No. 92655-7

IN THE SUPREME COURT OF WASHINGTON

TRACI TURNER,

Petitioner,

v.

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

Respondents.

ANSWER TO PETITION FOR REVIEW OF RESPONDENTS VULCAN INC., PAUL ALLEN, AND JODY ALLEN

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COURT OF APPEALS' DECISION

The unreported decision of the Court of Appeals was issued on November 2, 2015, and is available at 2015 WL 6684259.

ISSUES PRESENTED FOR REVIEW

(1) Whether the Court of Appeals correctly held that, under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 2, 4, a procedural unconscionability defense going to the contract as a whole (not the arbitration provision alone) is for the arbitrator to decide;

(2) Whether the Court of Appeals correctly held that the arbitration agreement in this case was not procedurally unconscionable; and

(3) Whether the Court of Appeals correctly held that the Arbitrator's award of attorney fees to an employer for fees incurred in connection with *nonstatutory* claims did not violate a well-defined, explicit, and dominant public policy under Washington law.

INTRODUCTION

This case presents straightforward questions of federal arbitration and state contract law. The Court of Appeals answered those questions correctly by applying the clear precedents of this Court and the U.S. Supreme Court in a unanimous, unpublished decision. In her petition for review, Petitioner Traci Turner challenges the Court of Appeals' decision as "contrary to Washington and Ninth Circuit law," Pet. 1, but she fails to

identify a single case from any court with which the decision actually conflicts. Instead, Turner attempts to manufacture conflicts by misconstruing cases in ways that, if adopted by this Court, would alter settled state law and create impermissible conflicts with federal law.

First, Turner asks the Court to disregard longstanding U.S. Supreme Court precedent establishing that a contract-law defense going to the "contract generally—as opposed to the arbitration clause itself—is for the arbitrators and not for the courts." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400 (1967).

Second, Turner asks the Court to rewrite the law of procedural unconscionability to invalidate an arbitration agreement conspicuously set forth in plain language, supported by consideration, and expressly affording the employee time to consult with counsel before executing it.

Third, Turner asks this Court to expand the public policy against attorney fee awards to employers in statutory discrimination and wage claims to encompass all *nonstatutory* claims between the parties.

An experienced AAA arbitrator, three Superior Court judges, and three Division I appellate judges have rejected Turner's arguments, none of which presents a serious question of law or a substantial issue of public importance warranting this Court's review. Respondents Vulcan Inc., Paul Allen, and Jody Allen (collectively, "Vulcan"), respectfully request

that this Court adhere to established law and deny Turner's petition.

STATEMENT

A. Turner's Employment and Agreements With Vulcan

Turner worked for Vulcan as an executive protection ("EP") specialist for about 9 months in 2011. *Turner v. Vulcan, Inc.* (*Turner III*), No. 71855-0-I, 2015 WL 6684259, at *1 (Wash. App. Nov. 2, 2015). In that role, Turner was responsible for protecting Vulcan founder and CEO Paul Allen and his family. At the outset of her employment, Turner signed an Employee Intellectual Property Agreement ("EIPA"), which provided for recovery of attorney fees by the prevailing party in a dispute with Vulcan arising out of either Turner's employment or the EIPA. *Id.*

In July 2011, Turner signed a Guaranteed Bonus Agreement ("GBA"), which guaranteed her an annual bonus of $25,156, in addition to her $140,000 salary. In exchange, she (1) renewed her confidentiality obligations under the EIPA; (2) released any claims she may have had against Vulcan arising on or before July 26, 2011 ("release provision"); and (3) agreed to resolve claims related to her employment or the GBA through binding, confidential arbitration ("arbitration provision"). *Id.*

B. Turner's First Lawsuit (*Turner I*)

Turner resigned from Vulcan in September 2011 and shortly thereafter filed her first employment discrimination lawsuit (*Turner I*).

Vulcan moved to compel arbitration. In opposition, Turner contended (among other arguments) that the GBA was invalid on the ground of procedural unconscionability. Judge Patrick Oishi granted Vulcan's motion and compelled arbitration. Turner moved for reconsideration but, before the court could rule, she voluntarily dismissed her lawsuit. *Id.*

Vulcan commenced arbitration to resolve the dispute. Vulcan's arbitration demand included claims against Turner for breach of contract and a declaratory judgment on the validity of the release. *Id.* at *2. "The next day, Turner's counsel . . . sent an e-mail informing Vulcan that Turner's current instructions to him were to refile the court case and to not accept the arbitration process." *Id.*

C. Turner's Second Lawsuit (*Turner II*)

Despite Judge Oishi's order compelling arbitration and Vulcan's initiation of an arbitration proceeding, Turner filed a second lawsuit against Vulcan in January 2012 (*Turner II*), which was assigned to Judge Monica Benton. The complaint featured five of the same claims as *Turner I* and added five new employment-related claims. *Id.* at *2.

Vulcan moved to dismiss the *Turner II* complaint under claim and issue preclusion and to (again) compel arbitration. Turner again resisted, disputing the preclusive effect of Judge Oishi's order and again arguing that the GBA was unconscionable. *Id.* Judge Benton rejected Turner's

arguments and ordered arbitration, ruling that *Turner II*'s claims were subject to "res judicata and/or collateral estoppel" and, alternatively, that the GBA "is not procedurally or substantively unconscionable." CP 2212.

D. The Arbitration

Before Arbitrator Carolyn Cairns, Vulcan filed summary judgment motions on two claims: (1) Turner's defamation claim; and (2) Vulcan's claim for a declaratory judgment that the GBA's release provision is valid. Vulcan prevailed on both motions. *Vulcan III*, 2015 WL 6684259, at *4.

In a one-day arbitration hearing in which Turner declined to participate, Vulcan presented evidence in support of its claims for breach of contract and declaratory judgment on Turner's claims. The Arbitrator ruled for Vulcan on all claims, holding that (1) Turner's claims were rebutted and therefore dismissed with prejudice; (2) Vulcan was entitled to a declaratory judgment of non-liability for Turner's claims; and (3) Vulcan proved its breach of contract claim and was entitled to $5,696.63 in damages. The Arbitrator also concluded that the EIPA's bilateral fee provision entitled Vulcan to an award of attorney fees incurred in connection with nonstatutory claims. In the Final Award, the Arbitrator awarded $113,235 in attorney fees to Vulcan based solely on its efforts in *Turner II* to compel arbitration. *Id.* at *3-*4; CP 3990-97.

E. Confirmation of the Arbitration Award

Vulcan moved to confirm the Final Award, and Turner cross-moved to vacate it. The case was reassigned to Judge Bruce Heller, who confirmed the award in all respects on the merits. The court vacated the award of attorney fees on public policy grounds, however, out of concern that allowing employers to recover fees for successfully compelling arbitration could chill employees' exercise of their right to a judicial forum. The court remanded to the Arbitrator for consideration of Vulcan's alternative fee request. *Turner III*, 2015 WL 6684259, at *4; CP 3583-98.

In its alternative request, Vulcan sought only those attorney fees it incurred to litigate successful summary judgment motions on two nonstatutory claims: (1) Turner's defamation claim, and (2) Vulcan's claim for a declaratory judgment on the enforceability of the GBA's release. In an amended fee award, the Arbitrator granted Vulcan's alternative fee request in the amount of $39,524.50. CP 3986-87.

Judge Heller confirmed the revised award and entered final judgment. Turner appealed the court orders compelling arbitration, confirming the final award, and awarding attorney fees to Vulcan.[1] *Turner III*, 2015 WL 6684259, at *4-*5.

[1] Turner also appealed Judge Heller's denial of her request for attorney fees for achieving a reduction in Vulcan's fees. Vulcan cross-appealed Judge Heller's decision vacating the Arbitrator's original fee award. The Court of Appeals affirmed each decision, and no party seeks review of either order. *Turner III*, 2015 WL 6684259, at *10-*12.

F. The Court of Appeals' Decision

The Court of Appeals affirmed the trial courts in all respects. In a unanimous, unpublished decision, the court held that Judges Oishi and Benton correctly compelled arbitration, that Turner had identified no basis to vacate the award, and that the fee award to Vulcan for work limited to nonstatutory claims was appropriate under Washington law. *Id.* at *1.

Applying well-settled U.S. Supreme Court precedent, the Court of Appeals determined that Turner's procedural unconscionability defense was a question for the arbitrator, not the trial court. "While it is true that the courts determine whether an arbitration clause is valid and enforceable," under the FAA "a challenge to the validity of the parties' contract as a whole . . . is for the arbitrator to decide." *Id.* at *5 (citing *McKee v. AT & T Corp.*, 164 Wn.2d 372, 394 (2008)). Turner's procedural unconscionability theory is that she allegedly "was forced to sign the contract for fear of losing her job and that she was not given sufficient time to review it." *Id.* at *6. Because that defense plainly "challenges the contract as a whole," the Court of Appeals held that it "need[ed] to be addressed by the arbitrator." *Id.*

As an alternative ground to affirm the Superior Court orders, the Court of Appeals also considered Turner's procedural unconscionability defense on the merits, and flatly rejected it. The touchstone of the defense

is whether a contracting party "lacked a meaningful choice." *Id.* at *7. Turner, however, *did* have a meaningful choice whether to sign the GBA: its terms were "fully disclosed," Turner had a "reasonable opportunity to inspect the agreement," and none of the key provisions in the short, plain-English agreement was "buried in a sea of fine print." *Id.* at *8. It does not matter that Turner supposedly "felt she would be fired if she did not sign the agreement within 24 hours," *id.* at *7, given that the GBA expressly "entitled [Turner] to seek [independent legal] advice . . . before executing the agreement." *Id.* at *8. Moreover, Turner admits she "did not even read the agreement," but instead "simply turned the letter to its last page and signed it." *Id.* at *7. The court held Turner's argument "does not support a finding of procedural unconscionability." *Id.* at *8.

The Court of Appeals also rejected Turner's argument that the GBA violated her constitutional right to a jury trial. "[A] party implicitly waives his or her right to a jury trial by agreeing to an alternative forum, arbitration," as Turner did when she signed the valid, enforceable GBA. *Id.* at *9 (alterations and internal quotation marks omitted) (quoting *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 360-61 (2004)).

With respect to the final issue relevant to Turner's petition, the Court of Appeals upheld the Arbitrator's alternative fee award to Vulcan of $39,524.50 for winning summary judgment on the enforceability of the

GBA's release and on Turner's defamation claim. In doing so, the Court rejected Turner's argument that the EIPA's bilateral fee-shifting provision was substantively unconscionable or against public policy. *Id.* at *12.

ARGUMENT

A. The Court of Appeals Correctly Held That Turner's Procedural Unconscionability Defense Was for the Arbitrator

It is undisputed that the FAA governs this dispute over an agreement to arbitrate in the employment context. *Zuver* v. *Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 301 (2004). The FAA reflects the "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). As a "matter of substantive federal arbitration law," the FAA provides clear rules as to which defenses are to be decided by the arbitrator, and which by the court. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006). Correctly applying these rules, the Court of Appeals held that Turner's procedural unconscionability claim was for the arbitrator.

1. Under the FAA, the arbitrator adjudicates a challenge that goes to the contract as a whole

There are two types of validity challenges under the FAA. "One type challenges specifically the validity of the agreement to arbitrate." *Id.* at 444. The second type "challenges the contract as a whole." *Id.* In a line of cases dating back to 1967 with *Prima Paint*, 388 U.S. at 403-04,

only the first type of challenge is decided by the court; a challenge to the contract as a whole is for the arbitrator. The U.S. Supreme Court has repeatedly "reaffirm[ed]" *Prima Paint*'s rule that "a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." *Buckeye*, 546 U.S. at 449; *see, e.g.*, *Rent-A-Center West, Inc. v. Jackson*, 561 U.S. 63, 70-71 (2010); *Preston v. Ferrer,* 552 U.S. 346, 349 (2008).

The *Prima Paint* rule applies in state as well as federal courts in disputes governed by the FAA, as here. *Zuver*, 153 Wn.2d at 301 (FAA "create[s] a body of federal substantive law of arbitrability" that "[b]oth state and federal courts must enforce.") (internal quotation marks omitted). And *Prima Paint* provides a simple rule in cases of this sort: a challenge to the contract as a whole is *for the arbitrator*. *See Townsend v. Quadrant Corp.*, 173 Wn.2d 451, 460 (2012) (the procedural unconscionability challenge "relate[s] to the [agreement] as a whole" so is "a matter reserved for the arbitrator") (internal quotation marks omitted). Turner invites the Court to ignore *Prima Paint* and misuse the "clear and unmistakable" delegation principle in this context, where it does not apply. *See* Pet. 10-12; Vulcan Ans. Br. (*Turner III*), at 18 n.7; *Buckeye*, 546 U.S. at 449.

The crux of Turner's argument is that the GBA was procedurally unconscionable because she was forced to sign it "under threat of

termination." Pet. 2. That argument is not only factually inaccurate, *see infra* at 14-16, but it clearly implicates the entire GBA, not merely its arbitration provision. (Turner also challenged the GBA's release provision. CP 4-5.) In other words, because the defense concerns the circumstances surrounding Turner's acceptance of the GBA, it challenges the whole agreement. *See Townsend*, 173 Wn.2d at 459-60 (procedural unconscionability defense pertained to agreement as a whole where it was based on "deni[al of] the opportunity to review and question the terms of the agreements before signing them" and "high-pressure sales tactics"). Here, as in *Townsend*, "one [can] decide whether the arbitration clause" of the GBA is procedurally unconscionable "only by deciding whether the [agreement] as a whole is unenforceable." *Id.* at 460. Thus, Turner's procedural unconscionability defense was for the Arbitrator to decide.

In her attempt to avoid application of *Prima Paint*, Turner's petition relies on dicta in cases that are fundamentally distinguishable and that, in any event, could not alter binding U.S. Supreme Court precedent. For example, the statement in *Hill v. Garda CL Northwest, Inc.*, 179 Wn.2d 47, 53 (2013), that "[u]nconscionability is one such gateway dispute" for courts to resolve refers to a *substantive* unconscionability challenge directed at the arbitration clause itself—there was no issue of *procedural* unconscionability directed to the contract as a whole.

Similarly, *Saleemi v. Doctor's Associates, Inc.*, 176 Wn.2d 368 (2013), is not on point because there the allegation was that specific arbitration terms were substantively unconscionable. *Id.* at 377 ("[Respondents] are not challenging the contract as a whole, only the enforceability of a few of its dispute resolution provisions."). And in *McKee*, 164 Wn.2d at 401-02, the court concluded that terms in the arbitration provision were substantively unconscionable, so it expressly did not reach the issue of procedural unconscionability (or who adjudicates it).

Nor does *Brown v. MHN Government Services, Inc.*, 178 Wn.2d 258 (2013), in any way undermine the *Prima Paint* rule. Its holding is expressly "limited to the facts of th[at] case because [the court had to] apply California law." *Id.* at 262. In addition, the Court (1) held that a provision *specific to the arbitration clause* was procedurally unconscionable, (2) discussed the broad-based challenges to procedural unconscionability in passing (rejecting them), and (3) did not address the *Prima Paint* line of cases at all, because the issue was not raised by the parties. *Id.* at 267-68. Similarly, in *Gorden v. Lloyd Ward & Associates, P.C.*, 180 Wn. App. 552, 562-64 (2014), the procedural unconscionability challenge was specific to the arbitration provision (no attorney explained to the client the arbitration provision in a retainer agreement). In any event, the Court of Appeals' general statements of who decides

unconscionability fail to acknowledge or address the *Prima Paint* line of cases. *See id.* at 562-63. Finally, in *Romney v. Franciscan Medical Group*, 186 Wn. App. 728 (2015), the *Prima Paint* question of who decides was not raised and the case arguably involved a standalone arbitration agreement (appendix to employment contract).

Here, in holding that Turner's procedural unconscionability challenge was for the arbitrator, the Court of Appeals correctly rejected the inapposite authority relied upon by Turner.

2. Turner was not entitled to a judicial hearing on her procedural unconscionability defense

Because Turner's procedural unconscionability defense was an issue for the arbitrator, Turner was not entitled to an evidentiary hearing in the trial court, as she contends for the first time in her petition.[2] Pet. 13. Although the FAA requires the court to decide the "threshold issue of the *existence* of an agreement to arbitrate," that issue is not presented in this case. *See Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1140-41 (9th Cir. 1991) (distinguishing challenges seeking to avoid or rescind a contract on grounds such as fraud and unconscionability—to which *Prima Paint* applies—from challenges to the very existence of a

[2] Turner did not request an evidentiary hearing in *Turner II*. Nor did she in *Turner I*, where she merely requested that Vulcan's motion to compel arbitration "be treated as a di[s]positive motion subject to CR 56 principles and oral argument." CP 79. Turner also failed to raise the issue before the Court of Appeals.

contract); *see also Buckeye*, 546 U.S. at 444 n.1 ("The issue of the contract's validity is different from the issue whether any agreement . . . was ever concluded. Our opinion . . . addresses only the former, and does not speak to the issue decided in the cases [that] hold that it is for courts to decide whether the alleged obligor ever signed the contract, whether the signor lacked authority to commit the alleged principal, and whether the signor lacked the mental capacity to assent.") (citations omitted).

Here, Turner has never disputed the *existence* of an agreement to arbitrate; she does not allege that her signature was forged or that the arbitration clause was inserted into the GBA after she signed it. Instead, Turner challenges the *enforceability* of an agreement whose existence is not in question. Even had Turner not forfeited her argument for an evidentiary hearing by failing to raise it in the courts below, it lacks merit.

B. The Court of Appeals Correctly Determined That the Guaranteed Bonus Agreement Is Not Unconscionable

After recognizing that Turner's procedural unconscionability defense was for the arbitrator, the Court of Appeals considered an independent and alternative basis to affirm the Superior Court's orders compelling arbitration. Namely, the Court assessed the merits of Turner's defense—and squarely rejected it.

1. The Agreement is not procedurally unconscionable

As the party opposing arbitration, Turner bears the burden to prove

procedural unconscionability. *Zuver*, 153 Wn.2d at 302. She has failed to carry that burden. As this Court held in *Zuver*, "[a]t minimum, an employee who asserts an arbitration agreement is procedurally unconscionable must show some evidence that the employer" (1) "refused to respond to her questions or concerns," (2) "placed undue pressure on her to sign the agreement without providing her with a reasonable opportunity to consider its terms, and/or" (3) "that the terms of the agreement were set forth in such a way that an average person could not understand them." *Id.* at 306-07. This case meets none of those criteria.

First, there is no evidence that Turner even *expressed* any questions or concerns about the GBA, let alone that Vulcan refused to respond. To the contrary, Turner admits that she "did not even read the agreement" before signing it, but instead "simply turned the [GBA] to the last page and signed it." *Turner III*, 2015 WL 6684259, at *7. "A party who has the opportunity to read a plain and unambiguous instrument cannot claim to have either been misled by or ignorant of its terms." *Id.*

Second, Turner *had* a reasonable opportunity to consider the GBA's straightforward terms. The text of the agreement itself provided that Turner was entitled to seek independent legal advice. *Id.* As the Court of Appeals held, "the terms of the agreement were fully disclosed and Turner was afforded a reasonable opportunity to inspect the

agreement." *Id.* at *8. That Turner failed to avail herself of that opportunity does not render the GBA procedurally unconscionable. *See, e.g., Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249, 265 (5th Cir. 2014) (arbitration agreement not procedurally unconscionable where plaintiff chooses not to read it); *Bowie v. Clear Your Debt, LLC*, 523 F. App'x 315, 316 (6th Cir. 2013) (same).

Third, the terms of the GBA are clear and unambiguous, and "none of the paragraphs contained in the GBA were of small type or buried in a sea of fine print." *Turner III*, 2015 WL 6684259, at *8. If Turner had any questions, the agreement expressly "entitled [her] to seek the advice of [her] own counsel before executing" it. CP 282. Turner did not do so, because she failed even to read the agreement before signing it.

Under these circumstances, the Court of Appeals properly rejected Turner's procedural unconscionability argument. *See, e.g., Zuver*, 153 Wn.2d at 306, 307 (rejecting procedural unconscionability claim where employee "had ample opportunity to contact counsel . . . about the terms of the . . . [arbitration] agreement," which were "not hidden in a maze of fine print") (internal quotation marks omitted).

2. The Court of Appeals' decision does not conflict with *Mayne v. Monaco Enterprises, Inc.*

Unable to show that the decision below departs from this Court's

precedent, Turner twists a recent Division III case in an attempt to concoct a conflict within the Court of Appeals. In reality, *Mayne v. Monaco Enterprises, Inc.*, 361 P.3d 264 (Wash. App. 2015), is perfectly consistent with the decision below.

In *Mayne*, 361 P.3d at 268, the employer presented a nine-year veteran of the company with a take-it-or-leave-it arbitration agreement that expressly stated he "would be fired if he did not consent to execute the agreement." Distinguishing *Zuver*, the court held that the agreement was procedurally unconscionable because it left the employee with "no meaningful choice." *Id.* At the same time, an employer may "condition employment upon the employee . . . *voluntarily* signing an arbitration agreement." *Id.* at 268-69. But in communicating its policy, an employer should take "some action to ameliorate the coercive impact . . . to ensure a voluntary decision." *Id.* at 269. Thus, "the employee could be offered *a reasonable time to sign* before voluntarily leaving employment, or could be offered *some incentive as consideration*" for agreeing to arbitration. *Id.* at 269 (footnote omitted, emphasis added).

In Turner's case, Vulcan took each of the ameliorative steps identified in *Mayne*: the GBA offered Turner consideration in the form of a $25,000 guaranteed bonus, and it expressly recognized Turner's right to consult with her own counsel before executing the agreement. CP 280-83.

Although Turner claims she *believed* she would be fired if she did not sign the GBA, her unadorned suspicion is a far cry from the coercive agreement in *Mayne*, which not only contained an explicit threat that the employee would be fired if he refused to sign, it offered no independent "incentive as consideration" for his acceptance. *Mayne*, 361 P.3d at 269 (footnote omitted).[3] *Mayne* is doubly distinguishable from this case.

For those reasons, Turner fails to identify any conflict between the decision below and either a precedent of this Court or another decision of the Court of Appeals. *See* RAP 13.4(b). Quite the opposite: the governing case law fully supports the Court of Appeals' conclusion here that the GBA is not procedurally unconscionable. Indeed, Turner has raised her procedural unconscionability defense to six judges—Judge Oishi, Judge Benton, Judge Heller, and the three judges on the Court of Appeals panel—and all six judges have rejected it. So, too, should this Court.

C. The Court of Appeals Correctly Affirmed the Award to Vulcan of Attorney Fees Limited to Nonstatutory Claims

The final question raised by Turner's petition is whether the award

[3] Turner mischaracterizes the record by claiming that "Vulcan Human Resources Director Laura Macdonald testified the entire EP team would lose their jobs if they did not sign the GBA 'urgently.'" Pet. 7 n.5. In fact, Macdonald testified only that there was a sense of urgency to get the GBA signed. CP 3213-14. Relatedly, Turner mischaracterizes the decision below by contending "[t]he Court of Appeals concluded that because Turner had 24 hours to consult an attorney before signing the arbitration clause, the fact [sic] that she was threatened with losing her job if she did not sign was inconsequential." Pet. 15; *see also Turner III*, 2015 WL 6684259, at *7-*8. The court observed only that "Turner said she felt she would be fired if she did not sign the agreement within 24 hours." *Id.* at *7.

violates public policy by awarding Vulcan attorney fees it incurred on two nonstatutory claims. The Court of Appeals properly upheld the award.

As an initial matter, review is unwarranted because Turner first raised the issue on appeal. RAP 2.5(a). Before Judge Heller, Turner did not oppose confirmation of the amended arbitration award, which included the revised fee award. CP 3640-47. Instead, Turner asked the Court to award fees to *her*, based on its vacatur of the initial fee award. *Id.*

Not only did Turner forfeit any challenge to the revised fee award, her argument lacks merit. As Turner acknowledges, "'[j]udicial review of arbitration awards under the FAA is 'extremely narrow and exceedingly deferential.'" Pet. 18 n.22 (citation omitted) (quoting *UMass Mem'l Med. Ctr. v. United Food & Commercial Workers Union*, 527 F.3d 1, 5 (1st Cir. 2008)). Turner challenges the fee award on public policy grounds, but the "public policy exception [to enforcing arbitration awards] is limited to decisions that violate an 'explicit,' 'well defined,' and 'dominant' public policy, not simply 'general considerations of supposed public interests.'" *Kitsap Cnty. Deputy Sheriff's Guild v. Kitsap Cnty.*, 167 Wn.2d 428, 435 (2009) (quoting *E. Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57, 62 (2000)); *accord Matthews v. NFL Mgmt. Council*, 688 F.3d 1107, 1111 (9th Cir. 2012). Turner identifies no such policy implicating the revised award; she cites no case in which the court vacated an arbitral

fee award to an employer in connection with nonstatutory claims.

Instead, Turner points to inapposite decisions overturning fee awards to defendants prevailing on *statutory* employment claims. *See, e.g.*, *LaCoursiere v. Camwest Dev., Inc.*, 181 Wn.2d 734, 748 (2014) ("[Plaintiff's] claim is grounded *exclusively* in the WRA [Wage Rebate Act]. He makes no claims on the employment agreement. Therefore, this suit arises out of the WRA, and we apply the attorney fee provision in the WRA.") (emphasis added). Proposing to extend that principle to bar fees for *any* claim in a dispute between an employee and an employer, Turner in effect asks this Court to establish a new public policy exception to enforcing arbitration awards. That alone confirms that no such "explicit, well-defined, and dominant" public policy exists under current law.

Accordingly, Turner has provided no sound basis to revisit the settled precedents of this Court, to depart from the clear rules of federal arbitration law, or to undercut the judgment of the Court of Appeals.

CONCLUSION

The petition for review should be denied.

DATED: January 4, 2016

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on January 4, 2015, I caused to be served upon the following, at the address stated below, via the method of service indicated, a true and correct copy of the foregoing document.

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

DATED this 4th day of January, 2016, at Seattle, Washington.

s/Julie DeShaw
Julie DeShaw, Legal Secretary

APPENDIX

TITLE 9—ARBITRATION

This title was enacted by act July 30, 1947, ch. 392, §1, 61 Stat. 669

AMENDMENTS

1990—Pub. L. 101-369, §2, Aug. 15, 1990, 104 Stat. 450, added item for chapter 3.

1970—Pub. L. 91-368, §2, July 31, 1970, 84 Stat. 693, added analysis of chapters.

TABLE

Showing where former sections of Title 9 and the laws from which such former sections were derived, have been incorporated in revised Title 9.

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1	Feb. 12, 1925, ch. 213, §1, 43 Stat. 883	1
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10	Feb. 12, 1925, ch. 213, §10, 43 Stat. 885	10
11	Feb. 12, 1925, ch. 213, §11, 43 Stat. 885	11
12	Feb. 12, 1925, ch. 213, §12, 43 Stat. 885	12
13	Feb. 12, 1925, ch. 213, §13, 43 Stat. 886	13
14	Feb. 12, 1925, ch. 213, §14, 43 Stat. 886	Rep.
15	Feb. 12, 1925, ch. 213, §15, 43 Stat. 886	14

POSITIVE LAW; CITATION

This title has been made positive law by section 1 of act July 30, 1947, ch. 392, 61 Stat. 669, which provided in part that: "title 9 of the United States Code, entitled 'Arbitration', is codified and enacted into positive law and may be cited as '9 U.S.C., §—'".

REPEALS

Section 2 of act July 30, 1947, ch. 392, 61 Stat. 674, provided that the sections or parts thereof of the Statutes at Large covering provisions codified in this Act, insofar as such provisions appeared in former title 9 were repealed and provided that any rights or liabilities now existing under such repealed sections or parts thereof shall not be affected by such repeal.

CHAPTER 1—GENERAL PROVISIONS

AMENDMENTS

1990—Pub. L. 101-650, title III, §325(a)(2), Dec. 1, 1990, 104 Stat. 5120, added item 15 "Inapplicability of the Act of State doctrine" and redesignated former item 15 "Appeals" as 16.

1988—Pub. L. 100-702, title X, §1019(b), Nov. 19, 1988, 102 Stat. 4671, added item 15 relating to appeals.

1970—Pub. L. 91-368, §3, July 31, 1970, 84 Stat. 693, designated existing sections 1 through 14 as "Chapter 1" and added heading for Chapter 1.

§1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

(July 30, 1947, ch. 392, 61 Stat. 670.)

DERIVATION

Act Feb. 12, 1925, ch. 213, §1, 43 Stat. 883.

§2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

(July 30, 1947, ch. 392, 61 Stat. 670.)

DERIVATION

Act Feb. 12, 1925, ch. 213, §2, 43 Stat. 883.

§3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

(July 30, 1947, ch. 392, 61 Stat. 670.)

DERIVATION

Act Feb. 12, 1925, ch. 213, §3, 43 Stat. 883.

§4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

(July 30, 1947, ch. 392, 61 Stat. 671; Sept. 3, 1954, ch. 1263, §19, 68 Stat. 1233.)

DERIVATION

Act Feb. 12, 1925, ch. 213, §4, 43 Stat. 883.

REFERENCES IN TEXT

Federal Rules of Civil Procedure, referred to in text, are set out in Appendix to Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

1954—Act Sept. 3, 1954, brought section into conformity with present terms and practice.

§5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

(July 30, 1947, ch. 392, 61 Stat. 671.)

DERIVATION

Act Feb. 12, 1925, ch. 213, §5, 43 Stat. 884.

§6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

(July 30, 1947, ch. 392, 61 Stat. 671.)

DERIVATION

Act Feb. 12, 1925, ch. 213, §6, 43 Stat. 884.

§ 7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

(July 30, 1947, ch. 392, 61 Stat. 672; Oct. 31, 1951, ch. 655, § 14, 65 Stat. 715.)

DERIVATION

Act Feb. 12, 1925, ch. 213, § 7, 43 Stat. 884.

AMENDMENTS

1951—Act Oct. 31, 1951, substituted "United States district court for" for "United States court in and for", and "by law for" for "on February 12, 1925, for".

§ 8. Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

(July 30, 1947, ch. 392, 61 Stat. 672.)

DERIVATION

Act Feb. 12, 1925, ch. 213, § 8, 43 Stat 884.

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

(July 30, 1947, ch. 392, 61 Stat. 672.)

DERIVATION

Act Feb. 12, 1925, ch. 213, § 9, 43 Stat. 885.

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

(July 30, 1947, ch. 392, 61 Stat. 672; Pub. L. 101–552, § 5, Nov. 15, 1990, 104 Stat. 2745; Pub. L. 102–354, § 5(b)(4), Aug. 26, 1992, 106 Stat. 946; Pub. L. 107–169, § 1, May 7, 2002, 116 Stat. 132.)

DERIVATION

Act Feb. 12, 1925, ch. 213, § 10, 43 Stat. 885.

AMENDMENTS

2002—Subsec. (a)(1) to (4). Pub. L. 107–169, § 1(1)–(3), substituted "where" for "Where" and realigned margins in pars. (1) to (4), and substituted a semicolon for

period at end in pars. (1) and (2) and "; or" for the period at end in par. (3).

Subsec. (a)(5). Pub. L. 107–169, §1(5), substituted "If an award" for "Where an award", inserted a comma after "expired", and redesignated par. (5) as subsec. (b).

Subsec. (b). Pub. L. 107–169, §1(4), (5), redesignated subsec. (a)(5) as (b). Former subsec. (b) redesignated (c).

Subsec. (c). Pub. L. 107–169, §1(4), redesignated subsec. (b) as (c).

1992—Subsec. (b). Pub. L. 102–354 substituted "section 580" for "section 590" and "section 572" for "section 582".

1990—Pub. L. 101–552 designated existing provisions as subsec. (a), in introductory provisions substituted "In any" for "In either", redesignated former subsecs. (a) to (e) as pars. (1) to (5), respectively, and added subsec. (b) which read as follows: "The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5."

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

(July 30, 1947, ch. 392, 61 Stat. 673.)

DERIVATION

Act Feb. 12, 1925, ch. 213, §11, 43 Stat. 885.

§ 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

(July 30, 1947, ch. 392, 61 Stat. 673.)

DERIVATION

Act Feb. 12, 1925, ch. 213, §12, 43 Stat. 885.

§ 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

(July 30, 1947, ch. 392, 61 Stat. 673.)

DERIVATION

Act Feb. 12, 1925, ch. 213, §13, 43 Stat. 886.

§ 14. Contracts not affected

This title shall not apply to contracts made prior to January 1, 1926.

(July 30, 1947, ch. 392, 61 Stat. 674.)

DERIVATION

Act Feb. 12, 1925, ch. 213, §15, 43 Stat. 886.

PRIOR PROVISIONS

Act Feb. 12, 1925, ch. 213, §14, 43 Stat. 886, former provisions of section 14 of this title relating to "short title" is not now covered.

§ 15. Inapplicability of the Act of State doctrine

Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine.

(Added Pub. L. 100–669, §1, Nov. 16, 1988, 102 Stat. 3969.)

CODIFICATION

Another section 15 of this title was renumbered section 16 of this title.

§ 16. Appeals

(a) An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

(Added Pub. L. 100–702, title X, § 1019(a), Nov. 19, 1988, 102 Stat. 4670, § 15; renumbered § 16, Pub. L. 101–650, title III, § 325(a)(1), Dec. 1, 1990, 104 Stat. 5120.)

AMENDMENTS

1990—Pub. L. 101–650 renumbered the second section 15 of this title as this section.

CHAPTER 2—CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

AMENDMENTS

1970—Pub. L. 91–368, § 1, July 31, 1970, 84 Stat. 692, added heading for chapter 2 and analysis of sections for such chapter.

§ 201. Enforcement of Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

(Added Pub. L. 91–368, § 1, July 31, 1970, 84 Stat. 692.)

EFFECTIVE DATE

Section 4 of Pub. L. 91–368 provided that: "This Act [enacting this chapter] shall be effective upon the entry into force of the Convention on Recognition and Enforcement of Foreign Arbitral Awards with respect to the United States." The Convention was entered into force for the United States on Dec. 29, 1970.

§ 202. Agreement or award falling under the Convention

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

(Added Pub. L. 91–368, § 1, July 31, 1970, 84 Stat. 692.)

§ 203. Jurisdiction; amount in controversy

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

(Added Pub. L. 91–368, § 1, July 31, 1970, 84 Stat. 692.)

§ 204. Venue

An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title may be brought in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.

(Added Pub. L. 91–368, § 1, July 31, 1970, 84 Stat. 692.)

§ 205. Removal of cases from State courts

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

(Added Pub. L. 91–368, § 1, July 31, 1970, 84 Stat. 692.)

§ 206. Order to compel arbitration; appointment of arbitrators

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein

provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

(Added Pub. L. 91–368, §1, July 31, 1970, 84 Stat. 693.)

§ 207. Award of arbitrators; confirmation; jurisdiction; proceeding

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

(Added Pub. L. 91–368, §1, July 31, 1970, 84 Stat. 693.)

§ 208. Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

(Added Pub. L. 91–368, §1, July 31, 1970, 84 Stat. 693.)

CHAPTER 3—INTER-AMERICAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION

§ 301. Enforcement of Convention

The Inter-American Convention on International Commercial Arbitration of January 30, 1975, shall be enforced in United States courts in accordance with this chapter.

(Added Pub. L. 101–369, §1, Aug. 15, 1990, 104 Stat. 448.)

EFFECTIVE DATE

Section 3 of Pub. L. 101–369 provided that: "This Act [enacting this chapter] shall take effect upon the entry into force of the Inter-American Convention on International Commercial Arbitration of January 30, 1975, with respect to the United States." The Convention was entered into force for the United States on Oct. 27, 1990.

§ 302. Incorporation by reference

Sections 202, 203, 204, 205, and 207 of this title shall apply to this chapter as if specifically set forth herein, except that for the purposes of this chapter "the Convention" shall mean the Inter-American Convention.

(Added Pub. L. 101–369, §1, Aug. 15, 1990, 104 Stat. 448.)

§ 303. Order to compel arbitration; appointment of arbitrators; locale

(a) A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. The court may also appoint arbitrators in accordance with the provisions of the agreement.

(b) In the event the agreement does not make provision for the place of arbitration or the appointment of arbitrators, the court shall direct that the arbitration shall be held and the arbitrators be appointed in accordance with Article 3 of the Inter-American Convention.

(Added Pub. L. 101–369, §1, Aug. 15, 1990, 104 Stat. 448.)

§ 304. Recognition and enforcement of foreign arbitral decisions and awards; reciprocity

Arbitral decisions or awards made in the territory of a foreign State shall, on the basis of reciprocity, be recognized and enforced under this chapter only if that State has ratified or acceded to the Inter-American Convention.

(Added Pub. L. 101–369, §1, Aug. 15, 1990, 104 Stat. 449.)

§ 305. Relationship between the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958

When the requirements for application of both the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, are met, determination as to which Convention applies shall, unless otherwise expressly agreed, be made as follows:

(1) If a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Inter-American Convention and are member States of the Organization of American States, the Inter-American Convention shall apply.

(2) In all other cases the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall apply.

(Added Pub. L. 101–369, §1, Aug. 15, 1990, 104 Stat. 449.)

§ 306. Applicable rules of Inter-American Commercial Arbitration Commission

(a) For the purposes of this chapter the rules of procedure of the Inter-American Commercial Arbitration Commission referred to in Article 3 of the Inter-American Convention shall, subject to subsection (b) of this section, be those rules as promulgated by the Commission on July 1, 1988.

(b) In the event the rules of procedure of the Inter-American Commercial Arbitration Commission are modified or amended in accordance with the procedures for amendment of the rules

of that Commission, the Secretary of State, by regulation in accordance with section 553 of title 5, consistent with the aims and purposes of this Convention, may prescribe that such modifications or amendments shall be effective for purposes of this chapter.

(Added Pub. L. 101–369, § 1, Aug. 15, 1990, 104 Stat. 449.)

§ 307. Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent chapter 1 is not in conflict with this chapter or the Inter-American Convention as ratified by the United States.

(Added Pub. L. 101–369, § 1, Aug. 15, 1990, 104 Stat. 449.)

523 Fed.Appx. 315 (Mem)
This case was not selected for publication in the Federal Reporter.
Not for Publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Sixth Circuit Rule 28.
(Find CTA6 Rule 28)
United States Court of Appeals,
Sixth Circuit.

Jalenna BOWIE, Plaintiff–Appellant,
v.
CLEAR YOUR DEBT, LLC; Orion Processing, LLC; Derin Scott; Shannon Scott; Pradeep Nair, Defendants–Appellees.

No. 12–3458. | June 14, 2013.

On Appeal from the United States District Court for the Northern District of Ohio.
BEFORE: McKEAGUE and DONALD, Circuit Judges, and LAWSON, District Judge.*

* The Honorable David M. Lawson, District Judge for the Eastern District of Michigan, sitting by designation.

OPINION

McKEAGUE, Circuit Judge.

Jalenna Bowie amassed a large amount of unsecured debt. She entered into a contract with Clear Your Debt, LLC, a debt resolution service. In exchange for a fee totaling over $8000, Clear Your Debt agreed to settle her debts covered by the contract at a fraction of the balance. As often happens when something seems too good to be true, this arrangement was no exception. Several of the debts that Bowie believed Clear Your Debt would pay went unpaid; a collection lawsuit was filed against her; and she ultimately paid Clear Your Debt over $5000 before realizing that some creditors refused to deal with the company and that Clear Your Debt would be unable to resolve much of her unsecured debt.

This suit followed. Bowie's complaint raises a litany of claims, but those claims are irrelevant to this appeal. We are only concerned with the arbitration clause in the contract between Bowie and Clear Your Debt. There is no dispute that the claims in her complaint fall within the arbitration clause. Her claim is that the arbitration clause is unconscionable. The district court disagreed, and so do we.

We review the district court's decision de novo, *Scovill v. WSYX/ABC*, 425 F.3d 1012, 1016 (6th Cir.2005), and look to state law when determining whether an arbitration provision is unconscionable, *Perry v. Thomas*, 482 U.S. 483, 492 n. 9, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987). In this case, we look to Ohio law under which a contract provision is only unconscionable if it is both procedurally and substantively unconscionable. *Scovill*, 425 F.3d at 1017 (interpreting Ohio law).

***316** Procedural unconscionability under Ohio law can be distilled to the following concept: the circumstances surrounding the creation of the contract evidence that no voluntary meeting of the minds occurred, usually because of a vast disparity in bargaining power. *Id.* Relevant factors include the "age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, and whether alterations in the printed terms were possible." *Id.* at 1017–18. In addition, we must look to see if other alternative sources of the service were available. *See Small v. HCF of Perrysburg, Inc.*, 159 Ohio App.3d 66, 823 N.E.2d 19, 23 (2004). To be sure, there was a disparity in bargaining power in this case: Clear Your debt drafted the contract and the contract appears to be a form contract. But the disparity was not so vast as to indicate that no voluntary meeting of the minds occurred.

And Bowie cannot otherwise establish that there is such a vast disparity. Boiled down to its essence, her argument is this: She felt pressured to sign the contract because of the speed with which the Clear Your Debt employee explained the contract to her, and further, because the employee failed to mention the arbitration clause. But presumably, and as the district court found, Bowie, as a single-mother who runs a household and has her associate's degree in nursing, was capable of asking for more time to read the contract and was capable of understanding the arbitration clause had she read it. Neither her failure to read the contract, nor the employee's failure to mention the arbitration clause, renders the contract procedurally unconscionable.

She also argues that the arbitration clause should have been more clearly demarcated on the page, but she cannot contend that it was hidden as the heading "Arbitration of Dispute"—written in bold—is on the top of a page and the arbitration provision is in the same font as the rest of the contract. Would it have been better for Clear Your Debt to

box off the arbitration clause and put the headings in all caps, as suggested by the American Arbitration Association? Perhaps. Does the failure to do so render the contract unconscionable? Certainly not.

Finally, this was not a situation where Bowie had no choice but to accept the contract. She could have tried to negotiate the arbitration provision or she could have gone to another debt services company. She did neither. Instead, she failed to read the contract and was later surprised to find that the contract contained an arbitration clause. The fault for not reading the contract rests with her. We therefore cannot say that there was such a vast disparity in bargaining power that no meeting of the minds occurred. There is no procedural unconscionability, and as a result, the arbitration provision was not unconscionable. *Id.* at 1017.

Bowie identifies several other perceived errors in the district court's order, but they are less convincing than her argument above. *First,* she argues that the district court erred by requiring her to arbitrate with the employees of Clear Your Debt—Shannon Scott, Derin Scott, and Pradeep Nair—because there is no evidence in the record that they were employees of Clear Your Debt. Bowie must ignore her complaint to make this argument—her complaint alleges that the Scotts were employees, and that Nair was an agent of Clear Your Debt. Indeed, her claims against these individuals are predicated upon their employment relationship with Clear Your Debt. She therefore cannot say that the record lacks any evidence that ***317** these individuals were employees of the company.

Second, and along the same vein, she argues that these individuals cannot compel arbitration because they were not signatories to the arbitration clause. Ordinarily, she would be right—nonsignatories cannot ordinarily compel arbitration. But where there is an agency relationship between a signatory and a nonsignatory, the nonsignatory may compel arbitration. *Javitch v. First Union Securities,* 315 F.3d 619, 629 (6th Cir.2003). Because her complaint appears to base Nair's liability on the fact that he is Clear Your Debt's agent, Nair can compel arbitration. Further, a signatory is estopped from avoiding arbitration with the nonsignatory where the nonsignatory's claims are intertwined with the underlying contract. *Id.* Bowie's claims against the Scotts—and Nair for that matter—are intertwined with the underlying contract. Thus, the district court had the discretion to compel arbitration on those claims.

Third, Bowie argues that the district court erred by conditioning the refiling of her claims against Orion and her claims for declaratory relief upon success at arbitration.[1] Specifically, she argues that "success" is ambiguous. We do not need to decide the issue at this time. After arbitration, she may refile her nonarbitrable claims, and if the parties wish to litigate whether she was successful, they may do so then.

[1] These claims were dismissed without prejudice because they were intertwined with the arbitration proceedings and because their result might be dependent upon the result of arbitration.

Therefore, the opinion of the district court is **AFFIRMED.**

LAWSON, District Judge, concurring.

I concur in the majority opinion affirming the order of the district court finding the plaintiff's monetary claims are subject to arbitration. I write separately, however, to express my concern with the way the district court disposed of those claims, namely, dismissing them *with prejudice.*

The district court dismissed the plaintiff's arbitrable claims "with prejudice for lack of jurisdiction pursuant to the arbitration clause...." Mem. Op. and Order at 10. A dismissal "with prejudice" implies an adjudication on the merits, which, of course, did not occur here. The Supreme Court recognized that "[a]t common law dismissal on a ground not going to the merits was not ordinarily a bar to a subsequent action on the same claim." *Costello v. United States,* 365 U.S. 265, 285, 81 S.Ct. 534, 5 L.Ed.2d 551 (1961). The dismissal of the plaintiff's arbitral claims should have been *without* prejudice, so that the plaintiff still can pursue them in arbitration if she chooses. *See McIntyre v. First Financial Group,* No. 12–740, 2012 WL 5939931, at *5 (W.D.Mich. Nov. 21, 2012). It appears that in this circuit, that style of dismissal is utilized under these circumstances. *See, e.g., Morgan v. United Healthcare Services, Inc.,* No. 12–676, 2013 WL 1828940 (S.D.Ohio Apr. 30, 2013); *Asbell v. Education Affiliates, Inc.,* No. 3:12–CV–00579, 2013 WL 1775078 (M.D.Tenn. Apr. 25, 2013); *Scott v. Ameritech Pub., Inc.,* 938 F.Supp.2d 702, 2013 WL 1489095 (E.D.Mich. Apr. 10, 2013); *Rodriguez v. Charles Schwab Corp.,* No. 12–2277, 2013 WL 907380 (W.D.Tenn. Mar. 8, 2013); *Smith v. Cheesecake Factory Restaurants, Inc.,* No. 3:06–CV–00829, 2013 WL 494090 (M.D.Tenn. Feb. 8, 2013); *see also Brotherhood of R.R. Signalmen v. Invensys Rail Corp.,* No. 12–63, 2013 WL 1309762 (W.D.Ky. Mar. 26, 2013) (rejecting request to dismiss with prejudice where ***318** grievance subject to arbitration was allegedly filed untimely, finding that to be

an issue relating to the merits of the grievance and thus subject to review by the arbitrator).

The parties apparently were not concerned with the style of dismissal utilized by the district court, since they did not address the point in their briefing. Therefore, it appears that the defendants have no quarrel with the plaintiff's ability to assert her monetary claims in an arbitral forum. And normally, we do not comb the record to search for issues on our own. However, for the sake of clarity, I would affirm the order of the district court finding the plaintiff's monetary claims are subject to arbitration, and remand with directions to amend the judgment to reflect that those claims are dismissed without prejudice.

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Traci Turner v. Vulcan Inc., et al.
Supreme Court No. _____ (not yet assigned)
Court of Appeals No. 71855-0-I

Dear Clerk:

Attached for filing, please find ***Answer to Petition for Review of Respondents Vulcan Inc., Paul Allen, and Jody Allen*** submitted by Counsel for Vulcan Inc., Paul Allen, and Jody Allen:

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Thank you for your assistance.

Respectfully,

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