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No. 67607-5-1

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

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

v.

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

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APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

This appeal concerns the trial court's erroneous exercise of jurisdiction regarding disputed matters that are subject to a mandatory contractual arbitration provision. The context is slightly complicated but the central issue is straight-forward.

Vulcan and Respondents are party to a profit-sharing contract (the "VEC Agreement") that provides for Respondents to receive a share of profits on certain Vulcan investments. Following termination of their employment with Vulcan, Respondents disputed how the VEC Agreement was to apply to distributions made to them in the future—specifically, with respect to their level of vesting for distributions. The VEC Agreement has a mandatory and exclusive arbitration clause. The parties' dispute was submitted to arbitration and an arbitration panel issued a Final Award (the "Award"), which was subsequently confirmed by the trial court and then entered as a judgment.

This appeal does not challenge the Award nor does it concern the trial court's confirmation of the Award or the resulting judgment. Rather what is at issue are post-judgment proceedings, in which the trial court exceeded its jurisdiction and erroneously (1) delved into, construed, and interpreted the Award *and* the underlying VEC Agreement; (2) modified the Award, and (3) addressed and adjudicated a new claim arising under

the VEC Agreement. The trial court's post-judgment order was then entered as a second judgment, and it is from this second judgment that Vulcan now appeals.

* * *

The Award provides declaratory relief regarding Respondents' vesting levels under the VEC Agreement for two types of distributions. These are classified in the Award as "Future Interim Distributions" and "Exit Vest Distributions." The Award capitalizes but does not define these terms—nor are they defined in the VEC Agreement. And this is the foundational problem.

Following judgment on the confirmed Award, Vulcan entered into a transaction for the partial sale of an asset. Vulcan paid Respondents on the proceeds of this transaction at a 96% vesting level. Based on this, Vulcan paid Respondents \$41.8 million and \$9.1 million, respectively.

But Respondents wanted more, and they took varying positions to this end. First, Respondents asserted that the vesting level at which they were paid was correct but that other additional monies (certain tax-related payments) were now due them under the VEC Agreement. Then, when Vulcan pointed out these additional payments had not been contractually triggered, Respondents changed their position and claimed that they should have been paid at a 100% vesting level. And when Vulcan

declined to pay more, Respondents filed a motion styled as “Motion to Enforce Judgment.”

This motion sought injunctive relief and also asserted a new statutory wage claim based on Vulcan’s alleged underpayment. The trial court granted Respondents’ motion in substantial part, but denied the wage claim with respect to “willfulness,” finding that there was a bona fide dispute.

In so ruling, the trial court necessarily found the Award to be ambiguous and looked beyond the four corners of the Award to interpret and construe not only the Award but the VEC Agreement itself. Indeed, Respondents encouraged this, submitting in support of their motion evidence that was presented to the Arbitration Panel regarding different distributions made years earlier. Respondents argued that this evidence was among “the facts upon which the Arbitration Panel based its Award.” By delving into the facts and evidence considered by the Panel and the provisions of the VEC Agreement—which it had to do to grant the relief it did and to make the finding of no “willfulness”—the trial court exceeded the permissible jurisdiction of the courts under the Federal Arbitration Act (the “FAA”). The merits of this dispute can only be resolved by arbitration, as mandated by the VEC Agreement and applicable law.

Moreover, in addition to making a new declaratory ruling on

matters subject to mandatory arbitration, the trial court effectively amended the Award to provide for new relief in the form of an injunction regarding a specific payment requirement. Simultaneously with its determination on the merits, the Court made a finding that the newly imposed injunction has been retroactively violated and ordered Vulcan to pay the disputed amounts to Respondents.

The initial judgment in this matter was not the result of the trial court's decision-making or a trial over which it presided; instead, it merely confirmed an arbitration award under the FAA. Regardless of what courts may do in enforcing their own judgments on the merits, the FAA does not give a court the statutory authority to interpret and amend an arbitration award based on its own interpretation of the facts and evidence before the arbitration panel—in the name of “enforcement” or otherwise.

If Respondents wish to dispute whether Vulcan's post-arbitration and post-judgment payments to them under the VEC Agreement are consistent with—or even addressed by—the Award's declaratory judgment ruling, then the matter must be arbitrated. The court below erred in holding otherwise. Notwithstanding the pragmatic appeal of resolving a dispute, the trial court improperly intruded on matters for which arbitration is the only permitted forum.

II. ASSIGNMENTS OF ERROR

A. The trial court erred by its exercise of jurisdiction to construe and interpret an ambiguous arbitration award, which necessarily required interpretation of a contract that requires arbitration.

B. The trial court exceeded its statutory authority in amending an arbitration award to provide for new declaratory and injunctive relief affirmatively requiring payments to be made under its new interpretation of the Award and the underlying contract.

C. The trial court erred by adjudicating a statutory wage claim arising from a contract with a mandatory arbitration provision.

III. STATEMENT OF THE CASE

A. THE PRIOR JUDGMENT.

On April 29, 2010, the court entered a Judgment that confirmed a Final Arbitration Award (the “Award”). CP 225–28, 230–35. The Award and the Judgment provide for (1) monetary damages and (2) declaratory relief relating to certain future payments due Respondents under several profit-sharing contracts. CP 226-27, 230–31. The monetary damages portion of the Judgment is not at issue. Respondents’ motion below was premised solely on the declaratory relief portion of the Award and

Judgment with respect to one particular contract, the VEC Agreement.¹

B. THE DISTRIBUTION PROVISION OF THE VEC AGREEMENT.

Section 6 of the VEC Agreement describes the circumstances that trigger a required distribution or “incentive compensation” payment to Respondents. It states:

Upon the receipt by [Vulcan] of any (i) distributions from, *or* proceeds in respect of any partial sale of [Paul Allen]’s interest in, Vulcan Energy or Vulcan Resources, of cash or Securities... *or* (ii) any amounts as a result of a Disposition or Deemed Disposition... the Participants shall become entitled to receive, and Vulcan shall make, incentive compensation payments to the Participants in respect of their Profits Interests[.]

CP 271 (emphasis supplied). The VEC Agreement thus provides for incentive compensation payments or distributions to Respondents in *three* different circumstances:

1. Distributions from Vulcan Energy or Vulcan Resources;
2. Proceeds arising from a partial sale of Paul Allen’s interest in Vulcan Energy or Vulcan Resources; and

¹ There are three relevant agreements, one of which is the Vulcan Energy Corporation Incentive Compensation Program (the “VEC Agreement”). CP 259–89. The parties agree that the material aspects of the relevant provisions in the various agreements operate identically. Thus, the parties referenced the VEC Agreement during the arbitration and thereafter, and the VEC Agreement was the only contract at issue in Respondents’ “Motion to Enforce Judgment.”

3. Proceeds from a Disposition or Deemed Disposition, which includes the sale of assets owned by Vulcan Energy or Vulcan Resources.²

C. THE DECLARATORY RELIEF OF THE ARBITRATION AWARD.

In a section captioned “Declaratory Judgments,” the Award addresses Respondents’ vesting level, or percentage, for two categories of future distributions to be made under the VEC Agreement.³ CP 231–32. In so doing, the Award does not track or correspond with the VEC Agreement and the different distribution scenarios it contemplates.

1. “Future Interim Distributions.”

The Award provides that Respondents shall be vested at 100% for “Future Interim Distributions.” CP 230–31. The term Interim Distributions is capitalized, but it is not defined anywhere in the Award. Nor does the VEC Agreement define—or even use—the term “Interim Distributions.”

² “Disposition” means the “sale, exchange, redemption... or other disposition by [Paul Allen] of Vulcan Energy or Vulcan Resources... and shall include the receipt by [Paul Allen] of a... distribution upon a sale of all or substantially all of the assets of Vulcan Energy or Vulcan Resources.” CP 263. A “Deemed Disposition” occurs if an asset has not been sold by December 31, 2015 and is not relevant here. CP 263, 273–74.

³ Like a stock option award, the VEC Agreement contains vesting provisions. The VEC Agreement allocates to Respondents and other investment managers a share of profits earned from investments they managed; this share was called the “carry.” See CP 241. Each person’s individual share of the carry (“Profits Interests”) vested monthly over time, up to a maximum of 80%. CP 270–71. The final 20% vests only upon an “Exit” from an investment—provided the individual is employed by Vulcan at the time of the Exit (the “Exit Vest”). *Id.* Vulcan terminated Respondents in October 2008. CP 239. At that time, they were 80% vested in their respective shares of the carry under the VEC Agreement. CP 241, 247.

A July 29, 2009 interim award, however, indicates the definition presumably intended by the Arbitration Panel.⁴ It summarized the “earnings achieved on any given investment program” as comprising (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.” CP 241 (emphasis supplied).

2. “Exit Vest Distributions.”

The Award also provides that Respondents shall be vested at 96% for “Exit Vest Distributions.” CP 231. Like “Interim Distributions,” the term “Exit Vest Distributions” is not defined in the Award; nor is it defined or used in the VEC Agreement.

The term “Exit,” however, is defined in the VEC Agreement as a “final Disposition or Deemed Disposition.” CP 263, 271 (emphasis supplied). The VEC Agreement does not define “final Disposition,” but “final” distinguishes the “sale of all or substantially all of the assets of Vulcan Energy or Vulcan Resources” from a partial sale of assets, both of which are forms of Disposition. CP 263. As noted, above, the interim award referred to “distributions upon the final sale or disposition of an

⁴ Prior to issuing the Final Award on February 9, 2010, the Arbitration Panel issued an interim award on July 29, 2009. CP 237-57. The interim award made a liability determination and the Arbitration Panel reserved jurisdiction to determine damages and attorneys’ fees. CP 256. The Final Award attached and incorporated by reference the interim award. CP 230.

asset.” CP 241.

3. Other Types of Proceeds or Distributions Are Not Addressed.

The Award makes no mention of and does not address in any way Respondents’ vesting levels or the disposition of proceeds or distributions due from the *partial sale of an asset*. It provides no direction regarding vesting levels for dispositions that are not final.

D. VULCAN’S PARTIAL SALE OF INTEREST IN PLAINS ALL AMERICAN.

In two related transactions in December 2010 and January 2011, Vulcan Energy Corporation sold its general-partnership-interest units in Plains All American Pipeline LP (the “PAA-GP sale”). CP 297. Vulcan continues to own limited-partnership-interest units in Plains All American Pipeline with substantial value. Id.

The proceeds from the PAA-GP sale were not interest and they were not dividends: they were proceeds of a partial sale. CP 297. By virtue of the sale itself, they were not recurring returns on an investment “still owned by Vulcan.” CP 241. These proceeds were not “Interim Distributions.”

Nor were the proceeds “Exit Vest Distributions,” because there had been no “final Disposition”—or “Exit”— from Plains All American. CP 297. Respondents acknowledge and concede this point. CP 10:12-13.

The proceeds from the PAA-GP sale comprise a category of distribution—the partial sale of an asset that does not qualify as a “final Disposition”—that is contemplated by the VEC Agreement but that is *not* addressed by the Award.

E. CONTEXT OF RESPONDENTS’ MOTION.

Vulcan paid Respondents a portion of the proceeds of the PAA-GP sale as if they were 96% vested in their share of profits under the VEC Agreement. The resulting payments were \$41.8 million to Mr. Capobianco and \$9.8 million to Mr. Thukkaram. CP 297.

Separately, Vulcan also had previously paid ten (10) distributions to Respondents since their termination that qualified as Interim Distributions (*i.e.*, dividends, interest or other return on investments still owned by Vulcan), totaling in excess of \$9.6 million. CP 296. Vulcan had paid every Interim Distribution to Respondents based on Profits Interest calculated at a 100% vesting level. CP 297. At the time of the motion below, the most recent such payment had occurred in March 2011, after the PAA-GP sale. CP 296–97. It is undisputed that when Vulcan received proceeds comprising dividends, interest or any other return on an investment still owned by Vulcan it paid Respondents according to the “Interim Distribution” declaratory relief in the Award.

Upon receiving payment for a portion of the proceeds of the PAA-

GP sale, Respondent Capobianco initially took the position that the 96% payment meant that there had been an “Exit” and, accordingly, Vulcan was required to make a tax true-up payment under Section 6(b) of the VEC Agreement. CP 291. This would have resulted in a substantial additional payment to Mr. Capobianco in the approximate range of \$10 million.⁵

In response, Vulcan pointed out that the PAA-GP sale did not qualify as a final Disposition or Deemed Disposition as those terms are defined in the VEC Agreement, and thus no true-up payments were due. CP 293.

Mr. Capobianco then reversed his position, claiming that instead the proceeds from the PAA-GP sale must be an Interim Distribution, entitling him to payment at a 100% vesting level. CP 295. Respondents’ motion to “enforce” this latter interpretation of the Award followed.

F. RESPONDENTS’ MOTION.

On April 28, 2011, Respondents filed a motion styled as “Motion to Enforce Judgment.”⁶ CP 3-13; see also CP 15-17, 18-205.

⁵ The specific amount is subject to certain tax-related calculations and, thus, is approximate.

⁶ Respondents had previously filed a substantively identical motion styled as “Motion for an Order to Show Cause Why Respondents Should Not Be Held in Civil Contempt for Failure to Comply with Judgment and For Remedial Sanctions.” This

Respondents asserted a purely binary view of the Award (and resulting Judgment).⁷ “Under the Judgment, distributions made under the [VEC Agreement] can *only* be Interim Distributions or Exit Distributions.” CP 11:22-23 (emphasis supplied). Thus, they asserted that the PAA-GP sale “was not a final disposition (and therefore was not an ‘Exit’), and so the distributions ... *necessarily* constitute Interim Distributions that should have been paid at 100%.” CP 11: 24-26 (emphasis supplied).

Respondents argued that Vulcan had failed to comply with the Award and judgment and that this constituted a “willful” statutory wage violation for which Vulcan should be liable for double damages. CP 11-13. Respondents requested that the court make the following findings and rulings:

1. That the PAA-GP distributions “constituted Interim Distributions under the declaratory relief portions of the Judgment [that confirmed the Award];
2. That Vulcan “violated the Judgment by treating [Respondents] as only 96% vested with respect to distributions resulting from the [PAA-GP sale];
3. that “Interim Distributions are wages that were willfully withheld from [Respondents];”

motion was then withdrawn, presumably upon Respondents’ recognition that neither the Award nor the confirming Judgment provided for injunctive relief.

⁷ The Judgment simply referenced the Award. *I.e.*, the Award provided for Declaratory Judgment regarding “Future Interim Distributions” and “Exit Vest Distributions” (CP 230-31), and the Judgment stated that Respondents “are awarded declaratory relief as described in [the Award].” CP 226.

4. That Respondents should ordered “to correct the underpayments . . . by paying the Withheld Wages to [Respondents];” and

5. That Respondents should be “ordered to pay statutory double damages pursuant to RCW 49.52.050 on the Withheld Wages.”

CP 15–16.

G. THE TRIAL COURT’S RULING.

The trial court granted Respondents’ motion in substantial part. The court made specific “find[ing]s” that (1) the Award (as confirmed by the Judgment) provided that Respondents were to be treated as 100% vested for purposes of “Interim Distributions;” *and* (2) the distributions from the PAA-GP sale constituted Interim Distributions. CP 312–13.

These findings necessarily required the court to resolve ambiguity in the Award and to delve into and construe the VEC Agreement. And the trial court acknowledged these necessities, and the scope of its inquiry and decision-making, by ruling that a “*bona fide dispute* existed as to whether these distributions [of the PAA-GP proceeds] were Interim Distributions.”⁸ CP 313 (emphasis supplied).

And, yet, despite the court’s express recognition of ambiguity and

⁸ Accordingly, the court denied Respondents’ request for an award of double damages on their statutory wage claim. CP 313. The impropriety of this request illustrates the impropriety of the entire motion. Within a motion purporting to seek enforcement of a judgment confirming an arbitration award, Respondents asserted an entirely new cause of action, based upon *post*-arbitration events, upon which they effectively sought summary judgment. CP 12-13, CP 16 (at ¶¶ 4, B, and D).

the legitimacy of Vulcan’s understanding of its obligations under the Award and the VEC Agreement, the court granted new injunctive relief as requested by Respondents. The order required Vulcan to “correct the underpayments” it had made based on its good-faith interpretation of the Award. CP 313. And the court awarded attorneys’ fees on Respondents’ new wage claim. Id. Judgment was entered consistent with the trial court’s order. CP 315-21.

IV. ARGUMENT

A. STANDARD OF REVIEW.

Review of the trial court’s judgment and underlying order is *de novo*. Smith v. Monson, 157 Wn.App. 443, 447, 236 P.3d 991 (2010) (authority of the trial judge is a question of law subject to *de novo* review).⁹ Although the judgment concerns what is captioned as an order of enforcement, there can be no dispute that, among other things, the trial court (a) clarified what it deemed to be an ambiguity in the Award; (b) determined that the ambiguity presented, as a matter of law, a “bona fide” dispute regarding Vulcan’s contractual payment obligation; and (c) provided injunctive relief that was not included in the Award. Even if

⁹ See also Meadow Valley Owners Ass’n v. St. Paul Fire & Marine Ins. Co., 137 Wn.App. 810, 816, 156 P.3d 240 (2007) (issues of statutory interpretation and claimed errors of law reviewed *de novo*); Bour v. Johnson, 80 Wn.App. 643, 647, 910 P.2d 548 (1996) (jurisdiction over the subject matter of an action is an elementary prerequisite to the exercise of judicial power and a judgment is void if entered without subject matter jurisdiction); In re Marriage of Kastanas, 78 Wn.App. 193, 197, 896 P.2d 726 (1995) (the determination of whether a court has subject matter jurisdiction is a question of law reviewed *de novo*)

such modifications and determinations had been a proper exercise of the court's authority, the order and resulting judgment require *de novo* review to determine compliance with the narrow statutory grounds for modification or correction. AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc., 508 F.3d 995, 999 (11th Cir. 2007) (“We review *de novo* questions of law that concern the modification of an arbitration award....”).¹⁰ The same standard necessarily applies to review of court's modification or amendment of an award after it has been confirmed.

Additionally, Respondents' motion to enforce required the trial court to determine whether the subject matter of the motion fell outside the scope of the Award and therefore was subject to mandatory arbitration—*i.e.*, to decide the arbitrability of the dispute. Arbitrability is a question of law that the courts also review *de novo*. McKee v. AT & T Corp., 164 Wn.2d 372, 383, 191 P.3d 845 (2008); Momot v. Mastro, 652 F.3d 982, 986 (9th Cir. 2011).

B. THE TRIAL COURT ERRED IN DECIDING MATTERS SUBJECT TO ARBITRATION.

1. The Award Does not Address the Distributions at Issue or, at Best, is Ambiguous.

The Award concerns the distribution of two (2) categories of revenue or income under the VEC Agreement. The Award states declaratory relief regarding the vesting level for future (*i.e.*, post-

¹⁰ See also RCW 7.04A.240 (stating the narrow grounds for modifying or correcting an arbitration award under the Washington arbitration statute); Bongirno v. Moss, 93 Wn.App. 654, 657–58, 969 P.2d 1118 (1999) (holding that it was improper for court to amend an arbitration award to include an award of attorneys' fees).

arbitration) distributions to Respondents for these two categories. First, the Award construes the VEC Agreement to require that “Future Interim Distributions” should be paid at a 100% vesting level. CP 230-31; see also CP 241: 20-21. Second, the Award provides that “Exit Vest Distributions” should be paid at a 96% vesting level. CP 231; see also CP 241:22. Respondents’ motion asserted that the PAA-GP distributions were “Interim Distributions” and therefore should have been paid to them at a 100% vesting level.

As a threshold matter, the Award does not define “Interim Distributions” or “Exit Vest Distributions.” Distributions of proceeds from the PAA sale were not Exit Vest Distributions, because there was no “final Disposition” of Vulcan’s interest in PAA. CP 297. Respondents agreed with this proposition below (although they initially took the opposite position). CP 10; *see also* CP 295. Nor were the proceeds of the asset sale an Interim Distribution, because they were not interest, dividends, or any other type of recurring return on an asset still owned by Vulcan. CP 241. Thus, the PAA-GP sale—*which was a partial sale of an asset*—triggered neither an “Interim Distribution” nor an “Exit Vest Distribution.” Nevertheless, Vulcan acted in good faith, complied with

the VEC Agreement, and paid Respondents for these distributions.¹¹ CP 297.

Although it granted Respondents' motion in substantial part, the trial court recognized that the Award (and its interrelation with the VEC Agreement) was, at a minimum, ambiguous with respect to whether it applied to the proceeds of the sale of Vulcan's PAA GP units. Thus, the court found that there was a bona fide dispute as to the meaning of "Interim Distributions." CP 313. The trial court's ruling in this respect evidences the broad scope of its inquiry—and demonstrates the improper exercise of jurisdiction.

Whether an employer's withholding of wages is willful is ordinarily a *question of fact*. Lillig v. Becton-Dickinson, 105 Wn.2d 653, 660, 717 P.2d 1371 (1986); Duncan v. Alaska USA Fed. Credit Union, Inc., 148 Wn.App. 52, 78-79, 199 P.3d 991 (2008). An employer's failure to pay wages is willful if it is volitional, *i.e.*, not a matter of mere carelessness but the result of knowing and intentional action—but if there is a bona fide dispute regarding the payment of wages, then the failure to pay them is not willful. Schilling v. Radio Holdings, Inc., 136 Wn.2d 152,

¹¹ That the PAA-GP proceeds triggered neither an "Interim Distribution" nor an "Exit Vest Distribution" under the Award does *not* mean there was no obligation to pay Respondents. Even in the absence of the Award, it is undisputed that Respondents are 80% vested in their profits interest. And, in fact, Vulcan paid Respondents as if they were 96% vested.

159-60, 961 P.2d 371 (1998). In order for a dispute to be “bona fide” it must be a “fairly debatable” dispute over whether an employment relationship exists, or whether all or a portion of the wages must be paid. Brandt v. Impero, 1 Wn.App. 678, 680-81, 463 P.2d 197 (1969).

Here, the trial court necessarily engaged in a factual inquiry, determined that there were no material facts in dispute, and then ruled as a matter of law that it was “fairly debatable” as to whether the PAA-GP proceeds required payment to Respondents as an “Interim Distribution” under the Award. CP 313. In ruling that there is a “fair debate” in the first instance and then in resolving this debate, the trial court interpreted and construed the Award and the meaning of the VEC Agreement. Under the VEC Agreement and the FAA, such decision-making is contractually and statutorily reserved to arbitration.

2. To Grant Respondents’ Motion Necessarily Required the Trial Court to Resolve Matters Subject to Mandatory Arbitration.

The declaratory provisions of the Award themselves construed, interpreted and amended in part the operation of the vesting and payment provisions of the VEC Agreement. Thus, while the VEC Agreement provided that Respondents’ were 80% vested, the Award says otherwise with respect to two categories of distributions (neither of which is defined in the Award or in the VEC Agreement). Respondents’ motion required

the trial court to interpret that Award and, in doing so, the VEC Agreement.

Respondents' motion argued that that the Award creates a purely binary world, such that all payments *must be* either Interim Distributions or Exit Vest Distributions. CP 8:1-2, 11:22-23, 303. Because the distributions were not Exit Vest Distributions, Respondents argued, they must have been Interim Distributions. CP 11.

But the Award on its face does not expressly address all instances in which distributions might be made under the terms of the VEC Agreement. Compare CP 230-31 with CP 271 at § 6(a). Most prominently, the Award simply fails to address distributions that result from a partial sale of an asset. Id.

The distributions from the PAA-GP sale did not qualify as either Interim or Exit Vest distributions as those terms appear to be used in the Award. CP 230-31; see also CP 241. Thus, at its core, the parties' dispute concerned whether all categories of proceeds or distributions contemplated by the VEC Agreement correspond with an apparently dichotomous Award structure—or whether the Award does not address at least one category.

By definition, this issue cannot be resolved without reference to and interpretation of not only the Award but also the VEC Agreement. To

determine whether Respondents were correct that *no* distributions are possible under the VEC Agreement that do *not* qualify as either Exit Vest or Interim Distributions, the court had to consider and interpret the vesting and payment provisions of the VEC Agreement itself. This it could not do under the VEC Agreement's mandatory and exclusive arbitration provision.

The parties agreed that “any dispute, controversy or claim of any kind arising out of, relating to or in connection with [the VEC Agreement] or the breach, termination or validity thereof shall be finally and exclusively settled by arbitration.” CP 281–82. Under the FAA, such written arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2.

The United States Supreme Court has stated that “[s]ection 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.” Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 103 S. Ct. 927, 74 L.Ed.2d 765 (1983). “The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.” Id. Both state and federal courts must enforce this body of substantive

arbitrability law. Perry v. Thomas, 482 U.S. 483, 489, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987). Accordingly, courts *must* indulge every presumption “in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” Moses H. Cone Mem’l Hosp., 460 U.S. at 25; see also Zuver v. Airtouch Communications, Inc., 153 Wn.2d 293, 301, 103 P.3d 753 (2004) (accord); Balen v. Holland America Line Inc., 583 F.3d 647, 652 (9th Cir. 2009) (accord).

Here, Respondents’ motion was not about straightforward application of unambiguous terms in the Award. Rather, as the trial court recognized, the term “Interim Distribution” was at least ambiguous and subject to fair debate as to meaning. And the term does not apply to the PAA-GP sale based on the *only* admissible evidence here illuminating the term as used by Arbitration Panel.¹² CP 241: 20-21

Whether and the extent to which the Award correlates to the payment provisions of the VEC Agreement is unquestionably a “dispute [or] controversy... relating to or in connection with” the VEC Agreement and therefore must be submitted to arbitration.

¹² Again, the term “Interim Distribution” is not defined by or used in the VEC Agreement.

C. THE TRIAL COURT DID NOT HAVE THE AUTHORITY TO INTERPRET OR CONSTRUE THE AWARD TO ADDRESS A NEW ISSUE OR ORDER NEW LEGAL RELIEF.

In addition to requiring interpretation of the VEC Agreement, Respondents' motion asked the trial court to interpret and construe the Award itself and then to modify and amend the Award to provide for injunctive relief. In doing so, the trial court exceeded its statutory authority.

1. The Trial Court Lacked Authority to Interpret and Construe the Award.

Under the FAA, the role of the courts with respect to arbitration awards is limited to (a) confirming and entering judgment on an award; (b) vacating an award on enumerated grounds; or (c) modifying or correcting an award for certain types of errors. 9 U.S.C. §§ 9-11. A court may modify an award only in three circumstances, *none of which is applicable here*: (a) where it contains a miscalculation of figures or mistake in the description of any person, thing, or property; (b) where the arbitrators have awarded upon a matter affecting the merits that was not submitted to them; or (c) where the award is imperfect in form not affecting the merits. 9 U.S.C. § 11. The permissible ministerial modifications are independent of the merits and substantive decision set forth in an arbitration award. Id.

Hellman v. Program Printing, Inc., 400 F. Supp. 915 (S.D.N.Y.

1975) illustrates these bedrock and statutorily-codified principles of judicial restraint and limited authority in the context of arbitration. In Hellman, an arbitrator entered an award requiring Program Printing to reinstate a union employee and to stop having work subject to a collective bargaining agreement performed at an outside plant. Id. at 917. Program Printing reinstated the worker but then failed to rehire him when the plant reopened the following season, claiming that there was insufficient work. Id. On petition of the union, the court granted the petition to confirm the arbitration award but denied the union's request that the court order reinstatement. Id. at 918.

It is not within the province of this Court to intrude into the arbitration procedure and interpose its interpretation of a disputed award on the parties to the collective bargaining agreement. When a petition for enforcement involves a new dispute, such as this one, enforcement must be denied.

Id. The court therefore confirmed the award in accordance with its allocated authority under the FAA, but denied the motion to enforce as presenting an issue that was "a proper subject for arbitration." *Id.*

Here, Respondents' motion asserted that (1) the Award addresses every distribution scenario possible under the VEC Agreement; and (2) because the proceeds of the PAA-GP sale were not *X* (Exit Vest Distribution), then they must have been *Y* (Interim Distribution). To

assess the merits of these assertions, it would be necessary to interpret the VEC Agreement, analyze the arguments and evidence presented in the arbitration to determine whether the parties or the Panel contemplated circumstances like the PAA-GP sale and, if so, decide whether the Award was intended to address such circumstances where it does not on its face. This is precisely the sort of judicial intrusion into the arbitration procedure that the FAA forbids, and that the Hellman court pointedly recognized.

And yet Respondents' motion encouraged the trial court to engage in this very inquiry and intrusion into the prior arbitration. For example, in response to Vulcan's explanation as to how the VEC Agreement contemplates distributions not addressed by Award, Respondents submitted evidence from the arbitration regarding the parties' alleged course of dealing and intent with respect to distributions under the VEC Agreement. Specifically, Respondents submitted as an exhibit a September 26, 2008 letter from Vulcan to show that similar distributions were paid at 100% prior to Respondents' termination and the ensuing arbitration. CP 311. Respondents argued that "the calculation of payments arising from the partial asset sale to Occidental was one of the facts upon which the Panel based its Award." CP 304.

By submitting this evidence and inviting the trial court to consider it, Respondents conceded that the dispute concerned interpretation of the

VEC Agreement, the parties' intent, and what the Panel meant with its Award and undefined terms therein. And by accepting Respondents' invitation, the trial court went far beyond its limited authority to confirm, vacate, or correct an award under the FAA.

2. The Trial Court Lacked Authority to Order New Relief not Provided for in the Award.

Respondents further asked the trial court to order compliance with its construction, thereby adding new relief in the form of an injunction not provided in the Award. Respondents sought to convert the purely declaratory relief in the Award into an injunction and then to have the trial court issue an injunctive order (*i.e.*, requiring payment) based on Vulcan's alleged violation of the previously non-existent injunction. The trial court lacked authority to order such relief in the name of enforcement.¹³

The Uniform Declaratory Judgments Act as embodied in Washington's statutory regime permits a court in some narrow contexts to grant further relief based upon a declaratory judgment. RCW 7.24.080. Such relief may be injunctive. United Nursing Homes, Inc. v. McNutt, 35 Wn.App. 632, 640, 669 P.2d 476 (1983). Such further relief, however, must be obtained by a petition for further relief. RCW 7.24.080. And,

¹³ The fact that Respondents did not base their motion on RCW 7.40 *et seq.* is an implicit acknowledgment that there is no injunctive aspect to the Award or the Judgment to be enforced.

more importantly, the premise of the statutory authority is to permit a court to enforce a judgment it has rendered based on its *own* decision-making under the Uniform Declaratory Judgments Act. See, e.g., United Nursing Homes, Inc., 35 Wn.App. at 640 (court that issued declaratory judgment as to meaning of statute also has authority to order DSHS to make certain payments).

Here, the trial court made no decision on the underlying merits—the substantive decisions that were made were by the Arbitration Panel—and the trial court did not render a declaratory judgment under the Uniform Declaratory Judgments Act. Instead, it confirmed an Arbitration Award under the FAA. Under the FAA, the trial court did not have the authority to do what Respondents’ motion asked.

Even if Respondents had filed a petition for further relief under RCW 7.24.080, they would need to show that the standard for issuing an injunction had been met. They could not do so. To obtain an injunction, a party must demonstrate (1) a clear legal or equitable right, (2) a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of either were resulting in or would result in actual and substantial injury. Washington Fed’n of State Employees, Council 28 AFL-CIO v. State, 99 Wn.2d 878, 888, 665 P.2d 1337 (1983).

Here, there is no clear right to receive proceeds from the PAA-GP

sale as if they were an Interim Distribution. To the contrary, the Award does not address these proceeds at all. And the trial court itself found the existence of the claimed right to constitute a bona fide dispute, one that is fairly debatable. Nor can there be a well-grounded of immediate invasion of the claimed right. To the contrary, Vulcan has paid every true Interim Distribution based on 100% vesting and paid distributions from the PAA-GP sale Vulcan based on 96% vesting, not the 80% they would be entitled to under the VEC Agreement—even though they are not addressed by the Award. Regardless, for this Court to assess the parties' arguments in this respect necessarily requires interpretation of the Award in tandem with the VEC Agreement.

3. Characterizing the Dispute as One to “Enforce” a Judgment Does not Give the Court Authority it Otherwise Lacks under the FAA.

Respondents 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.” CP 301. But § 13 of the FAA only addresses judgments that have been confirmed or modified under §§ 9 or 11. Section 13 does not, as Respondents would have it, negate the limitations that §§ 9 and 13 place on the courts' authority.

The parties' dispute does not concern the mere enforcement of a judgment, notwithstanding the caption of Respondents' motion below. Title 6 of the RCW concerns "Enforcement of judgments," and it addresses such matters as attachment, garnishment and supplemental proceedings. None of these are at issue.

In their motion to enforce, Respondents cited Allen v. American Land Research, 95 Wn.2d 841, 850 (1981), for the proposition that "[a] court that has jurisdiction over the parties and subject matter also has the power to enforce any judgment the court enters." CP 8. In Allen, the trial court entered judgment in favor of a plaintiff class on claims under Washington's Consumer Protection Act required certain defendants to deposit \$250,000 in trust and pay restitution. Id. at 844-45. The defendants failed to do so, and the trial court held them in contempt for this and for one defendant's refusal to appear for post-judgment supplemental proceedings. Id. at 849.

The Washington Supreme Court confirmed that the trial court had the power to require the establishment of the trust fund and to issue a contempt order to coerce compliance and that it had continuing jurisdiction to enter the contempt order against the defendant who failed to appear for supplemental proceedings. Id. at 850. In doing so, the Court noted that the "judgment unmistakably reserves to the trial court

continuing jurisdiction for the purpose of enforcing the judgment.” *Id.* *Allen* stands for the uncontroversial proposition that where a court has issued an injunction it has the authority to ensure compliance with the injunction. RCW 7.40.150. Allen has no bearing on this case.

Respondents here asked the trial court to make new declaratory findings regarding the meaning and effect of the Award (and the underlying VEC Agreement)—*i.e.*, to construe and modify the Award and to review evidence submitted to the Arbitration Panel —and then to enter injunctive relief to compel compliance with the Award so construed. Further, Respondents asserted a new claim and the court effectively rendered summary judgment on the claim. In doing so, the trial court went well beyond mere enforcement of a judgment and exceeded its statutory authority under the FAA.

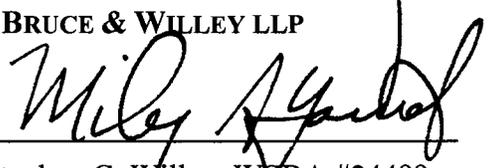
VI. CONCLUSION

The Judgment should be vacated and this matter should be remanded to the trial court with instructions to deny Respondents’ Motion to Enforce Judgment.

Submitted this 31st day of October 2011.

SAVITT BRUCE & WILLEY LLP

By: _____


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date I caused a copy of the attached document – APPELLANTS’ OPENING BRIEF – to be served by messenger on the attorneys of record listed below:

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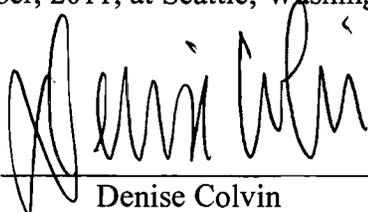
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I hereby certify, under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct.

DATED this 31st day of October, 2011, at Seattle, Washington.



Denise Colvin

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