**No. 92655-7**

**IN THE SUPREME COURT**
**OF THE STATE OF WASHINGTON**

COURT OF APPEALS NO. 71855-0-I

---

TRACI TURNER,

Appellant-Petitioner,

v.

VULCAN, INC., et al.,
Respondents.

---

# TURNER'S RESPONSE TO VULCAN'S MOTION TO STRIKE REPLY

---

REBECCA J. ROE, WSBA #7560
KATHRYN GOATER, WSBA#9648
**SCHROETER GOLDMARK & BENDER**
810 Third Avenue, Suite 500
Seattle, Washington 98104
206/622-8000

CARLA TACHAU LAWRENCE, WSBA #14120
(Of Counsel)

Petitioner Traci Turner asks the Court to deny Vulcan's motion to strike her Reply. Turner's Reply is limited in good faith to new issues which Vulcan injected into Turner's Petition for Review, but Turner did not raise. On the issues as to which Vulcan "presented legal arguments" and Turner did not "address" in her Petition, she is entitled to reply. Motion, at 2.[1]

RAP 13.4(d) does not prohibit the Reply. The Rule provides:

> A party may file a reply to an answer only if the answering party seeks review of issues not raised in the petition for review. A reply to an answer should be limited to addressing only the new issues raised in the answer.

The 2006 Drafters' comment explains:

> This provision has been subject to abuse by petitioning parties who attempt to cast an answering party's arguments in response to a petition for review as "new issues" in order to reargue issues raised in the petition. The proposed amendment is intended to clarify the rule's purpose by more clearly prohibiting a reply to an answer that is not strictly limited to responding to an answering party's request that the Court review an issue that was not raised in the initial petition for review.

3 *Wash. Prac., Rules Practice* RAP 13.4 (7th ed.) (2006 Drafters' Comment).

---

[1] Vulcan is incorrect in asserting that Turner "chose not to address ... the significance of *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)". Turner did not include any argument on *Prima Paint* in her Reply to Vulcan's Answer because "the significance of *Prima Paint*" was clearly not a "new issue" justifying a reply under RAP 13.4(d). Pet., Issues 1-2; pp. 6-7,10 & n.7 (Ninth Circuit has rejected the argument that *Prima Paint* requires arbitrator to decide all challenges to the contract as a whole); *id.*, pp. 11-17.

Turner does not reargue issues raised in the Petition. Instead, her Reply addresses new issues, not raised by Turner in her Petition, which Vulcan claims for the first time that this Court should consider in deciding whether or not to accept review:

- Vulcan's assumption, and contentions based thereon, that the facts on its motions to compel are undisputed;[2]
- Vulcan's claim that the Superior Court rejected Turner's arguments "on the merits"; and
- Vulcan's assertion that Turner waived a challenge to the award of attorney fees to Vulcan on remand.

Because the Court may base its decision to accept or decline review on Vulcan's new issues, Turner has the right to reply.

This Court has denied such motions to strike a reply, or passed them to the merits. *See, e.g., West v. Port of Olympia,* 165 Wn.2d 1050, 206 P.3d 657 (2009) (denying respondent's motion to strike reply); *Faust v. Albertson,* 164 Wn.2d 1025, 196 P.3d 136 (2008) (granting petition for review on one issue; passing motion to strike reply to the merits).

Vulcan's cases are inapposite. In *Oltman v. Holland Am. Line USA, Inc.,* 163 Wn.2d 236, 261, 178 P.3d 981 (2008), the stricken reply

[2] The Court of Appeals recently rejected the argument, similar to Vulcan's contention in its Answer, that the reviewing court should construe the trial court's rulings on a motion to compel arbitration as based on "implicit fact-finding". *Woodward v. Emeritus Corp.,* slip op., at 19 & n.12, No. 32880-5-III (Wash. Ct. App., Feb. 9, 2016). "There is no indication that the trial court engaged in fact finding in denying the motion to compel arbitration **nor would it have been proper for it to resolve disputed material facts on the basis of declarations.**" *Id.* (emphasis added). "When a motion to compel arbitration is not resolved by trial and fact finding by the court, the appropriate standard of review is de novo." *Id.*

responded to a factual matter in a footnote and to a copy of the federal complaint. In contrast, Turner's reply goes to new questions which Vulcan claims are dispositive of whether this Court should accept review.

In *Doe v. Gonzagha Univ.*, 143 Wn.2d 687, 700 n.8, 24 P.3d 390, 396 (2001), *reversed*, 536 U.S. 273, 122 S. Ct. 2268, 153 L.Ed.2d 309 (2002) (decided before the 2006 amendment to RAP 13.4(d) at issue), the Court, without explanation, simply stated that respondent did not request review of additional issues.

Turner respectfully asks the Court to deny Vulcan's motion to strike her Reply.

RESPECTFULLY SUBMITTED this 19th day of February, 2016.

SCHROETER GOLDMARK & BENDER

***s/ Rebecca J. Roe***
REBECCA J. ROE, WSBA #7560
KATHRYN GOATER, WSBA #9648
CARLA TACHAU LAWRENCE, WSBA #14120 (Of Counsel)
Counsel for Appellant
Schroeter Goldmark & Bender
810 Third Ave., Suite 500
Seattle, WA 98104
Telephone: (206) 622-8000 ~ Fax: (206) 682-2305
E-mail: roe@sgb-law.com, goater@sgb-law.com
carla@dactl.com

CERTIFICATE OF SERVICE

On the 19th day of February, 2016, 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.

| | |
|---|---|
| Harry H. Schneider, Jr.<br>Kevin J. Hamilton<br>Joseph M. McMillan<br>Perkins Coie LLP<br>1201 Third Ave., Suite 4800<br>Seattle, WA 98101-3099<br><br>HSchneider@perkinscoie.com<br>KHamilton@perkinscoie.com<br>JMcMillan@perkinscoie.com | ☒ Via Hand Delivery – ABC Legal<br>☐ Via U.S. Mail, 1st Class, Postage Prepaid<br>☐ Via CM/ECF System<br>☐ Via Overnight Delivery<br>☐ Via Facsimile<br>☒ Via Email |
| Jeffrey I. Tilden, WSBA #12219<br>Jeffrey M Thomas, WSBA #21175<br>Michael P. Brown, WSBA #45618<br>Gordon Tilden Thomas & Cordell<br>1001 Fourth Ave., Suite 4000<br>Seattle, WA 98154<br><br>jtilden@gordontilden.com<br>jthomas@gordontilden.com | ☒ Via Hand Delivery – ABC Legal<br>☐ Via U.S. Mail, 1st Class, Postage Prepaid<br>☐ Via CM/ECF System<br>☐ Via Overnight Delivery<br>☐ Via Facsimile<br>☒ 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 17th day of February, 2016.

*s/ Darla Moran*
Darla Moran
Legal Assistant

## OFFICE RECEPTIONIST, CLERK

**To:** Moran, Darla
**Cc:** Roe, Becky; Gallant, Lisa; Carla Tachau Lawrence (carla@dactl.com)
**Subject:** RE: Traci turner v. Vulcan, Inc., NO. 92655-7 : Response to Motion to Strike Reply

Received on 02-19-2016

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

**From:** Moran, Darla [mailto:moran@sgb-law.com]
**Sent:** Friday, February 19, 2016 11:43 AM
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
**Cc:** Roe, Becky <roe@sgb-law.com>; Gallant, Lisa <gallant@sgb-law.com>; Carla Tachau Lawrence (carla@dactl.com) <carla@dactl.com>
**Subject:** Traci turner v. Vulcan, Inc., NO. 92655-7 : Response to Motion to Strike Reply

Attached for filing in the above matter is Appellant-Petitioner's Response to Vulcan's Motion to Strike Reply. Thank you.

---

**Darla Moran**
*Legal Assistant*
Schroeter Goldmark Bender
810 Third Avenue Suite 500
Seattle, WA 98104
206-622-8000
206-682-2305 (fax)
email | web | en español