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No. 67607-5-1

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

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.

**RESPONDENTS' REPLY BRIEF
IN SUPPORT OF CROSS-APPEAL**

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**YARMUTH WILSDON
CALFO PLLC**

Richard C. Yarmuth, WSBA #4990
Matthew A. Carvalho, WSBA #31201
818 Stewart Street, Suite 1400
Seattle, Washington 98101

Attorneys for Respondent
David Capobianco

**McNAUL EBEL NAWROT &
HELGREN PLLC**

Robert M. Sulkin, WSBA #15425
600 University Street, Suite 2700
Seattle, Washington 98101-3143

Attorneys for Respondent
Navin Thukkaram

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Respondents' cross-appeal presents a straightforward issue: was there a bona fide dispute regarding Vulcan's obligation to pay Respondents' wages under the terms of the Judgment? In its briefing, however, Vulcan has attempted to obfuscate this issue by pointing to alleged ambiguities in the underlying compensation agreements, and by arguing that a new arbitration is necessary to resolve those alleged ambiguities. If Vulcan were correct—that enforcing the plain terms of the Judgment requires a whole new arbitration regarding Vulcan's obligations under the underlying contracts—there is little hope for an end to this litigation.

More fundamentally, Vulcan's argument sidesteps the issue that was presented to the trial court and that is now presented to this Court: under the terms of the Judgment, was Vulcan's obligation to pay Respondents debatable? It was not. The Judgment unambiguously defines Vulcan's payment obligations to Respondents in two categories: Exit Distributions (which are distributions resulting from the final sale of an asset), and Interim Distributions (which are distributions of dividends, interest, or other return on investments still owned by Vulcan). There is no dispute that the proceeds from the VEC/PAA Sale at issue in this case were derived from assets that Vulcan continues to own, and thus the

resulting distributions were unquestionably Interim Distributions payable at 100% of Respondents' vested interest.

The trial court recognized this and granted Respondents' Motion to Enforce Judgment ("Motion") on the papers. And yet, the trial court concluded—perhaps in an overly-generous spirit of compromise—that Vulcan was not liable for statutory double damages for wage withholding because a “bona fide dispute” existed as to Vulcan's obligation to pay Respondents at 100% vesting for distributions resulting from the VEC/PAA Sale. That aspect of the trial court's decision was error. Vulcan's obligation to pay Respondents at 100% vesting was—as a matter of law—clear and unambiguous. Accordingly, Respondents should have been awarded statutory damages under RCW 49.52.070.

I. ARGUMENT

A. The Trial Court Construed The Language Of The Judgment.

As explained in Respondents' Opening Brief, an employer who has willfully withheld wages is subject to statutory damages unless the employer demonstrates a “fairly debatable dispute over ... whether all or a portion of the wages must be paid.” *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 162 (1998) (collecting cases). The law is clear that an employer's mere “contrived legal argument” will not support a finding of

a bona fide dispute. *See Flower v. TRA Indus., Inc.*, 127 Wn. App. 13, 37 (2005).

In arguing that its payment obligations were debatable, Vulcan points to the underlying contract that was the subject of the Arbitration, and contends that the VEC Agreement contemplates “at least three circumstances in which distributions may be due ... none of which corresponds with the two categories created by the Award.” *See* Vulcan’s Reply at 1. According to Vulcan, therefore, arbitration is necessary to determine the company’s obligations to Respondents in light of this purported inconsistency between the Judgment and the VEC Agreement. Vulcan’s argument, however, misses the mark.

As an initial matter, Vulcan wrongly focuses on the VEC Agreement, rather than the trial court’s Judgment. The issue before the trial court on the Motion to Enforce Judgment, and now before this Court, concerns Vulcan’s payment obligations under the terms of the Judgment. Respondents are not seeking to enforce the VEC Agreement; they seek to enforce the trial court’s Judgment, which imposed prospective payment obligations on Vulcan. The instant dispute is not about the terms of the VEC agreement; it is about the terms of the Judgment—which the trial court had the authority to construe and enforce without sending the parties back to arbitration.

For example, in *Pelletier & Flanagan, Inc. v. Maine Court Facilities Authority*, 673 A.2d 213, 215 (Me. 1996), a party obtained a favorable arbitration award as well as a judgment confirming that award. When the other party failed to comply with its payment obligations under the judgment, however, the prevailing party compelled an entirely new arbitration to seek damages arising from the failure to pay. *Id.* The prevailing party argued that the failure to pay had triggered the arbitration agreement, as it was related to performance of the parties' contract. *Id.* On appeal, the court disagreed, holding that enforcement of the judgment was a matter for the trial court, not a second arbitration panel. *Id.* As the court explained, once the trial court had confirmed the first arbitration award, "[e]nforcement of what was then a judgment was the exclusive concern of the court." *Id.* Applying a provision of the Uniform Arbitration Act that is similar to the FAA, the court noted that, "[b]ecause the Act specifically provides for *judicial* enforcement of arbitration awards, it would be inconsistent to find an implied agreement to arbitrate this dispute regarding the claimed failure to honor an award." *Id.* (emphasis added).

The same is true in this case. As in *Pelletier*, Vulcan has failed to comply with its payment obligations under the trial court's Judgment. Because the FAA expressly provides for judicial enforcement of

arbitration awards, however, and because the Award has been incorporated in a formal Judgment, “it would be inconsistent to find an implied agreement to arbitrate this dispute regarding the claimed failure to honor an award.” *Id.* Rather, enforcement is now “the exclusive concern of the court.” *Id.* Accordingly, it is the terms of the Judgment, not the terms of the underlying contracts, that determine whether a bona fide dispute existed.

B. Vulcan’s Obligation To Pay Respondents At 100% Of Their Vested Interests Was Clear.

As explained in Respondents’ Opening Brief, the trial court’s Judgment separates Vulcan’s remaining financial obligations to Respondents into two categories: Exit Distributions and Interim Distributions. Those two categories are temporal. Under the terms of the 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). The Judgment is equally clear—and Vulcan does not dispute—that Vulcan is required to

pay Exit Distributions at 96% of Respondents' vested interests, and Interim Distributions at 100% of their vested interests.

The wages at issue here were payable as a result of the VEC/PAA Sale, a transaction in which Vulcan sold some, but not all, of its interest in Plains All American Pipeline GP LLC. In fact, 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.” There is, quite simply, no plausible reading of the Judgment that would support Vulcan’s contrived interpretation. As a result, the payments owing to Respondents as a result of the VEC/PAA Sale constituted Interim Distributions, and the trial court’s Judgment required Vulcan to pay Respondents for the distribution at the 100% vesting level.

C. Contrary To Vulcan’s Assertions, Respondents Have Not Taken Inconsistent Positions—To The Contrary, It Is Vulcan’s Position That Has Shifted.

Vulcan repeatedly asserts that Respondents initially “took the position” that the VEC/PAA Sale resulted in an Exit Distribution, and suggests that Respondents changed their position by arguing in the

Motion to Enforce Judgment that the transaction resulted in Interim Distributions. *See* Appellants' Reply Brief And Opposition To Cross-Appeal ("Vulcan Opposition") at 12 ("Either Respondents were acting in bad faith when they took their initial position or the meaning of 'Future Interim Distributions,' is, at best, ambiguous."). That is glaringly incorrect.

In fact, it was Vulcan who initially characterized the VEC/PAA Sale as an Exit Distribution in letters dated December 30, 2010 and January 14, 2011. CP 149, 151. In response to those letters, Respondent David Capobianco wrote to Vulcan that if the transaction constituted an Exit Distribution "as indicated in the letters from Vulcan," then the VEC/PAA Sale triggered the payment of other contractual obligations—specifically, a significant payment referred to as a "true-up." CP 153. Accordingly, Mr. Capobianco requested information from Vulcan about the calculations associated with the VEC/PAA Sale.

After receiving Mr. Capobianco's email, Vulcan changed its position and wrote to the Respondents that the VEC/PAA Sale did not, in fact, constitute an Exit, and thus no true-up payment was due.¹ In

¹ Vulcan Associate General Counsel Rich Sohn wrote that "the true-up amounts are due only upon a final Disposition or a Deemed Disposition . . . and [the Sale] is neither of the two." CP 164. As explained in Respondents' Opening Brief at page 9 and footnote 1, the terms "final Disposition" and "Exit" are synonymous.

response to that change of position, Mr. Capobianco then pointed out to Vulcan that if the Sale “was not a final disposition, we should have been paid 100% of our vested interest, rather than the 96% you have paid us.” CP 199. Vulcan then stated that it would not pay Respondents at the 100% level, in part because the Sale was not “recurring” (a wholly new concept of Vulcan’s own creation, which appears nowhere in the Plan, the Award, or the Judgment, but suddenly appeared in Vulcan’s correspondence to Respondents and in its briefing to this Court). CP 204.²

What Vulcan characterizes as Respondents “initial position” in fact was simply a response to Vulcan’s characterization of its own transaction in its initial correspondence to Respondents. Only when Vulcan’s position began to shift did it become apparent what Vulcan was attempting to do: namely, to contrive a new argument that would enable Vulcan to withhold Respondents’ wages.

D. The Trial Court Was Not Required To Hold An Evidentiary Hearing To Construe And Enforce Its Judgment.

² This time, Mr. Sohn wrote that the “sale proceeds were not an interim distribution of dividends, interest or other recurring return on an investment.” CP 204 (emphasis added). Vulcan strategically inserted the term “recurring” in an attempt to strengthen its argument that the sale proceeds were not Interim Distributions; and yet, that term “recurring” never appears anywhere in any of the relevant provisions of the VEC Plan, the Arbitration Award, or the Judgment. Notably, in its briefing to this Court, Vulcan again uses the term “recurring” to characterize Interim Distributions. *See* Vulcan Opposition at 10 (“[A]n ‘interim distribution’ refers to recurring distributions...”).

Vulcan incorrectly asserts in its brief that Respondents “asked the trial court . . . for a judgment in their favor without a hearing” and “insist they were entitled to proceed directly to judgment—without even having to meet the standards of CR 56.” Vulcan Brief at 24. Not only are those assertions false—in fact, it was the trial court that concluded no hearing was necessary and that the Motion could be resolved on the papers—they incorrectly presume that a CR 56 standard is applicable and then assert that whether a bona fide dispute exists is “of course, questions of fact.” Vulcan Opposition at 24.

The case law contradicts that. In fact, a court may decide a claim for willful withholding of wages as a matter of law “where reasonable minds could reach but one conclusion from the evidence presented.” *See Flower v. TRA Indus., Inc.*, 127 Wn. App. 13, 36-37 (2005). For example, in *Flower v. TRA Industries*, the trial court had dismissed an employee’s wage withholding claim as a matter of law. On appeal, the Court of Appeals reversed and held that the employee was entitled to statutory damages as a matter of law. *Id.* (“[The employer’s] implausible rationale for its failure to pay [the wages] supports a finding that there is substantial evidence of its willful and intentional deprivation...”). As the court in that case explained, “[courts] do not apply a particularly stringent test to determine whether there was willful

failure to pay wages; it means that the failure to pay was volitional or that the employer knows what [it] is doing, intends to do what [it] is doing, and is a free agent.” *Id.* at 37.

Here, Vulcan had the opportunity to—and in fact did—submit evidence in support of its position. *See* CP 222-297 (Declarations of Miles Yanick and Skyler Nelson, with exhibits). Although it requested oral argument on the Motion, Vulcan never indicated to the trial court that there might be other evidence or live testimony that might support its position. Accordingly, Vulcan cannot complain now that the trial court failed to consider the Motion on a sufficient evidentiary record. The Judgment and the evidence submitted by the parties provided the trial court a fully adequate record on which to review the Motion. *See Flower*, 127 Wn. App. at 36-37.

E. The Parties Did Not Agree To Arbitrate A Dispute Over The Trial Court’s Judgment.

Vulcan’s position that a bona fide dispute existed as to its payment obligations, and its argument that the parties have agreed to arbitrate that dispute, are incorrect. As explained, the issue presented to the trial court was whether Vulcan failed to comply with the trial court’s Judgment—a question the parties have never agreed to arbitrate. The parties’ arbitration agreement states in relevant part 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. That language does not embrace the instant dispute.

As an initial matter, the parties’ underlying dispute has *already* been settled, “finally and exclusively,” by arbitration; the resultant Award in Respondents’ favor has been confirmed and incorporated into a final Judgment. Thus, the Respondents are not seeking to enforce the VEC Agreement, or even the Arbitration Award; they are seeking to enforce the trial court’s Judgment, which imposes clear, prospective payment obligations on Vulcan.

There can be no question that a trial court has a clear interest—and authority—to ensure that its judgments are given full force and effect. *See Goodsell v. Goodsell*, 38 Wn.2d 135, 138 (1951); *see also N. Commercial Co. v. E.J. Herman 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. Vulcan’s attempt to distinguish these cases reveals a fundamental misunderstanding of the FAA, which expressly provides that a judgment confirming an arbitration award “may

be enforced as if it had been rendered in an action in the court in which it is entered.” 9 U.S.C. § 13.

If the Court accepts Vulcan’s broad interpretation of the arbitration agreement—that it requires arbitration not only for disputes over the VEC Agreement, but also for disputes over the enforceability of a judgment *resolving a prior dispute*—there is little hope for an end to this litigation. Vulcan’s interpretation would deny the trial court’s authority to enforce its judgments. Not only does this directly contravene the FAA’s express requirement that judgments confirming arbitration awards be enforced the same as other judgments, but it also undermines the clear policy goals of arbitration: finality and efficiency. *See Broom v. Morgan Stanley DW, Inc.*, 169 Wn.2d 231, 239 (2010) (explaining that “the purposes of arbitration [are] finality and efficiency”). As one court has explained, parties should not be permitted “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.” *In re Akin Gump Strauss Hauer & Feld, LLP*, 252 S.W.3d 480 (Tex. App. 2008).

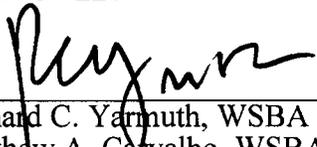
For all of the reasons set forth in this brief, the Court should reject Vulcan’s contention that a bona fide dispute existed as to its

payment obligations under the Judgment, and likewise should reject Vulcan's argument that such a dispute requires returning to yet another arbitration. The trial court should be affirmed insofar as it enforced the judgment, but reversed to the extent it denied Respondents' request for statutory damages for willful withholding of wages.

Dated: January 30, 2012.

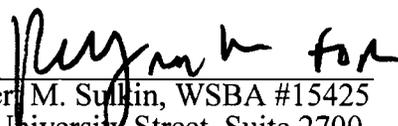
Respectfully submitted,

**YARMUTH WILSDON
CALFO PLLC**

By: 
Richard C. Yarmuth, WSBA #4990
Matthew A. Carvalho, WSBA #31201
818 Stewart Street, Suite 1400
Seattle, Washington 98101

*Attorneys for Respondent
David Capobianco*

**McNAUL EBEL NAWROT &
HELGREN PLLC**

By: 
Robert M. Sulkin, WSBA #15425
600 University Street, Suite 2700
Seattle, Washington 98101-3143

*Attorneys for Respondent
Navin Thukkaram*

CERTIFICATE OF SERVICE

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

Attorneys for Appellants/Cross-Appeal Respondents

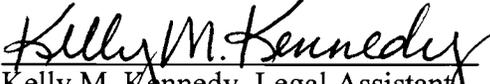
Stephen C. Willey
Miles A. Yanick
Savitt Bruce & Willey LLP
1425 Fourth Avenue, Suite 800
Seattle, WA 98101

Attorneys for Respondent/Cross-Appeal Appellant Thukkaram

Robert M. Sulkin
McNaul Ebel Nawrot & Helgren PLLC
600 University Street, Suite 2700
Seattle, WA 98101

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

Dated: January 30, 2012, at Seattle, Washington.


Kelly M. Kennedy, Legal Assistant

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