

13 F. Double Damages and the Withholding of Wages.

14 1. Severance.

15 The severance payments to which claimants are entitled have been paid into an escrow
16 account over which Claimants have investment control, but from which Claimants may make no
17 withdrawals. Respondents' deposit of these funds is consistent with good faith but is not
18 conclusive.
19

20 Double damages may be awarded under RCW 49.52.070 in the case of a "volitional"
21 failure to pay wages. *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 157, 961 P.2d 371, 374
22 (1998). However, double damages are not owed where there is a bona fide dispute regarding the
23 payment obligation. *Id.* at 160.
24

25 The Panel finds that Vulcan's action here concerning its severance obligation was
26 volitional. However, having found no definitive Washington authority on the propriety of

1 conditioning a severance payment upon the employee's furnishing a release, the Panel has applied
2 general contract principles and determined that the question of whether Vulcan was entitled to
3 insist upon a general release as a condition of paying severance constituted a bona fide dispute.
4 Claimants are entitled to the immediate release of the severance payment funds from escrow, but
5 are not entitled to double damages under RCW 49.52.070.
6

7 2. Damages for Other Wages Withheld.

8 Vulcan's failure to pay 100% of interim distributions owed to Claimants following
9 termination was also clearly "volitional." Whether double damages are owed for wrongfully
10 withholding a portion of the post-termination interim distributions (as distinct from the severance
11 payment) depends on whether there was a bona fide dispute regarding that obligation.
12

13 The Panel has already determined that a) the VEC Agreement, as amended, is
14 unambiguous regarding the obligation to make interim distributions at the 100% level; b) even if
15 the VEC Agreement were ambiguous, the evidence of course of performance would
16 overwhelmingly favor Claimants' interpretation. While Vulcan could argue to the contrary under
17 the original version of the VEC Agreement (Ex. 1), by the time Claimants' were terminated, the
18 VEC Agreement as amended unambiguously obligated Vulcan to pay all covered employees
19 interim distributions as if they were 100% vested. Further, Vulcan's post-termination treatment
20 of distribution obligations that had accrued before termination is inconsistent with Vulcan's
21 assertion that it was in fact exercising discretion in paying distributions at 100%.
22

23
24 As has been discussed above, for the purposes of the operation of these profit-sharing
25 plans, and only for those purposes, claimants shall be treated largely as if they were still
26 employed by Vulcan.

1 immediate and unrestricted access to the account(s) into which his respective severance payment
2 has been placed. These amounts are not subject to doubling under RCW 49.52.070.

3
4 5. Attorneys' Fees and Costs and Arbitrators' Fees and Costs. Pursuant to the
5 Agreements of the parties, the Arbitration Protocol and applicable law, Respondents shall bear
6 attorneys' fees and costs and arbitrators' fees and costs incurred with respect to issues on which
7 Claimants prevailed in an amount to be determined after a post-arbitration hearing and
8 submission of such evidence as is relevant to this issue.

9
10 6. Continuing Jurisdiction. The Panel will retain jurisdiction over this matter for
11 two limited purposes:

12 (a) The determination of the amount of the award of attorneys' fees and costs
13 and arbitrators' fees and costs pursuant to the Arbitration Protocol and applicable law; and

14 (b) A precise determination of amounts due and owing under this Award. The
15 parties are directed by the Panel to meet and confer within the next 15 days and attempt to reach
16 agreement regarding precise amounts due and owing. The parties should confirm in writing that
17 they have conferred and met and should provide a report regarding same to the Panel. While the
18 Panel believes this is a matter subject to arithmetic calculation, it retains jurisdiction to make a
19 specific determination if the parties cannot reach agreement.
20

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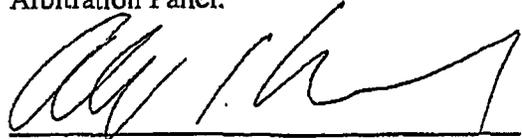
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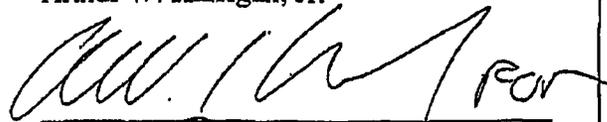
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DATED this 29th day of July, 2009.

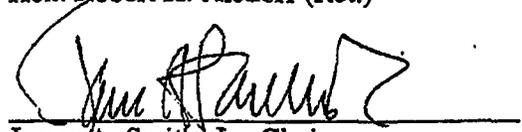
Arbitration Panel:



Arthur W. Harrigan, Jr.



Hon. Robert H. Alsdorf (Ret.)



James A. Smith, Jr., Chair

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EXHIBIT 4:

Index to Clerk's Papers

Vulcan, Inc., et al. v. Capobianco, et al.
No. 65365-2

INDEX TO CLERK'S PAPERS			
Document	Filed by	Date Filed	CP Number
Motion to Confirm Arbitration Awards	Capobianco/ Thukkaram	03/08/2010	CP 1-13
Declaration of Matthew A. Carvalho In Support of Motion to Confirm Arbitration Awards	Capobianco/ Thukkaram	03/08/2010	CP 14-15
Exhibit A: Final Arbitration Award (with exhibits)			CP 16-50
Exhibit B: Decision Regarding Disqualification of Arbitrator ("Lukens Decision")			CP 51-58
Exhibit C: Excerpt from profit-sharing agreement (mandatory arbitration clause)			CP 59-60
Exhibit D: Arbitration Protocol			CP 61-66
Declaration of Alan S. Rau (in support of Motion to Vacate Arbitration Award)	Vulcan	03/08/2010	CP 67-93
Motion to Vacate Arbitration Award and Proposed Order	Vulcan	03/08/2010	CP 94-126
Declaration of Bradley S. Keller (in support of Motion to Vacate Arbitration Award)	Vulcan	03/08/2010	CP 127-30
Exhibit A: Arbitration Protocol			CP 131-36
Exhibit B: Arbitration Award			CP 137-58
Exhibit C: VEC Agreement			CP 159-98
Exhibit D: Harrigan Invoice (December 2008)			CP 199-200
Exhibit E: Harrigan Invoice (January 2009)			CP 201-02
Exhibit F: Yarmuth Wilsdon Calfo Invoice (November 2008)			CP 203-06
Exhibit G: Yarmuth Wilsdon Calfo Invoice (December 2008)			CP 207-10

Exhibit H: Yarmuth Wilsdon Calfo Invoice (January 2009)			CP 211-15
Exhibit I: Demand for Arbitration			CP 216-28
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Exhibit K: Email correspondence between arbitrators and parties			CP 232-35
Exhibit L: Email correspondence between arbitrators and parties			CP 237-40
Exhibit M: Email correspondence between Vulcan counsel and Vulcan party-appointed arbitrator			CP 241-45
Exhibit N: Email correspondence between Vulcan counsel and Vulcan party-appointed arbitrator			CP 246-48
Exhibit O: Email correspondence between Vulcan counsel and Vulcan party-appointed arbitrator			CP 249-58
Exhibit P: Email correspondence between Vulcan counsel and Vulcan party-appointed arbitrator			CP 259-65
Exhibit Q: Email correspondence between Vulcan counsel and Vulcan party-appointed arbitrator			CP 266-68
Exhibit R: Email correspondence between Vulcan counsel and Vulcan party-appointed arbitrator			CP 269-71
Exhibit S: Arbitrator Disclosure Form (Harrigan)			CP 272-77
Exhibit T: Arbitrator Disclosure Form (Alsdorf)			CP 278-83
Exhibit U: Vulcan Response to Demand for Arbitration			CP 284-306

Exhibit V: Correspondence from Arbitration Panel to Counsel for Parties			CP 307-08
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Exhibit A: Vulcan Reply In Support of Respondents' Motion to Disqualify Arbitrator in Lukens Proceeding			CP 345-69
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Exhibit C: 08/20/2009 letter from Bradley S. Keller to Arbitration Panel (with exhibits)			CP 378-89
Exhibit D: Capobianco/Thukkaram Motion to Confirm The Panel's Authority			CP 390-401
Exhibit E: 09/22/2009 letter from Richard C. Yarmuth to Bradley S. Keller			CP 402-04
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Exhibit E: Excerpt from profit-sharing agreements (definition of "Vesting")			CP 484-86
Second Declaration of Matthew A. Carvalho In Support Of Motion To Confirm Arbitration Awards	Capobianco/ Thukkaram	03/18/2010	CP 487-88
Exhibit A: Correspondence from Judge Terry Lukens of JAMS attaching Arbitrator Disclosure Form			CP 489-502
Exhibit B: Correspondence from JAMS entitled "Commencement of Arbitration and Notice of Appointment of Arbitrator"			CP 503-08
Petitioners' Joint Reply In Support Of Motion To Confirm Arbitration Awards	Capobianco/ Thukkaram	03/18/2010	CP 509-15
Reply In Support Of Motion To Vacate Arbitration Award	Vulcan	03/18/2010	CP 516-27
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Declaration of Matthew A. Carvalho In Opposition To Motion To Allow Limited Discovery	Capobianco/ Thukkaram	03/24/2010	CP 551-52
Exhibit A: 08/20/2009 letter from Bradley S. Keller to Arbitration Panel			CP 553-55
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Supplemental Declaration Of Miles A. Yanick In Support Of Motion To Allow Limited Discovery	Vulcan	03/25/2010	CP 570-71
Exhibit A: 03/01/2010 letter from Miles A. Yanick to Richard C. Yarmuth and Matthew A. Carvalho			CP 572-75
Exhibit B: 03/04/2010 correspondence from Miles A. Yanick to Matthew A. Carvalho			CP 576-77
Clerk's Minutes	Court	03/26/2010	CP 578
Memorandum Decision on Motion to Confirm and Motion to Vacate	Court	04/06/2010	CP 579-85

<p>Order Denying Motion to Vacate Arbitration Award And Granting Motion To Confirm Arbitration Awards</p> <p>Exhibit A: Final Arbitration Award (with exhibits)</p> <p>Exhibit B: Lukens Decision</p>	Court	04/06/2010	<p>CP 586-87</p> <p>CP 588-622</p> <p>CP 623-30</p>
<p>Judgment</p> <p>Exhibit 1: Order Denying Motion to Vacate Arbitration Award And Granting Motion To Confirm Arbitration Awards (with exhibits)</p>	Court	04/30/2010	<p>CP 631-34</p> <p>CP 635-87</p>
<p>Notice of Appeal To The Court Of Appeals, Division I</p> <p>Exhibit 1: Judgment (omitting exhibits)</p> <p>Exhibit 2: Order Denying Motion to Vacate Arbitration Award And Granting Motion To Confirm Arbitration Awards (with exhibits)</p> <p>Exhibit 3: Memorandum Decision on Motion to Confirm and Motion to Vacate</p>	Vulcan	05/03/2010	<p>CP 688-89</p> <p>CP 690-94</p> <p>CP 695-97</p> <p>CP 698-705</p>
<p>Amended Notice of Appeal To The Court Of Appeals, Division II</p> <p>Exhibit 1: Judgment (with exhibits)</p>	Vulcan	05/05/2010	<p>CP 706-07</p> <p>CP 708-65</p>