

67607-5

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No. 67607-5-1

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

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VULCAN INC., a Washington corporation, VULCAN CAPITAL  
PRIVATE EQUITY, INC., a Delaware corporation, and VCPE ORANGE  
II, LLC, a Delaware limited liability company,  
Appellants and Cross-Appeal Respondents,

v.

DAVID CAPOBIANCO, an individual, and NAVIN THUKKARAM, an  
individual,  
Respondents and Cross-Appeal Appellants.

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**APPELLANTS' REPLY BRIEF AND  
OPPOSITION TO CROSS-APPEAL**

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## **I. INTRODUCTION**

Respondents' arguments come down to a single point. Both in opposing Vulcan's appeal and in their cross-appeal, Respondents' position rests entirely on their insistence that the proceeds from the sale of Vulcan's Plains All American General Partnership units (the "PAA-GP sale") are clearly, unequivocally "Future Interim Distributions" under the Award. This conclusion is so obvious, Respondents insist, that there can be no good faith dispute about it; and by the same token, they insist, there was no need for the court to go behind the Award or interpret the VEC Agreement to grant their motion to enforce.

But Respondents' professed certitude is at odds with the undisputed facts, as well as their own statements. For example:

- Respondents do not dispute that the VEC Agreement contemplates at least three circumstances in which distributions may be due to compensation-plan participants, none of which corresponds with the two categories created by the Award, which themselves are not defined in the Award.
- If the application of the Award to the PAA-GP sale proceeds were plain and unambiguous, there would have been no need for Respondents to rely on evidence purportedly submitted at the arbitration hearing to argue what the intent of the arbitrators must have been in making their Award.
- If the distributions of the PAA-GP sale proceeds are so clearly "Future Interim Distributions," Respondents could not, in good faith, have taken the opposite position at the outset of this dispute—as they did.

By resting their arguments solely on their denial that there is any ambiguity in the Award, Respondents effectively concede Vulcan's arguments regarding the court's jurisdiction to decide arbitrable disputes and authority to construe or modify an arbitration award. Respondents do not dispute that if the Award is incomplete or ambiguous, then resolving the parties' dispute about the payments due under the VEC Agreement falls within the scope of the agreement's arbitration clause and was beyond the court's jurisdiction to decide. Likewise, Respondents effectively concede that there is no authority for the proposition that a court may interpret or modify an award under the guise of "enforcement," much less add injunctive relief mandating payments due under its interpretation. If such "enforcement" powers existed, surely Respondents would have found an example.

Instead of addressing Vulcan's arguments and authority, Respondents ask the Court to join them in ignoring the language of the operative documents, the law, and Respondents' own shifting positions. In short, Respondents ask the Court to take their word for it that the Award must have been intended to address the parties' dispute—and therefore does, unambiguously. Based on their say-so, Respondents ask the Court not only to affirm the trial court's errors but to compound them by reversing the court's finding that the dispute underlying this appeal is at

least “fairly debatable.” The Court should deny such requests.

## **II. REPLY TO COUNTERSTATEMENT OF CASE**

Respondents’ opening brief concludes with the comment that because “the employer in this case is a billionaire,” this “is all the more reason [double] damages are appropriate.” (Resp. Op. Br. at 28.) This has been Respondents’ not-so-subtle theme throughout this case: because Vulcan is owned by a wealthy individual, it doesn’t deserve the same protection under the law as the rest of us. Most of Respondents’ “Statement of the Case” is in service of this offensive theme. But the relevant facts are few:

This appeal ultimately stems from a dispute between Vulcan and Respondents regarding how Respondents were to be compensated under the VEC Agreement. Vulcan took the position that Respondents were 80% vested for all purposes; Respondents took the position they were 100% vested for all purposes.

The parties’ dispute—indeed “any dispute... of any kind arising out of, relating to or in connection with” the VEC Agreement—was subject to mandatory arbitration. Thus, the parties arbitrated the dispute, and the arbitration panel entered an Award. Among other things, that Award granted declaratory relief regarding how Respondents were to be compensated under the VEC Agreement. In doing so, it expressly

interpreted the VEC agreement.

The Superior Court confirmed the Award. Respondents did not ask the court to modify the Award in any respect. The Award's declaratory relief identified two types of payment under the VEC Agreement: "Exit Vest Distributions" and "Interim Distributions," requiring payment at vesting levels of 96% and 100%, respectively. The Award did not define these terms.

Subsequently, Vulcan sold an asset. Vulcan believed the proceeds were not "Interim Distributions" and paid Respondents accordingly under the Award. Respondents initially agreed with Vulcan's characterization. But when Vulcan pointed out that the sale was not an "Exit" under the VEC Agreement, Respondents reversed their position and said the proceeds were instead Interim Distributions.

Respondents then asked the trial court to "enforce" the Award in accordance with their newly adopted position that the proceeds were Interim Distributions. They asked the court to issue supplemental declaratory relief to this effect and issue injunctive relief ordering Vulcan to pay according to this interpretation. Respondents also went a step further, asking the court to hold that—notwithstanding Respondents' own contrary positions on the issue—the interpretation they advocated was so obvious that there could be no bona fide dispute about it. In short,

Respondents asked the court to hold that the position that they had initially advocated was plainly wrong and penalize Vulcan for maintaining it. In support, Respondents submitted evidence allegedly considered by the arbitration panel and argument about what it showed about the panel's intent in issuing the Award.

The court granted Respondents motion in part. The court recognized that the parties' dispute about how to interpret the application of the Award and VEC Agreement under the circumstances was a legitimate one. But the court also purported to resolve the dispute. It ordered declaratory relief about the application of the Award to the payments at issue, which in turn required interpretation of the VEC Agreement. The court further ordered injunctive relief requiring Vulcan to supplement its payments to Respondents. This appeal followed.

### **III. REPLY ARGUMENT**

Vulcan's appeal identified three assignments of error. The first concerned the inquiry in which the trial court was asked to engage—and necessarily did engage—in order to rule on Respondents' motion to enforce. Because the Award's declaratory relief did not address the actual payment provisions of the VEC Agreement, it left an unresolved issue—or, at least, an ambiguity—which could only be resolved through interpretation of the Award and the VEC Agreement. As a result, the

dispute was subject to mandatory arbitration under the Federal Arbitration Act and the VEC Agreement and beyond the trial court's authority to decide.

The second and third assignments of error concern the authority of the court, having engaged in an impermissible interpretation of the Award and VEC Agreement, to order the relief it did in the name of "enforcement" of the Award. Specifically, the court both (a) amended the declaratory relief provisions of the Award to address a situation the Award did not expressly address and then (b) summarily adjudicated Respondents' statutory wage claim alleging a violation of the VEC Agreement and ordered injunctive relief based on that adjudication.

Respondents' opposition brief presumes the first assignment of error away by denying there is any question about the application of the Award to the payment at issue. Studiously avoiding any reference to the VEC Agreement, Respondents insist all payments that are possible under it *must* fall into one of the two categories identified in the Award's declaratory relief. Because the payment issue was not an "Exit Vest Distribution," Respondents now argue (contrary to the position they first took on this issue), it *must have been* an "Interim Distribution," because no other distribution is possible. At the same time, as they did before the trial court, Respondents delve into the evidence allegedly presented at the

arbitration hearing and draw inferences from that about what the panel must have meant by its Award. This is precisely what the FAA prohibits and what the trial court necessarily did in granting Respondents' motion to enforce.

As for the relief ordered by the trial court (the second and third assignments of error), Respondents argue that what the trial court could not do in affirming an award it can nonetheless do in the name of "enforcement"—i.e., construe and amend the award, and then summarily grant injunctive relief based on its construction. They cite no authority giving courts such broad "enforcement" authority under the FAA, and indeed there is none.

**A. RESPONDENTS EFFECTIVELY CONCEDE THAT THE TRIAL COURT LACKED JURISDICTION TO RESOLVE ANY DISPUTE RELATING TO THE VEC AGREEMENT.**

The scope of the trial court's authority to interpret and amend an arbitration award precedes the question of the court's authority to enforce a judgment based on such interpretation and amendment. Respondents would like this dispute to be about the court's enforcement authority, and toward that end they deny the existence of any question about what the Award says. Here, judgment confirmed an Award that granted declaratory relief regarding the application of certain provisions of the parties'

contract. The Award was ambiguous at best and, on its face, does not address the disputed payment at all. The trial court therefore could not resolve the parties' dispute and grant Respondents' motion without construing the Award in light of the VEC Agreement. Respondents even asked the court to consider evidence from the arbitration in making its ruling. Regardless of the courts' ability to enforce judgments—whether confirming arbitration awards or otherwise—the court exceeded its authority in engaging in that exercise.

**1. The Express Terms of the Award and of the VEC Agreement Do Not Correlate.**

There is simply no way to square the VEC Agreement's provisions regarding when and under what circumstances Respondents would be paid with the declaratory relief provisions of the Award. In its opening brief, Vulcan quoted the VEC Agreement to show that it provides for incentive compensation payments to Respondents in at least *three* different circumstances: (a) Distributions from Vulcan Energy or Vulcan Resources; (b) Proceeds arising from a partial sale; and (c) Proceeds from a Disposition or Deemed Disposition. Respondents do not dispute this. To the contrary, their opposition brief is devoid of any discussion of the payment provisions of the VEC Agreement.

Nor do Respondents dispute that the Award addresses

Respondents' vesting levels for only *two* categories of distributions—neither of which corresponds to one of the three categories contemplated under the VEC Agreement. Instead of addressing the payment scenarios contemplated in the VEC Agreement, the Award speaks only of “Future Interim Distributions” and “Exit Vest Distributions.” Neither term is used anywhere in the VEC Agreement.

Rhetoric aside, Respondents do not—and cannot—dispute that the declaratory relief in the Award and the VEC Agreement’s payment provisions do not correlate. The question therefore becomes whether the Award’s two categories nonetheless clearly and unambiguously encompass all of the payment scenarios contemplated by the VEC Agreement. They do not.

**2. The Award’s Declaratory Relief Provisions do Not Expressly Address Proceeds from a Non-Final Disposition of an Asset.**

The Award’s declaratory relief provisions use terms that do not appear anywhere in the VEC Agreement and are not defined anywhere in the Award itself. The Award refers to “Exit Vest Distributions” and “Future Interim Distributions.” Presumably, an “Exit Vest Distribution” is one made upon an “Exit,” which is defined in the VEC agreement as a “final Disposition or Deemed Disposition.” CP 263, 271. The sale of Vulcan’s PAA GP units is a form of “Disposition” (defined in the VEC

Agreement as the “sale, exchange, redemption, assignment, transfer, repayment, repurchase or other disposition” of an asset for cash or securities distributable under the VEC Agreement). CP 263. But the parties agree (at least now) that the sale was not a “final” or “deemed” Disposition as the VEC Agreement defines those terms.

The only other category of payment referenced in the Award is “Future Interim Distributions.” The Award purports to define that term in its July 29, 2009 interim award (incorporated by reference into the final Award), which refers to the “interim distribution of dividends, interest and any other return on investments still owned by Vulcan.” CP 241. Respondents appear to accept this definition. By this definition, an “interim distribution” refers to recurring distributions, such as interest and dividends, that result from an ownership interest, such as a membership unit or a share of stock, that continues to be held. This definition would exclude proceeds from the sale of the ownership interest.

Respondents nonetheless argue that the proceeds from the sale of the PAA GP units were “interim distributions.” Because Vulcan continues to own some *other* interest (specifically, limited partnership units) in the same entity, Respondents argue, the interests that Vulcan sold are “still owned,” notwithstanding the sale. Not only does this make no sense, but it also ignores that “investments still owned” appears in the phrase, “other

return on investments still owned,” and that “other return” is expressly likened to “dividends [and] interest.” Dividends and interest are generated as a result of continued ownership of the specific interest involved (share, membership unit, etc.) and cannot be categorized with sale proceeds by any common understanding of those terms.

**3. Respondents’ Own Conflicting Positions  
Demonstrate that the Award is at Least Ambiguous.**

Respondents’ argument that the meaning of “interim distributions” is unambiguous is belied by the position they took at the outset of this dispute. Upon receiving payment from the proceeds of the PAA-GP sale, Respondent Capobianco wrote to Vulcan:

As you are aware, pursuant to section 6b of the VEC Incentive Compensation Program, this sale triggers the payment of the true up, as well as the process of releasing the holdback, *given that these transactions were “Exit or Deemed Dispositions”* as indicated in letters from Vulcan we received on December 31<sup>st</sup> and January 14<sup>th</sup>.

CP 291 (emphasis added). In other words, Capobianco initially took the position that the PAA-GP sale proceeds were “Exit Vest Distributions” and demanded certain payments due under the VEC Agreement (not the Award, which does not address the issue) upon a final or Deemed disposition—i.e., an “Exit.” This would have resulted in a substantial additional payment to Mr. Capobianco in the approximate range of \$10 million.

But as Vulcan pointed out, the nature of the PAA-GP sale was not such that it amounted to a final or Deemed Disposition, and Respondents agreed; in fact, they did a complete reverse-course and maintained that the PAA-GP sale was *not* an Exit at all but that the proceeds from the sale were an “Interim Distribution.” CP 295. This second position is the one Respondents adopted for purposes of their motion to “enforce” the Award.

Whether the PAA-GP proceeds were a distribution on Exit, an Interim Distribution, or something else is the bedrock issue in dispute here—the one Vulcan maintains the court could not decide and that Respondents maintain is not even subject to bona fide dispute. But Respondents themselves have answered the question in *two different ways*, at different times maintaining *both* that the proceeds are distributions on an Exit *and* that they are Interim Distributions. While it is not inherently impermissible to change one’s position, Respondents cannot simultaneously, in good faith, maintain that there is absolutely no ambiguity in the Award. Either Respondents were acting in bad faith when they took their initial position or the meaning of “Future Interim Distributions” is, at best, ambiguous.

**4. The Court’s Order Denying Respondents’ Request for Double Damages Acknowledges that the Award is Ambiguous.**

The trial court denied Respondents’ request for double damages,

because it found that there was a bona fide dispute as to the meaning of “Interim Distributions,” and therefore any withholding of wages was not willful. CP 313. In order for a dispute to be “bona fide” it must be a “fairly debatable” dispute as to whether the wages in dispute must be paid. Brandt v. Impero, 1 Wn. App. 678, 680-81, 463 P.2d 197 (1969).

Here, whether the wages in dispute must be paid depends on whether the distribution of the PAA-GP sale proceeds were an “Interim Distribution.” In finding this question to be fairly debatable, the court correctly acknowledged that there is more than one reasonable position that one could take with respect to it (as Respondents have demonstrated)—i.e., that it is ambiguous.

**5. To Grant Respondents’ Motion to Enforce Required the Court to Go Behind the Award and Address Matters Subject to Mandatory Arbitration.**

Respondents do not dispute that the parties agreed to submit “any dispute... of any kind arising out of, relating to or in connection with” the VEC Agreement to arbitration. CP 281-82. Nor do they dispute the enforceability of this provision under the FAA or the strong federal policy requiring courts to indulge every presumption in favor of arbitration. See 9 U.S.C. § 9; Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 103 S. Ct. 927, 74 L.Ed.2d 765 (1983). Instead, Respondents *deny the existence* of any such dispute and accuse Vulcan of

“manufacturing” one. (Resp. Op. Br. at 15.) They do so by denying the existence of an ambiguity and, therefore, that their motion to “enforce” required the court to construe the VEC Agreement.

A fair review of the actual language of the Award in light of the VEC Agreement reveals otherwise. As Respondents own contrary positions demonstrate, the application of the Award to the proceeds from the sale of the PAA GP units is not obvious, and the trial court acknowledged this too. But once it was apparent that the application of the Award to these circumstances was not clear, and that the question necessarily “relat[ed] to” the VEC Agreement, the parties’ dispute became subject to mandatory arbitration.

The court nonetheless proceeded to resolve the dispute. Indeed, Respondents asked the court (and apparently the court consented) to delve into selected evidence ostensibly submitted to the arbitrators in order to ascertain what, according to Respondents, the panel must have meant with its Award.<sup>1</sup> Specifically, Respondents submitted as an exhibit a September 26, 2008 letter from Vulcan, which, they argue, “the Arbitration Panel had expressly relied on” in analyzing the “parties’ course of dealing ‘under the VEC Agreement.’” (Resp. Op. Br. at 25.) In

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<sup>1</sup> The undersigned counsel did not represent Vulcan at the arbitration, and there is no transcript or other record of the hearing. Thus, what the arbitrators reviewed and considered is not subject to easy, if any, verification.

fact, the portion of the Award Respondents cite addresses Schedule A(I) to the VEC Agreement, titled “Example of Reallocation and Vesting of Profits Interest as of February 24, 2008.” CP 30. However, the Schedule A(I) attached to the VEC Agreement submitted by Respondents is entitled “Example of Reallocation and Vesting of Profits Interest As of *January 31, 2007*” and does not refer to the September 26, 2008 letter Respondents have submitted as evidence here. CP 197 (emphasis added); see also CP 289 (copy of VEC Agreement submitted by Vulcan).<sup>2</sup>

Thus, Respondents’ suggestion that the Arbitration Panel “expressly relied upon” the evidence they have submitted in this proceeding is not at all clear from the face of the Award. Respondents are asking the court to rely on their say-so about what the Panel meant by its Award, in reliance on evidence not addressed in the Award but allegedly submitted to the Panel in a context that is not clear from the Award. In doing so, Respondents effectively concede that the parties’ dispute required interpretation of the VEC Agreement, the parties’ intent, and what the Panel meant by the undefined terms in the Award. By the same

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<sup>2</sup> Respondents submitted the March 31, 2007 version of the VEC Agreement. CP 169. The Award refers to the May 21, 2007 version. CP 29-30. This may explain the different dates referred to in the Schedule A(I), but in any event, the schedule in the record—and presumably also the one addressed in the Award—does not refer to the September 26, 2008 letter that Respondents have submitted here, and nor does the Award.

token, to assess the merits of Respondents' position, the trial court had to engage in this inquiry and determine whether the Panel contemplated circumstances like the PAA-GP sale and, if so, whether the Award was intended to address such circumstances. This is precisely the sort of judicial intrusion into the arbitration procedure that the FAA forbids.

**B. RESPONDENTS PROVIDE NO AUTHORITY FOR THE PROPOSITION THAT A COURT'S ABILITY TO ENFORCE AN ARBITRATION AWARD REDUCED TO JUDGMENT ALLOWS IT TO CONSTRUE OR AMEND THE AWARD.**

The trial court's scope of authority in the enforcement of a judgment confirming an arbitration award is a separate matter from its jurisdiction to decide matters subject to mandatory arbitration. As discussed above, the trial court entered territory expressly reserved for arbitration by resolving a dispute that required it to look behind the Award at the VEC Agreement and the evidence presented at the arbitration. By then issuing an order that both construed the Award and, in addition, ordered new injunctive relief requiring Vulcan to make certain payments based on the court's construction, the court exceeded the scope of its authority under the FAA.

**1. The Enforceability of an Arbitration Award Reduced to Judgment Does not Give Courts the Ability to Modify the Award.**

Respondents rely on 9 U.S.C. § 13, which allows a judgment

confirming an arbitration award to be “enforced as if it had been entered in an action in the court which entered it.” As Vulcan noted in its opening brief, this provision comes into play only after an award has been confirmed as judgment; it does not retroactively expand the scope of the courts’ discretion in confirming an award in the first place. Put another way, the right to “enforce” an award reduced to judgment does not give courts’ the right to go back and construe, modify, or extend an incomplete or ambiguous award. Such a broad “enforcement” authority would render meaningless the limitations placed on courts reviewing arbitration awards under §§ 9 and 13 of the FAA.<sup>3</sup>

Respondents’ authority illustrates this point. In support of their position that a trial court may construe and amend an award under the guise of “enforcement,” Respondents cite In re Aiken Gump Strauss Hauer & Feld, LLP, 252 S.W.3d 480 (Tex. Ct. App. 2008). Aiken Gump involved a motion to remand certain disputes to the original arbitration panel seven years after the award had been confirmed in a final judgment. Id. at 482. The Texas Court of Appeals held that the trial court did not clearly abuse its discretion in denying the motion to remand. Id.

In addition to being inapposite procedurally, there is a crucial

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<sup>3</sup> Respondents misconstrue this point at page 14 of their opening brief.

difference between the issue presented in Aiken Gump and the issue here. In Aiken Gump, the party seeking remand to the arbitrators “ha[d] not alleged that the Award [wa]s ambiguous or incomplete.” Id. at 491. The court noted that it had found “no cases holding that remand is required... in cases in which there is no assertion that the Award is ambiguous or incomplete.” Id. at 491. The court stressed this distinction repeatedly in its analysis. See id. at 491-92 & nn. 14-15.

In contrast, Hellman v. Program Printing, Inc., 400 F. Supp. 915 (S.D.N.Y. 1975) (discussed in Vulcan’s opening brief), addresses the situation where circumstances arise post-award that the award does not expressly address. There, the court recognized that “[i]t is not within the province of this Court to intrude into the arbitration procedure and interpose its interpretation of a disputed award”; rather, “[w]hen a petition for enforcement involves a new dispute, such as this one, enforcement must be denied.” Id. at 918.

Here, the Award does not address payment of proceeds from the sale of an asset that does not qualify as an Exit. Either this was a “new” issue or it required the court to “interpose its interpretation of a disputed award.” Id. Either way, it was “not within the province of” the trial court to decide. Id.

The other cases cited by Respondents have nothing to do with

judgments on arbitration awards. That Respondents have gone as far afield as they have only to come up with cases that are not on point demonstrates that absence of authority supporting their position. In Goodsell v. Goodsell, 38 Wn.2d 135,138, 228 P.2d 155 (1951), the court in a divorce proceeding had entered an order incorporating the parties' agreement regarding division of the family home and child support. Among other things, the property-division order provided for a contractual lien on the property securing child-support obligations and stated that the property would not be divided or sold until 1952 (seven years after the sale). Id. at 136, 139. When child support payments were not made, the appellant executed on the order as if the contractual lien were a judgment lien and purchased the property at a sheriff's sale. Id. at 136-37.

The trial court set aside the sale. Id. at 135. The Supreme Court affirmed, holding that the agreement and order to "hold the property for a definite period of time... would be thwarted if the [appellant] was permitted to secure a judgment independent of the lien and have the property sold on execution." Id. at 138-39. Thus, the trial court in Goodsell was protecting the very subject matter of its order—the real property—which the appellant had attempted to sell without authority and in contravention of the express terms of the order. Nothing of the sort is true here, where the judgment provided declaratory relief concerning

future payments, and the parties merely dispute how it applies to a particular payment.

Northern Commercial Co. v. E.J. Hermann, 22 Wn. App. 963, 593 P.2d 1332 (1979), also is irrelevant. It too involved a divorce decree creating an equitable lien on real property securing a husband's payment obligations under the decree. Id. at 965. Subsequently, the husband defaulted on a personal guarantee to a third party (Northern Commercial), which obtained a judgment on the personal guarantee and then sold the property without notice to the wife. Id. at 966. In a subsequent action by the wife, the trial court held that her interest was not affected by the sale under the circumstances. Id. at 967.

In affirming the trial court's decision, the Court of Appeals addressed whether the divorce decree could create an equitable lien on the property. Id.<sup>4</sup> In holding that it could, the court stated that the courts have inherent power to impose such liens in order to make their judgments effective. Id. at 968. Thus, Hermann is not about post-judgment "enforcement" remedies at all—it concerns the scope of the courts'

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<sup>4</sup> The divorce decree had provided that the lien was to be "a first, prior and paramount lien upon each and every item of said real property, with appurtenances thereon, subject only to the existing liens for mortgages thereon, and any subsequent purchaser, lienor or encumbrancer shall be subject in interest to the lien of the plaintiff." Id. at 955-66 (internal quotation marks omitted).

authority in entering a judgment in the first place.<sup>5</sup>

In truth, the dispute here does not concern enforcement of a judgment. Enforcement of judgments is addressed in Title 6 of the RCW, which concerns the various modes of executing on a money judgment and other enforcement procedures. Rather than enforcement, Respondents' motion sought to construe and extend the Award and convert its declaratory relief into injunctive relief. There is simply no enforcement mechanism allowing the court to do this.

**2. The Enforceability of an Arbitration Award Reduced to Judgment Does not Give Courts the Ability to Issue New Injunctive Relief Not Provided in the Award.**

The third assignment of error identified in Vulcan's opening brief concerned the new injunctive relief ordered by the trial court. The provisions of the Award at issue are declaratory—they purport to define future payment obligations under the VEC Agreement. A failure to make a payment due under the VEC Agreement might have supported an action for breach of the agreement so construed, but it would not have been a violation of injunctive relief—the Award imposed no such relief.

In the name of “enforcement,” the trial court changed that.

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<sup>5</sup> Respondents have abandoned authority cited in their motion to enforce, effectively conceding that it too is inapposite. Cf. CP 11 (citing Allen v. American Land Research, 95 Wn.2d 841, 850, 631 P.2d 930 (1981)).

Respondents requested that the court not only declare that the PAA-GP distributions “constituted Interim Distributions under the declaratory relief portions of the Judgment [that confirmed the Award]” but also asked it to rule that Vulcan had “violated the Judgment” as amended and ordered Vulcan “to correct the underpayments... by paying the Withheld Wages to [Respondents].” CP 15-16 (emphasis added). And the trial court did so, converting a declaratory award into injunctive relief. CP 313.

Respondents cite no authority suggesting that a trial court may convert declaratory relief in an arbitration award into injunctive relief. Ordering new relief goes far beyond even the court’s ability to modify an award under the FAA.<sup>6</sup> Respondents do not even attempt to articulate how the provisions of the FAA could support the relief they requested and received. Nor do Respondents address Vulcan’s argument and authority that an injunction enforcing a declaratory judgment is only available to the court that entered the declaratory relief. (Apps.’ Op. Br. at 25-26.) As with the court’s lack of authority to delve into arbitrable issues, Respondents attempt to sweep these fatal flaws under the rug and insist that all’s fair in the name of “enforcement.”

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<sup>6</sup> The courts’ ability to modify is limited to circumstances where (a) the award contains a miscalculation of figures or mistake in the description of any person, thing, or property; (b) the arbitrators have awarded upon a matter affecting the merits that was not submitted to them; or (c) the award is imperfect in form not affecting the merits. 9 U.S.C. § 11.

Even if there were no arbitration award involved and the trial court had entered its own declaratory judgment, Respondents would not be entitled to injunctive relief on the showing they have made. Under Washington's Uniform Declaratory Judgments Act, a party may make a petition for further relief, including injunctive relief, where "necessary and proper." RCW 7.24.080; United Nursing Homes, Inc. v. McNutt, 35 Wn. App. 632, 640, 669 P.2d 476 (1983). Among other things, that petition would have to show that the standard for issuing an injunction had been met: (1) a clear legal or equitable right, (2) a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of either were resulting in or would result in actual and substantial injury. Washington Fed'n of State Employees, Council 28 AFL-CIO v. State, 99 Wn.2d 878, 888, 665 P.2d 1337 (1983). Respondents have not even attempted such a showing; and as argued in Vulcan's opening brief, they would not have been able to make one. Thus, even if the trial court had the legal authority to add injunctive relief to an arbitration award, it would have been reversible error to do so on this record. Respondents have failed even to address this argument in their response brief.

#### **IV. ARGUMENT IN RESPONSE TO CROSS-APPEAL**

A failure to pay wages is not willful where it is based on a genuine and reasonable belief that the wages in question are not due. Moore v.

Blue Frog Mobile, Inc., 153 Wn. App. 1, 3, 221 P.3d 913 (2009). Thus, where the employer believes wages are not due and that belief is “fairly debatable,” a bona fide dispute exists precluding a finding of willfulness, regardless of whether the belief was correct. Id. at 8. These are, of course, questions of fact. Id.

Respondents asked the trial court (and, by their appeal, ask this Court) for a judgment in their favor on this inherently factual question without a hearing (which Vulcan requested) or testimony. Indeed, other than the Award, the VEC Agreement, and a few e-mails, there was no factual record here. Yet Respondents insist they were entitled to proceed directly to judgment—without even having to meet the standards of CR 56.<sup>7</sup> The view that they were entitled to a judgment on a new, unadjudicated claim of willful wage withholding upon a simple motion demonstrates the extreme and untenable view Respondents hold of a court’s power to “enforce” a judgment.

Respondents’ position is equally untenable on the merits. Respondents accuse Vulcan of “manufacturing” a dispute by taking the very same position that they once took. Vulcan, at least, has never changed its position: it has maintained from the outset that the proceeds

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<sup>7</sup> Had respondents been required to at least meet the summary judgment standard, all reasonable inferences would have been drawn in Vulcan’s favor.

from the PAA-GP sale should be paid at the 96% vesting level applicable to “Exit Vest Distributions” because the transaction involved the disposition of an asset, rather than an “Interim Distribution” from an asset still owned. Not only is this position reasonable, it is one Respondents themselves initially took. For Respondents to argue now that Vulcan’s position is not even fairly debatable is for them to admit their own bad faith from the outset.

Here again, Respondents’ authority illustrates the point. In Flower v. TRA Industries, Inc., 127 Wn. App. 13, 111 P.3d 1192 (2005), the employer promised, in writing, to pay the employee a \$10,000 signing bonus plus an allowance of \$10,000 in moving expenses. Id. at 23-24, 34. The moving expenses were subject to repayment if the employee left within a year. Id. at 24. Within a year, the employer fired the employee and refused to pay the signing bonus. Id. at 24. The employer took the position, without any factual support, that the signing bonus was really a moving “expense” and therefore was not due, given that the employee left within a year. Id. at 33. Thus, in Flower, the employer effectively took the arbitrary position that day is night. That does not create a bona fide dispute.<sup>8</sup>

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<sup>8</sup> Further, the contract in Flower was drafted by, and therefore construed against, the employer. Id. at 36. Here, the Award was not drafted by Vulcan. And the VEC

By contrast, courts routinely deny claims of willfulness where the alleged obligation to pay wages depends on the application of a statute or agreement on whose meaning reasonable minds could differ. See, e.g., Lillig v. Becton-Dickinson, 105 Wn.2d 653, 660, 717 P.2d 1371 (1986) (affirming finding of bona fide dispute based on ambiguity as to whether there was an enforceable contract and as to the amount of compensation due under the formula set forth in the employer's bonus structure); Morrison v. Basin Asphalt Co., 131 Wn. App. 158, 165, 127 P.3d 1 (2005) (finding bona fide dispute where the application of certain provisions of Washington's Prevailing Wage Act was uncertain); Bates v. City of Richland, 112 Wn. App. 919, 939, 51 P.3d 816 (2002) (declining to award exemplary damages because there was bona fide dispute as to the amount pensioners were due under the terms of their pension plan and applicable Washington law).

Unless Respondents were acting in bad faith from the outset of this dispute, they must concede that the question of how (or whether) the Award treats proceeds from a non-final disposition of an asset is at least "fairly debatable." The trial court thought so. Although it was error to wade into these arbitrable issues, the court was right in this regard.

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Agreement, on which this dispute also depends, was the product of "intense negotiations" between parties all represented by counsel. See CP 246.

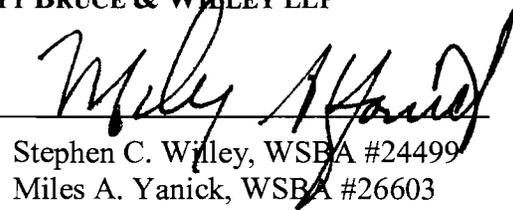
V. CONCLUSION

The Judgment should be vacated, and this matter should be remanded to the trial court with instructions to deny Respondents' Motion to Enforce Judgment. If the Judgment is not vacated, the trial court's finding of a bona fide dispute regarding the application of the Award under the circumstances should nonetheless be affirmed.

Submitted this 30<sup>th</sup> day of December 2011.

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By: \_\_\_\_\_



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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this date I caused a copy of the attached document – APPELLANTS’ REPLY BRIEF AND OPPOSITION TO CROSS-APPEAL – to be served by messenger on the attorneys of record listed below:

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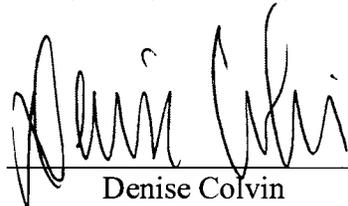
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I hereby certify, under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct.

DATED this 30<sup>th</sup> day of December, 2011, at Seattle, Washington.

  
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Denise Colvin