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No. 67607-5-1

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

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

Appellants/Cross-Appeal Respondents,

v.

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

Respondents/Cross-Appeal Appellants.

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**RESPONDENTS' OPENING BRIEF**

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## I. INTRODUCTION

1. Vulcan has based its appeal on a faulty premise: that courts have less power and authority in enforcing judgments that confirm arbitration awards than “they do in enforcing their own judgments on the merits.” Vulcan Opening Brief at 4. That premise is legally incorrect and was properly rejected by the trial court—the effect of both types of judgments, and the court’s authority to interpret and enforce them, is precisely the same.

Indeed, the Federal Arbitration Act, pursuant to which the Award in this case was confirmed, expressly provides that a judgment confirming an arbitration award “shall have the same force and effect, in all respects as. . . a judgment in an action; and it may be enforced as if it had been rendered in an action. . .” 9 U.S.C. § 13. Nevertheless, Vulcan apparently believes that by avoiding the word “Judgment”—and using instead the term “Award”—it can create a legal distinction, even though no distinction exists (*See*, for example, Vulcan’s “Assignments of Error” and the headings in its “Argument,” all of which ignore that the Award was confirmed as a fully enforceable judgment and eschew the use of the latter term.)

2. Respondents have cross-appealed because Vulcan’s defense in the trial court (to explain why it failed to pay to Respondents

the wages due them) was a contrived legal argument that does not support the finding of a bona fide dispute. The Judgment the trial court enforced plainly separates Vulcan's remaining financial obligations to Respondents into two categories: Interim Distributions and Exit Distributions. The trial court properly rejected Vulcan's claim that there was an unprecedented *third* category that—contrary to the Judgment—would have relieved Vulcan of its payment obligations. But Vulcan's novel argument—and the shifting positions it took leading up to that argument—did not create a bona fide dispute regarding its obligation to pay Respondents what they were owed.

The trial court properly exercised its authority to enforce the Judgment, and its rulings in that respect should be affirmed. However, the trial court was overly charitable to Vulcan in finding there was a bona fide dispute regarding Vulcan's obligation to pay Respondents their just and appropriate wages, and statutory double damages, and that portion of its decision should be reversed.

## **II. ASSIGNMENT OF ERROR**

A. Although the trial court properly enforced its Judgment, the court erred in finding that Vulcan's contrived legal argument constituted a bona fide dispute for purposes of the wage-withholding statute; in fact, the trial court's Judgment, which incorporated the Arbitration Award, and

Vulcan's own course of dealing make clear that the distributions at issue were Interim Distributions payable at 100% vesting.

### III. COUNTER-STATEMENT OF THE CASE

#### A. **Vulcan Wrongfully Terminated Respondents' Employment in a Bad Faith Attempt to Avoid Sharing Profits.**

Respondents are private equity professionals who were employed between 2003 and 2008 by Paul Allen's company, Vulcan, Inc. CP 25. As is common in the private equity world, Respondents' compensation was governed by certain profit-sharing agreements with Vulcan. CP 26-29. Those agreements provided that Mr. Allen would receive a return of his initial capital plus a preferred return, and Respondents would share in any profits generated above that preferred return—and, if there were no profits, Respondents would receive nothing. CP 27. The employment agreements also provided Respondents with certain protections, including that any unvested profit-sharing rights (referred to as "carry") of a terminated team member would automatically be reallocated to the remaining team members. CP 27, 31-32. This "reallocation" provision was intended to eliminate any incentive Mr. Allen might have to terminate successful investment professionals to take their unvested carry for himself. *Id.*

As it happened, Respondents were the most successful private equity professionals Mr. Allen had ever hired. In the course of just five

years, they created more than \$2 billion in profits for Mr. Allen. The largest portion of the profits they made for Mr. Allen came from an investment called Vulcan Energy Corporation (“VEC”). By 2008, VEC had become the most valuable investment in Mr. Allen’s portfolio. Respondents’ compensation with respect to VEC was determined by a document called the Vulcan Energy Corporation Incentive Compensation Program (“the VEC Plan” or “the Plan”). CP 24-25, 167-197.

Because Respondents’ investment performance was so successful, their profit-sharing rights under the VEC Plan became highly valuable—so valuable, in fact, that Mr. Allen apparently regretted having agreed to share to the extent he had. CP 25, 29. In late 2008, attempting to circumvent Respondents’ profit-sharing rights (and, specifically, to avoid the “reallocation provision”), Vulcan terminated the entire private equity team and then simultaneously re-hired four of the lowest-compensated team members. CP 25, 29. After firing the entire team simultaneously, Vulcan claimed that there were not remaining team members to whom unvested carry could be reallocated, and that the team’s entire unvested carry, worth more than \$20 million, should go instead to Mr. Allen. CP 27-33. As Vulcan CEO Jody Patton and President of Vulcan Capital Lance Conn would later testify, Vulcan enacted the scheme “to stop the [compensation] plan.” CP 32.

**B. The Arbitration Panel Held that Vulcan Acted in Bad Faith.**

Respondents initiated arbitration against Vulcan in December 2008, alleging that the firing-and-simultaneous-rehiring scheme was a breach of the profit-sharing agreements and a breach of the covenant of good faith and fair dealing. CP 23-25. Following extensive discovery and a four-day arbitration hearing, the Arbitration Panel ruled unanimously that Vulcan had acted in bad faith by terminating Respondents as it did. CP 41-43. Accordingly, the Panel ordered Vulcan to pay Respondents their full profit-sharing rights. *Id.*

Under Respondents' profit-sharing agreements, their compensation is determined according to their "vested" percentage. CP 27-28. Accordingly, as a remedy for Vulcan's bad faith, the Panel ruled as follows:

Given the wrongful nature of [Vulcan's] conduct, the Panel's right to fashion an appropriate remedy pursuant to the covenant of good faith and fair dealing, and the need to place [Respondents] as closely as possible in the financial position they would have been in but for Vulcan's breaches of contract, the Panel determines that the Claimants shall be entitled to be treated as if they were still employed...

CP 33. Describing Vulcan's conduct as a bad-faith "gambit" intended to "prevent the literal application of the [compensation plan]," the Panel then provided that:

For the previously stated reasons, the Panel finds [Vulcan] breached the VEC Agreement and violated the covenant of good

faith and fair dealing. Accordingly, the Panel grants the following relief.

1. Declaratory Judgment Re: Future Interim Distributions. All future interim distributions to the Claimants under the VEC Agreement ... shall continue at the 100% level.

\* \* \*

3. Declaratory Judgment Re: Exit Vest. Each Claimant is entitled to be 96% vested in all investments under the VEC Agreement ... when such investments are disposed of in the manner which triggers the Exit Vest obligation.

CP 41.

Pursuant to the Award, then, all distributions made to Respondents on a going-forward basis were to be made by one of two methods: either at 100% (in the case of “Interim Distributions”) or at 96% (in the case of “Exit Distributions”). CP 41, 55-56. For purposes of this case, it is significant that the Panel defined Interim Distributions as “distributions of dividends, interest and any other return on investments still owned by Vulcan.” CP 27 (emphasis added).

**C. The Trial Court Confirmed the Arbitration Award.**

Following the arbitration, Respondents filed a Motion to Confirm the Arbitration Award with the King County Superior Court. CP 97. Vulcan countered with a Motion to Vacate the Award, alleging that the Arbitration Panel had manifestly disregarded the law, entered an “irrational” award, and that one of the arbitrators had engaged in improper *ex parte* contact. *Id.* After reviewing the evidence and the parties’

briefing, the Honorable Paris Kallas denied Vulcan's motion and confirmed the award, explaining that the record contained no evidence to support Vulcan's allegations. CP 97-105. The trial court then entered a Judgment ("the Judgment") that expressly incorporates and attaches the Award and provides that Respondents are awarded both monetary and declaratory relief as set forth in the Award. CP 92-94.

**D. Vulcan Willfully Refused to Comply with the Judgment.**

Vulcan appealed the trial court's ruling and filed a *supersedeas* bond to stay the monetary portion of the Judgment. CP 144-145. Nevertheless, Vulcan recognized that the declaratory portion of the Judgment imposed ongoing payment obligations. CP 147. Accordingly, Vulcan proceeded to pay Interim Distributions at 100% vesting and, with each interim payment, sent a letter to Respondents stating the following:

As you are aware, on July 29, 2009, an arbitration award ("the Award") was issued that determines [Respondents'] Vested Profits Interest for purposes of calculating the incentive compensation payment detailed below. As you are also aware, Vulcan contends that the award is faulty and is pursuing appropriate remedies. In the event it is determined by a court that the Award should be vacated, Vulcan reserves the right to recoup or offset the amount identified below from future incentive compensation payments.

*Id.* With the exception of the payment at issue, Vulcan has paid—as is its obligation—all Interim Distributions at 100% vesting. CP 297.

In December 2010, however, VEC sold a 50.1% interest in a company called Plains All American GP LLC (the "VEC/PAA Sale"),

which triggered Vulcan's obligation to make distributions to Respondents. CP 147-151. In the past, Vulcan had consistently treated similar sales as Interim Distributions, paying Respondents at 100% vesting. CP 311. For example, in August 2008, prior to Respondents' termination, Vulcan sold a separate portion of its interest in Plains All American Pipeline and paid the resulting distributions to Respondents at 100% vesting. *Id.* Following the most recent VEC/PAA Sale, however, Vulcan initially characterized the sale as an "Exit" and, accordingly, paid Respondents at 96% vesting (rather than the required 100% vesting for Interim Distributions). CP 149, 151. At that time, Vulcan did not claim that the Judgment failed to address the particular type of sale at issue or that Vulcan's resultant payment obligations somehow fell outside the scope of the Judgment.

Respondent David Capobianco wrote to Vulcan General Counsel Bill McGrath on January 21, 2011 seeking clarification regarding the nature of the VEC/PAA Sale. CP 153. As Mr. Capobianco explained, if the sale was an "Exit," then certain other contractual obligations should have been triggered, including a significant tax "true-up" payment to Respondents. *Id.* When Vulcan failed to respond substantively, Mr. Capobianco again wrote to Mr. McGrath on January 31, 2011, requesting an opportunity to discuss the payments. CP 155. Mr. McGrath responded that he needed "to discuss with my colleagues in Finance." CP 157. Mr.

Capobianco then followed up by telephone, leaving Mr. McGrath a voice message on February 3, 2011. CP 160. On February 4, 2011, Mr. McGrath wrote to Mr. Capobianco and explained that Vulcan was holding a meeting on February 8, 2011, to discuss Mr. Capobianco's inquiry. CP 147-151.

On February 10, 2011, Vulcan Associate General Counsel Rich Sohn sent a letter to Petitioners providing additional documentation relating to the recent payments and advising as follows:

I understand that you have suggested that the sale of the [PAA] GP sale units triggers a release of the tax true-up amounts under the incentive compensation agreement. However, the true-up amounts are due only upon a final Disposition or a Deemed Disposition as defined in the Agreement, and the sale of [PAA] GP units is neither of the two.

CP 164. Mr. Sohn's explanation was an acknowledgment that Vulcan had incorrectly characterized the VEC/PAA Sale as an Exit, because the terms "Final Disposition" and "Exit" are synonymous under the Plan. CP 171, 178-79.<sup>1</sup>

Under the Judgment, if the VEC/PAA Sale was not an Exit, then the resulting distributions were necessarily Interim Distributions (and, indeed, the payments match the Judgment's definition of Interim

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<sup>1</sup> "Exit" is defined in the Plan as "the earlier of a final Disposition or Deemed Disposition," and because no Deemed Disposition can occur before 2015, the term "Exit" and the term "final Disposition" are necessarily synonymous in this case. CP 171, 178-79.

Distributions). Accordingly, Mr. Capobianco wrote to Vulcan on March 15, 2011, explaining that “because the [VEC/PAA Sale] was not a final disposition, we should have been paid 100% of our vested interest, rather than the 96% that you have paid us.” CP 199. Mr. Capobianco requested immediate payment of the remaining 4% plus interest, which amounts to more than \$2 million. *Id.* After receiving no response, Mr. Capobianco wrote again on March 21, 2011, to request the payment. CP 201.

On March 23, 2011, Vulcan Associate General Counsel Rich Sohn responded as follows:

We do not agree with your assertion below that the [VEC/PAA Sale] proceeds constitute an interim distribution that should have resulted in a payout at 100% (rather than 96%). The sale proceeds were not an interim distribution of dividends, interest or other recurring return on an investment.

CP 204 (emphasis added). Notably, Vulcan strategically inserted the word “recurring” into its description of the type of distribution payable at 100%, in an attempt to bolster its position that the payments were not Interim Distributions. And yet, this was an entirely new concept of Vulcan’s creation. Never before in the documents or in the parties’ course of dealing was Interim Distribution defined with reference to the recurring or non-recurring nature of a payment.

In other words, Vulcan has now taken the incongruous position that the VEC/PAA Sale constitutes neither an Exit—which would trigger a

tax true-up payment—nor an Interim Distribution, which is payable at 100% vesting. *Id.* And yet, Vulcan never mentioned this supposed third category of distribution when it initially characterized the sale as an Exit, nor when it later retreated from that position to avoid paying a tax true-up payment. In fact, Vulcan never mentioned this supposed third category of payment in *more than two years* of litigation over Vulcan’s payment obligations under the Plan.

**E. The Trial Court Held that Vulcan Had Violated the Judgment.**

When Vulcan refused to pay the Interim Distributions resulting from the VEC/PAA sale, Respondents filed a Motion to Enforce Judgment with the trial court. In that motion, Respondents contended that Vulcan’s willful refusal to pay Respondents their just and appropriate wages constituted a violation of the court’s Judgment and gave rise to statutory damages under RCW 49.52.050. CP 3-13.<sup>2</sup> The trial court granted Respondents’ motion, holding that the distributions from the VEC/PAA Sale “constituted Interim Distributions under the declaratory relief portions of the Judgment ... and accordingly [Vulcan] was required to treat [Respondents] as 100% vested with respect to those distributions.” CP 312-313.

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<sup>2</sup> The Arbitration Panel unanimously found that distributions to Respondents under the Plan constitute “wages” under the wage-withholding statute, a finding that Vulcan has never challenged. CP 40-41.

As the trial court explained, Vulcan “violated the Judgment by treating [Respondents] as only 96% vested with respect to distributions resulting from the VEC/PAA Sale.” CP 313. Accordingly, the trial court properly ordered Vulcan to pay Respondents for the VEC/PAA Sale at 100% vesting with prejudgment interest of 12% plus attorney fees. *Id.* With respect to Respondents’ request for statutory damages due to Vulcan’s willful withholding of wages, the trial court concluded that such damages were not appropriate because there had been a “bona fide dispute” as to whether the distributions from the VEC/PAA Sale constituted Interim Distributions. *Id.*

#### **IV. ARGUMENT**

##### **A. STANDARD OF REVIEW**

The trial court’s decision on a motion to enforce judgment is reviewed de novo where, as here, the trial court decided the motion without hearing oral testimony and the evidence consists only of declarations and affidavits. *See Veith v. Xterra Wetsuits, LLC*, 144 Wn. App. 362, 365 (2008).

##### **B. THE TRIAL COURT PROPERLY EXERCISED ITS AUTHORITY TO ENFORCE THE JUDGMENT.**

A court with jurisdiction over the parties and subject matter will have the power to enforce any judgment entered in the litigation. *See Goodsell v. Goodsell*, 38 Wn.2d 135, 138 (1951); *see also N. Commercial*

*Co. v. E.J. Hermann Co., Inc.*, 22 Wn. App. 963, 968 (1979) (recognizing the trial court’s “inherent authority to make its judgments effective”).

Under Washington law, “[a] court not only has the right, but it is its duty to make its decree effective and to prevent evasion thereof.” *See*

*Goodsell*, 38 Wn.2d at 138.

The Federal Arbitration Act (FAA) provides that a reviewing court may issue a judgment confirming, modifying, or vacating an arbitration award. *See* 9 U.S.C. § 9. The court’s judgment “shall be docketed as if it was rendered in an action.” *See* 9 U.S.C. § 13. Under the express provisions of the FAA,

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.***

*See* 9 U.S.C. § 13 (emphasis added).<sup>3</sup> Here, the trial court properly exercised its authority to enforce its Judgment confirming the arbitration award.

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<sup>3</sup> Washington law contains a substantially similar provision: “Upon granting an order confirming ... an award, the court shall enter a judgment in conformity with the order, [and] ***the judgment may be recorded, docketed, and enforced as any other judgment in a civil action.***” *See* RCW 7.04A.250 (emphasis added); *see also* Uniform Arbitration Act § 25 (same).

**1. The trial court properly recognized that its Judgment had the same force and effect as a judgment in an action.**

Vulcan erroneously contends that the trial court lacked authority to order Vulcan to comply with the Judgment and pay Respondents for the VEC/PAA Sale at 100% vesting. As an initial matter, Vulcan notes in its opening brief that Respondents and the trial court both “relied on 9 U.S.C. § 13 for the proposition that a judgment confirming an arbitration award may be enforced as if it had been entered in an action in the court which entered it.” Vulcan’s Opening Brief at 27. According to Vulcan, however, “§ 13 of the FAA *only* addresses judgments that have been confirmed or modified under §§ 9 or 11.” *Id.* (emphasis added).

Critically, Vulcan fails to acknowledge that the trial court *did confirm the Award under § 9 of the FAA*. As the trial court correctly noted in its order, “[t]he [parties’] motions are governed by the Federal Arbitration Act.” CP 99. Citing § 9 of the FAA, the trial court then explained that it “must confirm [the] award unless the award is vacated, modified, or corrected as prescribed in Section 10 and 11 of [the FAA].” *Id.* Finding no evidence to support Vulcan’s challenge to the Arbitration Award as being in manifest disregard of the law, irrational, or involving improper *ex parte* contact, the court denied Vulcan’s motion to vacate and entered Judgment confirming the Award in full pursuant to § 9 of the

FAA. Accordingly, under both the FAA and Washington law, the trial court then had authority to enforce its Judgment with “the same force and effect, in all respects ... [as] a judgment in an action.” *See* 9 U.S.C. § 13.

**2. The trial court had authority to enforce its Judgment without compelling an entirely new arbitration.**

Vulcan further argues that the trial court erred by not ordering an entirely new arbitration over Vulcan’s failure to treat the VEC/PAA payments as Interim Distributions. Vulcan’s argument—that a dispute about the terms of the Judgment necessarily constitutes an entirely new arbitrable dispute—is at odds with the purpose of arbitration, which is supposed to promote final and efficient resolution of disputes. *See Broom v. Morgan Stanley DW Inc.*, 169 Wn.2d 231, 239 (2010) (explaining that “the purposes of arbitration [are] finality and efficiency”). If Vulcan may compel new arbitration proceedings merely by manufacturing a dispute over the terms of the Judgment, Respondents would be forced into an endless loop of arbitration followed by litigation simply to enforce their rights under the Judgment. Neither federal law nor Washington law countenances such a result, and the strong policy goals of arbitration mandate against it.

Although there do not appear to be any Washington cases directly on point, other courts have rejected arguments similar to Vulcan’s contention here. For example, in *In re Akin Gump Strauss Hauer & Feld*

*LLP*, a party to an arbitration award moved the court to compel new arbitration proceedings to resolve a dispute over the meaning of the judgment confirming the award. 252 S.W.3d 480 (Tex. App. 2008).<sup>4</sup> The party seeking to compel arbitration argued that a court may only “enforce its [post-arbitration] judgment through ministerial, mandatory acts or by adopting an uncontested interpretation of the award language.” *Id.* at 492.

The appellate court rejected that argument. *Id.* As the court explained, trial courts “usually have to interpret judgments before they can enforce them and ... parties often dispute the proper interpretation of judgments in enforcement proceedings.” *Id.* As a result, requiring additional arbitration proceedings would undermine the “trial court’s broad discretion in carrying out its duty to interpret and enforce its judgments,” especially considering the FAA’s express requirement that post-arbitration judgments “be subject to the same law and given the same effect as judgments not rendered on arbitration awards.” *Id.* The court also explained that, far from supplanting the parties’ agreement to arbitrate disputes, “the trial court’s interpretation and enforcement ... vindicate [the] agreement and give effect to the end result of the arbitration in the

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<sup>4</sup> Specifically, the party sought remand to the initial arbitration panel or, failing that, an entirely new arbitration. *Id.* at 488 n.10.

manner provided by the [FAA] and [state] law.” *Id.* at 494. Finally, the court stated:

Another policy concern might be the need for finality, efficiency, and a prompt resolution of the issues in arbitration, without allowing parties to seek to reopen issues years later during the enforcement-of-judgment phase, simply by asserting that there are interpretation disputes regarding language in the arbitration award upon which the trial court rendered judgment.

*Id.* at 492, n.17.

Here, the Award and subsequent Judgment are clear: Vulcan was required to pay Respondents for the VEC/PAA Sale as an “Interim Distribution” at 100% vesting. The Award plainly separated Vulcan’s prospective payment obligations into two categories—Interim Distributions and Exit Vest Distributions. Even apart from the fact that Vulcan had previously treated similar sales as Interim Distributions, the VEC/PAA Sale fit squarely within the definition of an Interim Distribution, because Vulcan continues to own significant assets in Plains All American following the sale.<sup>5</sup> Like the party in *Akin Gump*, however, Vulcan “seek[s] to reopen issues years later during the enforcement-of-judgment phase, simply by asserting that there are interpretation disputes regarding language in the arbitration award upon which the trial court

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<sup>5</sup> As the Panel explained in its interim award, which is expressly incorporated in the Final Award and thus the Judgment, the “earnings achieved on any given investment program” could be separated into (1) distributions upon the final sale or disposition of an asset, and (2) “interim distribution of dividends, interest and *any other return on investments still owned by Vulcan.*” See CP 241 (emphasis added).

granted judgment.” *Id.* The Court should reject that argument as meritless.

**3. The trial court properly refused to order additional arbitration proceedings merely to address issues that were already resolved in the Judgment.**

Vulcan’s reliance on *Hellman v. Program Printing, Inc.* in support of its flawed argument is misplaced. 400 F. Supp. 915 (S.D.N.Y. 1975). In *Hellman*, the arbitration panel had ordered an employer to reinstate a former employee. *Id.* After the employer fully complied with the award and reinstated the employee, however, the company lost several work contracts and was forced to lay the employee off. *Id.* Shortly thereafter, the union sought to confirm the award and enforce the judgment, thus requiring the employer to reinstate the employee yet again. *Id.* The court rejected the union’s request, however, explaining that the circumstances had materially changed from the time that the employer had initially complied with the arbitration award. *Id.* As the court noted, “the issue of whether the [employer] must again rehire [the employee] in light of the alleged change in circumstances, is a proper subject for arbitration.” *Id.* at 918 (emphasis added).

In contrast to *Hellman*, the instant dispute does not involve *any* alleged change in circumstances, whether material or otherwise. Indeed, the parties are in precisely the same position that they were in prior to

issuance of the Award, which clearly separated Vulcan’s prospective payment obligations into two categories. The only “new fact” here is that Vulcan has willfully violated the Judgment. The trial court properly exercised its authority, ordering Vulcan to comply with the Judgment and pay Respondents for the VEC/PAA Sale at 100% vesting. The Court should reject Vulcan’s cynical attempt “to reopen issues years later ... simply by asserting that there are interpretation disputes regarding language in the arbitration award upon which the trial court granted judgment.” *In re Akin Gump*, 252 S.W.3d at 492, n.17.

**C. VULCAN’S REFUSAL TO PAY RESPONDENTS THEIR WAGES DID NOT CONSTITUTE A “BONA FIDE DISPUTE,” AND STATUTORY DAMAGES WERE THUS APPROPRIATE.**

Under RCW 49.52.050, an employer is guilty of a misdemeanor if it “willfully and with intent to deprive the employee of any part of his wages, ... pay[s] any employee a lower wage than the wage such employer is obligated to pay such employee by statute, ordinance, or contract.” Washington courts define a “wage” as “compensation due to an employee by reason of employment.” *Flower v. TRA Indus., Inc.*, 127 Wn. App. 13, 35 (2005). Here, the Judgment expressly provides that all distributions to Respondents under the VEC plan constitute “wages” within the meaning of RCW 49.52.050—a finding that Vulcan has never challenged.

Further, RCW 49.52.070 provides for civil liability of statutory double damages and attorney fees against “[a]ny employer and any officer, vice principal or agent of any employer” who violates the provision above. *Id.* at 34. As Washington courts have explained, the statutes “must be liberally construed to advance the legislature’s intent to protect employee wages and assure payment.” *Morgan v. Klingen*, 141 Wn. App. 143, 152 (2007).

“The critical determination in a case under RCW 49.52.070 for double damages is whether the employer’s failure to pay wages was willful.” *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152 (1998). “An employer’s nonpayment of wages is willful and made with intent when it is the result of knowing and intentional action and not the result of a bona fide dispute as to payment.” *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 849 (2002).<sup>6</sup> Here, the trial court properly recognized that the Judgment requires distributions from the VEC/PAA sale to be treated as Interim Distributions—indeed, the trial court was able to reach that conclusion on the papers without holding a hearing as requested by

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<sup>6</sup> The Court reviews these issues *de novo* where, as here, the trial court made its determination on a written record with no live hearing. *See Veith v. Xterra Wetsuits, LLC*, 144 Wn. App. 362, 366 (2008) (“Motions to enforce judgment are reviewed *de novo* where the evidence consists of only declarations and affidavits.”).

Vulcan. And yet, the trial court erred in finding a bona fide dispute as to the amount of wages that Vulcan owed to Respondents.

**1. The VEC/PAA Sale triggered Interim Distributions requiring payment to Respondents at 100% vesting.**

The trial court's initial Judgment, which incorporated the Arbitration Award, plainly separates Vulcan's remaining financial obligations to Respondents into two categories: Interim Distributions and Exit Distributions. Under the terms of that Judgment, an "Exit Distribution" occurs upon the final sale of an asset, *i.e.*, there is no asset left to dispose of after the sale or disposition. An "Interim Distribution," on the other hand, is simply any distribution that occurs prior to an Exit Distribution, including any "interim distribution of dividends, interest and any other return on investments still owned by Vulcan." CP 27 (emphasis added).

Here, Vulcan has conceded—as it must—that it "continues to own limited partnership units in Plains All American Pipeline with substantial value." Vulcan's Opening Brief at 4. That concession is critical. Because Vulcan continues to own an interest with substantial value, there has been no final disposition of that asset and thus no Exit. Therefore, the proceeds from the sale of the VEC/PAA Sale are "returns on assets still owned by Vulcan," because the company—in its own words—"continues to own" valuable interests in Plains All American Pipeline. There is, quite simply,

no plausible reading of the Judgment that would support Vulcan's contrived interpretation. As a result, the sale constituted an Interim Distribution, and the trial court's Judgment required that Vulcan pay Respondents for the distribution at the 100% vesting level.

**2. Vulcan's contrived legal argument does not give rise to a bona fide dispute.**

Under Washington law, to prevail on a showing of bona fide dispute, an employer must demonstrate a "fairly debatable dispute over ... whether all or a portion of the wages must be paid." *Schilling*, 136 Wn.2d at 162 (collecting cases). Importantly, an employer's mere "contrived legal argument" will not support a finding of a bona fide dispute. *See Flower*, 127 Wn. App. at 37.

For example, in *Flower v. TRA Industries, Inc.*, the employer argued that there was a bona fide dispute over whether the employee's purported wages were a "bonus" or an "expense." *Id.* The employer urged that the factual distinction was important, as the employer would owe the employee nothing if the wages were "expenses" rather than "bonuses." *Id.* Without hearing oral testimony, the trial court agreed with the employer and held that, as a matter of law, there was a bona fide dispute precluding statutory double damages. *Id.* On appeal, however, the court reversed, explaining that the employer had failed to demonstrate any bona fide dispute over the wages. *Id.* As the appellate court explained,

“the fact that [the employer] contrived a legal argument that the bonus was actually an expense does not make it a bona fide dispute.” *Id.* According to the court, the employer’s “implausible rationale for its failure to pay” demonstrated that the employer had wrongfully withheld wages, thus giving rise to statutory double damages and attorney fees under RCW 49.52.070. *Id.*

Here, there can be no bona fide dispute regarding Vulcan’s obligation to pay Respondents at the 100% vesting level for the Interim Distributions resulting from the VEC/PAA Sale. When Vulcan first notified Respondents of the payments, it characterized the Sale as an Exit. To avoid paying a tax true-up payment, however, it later retreated from that position. Then, to avoid paying at 100% vesting, Vulcan changed positions again, this time arguing that the payments were not Interim Distributions, in part because they were not “recurring”—a requirement found nowhere in the Judgment or the Award. Indeed, like the employer in *Flower*, Vulcan has contrived a legal argument in an attempt to justify its wrongful withholding of Respondents’ wages. Just as the employer in *Flower* attempted to make a baseless factual distinction between “bonuses” and “wages,” Vulcan has attempted to create an unprecedented *third* category of distributions that would not require Vulcan to pay Respondents at 100% vesting *or* make a tax true-up payment.

Further, Vulcan's contrived legal argument finds no support in the Judgment or Award, both of which plainly separate Vulcan's remaining financial obligations into two categories. Just as Vulcan cannot force the parties into an endless loop of arbitration by characterizing disputes over interpretation of the Judgment as new contractual disputes, it cannot avoid the wage-withholding statute simply by characterizing its strategically-contrived interpretation as a bona fide dispute. As the trial court in this case held, Vulcan "violated the Judgment by treating [Respondents] as only 96% vested with respect to distributions from the VEC/PAA Sale." CP 312-13. For that very reason, Vulcan's actions constitute a wrongful and intentional withholding of Respondents' wages, and Respondents should have been awarded statutory damages.

**3. Vulcan's past conduct further confirms that the proceeds from the VEC/PAA Sale triggered an Interim Distribution at 100% vesting.**

Vulcan's attempt to create an unprecedented third category of distributions is undermined not only by the plain language of the Judgment and Award, but also by Vulcan's own course of dealing. Critically, in August 2008, prior to terminating Respondents' employment, Vulcan sold a portion of its interest in Plains All American Pipeline and made distributions to Respondents at 100% vesting. CP 311. Indeed, in fashioning its remedy for Vulcan's bad faith termination of Respondents'

employment, the Arbitration Panel had expressly relied on Vulcan's prior conduct, explaining that the parties' course of dealing "under the VEC Agreement overwhelmingly favors [Respondents'] analysis." CP 30. Accordingly, the Panel ruled that "[a]ll future interim distributions to the Claimants under the VEC Agreement ... shall continue at the 100% level." CP 41. And, as the Panel explained, "there can be no bona fide dispute regarding Vulcan's obligation to continue to make interim distribution payments at the 100% level." *Id.* (emphasis added). That conclusion is expressly incorporated into the trial court's Judgment.

Having paid Respondents at the 100% level for previous partial asset sales like the VEC/PAA Sale, Vulcan can hardly adopt a different approach now. Under the express terms of the Judgment and Award, the Respondents "shall be treated as if they were still employed by Vulcan." CP 40 (emphasis added). Therefore, in light of Vulcan's prior conduct and the plain language of the Judgment and Award, there can be no bona fide dispute as to the amount of wages that Vulcan owed to Respondents. The Judgment required Vulcan to pay Respondents for the proceeds of the VEC/PAA Sale as an Interim Distribution at 100% vesting, but Vulcan wrongfully withheld Respondents' appropriate wages.

**4. Vulcan’s attempt to contrive a reason not to pay Respondents is precisely the situation the wage-withholding statute is designed to address.**

Vulcan implies in its Opening Brief that Respondents are somehow seeking a windfall, or funds to which they are not entitled. *See, e.g.*, Vulcan’s Opening Brief at 2 (“Vulcan paid Respondents \$41.8 million and \$9 million, respectively[, b]ut Respondents wanted more...”). The regrettable irony in Vulcan’s argument is that the payments at issue are incentive compensation payments owing because Respondents earned more than \$2 billion for Paul Allen and Vulcan. If Respondents had not earned substantial profits for Vulcan, they would not have been entitled to receive anything.<sup>7</sup> Vulcan can scarcely be heard to complain about the size of payments made to Respondents, when those payments are a contractually-determined fraction of the profits Vulcan itself has received.

For the same reason, an award of statutory double damages would not constitute an inappropriate windfall to Respondents. The very purpose of Washington’s wage-withholding statute is to ensure that an employee “shall realize the full amount of the wages which by statute, ordinance, or contract he is entitled to receive from his employer,” and to ensure that the employer is not “permitted to evade his obligation, by a withholding of a

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<sup>7</sup> The Plan provided that Respondents would share in the profits they generated after Vulcan recouped its initial investment plus an additional 8% return. CP 118, 180. Only then were Respondents entitled to share in the profits they generated.

part of the wages.” *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 159 (1998) (emphasis added). For that reason, courts “liberally construe the wrongful withholding statute to advance the Legislature’s intent to protect employee wages and assure payment.” *Durand v. HIMC Corp.*, 151 Wn. App. 818, 835 (2009). In performing that analysis, courts do not look to the amount an employee is to receive, or whether that amount might be perceived as a windfall; rather, “[t]he critical determination in a case under RCW 49.52.070 for double damages is whether the employer’s failure to pay wages was willful.” *Schilling*, 136 Wn.2d at 159.

Here, Vulcan has a history of attempting to evade its payment obligations to Respondents. First, it concocted a scheme—a “gambit” in the words of the Arbitration Panel—to terminate Respondents in a way that would “stop” the compensation Plan and enable Vulcan to avoid paying Respondents their legitimate share of Vulcan’s profits. Now, once again, Vulcan has attempted to concoct another contrived argument that would enable it to avoid paying Respondents the profit-sharing they are owed—first by wrongly characterizing the sale as an Exit, and then later by retreating from that position and injecting new and unprecedented language into the Judgment.

An award of statutory double damages in this case would directly promote the goals of the wage-withholding statute by imposing a penalty

on an employer who has repeatedly attempted to evade its payment obligations to employees. That the employer in this case is a billionaire attempting to avoid paying profit-sharing to employees who earned him more than \$2 billion in profits is all the more reason such damages are appropriate.

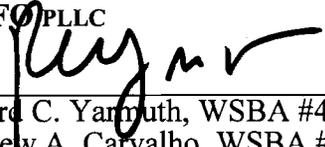
### V. CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court affirm the trial court's enforcement of its Judgment but reverse the trial court's finding of a bona fide dispute regarding the amount of wages that Vulcan wrongfully withheld from Respondents.

Dated: November 30, 2011.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date, I caused a copy of the foregoing RESPONDENTS' OPENING BRIEF to be hand-delivered to the attorneys of record listed below:

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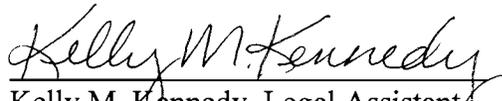
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I hereby certify, under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct.

Dated: November 30, 2011, at Seattle, Washington.

  
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