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NO. 71855-0-I

COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

TRACI TURNER,

Appellant,

v.

VULCAN, INC., et al.,

Respondents.

Appeal from the Superior Court of Washington
for King County

Cause No. 12-2-03514-8 SEA

**BRIEF OF APPELLANT
TRACI TURNER**

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I. INTRODUCTION

This case illustrates the danger of arbitration in employment actions when the employer uses the process not for inexpensive and expeditious resolution of disputes, but to circumvent employees' statutory and constitutional rights. Appellant Traci Turner began these proceedings by filing statutory employment and wage claims against Respondent Vulcan¹ in court. But based on an unconscionable arbitration clause, Vulcan pursued Turner in arbitration, obtaining a judgment of a little more than \$5,000 against her (for reimbursement of relocation expenses). Following this small recovery, Vulcan received an attorney fees award of \$113,325 --more than 20 times the judgment, effectively punishing this employee for bringing suit--later vacated by the court as unconscionable and in violation of public policy. In this appeal, Turner contends the superior court erred in granting Vulcan's motion to compel arbitration without ruling the arbitration provision unconscionable. In addition, Turner appeals the attorney fees award granted by the arbitrator on remand, as it is based on claims arising out of the same facts and law as the previously vacated award.

Vulcan's arbitration tactics provide a case study of companies using confidential arbitrations to bully employees and shield their

¹ Respondents are Vulcan, Inc., Paul Allen, Ray Colliver and Laura Macdonald (collectively "Vulcan").

misconduct from public view. There are legitimate and even constitutional separation of powers concerns about “the independence of the administrative framework under which arbitration is conducted. The notion that justice may be fairly and effectively dispensed under the auspices of a private corporation whose legal rights are at issue should strike reasonable people as absurd.” Thomas J. Stipanowich, *The Arbitration Fairness Index*, 60 U. Kan. L. Rev. 985, 989 (2012).²

[T]here are concerns about arbitrators, the individuals whose decisions—awards—are largely immune to judicial reversal for errors of law or fact and hence more ironclad than court judgments or jury verdicts.

Id. at 990 (footnotes omitted; citing studies, articles, cases).³

These concerns became realities in this case. Accordingly, Appellant Traci Turner asks the Court to reverse the superior court’s order compelling arbitration, on the grounds that the arbitration agreement is

² See also *id.* at 987-88, 998-99 (2012) (employees have little or no idea what arbitration entails; many believe there is no point in trying to avoid or alter arbitration provision or that “privacy enshroud[s] these processes”; there is little or no evidence that companies “promote or incentivize conscious choices regarding arbitration.”); e.g., Lisa Blomgren Amsler, *Combating Structural Bias in Dispute System Designs That Use Arbitration: Transparency, the Universal Sanitizer*, 6 Y.B. On Arb. & Mediation 32, (2014) (corporations have such vast economic power that employees are generally unable to evade arbitration clauses); George Padis, *Arbitration Under Siege: Reforming Consumer and Employment Arbitration and Class Actions*, 91 Tex.L.Rev. 665, 667-68 (2013).

³ Pres. Obama ordered corporations receiving federal contracts over \$1 million may not require workers to arbitrate Title VII or sexual assault claims. <http://publicjustice.net/content/slate-story-obamas-federal-worker-rules#sthash.juweky9p.dpuf>. A study of 4,000 arbitrations (2003-07) showed employees claiming discrimination won about 21% of the time, as opposed to 50-60 % in court, where damages averaged 5 times higher (other studies). *Id.*; Colvin, *An Empirical Study of Employment Arb.*, <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1586&context=articles>.

procedurally and substantively unconscionable (though it need only be one or the other), and therefore unenforceable. It is also an involuntary waiver of Turner's right to a jury trial. In addition, Turner requests reversal of the court's order confirming the arbitrator's attorney fees to Vulcan on remand, and reversal of the order denying attorney fees to Turner for prevailing in overturning the previous fees award in her statutory employment and wage case.

II. ASSIGNMENTS OF ERROR

Appellant Traci Turner assigns error to the following:

1. The superior court's Order Compelling Plaintiff To Arbitrate Claims And Staying Proceedings in King County Superior Court Case No. 12-2-03514-8 SEA (June 8, 2012) (*Turner II*), CP 4027-30 (Appendix D). Reversal of this Order would result in vacation of all subsequent orders and the Final Judgment, and remand to the superior court for trial.

2.(a) The court's confirmation of the arbitrator's award of \$39,524.50 in attorney fees to Vulcan, CP 3985-88, when the court had previously vacated the arbitrator's attorney fees award to Vulcan as violating public policy and unconscionable, CP 3978-3997.

(b) The superior court's denial of Turner's motion for attorney fees for prevailing in vacating the \$113,235 fees award to Vulcan, CP 3976-77.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1.(a) When unconscionability is a gateway dispute that the court, not the arbitrator, must decide, and the arbitration clause was procedurally and substantively unconscionable, did the superior court err in concluding, contrary to Washington law and the undisputed facts, that the arbitration clause was conscionable? (Assignment of error 1; de novo.)

(b) Did the superior court err in giving preclusive effect to a previous order compelling arbitration in Turner's first lawsuit, when the first court never decided unconscionability and thus also erred in compelling arbitration based on the unconscionable clause? (Assignment of error 1; de novo.)

(c) Does enforcement of the GBA's arbitration clause violate Turner's constitutional right to a jury trial and the constitutional separation of powers doctrine? (Assignment of error 1; de novo.)

2. When the issues on employer Vulcan's summary judgment motions were based on a common core of facts and related legal theories in Turner's statutory employment and wage claims, and the court concluded the arbitrator's award of attorney fees to Vulcan is unconscionable and a violation of public policy, is the arbitrator's subsequent fees award to Vulcan also unconscionable and a violation of public policy, so that the superior court erred in confirming that award?

(Assignment of error 2(a); de novo).

3. Is Turner entitled to attorney fees on prevailing in her court action to vacate the \$113,325 attorney fees award to employer Vulcan in arbitration? (Assignment of error 2(b); de novo.)

4. Is Turner entitled to attorney fees for this appeal?

IV. STATEMENT OF THE CASE

Turner is a former employee of Vulcan, Inc. She served on the Executive Protection (EP) team at Vulcan from January to September 2011. CP 584. The EP team provides personal protection to Paul Allen, his sister Jody Allen, and Jody Allen's children. CP 642. At the start of her employment on January 17, 2011, Turner signed an Employee Intellectual Property Agreement (EIPA). CP 2359-63, 2601 (Appendix B). In signing, she agreed to keep information confidential—particularly trade secrets, inventions, patents, and the like. CP 2359-63, 2602.

Buried in the EIPA's discussion of inventions, patents, and trade secrets was a sentence under the heading, "Miscellaneous," that in any lawsuit arising out of "my employment ..., including any alleged tort or statutory violation, the prevailing party shall recover their reasonable costs and attorneys fees". CP 2362. Thus, on her second day on the job, Turner was asked to sign a document containing illegal and unenforceable

provisions, *i.e.*, awarding a prevailing employer attorney fees and costs in a discrimination or wage claim, in direct violation of Washington law. CP 3593-98 (Appendix G).

Turner joined the Vulcan EP team at a time of chaos and hostility. Owner Paul Allen and his sister Jody were involving team members in unethical and illegal activities. CP 584, 2602. Tension between the Allens and their protection team came to a head in the summer of 2011, when ten members threatened legal action against Vulcan. The claims were mediated in July 2011. CP 2602-03. While the settlement process was ongoing, Vulcan presented remaining EP team members, including Turner, with a Guaranteed Bonus Agreement (GBA). CP 280-82 (Appendix A). The agreement had two discrete provisions. First, employees would “waive any potential claims against Vulcan and its affiliates.” Second, employees agreed to confidential arbitration of all future claims. In return, *i.e.*, “consideration,” employees were guaranteed a heretofore discretionary bonus at the end of the year. CP 280-82.

Turner was eligible to receive \$25,156 as a guaranteed bonus for signing the GBA. CP 280. The “consideration” provided was for the waiver of claims. CP 3213.⁴ The amount had no relationship to any claims Turner was giving up, nor was it determined that any portion was

⁴ Excerpts of Deposition of Vulcan Human Resources Director Laura Macdonald.

“consideration” for the arbitration clause. CP 2623, 3213. The amount was based solely on a percentage of salary. CP 2851, 3212 (105:21-25).

At the direction of Human Resources Director Laura Macdonald, Director of Security Kathy Leodler presented the GBA to Turner in person on July 26, 2011. CP 585, 622, 643. Leodler had been “tasked” by Macdonald to require the EP team members to sign the confidential arbitration agreement. CP 643. Leodler had been told Paul Allen would not allow anyone around him who had not signed one (CP 643), and she so informed Turner. CP 585. As the lead on his protection detail, Turner could not perform her duties without signing. *Id.* Though the “agreement” gave her the right to consult counsel, it was illusory: she was given a 24-hour turnaround time. CP 585, 622. Turner believed she would be fired if she did not sign. CP 585, 623. Turner signed the GBA, telling Leodler she knew she had no choice but to sign or lose her job. CP 585, 643.

Turner did not understand the meaning of the terms and had no idea about arbitration, its rules or costs. CP 585-86. She was not told she was waiving her right to a jury trial. She was not told she was agreeing to significant arbitration fees that were many times higher than superior court filing fees. She was not told that if the arbitrator were wrong on the law, she would have no right to appeal the arbitrator’s mistakes or disregard of the law. She was not told that in a confidential arbitration, she could talk

to no one about her case, nor could she disclose what anyone said under oath in her arbitration to compare their testimony in another proceeding.

Id.

Executing the GBA did not mend the fractured relationship between EP team members and Vulcan executives. Instead, the environment became increasingly hostile, to the point of being unbearable. In September 2011, in addition to the turmoil surrounding the EP team, Turner had complained to HR about gender discrimination. CP 2603, 586. She experienced retaliation for her complaint and was constructively discharged on September 23, 2011. CP 160-162, 586, 2603.

- **Turner I.** On September 26, 2011, Turner filed a lawsuit for claims arising out of her employment. The claims were constructive discharge, fraud, hostile work environment, tort, defamation, gender discrimination, harassment and retaliation. CP 160-62. The case was assigned to King County Superior Court Judge Patrick Oishi. The next day, on September 27, 2011, Vulcan filed a Motion to Compel Arbitration, CP 62-72, premised on its argument, repeatedly and vigorously made, that the only decision before the court was whether an arbitration agreement existed covering the claims. Vulcan argued: the case must be ordered into arbitration if there was an offer, acceptance, and consideration; Turner's signature on the GBA constituted a final binding agreement; and the court

must “summarily” order arbitration. CP 69. All issues concerning the arbitration agreement’s enforceability and unconscionability were to be decided by the arbitrator, represented Vulcan. No discovery was necessary or appropriate because Turner signed the GBA; only the fact of her signature and that it covered matters arising from her employment were relevant. CP 69-70.

Turner filed a declaration outlining the duress and coercion she experienced in Vulcan’s procuring the GBA. CP 622-23. Vulcan argued those issues were for arbitrator, not the court. CP 62-72. Turner maintained the issue of unconscionability of the arbitration clause required discovery, she had not knowingly and voluntarily waived her right to a jury trial, and the motion should be treated as one for summary judgment. CP 75-79. In reply, Vulcan reiterated that each of Turner’s arguments challenging the enforceability rather than the existence of the agreement was to be decided by the arbitrator. CP 87. Vulcan argued that validity of the agreement, claims of duress, coercion, unconscionability, or confusion are determined by the arbitrator. CP 87-90.

Vulcan noted this as a six-day motion, and the court decided it without a hearing. On October 6, 2011, Judge Oishi ordered the matter to arbitration. CP 95-96. His order reflects that he considered the declaration of Nicole Stansfield (Vulcan HR), which simply authenticated that Turner

signed the GBA. CP 270-72. Judge Oishi interlineated that he considered Turner's declaration and that he declined to treat the motion as a dispositive motion under CR 56 because it had not been noted or pled as such. CP 95-96. Turner moved for reconsideration, alleging substantive and procedural unconscionability. CP 98-103. She was again met with Vulcan's insistence that the existence of the GBA meant arbitration was required, and all issues of procedural and substantive unconscionability were to be decided by the arbitrator. CP 117-118. While the motion for reconsideration was pending, Turner took a nonsuit because the parties were participating in a mediation. CP 127.

- **Vulcan's Arbitration Notice.** On December 14, 2011, Vulcan filed Notice of Intent to Arbitrate, bringing ten claims against Turner. CP 139-40.⁵ The first five claims were variations on the theme that Turner violated the EIPA confidentiality provision by threatening to reveal private information. But the only "threat" by Turner was to file a lawsuit.⁶ Vulcan alleged breach of the EIPA, anticipatory breach of the EIPA, breach of the duty of loyalty to act at all times solely for Vulcan's benefit, and breach of confidential relationships. Vulcan claimed violation of the

⁵ Vulcan first claimed 3 arbitrators were needed, though later settled for one. CP 146.

⁶ Vulcan apparently believes the EIPA prevents an employee from filing a lawsuit at all. The GBA contained no exception to the "gag" provision for discussions with attorneys. CP 12, § D. The provision allowing the employee to have counsel review the agreement reminded the employee that the attorney must agree to be bound by the confidentiality terms. CP 13, § G.

Computer Fraud and Abuse Act, apparently for sending email correspondence to her home email. CP 418. Vulcan asserted four “claims” that were in reality defenses, and asked for a declaratory award that it had no liability for any employment claim, fraud, defamation, or any conduct before the July 26, 2011 Release. CP 419-20. Vulcan ultimately dismissed all claims except one, CP 2548, pursuing only its claim for repayment of the prorated relocation bonus plus interest (\$5,025.81). CP 419. However, with a “loser pays” provision buried in the EIPA, Vulcan can and did run up enormous legal fees with which to threaten Turner and chill her exercise of her legal rights.

Upon Vulcan’s filing its arbitration Notice, the American Arbitration Association (AAA) immediately billed Turner a \$10,200 initial fee and \$4,000 as a final fee. CP 2425. These administrative fees did not include the arbitrator’s fee, to be billed at \$450 per hour. CP 2427.

• ***Turner II—Motion To Compel Arbitration (Judge Benton).***

On January 27, 2012, with new counsel, Turner filed five additional claims in King County Superior Court that she had not brought in her first complaint, including wage and age discrimination claims. CP 182-85. *Turner II* was assigned to Judge Monica Benton for hearing on Vulcan’s motion to dismiss. Vulcan argued all claims in both cases arose out of “a common nucleus of underlying facts, allegations, and claims.” CP 2002.

Indeed, Vulcan asserted Turner should have brought all the claims in *Turner II* earlier and she was impermissibly “splitting” her causes of action. CP 2007-08.

During the weeks leading up to the April 5, 2012 hearing, Vulcan vigorously resisted discovery, specifically on the question what would have happened to Turner’s employment if she had refused to sign the GBA’s arbitration clause. After having argued to Judge Oishi that his decision to compel arbitration did not determine the enforceability or unconscionability of the arbitration clause, but rather solely its existence, Vulcan pivoted to portray Judge Oishi’s ruling as a decision that the GBA’s arbitration clause was not unconscionable. CP 1991. Alternatively, Vulcan continued to argue all unconscionability decisions should be made by the arbitrator. CP 2008-09. For this reason, Vulcan told Judge Benton, discovery sought by Turner was unnecessary, since the arbitrator would fully and fairly litigate unconscionability. CP 4233-34. Finally, Vulcan asserted the evidence showed neither procedural nor substantive unconscionability. CP 1991.

By February 2012, Turner had received bills in excess of \$20,000 for her portion of arbitration fees. CP 2454. Turner’s counsel started asking Vulcan to pay the entire arbitration fees in March 2012. CP 2430. Vulcan steadfastly refused. CP 2430.

• **Hearing Before Judge Benton.** The April 5, 2012 hearing in front of Judge Benton was remarkable for the disingenuousness in Vulcan's representations of the case history. Initially, Vulcan continued the argument made to Judge Oishi:

The decision for the court: Two things: Did a contract exist?
And second, does it cover this particular subject matter?

CP 4139.

Once the court has decided that a contract exists and that the subject matter is covered, the case goes to arbitration, and the arbitrator decides such questions as enforceability.

CP 4139.

We all agree there's a contract. Its legal effect is hotly disputed ... the debate about its avoidance is ... resolved by the arbitrator.

CP 4214-15.

Vulcan then proceeded to argue all Turner's concerns about unconscionability could and should have been presented to Judge Oishi in October 2011. After conceding it was significantly different if Turner was told she would lose her job in the event she did not sign the GBA, as opposed to a subjective belief she would be fired (CP 4129), Vulcan argued to Judge Benton:

That's a question that the court should have considered, could have considered, probably would have considered back in October if it was presented.

CP 4129. Judge Benton expressed concern about the arbitration fee issue.

CP 4220. Incredibly, yet again Vulcan claimed:

Turner should have raised the issue in front of Judge Oishi with competent evidence so he could have considered alleviating Turner of the responsibility for fees.

CP 4222.⁷

Turner argued that the confidentiality provision was substantively unconscionable because, among other reasons, it denied her access to relevant evidence. CP 4201-02. Vulcan urged that the “confidential” condition attached to the arbitration meant only that it was private, and the arbitrator could choose not to enforce confidentiality. CP 4134-35. Again, Vulcan flatly misrepresented the procedural history:

To be very clear, Judge Oishi could have taken a look at the unconscionability issue and severed that provision of the contract[.]

CP 4181.⁸

The confidentiality of the proceedings, coupled with the lack of discovery, permitted Vulcan to grossly distort the facts and make contradictory representations during the proceedings. But the circumstances of signing the GBA were critical disputed issues: what was Turner told would happen if she did not sign? Turner had submitted a

⁷ In the same breath, Vulcan maintained that because she had paid the first fee of \$900, obviously she could pay. CP 4221.

⁸ Vulcan argued Judge Benton, as an equivalent, non-reviewing court, could not consider unconscionability “a second time.” *Id.*

declaration that she believed she would lose her job if she did not sign the GBA, and that her direct supervisor, Kathy Leodler, said she had 24 hours to decide. CP 622. Leodler confirmed in her declaration that she told Turner she would be out of job if she did not sign, and she may have told Turner she had 24 hours. CP 643.

Vulcan submitted the declaration of Laura Macdonald,⁹ accusing Leodler of being “highly misleading” in: (1) reporting she may have given Turner a 24-hour turnaround and (2) reporting that Macdonald instructed her to require EP team members to sign the GBA. CP 814-15. Macdonald’s carefully crafted declaration, not subject to testing through a deposition, denied she instructed Leodler to have employees sign the agreement, and claimed Leodler did not report to her and Macdonald did not exercise authority over Leodler. Macdonald acknowledged asking Leodler to forward the GBA to Turner, but stated she did not give a 24-hour turnaround. CP 815. She did not, nor could she, dispute what Leodler said to Turner. Rather, Vulcan insinuated Leodler was either lying or did not have authority to represent to Turner that she needed to sign the GBA, and quickly.

However, when Macdonald was deposed in the other four EP-Vulcan cases on June 5, 2012, she acknowledged working with Vulcan

⁹ Both Macdonald and Leodler were executive management.

attorneys on the GBA, she gave the GBAs to Leodler to have signed (CP 3213), Vulcan counsel conveyed a sense of “urgency” to Macdonald and Leodler (CP 3213-14), and Macdonald told Leodler to convey urgency to sign to the EP team. CP 3215. Macdonald did not think she gave a 24-hour turnaround but knew she relayed there was “absolutely a sense of urgency” they get the GBAs signed. CP 3213. Though Macdonald claimed it was “undecided” what would happen to those who refused to sign the document, she admitted no one declined to sign. CP 3214, 3216.

Before Judge Benton, Vulcan argued Judge Oishi’s “careful consideration” (CP 2009) of the conscionability issue was “res judicata” as to unconscionability, should she even reach that issue. Vulcan’s “evidence” of this “careful consideration” was the fact that Judge Oishi handwrote two sentences in the Order. CP 2035. Neither interlineation remotely suggests he considered or decided unconscionability. The Order does not mention unconscionability at all. CP 4032-33 (Appendix C).

Following the April 5th hearing, Judge Benton requested supplemental briefing on the issue of “arbitrability.” Vulcan continued to oppose depositions, and in fact successfully moved to preclude them. CP 1713-14. Vulcan again argued Judge Oishi’s October 6, 2011 Order was “res judicata” and “collaterally estopped” Judge Benton from addressing arbitrability. CP 1504-05. Vulcan maintained procedural

unconscionability was reserved for the arbitrator. CP 1506-7. Vulcan contended substantive unconscionability could be determined based on affidavits about Turner's financial ability to pay arbitration fees, and the substantive unconscionability of the confidentiality provision was not before the court. CP 1507-08.¹⁰

Turner argued the arbitration agreement was procedurally unconscionable because it was presented in a take-it-or-leave-it fashion and she had no meaningful choice or opportunity to understand the rights waived by signing.¹¹ CP 1783-95. She contended the arbitration agreement was substantively unconscionable because of the confidentiality provision which limited an employee's access to the relevant facts (CP 1795-97), contained non-mutual legal remedies favoring Vulcan (CP 1798-99), improperly purported to waive statutory rights (CP 1799-1801), and contained impermissible fee-splitting (CP 1801-03). Turner provided a declaration of her assets, corroborated by her bank's declaration that she was unemployed and not receiving unemployment compensation, had bank balances of about \$32,000, had been billed by AAA a \$10,200 filing fee and additional \$20,250 for her

¹⁰ Turner contended that Paul and Jody Allen's intimate involvement with creating and implementing the binding confidential arbitration agreement and the consequences of not signing were critical issues. CP 1574-75.

¹¹ Judge Benton denied Turner's motion to compel depositions on 4-28-12. CP 1713-14.

half of the arbitrator's fees, and that she could not afford this arbitration.¹²
CP 1813, 1822, 1824-25.

On June 8, 2012, Judge Benton entered an order sending all Turner's claims to arbitration on the basis that Judge Oishi's order was "res judicata and/or collateral estoppel" "and on the basis that the parties' written agreement is not procedurally or substantively unconscionable or otherwise unenforceable." CP 2210-13. Judge Benton made no findings of fact regarding procedural or substantive unconscionability.

• **Arbitration Proceedings.** Having advocated the policy favoring arbitration as an inexpensive and expeditious way to resolve claims, and armed with an opponent who already could not afford fees, Vulcan set out to make the arbitration proceeding as expensive as possible. Although four other legal proceedings involving the same witnesses were underway (CP 2606-07), Vulcan specifically spurned Turner's request to participate in, and have access to, relevant evidence being gathered in those other proceedings. CP 3260. Vulcan also impeded access to witnesses by warning Turner's counsel that Vulcan employees would not agree to discovery interviews in lieu of depositions. CP 2912-13.

Vulcan filed its first request for a partial summary judgment

¹² She had an IRA valued at \$103,756.90. CP 1824.

regarding Turner's defamation "counterclaim"¹³ on May 14, 2012. CP 2433-35. Turner objected, based on the increased cost of filing multiple motions and her lack of opportunity for relevant discovery. CP 2436-37. The arbitrator granted leave to file. CP 2442. On July 6, 2012, Vulcan requested permission to file a second summary judgment motion on the enforceability of the Release provision in the GBA. CP 2438. In requesting permission, Vulcan asserted:

At this point, we believe the issue is settled—the Guaranteed Bonus Agreement has been determined valid and enforceable by the court in ordering Ms. Turner (twice) to submit her claims to AAA arbitration. Having argued unsuccessfully before the Superior Court that the Guaranteed Bonus Agreement was procedurally unconscionable, substantively unconscionable, legally invalid, and therefore unenforceable, we believe Ms. Turner is now estopped from seeking a contrary ruling in arbitration.

CP 2439.¹⁴ Vulcan had thus completed its duplicitous circle, first by arguing unconscionability was not an issue for the superior court, and then the opposite before the arbitrator—that both judges had decided unconscionability against Turner.

Turner opposed more partial summary judgment motions, citing the lack of opportunity for discovery. Her counsel outlined relevant depositions that needed to occur, several of which were already scheduled.

¹³ Turner's claims in court became counterclaims in response to Vulcan's demand for arbitration.

¹⁴ *But see* CP 4129, 4215, 4220, 4222, *supra*, pages 13-14.

CP 2444. Many were taking place during this precise time period in the other four cases. CP 2606-07. The arbitrator permitted the motion in order to eliminate the bulk of Turner's case, without permitting discovery (CP 2795 ¶45); and the arbitrator denied Turner's request for a continuance for discovery or to obtain counsel. CP 2534.¹⁵

In the subsequent superior court proceedings to confirm/vacate, Judge Heller found it a close question whether the arbitrator's ruling denying a continuance deprived Turner of fundamental fairness and rose to the level of misconduct meriting vacation of the arbitration award:

[Turner] was placed at a severe disadvantage in having to resist Vulcan's partial summary judgment without legal representation. For example, she could not have been expected to know that the legal standards applicable to enforcement of releases may be distinct from an unconscionability analysis and that perhaps a different approach from the briefing in *Turner I* and *Turner II* was required.... The fact that other former Vulcan employees with legal representation were successful in resisting the same partial summary judgment before another arbitrator is troubling.

CP 3591 (Appendix G). Judge Heller ultimately concluded the denial of the continuance was not "misconduct" under the FAA's narrow standard of review. CP 3592.

Faced with continuing and mounting arbitration bills, Turner sent AAA notice she was withdrawing her counterclaims. CP 2536. Vulcan,

¹⁵ The \$39,524.50 in fees associated with these two motions were again levied by the arbitrator on remand and are the subject of this appeal.

determined to proceed against Turner, then switched course and decided to pay all fees. CP 2461.¹⁶ The arbitrator found against Turner on all her counterclaims and for Vulcan on its one claim for the relocation bonus. CP 4012-19.

- **Vulcan Circumvents The Purposes Of Arbitration And Chills Turner’s Right To Bring Statutory Claims.** This case vividly demonstrates the chilling effect of Vulcan’s arbitration process on an employee: Vulcan ignored, delayed, or circumvented legitimate discovery obligations; switched positions on who decides unconscionability, and misrepresented to the second judge that the first one had already resolved it in a preclusive ruling; refused to pay arbitration fees and drove them up with motions. Once safely in arbitration, and not before (CP 262-64), Vulcan raised the “loser pays” provision buried within its EIPA under “Miscellaneous”.

But lest the Court have any question whether Vulcan’s strategy of making arbitrations unworkable and unjust for employees is mere coincidence, the EIPA in use since January 2012 puts all doubt to rest. CP

¹⁶ In November 2012, Vulcan had to file a “motion to clarify” under the AAA rules to get AAA to transfer fees to Vulcan (CP 2452-58) – this in the face of no opposition. AAA nonetheless continued to send Turner invoices into December 2012 for \$23,634.96. CP 2464.

3203 (Appendix E).¹⁷ This EIPA sharply limits an employee's right to discovery, knowing Vulcan will have exclusive access to all the witnesses and discovery it needs, while employees will have no ability to conduct any investigation outside formal discovery because everyone is bound by the EIPA's confidentiality.¹⁸ Vulcan's 2012 EIPA purports to contractually obligate employees to the harsh, unfair process Vulcan imposed in Turner's arbitration. It practically declares Vulcan's purpose in requiring arbitration is to strip employees of any conceivable ability to obtain justice—not to promote fair, inexpensive, or expeditious resolution of claims.

- **Vulcan Seeks And Recovers Attorney Fees.** Following Turner's withdrawal from arbitration (Oct. 17, 2012), Vulcan proceeded only on its claim for a portion of the relocation bonus, abandoning all other

¹⁷ This EIPA contains a long list of unconscionable, unenforceable arbitration provisions designed to eliminate employees' ability to bring claims against Vulcan by circumventing arbitration's legitimate purposes: Vulcan will reimburse the employee to the extent the arbitration filing fee exceeds the cost of filing a lawsuit in a court in King County, Wash., yet ignores that arbitrator fees are the major cost of arbitration. This EIPA remains silent on whether Vulcan would pay those fees under an "employer promulgated plan," so it can continue to drive employees away from bringing claims by leading them to believe they will have to advance \$25,000-\$30,000 to arbitrators. As in *Turner*, to maximize arbitration expenses to the employee, the 2012 EIPA provides that an unlimited number of pre-trial motions can be filed (contrary to AAA Rule 27, though otherwise adopting AAA Rules). Employees "agree" to cut off even the narrow court review under the FAA, limiting appeal of the award to a 15-day motion for reconsideration, purportedly binding and nonappealable. There is absolute secrecy regarding evidence, discovery, testimony, the decision and award. The "loser pays" section (still under "Miscellaneous") remains. CP 3204 (Appendix E).

¹⁸ The EIPA limits the parties to 4 half-day depositions, 10 interrogatories including subparts, and 10 RFPs, and denies depositions or testimony by Paul or Jody Allen or family members, no matter how integral they may be to the employee's claim.

allegations from December 2011. Vulcan then sought and succeeded in obtaining \$113,325 in attorney fees for its activities in forcing *Turner II* into arbitration or alternatively for partial summary judgment motions.

- **Superior Court Vacates The Attorney Fee Award.** Turner brought most of her claims under the Washington Law Against Discrimination (WLAD), RCW 49.60, *et. seq.*, and improper wage withholding. RCW 49.46, 49.48, and 49.52, *et seq.*; CP 438-40. As Judge Heller recognized, those statutes prohibit an employer from obtaining attorney fees for prevailing against an employee. CP 3593-98 (Appendix G).

On Turner's motion to vacate the arbitration award, Judge Heller reversed the arbitrator's ruling that Vulcan could be awarded fees for prevailing on a motion to compel arbitration of largely statutory claims. CP 3592-98. Judge Heller decided an award of fees to an employer for compelling arbitration on statutory claims violated public policy because it would chill an employee's challenge to even the most onerous and illegal arbitration clauses, such as the Vulcan arbitration provisions:

[T]he prospects of having to pay attorneys' fees to an employer successful in compelling arbitration will almost certainly have a chilling effect on an employee contemplating a court action to challenge the conscionability of an arbitration agreement and/or vindicate her statutory rights.

CP 3597. Vulcan then requested remand to the arbitrator to determine whether she awarded fees for the partial summary judgment motions. CP

4539-65. Judge Heller remanded. CP 3483-85. On remand, Turner pointed out the fees were a result of Vulcan's determined effort to drive up costs by bringing multiple motions from a single common set of facts. CP 3436-38. Nonetheless, the arbitrator granted Vulcan's motion for \$39,524.50 in fees. CP 3522-24 (Appendix H). The superior court confirmed this arbitration award. CP 2346-47.

Turner then sought attorney fees for having vindicated Turner's statutory rights by vacating a large portion of the illegal fee award. CP 3640-3700. Judge Heller denied the request. CP 3976-77. Turner timely appealed.

V. ARGUMENT

A. Standard Of Review: De Novo On All Issues.

1. Orders Granting Motion To Compel. This Court reviews trial court decisions on a motion to compel arbitration de novo. *Saleemi v. Doctor's Associates, Inc.*, 176 Wn.2d 368, 375-78, 292 P.3d 108 (2013) (citing *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 302, 103 P.3d 753 (2004)).

2. Unconscionability Of Arbitration Clause. "The existence of an unconscionable bargain is a question of law for the courts." *Zuver*, at 302-03 (2004); *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 344, 103 P.3d 773 (2004). The court reviews this legal question de novo. *McKee v. AT*

& T Corp., 164 Wn.2d 372, 383, 191 P.3d 845 (2008); *Hill v. Garda CL Nw., Inc.*, 179 Wn.2d 47, 53, 308 P.3d 635 (2013), *cert. denied*, 134 S. Ct. 2821 (2014).

3. Constitutionality Of Jury Trial Waiver. The Court reviews constitutional challenges de novo, including whether an arbitration agreement violates the right to a jury trial under article I, section 21 of the Washington Constitution. *Adler*, at 360-61.

4. Arbitrator's Award (Attorney Fees). The Court reviews de novo a trial court's decision whether an arbitrator's fees award violates public policy. *International Union of Operating Engineers v. Port of Seattle*, 176 Wn.2d 712, 721, 295 P.3d 736 (2013).

B. The Order Compelling Arbitration Is Erroneous Because The Arbitration Clause Is Unconscionable.

In Washington, an arbitration agreement “is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of contract.” *Saleemi*, 176 Wn.2d at 375. This includes “gateway” contract defenses such as unconscionability. *E.g.*, *Hill*, at 53; *McKee*, at 383 (“General contract defenses such as unconscionability may invalidate arbitration agreements.”).

Turner has the right to judicial review of the trial court's decision compelling arbitration. *Saleemi*, at 375-76. To the extent that it is

necessary to show prejudice from the Order (*id.* at 380-81), the harm is evident in the “daunting”, “shocking”, “overly-harsh” \$113,325 in fees against Turner in violation of public policy, CP 3597-98, necessitating her successful motion to vacate, and now this appeal for the remaining, still erroneous award.

Courts, not arbitrators, determine the threshold issue whether an arbitration clause is valid and enforceable. *Saleemi*, at 376; *Hill*, at 53; *McKee*, at 404 (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006)). As the Washington Supreme Court articulated in *Hill*:

“ ‘[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.’” ... To that end, we have recognized our authority to decide “‘gateway dispute[s].’” These types of disputes go to the validity of the contract and are preserved for judicial determination, as opposed to arbitrator determination, unless the parties' agreement clearly and unmistakably provides otherwise. ... Unconscionability is one such gateway dispute.

Hill, at 53 (citations omitted). “Unconscionability is a ‘gateway dispute’ that courts must resolve because a party cannot be required to fulfill a bargain that should be voided.” *Id.* at 54 (citing *Zuver*, at 302-03).

The reason courts, not arbitrators, determine arbitrability, is to avoid exactly what happened here – a costly, improper proceeding pitting

a wealthy corporation against an individual employee on an uneven playing field:

If a court compels arbitration without deciding the validity of the arbitration clause, a party may be forced to proceed through a potentially costly arbitration before having the opportunity to appeal. This is particularly a concern where an arbitration clause imposes all or some of the costs of arbitration on the disfavored party.

Id. at 54. In this case, *Hill*'s prediction came true: Vulcan (a multi-billion-dollar corporation) forced Turner (unemployed, unable to afford counsel or defend herself pro se against Vulcan's lawyers) to undergo an increasingly expensive arbitration, knowing fees would be imposed on her.

In *Brown v. MHN Gov't Servs., Inc.*, 178 Wn.2d 258, 275, 306 P.3d 948 (2013), as in *Hill*, the Washington Supreme Court concluded the contract at issue (a "Provider Services" agreement containing an arbitration provision) did not clearly and unmistakably delegate the issue of arbitrability to the arbitrator:

A threshold dispute as to whether an arbitration agreement is unconscionable is ordinarily a decision for the court and not the arbitrator. ... Here, the issue of arbitrability has not been clearly and unmistakably delegated to the arbitrator on the face of the contract. Therefore, it is proper for us to determine the enforceability of the arbitration agreement.

Brown, at 264-65 (citation omitted). *See also, e.g., Gorden v. Lloyd Ward & Associates, P.C.*, 180 Wn. App. 552, 562-65, 323 P.3d 1074 (2014)

(unconscionability is for the court); *McKee*, at 383–84 (same). The GBA does not provide “clearly and unmistakably” that the issues of unconscionability and enforceability are for the arbitrator rather than the court. It is completely silent as to who decides arbitrability.¹⁹

The “clearly and unmistakably” standard, however, leaves employees vulnerable to employers’ highly foreseeable revision of their arbitration clauses to delegate all decisions in arbitration to the arbitrator, just as Vulcan has done in its 2012 EIPA. Accordingly, Turner requests that the Court close this loophole to prevent Vulcan and similarly aggressive employers from contracting around the court’s non-delegable authority to decide whether an arbitration agreement is unconscionable or otherwise unenforceable.

In response, Vulcan will contend, as it argued before Judge Oishi and intermittently before Judge Benton, that all issues of the arbitration clause’s enforceability and conscionability were to be decided by the arbitrator, and the only question before the court was whether Turner signed the document to create a supposedly binding arbitration agreement.

¹⁹ Perhaps the best illustration of this point comes from comparing the July 2011 GBA to Vulcan’s 2012 EIPA (CP 3200-05), App. E, blatantly circumventing Washington law by dumping every conceivable procedural step and every possible issue in any dispute into arbitration, including discovery, appeal, and other matters described above, virtually immunizing the entire process from judicial review. *See* 9 U.S.C. § 10 (extremely deferential standard of review of arbitration award). The EIPA signed by Turner earlier in 2011 is silent as to arbitration. CP 609, App. B.

CP 69, 251-54, 1900-01, 1991, 2009.²⁰ They will cite the simple fact the GBA contained another provision (the Release of Claims).

That is not the test under the FAA or Washington law. In *Saleemi*, the corporate defendant (franchisor) argued, as Vulcan claimed here,²¹ that *Buckeye* precluded the court from deciding any issue beyond whether there was an enforceable agreement to arbitrate the dispute:

We can find no such statement in *Buckeye*. *Buckeye* holds that the question of whether the whole *contract*, as opposed to the arbitration provision, is void [is] for the arbitrator, not the court. ... [Plaintiffs] are not challenging the contract as a whole, only the enforceability of a few of its dispute resolution provisions.

...

While we agree with DAI that courts' authority is limited once the parties have agreed to submit their claims to arbitration, **it is for the courts to determine whether the agreement to arbitrate is valid and enforceable based on general contract principles.**

Saleemi, 176 Wn.2d at 377-78 (emphasis added).

²⁰ *But see* CP 1991-2009, 4222 (arguing Oishi Order was final, preclusive, and resolved unconscionability). Turner submits that Vulcan was and is judicially estopped from arguing, inconsistent with its position before Judge Oishi, that all issues were decided by him. *Harris v. Fortin*, 71649-2-1, 2014 WL 4411006 (Wn. App., Sept. 8, 2014). Judicial estoppel precludes a party from asserting one position in a court proceeding (before Judge Oishi) and later seeking an advantage by taking a clearly inconsistent position (before Judge Benton, Judge Heller, or this Court). *Id.*, at *2. The factors are (1) whether the later position is clearly inconsistent with the earlier one (as discussed above, it is); (2) whether Judge Benton's acceptance of the inconsistent position before her would create the perception that either Judge Oishi or Judge Benton was misled (Vulcan misled Judge Benton to believe Judge Oishi had considered unconscionability and his Order had preclusive effect); and (3) whether Vulcan would derive an unfair advantage (it did, in Judge Benton's Order) or an unfair detriment is imposed on Turner (the same Order) if Vulcan is not estopped. *Id.* at *2.

²¹ CP 1850, 1854, 1876, 1902-03, 1930, 1999, 2002, 2008, 2114.

Likewise, in *McKee*, 164 Wn.2d at 394, the Court held that plaintiffs' challenge to an arbitration clause was "sufficiently discrete to be decided by the court". *McKee* concluded the arbitration agreement was "substantively unconscionable and therefore unenforceable" because, among other things, it required confidentiality (like the GBA). *Id.* at 398-99. In contrast to *McKee*, in *Townsend v. Quadrant Corp.*, 173 Wn.2d 451, 459, 268 P.3d 917 (2012), the Court noted that in *McKee*, it had "distinguished *Buckeye* on the basis that the challenges raised therein related only and specifically to the arbitration clause, whereas in *Buckeye* the challenge was directed to the contract as a whole rather than simply to the arbitration clause." *Townsend*, at 458-59. There, plaintiff-homeowners challenged the entire multi-page Purchase & Sale Agreement of which the arbitration clause was a minor piece; their claims were "so wrapped into their general allegations regarding the PSA that both issues must be decided by an arbitrator under *Prima Paint* and *Buckeye*." *Townsend*, at 459.

[T]he Homeowners have framed their claims pertaining to the arbitration clause and the PSA in a way that renders the two inseparable. In our view, one could decide whether the arbitration clause is unenforceable only by deciding whether the PSA as a whole is unenforceable.

Id. at 460. As in *Saleemi* and *McKee*, in contrast to *Townsend*, Turner made a discrete challenge to the unconscionability of the GBA's

arbitration clause, not the entire agreement.²² Judge Oishi and subsequently Judge Benton seemingly accepted Vulcan's arguments that all issues were for the arbitrator once the court found Turner had signed the document. The court did not examine, as it is required to do, the gateway issue whether the arbitration clause was unconscionable, even though the Washington Supreme Court had long before declared a similar confidentiality term in an arbitration provision to be substantively unconscionable. *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 314-15, 103 P.3d 753 (2004). This alone makes the Order compelling arbitration reversible legal error.

As discussed below, Judge Benton also erroneously gave Judge Oishi's order preclusive effect on unconscionability. However, Judge Benton made no findings, and her legal conclusions are flatly erroneous. Turner asks this Court to reverse Judge Benton's Order compelling arbitration, and conclude as a matter of law, the arbitration clause is substantively or procedurally unconscionable.

²² She attempted to demonstrate this without the benefit of discovery and evidence which was entirely in Vulcan's possession and control. While the factual reasons the arbitration clause was unconscionable overlap with the reasons the Release was unenforceable, their enforceability presents distinct legal issues, as Judge Heller recognized, CP 3591, and he was troubled that other Vulcan employees had defeated a similar dispositive motion on the Release. *Id.*, CP 3196. The arbitrator also understood there were "[d]isputes of fact and credibility as to the circumstances involved in signing the Agreement". CP 3090, 3586.

C. The Arbitration Clause Is Substantively And Procedurally Unconscionable.

Either substantive or procedural unconscionability is enough to void a contract. *Hill*, 179 Wn.2d at 55 (citing *Adler*, 153 Wn.2d at 347). Here, the arbitration clause in the GBA is both.²³

1. Substantive Unconscionability. “[A] term is substantively unconscionable where it is overly or monstrously harsh, is one-sided, overly harsh, shocks the conscience, or is exceedingly calloused.” *Hill*, at 55 (quoting *Gandee v. LDL Freedom Enters., Inc.*, 176 Wn.2d 598, 603, 293 P.3d 1197 (2013)). “A provision in an arbitration agreement may be substantively unconscionable if it effectively undermines an employee’s ability to vindicate his statutory rights.” *Walters v. A.A.A. Waterproofing, Inc.*, 151 Wn. App. 316, 321, 211 P.3d 454 (2009) (citing *Adler*, at 355); *Hill*, at 55-58 (substantively unconscionable terms pervaded arbitration agreement, requiring its invalidation); *Gandee*, at 604-08 (same, including “loser pays” attorney fees).

The arbitration provision, as applied by the arbitrator, has three provisions that are substantively unconscionable: (a) the confidentiality

²³ See Marissa Dawn Lawson, *Judicial Economy at What Cost? An Argument for Finding Binding Arbitration Clauses Prima Facie Unconscionable*, 23 Rev.Litig. 463, 465 (2004) (proposing that courts hold binding arbitration clauses prima facie unconscionable).

provision, (b) the “loser pays” provision (incorporated into the GBA via the EIPA),²⁴ and (c) the unilateral right granted to Vulcan only, to escape arbitration and to seek relief from state or federal court.

(a) Confidentiality Provisions Are Substantively Unconscionable. The Washington Supreme Court held in 2004, well before Turner began working at Vulcan, that a confidentiality provision such as the one in the GBA’s arbitration clause is substantively unconscionable. *Zuver*, at 314-15. In an individual statutory context (such as employment), a confidentiality provision “undermines an employee’s confidence in the fairness and honesty of the arbitration provision and thus, potentially discourages that employee from pursuing a valid discrimination claim.” *Zuver*, at 315. “ ‘[I]n the context of individual statutory claims, a lack of public disclosure may systematically favor companies over individuals.’” *Id.* at 314 (citation omitted).

The effect of the provision here benefits only Airtouch. As written, the provision hampers an employee’s ability to prove a pattern of discrimination or to take advantage of findings in past arbitrations.

Id. at 315. Four years later, in *McKee*, the Court confirmed:

A confidentiality clause in a contract of adhesion is a one-sided provision designed to disadvantage claimants and may even help conceal consumer fraud. Confidentiality

²⁴ It was not until after the court proceedings compelling arbitration that Vulcan argued the EIPA entitled it to attorney fees, and convinced the arbitrator to read the EIPA’s loser pays fees clause into the GBA’s arbitration agreement. *See* CP 262-64 (requesting fees under CR 11 and RCW 4.84.185).

unreasonably favors repeat players such as AT&T. ... Secrecy conceals any patterns of illegal or abusive practices. It hampers plaintiffs in learning about potentially meritorious claims and serves no purpose other than to tilt the scales in favor of AT&T. ... It ensures that AT&T will “accumulate[] a wealth of knowledge” about arbitrators, legal issues, and tactics. ... Meanwhile, consumers are prevented from sharing discovery, fact patterns, or even work product, such as briefing, forcing them to reinvent the wheel in each and every claim, no matter how similar.

Washington has a strong policy that justice should be administered openly and publicly.... Under our constitution, “[j]ustice in all cases shall be administered openly.” CONST. art. I, § 10. Secrecy breeds mistrust and, potentially, misuse of power. ... We hold that the confidentiality provision before us is substantively unconscionable.

Id., 164 Wn.2d at 398-99 (citations omitted.) *See also In re Checking Account Overdraft Litig.*, 718 F. Supp. 2d 1352, 1359 (S.D. Fla. 2010) (following *Zuver*).²⁵

(b) Loser Pays Clauses Are Substantively Unconscionable.

Judge Heller commented that this Court in *Walters* and the Washington Supreme Court in *Gandee* held unconscionable “loser pays” provisions that were “substantially similar, if not identical” to the one in the GBA. CP 3595, App. G (citing *Walters*, 151 Wn. App. at 324-25; *Gandee*, 176 Wn.2d at 606).²⁶

²⁵ “Defendant’s one-sided access to information would similarly discourage a plaintiff from bringing a suit. KeyBank would have the benefit of knowing what happened in past arbitrations while Plaintiff would not. ... Even if future plaintiffs could learn the outcome of this arbitration, Plaintiff would still be denied information regarding previous arbitrations ...”

²⁶ In *Adler*, the Court stated the arbitration clause’s mandatory “loser pays” provision

Because the “loser pays” provision serves to benefit only Freedom and, contrary to the legislature's intent, effectively chills Gandee's ability to bring suit under the CPA, it is one-sided and overly harsh. Therefore, we hold it to be substantively unconscionable.

Gandee, at 606 (citing *Adler*, at 354-55, *Walters*, at 316). In *Brown*, the Washington Supreme Court similarly ruled a loser pays provision unconscionable:

In *Walters*, [this Court] held that mandatory fee shifting provisions in arbitration agreements are unconscionable where the Washington Minimum Wage Act provides that only a prevailing employee would be entitled to recover costs and fees. The risk of having to pay the employer's expenses and fees was a significant deterrent to employees contemplating initiating an action to vindicate their rights....

Mandatory fee shifting provisions in arbitration agreements are substantively unconscionable where the Washington Minimum Wage Act provides that only a prevailing employee would be entitled to recover costs and fees. We find the fee shifting provision substantively unconscionable.

Id. at 274-75 (citing *Walters*, at 321-22). This was true even though not all plaintiff's claims were under the Washington Minimum Wage Act, and though the agreement provided California law applied. As with the confidentiality provision, it is a straightforward application of law to hold Vulcan's EIPA loser pays provision, read into the GBA's arbitration clause, is substantively unconscionable.

was substantively unconscionable because it undermined an employee's statutory right to an award of attorney fees upon prevailing. *Adler*, at 354-55.

(c) Unilateral Litigation Option Clauses Are Substantively Unconscionable. The arbitration provision’s option for Vulcan only “to seek emergency injunctive relief in court” is also substantively unconscionable because it is “so ‘one-sided and ‘overly harsh’ as to render it unconscionable.” *Zuver*, 153 Wn.2d at 318-19 & n.18;²⁷ *Hill*, 179 Wn.2d at 55-56.²⁸ Vulcan argued to the superior court that this unilateral right was meaningless because employees also had such a right. The Court in *Hill* rejected a similar argument that the challenged provision was “not really a limitation.” *Id.* at 56 n.4. If the provision is bilateral, the employer drafting it should explicitly say so. Here, Vulcan, does not.²⁹

(d) Conclusion. The Court should reverse the order compelling arbitration and hold, as a straightforward matter of Washington law, that the confidentiality, loser pays, and unilateral injunctive relief clauses are substantively unconscionable, and render the arbitration clause unenforceable. These terms pervade the arbitration clause. Severing them would significantly alter the tone of the arbitration clause and the nature of

²⁷ (Unilateral remedies limitation provision in arbitration agreement was substantively unconscionable because it “blatantly and excessively favors the employer in that it allows the employer alone access to a significant legal recourse”.)

²⁸ (Time limitation on back pay damages was unconscionable “in that it unfairly favors [employer] by significantly curbing what an employee could recover against [employer] compared to what the employee could recover under a statutory wage and hour claim”.)

²⁹ If Vulcan intended that the agreement give or recognize that employees such a right but did not draft the provision bilaterally, then it is also procedurally unconscionable.

the arbitration Vulcan contemplated in drafting it. The entire arbitration clause must be invalidated. *Hill*, at 58; *Gandee*, at 607.

2. Procedural Unconscionability.

“The procedural element concerns the manner in which the contract was negotiated, focusing on oppression or surprise.” ... “Procedural unconscionability has been described as the lack of a meaningful choice, considering all the circumstances surrounding the transaction including [t]he manner in which the contract was entered, whether each party had a reasonable opportunity to understand the terms of the contract, and whether the important terms [were] hidden in a maze of fine print.”

Gorden v. Lloyd Ward & Associates, P.C., 180 Wn. App. 552, 563, 323 P.3d 1074 (2014) (citations omitted). In *Gorden*, debtors signed an agreement containing an attorney retainer agreement with an arbitration clause which provided, among other things, that venue was in Texas under Texas law. Despite an attorney-client relationship, the debtors were never informed the consequences of agreeing to arbitration. In *Brown*, the arbitration agreement was procedurally unconscionable because it was ambiguous concerning which set of AAA rules applied. *Id.*, 178 Wn.2d at 267.³⁰

In this case, Vulcan never gave Turner a meaningful choice whether or not to agree to arbitration (not to mention paying Vulcan’s

³⁰ Much like Vulcan has changed positions on arguments and who pays fees, the defendant in *Brown* “changed its position several times regarding which set of AAA rules is appropriate. This further supports [plaintiffs’] argument that the ambiguity in the arbitration agreement has resulted in procedural surprise.” *Id.* at 268.

attorney fees in the event that she lost in arbitration, hidden in the EIPA). The preprinted, take-it-or-leave-it agreement states: "You are entitled to seek the advice of your own counsel before executing this agreement." CP 282. That was an intentionally false statement given the 24-hour turnaround. The evidence Turner presented, and more evidence revealed in the other EP team members' cases, showed the entire team would lose their jobs if they did not sign the GBA "urgently". CP 3212-16.

Every other aspect of the "agreement" was similarly unbalanced. Vulcan had a battery of attorneys and Human Resources personnel, including Laura Macdonald, reviewing and proposing the document while Turner had no such option. *E.g.*, CP 3212-16. Vulcan managers and lawyers are highly-educated professionals. Turner was a bodyguard facing loss of her job if she did not sign in 24 hours. But the court did not consider any of this and never actually resolved Turner's procedural unconscionability claim.

Moreover, the arbitration clause was procedurally unconscionable because there was no consideration. *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 834, 100 P.3d 791 (2004) (non-competition agreement imposed after employment commenced was unenforceable unless supported by consideration other than continued employment). The only evidence in the record is from Macdonald that the guaranteed bonus was

for the Release of Claims. No one at Vulcan testified that any portion of the bonus was consideration for agreeing to arbitration. All the witnesses with knowledge of the origins of the GBA bonus amounts, as well as any evidence that same amount was for agreeing to arbitration, are within Vulcan's control.

For all these procedural surprises, oppression, and lack of meaningful opportunity, the arbitration clause should be held procedurally unconscionable as a matter of law.

D. Enforcement Of The Arbitration Agreement Violates Turner's Constitutional Right To A Jury Trial.

In *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 360-61 (2004), the Court recognized that "by knowingly and voluntarily agreeing to arbitration, a party implicitly waives his right to a jury trial by agreeing to an alternate forum, arbitration." But to waive the right to jury trial under article I, section 21 of the Washington Constitution in an agreement to arbitrate, the employee's consent must be knowing and voluntary. *Id.* In *Adler*, the parties disputed evidence regarding the employee's waiver, so the Court remanded. As in this case, the employee contended the employer's representative threatened to fire him if he refused to sign the arbitration agreement:

[D]isputes still remain about the manner in which Adler entered into the arbitration agreement with Fred Lind Manor. Consequently, we decline to hold here that Adler knowingly and voluntarily entered into the arbitration agreement with Fred Lind Manor. On remand, if the trial court concludes that Fred Lind Manor's representative threatened to fire him if he refused to sign the agreement despite the fact he raised concerns with its terms or indicated a lack of understanding, then the evidence here would not support Fred Lind Manor's claim that Adler knowingly and voluntarily agreed to arbitration, and thus implicitly waived his right to a jury trial.

Id. at 361, 364. Here, even though Turner never had the opportunity to conduct discovery to prove she did not knowingly and voluntarily waive her right to a jury trial,³¹ the evidence that exists shows she was threatened with the “urgent” requirement to sign the GBA or lose her job, and had no meaningful choice other than sign, and no reasonable opportunity to understand the terms, consult an attorney, or learn the difference between arbitration and court. Upholding the arbitration clause would violate Turner’s right to a jury trial on her claims. *See, e.g., Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to A Jury Trial*, 16 Ohio St. J. on Disp. Resol. 669, 733 (2001) (“when an arbitration clause is being used to deny persons the Seventh Amendment jury trial right they otherwise would have had, it is unconstitutional for courts to enforce such a clause.”)

³¹ The right to discovery too is constitutional, included in the right of open access to courts. *Putman v. Wenatchee Valley Med. Ctr.*, 166 Wn.2d 974, 979, 216 P.3d 374 (2009). Turner was not told and could not know the arbitration agreement would mean losing the right to discovery.

E. Delegation Of Court's Powers To Arbitrators Violates Separation Of Powers.

Turner also contends the Legislature's adoption of the FAA governing employment arbitrations, with its extremely narrow judicial review, violates the separation of powers doctrine by delegating what should be court powers to a private individuals. The Washington Supreme Court and others have held certain types of arbitration unconstitutional when they violate a federal or state prohibition on private delegation. *See, e.g., State ex rel. Everett Fire Fighters Local No. 350 v. Johnson*, 46 Wn.2d 114, 121, 278 P.2d 662 (1955) (municipal charter provision requiring firefighter contract disputes to be arbitrated was an unconstitutional delegation of legislative authority).³² *See also Putman v. Wenatchee Valley Med. Ctr.*, 166 Wn.2d 974, 980, 216 P.3d 374 (2009) ("If the activity of one branch threatens the independence or integrity or invades the prerogatives of another, it violates the separation of powers"; internal citations omitted).

³² *Hays County Appraisal Dist. v. Mayo Kirby Springs, Inc.*, 903 S.W.2d 394, 397 (Tex. Ct. App. 1995) (invalidating use of mandatory binding arbitration to determine property taxes in part on separation of powers grounds); *City of Sioux Falls v. Sioux Falls Firefighters Local 814*, 234 N.W.2d 35, 37-38 (S.D. 1975) (a statute mandating arbitration of police and firefighter labor disputes was unconstitutional delegation of legislative power). *See generally* Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 Nw. U. L. Rev. 62, 64-65 (1990) (all private delegations are inconsistent with separation of powers doctrine).

F. The Order Compelling Arbitration in *Turner I* Did Not Preclude Claims Alleged In *Turner II*.

Judge Benton's Order erroneously states that the claims in *Turner II* were barred by "res judicata and/or collateral estoppel". CP 3566. Both res judicata and collateral estoppel were never for the court; they are procedural matters for the arbitrator. *Yakima Cnty. v. Yakima Cnty. Law Enforcement Officers Guild*, 157 Wn. App. 304, 325-28, 237 P.3d 316 (2010). But even if the court could decide these affirmative defenses,³³ Vulcan had the burden of proving the requirement, common to both, that there was a prior final judgment on the merits. *Pederson v. Potter*, 103 Wn. App. 62, 67, 11 P.3d 833 (2000) (res judicata "requires a final judgment on the merits."); *State Farm*, at 304 (collateral estoppel requires prior final judgment on merits; question is "always whether the party to be estopped had a full and fair opportunity to litigate the issue."). Judge Oishi's Order was not final. Turner voluntarily dismissed that action. She certainly never had a "full and fair opportunity" to litigate the gateway issue whether the arbitration agreement was unconscionable.

This Court in *Yakima County* rejected a similar res judicata argument in proceedings involving an arbitration: "[e]ven if" the court could decide res judicata, *id.* at 330, the arbitrated claims on which the

³³ *Jumamil v. Lakeside Casino, LLC*, 179 Wn. App. 665, 680, 319 P.3d 868 (2014); CR 8(c); *State Farm Mut. Auto. Ins. Co. v. Avery*, 114 Wn. App. 299, 304, 57 P.3d 300 (2002).

County sought preclusive effect against the Guild were not barred by the doctrine, in part because the deputy involved in the proceedings (later represented by the Guild) had voluntarily dismissed those claims: “The issues were not decided because Ms. Bartleson voluntarily dismissed that appeal in favor of filing the civil suit for discrimination.” *Id.* at 328. The deputy’s prior proceedings neither raised nor resolved the claims in the Guild’s grievance. *Id.* at 331.

G. The Attorney Fees Award To Employer Vulcan Violates Public Policy.

The arbitrator’s fee award of \$39,524 on remand is void against public policy because the contractual provision on which it is based (in the EIPA’s Miscellaneous section) is substantively unconscionable and violates public policy, for all the reasons set forth above and in Judge Heller’s Memorandum Opinion.

In remanding the question of an alternative basis for fees,³⁴ the court directed the arbitrator to “clarify whether she has already addressed Vulcan’s alternative request for fees” “based on work performed in connection with” Vulcan’s summary judgment motions to dismiss Turner’s defamation claim and to enforce the Release portion of the GBA. CP 4067. On remand, the arbitrator granted Vulcan fees for that work

³⁴ The remand occurred in response to a request from Vulcan in its Notice of Presentation of its Proposed Order to Judge Heller. CP 4539-4565.

based on the same EIPA loser pays provision, reasoning these fees were incurred in connection with non-statutory claims. CP 3986-87.³⁵ This ruling, confirmed by the superior court, is contrary to all applicable law and should be vacated for the same reasons stated here and in the Memorandum Opinion.³⁶ The only difference is that, whereas Judge Heller ruled the arbitrator could not “carve out” an exception from the statutory prohibition against awarding fees to a prevailing employer (WLAD and wage laws) for moving to compel the employee to arbitrate, here the arbitrator carved out an exception for Vulcan’s work on two partial summary judgment motions involving claims arising from Turner’s employment with Vulcan. CP 3594-95. “The statute authorizing an award of attorney fees to a prevailing employee may not be superseded by an agreement between employee and employer to permit either prevailing party to recover attorney fees” because that would be substantively

³⁵ The arbitrator rejected Turner’s objection that Vulcan could have presented evidence at the arbitration instead of bringing these unnecessary motions (*see* CP 3434-38), particularly without Turner present to defend against a fees provision not even in the arbitration clause. CP 3987. “In considering whether a fee is ‘reasonable’ the trial court must also consider whether those fees and expenses could have been avoided or were self-imposed.” *MacDonald v. Korum Ford*, 80 Wn. App. 877, 891, 912 P.2d 1052 (1996).

³⁶ CP 3594. Judge Heller followed *Gandee* and *Walters*, and rejected Vulcan’s argument that *Zuver* allows a reciprocal “loser pays” provision in an employment arbitration. CP 3596. *Brown* too distinguished *Zuver* (provision was permissive). As Judge Heller pointed out, *Gandee* eliminates any argument that *Zuver* approves a bilateral loser-pays provision: CP 3596-97; *Gandee*, at 606. Also in *Zuver* there was no evidence of the effect of the loser pays provision on the employee, CP 3597 (*citing Zuver*, at 319), whereas the award here resulted in a “daunting amount” of fees imposed on Turner. *Id.*

unconscionable. 25 David K. DeWolf, Keller W. Allen, Darlene Barrier Caruso, *Wash. Prac., Contract Law And Practice* § 17:7 (2d ed. 2013) (discussing *Brown*). Yet circumventing the employment and wage statutes' prohibition against fees to the employer is exactly what the arbitrator allowed on remand.

Indeed, the few cases that Vulcan cited to the court for its theory that it could segregate work on defamation and enforceability of the Release have no bearing on this Washington statutory employment and wage lawsuit.³⁷ In such actions, where “ ‘the plaintiff's claims for relief ... involve a common core of facts or [are] based on related legal theories,’” a lawsuit cannot be “‘viewed as a series of discrete claims” and, thus, the claims should not be segregated in determining an award of fees. *Fiore v. PPG Indus., Inc.*, 169 Wn. App. 325, 352, 279 P.3d 972 (2012) (citations omitted); *Pham v. City of Seattle, Seattle City Light*, 159 Wn.2d 527, 547, 548 n.7, 151 P.3d 976 (2007); *Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 673, 880 P.2d 988 (1994). Indeed, in *Brown*, the Court refused to shift fees to a prevailing defendant though only “some of the underlying claims f[e]ll under the Washington Minimum Wage Act.” *Id.* at 274.

In fact, Washington courts look to federal courts' interpretation of

³⁷ CP 4543. *Boguch v. Landovere Corp.*, 153 Wn. App. 595, 224 P.3d 795 (2009) and *Pearson v. Shubach*, 52 Wn. App. 716, 723, 763 P.2d 834 (1988) did not involve statutory employment or wage claims, but segregation of contract versus tort claims. See also CP 3443-47 (no authority on “segregation”).

federal civil rights law, in particular that regarding recovery of fees for civil rights suits. *Blair v. Washington State University*, 108 Wn.2d 558, 572, 740 P.2d 1379 (1987). This case is based entirely on Turner's employment at Vulcan. As Vulcan argued to Judge Benton, all allegations in the arbitration arose out of "a common nucleus of underlying facts, allegations, and claims". CP 2002.³⁸ Vulcan is judicially estopped from making assertions of fact inconsistent with that position, which it took before Judge Oishi as well. *See* n. 26, *supra*.

In ruling on Vulcan's summary judgment motion regarding the Release, the arbitrator relied on pleadings submitted by both parties in *Turner I* and *Turner II* "addressing the enforceability of the" GBA "both its arbitration provision and in its entirety." CP 2541-43. Her Order demonstrates the allegations in that motion arose out of the same statutory employment and wage claims. *Id.*

The arbitrator's exception (confirmed by the court) for fees on the two summary judgment motions creates a dangerous loophole for employers like Vulcan, which the Court should firmly close. As the Washington Supreme Court stated in *McKee*, at 404, "[c]ourts will not be easily deceived by attempts to unilaterally strip away consumer protections and remedies by efforts to cloak the waiver of important rights

³⁸ *See also* CP 4030 (Benton: all claims considered related to Turner's employment).

under an arbitration clause.” An award of fees to Respondent Vulcan for any of its efforts spent defending against any of Turner’s claims in this case violates public policy because it chills employees from pursuing their statutory claims. The remaining fee award should be vacated.

H. Turner Is Entitled To Her Attorney Fees For Prevailing In Overturning Fees Awarded To Vulcan.

Turner prevailed in superior court in this statutory wage and employment case by obtaining the court’s order vacating the arbitrator’s attorney fees award to a prevailing employer, in violation of public policy. RCW 49.60.030(2) entitles Turner to her attorney fees for vacating the initial award in court. “As a general rule, fees incurred **while litigating an entitlement to fees** are recoverable under remedial statutes such as the WLAD.” *Johnson v. State, Dep’t of Transp.*, 177 Wn. App. 684, 695, 313 P.3d 1197 (2013) (emphasis added),³⁹ *review denied*, 179 Wn.2d 1025 (2014). “A party who substantially prevails on appeal is entitled to an award for attorney fees on appeal.” *Collins v. Clark Cnty. Fire Dist. No. 5*, 155 Wn. App. 48, 104-05, 231 P.3d 1211 (2010) (citing *Day v. Santorsola*, 118 Wn. App. 746, 770–71, 76 P.3d 1190 (2003)).

A plaintiff in Washington employment cases “prevails” under the WLAD when she succeeds on any significant issue and achieves some benefit in bringing the suit. *Blair*, at 572 (citing *Hensley v. Eckerhart*, 461

³⁹ Citing, e.g., *Fisher Props., Inc. v. Arden–Mayfair, Inc.*, 115 Wn.2d 364, 378, 798 P.2d 799 (1990); *Steele v. Lundgren*, 96 Wn. App. 773, 781, 982 P.2d 619 (1999).

U.S. 424, 433, 103 S.Ct. 1933 (1983)). As Judge Heller noted, status as a prevailing party is determined on the outcome of the case as a whole, including “matters decided after judgment on the merits”. *Jenkins by Jenkins v. State of Mo.*, 127 F.3d 709, 714 (8th Cir. 1997). The statute is construed broadly. *Wheeler v. Catholic Archdiocese of Seattle*, 124 Wn.2d 634, 642-43, 880 P.2d 29 (1994); *Blair*, at 570. If neither party wholly prevails, “then the determination of who is a prevailing party depends upon who is the substantially prevailing party, and this question depends upon the extent of the relief afforded to the parties.” *Collins*, at 104-05 (quoting *Day*, at 770–71). “[A] plaintiff prevails when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.” *Parmelee v. O'Neel*, 168 Wn.2d 515, 522, 229 P.3d 723 (2010) (citations omitted). Here, Vulcan obtained a small judgment of \$5,696.63 without any defense from Turner, whereas Turner vacated an attorney fees award against her of about 20 times that amount, \$113,325, against this forcefully-defended corporation. Turner’s relief has materially altered the legal relationship between the parties, modified Vulcan’s behavior in a way that directly benefits her, as well as employees involved in disputes with Vulcan in the future. Vulcan can never recover attorney fees for prevailing against its employees in these claims arising out of employment. “[I]n cases involving the law against discrimination,

heavy reliance on the degree of success may constitute an abuse of discretion.” *Steele*, 96 Wn. App. at 784-85. Such a rule of proportionality would undermine the purpose of these remedial statutes, making it difficult if not impossible for employees to obtain redress from the courts. *Id.* Here, interpreting Vulcan to be the prevailing party would turn the statutory policy on its head, rewarding the employer for running the employee out of court as well as the arbitration and then pursuing her on a small claim. Turner, in contrast, is entitled to her attorney fees for prevailing in overturning the “daunting”, “shocking” award of fees to Vulcan based on an unconscionable provision which violates public policy. Turner also seeks her attorney fees incurred in this appeal, under RAP 18.1, RCW 49.60 *et seq.*, and RCW 49.46, 49.48, RCW 49.52, *et seq.* *Collins*, at 104-05.

VI. CONCLUSION

Vulcan presented agreements to Turner that it knew or should have known contained illegal provisions: The EIPA had an illegal loser pays provision, and the GBA contained an illegal confidentiality provision coupled with arbitration, placing judicial review out of reach, while reserving to itself the right to obtain judicial relief. One reason Vulcan does this is to intimidate employees’ exercise of their rights under Washington employment law by telling them they may have to pay

Vulcan's bills—knowing that is false. Or Vulcan may intend to convince arbitrators that the loser pays “contract” trumps employee's rights. This error of law by an arbitrator is reviewable under such a high standard that it may not be vacated. Third, Vulcan could be loading up unconscionable provisions to use as bargaining chips in negotiating procedures that will remain permeated with unfairness.

The last option is all the more dangerous when Vulcan, by revising its current EIPA arbitration provision, explicitly provides all decisions about procedural and substantive unconscionably are specifically reserved to the arbitrator. This practice undermines discrimination and wage laws protecting employees, as occurred here, and is contrary to public policy. The Order compelling arbitration should be reversed, the arbitration clause found substantively and procedurally unconscionable, and the matter sent to King County Superior Court for trial. The attorney fees award to Vulcan should be reversed, and Turner awarded her fees for prevailing in vacating Vulcan's fees and on appeal.

RESPECTFULLY SUBMITTED this 15th day of September, 2014.

SCHROETER, GOLDMARK & BENDER



REBECCA J. ROE, WSBA #7560

KATHRYN GOATER, WSBA #9648

Of Counsel:

CARLA TACHAU LAWRENCE, WSBA #14120

Counsel for Appellant Traci Turner

CERTIFICATE OF SERVICE

On the 15th day of September, 2014, I caused to be served upon the following, at the addresses stated below, via the method of service indicated, a true and correct copy of the foregoing document.

Harry H. Schneider, Jr. Kevin J. Hamilton Joseph M. McMillan Perkins Coie LLP 1201 Third Ave., Suite 4800 Seattle, WA 98101-3099 <u>HSchneider@perkinscoie.com</u> <u>KHamilton@perkinscoie.com</u> <u>JMcMillan@perkinscoie.com</u>	<input checked="" type="checkbox"/> Via Hand Delivery – ABC Legal <input type="checkbox"/> Via U.S. Mail, 1 st Class, Postage Prepaid <input type="checkbox"/> Via CM/ECF System <input type="checkbox"/> Via Overnight Delivery <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via Email
Jeffrey I. Tilden, WSBA #12219 Jeffrey M. Thomas, WSBA #21175 Michael P. Brown, WSBA #45618 Gordon Tilden Thomas & Cordell, LLP 1001 Fourth Ave., Suite 4000 Seattle, WA 98154 <u>jtilden@gordontilden.com</u> <u>jthomas@gordontilden.com</u>	<input checked="" type="checkbox"/> Via Hand Delivery – ABC Legal <input type="checkbox"/> Via U.S. Mail, 1 st Class, Postage Prepaid <input type="checkbox"/> Via CM/ECF System <input type="checkbox"/> Via Overnight Delivery <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via Email

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

DATED at Seattle, Washington, this 15th day of September, 2014.



 Darla Moran
 Legal Assistant

APPENDIX A



Dear Traci Turner;

We are pleased to extend to you this offer to guarantee your 2011 discretionary bonus, in exchange for your agreement to waive any potential claims against Vulcan and its affiliates. If, after reviewing this letter, you would like to accept this offer, please sign and return this letter to me at your earliest convenience. Of course I would be happy to discuss the details or answer any questions you might have as well.

A. Guaranteed 2011 Bonus

In exchange for your waiver and release of any claims as set forth below, Vulcan will guarantee, on a one-time basis, your 2011 Annual Bonus Opportunity at 125% of your 2011 annual bonus target, pro rated from your start date or the beginning of the year (whichever is more recent) through the end of the year (your "Guaranteed Bonus"). Traci, you are eligible for a minimum bonus of \$25,156 under this agreement. If your employment terminates for any reason (including voluntary resignation) before December 31, 2011, you will receive a prorated amount of your Guaranteed Bonus through the date your Vulcan employment ends on the date bonuses would normally be paid. You do not need to be employed by Vulcan on the day the bonuses are paid in order to receive the Guaranteed Bonus. Except as set forth above, the Guaranteed Bonus will otherwise be payable pursuant to Vulcan's applicable bonus schedule and policies.

B. Full Release of Claims

You hereby release and forever discharge (i) Vulcan, and each and every affiliate (meaning any person or entity which controls, is controlled by, or is under common control with Vulcan), and every shareholder, member, partner, manager, director, officer, employee, contractor, agent, consultant, representative, administrator, fiduciary, attorney and benefit plan of Vulcan and any such affiliate, and (ii) every predecessor, successor, transferee and assign of each of the persons and entities described in this sentence, from any and all claims, disputes and issues of any kind, known or unknown, that arose on or before the date you signed this Agreement. This release of claims, however, does not extend to claims that arise after you sign this agreement.



C. Arbitration

Any and all claims, disputes, or other matters in controversy on any subject arising out of or related to this Agreement and your employment shall be subject to confidential arbitration; provided, however, that Vulcan shall have the right, upon its election, to seek emergency injunctive relief in court in aid of arbitration to preserve the status quo pending determination of the merits in arbitration and venue and jurisdiction for any such injunctive action will exist exclusively in state and federal courts in King County, Washington. Upon receipt of a demand for arbitration, the parties shall promptly attempt to mutually agree on an arbitrator and, if mutual agreement cannot be made, an arbitrator shall be selected and any arbitration proceedings shall be conducted in Seattle, Washington in accordance with applicable AAA rules. The award rendered by the arbitrator shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof. The parties and the arbitrator shall treat all aspects of the arbitration as strictly confidential and not subject to disclosure to any third party or entity, other than to the parties, the arbitrator and any administering agency.

D. Confidentiality

The terms of this Agreement and your employment with Vulcan are intended to be confidential. Except as specifically permitted by this Agreement, in response to a lawful subpoena, court order or governmental administrative request, or as otherwise required by law, you have not and will not discuss with or communicate to any person or entity the terms of this Agreement.

E. Applicable Law

This Agreement will be governed by the laws of the State of Washington, without regard to conflict of law principles.

Please carefully review this letter. I would be happy to respond to any questions you might have. If you would like to accept this offer, please sign and date this letter and return a copy to me at your earliest convenience.



F. Other Terms of Employment

Except as provided in this Agreement, your other terms of employment and the agreements that govern your employment, including your Employee Intellectual Property Agreement, shall remain in full force and effect.

G. Other Terms

You are entitled to seek the advice of your own counsel before executing this Agreement. If you should seek such advice, remember that your attorney must also agree to be bound by the confidentiality provisions of this Agreement.

Thank you for your continued service at Vulcan.

Sincerely,

Kathy Leodler

AGREED and ACCEPTED this 26 day of July 2011:

TRACY TURNER
Print Name
[Signature]
Signature

APPENDIX B



**Vulcan and Affiliates
Employee Intellectual Property Agreement**

In exchange for my becoming employed (or my employment being continued) by Vulcan Inc. and/or any of its current or future affiliates (collectively "Vulcan"), and for any cash compensation for my services, I, the undersigned employee, agree as follows for the benefit of Vulcan:

1. **Confidentiality.** I agree that information or physical material that is not generally known or available to the public to which I have been or will be exposed as a result of my being employed by Vulcan is confidential information that belongs to Vulcan. This includes information developed by me, alone or with others, or entrusted to Vulcan by others. I will hold Vulcan's confidential information in strict confidence, and not disclose or use it except as authorized by Vulcan and for Vulcan's benefit. If anyone tries to compel me to disclose any of Vulcan's confidential information, by subpoena or otherwise, I will immediately notify Vulcan so that Vulcan may take any actions it deems necessary to protect its interests. My agreements to protect Vulcan's confidential information apply both while I am employed by Vulcan and after my employment by Vulcan ends, regardless of the reason it ends.

Vulcan's confidential information includes, without limitation, (a) Vulcan inventions (as defined below), (b) laboratory notebooks, (c) information relating to: (i) financial and marketing matters, (ii) investment matters, (iii) trade secrets, (iv) research and development, or (v) Vulcan's employees, and (d) information about Paul Allen, his family, friends, business associates, business or personal interests, assets or properties (including interests, assets or properties held in trust for him), and business or technical information related thereto.

VULCAN.COM

I understand that this agreement does not limit my right to use my own general knowledge and experience, whether or not gained while employed by Vulcan, or my right to use information that is or becomes generally known to the public through no fault of my own, but I have the burden in any dispute of showing that information is not Vulcan's confidential information.

I understand it is Vulcan's policy not to improperly obtain or use confidential, proprietary or trade secret information that belongs to third parties, including others who have employed or engaged me or who have entrusted confidential information to me. I will not use for Vulcan's benefit or disclose to Vulcan confidential, proprietary or trade secret information that belongs to others, unless I advise Vulcan that the information belongs to a third party and both Vulcan and the owners of the information consent to the disclosure and use.

2. **Inventions, Copyrights and Patents.** Vulcan owns all inventions that I make, conceive, develop, discover, reduce to practice or fix in a tangible medium of expression, alone or with others, (a) during my employment by Vulcan (including past employment with Vulcan, and whether or not during working hours) or (b) if the invention results from any work I performed for Vulcan or involves the use or assistance of Vulcan's facilities, materials, personnel or confidential information (collectively, "Vulcan Inventions").

I will promptly disclose to Vulcan, will hold in trust for Vulcan's sole benefit, will assign to Vulcan and hereby do assign to Vulcan all Vulcan inventions and any rights that I may have or

505 Fifth Ave S, Suite 900
Seattle, WA 98104
206 342 2000 Tel
206 342 3000 Fax

Exhibit 2

acquire in such Vulcan Inventions. I will waive and hereby do waive any moral rights I have or may have in Vulcan Inventions. Vulcan Inventions shall be considered "works made for hire" to the fullest extent permitted by law.

I attach hereto as Exhibit A a complete list of all inventions, if any, made or conceived or first reduced to practice by me, alone or jointly with others prior to my employment relationship with Vulcan that are relevant to Vulcan's business, and I represent and warrant that such list is complete. If no such list is attached to this Agreement, I represent that I have no such inventions at the time of signing this Agreement. If I use or incorporate an invention in which I have an interest and that is not otherwise a Vulcan Invention into any Vulcan Invention, I hereby grant to Vulcan a non-exclusive, fully paid-up, perpetual, world-wide license of my interest in such invention, to make, use, sell, offer for sale, import and sublicense, such invention without restrictions of any kind.

"Inventions" means discoveries, developments, concepts, ideas, know-how, designs, improvements, processes, procedures, machines, products, compositions of matter, formulas, algorithms, systems, computer programs and techniques, original works of authorship (including interim work product, modifications and derivative works, and all similar matters), and other matters ordinarily intended by the word "invention," and all records and expressions thereof, whether or not patentable, copyrightable or otherwise legally protectable.

I understand that this agreement does not apply to any invention for which no equipment, supplies, facilities or trade secret information of Vulcan was used and which was developed entirely on my own time, unless (a) the invention relates directly to Vulcan's business or actual or demonstrably anticipated research or development, or (b) the invention results from any work I performed for Vulcan.

3. **Further Assistance; Power of Attorney.** I agree to perform, during and after my employment with Vulcan, all acts deemed necessary or desirable by Vulcan to permit and assist it, at its expense, in obtaining and enforcing the full benefits, enjoyment, rights and title throughout the world in Vulcan Inventions. Such acts may include, but are not limited to, execution of documents and assistance or cooperation in legal proceedings. Vulcan shall have full control over all applications for patents or other legal protection of these Vulcan Inventions. If, for any reason, I am unable or do not perform the acts set forth herein, I hereby irrevocably designate Vulcan and its duly authorized officers and agents as my agent and attorney-in-fact to execute and file on my behalf any applications for patents or other legal protection of Vulcan Inventions and to do all other lawful acts to further the prosecution and issuance of patents, copyright and other registrations related to such Vulcan Inventions. This power of attorney shall not be affected by my subsequent incapacity.
4. **Vulcan Materials.** All documents and property in my care, custody or control relating to my employment or Vulcan's business, including without limitation any documents that contain Vulcan's confidential information, will be and will remain the sole property of Vulcan. I will safeguard such documents and property during my employment with Vulcan and return such documents and property to Vulcan when my employment ends, or sooner if Vulcan requests.
5. **Non-raiding of Employees, Consultants and Other Parties.** During my employment with Vulcan and for twelve (12) months after my employment ends, regardless of the reason it

ends, I will not directly or indirectly solicit any employee or consultant to leave his or her employment or consultancy with Vulcan. This includes that I will not (a) disclose to any third party the names, backgrounds or qualifications of any Vulcan employees or consultants, or otherwise identify them as potential candidates for employment; (b) personally or through any other person approach, recruit or otherwise solicit Vulcan employees or consultants to work for any other employer; or (c) participate in any pre-employment interviews with any person who was engaged by Vulcan as an employee or consultant while I was employed by Vulcan. During my employment with Vulcan and for twelve (12) months after my employment ends, regardless of the reason it ends, I will not solicit any licensor, licensee or customer of Vulcan that is known to me, with respect to any business, products or services that are competitive to the business, products or services of Vulcan or under development as of the date of termination of my relationship with Vulcan.

6. **Publicity; No Disparagement or Interference.** I will not be involved in the preparation of any book, article, story, video or film about Mr. Allen, his family, friends, business associates or business or personal interests, and I will not give interviews about Mr. Allen, his family, friends, business associates or business or personal interests. I will not disparage Vulcan or its business or products and will not interfere with Vulcan's relationships with its customers, employees, vendors, bankers or others. I will not disparage Mr. Allen, his family, friends, business associates or business or personal interests. These agreements apply both while I am employed by Vulcan and after my employment by Vulcan ends, regardless of the reason it ends.
7. **Other Employment While Employed By Vulcan:** While I am employed by Vulcan I will not do work that competes with or relates to any of Vulcan's activities without first obtaining Vulcan's written permission. Any business opportunities related to Vulcan's business that I learn of or obtain while employed by Vulcan (whether or not during working hours) belong to Vulcan, and I will pursue them only for Vulcan's benefit. Before I undertake any work for myself or anyone else during my employment by Vulcan that will involve subject matter related to Vulcan's activities, I will fully disclose the proposed work to Vulcan.
8. **Future Consulting or Employment for Vulcan.** If my employment relationship with Vulcan ends but Vulcan employs me again or engages me as a consultant, then this agreement shall apply to my later employment(s) or engagement(s) unless they follow a period of a year or more during which I was neither employed nor engaged by Vulcan. If this agreement becomes applicable to a consulting relationship, the references in this agreement to my employment by Vulcan shall be treated, as appropriate, as referring to my consulting relationship with Vulcan.
9. **No Guarantee of Employment.** I understand this agreement is not a guarantee of continued employment. My employment is terminable at any time by Vulcan or me, with or without cause or prior notice, unless otherwise provided in a written employment agreement.
10. **No Conflicting Agreements.** I am not a party to, and during my employment with Vulcan, I will not enter into any agreements, such as confidentiality or non-competition agreements, that limit my ability to perform my duties for Vulcan.

11. **Miscellaneous.** If I breach this agreement it will cause Vulcan irreparable harm. If I breach or threaten to breach this agreement, Vulcan will be entitled to injunctive or other equitable relief as well as money damages. If I breach this agreement, I will hold in trust for Vulcan all income I receive as a result of the violation. I consent to Vulcan notifying anyone to whom I may provide services of the existence and terms of this agreement. In any lawsuit arising out of or relating to this agreement or my employment, including without limitation arising from any alleged tort or statutory violation, the prevailing party shall recover their reasonable costs and attorneys fees, including on appeal. This agreement shall be governed by the internal laws of the state of Washington without giving effect to provisions thereof related to choice of laws or conflict of laws. Venue and jurisdiction of any lawsuit involving this agreement or my employment shall exist exclusively in state and federal courts in King County, Washington, unless injunctive relief is sought by Vulcan and, in Vulcan's judgment, may not be effective unless obtained in some other venue. If any part of this agreement is held to be unenforceable, it shall not affect any other part. If any part of this agreement is held to be unenforceable as written, it shall be enforced to the maximum extent allowed by applicable law. My obligations under this agreement supplement and do not limit other obligations I have to Vulcan, including without limitation under the law of trade secrets. This agreement shall be enforceable regardless of any claim I may have against Vulcan. This agreement shall survive the termination of my employment, however caused. The waiver of any breach of this agreement or failure to enforce any provision of this agreement shall not waive any later breach. This agreement is binding on me, my heirs, executors, personal representatives, successors and assigns, and benefits Vulcan and its successors and assigns. This agreement is the final and complete expression of my agreement on these subjects, and may be amended only in writing.

DATED this 18 day of JANUARY 2010.

Signature



Print Name:

Paul Turman

Vulcan Inc.

By:



Exhibit A

Prior Inventions

Vulcan Inc.
505 Fifth Avenue South, Suite 900
Seattle, WA 98104
Attn: General Counsel

The following is a complete list of all inventions relevant to the subject matter of my employment by Vulcan that have been made or conceived or first reduced to practice by me, alone or jointly with others. I represent that such list is complete.

VULCAN.COM

By: Taru Tidner

[Print Name]

505 Fifth Ave S Suite 900
Seattle, WA 98104
206 342 2000 Tel
206 342 3000 Fax

APPENDIX C

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THE HONORABLE PATRICK OISHI
Noted for Consideration: October 5, 2011
Oral Argument Requested

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

TRACI TURNER,

Plaintiff,

v.

VULCAN INC.; PAUL GARDNER
ALLEN, JODY ALLEN, RAY
COLLIVER, and LAURA MACDONALD

Defendants.

No. 11-2-32744-2 SEA

[PROPOSED] ORDER GRANTING
DEFENDANT VULCAN INC.'S MOTION
TO COMPEL ARBITRATION AND TO
STAY PROCEEDINGS

THIS MATTER came regularly before the Court on Defendant Vulcan, Inc.'s Motion to Compel Arbitration and to Stay Proceedings. The Court considered the motion, the declarations of Harry H. Schneider, Jr. and Nicole Stansfield in support of the motion, *the declaration of Traci Turner in support of plaintiff's response,* plaintiff's response, if any, and Defendant's reply, if any, and being fully advised, hereby:

ORDERS that Defendant's motion to compel arbitration is GRANTED.

Accordingly, plaintiff is ordered to submit his claims to arbitration pursuant to the

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arbitration provision set out in the parties' Guaranteed Bonus Agreement, attached as Exhibit B to the Stansfield Declaration. All further proceedings in this matter are stayed until the completion of arbitration.

Furthermore, the Court denies the plaintiff's request to treat defendant's motion to compel arbitration as a dispositive motion under CR 56 because the matter was not properly noted,

DATED: this 6th day of October, 2011.


Honorable Patrick Oishi

Presented by: *Filed, or scheduled pursuant to the requirements of CR 56 and King County LCR 56.*

/s Harry H. Schneider, Jr.
Harry H. Schneider, Jr., WSBA No. 09404
HSchneider@perkinscoie.com
Kevin J. Hamilton, WSBA No. 15648
KHamilton@perkinscoie.com
Joseph M. McMillan, WSBA No. 26527
JMcMillan@perkinscoie.com
Perkins Cole LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000

APPENDIX D

FILED
KING COUNTY, WASHINGTON

JUN 8 2012

SUPERIOR COURT CLERK
JON SCHROEDER
DEPUTY

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THE HONORABLE MONICA J. BENTON
Noted for Consideration: May 22, 2012

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

TRACI TURNER,

Plaintiff,

v.

VULCAN INC., PAUL ALLEN, JODY
ALLEN, RAY COLLIVER, and LAURA
MACDONALD

Defendants.

No. 12-2-03514-8 SEA

~~[REVISED PROPOSED]~~ ORDER
COMPELLING PLAINTIFF TO
ARBITRATE CLAIMS AND STAYING
PROCEEDINGS

THIS MATTER, having originally come before the Court on April 5, 2012, at which time the Court heard oral argument on various motions brought by Plaintiff Turner and Defendants Vulcan, Colliver and Macdonald;

AND THE COURT HAVING ENTERED ON APRIL 16, 2012, ITS ORDER ON PARTIES MOTIONS ARGUED APRIL 5, 2012, in which the Court DENIED Plaintiff Turner's Motion for Relief From Order Compelling Arbitration (CR 60), RESERVED its ruling on Defendants' Motion to Dismiss, and ORDERED the parties to submit additional

~~[REVISED PROPOSED]~~ ORDER
COMPELLING PLAINTIFF TO ARBITRATE
CLAIMS AND STAYING PROCEEDINGS - 1
34528-0102/LEGAL23723742.1

ORIGINAL

Perkins Coie LLP
201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

1 briefing on the issue of whether the Plaintiff's five additional claims are subject to
2
3 mandatory arbitration vis-à-vis a mandatory arbitration provision contained in an underlying
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5 employment contract;

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7 AND THE COURT HAVING RECEIVED AND CONSIDERED the supplemental
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9 briefing of the parties including:

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11 1. Vulcan Defendants' Supplemental Brief on Arbitrability of Plaintiffs'
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13 Remaining Claims, filed May 9, 2012, together with supporting Declarations and out-of-
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15 state authorities.

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17 2. Plaintiff's Supplemental Briefing to Defendant Vulcan Inc.'s Motion to
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19 Dismiss and for Other Relief, filed May 9, 2012, together with supporting Declarations and
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21 out-of-state authorities.

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23 3. Vulcan Defendants' Response to Plaintiff's Supplemental Brief on
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25 Arbitrability of Remaining Claims, filed May 21, 2012, together with supporting
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27 Declarations and out-of-state authorities.

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29 4. Plaintiff's Response Brief, filed May 21, 2012, together with supporting
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31 Declarations and out-of-state authorities.

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33 5. Opening Brief of Defendants Colliver and Macdonald Regarding Mandatory
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35 Arbitration of Claims, filed May 9, 2012, together with supporting Declaration.

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37 6. Responding Brief of Defendants Colliver and Macdonald Regarding
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39 Mandatory Arbitration of Claims, filed May 21, 2012.

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41 IT IS HEREBY ORDERED as follows:

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43 1. Further oral argument is not necessary and Defendants' Request for Oral
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45 Argument is DENIED;

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47
[REVISED PROPOSED] ORDER
COMPELLING PLAINTIFF TO ARBITRATE
CLAIMS AND STAYING PROCEEDINGS --2

34528-0102/LEGAL23723742.1

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2. As indicated in its oral ruling on April 5, 2012, and in its April 16, 2012, Order On Parties' Motions Argued April 5, 2012, Plaintiff's claims in this matter ("*Turner II*") that were previously asserted in King County Superior Court Case No. 11-2-32744-2 SEA ("*Turner I*") are hereby DISMISSED, on the grounds that those claims have already been referred to arbitration by Judge Oishi in *Turner I*. Accordingly, the following of Plaintiff's claims are DISMISSED WITHOUT PREJUDICE to their resolution in the AAA arbitration now underway involving Plaintiff Turner and Defendant Vulcan:

- 2.1 Gender Discrimination
- 2.2 Hostile Work Environment
- 2.3 Retaliation
- 2.4 Wrongful Constructive Termination of Employment
- 2.5 Defamation

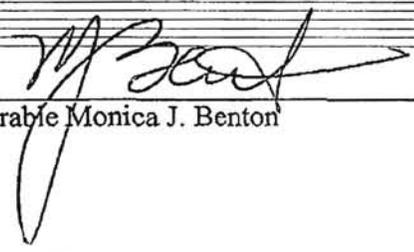
3. Vulcan's Motion to Dismiss Plaintiff's remaining claims in this matter is GRANTED on the grounds of res judicata and/or collateral estoppel and on the basis that the parties' written agreement is not procedurally or substantively unconscionable or otherwise unenforceable, and the following of Plaintiff's claims are DISMISSED WITHOUT PREJUDICE to their resolution in the same AAA arbitration now underway involving Plaintiff Turner and Defendant Vulcan:

- 3.1 Sexual Orientation Discrimination
- 3.2 Age Discrimination
- 3.3 Intentional Infliction of Emotional Distress
- 3.4 Negligent Infliction of Emotional Distress
- 3.5 Willful Withholding of Wages

1 4. Plaintiff is ORDERED to submit all of her claims arising out of or related to
2 her employment with Vulcan to binding arbitration pursuant to the written agreement of the
3 parties in the Guaranteed Bonus Agreement containing an arbitration clause.
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6 5. All further proceedings in this matter are STAYED until completion of
7 arbitration.
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12 DATED: this 8 day of June, 2012.


Honorable Monica J. Benton

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18 Presented by:

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20
21 s/ Harry H. Schneider, Jr., WSBA No. 9404
22 Harry H. Schneider, Jr., WSBA No. 09404
23 HSchneider@perkinscoie.com
24 Kevin J. Hamilton, WSBA No. 15648
25 KHamilton@perkinscoie.com
26 Joseph M. McMillan, WSBA No. 26527
27 JMcMillan@perkinscoie.com
28 **Perkins Coie LLP**
29 1201 Third Avenue, Suite 4800
30 Seattle, WA 98101-3099
31 Telephone: 206.359.8000
32 Facsimile: 206.359.9000
33
34

35 Attorneys for Defendants
36 Vulcan Inc., Paul Allen, and Jody Allen
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[REVISED PROPOSED] ORDER
COMPELLING PLAINTIFF TO ARBITRATE
CLAIMS AND STAYING PROCEEDINGS - 4
34528-0102/LEGAL23723742.1

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Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

APPENDIX E



**Vulcan and Affiliates
Employee Intellectual Property Agreement**

In exchange for my becoming employed (or my employment being continued) by Vulcan Inc. and/or any of its current or future affiliates (collectively "Vulcan"), and for any cash compensation for my services, I, the undersigned employee, agree as follows for the benefit of Vulcan:

1. **Confidentiality.** I agree that information or physical material that is not generally known or available to the public to which I have been or will be exposed as a result of my being employed by Vulcan is confidential information that belongs to Vulcan. This includes information developed by me, alone or with others, or entrusted to Vulcan by others. I will hold Vulcan's confidential information in strict confidence, and not disclose or use it except as authorized by Vulcan and for Vulcan's benefit. If anyone tries to compel me to disclose any of Vulcan's confidential information, by subpoena or otherwise, I will immediately notify Vulcan so that Vulcan may take any actions it deems necessary to protect its interests. My agreements to protect Vulcan's confidential information apply both while I am employed by Vulcan and after my employment by Vulcan ends, regardless of the reason it ends.

Vulcan's confidential information includes, without limitation, (a) Vulcan inventions (as defined below), (b) laboratory notebooks, (c) information relating to: (i) financial and marketing matters, (ii) investment matters, (iii) trade secrets, (iv) research and development, or (v) Vulcan's employees, (d) information about Vulcan's affiliates or their assets or properties, and (e) information about Paul Allen, his family, friends, business associates, business or personal interests, assets or properties (including interests, assets or properties held in trust for him or beneficially owned by him), and business or technical information related thereto.

VULCAN.COM

I understand that this agreement does not limit my right to use my own general knowledge and experience, whether or not gained while employed by Vulcan, or my right to use information that is or becomes generally known to the public through no fault of my own, but I have the burden in any dispute of showing that information is not Vulcan's confidential information.

I understand it is Vulcan's policy not to improperly obtain or use confidential, proprietary or trade secret information that belongs to third parties, including others who have employed or engaged me or who have entrusted confidential information to me. I will not use for Vulcan's benefit or disclose to Vulcan confidential, proprietary or trade secret information that belongs to others, unless I advise Vulcan that the information belongs to a third party and both Vulcan and the owners of the information consent to the disclosure and use.

2. **Inventions, Copyrights and Patents.** Vulcan owns all inventions that I make, conceive, develop, discover, reduce to practice or fix in a tangible medium of expression, alone or with others, (a) during my employment by Vulcan (including past employment with Vulcan, and whether or not during working hours) or (b) if the invention results from any work I performed for Vulcan or involves the use or assistance of Vulcan's facilities, materials, personnel or confidential information (collectively, "Vulcan Inventions").

505 Fifth Ave S. Suite 900
Seattle, WA 98104
206 342 2000 Tel
206 342 3000 Fax

I will promptly disclose to Vulcan, will hold in trust for Vulcan's sole benefit, will assign to Vulcan and hereby do assign to Vulcan all Vulcan Inventions and any rights that I may have or acquire in such Vulcan Inventions. I will waive and hereby do waive any moral rights I have or may have in Vulcan Inventions. Vulcan Inventions shall be considered "works made for hire" to the fullest extent permitted by law.

I attach hereto as Exhibit A a complete list of all Inventions, if any, made or conceived or first reduced to practice by me, alone or jointly with others prior to my employment relationship with Vulcan that are relevant to Vulcan's business, and I represent and warrant that such list is complete. If no such list is attached to this agreement, I represent that I have no such Inventions at the time of signing this agreement. If I use or incorporate an Invention in which I have an interest and that is not otherwise a Vulcan Invention into any Vulcan Invention, I hereby grant to Vulcan a non-exclusive, fully paid-up, perpetual, world-wide license of my interest in such Invention, to make, use, sell, offer for sale, import and sublicense, such Invention without restrictions of any kind.

"Inventions" means discoveries, developments, concepts, ideas, know-how, designs, improvements, processes, procedures, machines, products, compositions of matter, formulas, algorithms, systems, computer programs and techniques, original works of authorship (including interim work product, modifications and derivative works, and all similar matters), all other matters ordinarily intended by the word "invention," and all records and expressions thereof, whether or not patentable, copyrightable or otherwise legally protectable.

I understand that this agreement does not apply to any Invention for which no equipment, supplies, facilities or trade secret information of Vulcan was used and which was developed entirely on my own time, unless (a) the Invention relates directly to Vulcan's business or actual or demonstrably anticipated research or development, or (b) the Invention results from any work I performed for Vulcan.

3. **Further Assistance; Power of Attorney.** I agree to perform, during and after my employment with Vulcan, all acts deemed necessary or desirable by Vulcan to permit and assist it, at its expense, in obtaining and enforcing the full benefits, enjoyment, rights and title throughout the world in Vulcan Inventions. Such acts may include, but are not limited to, execution of documents and assistance or cooperation in legal proceedings. Vulcan shall have full control over all applications for patents or other legal protection of these Vulcan Inventions. If, for any reason, I am unable or do not perform the acts set forth herein, I hereby irrevocably designate Vulcan and its duly authorized officers and agents as my agent and attorney-in-fact to execute and file on my behalf any applications for patents or other legal protection of Vulcan Inventions and to do all other lawful acts to further the prosecution and issuance of patents, copyright and other registrations related to such Vulcan Inventions. This power of attorney shall not be affected by my subsequent incapacity.
4. **Vulcan Materials.** All documents and property in my care, custody or control relating to my employment or Vulcan's business, including without limitation any documents that contain Vulcan's confidential information, will be and will remain the sole property of Vulcan. I will safeguard such documents and property during my employment with Vulcan and return such documents and property to Vulcan when my employment ends, or sooner if Vulcan requests.

5. **Non-raiding of Employees, Consultants and Other Parties.** During my employment with Vulcan and for twelve (12) months after my employment ends, regardless of the reason it ends, I will not directly or indirectly solicit any employee or consultant to leave his or her employment or consultancy with Vulcan. This includes that I will not (a) disclose to any third party the names, backgrounds or qualifications of any Vulcan employees or consultants, or otherwise identify them as potential candidates for employment; (b) personally or through any other person approach, recruit or otherwise solicit Vulcan employees or consultants to work for any other employer; or (c) participate in any pre-employment interviews with any person who was engaged by Vulcan as an employee or consultant while I was employed by Vulcan. During my employment with Vulcan and for twelve (12) months after my employment ends, regardless of the reason it ends, I will not solicit any licensor, licensee or customer of Vulcan that is known to me, with respect to any business, products or services that are competitive to the business, products or services of Vulcan or under development as of the date of termination of my relationship with Vulcan.
6. **Publicity; No Disparagement or Interference.** I will not be involved in the preparation of any book, article, story, video or film about Mr. Allen, his family, friends, business associates or business or personal interests, and I will not give interviews about Mr. Allen, his family, friends, business associates or business or personal interests. I will not disparage Vulcan or its business or products and will not interfere with Vulcan's relationships with its customers, employees, vendors, bankers or others. I will not disparage Mr. Allen, his family, friends, business associates or business or personal interests. These agreements apply both while I am employed by Vulcan and after my employment by Vulcan ends, regardless of the reason it ends.
7. **Other Employment While Employed By Vulcan.** While I am employed by Vulcan I will not do work that competes with or relates to any of Vulcan's activities without first obtaining Vulcan's written permission. Any business opportunities related to Vulcan's business that I learn of or obtain while employed by Vulcan (whether or not during working hours) belong to Vulcan, and I will pursue them only for Vulcan's benefit. Before I undertake any work for myself or anyone else during my employment by Vulcan that will involve subject matter related to Vulcan's activities, I will fully disclose the proposed work to Vulcan.
8. **Future Consulting or Employment for Vulcan.** If my employment relationship with Vulcan ends but Vulcan employs me again or engages me as a consultant, then this agreement shall apply to my later employment(s) or engagement(s) unless they follow a period of a year or more during which I was neither employed nor engaged by Vulcan. If this agreement becomes applicable to a consulting relationship, the references in this agreement to my employment by Vulcan shall be treated, as appropriate, as referring to my consulting relationship with Vulcan.
9. **No Guarantee of Employment.** I understand this agreement is not a guarantee of continued employment. My employment is terminable at any time by Vulcan or me, with or without cause or prior notice, unless otherwise provided in a written employment agreement.
10. **No Conflicting Agreements.** I am not a party to, and during my employment with Vulcan, I will not enter into any agreements, such as confidentiality or non-competition agreements, that limit my ability to perform my duties for Vulcan.

11. **Arbitration.** Any and all claims, disputes, or other matters in controversy on any subject arising out of or related to this agreement and my employment with Vulcan shall be subject to arbitration in Seattle, Washington; provided, however, that Vulcan shall have the right, upon its election, to seek a temporary restraining order or emergency injunctive relief in aid of arbitration to preserve the status quo pending determination of the merits in arbitration and venue and jurisdiction for any such injunctive relief will exist exclusively in state and federal courts in King County, Washington, unless, in Vulcan's judgment, relief may not be effective unless obtained in some other venue.

Each party, at its own expense, has the right to hire an attorney to represent it in the arbitration. All parties shall have the right to present evidence at the arbitration, through testimony and documents, and to cross-examine witnesses called by another party.

A demand for arbitration shall be made in writing, delivered to the other party to this agreement, and delivered to the person or entity, if known, administering the arbitration. Any filing fee will be paid by the party initiating arbitration. To the extent such a fee exceeds the cost of filing a lawsuit in a court in King County, Washington, Vulcan will reimburse the difference. Any postponement or cancellation fee imposed by the arbitration service will be paid by the party requesting the postponement or cancellation.

The party filing a notice of demand for arbitration must assert in the demand all claims then known to that party on which arbitration is permitted to be demanded. Upon receipt of a demand for arbitration through either personal service or certified mail, the parties shall promptly attempt to mutually agree on an arbitrator. If the parties do not agree on an arbitrator within thirty (30) days after receipt of a demand for arbitration, the dispute shall be submitted to the American Arbitration Association ("AAA"). If AAA is unable or unwilling to accept the matter, the parties agree to submit this matter to a comparable arbitration service. The arbitration shall be administered in accordance with AAA arbitration rules in effect on the date of the arbitration, unless otherwise provided herein or agreed to in writing by the parties.

The parties shall have the right to discovery in advance of arbitration as determined to be necessary and reasonable by the arbitrator(s), recognizing the intention of the parties to streamline the arbitration process and to minimize costs, and provided further that, unless otherwise agreed to in writing by Vulcan, (i) no discovery shall be allowed which does not relate specifically to the issues to be arbitrated, (ii) the number of depositions for each party shall be limited to no more than four (4) half day depositions, (iii) the number of interrogatories for each party shall be limited to ten (10), including subparts, (iv) any electronic discovery or requests for production by each party shall be limited to no more than ten (10) custodians who must be directly involved in the issues being arbitrated, and (v) discovery shall not include depositions of Paul G. Allen, Jody Allen or their family, including, without limitation, their children, parents, cousins, nieces, nephews, and current, future, or former spouses or domestic partners. Any dispute concerning discovery will be resolved by the arbitrator(s).

Either party may file, and the arbitrator(s) shall consider and rule on, pre-trial motions. The arbitrator(s) shall hear and determine any preliminary issue of law asserted by any party to be dispositive of any claim or defense, in whole or in part, in the manner that a court would hear

and dispose of a motion to dismiss for failure to state a claim, or for summary judgment, pursuant to such terms and procedures as the arbitrator(s) deems appropriate.

Upon completion of the arbitration, the arbitrator(s) shall, within thirty (30) days, issue a written and signed statement of the basis of his, her or their decision, including findings of fact and conclusions of law. The arbitrator(s) may only award any remedy that would have been available in court. The decision and award, if any, shall be consistent with the terms of this agreement.

Within fifteen (15) days of receipt of the written decision, either party will have the right to file with the arbitrator(s) and simultaneously serve on the other party a written motion to reconsider. The arbitrator(s) may request the nonmoving or responding party to file a written response within ten (10) days after receipt of that request. The arbitrator(s) thereupon will reconsider the issues raised by the motion and response (if any) and either confirm or alter their decision, which will then be final, binding and conclusive upon the parties. The costs of such motion for reconsideration and written opinion of the arbitrator(s), including attorneys' fees, shall be awarded against the moving party if its motion does not substantially prevail. The award rendered by the arbitrator(s) shall be final and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof. Each party agrees to promptly pay any arbitration award against it at the conclusion of arbitration. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to the agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

The parties and the arbitrator(s) shall treat all aspects of the arbitration or other related proceedings, including, without limitation, discovery, testimony, evidence, the record of the proceedings, briefs, and the decision or award, as strictly confidential and not subject to disclosure to any third party or entity, other than to the parties, the arbitrator(s) and any administering agency. The hearings shall be conducted privately, and in a private setting, with no persons permitted to participate or be present except the parties, their designated counsel and representatives, the arbitrator(s), witnesses, a reporter of the proceedings (if requested and paid for by a party) and a representative of the administering agency.

12. *Miscellaneous.* If I breach this agreement it will cause Vulcan irreparable harm. If I breach or threaten to breach this agreement, Vulcan will be entitled to injunctive or other equitable relief as well as money damages. If I breach this agreement, I will hold in trust for Vulcan all income I receive as a result of the violation. I consent to Vulcan notifying anyone to whom I may provide services of the existence and terms of this agreement. In any dispute arising out of or relating to this agreement or my employment, including without limitation arising from any alleged tort or statutory violation, the prevailing party shall recover their reasonable costs and attorneys fees, including on appeal. This agreement shall be governed by the internal laws of the state of Washington without giving effect to provisions thereof related to choice of laws or conflict of laws. If any part of this agreement is held to be unenforceable, it shall not affect any other part. If any part of this agreement is held to be unenforceable as written, it shall be enforced to the maximum extent allowed by applicable law. My obligations under this agreement supplement and do not limit other obligations I have to Vulcan, including without limitation under the law of trade secrets. This agreement shall be enforceable regardless of any claim I may have against Vulcan. This agreement shall survive the

termination of my employment, however caused. The waiver of any breach of this agreement or failure to enforce any provision of this agreement shall not waive any later breach. This agreement is binding on me, my heirs, executors, personal representatives, successors and assigns, and benefits Vulcan and its successors and assigns. This agreement is the final and complete expression of my agreement on these subjects, and may be amended only in writing. Each party hereby acknowledges that it has read this agreement, has had an opportunity to consult with its own legal advisers if it so desired, and following such consultation or the opportunity for such consultation agrees to all terms and conditions contained herein.

DATED this 29th day of Dec 2012 2011.

Signature

Print Name:

Vulcan Inc.

By: _____

APPENDIX F

ARBITRATOR CAROLYN CAIRNS

AMERICAN ARBITRATION ASSOCIATION
EMPLOYMENT ARBITRATION TRIBUNAL

VULCAN INC.,

Claimant,

v.

TRACI TURNER,

Respondent

v.

RAY COLLIVER and LAURA
MACDONALD,

Third-Party Respondents.

Case No.: 75 166 00410 11 DWPA

**FINDINGS OF FACT, CONCLUSIONS
OF LAW AND INTERIM
ARBITRATION AWARD**

I, the undersigned Arbitrator, having been designated in accordance with the arbitration agreement entered into between the above-named parties, and having been duly sworn, and having duly heard the proofs and allegations presented by Claimant Vulcan Inc., and Third-Party Respondents Ray Colliver and Laura MadDonald, do hereby issue this INTERIM AWARD, as follows:

FINDINGS OF FACT

1. Claimant Vulcan Inc. ("Vulcan") is a Washington corporation that manages the affiliated businesses, charitable foundations and assets of Paul G. Allen. Vulcan initiated this

FINDINGS OF FACT, CONCLUSIONS OF LAW AND
INTERIM ARBITRATION AWARD - 1
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STOKES LAWRENCE, P.S.
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proceeding by filing a Demand for Arbitration with the American Arbitration Association (“AAA”) on December 14, 2011.

2. Respondent Traci Turner is a former Vulcan employee. Ms. Turner was employed as a member of Vulcan’s Executive Protection (“EP”) team from January 17, 2012, until she submitted her resignation on September 23, 2012. She subsequently asserted employment-related claims in two separate lawsuits against Vulcan, the first on September 26, 2011, and the second on January 27, 2012.

3. In both of the lawsuits filed by Turner, the court granted Vulcan’s motion to compel arbitration and stayed the litigation pending resolution of Turner’s claims in this arbitration. Turner’s claims in this matter are styled “counterclaims” because Vulcan initiated the arbitration when Turner failed to do so after the court granted Vulcan’s first motion to compel arbitration in October 2011.

4. Ray Colliver and Laura Macdonald are Vulcan executives and Third-Party Respondents in this proceeding. Turner has asserted the same claims against Colliver and Macdonald as against Vulcan. Colliver is Vice President of Design and Construction at Vulcan, and was the senior executive supervising the EP team during Turner’s tenure at Vulcan. Laura Macdonald is Vulcan’s Senior Director of Human Resources.

5. In its Demand for Arbitration, Vulcan asserted the following claims against Turner:

- (1) Breach of Employee Intellectual Property Agreement (“EIPA”);
- (2) Anticipatory Breach of Employee Intellectual Property Agreement;
- (3) Breach of Duty of Loyalty;
- (4) Breach of Confidential Relationship;
- (5) Violation of Computer Fraud and Abuse Act;
- (6) Repayment of Prorated Bonuses;
- (7) Declaratory Relief – Nonliability for Employment-Related Causes of Action;

- (8) Declaratory Relief – Nonliability for Fraud;
- (9) Declaratory Relief – Nonliability for Defamation;
- (10) Declaratory Relief – Nonliability for Actions Prior to July 26, 2011, Release.

6. By letter from Turner’s counsel dated March 9, 2012, Turner asserted the following counterclaims against Vulcan, Colliver, and Macdonald:

- (1) Gender Discrimination in Violation of RCW 49.60 et seq.;
- (2) Sexual Orientation Discrimination in Violation of RCW 49.60 et seq.;
- (3) Age Discrimination in Violation of RCW 49.60 et seq.;
- (4) Hostile Work Environment;
- (5) Retaliation;
- (6) Wrongful Constructive Termination;
- (7) Intentional Infliction of Emotional Distress;
- (8) Negligent Infliction of Emotional Distress;
- (9) Defamation; and
- (10) Willful Withholding of Wages.

7. On October 31, 2012, the Arbitrator granted Vulcan’s Motion for Partial Summary Judgment on Validity and Effect of Release, ruling as a matter of law that a “Release granted to Vulcan by Traci Turner on July 26, 2011, is valid and enforceable, covers Vulcan Inc. as well as Third-Party Respondents Ray Colliver and Laura Macdonald, and precludes reliance by Turner on acts or events on or before that date to support her claims or counterclaims in this proceeding.” Vulcan is therefore entitled to an award in its favor on its claim for Declaratory Relief on the Validity and Effect of the Release (claim 10 listed in paragraph 5 above).

8. On October 31, 2012, the Arbitrator also granted Vulcan’s Motion for Partial Summary Judgment on Defamation Claim, dismissing Turner’s defamation counterclaim as a matter of law. Vulcan is therefore entitled to an award in its favor on its claim for Declaratory Relief – Nonliability for Defamation (claim 9 listed in paragraph 5 above).

9. Prior to the arbitration hearing in this matter, Vulcan dismissed without prejudice its claims against Turner for Breach of the EIPA, Anticipatory Breach of the EIPA, Breach of Duty of Loyalty, Breach of Confidential Relationship, Violation of Computer Fraud and Abuse Act, and Declaratory Relief – Nonliability for Fraud.

10. A hearing in this matter was held by the Arbitrator on November 26, 2012. Representatives of Vulcan and Third-Party Respondents participated in the hearing, introducing documentary evidence and presenting testimony from four witnesses:

Ray Colliver;

Laura Macdonald;

Frank Liebscher;

Josh Sternberg.

11. Respondent Traci Turner withdrew from these proceedings on October 17, 2012 and declined to participate further. Ms. Turner did not appear, introduce evidence, or participate in the hearing. The Arbitrator reviewed Ms. Turner's deposition taken by Vulcan on May 10, 2012.

12. Turner has failed to carry her burden of proof with respect to any of the elements of the causes of action she asserted in this proceeding. Accordingly, Vulcan, Colliver and Macdonald are entitled to an award on the merits, dismissing all of Turner's claims with prejudice.

13. In addition, the un rebutted testimony of the four witnesses at the arbitration hearing, plus the documentary evidence submitted by Vulcan, establish that Ms. Turner suffered neither adverse employment action nor any hostile work environment while at Vulcan. Moreover, she was fully paid for all work performed, was not constructively terminated, and was not subject to either intentional or negligent infliction of emotional distress.

14. Based on the validity of the Release signed by Ms. Turner on July 26, 2011, and the evidence introduced by Vulcan, Colliver and Macdonald at the November 26, 2012, hearing, Vulcan has shown that it is not liable to Turner on any employment-related claims. Accordingly,

Vulcan is entitled to an award in its favor on its claim for declaratory relief that it is not liable to Turner for employment-related causes of action.

15. Vulcan has also proven that pursuant to the terms of Turner's Employment Offer Letter, Turner received from Vulcan a signing bonus of \$5000.00 and an additional bonus of \$14,531.32 to reimburse her for repayment to her former employer for relocation expenses. The Employment Offer Letter provided, however, that if Turner's employment with Vulcan was terminated for any reason, voluntarily or involuntarily, within the one-year period following her start date, then Turner would be required to repay both of these bonuses to Vulcan on a prorated scale.

16. Turner's employment at Vulcan terminated upon her resignation on or about September 23, 2011, which was less than one year after her start date of January 17, 2011. By letter dated October 6, 2011, Vulcan demanded repayment from Turner of a prorated portion of the bonuses, in the amount of \$5,696.63, consistent with the terms of the Employment Offer Letter that Turner accepted. Turner failed to respond to that demand. Turner is in breach of that contractual obligation, and is liable to Vulcan for damages in the amount of \$5,696.63.

17. Upon joining Vulcan, Ms. Turner signed the Employee Intellectual Property Agreement ("EIPA"), which contains the following fees provision:

In any lawsuit arising out of or related to this agreement or my employment, including without limitation arising from any alleged tort or statutory violation, the prevailing party shall recover their reasonable costs and attorneys' fees, including on appeal.

18. The EIPA is a valid and enforceable contract, supported by consideration, subject to paragraph 19 of the Findings of Fact.

19. This dispute arises out of Ms. Turner's employment at Vulcan, and Vulcan is a prevailing party in this proceeding; however, Vulcan may not recover attorneys' fees and costs flowing from Ms. Turner's statutory claims of employment discrimination in the absence of a showing that her statutory claims were "frivolous, unreasonable, or without foundation". Based on the available record, the Arbitrator cannot conclude that this is among the rare cases where

such a finding should be made. Based on the fees provision in the EIPA, Ms. Turner is liable for Vulcan's reasonable costs and attorneys' fees in this arbitration only as to non-statutory claims and some portion of the attorneys' fees and costs incurred in two lawsuits seeking to enforce the arbitration clause contained in the bonus agreement signed by Ms. Turner on July 26, 2011.

CONCLUSIONS OF LAW

Based on the foregoing, the Arbitrator enters the following Conclusions of Law:

1. Dismissal with Prejudice of Turner's Claims. All of Respondent Traci Turner's claims in this proceeding, as listed in paragraph 6 of the Findings of Fact above, fail for lack of proof and for the reasons set forth in the Arbitrator's October 31, 2012, Orders entered in this case. Those claims have also been effectively rebutted by Vulcan's affirmative showing at the arbitration hearing and are hereby dismissed with prejudice. This dismissal covers all claims asserted against Claimant Vulcan and against Third-Party Respondents Colliver and Macdonald.

2. Declaratory Relief of Non-Liability on Employment-Related Claims. Vulcan is not liable to Turner on any employment-related claims, whether based on statute or sounding in contract or in tort. Accordingly, Vulcan is entitled to an award in its favor on its claim for Declaratory Relief that it is not liable to Turner for employment-related causes of action.

3. Vulcan's Right to Recover Prorated Portion of Bonuses. Turner has breached her contractual obligation to repay Vulcan a prorated portion of the bonuses she received at the start of her employment at Vulcan. Accordingly, Turner is liable to Vulcan for damages for that breach in the amount of \$5,696.63.

4. Turner Is Liable to Vulcan for Its Reasonable Costs and Attorneys' Fees. The EIPA is a valid and enforceable contract that contains a fees provision. This dispute arises out of Turner's employment at Vulcan, and Vulcan is a prevailing party in this proceeding. Accordingly, based on the fees provision in the EIPA, Turner is liable for Vulcan's reasonable costs and attorneys' fees as to nonstatutory claims in this arbitration. The Arbitrator cannot conclude on this record that Ms. Turner's statutory claims of employment discrimination were "frivolous, unreasonable, or without foundation". *Walters v AAA Waterproofing, Inc.*, 151

Wn. App. 316, 323 (2009). Accordingly, Vulcan may not recover attorneys' fees and costs in defending Ms. Turner's unsuccessful statutory claims. Vulcan may also recover a portion of its reasonable fees and costs as to the two lawsuits filed by Ms. Turner to the extent they relate to Vulcan's efforts to have the litigation stayed pending resolution in this forum.

INTERIM AWARD

Based on the Findings of Fact and Conclusions of Law set forth above, the Arbitrator enters the following Interim Award, which is a final determination on liability issues, and interim only with respect to the amount of reasonable costs and attorneys' fees awarded under paragraph 4 below:

1. Dismissal with Prejudice of Turner's Claims. All of Respondent Traci Turner's claims in this proceeding, as listed in paragraph 6 of the Findings of Fact above, are hereby dismissed with prejudice. This dismissal covers all claims asserted against Claimant Vulcan and against Third-Party Respondents Colliver and Macdonald.
2. Declaratory Relief: Vulcan Not Liable on Employment-Related Claims. Vulcan is hereby awarded Declaratory Relief that it is not liable to Ms. Turner for any employment-related causes of action.
3. Vulcan Is Awarded \$5,696.63 from Turner for Breach of Contract. Ms. Turner has breached her contractual obligation to repay Vulcan a prorated portion of the bonuses she received at the start of her employment at Vulcan. Accordingly, Vulcan is awarded damages for that breach from Ms. Turner in the amount of \$5,696.63.
4. Turner Is Liable to Vulcan for Its Reasonable Costs and Attorneys' Fees. The EIPA is a valid and enforceable contract that contains a fees provision. This dispute arises out of Turner's employment at Vulcan, and Vulcan is a prevailing party in this proceeding. Accordingly, based on the fees provision in the EIPA, Turner is liable for Vulcan's reasonable costs and attorneys' fees as to nonstatutory claims in this arbitration. The Arbitrator cannot conclude on this record that Ms. Turner's statutory claims of employment discrimination were frivolous, unreasonable or without foundation. Accordingly, Vulcan may not recover attorneys'

fees and costs in defending Ms. Turner's unsuccessful statutory claims. Vulcan may also recover a portion of its reasonable fees and costs as to the two lawsuits filed by Ms. Turner to the extent they relate to Vulcan's efforts to have the litigation stayed pending resolution in this forum.

5. Vulcan May Submit Post-Hearing Briefing on Reasonable Fees and Costs.

Within 30 days of receipt of these Findings of Fact, Conclusions of Law, and Interim Award, Vulcan may submit declarations and documentary evidence to establish the amount of costs and fees that it reasonably incurred in defending nonstatutory claims in arbitration and in having Ms. Turner's two lawsuits stayed pending resolution in arbitration. The Arbitrator will consider that submission and issue a Final Award that includes the amount of costs and fees awarded, which Final Award will supersede this Interim Award.

This Interim Award shall remain in full force and effect until such time as a final Award is rendered.

DATED this 21st day of December, 2012.


Arbitrator Carolyn Cairns

Presented by:

Harry H. Schneider, Jr., WSBA No. 09404
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Kevin J. Hamilton, WSBA No. 15648
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APPENDIX G

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HON. BRUCE E. HELLER

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

TRACI TURNER,

Plaintiff,

v.

VULCAN, INC., PAUL ALLEN, JODY ALLEN, RAY COLLIVER, and LAURA MACDONALD,

Defendants.

No. 12-2-03514-8 SEA
MEMORANDUM OPINION

I. INTRODUCTION

This matter is before the court on cross motions to confirm and vacate an arbitration award. The two primary issues presented are (1) whether the Arbitrator's refusal to grant a continuance of the arbitration hearing constituted "misconduct" under the Federal Arbitration Act and (2) whether the award of \$113,234 in attorneys' fees against Traci Turner should be vacated, either because it is "completely irrational" or because it violates public policy. The court concludes that the Arbitrator's denial of the requested continuance was within her discretion. However, the court vacates the attorneys' fee award because it violates public policy.

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II. BACKGROUND

Traci Turner began working for Vulcan as a Senior Executive Protection Specialist on January 17, 2011. This job involved providing security for Paul Allen and his family. When she was hired, Turner signed an Employee Intellectual Property Agreement (EIPA) that provided:

In any lawsuit arising out of or relating to this agreement or my employment, including without limitation arising from any alleged tort or statutory violation, the prevailing party shall recover their reasonable costs and attorneys fees, including an appeal.

Declaration of Harry Schneider, Ex. 7, Section 11.

On July 26, 2013, Turner signed a Guaranteed Bonus Agreement (GBA) that contained the following arbitration provision:

Any and all claims, disputes, or other matters in controversy on any subject arising out of or related to this Agreement and your employment shall be subject to confidential arbitration.

Declaration of Rebecca Roe, paragraph C. The GBA also included a release of claims provision that applied to all claims arising prior to its execution. *Id.*, paragraph B.

In September 2011, Turner terminated her employment with Vulcan. Soon thereafter, she filed a lawsuit in this court against Vulcan and several of its executives (collectively "Vulcan"), alleging constructive discharge, hostile work environment, gender discrimination and retaliation ("*Turner I*"). On October 6, Judge Patrick Oishi granted Vulcan's Motion to Compel Arbitration. Turner filed a motion for reconsideration but took a voluntary nonsuit before obtaining a ruling. After an unsuccessful mediation, Turner filed a second lawsuit in this court that alleged discrimination based on sexual orientation, age and gender, hostile work environment, retaliation, willful withholding of wages, constructive termination, defamation, and negligent and intentional infliction of emotional distress ("*Turner II*"). On June 8, 2012,

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1 Judge Monica Benton ordered Turner to submit all of her employment claims against Vulcan
2 to binding arbitration.

3 Meanwhile, on December 14, 2011, Vulcan filed a demand for arbitration with the
4 American Arbitration Association. On March 1, 2012, Carolyn Cairns was appointed as the
5 arbitrator. On July 13, 2012, Turner's counsel requested a four-month continuance of the
6 November 26, 2012 arbitration hearing in order to provide additional time for discovery. The
7 Arbitrator denied the continuance. On August 27, 2012, Turner's attorney withdrew from the
8 case. On September 7, 2012, Turner, now acting pro se, requested a four-month continuance
9 of the hearing date:

10 I am requesting this continuance on the basis for my active search for new counsel, and
11 due to the inactivity around discovery during the month of August while motions were
12 being heard . . .

13 I will keep you appropriately apprised of my progress around finding new counsel . . .
14 As you are aware, I am a layperson with respect to legal matters and do not possess the
15 institutional knowledge necessary to answer and respond to motions, pleadings, etc.
16 However, I assure you I will do my best to keep up with the process in a timely
17 manner.

18 Schneider Decl. Ex. 31.

19 Vulcan opposed the continuance. It argued that the requested continuance was the
20 latest in Turner's attempts to avoid and delay the arbitration, noting that Turner's attorney had
21 informed her that his withdrawal would result in a continuance of the hearing. Vulcan urged
22 the arbitrator to hear its motion for partial summary judgment on the validity of the Release of
23 Claims provision in the GBA and revisit the issue of continuing the hearing if the motion were
24 denied. Vulcan also advised the arbitrator that it would take no further action in the case until
September 30, 2012 in order to give Turner thirty days from her attorney's August 27, 2013
withdrawal to obtain new counsel. Finally, Vulcan argued that a continuance was not

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1 warranted for conducting further discovery because, according to Vulcan, Turner's attorney
2 had refused to go forward with scheduled discovery beginning on July 30, 2012.

3 On September 18, 2012, the arbitrator denied the requested continuance:

4 There is no current basis for granting a motion for continuance of any length, let alone
5 120 days. Ms. Turner's motion is denied without prejudice, meaning that she can make
6 another request for a continuance depending on the outcome of [Vulcan's proposed
7 motion on the enforceability of Turner's release of claims].

8 Schneider Decl. Ex. 33. The Arbitrator further explained that if she granted Vulcan's motion
9 and upheld the release, the case would be substantially reduced, resulting in the need for less
10 discovery. On the other hand, if the motion were denied, the Arbitrator would revisit the issue
11 of discovery and hearing dates. *Id.*

12 On September 26, 2012, Turner, still acting pro se, urged the Arbitrator not to consider
13 Vulcan's motion to enforce the release of claims provision, contending the GBA was
14 procedurally unconscionable. On October 17, 2012, after Vulcan filed its motion, Turner
15 withdrew from the arbitration proceedings:

16 I am incapable of continuing pro se. I am not an attorney and I simply don't know
17 what I'm doing . . .

18 I am unable to pay for counsel because I'm unemployed and do not have the financial
19 means to pay hourly fees. I fear I am only hurting myself by continuing in a process
20 that requires years of schooling.

21 Roe Decl. Ex. 29.

22 On October 31, 2012, the Arbitrator granted Vulcan's Motion for Partial Summary
23 Judgment on Validity and Effect of Release. Schneider Decl. Ex. 35. The Arbitrator noted
24 that although Turner had filed no response to the motion, she had considered the pleadings
25 filed by Turner's counsel in *Turner I* and *Turner II* regarding the enforceability of the GBA.

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1 The arbitration hearing took place on November 26, 2012, without Turner being in
2 attendance. On December 21, 2012, the Arbitrator ruled in Vulcan's favor on all issues
3 presented. In her Findings of Fact, Conclusions of Law, and Interim Arbitration Award
4 ("Interim Arbitration Award"), she dismissed Turner's claims with prejudice and awarded
5 Vulcan \$5,696.63 based on Vulcan's claim of breach of contract related to a relocation bonus.
6 Schneider Decl. Ex. 38. With regard to attorneys' fees, the Arbitrator found:

7 Vulcan may not recover attorneys' fees and costs flowing from Ms. Turner's statutory
8 claims of employment discrimination in the absence of a showing that her statutory
9 claims were frivolous, unreasonable, or without foundation. Based on the available
10 record, the Arbitrator cannot conclude that this is among the rare cases where such a
11 finding should be made. Based on the fees provision in the EIPA, Ms. Turner is liable
12 for Vulcan's reasonable costs and attorneys' fees in this arbitration only as to non-
13 statutory claim **and some portion of the attorneys' fees and costs incurred in two**
14 **lawsuits seeking to enforce the arbitration clause contained in the [GBA].**

15 *Id.* at ¶19 (emphasis added, internal quotation marks omitted). Vulcan subsequently filed a
16 motion for an award of attorneys' fees. The fee request was limited to a portion of its fees
17 incurred in *Turner II*. On March 7, 2013, the Arbitrator awarded Vulcan \$113,235 in
18 attorneys' fees based on Vulcan's successful efforts to compel arbitration in *Turner II*.
19 Schneider Decl. Ex. 40.

20 III. DISCUSSION

21 A. Standard of Review

22 Judicial review of arbitration awards under the Federal Arbitration Act ("FAA"), 9
23 U.S.C. § 1-16 is "extremely narrow and exceedingly deferential." *UMass Mem'l Med. Ctr. v.*
24 *United Food & Commercial Workers Union*, 527 F.3rd 1, 5 (1st Cir. 2008) (internal quotation
marks omitted). Both federal and Washington cases have consistently reaffirmed this limited

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1 scope of review. Thus, in *Bosack v. Soward*, 586 F.3rd 1096, 1106 (9th Cir. 2009)(as
2 amended), the court stated that:

3 [W]e do not decide the rightness or wrongness of the arbitrator's contract
4 interpretation, only whether the panel's decision draws its essence from the contract.
5 We will not vacate an award simply because we might have interpreted the contract
6 differently." (citations and internal quotation marks omitted).

7 In *International Union of Operating Engineers v. Port of Seattle*, 176 Wn.2d 712, 720, 295
8 P.3rd 736 (2013), the Washington Supreme Court observed that to apply anything other than a
9 limited standard of review would "call into question the finality of arbitration decisions and
10 undermine alternate dispute resolution." However, notwithstanding such judicial deference,
11 arbitration awards will be vacated if they violate "an explicit well defined and dominant public
12 policy, not simply general considerations of supposed public interest." *Id.*, 176 Wn.2d at 721.
13 (internal quotation marks omitted).

14 **B. The Arbitrator's Denial of Turner's Request for a Continuance of the Hearing
15 Was Within Her Discretion**

16 Turner asks the court to vacate the arbitration Award based on Section 10(a)(3) of the
17 FAA, which grants courts the power to vacate arbitration awards "where the arbitrators were
18 guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown . . ."
19 9 U.S.C. § 10(a)(3). Courts have interpreted Section 10(a)(3) to mean that except where
20 fundamental fairness is violated, arbitration determinations will not be second-guessed.
21 *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3rd 16, 20 (2nd Cir. 1997). Thus, courts will not
22 intervene in an arbitrator's decision denying a requested continuance if any reasonable basis
23 for it exists. *El Dorado Sch. Dist. No. 15 v. Continental Cas. Co.*, 247 F.3rd, 843, 848 (8th Cir.
24 2001).

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1 The failure by an arbitrator to give a reason for the denial does not indicate misconduct
2 as long as reasons for the decision appear in the record. *Id.* In *Tempo Shain*, the court found
3 that an arbitration panel's refusal to keep open the record to permit the testimony of a witness
4 unable to attend the hearing because of his wife's unexpected reoccurrence of cancer
5 constituted misconduct under Section 10(a)(3). *Id.*, 120 F.3d at 20. Similarly, in *Naing Int'l*
6 *Enterprises, Ltd v. Ellsworth Assoc., Inc.*, 961 F.Supp. 1, 3-5 (D.D.C. 1997), a refusal to allow
7 one party to complete a critical pre-hearing investigation constituted misconduct because it
8 resulted in "the foreclosure of the presentation of pertinent and material evidence." *Id.* at 3.
9 On the other hand, an arbitrator's denial of an attorney's request for a continuance on the eve
10 of the hearing because his son had been scheduled for outpatient surgery for a recurrent ear
11 infection problem was held not to violate Section 10(a)(3). *El Dorado*, 247 F.3d at 847-48.

12 Turner argues that the Arbitrator's denial of her request for a continuance was
13 tantamount to a refusal to hear evidence from her. She points out that her request came at a
14 crucial point in the arbitration when the Arbitrator was about to consider the validity of the
15 Release of Claims provision in the GBA. Further, in her decision granting Vulcan's motion
16 for partial summary judgment, the Arbitrator stated that Turner's testimony would have been
17 relevant in determining whether the release was unconscionable, but without any submission
18 from Turner, the Arbitrator had no choice but to accept Vulcan's version of the events.

19 According to Turner, the denial of the motion for continuance of the motion also
20 ensured that she would be unable to find counsel. Turner's current counsel, Ms. Rebecca Roe,
21 provided a declaration stating that she was approached about the possibility of representing
22 Turner in August or September 2012 but declined "because of the very real possibility the
23 arbitration would occur in November." Suppl. Roe Decl. at ¶3. The Roe Declaration also

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1 notes that Judge George Finkle, acting as an arbitrator in a parallel case involving Vulcan and
2 co-employees of Turner's (presumably represented by counsel), denied the identical motion
3 for partial summary judgment by Vulcan. *Id.* at ¶5.

4 In response, Vulcan argues that the Arbitrator did not refuse to consider evidence but
5 rather that Turner refused to present evidence when she abandoned the arbitration process.
6 Vulcan relies on *Three S Delaware, Inc. v. Dataquick Info Systems, Inc.*, 492 F.3rd 520(4th Cir.
7 2007) in which the court rejected a Section 10(a)(3) challenge to an arbitration award because
8 the party challenging the award would have had an ample opportunity to present its evidence if
9 its owner had not insisted on abandoning the arbitration hearing. According to Vulcan,
10 nothing prevented Turner from telling her side of the story regarding how she came to sign the
11 GBA. Vulcan also asserts that the issues involved in the partial summary judgment motion --
12 the conscionability of the GBA -- had been litigated twice in *Turner I* and *Turner II*, and that
13 the Arbitrator considered those briefs, including declarations by Turner, in her decision.
14 Finally, Vulcan argues that the Arbitrator would have been fully justified in viewing Turner's
15 counsel's withdrawal as tactical given counsel's admission that he told Turner that his
16 withdrawal would likely result in a continuance.

17 In ruling on motions for continuance to seek new counsel, arbitrators, like judges,
18 must balance the needs of the party requesting the continuance against the adverse party's right
19 to finality without undue delay. Whether this court believes that the Arbitrator struck the right
20 balance is not the question. Rather, it is whether there are reasons in the record that would
21 support the Arbitrator's decision and whether the decision deprived Turner of fundamental
22 fairness. As to the first question, the Arbitrator, like this court, was presented with competing.

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1 non-frivolous arguments which supplied a basis for her decision. Consequently, her denial of
2 the requested continuance was not arbitrary.

3 Whether the Arbitrator's ruling deprived Turner of fundamental fairness is a closer
4 question. Even though, as Vulcan points out, Turner was capable of presenting evidence
5 regarding the circumstances surrounding the execution of the GBA, she was placed at a severe
6 disadvantage in having to resist Vulcan's partial summary judgment motion without legal
7 representation. For example, she could not have been expected to know that the legal
8 standards applicable to enforcement of releases may be distinct from an unconscionability
9 analysis and that perhaps a different approach from the briefing in *Turner I* and *Turner II* was
10 required. See *Finch v. Carlton*, 84 Wn.2d 140, 143 (1974)(setting forth five-factor test in
11 determining whether release was "fairly and knowingly made."). The fact that other former
12 Vulcan employees with legal representation were successful in resisting the same partial
13 summary judgment motion before another arbitrator is troubling.

14 Ultimately, however, the court concludes that Turner bears some of the responsibility
15 for what occurred. When she requested the continuance, Turner told the Arbitrator, "I will
16 keep you appropriately apprised of my progress around finding new counsel." Schneider Decl.
17 Ex. 31. She never did. Had Turner told the Arbitrator, for example, that she was diligently
18 seeking new counsel and that she was unsuccessful because no attorney was willing to step in
19 given the current deadlines, the Arbitrator might have considered a different briefing and
20 hearing schedule. Or, if new counsel had made a limited appearance and asked for a
21 reasonable continuance to get up to speed, it is difficult to imagine a fair-minded arbitrator
22 denying the request. Instead, Turner never requested an adjustment of the summary judgment

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1 briefing schedule and then withdrew a few days before her summary judgment response was
2 due.

3 Under these circumstances, without any additional information about Turner's progress
4 in obtaining counsel, the Arbitrator's scheduling orders were within her discretion and cannot
5 be considered misconduct.

6 C. The Award of Attorneys' Fees

7 I. The Fee Award is not completely irrational

8 Under Section 10(a)(4) of the FAA, a reviewing court may vacate an award "where the
9 arbitrators exceeded their powers." An arbitrator exceeds her powers where the award "is
10 completely irrational or exhibits a manifest disregard for the law." *Kyocera Corp. v.*
11 *Prudential-Bache Trade Services*, 341 F.3rd 987, 997 (9th Cir. 2003). Review of an
12 arbitrator's award under Section 10(a)(4) requires the same deferential standard of review as
13 under Section 10(a)(3). In *Oxford Health Plans LLC v. Sutter*, ___ U.S. ___, 133 S.Ct. 2064,
14 2068, 2013 WL 2459522 (June 10, 2013), the United States Supreme Court stated with respect
15 to Section 10(a)(4): "... [A]n arbitral decision even arguably construing or applying the
16 contract must stand, regardless of a court's view of its (de)merits." (internal quotations marks
17 omitted).

18 Here, the arbitrator based her fee award on Section 11 of the EIPA, which provides: "In
19 any lawsuit arising out of or relating to this agreement or my employment, including without
20 limitation arising from any alleged tort or statutory violation, the prevailing party shall recover
21 their reasonable costs and attorneys fees, including on appeal." *Schneider Decl. Ex. 7.*

22 Turner's contention that the award of attorneys' fees was "completely irrational" is based on

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1 the argument that Section 11 is limited to lawsuits, whereas the fees here were awarded in an
2 arbitration proceeding:

3 Vulcan neither included an attorney fees provision in the GBA, nor incorporated the
4 EIPA's lawsuit-fees provision in the GBA. In contrast, in the GBA, Vulcan confirmed
prior confidentiality provisions to which employees had agreed.

5 Mem. in Support of Motion to Vacate at 21.

6 Regardless of the merits of this argument, it does not follow that the Arbitrator's
7 contrary conclusion "is completely irrational or exhibits a manifest disregard for the law."
8 *Kyocera Corp, Inc.*, 341 F.3d at 997. First, it could be argued that in limiting fees to the
9 *Turner II* lawsuit, the Arbitrator's ruling was consistent with Section 11 of the EIPA, which
10 allows for fees "in any lawsuit." Second, case law from California and Florida supports the
11 argument that the term "lawsuit" in the EIPA may be broadly construed to encompass
12 arbitrations. *Severtson v. Williams Constr. Co.*, 222 Cal.Rptr. 400, 406 (Ct. App. 1985)("[T]he
13 use of the term 'suit' in the present contract was broad enough to embrace arbitration, and
14 attorneys' fees and costs were properly awarded by the arbitrator."); *Tate v. Saratoga Sev. &*
15 *Loan Assn.*, 265 Cal. Rptr. 440, 448 (Ct. App. 1989)(same); *Par Four, Inc. v. Gottlieb*, 602
16 So.2d 689, 690 (Fla. Dist. Ct. App. 1992)(The phrase "in the event of any litigation, the
prevailing party would be entitled to attorneys' fees" included arbitration proceedings.).

17 Based on the existence of legitimate arguments supporting the Arbitrator's reliance on
18 the fee provision in the EIPA, the court concludes that Turner has not met her burden of
19 demonstrating that the fee award was completely irrational.

20 **2. The Award of Attorneys' Fees Against an Employee Raising Statutory Claims**
21 **Violates Public Policy**

22 As previously noted, courts will vacate an arbitration award that violates "an explicit,
well-defined, and dominant public policy, not simply general considerations of supposed

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1 public interest.” *Operating Engineers*, 176 Wn.2d at 721. The need to identify with precision
2 the public policy at issue stems from the fact that the public policy exception is a
3 “narrow” one, *Kitsap County Deputy Sheriffs Guild v. Kitsap County*, 167 Wn.2d 428, 436
4 (2009), and that courts are not to vacate arbitration awards simply because they disagree with
5 the result.

6 Since Turner brought claims in *Turner II* pursuant to the Washington Law Against
7 Discrimination (WLAD), RCW 49.60 et seq., and the Washington Minimum Wage Act
8 (MWA), RCW 49.48 et seq., the court begins its analysis with those statutes. First, regarding
9 the WLAD, the Washington Supreme Court has held that “[t]he laws against workplace
10 discrimination set forth an explicit, well-defined and dominant public policy.” *Operating*
11 *Engineers*, 176 Wn.2d at 721. The WLAD aims “to enable vigorous enforcement of modern
12 civil rights litigation and to make it financially feasible for individuals to litigate civil rights
13 violations.” *Martinez v. City of Tacoma*, 81 Wn.App. 228, 235 (1996). Consequently, the
14 WLAD entitles prevailing plaintiffs, but not prevailing defendants, to reasonable attorneys
15 fees. RCW 49.60.030(2); *Collins v. Clark Cnty Fire District No. 5*, 155 Wn.App. 48, 98
16 (2010).

17 The wage and hour laws occupy a position of similar importance in Washington. “The
18 Legislature has evidenced a strong policy in favor of payment of wages due employees by
19 enacting a comprehensive scheme to ensure payment of wages.” *Schilling v. Radio Holdings,*
20 *Inc.*, 136 Wn.2d 152, 157 (1998). Additionally,

21 [b]y providing for costs and attorney fees, the Legislature has provided an effective
22 mechanism for recovery even where wage amounts wrongfully withheld may be small.
This comprehensive legislative system with respect to wages indicates a strong
legislative intent to assure payment to assure payment to employees of wages they have
earned.

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1 *Id.* at 159.

2
3 Consequently, an employment agreement or arbitration award that denies attorneys'
4 fees to a prevailing plaintiff or awards fees to a prevailing defendant in a WLAD or wage and
5 hour lawsuit violates public policy. In *Gandee v. LDL Freedom Enterprises, Inc.*, 176 Wn.2d
6 598 (2013), the court found unconscionable a "loser pays" provision in an arbitration
7 agreement contained in a debt adjustment contract that is virtually identical to the provision in
8 Section 11 of the EIPA. The court reasoned that "[b]ecause the 'loser pays' provision serves
9 to benefit only Freedom and, contrary to the legislature's intent, effectively chills Gandee's
10 ability to bring suit under the CPA, it is one-sided and overly harsh." *Id.* at 606. In *Walters v.*
11 *A.A.A. Waterproofing, Inc.*, 151 Wn.App. 316 (2009), Division I reached a similar conclusion:

12 While Walters is assured that he will recover his expenses and legal fees if he wins
13 decisively, he must assume the risk that if he loses, he will have to pay
14 Waterproofing's expenses and legal fees. This risk is an enormous deterrent to an
15 employee contemplating a suit to vindicate the right to overtime pay. Under these
16 circumstances, in the context of an employee's suit where the governing statutes
17 provide that only a prevailing employee will be entitled to recover fees and costs, a
18 reciprocal attorney fees provision is unconscionable, and therefore, unenforceable.

19 *Id.* at 324-325.

20 In this case, the Arbitrator awarded Vulcan its attorneys' fees based on a provision that
21 is substantially similar, if not identical, to the "loser pays" provisions found unconscionable in
22 *Gandee* and *Walters*. Both Vulcan (implicitly) and the Arbitrator (explicitly) recognized that
23 Section 11 was unenforceable if it were used to award fees incurred by Vulcan in defeating
24 statutory claims at arbitration. Instead, Vulcan limited its fee request to its efforts to compel

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1 arbitration in *Turner II*, and the Arbitrator agreed. The narrow issue before the court is
2 whether this “carve-out” violates public policy. The court concludes that it does.¹

3 As counsel for Vulcan acknowledged at oral argument, there are no cases recognizing
4 an exception to fee shifting principles if an employer prevails on procedural, as opposed to
5 substantive, grounds. Thus, if an employee brought a discrimination claim that was
6 subsequently dismissed on statute of limitations grounds, the prevailing employer would not
7 be entitled to attorneys’ fees. Yet Vulcan argues it is entitled to fees because in *Turner II* it
8 prevailed based on a different procedural defense, i.e., that the litigation should occur in a
9 different forum.

10 Vulcan relies primarily on *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293,
11 319 (2004), in which the Washington Supreme Court upheld a provision requiring a party who
12 files a judicial action to pay the attorneys fees and costs of the opposing party who
13 successfully compels arbitration. The court based this holding on the following two sentences:

14 . . . [A]s Airtouch aptly notes, this provision permits *either* party to recover fees on a
15 successful motion to stay an action and/or to compel arbitration. Thus it does not
16 appear to be so one-sided and harsh as to render it substantively unconscionable.

17 *Id.* at 319.

18 There is a serious question whether the *Zuver* court’s exclusive focus on the bilateral
19 nature of the fee provision continues to represent the current view of the court.² In *Gandee*,
20 issued nine years later, the court invalidated a bilateral “loser pays” provision because (1) in

21 ¹ Neither party has briefed the issue of whether the Arbitrator exceeded her powers by giving a
22 more limited interpretation, i.e., “blue-pencilling,” a fee provision that is unconscionable on its face. It
23 is not necessary to address this issue in light of the court’s conclusion that the “carve-out” is
24 unenforceable as well.

² *Zuver* is not directly on point since it addressed unconscionability as opposed to violations of public
policy. However, the two concepts are closely related. A provision in an arbitration agreement may be

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1 reality, the provision benefited only one party, and (2) the prospects of having to pay the
2 company's fees effectively chilled the consumer's exercise of her rights under the CPA.

3 These two rationales apply equally here. First, while it is theoretically possible that an
4 employee could be awarded fees against an employer resisting arbitration, such a scenario is
5 extremely unlikely. When arbitration agreements are signed in the employment setting, they
6 are, almost without exception, done so at the behest of the employer, not the employee. That
7 is what occurred here when Vulcan presented Turner with the GBA. Therefore, the party
8 benefitting from a fee provision like the one in *Zuver* will almost invariably be the employer,
9 not the employee. Second, the prospects of having to pay attorneys' fees to an employer
10 successful in compelling arbitration will almost certainly have a chilling effect on an employee
11 contemplating a court action to challenge the conscionability of an arbitration agreement
12 and/or to vindicate her statutory rights.

13 An additional distinction between this case and *Zuver* is that there was no evidence
14 presented in *Zuver* regarding the effect of the fee provision on the employee. This perhaps
15 explains the court's conclusion that the provision did not "appear to be" overly harsh. *Id.* at
16 319. Here, the effect of the Arbitrator's fee award was to impose a daunting amount –
17 \$113,235 – on a terminated employee who a few months earlier had written the Arbitrator, "I
18 am unable to pay for counsel because I'm unemployed and do not have the financial means to
19 pay hourly fees." Roe Decl. Ex. 29. In *Gandee*, the court defined a substantively
20 unconscionable provision as being "one-sided or overly harsh" and "shocking the conscience."

21
22 substantively unconscionable if it effectively undermines an employee's ability to vindicate his or her
23 statutory rights. *Adler v. Fred Lind Manor*, 153 Wash.2d 316, 355 (2004). It is difficult to conceive of
24 a provision that fits within this definition of unconscionability that would not also violate public policy.

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1 *Id.*, 176 Wn.2d at 603 (quoting *Adler*, 153 Wn.2d at 344-45). In this court's view, these terms
2 aptly describe the effect of the fee award on Turner.

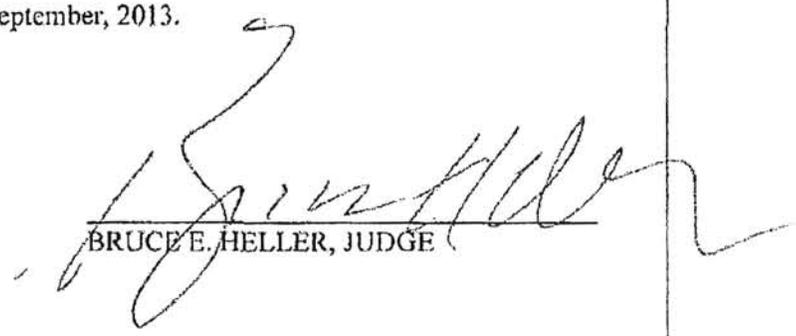
3 In addition to being unconscionable, the court finds that the \$113,235 fee award
4 violates an explicit, well-defined, and dominant public policy because it undermines an
5 employee's ability to vindicate her statutory rights.

6 III. CONCLUSION

7 The Arbitrator's Interim and Final Awards are hereby CONFIRMED in part. The
8 award of attorneys' fees in both Awards is VACATED. The parties are directed to present on
9 Order consistent with this Opinion.

10 IT IS SO ORDERED.

11 ENTERED this 27th day of September, 2013.

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BRUCE E. HELLER, JUDGE

APPENDIX H

AMERICAN ARBITRATION ASSOCIATION
EMPLOYMENT ARBITRATION TRIBUNAL

VULCAN, INC.,

Claimant,

v.

TRACI TURNER,

Respondent

v.

RAY COLLIVER and
LAURA MACDONALD.

Case No.: 75 160 00410 11 DWPA

AMENDED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND FINAL
ARBITRATION AWARD

I the undersigned Arbitrator, having been designated in accordance with the arbitration agreement between Vulcan Inc. and Traci Turner, and having been duly sworn, rendered an Interim Award in this matter on December 21, 2012, and a Final Award on March 7, 2013.

On October 29, 2013, the Honorable Bruce E. Heller issued an Amended Order Confirming in Part and Vacating in Part Arbitration Award, and Remanding for Consideration of Alternative Basis for Fee Award (hereafter the "Court's October 29 Order") in *Turner v. Vulcan Inc.*, No. 12-2-03514-8 SEA. Having reviewed the Court's October 29 Order, the evidence and briefing submitted by Vulcan Inc. and Traci Turner, the Arbitrator does hereby issue these Amended Findings of Fact, Conclusions of Law, and Final Award, as follows:

1. Findings of Fact and Conclusions of Law. The Findings of Fact and Conclusions of Law contained in the Interim Award are made final by, and incorporated into, this Final Award, except as herein amended:

a. Finding of Fact ¶ 19, stating that Vulcan is entitled to recover "some portion of the attorneys' fees and costs incurred in two lawsuits seeking to enforce the arbitration clause", was OVERRULED by the Court's October 29 Order, and

b. The specific portions of Conclusion of Law ¶ 4 and Interim Award ¶ 4 providing that "Vulcan may. . . recover a portion of its reasonable attorneys' fees and costs as to

AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND FINAL ARBITRATION AWARD - 1
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1 the two lawsuits filed by Ms. Turner to the extent they relate to Vulcan's efforts to have the
2 litigation stayed pending resolution in [the arbitral] forum" was VACATED by the Court's
3 October 29 Order.

4 2. Dismissal with Prejudice of Turner's Claims. All of Respondent Traci Turner's
5 counterclaims in this proceeding, as listed in ¶ 6 of the Findings of Fact contained in the Interim
6 Award, are hereby dismissed with prejudice. Ms. Turner's Defamation claim was previously
7 dismissed on October 31, 2012. The instant dismissal includes all claims asserted against
8 Claimant Vulcan and against Third-Party Respondents Colliver and MacDonald.

9 3. Declaratory Relief: Vulcan Not Liable on Employment-Related Claims. Vulcan
10 is hereby awarded Declaratory Relief that it is not liable to Ms. Turner for any employment-
11 related causes of action.

12 4. Vulcan Is Awarded \$5,696.63 from Turner for Breach of Contract. Ms. Turner
13 has breached her contractual obligation to repay Vulcan a prorated portion of the bonuses she
14 received at the start of her employment at Vulcan. Accordingly, Vulcan is awarded damages for
15 that breach from Ms. Turner in the amount of \$5,696.63.

16 5. Award of \$39,524.50 in Attorneys' Fees to Vulcan. The Employee Intellectual
17 Property Agreement ("EIPA") signed by Ms. Turner at the outset of her employment with
18 Vulcan is a valid and enforceable contract that contains a fees provision in the event of a dispute
19 concerning Ms. Turner's employment. This dispute arises out of Turner's employment at
20 Vulcan, and Vulcan is a prevailing party in this proceeding. Accordingly, based on the fees
21 provision in the EIPA, Vulcan is entitled to an award of reasonable attorneys' fees except with
22 respect to Ms. Turner's statutory employment discrimination claims (for which only prevailing
23 plaintiffs are eligible for an attorneys' fee award except in rare cases).

24 In the Final Award entered March 7, 2013, the Arbitrator awarded Vulcan \$113,235 for
25 attorneys' fees incurred in connection with compelling arbitration in *Turner II*. In making that
26 award, the Arbitrator acknowledged, but did not reach, an alternative basis for an attorneys' fee
27 award that was included in Vulcan's motion for fees. The Court's October 29 Order vacated the

1 fee award based on *Turner II* on public policy grounds, and the Court remanded the case to the
2 Arbitrator for potential consideration of Vulcan's alternative basis for attorneys' fees.

3 On remand, Vulcan seeks an award of (1) \$18,875 for attorneys' fees incurred in
4 connection with a successful motion for partial summary judgment on Ms. Turner's defamation
5 claim, and (2) \$21,449.50 for prevailing on a motion for partial summary judgment on the
6 enforceability of a contractual release signed by Ms. Turner. Vulcan has limited its request to a
7 portion of fees incurred by partner Joseph M. McMillan, then associate Jeffrey M. Hanson, and
8 paralegal Patricia Marino.

9 The requested fees were incurred in connection with nonstatutory claims and are
10 warranted based on the contractual fee provision and under Washington law. The arbitrator has
11 reviewed all billing records provided by Vulcan counsel to support its request for attorneys' fees
12 for both motions, and the fees requested are reasonable. Ms. Turner objects to a fee award on the
13 ground that it was not necessary for Vulcan to file partial summary judgment motions rather than
14 having the issues addressed at hearing. Ms. Turner presents no authority, and the Arbitrator is
15 aware of none, that would require Vulcan to forego summary judgment motions in favor of
16 presenting evidence at the hearing. Nor does Ms. Turner challenge the rates charged by
17 Vulcan's counsel or the specific time spent by counsel on the motions.

18 Accordingly, Vulcan's motion for attorneys' fees against Respondent Traci Turner on
19 remand is GRANTED in the amount of \$39,524.50, which represents reasonable attorneys' fees
20 incurred by Vulcan in support of its successful efforts on the two motions for partial summary
21 judgment. Vulcan's request for an award against Ms. Turner of \$5,696.63 for breach of contract
22 is GRANTED.

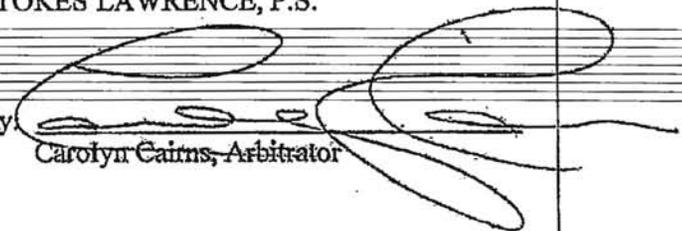
23 Vulcan has previously agreed to pay the Arbitrator's compensation in full and to pay
24 AAA's administrative costs and fees. The administrative filing and case service fees of the AAA,
25 totaling \$1,400.00, shall be borne as incurred. The fees and expenses of the arbitrator, totaling
26 \$34,961.24 shall be borne as incurred.

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This AWARD is in full settlement of all claims and counterclaims submitted to this arbitration.

DATED this 30 day of January, 2014.

STOKES LAWRENCE, P.S.

By: 
Carolyn Cairns, Arbitrator

APPENDIX I

FILED
KING COUNTY SUPERIOR COURT

APR 01 2014

SUPERIOR COURT CLERK
BY JOSEPH MASON
DEPUTY

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

TRACI TURNER,

Plaintiff,

v.

VULCAN INC., PAUL ALLEN, JODY
ALLEN, RAY COLLIVER and LAURA
MACDONALD,

Defendants.

No. 12-2-03514-8 SEA

**ORDER DENYING PLAINTIFF'S
MOTION FOR AWARD OF
ATTORNEYS' FEES**

This matter is before the Court on Plaintiff's Motion for Award of Attorneys' Fees. In addition to the motion, the Court has considered the Declaration of Rebecca J. Roe and attachments thereto, Defendants' Opposition, the Declaration of Joseph M. McMillan and attachments thereto, Turner's Reply, and other relevant records on file in this matter.

A prevailing party "is one who receives judgment in that party's favor" or who "succeeds on any significant issue which achieves some benefit the party sought in bringing suit." *Blair v. Washington State Univ.*, 108 Wn.2d 558, 572 (1987). Further, "status as a prevailing party is determined on the outcome of the case as a whole, rather than by piecemeal assessment of how a party fares on each motion along the way." *Jenkins v. State of Mo.*, 127 F.3rd 709, 714 (8th Cir. 1997). While plaintiff succeeded in overturning a substantial award of attorneys' fees on public policy grounds, she did not receive a judgment

ORDER DENYING PLAINTIFF'S MOTION FOR AWARD OF
ATTORNEYS' FEES - 1

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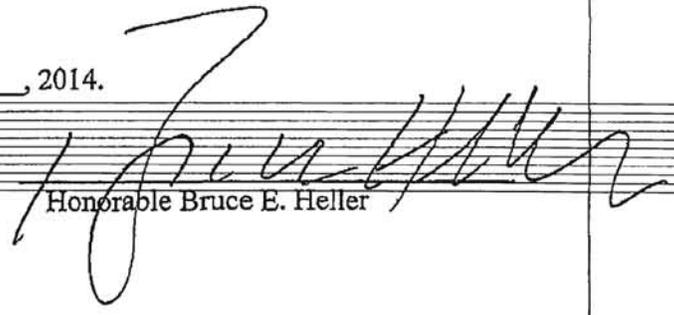
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or achieve any benefit sought in her Complaint.

The Court has considered *Balark v. City of Chicago*, 81 F.3d 658 (7th Cir. 1996), cited by plaintiff, and finds it distinguishable. In *Balark*, a plaintiff class was deemed a prevailing party even though a consent decree in plaintiffs' favor was ultimately overturned. Unlike this case, plaintiffs obtained various forms of relief that were not affected by the prospective termination of the consent decree.

As the non-prevailing party, plaintiff's request for attorneys' fees is DENIED.
IT IS SO ORDERED.

DATED this 1 day of April, 2014.



Honorable Bruce E. Heller