

No. 71855-0-1

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

TRACI TURNER,

Appellant,

v.

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

Respondents and Cross-Appellant.

**ANSWERING BRIEF OF RESPONDENTS VULCAN INC.,
PAUL ALLEN, AND JODY ALLEN, AND OPENING BRIEF
OF RESPONDENT/CROSS-APPELLANT VULCAN INC.**

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 DIVISION I

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ISSUES PRESENTED IN APPELLANT TURNER’S APPEAL	2
III. ASSIGNMENTS OF ERROR AND ISSUES PRESENTED IN VULCAN’S CROSS-APPEAL	3
IV. STATEMENT OF THE CASE	3
A. Employment on the Vulcan Executive Protection Team	3
B. <i>Turner I</i> and Judge Oishi’s Order Compelling Arbitration	5
C. <i>Turner II</i> and Judge Benton’s Order Compelling Arbitration	6
D. Arbitration Proceedings Before Arbitrator Carolyn Cairns.....	7
E. Judge Heller Confirms the Final Arbitration Award in Part, but Vacates the Fee Award on Public Policy Grounds	10
F. On Remand, the Arbitrator Enters an Amended Final Award that Includes a Revised Fee Award to Vulcan.....	11
G. Judge Heller Confirms the Amended Final Award and Denies Turner’s Motion for Attorneys’ Fees.....	12
V. SUMMARY OF THE ARGUMENT	13
VI. ARGUMENT.....	15
A. Standard of Review	15
1. Decisions of Superior Court Subject to De Novo Review	15
2. Turner Must Show Prejudice.....	15
B. The Superior Court Properly Ordered Arbitration	15
1. Vulcan Correctly Informed the Court Concerning Which Issues Were for the Arbitrator to Decide.....	15
2. Judge Oishi Properly Compelled Arbitration in <i>Turner I</i> , a Decision that Turner Does Not Challenge	20

TABLE OF CONTENTS

(continued)

	Page
3. Judge Benton Properly Compelled Arbitration of All Claims Asserted in <i>Turner I</i> and <i>Turner II</i>	22
a. All of Turner’s Claims Were Subject to Arbitration Based on the Preclusive Effect of Judge Oishi’s Order	23
(i) Claim Preclusion Applies	23
(ii) Issue Preclusion Applies.....	27
b. Judge Benton Correctly Included an Alternative Basis for Compelling Arbitration	27
(i) The Arbitration Clause Is Not Substantively Unconscionable	28
(a) Confidentiality Provision.....	28
(b) “Loser Pays” Provision.....	31
(c) “Unilateral Litigation Option”	32
(ii) The Arbitration Clause Is Not Procedurally Unconscionable	33
4. The Arbitration Agreement Violated Neither Turner’s Right to a Jury Trial, Nor Separation of Powers	37
C. Turner’s Challenge to the Superior Court Order Confirming the Arbitrator’s Revised Fee Award Is Without Merit	39
1. Turner’s Challenge to the Arbitrator’s Revised Fee Award Was Not Raised Below	40
2. Turner Fails to Show that the Amended Final Arbitration Award Violates Public Policy	40
a. Judicial Review of Arbitration Awards Is “Extremely Narrow and Exceedingly Deferential”	40

TABLE OF CONTENTS
(continued)

	Page
b. The Public Policy Exception Is Also Exceedingly Narrow	41
c. There Is Not an Explicit, Well-Defined, and Dominant Public Policy Against Fee Awards for Employers Who Prevail on Nonstatutory Claims	43
D. The Superior Court Correctly Denied Turner’s Motion for Attorneys’ Fees, as She Was Not a Prevailing Party	45
VII. ARGUMENT FOR VULCAN’S CROSS-APPEAL	46
A. Standard of Review	46
B. The Superior Court Erred in Vacating the Arbitrator’s Original Award of Attorneys’ Fees to Vulcan.....	46
1. The Original Fee Award Was Not Contrary to an Explicit, Well-Defined, and Dominant Public Policy	46
2. Upholding the Original Fee Award Would Not Undermine the Identified Public Policy	49
VIII. ATTORNEYS’ FEES ON APPEAL	50
IX. CONCLUSION	50

APPENDICES

- A: Employee Intellectual Property Agreement (Jan. 16, 2011)
- B: Guaranteed Bonus Agreement (July 26, 2011)
- C: Order Granting Defendant Vulcan Inc.'s Motion to Compel Arbitration and Stay Proceedings (Judge Oishi, Oct. 5, 2011)
- D: Stipulated Order on Parties' Motions Argued on April 5, 2012 (including denial of Turner's CR 60 Motion, Judge Benton, Apr. 16, 2012)
- E: Order Compelling Plaintiff to Arbitrate Claims and Staying Proceedings (Judge Benton, June 8, 2012)
- F: Findings of Fact, Conclusions of Law and Interim Arbitration Award (Dec. 21, 2012)
- G: Findings of Fact, Conclusions of Law, and Final Arbitration Award (Mar. 7, 2013)
- H: Memorandum Opinion (confirming in part and vacating in part Final Arbitration Award, Judge Heller, Sept. 27, 2013)
- I: Amended Order Confirming In Part and Vacating In Part Arbitration Award, and Remanding for Consideration of Alternative Basis for Fee Award (Judge Heller, Oct. 30, 2013)
- J: Amended Findings of Fact, Conclusions of Law, and Final Arbitration Award (Jan. 30, 2014)
- K: Order Denying Plaintiff's Motion for Award of Attorneys' Fees (Judge Heller, Apr. 1, 2014)
- L: Order Confirming Final Arbitration Award (Judge Heller, Apr. 1, 2014)
- M: Final Judgment on Final Arbitration Award (Judge Heller, Apr. 1, 2014)
- N: AAA Employment Arbitration Rule 29

TABLE OF AUTHORITIES

	Page
FEDERAL CASES	
<i>ARW Exploration Corp. v. Aguirre</i> , 45 F.3d 1455 (10th Cir. 1995)	41
<i>Buckeye Check Cashing, Inc. v. Cardegna</i> , 546 U.S. 440 (2006)	16, 17, 20, 21
<i>Doctor's Assocs., Inc. v. Casarotto</i> , 517 U.S. 681 (1996)	17
<i>E. Assoc. Coal Corp. v. United Mine Workers of Am., Dist. 17</i> , 531 U.S. 57 (2000)	41
<i>ESCO Corp. v. Bradken Res. Pty Ltd.</i> , No. 10-788-AC, 2011 WL 1625815, (D. Or. Jan. 31, 2011), <i>report and recommendation adopted</i> , 2011 WL 1630355 (D. Or. Apr. 27, 2011)	44
<i>Gore v. Alltel Commc'ns, LLC</i> , 666 F.3d 1027 (7th Cir. 2012)	18
<i>Howsam v. Dean Witter Reynolds, Inc.</i> , 537 U.S. 79 (2002)	18
<i>Jenkins by Jenkins v. Missouri</i> , 127 F.3d 709 (8th Cir. 1997)	45
<i>Jenkins v. First Am. Cash Advance of Ga., LLC</i> , 400 F.3d 868 (11th Cir. 2005)	13, 19, 31
<i>JLM Indus., Inc. v. Stolt-Nielsen SA</i> , 387 F.3d 163 (2d Cir. 2004)	19
<i>Madol v. Dan Nelson Auto. Grp.</i> , 372 F.3d 997 (8th Cir. 2004)	18
<i>Matthews v. Nat'l Football League Mgmt. Council</i> , 688 F.3d 1107 (9th Cir. 2012)	41, 42, 49
<i>Moses v. Phelps Dodge Corp.</i> , 826 F. Supp. 1234 (D. Ariz. 1993)	44
<i>Perez v. Qwest Corp.</i> , 883 F. Supp. 2d 1095 (D.N.M. 2012)	48

TABLE OF AUTHORITIES
(continued)

	Page
<i>Preston v. Ferrer</i> , 552 U.S. 346 (2008)	16, 17
<i>Prima Paint Corp. v. Flood & Conklin Manufacturing Co.</i> , 388 U.S. 395 (1967)	17, 19, 20, 21
<i>Rojas v. TK Commc 'ns, Inc.</i> , 87 F.3d 745 (5th Cir. 1996)	19
<i>Se. Res. Recovery Facility Auth. v. Montenay Int'l Corp.</i> , 973 F.2d 711 (9th Cir. 1992)	24
<i>Southland Corp. v. Keating</i> , 465 U.S. 1 (1984)	16, 17
<i>Stead Motors of Walnut Creek v. Auto. Machinists Lodge No.</i> 1173, 886 F.2d 1200 (9th Cir. 1989)	47
<i>Towers, Perrin, Forster & Crosby, Inc. v. Brown</i> , 732 F.2d 345 (3d Cir. 1984)	24, 25
<i>UMass Mem'l Med. Ctr., Inc. v. United Food & Commercial Workers Union</i> , 527 F.3d 1 (1st Cir. 2008)	40, 41
<i>United Paperworkers Int'l Union v. Misco, Inc.</i> , 484 U.S. 29 (1987)	41
 WASHINGTON CASES	
<i>Adler v. Fred Lind Manor</i> , 153 Wn.2d 331 (2004)	32, 38, 39
<i>Allied Daily Newspapers of Wash. v. Eikenberry</i> , 121 Wn.2d 205 (1993)	21
<i>Blair v. Wash. State Univ.</i> , 108 Wn.2d 558 (1987)	45
<i>Boguch v. Landover Corp.</i> , 153 Wn. App. 595 (2009)	47
<i>Brown v. MHN Government Services, Inc.</i> , 178 Wn.2d 258 (2013)	18, 20, 32

TABLE OF AUTHORITIES
(continued)

	Page
<i>City of Spokane v. Spokane Police Guild</i> , 87 Wn.2d 457 (1976).....	39
<i>Ensley v. Pitcher</i> , 152 Wn. App. 891 (2009).....	24, 26
<i>Gandee v. LDL Freedom Enterprises, Inc.</i> , 176 Wn.2d 598 (2013).....	32, 49
<i>Gorden v. Lloyd Ward & Associates, P.C.</i> , 180 Wn. App. 552 (2014).....	20, 37
<i>Hill v. Garda CL Northwest, Inc.</i> , 179 Wn.2d 47 (2013).....	20, 32
<i>Hume v. Am. Disposal Co.</i> , 124 Wn.2d 656 (1994).....	44
<i>International Union of Operating Engineers, Local 286 v. Port of Seattle</i> , 176 Wn.2d 712 (2013).....	42, 43, 49
<i>Karlberg v. Otten</i> , 167 Wn. App. 522 (2012).....	31, 40
<i>Kitsap Cnty. Deputy Sheriff's Guild v. Kitsap Cnty.</i> , 167 Wn.2d 428 (2009).....	41, 42, 46
<i>Kuhlman v. Thomas</i> , 78 Wn. App. 115 (1995).....	26
<i>Labriola v. Pollard Group, Inc.</i> , 152 Wn.2d 828 (2004).....	33
<i>McKee v. AT & T Corp.</i> , 164 Wn.2d 372 (2008).....	20, 28, 29
<i>Mendez v. Palm Harbor Homes, Inc.</i> , 111 Wn. App. 446 (2002).....	25
<i>Nelson v. McGoldrick</i> , 127 Wn.2d 124 (1995).....	28
<i>Organon, Inc. v. Hepler</i> , 23 Wn. App. 432 (1979).....	33

TABLE OF AUTHORITIES
(continued)

	Page
<i>Saleemi v. Doctor’s Assocs., Inc.</i> , 176 Wn.2d 368 (2013).....	passim
<i>State ex rel. Everett Fire Fighters Local No. 350 v. Johnson</i> , 46 Wn.2d 114 (1955).....	38, 39
<i>State v. Scott</i> , 110 Wn.2d 682 (1988).....	37
<i>Townsend v. Quadrant Corp.</i> , 173 Wn.2d 451 (2012).....	20
<i>Walters v. AAA Waterproofing, Inc.</i> , 151 Wn. App. 316 (2009).....	30, 32
<i>Williams v. Leone & Keeble, Inc.</i> , 171 Wn.2d 726 (2011).....	23
<i>Yakima County v. Yakima County Law Enforcement Officers Guild</i> , 157 Wn. App. 304 (2010).....	26, 27
<i>Zuver v. Airtouch Commc’ns, Inc.</i> , 153 Wn.2d 293 (2004).....	passim
 FEDERAL STATUTES	
9 U.S.C. § 2	16, 17
9 U.S.C. § 4	17, 32
Federal Arbitration Act, 9 U.S.C. §§ 1-16.....	passim
 WASHINGTON STATUTES	
Ch. 49.60 RCW	42
Washington Uniform Arbitration Act (Ch. 7.04A RCW)	20, 25
 RULES	
RAP 2.5	37
RAP 18.1	50
Superior Court Civil Rule 60.....	6, 7, 20, 22

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

AAA Employment Arbitration Rule 29.....	8, 9, 28, 33
Restatement (Second) of Judgments § 13.....	24

I. INTRODUCTION

Appellant Traci Turner asks this Court to disregard long-settled state and federal law governing arbitrability and enforcement of arbitration awards, and to promulgate a new public policy that disfavors arbitration in employment actions. The Court should decline that invitation to revise Washington law and challenge federal supremacy in this area.

Turner complains that Vulcan “pursued” and “bull[ied]” her in arbitration. In reality, Vulcan simply enforced a contractual right to an arbitral forum, which afforded Turner ample opportunity to fairly resolve the matters in dispute. Instead of availing herself of that opportunity, Turner devoted extraordinary efforts to delay and obstruction. Within two weeks of the start of her first lawsuit against Vulcan Inc. (*“Turner I”*), Superior Court Judge Patrick Oishi ruled that she must pursue her claims in arbitration. Turner then voluntarily dismissed her claims, but three months later, re-asserted them in a new lawsuit (*“Turner II”*), along with five additional claims that were also within the scope of the arbitration agreement. Judge Monica Benton then reached the same conclusion as Judge Oishi and granted Vulcan’s second motion to compel arbitration.

A third Superior Court Judge, Bruce Heller, then confirmed the Arbitrator’s award, which ruled in Vulcan’s favor on the merits of all

claims. Aside from one aspect of Judge Heller’s decision—his ruling that the initial award of attorneys’ fees to Vulcan violated public policy, which is the subject of Vulcan’s cross-appeal—all of these decisions were in strict conformity with governing law, and should be affirmed.

II. ISSUES PRESENTED IN APPELLANT TURNER’S APPEAL

Order Compelling Arbitration

1. Did the Superior Court properly compel arbitration of the claims asserted in *Turner II* based on claim preclusion and/or issue preclusion, given the order compelling arbitration in *Turner I*?

2. Did the Superior Court properly compel arbitration in *Turner II* on the alternative ground that the arbitration clause was neither substantively nor procedurally unconscionable?

3. Should the Court reverse the Superior Court’s order compelling arbitration based on constitutional arguments that Turner first raises on appeal (right to a jury and separation of powers)?

Issues Regarding Attorneys’ Fees

4. Does the Arbitrator’s revised award of attorneys’ fees to Vulcan violate an explicit, well-defined, and dominant public policy, where no Washington authority bars a fee award to an employer prevailing on nonstatutory claims?

5. Did the Superior Court err by denying Turner's motion for attorneys' fees where she was not a prevailing party?

III. ASSIGNMENTS OF ERROR AND ISSUES PRESENTED IN VULCAN'S CROSS-APPEAL

Assignment of Error: The Superior Court erred in vacating the Arbitrator's initial attorneys' fee award to Vulcan in its September 27, 2013, Memorandum Opinion and October 30, 2013, Order.

Issue Presented: Did the Superior Court err in vacating the Arbitrator's initial fee award to Vulcan on public policy grounds, where this case involves both statutory and nonstatutory claims and no Washington authority bars a fee award to a party who successfully compels arbitration?

IV. STATEMENT OF THE CASE

A. Employment on the Vulcan Executive Protection Team

Appellant Traci Turner was employed by Vulcan as an Executive Protection ("EP") Specialist from January 2011 until she resigned in September 2011. CP 271. Vulcan's EP team provides protection for Vulcan Chairman Paul G. Allen and members of his family. CP 271.

As a condition of her employment, Turner signed an Employee Intellectual Property Agreement ("EIPA"), which requires her to "hold Vulcan's confidential information in strict confidence." CP 271, 275-78,

2853-57 (App. A).¹ The EIPA defines Vulcan’s confidential information to include not only sensitive business information, but also “information about Paul Allen, his family, friends, . . . [and] personal interests.” CP 2853. This privacy protection is critically important, as EP team members in the course of their work necessarily have access to the most private and personal information about Mr. Allen and his family members.

The EIPA also contains a bilateral attorneys’ fee provision, which provides that “[i]n any lawsuit arising out of or relating to this agreement or my employment, . . . the prevailing party shall recover their reasonable costs and attorneys[’] fees, including on appeal.” CP 2856.

In July 2011, Turner signed a “Guaranteed Bonus Agreement” (“GBA”) with Vulcan, which *guaranteed* an otherwise discretionary bonus for 2011 at 125% of her bonus target, in exchange for renewed confidentiality obligations, a release of claims, and an arbitration provision. CP 280-83 (App. B). The guaranteed bonus was over \$25,000.²

The arbitration clause in the GBA provides that “[a]ny and all claims, disputes, or other matters in controversy on any subject arising out

¹ The EIPA signed by Turner is incorrectly dated 2010, instead of 2011. *See* CP 3991, 3994.

² This payment would be prorated if her employment ended during the year.

of or related to this Agreement and your employment shall be subject to confidential arbitration.” CP 281.

B. *Turner I* and Judge Oishi’s Order Compelling Arbitration

In September 2011, Turner resigned from Vulcan and filed suit against the company and several of its officers, asserting claims arising out of her employment. CP 37-39 (alleging constructive termination, fraud, hostile work environment, “tort,” defamation, gender discrimination, harassment, and retaliation). Based on the arbitration clause in the GBA, Vulcan promptly moved to compel arbitration. CP 62-72. Turner opposed, filing a brief that identified various defenses (including scope of the arbitration clause, lack of consideration, lack of mutuality, and procedural and substantive unconscionability), but making little effort to show how any of them applied to the facts of her case. CP 75-79. The declaration that Turner filed with her opposition contained allegations relevant only to the procedural unconscionability defense. CP 1895-97.

On October 6, 2011, Judge Patrick Oishi entered an Order Granting Vulcan’s Motion to Compel Arbitration. CP 95-96 (App. C). Turner moved for reconsideration, but again made no argument going solely to the validity of the arbitration provision in the GBA. CP 98-103. Vulcan opposed reconsideration, pointing out (as it has consistently in this case) that challenges to the GBA as a whole should be resolved by the

Arbitrator. CP 106-19. Before Judge Oishi could rule on the motion for reconsideration, Turner voluntarily dismissed her suit. CP 122-25.

In December 2011, Vulcan commenced a AAA arbitration to resolve the dispute. CP 412-21, 2787. Vulcan's arbitration demand included claims for breach of contract for repayment of signing and relocation bonuses, and for declaratory relief on the validity of the release in the GBA, among other claims. CP 419-20.

C. *Turner II* and Judge Benton's Order Compelling Arbitration

Despite Judge Oishi's Order referring her claims to arbitration, Turner filed a second lawsuit against Vulcan in January 2012, reasserting five claims from *Turner I* and adding five new employment-related claims. CP 1-20. *Turner II* was assigned to Judge Monica Benton.

Once again, Vulcan moved to have the claims referred to arbitration and dismissed from Superior Court. CP 236-65. Vulcan argued that, among other things, Judge Oishi had already ordered that Turner's employment-related claims be resolved in arbitration and, therefore, the doctrines of *res judicata* and collateral estoppel prevented her from re-litigating that issue. CP 250-61.³ Turner responded by filing a CR 60 motion for relief from Judge Oishi's Order. CP 590-602.

³ Consistent with its briefing to Judge Oishi, Vulcan explained to Judge Benton that under the Federal Arbitration Act, which governs here, arguments going to the validity of the GBA *as a whole* should be decided by the Arbitrator, while those focused

At an April 5, 2012, hearing, Judge Benton denied Turner’s CR 60 motion (concluding that the *Turner I* claims must be arbitrated, as ordered by Judge Oishi) and requested supplemental briefing on the issue of whether Turner’s five new claims were subject to arbitration. CP 1483-88 (App. D).⁴ After additional briefing focusing on preclusion and unconscionability, Judge Benton granted Vulcan’s motion to dismiss and ordered Turner to arbitrate all of her claims—just as Judge Oishi had ordered eight months earlier. CP 2210-13 (App. E). Judge Benton ruled that the claims were subject to “res judicata and/or collateral estoppel” and, in the alternative, that the GBA “is not procedurally or substantively unconscionable or otherwise unenforceable.” CP 2212.

D. Arbitration Proceedings Before Arbitrator Carolyn Cairns

Meanwhile, as these issues were being litigated before Judge Benton, the arbitration proceeded under the AAA Employment Arbitration Rules, with Seattle attorney Carolyn Cairns serving as Arbitrator. Turner was a reluctant participant, repeatedly moving (unsuccessfully) to stay and then to dismiss the arbitration. *See, e.g.*, CP 2764-70, 2791-95, 2882-98,

solely on the arbitration provision are for the court to decide. *See, e.g.*, CP 252-54, 260-61, 1847-55. Turner’s contention that Vulcan “pivoted” on this issue, arguing one thing to Judge Oishi and another to Judge Benton (*see, e.g.*, Turner Br. at 12, citing CP 1991 and CP 2008-09) is false, as reference to Vulcan’s briefing in the record reveals. *Compare, e.g.*, CP 89-90, 106-19, with CP 252-54.

⁴ *See also* CP 4239-40 (“THE COURT: I do want an order that reflects the court’s holding that the CR 60 motion is denied, that the claims in Turner 2 that are identical to the claims in Turner 1 be referred to arbitration . . .”).

2904-16, 2927-3042, 3038-42. Contrary to Turner's representations, however (e.g., Turner Br. at 14), discovery was available to her within the arbitration, including interrogatories, requests for production, and depositions. *See, e.g.*, CP 1740-66, 2792, 2912.

Consistent with the AAA Rules, Vulcan sought and obtained leave to file summary judgment motions on two claims: (1) Turner's defamation claim and (2) Vulcan's claim for declaratory relief on the validity of the release set forth in the GBA. In July 2012, Turner's counsel submitted a brief in opposition to the defamation motion and opposed Vulcan's request for leave to file the motion on the release. CP 2793, 2796. In August 2012, however, prior to the briefing on the motion on the release, Turner's counsel gave notice that he was withdrawing from his representation of Turner effective September 6, 2012. Thereafter, Turner continued on a *pro se* basis, until October 17, 2012, when she informed the Arbitrator that she was "withdrawing from the arbitration proceedings." CP 3083.

Despite Turner's withdrawal, the arbitration proceeded on the merits, consistent with AAA Rules. App. N (Rule 29). On October 31, 2012, the Arbitrator issued written decisions granting Vulcan's summary judgment motions on defamation and on the validity of the release. CP 2795-96, 3086-92. In considering the motion on the release, the Arbitrator reviewed the briefing in *Turner I* and *Turner II* regarding the GBA, so she

was well aware of Turner's challenges to its enforceability, including her arguments regarding procedural unconscionability. CP 3086-87.⁵

On November 26, 2012, a one-day hearing was held before the Arbitrator in which Vulcan elicited live testimony from four witnesses in support of its breach of contract claim and its claim for declaratory judgment on Turner's employment-related claims. CP 2796. Turner declined to participate. *Id.*

On December 21, 2012, the Arbitrator issued her Findings of Fact, Conclusions of Law, and Interim Arbitration Award ("Interim Award"). CP 3990-97 (App. F). The Arbitrator found and concluded that (1) Turner's claims were rebutted and therefore dismissed with prejudice; (2) Vulcan was entitled to declaratory relief that it was not liable for claims arising out of Turner's employment; and (3) Vulcan prevailed on its breach of contract claim in the amount of \$5,696.63. CP 3995-97.

In the Interim Award, the Arbitrator also concluded that the fee provision in the EIPA entitled Vulcan to an award of reasonable attorneys' fees incurred in connection with *nonstatutory* claims (i.e., not with respect to statutory discrimination and wage claims, where the statutes only permit prevailing plaintiffs to recover fees). CP 3995-96. In its motion

⁵ Turner's allegations regarding procedural unconscionability (and other challenges to the GBA) were disputed by Vulcan and the other parties. *See, e.g.*, CP 4218-20.

for attorneys' fees, Vulcan limited its request to a portion of fees incurred in securing its *second* order compelling arbitration (i.e., in *Turner II*)—fees incurred because Turner defied Judge Oishi's Order compelling arbitration in *Turner I*. CP 3103-14. Vulcan also included an *alternative* fee request for prevailing on its two motions for partial summary judgment, which also involved nonstatutory claims. CP 3112-13.

On March 7, 2013, the Arbitrator entered her Findings of Fact, Conclusions of Law, and Final Arbitration Award ("Final Award"), which included an award of \$113,235 in attorneys' fees to Vulcan based solely on its efforts in *Turner II* to compel arbitration (i.e., she did not reach Vulcan's alternative fee request). CP 3117-20 (App. G).

E. Judge Heller Confirms the Final Arbitration Award in Part, but Vacates the Fee Award on Public Policy Grounds

Vulcan moved to confirm the Final Award. CP 2214-21. On March 21, 2013, Turner's current counsel appeared in the case, prompting Judge Benton's recusal and reassignment of the case to Judge Bruce Heller. CP 2629, 4280-81. In June, Turner cross-moved to vacate the Final Award, arguing that the Arbitrator improperly denied Turner's request for a four-month continuance and that the award of attorneys' fees was "completely irrational." CP 2597-2619, 3220-46, 4536.

At a hearing held on July 19, 2013, Judge Heller requested supplemental briefing on an issue he raised *sua sponte*: whether the attorneys' fees awarded to Vulcan for its efforts to compel arbitration a second time should be vacated as contrary to public policy. CP 3283, 4538. After supplemental briefing, CP 3261-94, 3372-87, Judge Heller issued a Memorandum Opinion on the cross-motions, CP 3417-33 (App. H). Judge Heller confirmed the Final Award in part, rejecting Turner's arguments regarding Arbitrator "misconduct" (by declining to grant a continuance) and that the fee award was "irrational." CP 3422-27. The court concluded, however, that the fee award violated public policy, and therefore vacated that portion of the Final Award. CP 3427-32. This decision is the subject of Vulcan's cross-appeal.

On October 30, 2013, Judge Heller issued an order confirming in part, vacating in part, and remanding the matter to the Arbitrator for the limited purpose of considering Vulcan's *alternative* fee request related to nonstatutory claims. CP 3500-02 (App. I).

F. On Remand, the Arbitrator Enters an Amended Final Award that Includes a Revised Fee Award to Vulcan

On remand, after briefing by the parties and consistent with Judge Heller's Order, the Arbitrator awarded Vulcan \$39,524.50 in attorneys' fees for prevailing on two motions for partial summary judgment on

nonstatutory claims: (1) Turner's defamation claim and (2) Vulcan's claim for declaratory relief on the enforceability of the release in the GBA.

CP 3986-87. In doing so, the Arbitrator rejected the only two arguments raised by Turner: that the two motions were "unnecessarily brought" and "made with the intent to burden the plaintiff financially." CP 3827-29.

The fee award was included in the Arbitrator's Amended Findings of Fact, Conclusions of Law, and Final Arbitration Award ("Amended Final Award"), issued on January 30, 2014. CP 3985-88 (App. J).

G. Judge Heller Confirms the Amended Final Award and Denies Turner's Motion for Attorneys' Fees

Vulcan thereafter moved to confirm the Amended Final Award.

CP 3503-33. Turner's "Response" offered no argument whatsoever opposing Vulcan's motion to confirm or the revised fee award. CP 3640-48. Instead, Turner's responsive brief constituted a stand-alone motion requesting that attorneys' fees be awarded to Turner because, she argued, she obtained "substantial relief when th[e] court reduced the judgment by \$73,710.50 [i.e., the difference between the original and the amended fee awards to Vulcan]." CP 3640; *see also* CP 3701-07, 3715-30. On April 1, 2014, Judge Heller denied Turner's request for attorneys' fees, confirmed the Amended Final Award, and entered judgment in favor of Respondents. CP 3976-77 (App. K), 3978-79 (App. L), 3980-97 (App. M).

V. SUMMARY OF THE ARGUMENT

Despite the Superior Court's order compelling arbitration of the claims asserted in *Turner I*—an order not challenged on appeal—Turner filed a new action asserting the same claims and additional employment-related claims. In the second action, Turner challenged the arbitration clause as substantively unconscionable and claimed that pressure to sign the overall agreement rendered it procedurally unconscionable.

The Superior Court correctly ordered that all *Turner II* claims be arbitrated, based on alternative and independently sufficient grounds. *First*, claim preclusion bars the claims asserted in *Turner II*. A motion to compel arbitration invokes a special proceeding, which is deemed complete upon issuance of the order resolving the question of arbitrability. Thus, the *Turner I* order compelling arbitration is a final order for purposes of claim preclusion. Because the two cases involved the same parties and subject matter, the Superior Court properly ordered all *Turner II* claims to be arbitrated based on application of claim preclusion. *Second*, alternatively, the doctrine of issue preclusion bars Turner's attempt to evade the *Turner I* order compelling arbitration, for the reasons discussed in the brief of Respondents Colliver and Macdonald.

Third, even if the *Turner I* Order did not preclude the claims raised in *Turner II*, the court correctly ordered arbitration on alternative grounds,

rejecting Turner’s arguments that the arbitration clause should not be enforced on the grounds of substantive and procedural unconscionability. Under the Federal Arbitration Act (“FAA”), challenges going solely to an arbitration provision are resolved by the court, while challenges to the entire agreement, and not the arbitration clause exclusively, are resolved by the arbitrator. Because Turner’s unconscionability challenges directed to the arbitration clause are meritless and most of her procedural unconscionability arguments were directed to the entire agreement—and thus for the Arbitrator—the *Turner II* court properly enforced the arbitration clause.

Turner’s constitutional challenges to the arbitration agreement and her objection to the revised attorneys’ fee award to Vulcan are newly raised and should be deemed waived, and in any event lack merit. Also meritless is her claim that she is entitled to an attorneys’ fee award despite not being a prevailing party.

Finally, with respect to Vulcan’s cross-appeal, no Washington authority prohibits an attorneys’ fee award to an employer who successfully compels arbitration in cases involving statutory and nonstatutory claims. The Superior Court therefore erred in vacating the Arbitrator’s original fee award to Vulcan on the ground that it was contrary to an explicit, well-defined, and dominant public policy.

VI. ARGUMENT

A. Standard of Review

1. Decisions of Superior Court Subject to De Novo Review

The following decisions by the court below are subject to de novo review: (1) orders compelling arbitration; (2) application of claim preclusion or issue preclusion; (3) confirmation of an arbitration award; and (4) the legal basis for awarding attorneys' fees.

2. Turner Must Show Prejudice

Turner must show prejudice to prevail on her challenge to the order compelling arbitration. “[A] party who fails to seek discretionary review of an order compelling arbitration . . . must show prejudice as a condition of relief from the arbitration award.” *Saleemi v. Doctor's Assocs., Inc.*, 176 Wn.2d 368, 380 (2013) (no prejudice shown from court order striking choice-of-law, forum selection, and damages limitation in arbitration clause). Turner assigns error to Judge Benton's Order compelling arbitration, but since Turner did not seek discretionary review by this Court, she must show prejudice.

B. The Superior Court Properly Ordered Arbitration

1. Vulcan Correctly Informed the Court Concerning Which Issues Were for the Arbitrator to Decide

Turner wrongly accuses Vulcan of having “flatly misrepresented the procedural history” to Judge Benton, and of having “switched

positions on who decides unconscionability.” Turner Br. at 13-14, 21. The accusations are baseless and are accompanied by distortions of Vulcan’s arguments to the court below. At best, Turner’s accusations can be attributed to a failure to understand the nuances of the relevant law and a misreading of Vulcan’s briefing below.⁶

The FAA applies to this employment dispute, as Turner concedes. *Zuver v. Airtouch Commc’ns, Inc.*, 153 Wn.2d 293, 301 (2004); Turner Br. at 29, 41; CP 596, 1168, 2614. It is well settled that the FAA “supplies not simply a procedural framework applicable in federal courts; it also calls for the application, in state as well as federal courts, of federal substantive law regarding arbitration.” *Preston v. Ferrer*, 552 U.S. 346, 349 (2008) (citing *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984)). Applicable federal substantive law includes rules governing which questions are reserved for the arbitrator. *See id.*; *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006).

Section 2 of the Act provides that an arbitration agreement falling within the scope of the FAA “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. Such grounds include “generally applicable

⁶ To take but one example, Turner writes: “Before Judge Benton, Vulcan argued Judge Oishi’s ‘careful consideration’ (CP 2009) of the *conscionability* issue was ‘res judicata’” Turner Br. at 16 (emphasis added). In fact, Vulcan referred to Judge Oishi’s consideration of the “*arbitrability* issue.” CP 2009 (emphasis added).

contract defenses, such as fraud, duress, or unconscionability, [which] may be applied to invalidate arbitration agreements without contravening § 2.” *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

Critically, however, the United States Supreme Court has long distinguished between two types of validity challenges under section 2: “One type challenges specifically the validity of the agreement to arbitrate,” while “[t]he other challenges the contract as a whole.” *Buckeye*, 546 U.S. at 444 (citing *Southland*, 465 U.S. at 4-5). Beginning with *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 403-04 (1967), the Supreme Court has construed section 4 of the FAA to allow courts only to review validity challenges of the first type—relating specifically to the agreement to arbitrate.

The *Prima Paint* rule remains binding today, as the Supreme Court has confirmed on multiple occasions. In *Buckeye*, for example, the Court “reaffirm[ed] . . . that, regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.” 546 U.S. at 449; *see also Preston*, 552 U.S. at 349 (“[W]hen parties agree to arbitrate all disputes arising under their contract, questions concerning

the validity of the entire contract are to be resolved by the arbitrator in the first instance, not by a federal or state court.”).⁷

Thus, where a party contends that an agreement to arbitrate is procedurally unconscionable because of the circumstances surrounding acceptance of the agreement containing the arbitration clause, the challenge goes to the entire contract and must be resolved by the arbitrator. *See, e.g., Gore v. Alltel Commc'ns, LLC*, 666 F.3d 1027, 1036-37 (7th Cir. 2012) (“The . . . issue . . . whether application of the arbitration clause to this dispute is procedurally unconscionable . . . is one properly resolved by the arbitrator in the first instance because [plaintiff] attacks as unconscionable the entire [wireless] Agreement, not just the arbitration clause itself.”); *Madol v. Dan Nelson Auto. Grp.*, 372 F.3d 997,

⁷ Turner’s discussion of the “clearly and unmistakably delegated” standard for delegating arbitrability determinations to the arbitrator does not support her position, as that applies only where one of the parties is trying to avoid the effect of the presumptions set up by the FAA. *See* Turner Br. at 27-28. As noted above, the presumptions set up by the FAA are that challenges going to the *contract as a whole* are for the arbitrator, while challenges to the *arbitration clause alone* are for the court. That can be modified by the parties if they “clearly and unmistakably” delegate responsibility for those determinations to a different decision-maker. But where the agreement is silent as to who decides arbitrability, as in this case, then the FAA’s presumptions govern. In *Brown v. MHN Government Services, Inc.*, 178 Wn.2d 258, 263-65 (2013), on which Turner relies, the challenges went to the arbitration clause alone, and therefore in the absence of a clear delegation clause, they were for the court to decide. In this case, most of Turner’s procedural unconscionability challenges affected the entire agreement, and were for the arbitrator. The “clearly and unmistakably delegated” standard often arises in cases presenting “questions of arbitrability” not at issue in this case. The U.S. Supreme Court uses the phrase “questions of arbitrability” as a term of art of “limited scope” to refer to disputes over whether an arbitration provision applies to a particular party or dispute. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002). Such issues—not presented here—are presumptively for the court, absent clear and unmistakable delegation. *See id.*

1000 (8th Cir. 2004) (“[T]he plaintiffs’ arguments that their vehicle purchase transactions were generally unconscionable were subject to resolution by an arbitrator, absent a showing by the plaintiffs that the DRA [arbitration agreement], standing alone, was invalid.”).⁸

Turner has advanced various challenges to arbitration throughout this case, some of which are directed to the arbitration provision alone. From the outset, however, she has also contended that the clause was procedurally unconscionable because of the circumstances surrounding her acceptance of the GBA (e.g., allegations of a 24-hour turnaround and threat of termination). *See, e.g.*, CP 77-78, 597-99, 1169-72, 1791-94; Turner Br. at 37-39. Because those challenges apply to the entire GBA and not the arbitration provision alone, the arbitrator must resolve those issues.⁹ On the other hand, challenges directed to *terms* of the arbitration

⁸ *See also Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 877 (11th Cir. 2005) (applying *Prima Paint* rule to claims of adhesion and unconscionability because arguments went to loan agreements generally, not arbitration agreement specifically, and holding that “the FAA does not permit a federal court to consider claims alleging the contract as a whole was adhesive”); *JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 170 (2d Cir. 2004) (“According to the principle announced in *Prima Paint . . .*, the issue of whether the [shipping contract]—as opposed to the arbitration clause alone—is a contract of adhesion is itself an arbitrable matter not properly considered by a court.”); *Rojas v. TK Commc’ns, Inc.*, 87 F.3d 745, 749 (5th Cir. 1996) (“[Employee’s] claim that the employment agreement is an unconscionable contract of adhesion is an attack on the formation of the contract generally, not an attack on the arbitration clause itself. Because her claim relates to the entire agreement, rather than just the arbitration clause, the FAA requires that her claims be heard by an arbitrator.”).

⁹ The *Turner II* Complaint itself includes allegations surrounding her acceptance of the GBA and contends that the release it contained was “unconscionable.” CP 4-5. Turner also concedes that “the factual reasons the arbitration clause was unconscionable overlap with the reasons the Release was unenforceable.” Turner Br. at 31 n.22.

clause alone and not to the entire agreement—such as Turner’s substantive unconscionability claims—were for the court. Vulcan consistently informed Judge Oishi and Judge Benton of this distinction.¹⁰

2. Judge Oishi Properly Compelled Arbitration in *Turner I*, a Decision that Turner Does Not Challenge

Turner does not assign error to Judge Oishi’s Order in *Turner I* compelling her to arbitrate her original claims, nor to Judge Benton’s denial of Turner’s CR 60 motion for relief from Judge Oishi’s Order.

¹⁰ Turner fails to meaningfully address the issue. As an initial matter, she principally focuses on Washington cases applying the Washington Uniform Arbitration Act and ignores binding U.S. Supreme Court caselaw applying the law at issue—the FAA. See Turner Br. at 25-31. *Saleemi* is not on point because there the allegation was that specific arbitration terms were substantively unconscionable. 176 Wn.2d at 377 (“[Respondents] are not challenging the contract as a whole, only the enforceability of a few of its dispute resolution provisions.”). Similarly, when the court in *Hill v. Garda CL Northwest, Inc.*, 179 Wn.2d 47, 53 (2013), states that “[u]nconscionability is one such gateway dispute” for courts to resolve, it is referring to a *substantive unconscionability* challenge directed at the arbitration clause itself—there was no issue of procedural unconscionability. In *McKee v. AT & T Corp.*, 164 Wn.2d 372, 401-02 (2008), the court expressly did not reach the issue of procedural unconscionability (or who decides) because it concluded that terms in the arbitration provision were substantively unconscionable. The holding of *Brown v. MHN Government Services, Inc.*, 178 Wn.2d 258, 262 (2013), is expressly “limited to the facts of th[at] case because [the court had to] apply California law.” In addition, the court (1) found a provision *specific to the arbitration clause* to be procedurally unconscionable, (2) discussed the broad-based challenges to procedural unconscionability in passing (finding none), and (3) did not address the *Prima Paint* line of cases at all, perhaps because the issue was not raised. *Id.* at 267-68. In *Gorden v. Lloyd Ward & Associates, P.C.*, 180 Wn. App. 552, 562-64 (2014), the procedural unconscionability challenge was specific to the arbitration provision (no attorney or representative explained to the client the arbitration provision in an attorney-client agreement, which also implicated Rules of Professional Conduct). In any event, the Division III panel’s general statements of who decides unconscionability fail to acknowledge or address the *Prima Paint* line of cases, which are binding in this case. See *id.* at 562-63. Finally, to try to distinguish her case from *Townsend v. Quadrant Corp.*, 173 Wn.2d 451 (2012), which properly applied *Prima Paint* and *Buckeye*, Turner asserts that she “made a discrete challenge to the unconscionability of the GBA’s arbitration clause, not the entire agreement.” Turner Br. at 30-31. That is demonstrably untrue for her procedural unconscionability arguments alleging improper pressure to accept the GBA, none of which relate to the arbitration clause specifically.

CP 95-96 (App. C), 1483-87 (App. D). As a result, those decisions are not subject to review. *See Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wn.2d 205, 214 (1993).

Nor could Turner have any reasonable basis to challenge Judge Oishi's Order. In opposing arbitration in *Turner I*, Turner identified several legal doctrines, but the only ones she continues to assert are procedural and substantive unconscionability. CP 75-79.¹¹ Her brief *defined* substantive unconscionability, but she *did not identify anything* in the arbitration clause (or GBA) that was substantively unconscionable, let alone advance an argument in support. *See* CP 76-78. With regard to procedural unconscionability, Turner argued that the GBA was an unenforceable contract of adhesion and that she was subject to "undue pressure" to sign it. CP 77-78.

Thus, in reply, Vulcan observed that Turner's "resistance to enforcement of the arbitration clause relates solely to whether the [GBA] *as a whole* was the product of duress or coercion," which must be decided by the arbitrator. CP 87; *see also* CP 89-90 (discussing *Prima Paint* and *Buckeye*). By granting the motion, CP 95-96 (App. C), Judge Oishi rejected Turner's challenges to the arbitration clause specifically

¹¹ Her current lack-of-consideration argument was not raised below. *See* discussion *infra* Part VI.B.3.b(ii).

(including her unsupported substantive unconscionability argument) and left procedural unconscionability for the arbitrator.

Although Turner moved for reconsideration of Judge Oishi's Order, she voluntarily dismissed her case before the court could rule on the issue. CP 98-103, 122-25. Of course, a party cannot avoid the consequences of an unfavorable decision by simply nonsuiting the case and starting anew. Judge Oishi's Order remains valid and binding.

3. Judge Benton Properly Compelled Arbitration of All Claims Asserted in *Turner I* and *Turner II*

After Turner ignored Judge Oishi's Order and filed a new Complaint asserting five *Turner I* claims and five new claims also arising out of her employment, Vulcan filed a motion to dismiss seeking referral of all claims to arbitration. CP 1-9, 236-66. At an April 5, 2012, hearing, Judge Benton denied a CR 60 motion filed by Turner seeking relief from Judge Oishi's Order, thereby ordering all *Turner I* claims to proceed in arbitration. CP 4239-40; *see also* CP 1483-88. Turner does not assign error to that decision. Turner Br. at 3. Instead, Turner assigns error to Judge Benton's Order of June 8, 2012, which ordered arbitration of the new claims asserted in *Turner II*. CP 2210-13 (App. E). The court did so based on two alternative grounds: (1) that the claims were subject to "res judicata and/or collateral estoppel" and (2) that the GBA "is not

procedurally or substantively unconscionable or otherwise unenforceable.”

CP 2212. Neither ground constitutes error.

a. All of Turner’s Claims Were Subject to Arbitration Based on the Preclusive Effect of Judge Oishi’s Order

Both claim preclusion (*res judicata*) and issue preclusion (*collateral estoppel*) barred Turner’s attempt in *Turner II* to avoid arbitration of her claims. Turner’s cursory argument fails to address relevant authority and instead relies principally on a case that is inapposite. Turner Br. at 42-43. Application of *either* doctrine mandates affirmance of Judge Benton’s Order compelling arbitration.

(i) Claim Preclusion Applies

For claim preclusion to bar a subsequent action, the two actions must involve “(1) the same subject matter, (2) the same cause of action, (3) the same persons or parties, and (4) the same quality of persons for or against whom the decision is made as did a prior adjudication.” *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 730 (2011). The prior action must also have resulted in a final judgment. *Id.* Here, there is an identity of parties in the two cases, and all claims arise out of Turner’s employment with Vulcan. Thus, elements (1), (3), and (4) are satisfied, leaving only the questions of whether Judge Oishi’s Order was sufficiently final and whether the two lawsuits involve the same cause of action.

With respect to finality—which is the only element Turner challenges—Washington follows the modern view articulated in the Restatement (Second) of Judgments (“Restatement”) and federal caselaw. *See Ensley v. Pitcher*, 152 Wn. App. 891, 899-900 (2009). “[A] judgment will ordinarily be considered final in respect to a claim (or a separable part of a claim . . .) if it is not tentative, provisional, or contingent and represents the completion of all steps in the adjudication of the claim by the court.” *Id.* at 900 (quoting Restatement § 13 cmt. b).

Courts treat prior orders compelling or denying arbitration as “final” for purposes of claim preclusion because no further determination is necessary on the question of arbitration. They do so because a motion to compel arbitration is deemed a “special proceeding” within the larger action, and an order on the arbitration issue is final within that special proceeding. *See Towers, Perrin, Forster & Crosby, Inc. v. Brown*, 732 F.2d 345, 348-49 (3d Cir. 1984) (applying claim preclusion to prior order denying arbitration and observing that “a petition to compel arbitration involves a separate special proceeding”); *see also id.* at 349 (“[T]he special proceeding finally determined the merits therein, i.e., the arbitrability of the dispute[;] . . . [t]he finality of the order entered in the special proceeding is not undermined by the fact that the outcome of the dispute itself must be resolved by a separate action.”); *Se. Res. Recovery*

Facility Auth. v. Montenay Int'l Corp., 973 F.2d 711, 713 (9th Cir. 1992) (“Under California law, an order compelling arbitration is the final order in a special proceeding. Once the order is made, the special proceeding is complete and the arbitration must proceed.”).¹²

The same analysis applies in this case. Vulcan’s motion to compel arbitration in *Turner I* invoked a special proceeding, which was completed when Judge Oishi issued his Order compelling arbitration. Nothing was left to decide, so the Order is final for purposes of the special proceeding. To hold otherwise would invite endless gamesmanship, as the *Towers* court observed: “There must be a limitation on successive petitions to compel arbitration other than the imagination or willpower of the party seeking arbitration, lest judicial proceedings on the merits be indefinitely delayed.” 732 F.2d at 349. That concern applies with even greater force where a party ignores a prior order *compelling* arbitration, as *Turner* did here, in light of the strong public policy favoring arbitration.

The final requirement for application of claim preclusion—the same cause of action—also applies. “Under the doctrine of *res judicata*, a plaintiff is barred from litigating claims that either were, or *should have been*, litigated in a former action. The purpose of this doctrine is to

¹² See also *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 455 (2002) (describing motion to compel arbitration under Washington Uniform Arbitration Act as “invok[ing] special proceedings” that are separate from the “action on the merits”) (internal quotation marks and citation omitted).

eliminate duplicitous litigation (i.e., the splitting of claims) and yet allow a party to litigate matters not properly included in the former action.”

Kuhlman v. Thomas, 78 Wn. App. 115, 120 (1995) (emphasis added).

Here, Turner should have asserted all her employment-related claims in *Turner I*. The question decided by Judge Oishi in the special proceeding in *Turner I* initiated by Vulcan’s motion to compel arbitration was whether Turner’s employment-related claims must be arbitrated based on the arbitration clause. Because the claims in *Turner II* also arose out of Turner’s employment, the identical question of arbitrability was presented in both cases, involving the same evidence. Had the five new claims in *Turner II* been allowed to proceed in court, it would have destroyed Vulcan’s right (established in *Turner I*) to have all employment-related claims arbitrated. Thus, the “same cause of action” element is also satisfied. *See Ensley*, 152 Wn. App. at 903.

Turner further contends that “res judicata and collateral estoppel were never for the court,” but instead were “affirmative defenses” that were “procedural matters for the arbitrator.” *Turner Br.* at 42-43. She relies almost exclusively on *Yakima County v. Yakima County Law Enforcement Officers Guild*, 157 Wn. App. 304 (2010), a procedurally complex but easily distinguishable case governed by a collective bargaining agreement. *Yakima County* is inapt because it related to

preclusion defenses directed to the *merits* of a plaintiff's claims. Here, by contrast, the issue is whether a prior court's order compelling *arbitration* is entitled to preclusive effect. Vulcan did not argue that Turner's claims on the merits were precluded. To the contrary, the merits were for the Arbitrator, as Judge Oishi ordered.¹³

(ii) Issue Preclusion Applies

Even if the Court were to conclude that claim preclusion did not mandate arbitration of the claims asserted in *Turner II*, the Court should affirm Judge Benton's Order based on application of issue preclusion, for the reasons discussed in the responsive brief filed by Respondents Colliver and Macdonald, which Vulcan joins.

b. Judge Benton Correctly Included an Alternative Basis for Compelling Arbitration

Judge Benton's Order also included an alternative basis for compelling arbitration, concluding that the arbitration clause in the GBA "is not procedurally or substantively unconscionable or otherwise unenforceable." CP 2212 (App. E). Thus, the Order (1) rejected Turner's substantive unconscionability challenges (which went solely to the

¹³ The voluntary dismissal in *Yakima County* is equally irrelevant to this dispute. In that case, a union member employee initially filed a grievance under a collective bargaining agreement, then appealed to the civil service commission upon denial of her grievance. 157 Wn. App. at 328. She withdrew that appeal and instead initiated a civil lawsuit, as permitted under the CBA. *Id.* Labor law procedures have no application to this case, and *Yakima County* in no way suggests that a party can moot a Superior Court order compelling arbitration by voluntarily dismissing the case after entry of the order.

arbitration clause), (2) rejected her argument that a failure to include a copy of the AAA rules was procedurally unconscionable (which also went solely to the arbitration clause), and (3) implicitly left the balance of Turner's procedural unconscionability challenges for the Arbitrator because they applied to the GBA as a whole. Such a reading is consistent with both the controlling authority discussed in Part VI.B.1 above and the briefing from Vulcan and other Respondents addressing which questions are for the court and which for the Arbitrator. *See* CP 253-54, 260-61, 1272-73, 1720-21, 1850-51, 2073-74, 2103-04.

**(i) The Arbitration Clause Is Not
Substantively Unconscionable**

Contract terms may only be deemed substantively unconscionable if they are grossly one-sided and harsh. *Nelson v. McGoldrick*, 127 Wn.2d 124, 131 (1995) (“‘Shocking to the conscience,’ ‘monstrously harsh,’ and ‘exceedingly calloused’ are terms sometimes used to define substantive unconscionability.”) (citation omitted). Turner contends that three provisions in the arbitration clause are substantively unconscionable: (1) confidentiality provision; (2) “loser pays” provision; and (3) an alleged “unilateral litigation option clause.” Turner Br. 33-36.

(a) Confidentiality Provision

Turner relies on *Zuver*, 153 Wn.2d at 314-15, and *McKee*, 164 Wn.2d at 398-99, to argue that the confidentiality provision in the

arbitration clause is substantively unconscionable. Turner Br. at 33-34. She makes no attempt to argue why those holdings apply in *this case*. There is no *per se* rule against confidential arbitration—*Zuver* itself recognized that “courts have accepted confidentiality provisions in many agreements.” 153 Wn.2d at 314.¹⁴ In this case, involving sensitive job duties entirely different from those present in *Zuver*—and bearing no similarity to the consumer class action in *McKee*—the confidentiality provision is not “monstrously harsh.” Rather, it is consistent with the privacy protections that are appropriate and expected within the executive protection industry.

In carrying out their duties, EP personnel are necessarily privy to the personal lives of Paul Allen and his family. These individuals have legitimate privacy interests that deserve to be respected. Preventing public disclosure of security-related information about high-profile individuals and their family members is not merely legitimate, it is prudent and responsible. Confidential arbitration in this context is reasonable and is merely an extension of the confidentiality obligation that all EP members agree to at the outset of their employment. *See* CP 2359 (App. A).

¹⁴ In *Zuver*, for example, the court made a point to address only whether “*this* confidentiality provision is conscionable.” 153 Wn.2d at 314. The same was true in *McKee*, where the court merely held that “the confidentiality provision *before us*” was substantively unconscionable. 164 Wn.2d at 399 (emphasis added).

Further, unlike the concern raised in *Zuver*, 153 Wn.2d at 315, the benefits of confidential arbitration are not one-sided. In the security industry, publicity around any claim that a bodyguard might bring against an employer is almost certain to have a negative effect on the claimant's future job prospects within the industry. This is inevitable, because consumers of bodyguard services reasonably do not want details of their private lives disclosed by those entrusted to protect them, particularly when such details often have little to do with meritorious claims (and the threat of disclosure can be used to try to extract favorable settlements). Thus, Turner also had a significant interest in confidential arbitration.

These characteristics distinguish this case from the cases Turner relies on. Yet even if this Court were to find the confidentiality provision substantively unconscionable, it would not constitute reversible error. The appropriate remedy would be to sever the confidentiality provision, which is what the *Zuver* court did, not void the entire arbitration clause. *See* 153 Wn.2d at 320-21; *Walters v. AAA Waterproofing, Inc.*, 151 Wn. App. 316, 330 (2009) (“A court will declare the entire arbitration agreement unenforceable only when unconscionable provisions are pervasive.”). In addition, Turner must show prejudice under *Saleemi*, 176 Wn.2d at 380,

which she has not done and cannot do.¹⁵ She cannot show that the outcome of the arbitration would have differed had it not been confidential.

(b) “Loser Pays” Provision

Equally meritless, on multiple grounds, is Turner’s argument that the attorneys’ fee provision in the EIPA is substantively unconscionable. Turner Br. at 34-35. *First*, Turner did not challenge the fee-shifting provision as unconscionable before the court below, so the issue is waived. *See Karlberg v. Otten*, 167 Wn. App. 522, 531 (2012) (“A failure to preserve a claim of error by presenting it first to the trial court generally means the issue is waived. While an appellate court retains the discretion to consider an issue raised for the first time on appeal, such discretion is rarely exercised.”) (citations omitted).¹⁶ *Second*, even if the provision was unconscionable, Turner cannot show prejudice because the Arbitrator restricted application of the fee provision to Turner’s *nonstatutory* claims. CP 3099-3100. *Third*, the cases relied on by Turner are plainly

¹⁵ *See* discussion *supra* Part VI.A.2; Turner’s only claim of prejudice focuses on the Arbitrator’s fee awards to Vulcan. Turner Br. at 25-26. But the substantive decisions of the Arbitrator should not be deemed “prejudice” within the meaning of *Saleemi*, which focused not on “the *arbitrator’s* actions,” but on “whether the *court’s* order prejudiced a party” by, for example, denying it “certain legal defenses” or eliminating protections “allowed by the contract.” 176 Wn.2d at 387. Ultimately, Turner is advancing the same “structural error” analysis that *Saleemi* rejected. *Id.* at 387-88.

¹⁶ In Superior Court, the only fee-related challenge that Turner raised was that splitting the arbitration fees was substantively unconscionable. *See, e.g.*, CP 1174. She does not raise that issue on appeal (even if she had, she could show no prejudice, as Vulcan ultimately paid all of the Arbitrator’s and AAA’s fees). *See* CP 3039-42.

distinguishable.¹⁷ *Fourth*, even if the fee-shifting provision was deemed unconscionable, severance would be the appropriate remedy. *See Adler*, 153 Wn.2d at 359-60; *Walters*, 151 Wn. App. at 330.

(c) “Unilateral Litigation Option”

Turner also challenges the language in the arbitration clause that states, “Vulcan shall have the right, upon its election, to seek emergency *injunctive relief in court in aid of arbitration* to preserve the status quo pending determination of the merits in arbitration” CP 281 (emphasis added). Her argument is without merit, as this language did not provide Vulcan with a unilateral right to litigate the merits in court, but merely put Turner on notice that Vulcan intended to exercise the right both parties had under the FAA, 9 U.S.C. § 4, to petition a court to compel arbitration if the other party breached its obligation to arbitrate a dispute. The provision did not purport to limit Turner’s equal right to do so, and of course, Turner’s initiation of two separate actions in Superior Court forecloses any ability to show prejudice, as she must under *Saleemi*.¹⁸

¹⁷ For example, in *Gandee v. LDL Freedom Enterprises, Inc.*, 176 Wn.2d 598, 601-02 (2013), plaintiff’s claims were exclusively statutory claims. Here, Turner asserted both statutory and nonstatutory claims, and the Arbitrator limited application of the fee provision to nonstatutory claims. *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 354-55 (2004), concerned a provision that would have prevented plaintiff from recovering statutory fees as a prevailing party (i.e., not a “loser pays” provision). And the holding of *Brown*, 178 Wn.2d at 262, is expressly “limited to the facts of th[at] case because [the court had to] apply California law.”

¹⁸ Moreover, the one-sided limitation of remedies at issue in the two cases cited by Turner are readily distinguishable. *Hill*, 179 Wn.2d at 55 (14-day limitations

**(ii) The Arbitration Clause Is Not
Procedurally Unconscionable**

Turner contends on appeal that the arbitration clause was procedurally unconscionable because she alleges that “Vulcan never gave Turner a meaningful choice whether or not to agree to arbitration,” she “fac[ed] loss of her job if she did not sign in 24 hours,” “Vulcan had a battery of attorneys and Human Resources personnel,” and “because there was no consideration.” Turner Br. at 38. Her arguments lack merit.

As an initial matter, Turner’s lack-of-consideration argument is newly raised in this appeal, and thus it should be deemed waived.¹⁹ Before Judge Benton, Turner raised only one procedural unconscionability challenge that was directed to the arbitration clause specifically: that

provision and two- and four-month limits on back pay damages); *Zuver*, 153 Wn.2d at 315 (employee waived right to punitive or exemplary damages).

¹⁹ See CP 597-601, 1169-74, 1791-1804, 2091-97 (lack of consideration not among arguments raised to Judge Benton). Although Turner identified lack of consideration as an “issue[.]” “[t]he Court must resolve” in her briefing in *Turner I*, see CP 76, 100-01, she does not assign error to Judge Oishi’s Order and she did not present Judge Oishi with her current argument. (Perhaps aware that the issue is not properly raised, Turner incorrectly characterizes her consideration argument as one of procedural unconscionability, when in fact it is simply a standard contract defense.) In any event, the consideration argument Turner advances on appeal is frivolous. The GBA plainly did include consideration—a guaranteed bonus of \$25,000, among other benefits to Turner—and she cites no authority supporting her remarkable contention that consideration is lacking because “[n]o one at Vulcan testified that any portion of the bonus was consideration for agreeing to arbitration.” See CP 280; Turner Br. at 38-39. Turner cites no case suggesting that contracts must expressly apportion consideration for each benefit. *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 834-36 (2004), holds only that the benefit of continued employment, by itself, is legally insufficient to support a noncompete agreement signed by an already current employee. It has no application here, where there was independent consideration. Moreover, while noncompete agreements are *disfavored* on public policy grounds, arbitration agreements are strongly *favored*. See, e.g., *Organon, Inc. v. Hepler*, 23 Wn. App. 432, 436 n.1 (1979).

Vulcan failed to include a copy of the relevant AAA rules with the GBA. *See* CP 598-99, 1171-72. Judge Benton considered and rejected that argument, and Turner has not raised the issue on appeal.

The balance of Turner's procedural unconscionability challenge, and the core of her challenge in Superior Court, was directed at the GBA *as a whole*, not the arbitration clause exclusively. Turner does not, and cannot, dispute that the GBA—which contained the arbitration clause and release, among other provisions—was presented to Turner and signed by her as a whole. She does not contend that the arbitration provision was separately negotiated. Because all of her arguments about alleged pressure to sign the arbitration clause apply to the entire agreement, the question of procedural unconscionability was for the Arbitrator to decide, based on the authority discussed above.²⁰

Thus, regarding procedural unconscionability, Judge Benton's Order is most reasonably read as denying the challenge relating to the AAA rules and leaving for the Arbitrator the balance of the procedural unconscionability challenge. The Court should affirm that decision.

In the arbitration, Turner opted not to move for dismissal on the ground that the GBA was procedurally unconscionable.²¹ That decision

²⁰ *See* discussion *supra* Part VI.B.1.

²¹ In the context of Vulcan's motion on the enforceability of the contractual release contained in the GBA, which was decided after Turner withdrew from the

likely reflects her recognition of the weakness of her claim. If this Court determines it should reach the merits of Turner's procedural unconscionability claim, it should be rejected.

“[T]he key inquiry for finding procedural unconscionability is whether [the party seeking to avoid enforcement] lacked meaningful choice” when presented with the contract he or she signed. *Zuver*, 153 Wn.2d at 305. “At minimum, an employee who asserts an arbitration agreement is procedurally unconscionable must show some evidence that the employer refused to respond to her questions or concerns, placed undue pressure on her to sign the agreement without providing her with a reasonable opportunity to consider its terms, and/or that the terms of the agreement were set forth in such a way that an average person could not understand them.” *Id.* at 306-07.

Turner fails to carry her burden to prove procedural unconscionability. *See id.* at 302 (“[T]he party opposing arbitration bears the burden of showing that the agreement is not enforceable.”). Turner acknowledges that she signed the GBA at a meeting when the document was first presented to her by her supervisor, Kathy Leodler. CP 585. Turner offers no credible evidence that she requested or needed additional time to review its terms. In fact, not only did Turner *not* ask for more time

arbitration, the Arbitrator considered the briefing on procedural unconscionability and concluded that the GBA was enforceable. CP 3086-90.

to consider the GBA, she admitted in her briefing to Superior Court that she “did not even read the agreement, which was in the form of a letter. She simply turned the letter to its last page and signed it.” CP 594. Prior to her departure from Vulcan, Turner never suggested to Vulcan that her signature was coerced, mistaken, or in any other respect improperly obtained. CP 271-72.

Moreover, Turner’s self-serving statements about an alleged 24-hour deadline for signing are not consistent with the declaration of Leodler, which was submitted at a time when Leodler herself was adverse to Vulcan. Leodler concedes that she “d[id] not recall our conversation verbatim,” but speculates that she “*may* have said it was a 24-hour turnaround, as that was the direction from [Laura] McDonald [sic]” of Vulcan Human Resources. CP 643 (emphasis added). Macdonald, however, flatly denies that she imposed any such deadline (“I did not tell Ms. Leodler that she had 24 hours to obtain a signature”) or that she “required” every EP member to sign the GBA to preserve his or her job. CP 815. Macdonald also denies that Turner would have been fired had she declined to enter into the GBA: “I never told Ms. Leodler that unless Vulcan obtained signatures from the EP team members on arbitration agreements, those individuals would lose their jobs at Vulcan. Likewise,

to the best of my knowledge, no one else in Vulcan's Human Resources ever communicated such a message to Ms. Leodler." CP 815.²²

In short, Turner fails to carry her burden to show procedural unconscionability. Thus, if this Court opts to reach that issue, it should affirm Judge Benton's Order.

4. The Arbitration Agreement Violated Neither Turner's Right to a Jury Trial, Nor Separation of Powers

Turner raises two purported "constitutional" challenges for the first time on appeal: (1) arbitration violates Turner's right to a jury trial, and (2) arbitration violates separation of powers "by delegating what should be court powers to a private individual." Turner Br. at 41. While "manifest error affecting a constitutional right" is a narrow exception to RAP 2.5's general proscription against review of matters not presented to the trial court, neither of these manufactured issues fall within that exception.²³ Instead, Turner's arguments are untimely, generic complaints about arbitration (dressed in constitutional garb) that have been soundly rejected by the Washington Supreme Court.

²² Nor does the fact that Vulcan had more resources change the analysis. *Zuver*, 153 Wn.2d at 307 ("[I]f a court found procedural unconscionability based solely on an employee's unequal bargaining power, that holding could potentially apply to invalidate every contract of employment in our contemporary economy.") (internal quotation marks, alteration, and citation omitted). Turner cites, but makes no effort to compare, the facts of this case to *Gorden*, 180 Wn. App. at 563-64, a readily distinguishable case implicating Rules of Professional Conduct and attorney-client agreements.

²³ See *State v. Scott*, 110 Wn.2d 682, 687 (1988) (noting that "the exception actually is a narrow one").

First, Turner's argument regarding her right to a jury trial is simply a repackaged version of her procedural unconscionability argument. There is no dispute that she signed an agreement containing an arbitration provision. CP 585; Turner Br. at 7. Having done so, "a party implicitly waives his right to a jury trial by agreeing to an alternate forum, arbitration." *Adler*, 153 Wn.2d at 360-61; *see also id.* at 341 n.4, 343-44 (reaffirming Washington's "strong public policy favoring arbitration," rejecting argument that WLAD entitled employee to a judicial forum, and holding that "the FAA clearly preempts any state law to the contrary"). Turner's argument concerning compulsion and lack of an opportunity to understand the document she signed go to the agreement *as a whole*, and was therefore an issue for the Arbitrator to decide.²⁴ Turner never presented the issue to the Arbitrator, however. Under these circumstances, Turner's arguments concerning her right to a jury trial have been waived.²⁵

Second, Turner's argument that arbitration violates separation of powers by improperly delegating judicial authority to arbitrators is also rather obviously wrong. In fact, the only Washington case she cites to support that proposition, *State ex rel. Everett Fire Fighters Local No. 350*

²⁴ *See* discussion *supra* Part VI.B.1.

²⁵ Turner incorrectly states that she raised the issue in *Turner I*. Turner Br. at 9. In fact, in *Turner I* she raised the issue of "her right to a *judicial forum*," not a jury trial. CP 79 (emphasis added). Turner's argument that she did not have the opportunity to conduct discovery on the circumstances of her execution of the GBA is also wrong. Turner could, and did, conduct discovery within the arbitration. *See* CP 2912-13, 2933.

v. Johnson, 46 Wn.2d 114 (1955) (amendment to city charter providing for arbitrators to resolve disputes between firemen and city held to be unlawful delegation of legislative responsibility to fix wages of city employees), was overruled by statute in 1973. As the Washington Supreme Court explained, *Everett Fire Fighters* “was decided prior to the enactment . . . of the Public Employees’ Collective Bargaining Act . . . and what was held unlawful in that case is now both lawful and mandatory.” *City of Spokane v. Spokane Police Guild*, 87 Wn.2d 457, 464 (1976). Washington courts likewise do not regard arbitration as an improper delegation of judicial authority. Indeed, in light of the repeated emphasis in Washington cases on the strong public policy favoring arbitration, Turner’s argument must be rejected as frivolous. *See Zuver*, 153 Wn.2d at 301 n.2; *Adler*, 153 Wn.2d at 341 n.4.

C. Turner’s Challenge to the Superior Court Order Confirming the Arbitrator’s Revised Fee Award Is Without Merit

Turner argues that the Superior Court’s Order confirming the Amended Final Award—which includes the Arbitrator’s revised award of \$39,524.50 in attorneys’ fees to Vulcan—violates public policy. The Arbitrator’s revised fee award was expressly limited to fees incurred in connection with Vulcan’s successful summary judgment motions on two *nonstatutory* claims: defamation and declaratory judgment on the validity

of a contractual release. CP 3560-61. Turner's challenge fails for two reasons: (1) the issue was waived because it was not raised below, and (2) the award does not violate public policy.

1. Turner's Challenge to the Arbitrator's Revised Fee Award Was Not Raised Below

Turner *did not oppose* the Superior Court's confirmation of the Arbitrator's Amended Final Award, which included the revised fee award. Turner's "Response" to Vulcan's motion to confirm the award made no mention of that revised fee award. Instead, it raised a single, completely different issue, arguing for a separate award of attorneys' fees *to Turner*, based on the court's vacatur of the Arbitrator's first fee award. *See* CP 3640-47. Accordingly, the challenge to the revised fee award has been waived. *See Karlberg*, 167 Wn. App. at 531.

2. Turner Fails to Show that the Amended Final Arbitration Award Violates Public Policy

In any event, Turner's challenge fails because an arbitrator's fee award for prevailing on nonstatutory claims does not violate public policy.

a. Judicial Review of Arbitration Awards Is "Extremely Narrow and Exceedingly Deferential"

Review of an arbitration award under the FAA is "extremely narrow and exceedingly deferential." *UMass Mem'l Med. Ctr., Inc. v. United Food & Commercial Workers Union*, 527 F.3d 1, 5 (1st Cir. 2008)

(internal quotation marks and citation omitted). As a result, arbitration awards are “nearly impervious to judicial oversight” and must be sustained even where the court is convinced that the arbitrator committed serious error. *Id.* The standard of review for arbitration awards has been described as “among the narrowest known to the law.” *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1462 (10th Cir. 1995).

b. The Public Policy Exception Is Also Exceedingly Narrow

Consistent with decisions in federal FAA cases, the Washington Supreme Court has emphasized that the “public policy exception [to enforcing arbitration awards] is limited to decisions that violate an ‘explicit,’ ‘well defined,’ and ‘dominant’ public policy, not simply ‘general considerations of supposed public interests.’” *Kitsap Cnty. Deputy Sheriff’s Guild v. Kitsap Cnty.*, 167 Wn.2d 428, 435 (2009) (quoting *E. Assoc. Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 62 (2000)). To vacate an arbitration award on public policy grounds, the violation “must be clearly shown,” *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987), and the public policy must be “one that specifically militates against the relief ordered by the arbitrator,” *Matthews v. Nat’l Football League Mgmt. Council*, 688 F.3d 1107, 1111 (9th Cir. 2012) (internal quotation marks and citation omitted).

The party seeking to vacate an arbitration award based on public policy bears the burden of making this showing. *Id.* at 1112.

The “exacting requirements” of this standard are rarely satisfied. *Kitsap Cnty.*, 176 Wn.2d at 438. For example, in *Kitsap County*, the County challenged an arbitrator’s award ordering the reinstatement of a sheriff’s deputy who had been terminated for “29 documented incidents of misconduct, including untruthfulness.” *Id.* at 431. The County sought to vacate the award on public policy grounds, including the strong public policy embodied in criminal statutes prohibiting false statements to law enforcement officers. The Court found this insufficient as a matter of law and ordered reinstatement of the award. “[E]ven when reinstatement would likely be contrary to general public policy considerations,” the court required a more specific expression of public policy to overturn the arbitrator’s award. *Id.* at 437-38 (“Washington statutes prohibit making false statements to a public officer but there is no statute or other explicit, well defined, and dominant expression of public policy that requires the automatic termination of an officer found to have been untruthful.”).²⁶

²⁶ *International Union of Operating Engineers, Local 286 v. Port of Seattle*, 176 Wn.2d 712, 719 (2013), illustrates the same principle. There, an arbitrator reinstated an employee who had been terminated for violating the Port’s zero-tolerance anti-harassment policy by hanging a rope noose over the shop floor. Instead, the arbitrator imposed a 20-day suspension without pay as punishment for the offense. The trial court granted the Port’s motion to vacate the award on public policy grounds, based on the strong public policy against workplace discrimination embodied in the Washington Law Against Discrimination (“WLAD”), Ch. 49.60 RCW. The Court of Appeals affirmed,

c. There Is Not an Explicit, Well-Defined, and Dominant Public Policy Against Fee Awards for Employers Who Prevail on Nonstatutory Claims

In this case, Turner fails to carry her burden of showing an explicit, well-defined, and dominant public policy against fee awards to employers who prevail on nonstatutory claims. Turner does not cite a single case, statute, or other legal authority for that proposition. Instead, she points to judicial rulings on a different issue, i.e., barring fee awards to employers who successfully defend against *statutory* discrimination and wage claims (rulings based on nonreciprocal fee provisions in the governing statutes), and asks this Court to *extend* that principle to cover *any* claim in a dispute between an employee and an employer. *See, e.g.*, Turner Br. at 48 (“Vulcan can never recover attorney fees for prevailing against its employees in these claims arising out of employment”).

Seeking an *extension* of a judicial practice, however, implies that no explicit, well-defined public policy in that area currently exists. “This absence of authority refutes [the moving party’s] claim of public policy

but the Supreme Court reversed. *Id.* at 742. Despite the fact that WLAD sets forth an explicit, well-defined, and dominant public policy against discrimination, and “antidiscrimination laws create an *affirmative duty* for employers to prevent racial harassment in the workplace by sufficiently disciplining those that engage in harassing behavior,” *id.* at 722 (emphasis added), the court upheld the award, refusing to substitute its judgment for that of the arbitrator on whether the suspension was sufficient to “prevent a similar incident in the future,” *id.* at 724. In the absence of explicit statutory or other binding directives governing the remedy at issue, the court declined to vacate the arbitrator’s award based on general arguments about alleged incentives or disincentives created by that remedy, even when a strong public policy was involved.

that is explicit, well-defined, and dominant.” *ESCO Corp. v. Bradken Res. Pty Ltd.*, No. 10-788-AC, 2011 WL 1625815, at *10 (D. Or. Jan. 31, 2011) (denying motion to vacate arbitrator’s award of fees to prevailing party on public policy grounds), *report and recommendation adopted*, 2011 WL 1630355 (D. Or. Apr. 27, 2011).²⁷

Turner’s arguments fall well short of meeting the “exacting requirements” to vacate an arbitration award on public policy grounds. Accordingly, her bid to have this Court announce a new public policy and overrule established law on the public policy exception should be rejected.

Turner’s argument that no segregation of fees should have been attempted is also mistaken. In this case, the Arbitrator noted the limited scope of Vulcan’s alternative fee request, “reviewed . . . billing records” that properly segregated the work for the recoverable claims, and found the fees “reasonable.” CP 3987. That was entirely consistent with Washington law, as courts instruct finders of fact to segregate fees, even in cases (such as this one) involving statutory employment claims. *See, e.g., Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 672 (1994).²⁸

²⁷ The moving party’s position in *ESCO* was much stronger than Turner’s because the fees arose directly from the defense of a *statutory* claim, where the governing statute (the Clayton Act) permitted only a successful plaintiff to recover fees. The *ESCO* court concluded, however, that because the statute did not expressly *bar* a fee award to a successful defendant, the narrow public policy exception was not satisfied. *Id.* at *12-13.

²⁸ *See also Moses v. Phelps Dodge Corp.*, 826 F. Supp. 1234, 1236 (D. Ariz. 1993) (awarding fees to an employer who successfully defended against employee’s

Because the revised fee award does not violate public policy and involves claims asserted in *Turner I*—and Turner has not assigned error to Judge Oishi’s Order compelling arbitration of those claims—the Court should affirm that award even if it were to reverse Judge Benton’s Order.

D. The Superior Court Correctly Denied Turner’s Motion for Attorneys’ Fees, as She Was Not a Prevailing Party

Turner’s challenge to the denial of her motion for attorneys’ fees should also be rejected, as that ruling (CP 3976-77) correctly applied the law in determining that Turner was not a prevailing party. “In Washington, the prevailing party is the one who receives judgment in that party’s favor” or “succeeds on any significant issue which achieves some benefit the party sought in bringing suit.” *Blair v. Wash. State Univ.*, 108 Wn.2d 558, 572 (1987) (identifying prevailing party in a WLAD sex discrimination case). “[S]tatus as a prevailing party is determined on *the outcome of the case as a whole*, rather than by piecemeal assessment of how a party fares on each motion along the way.” *Jenkins by Jenkins v. Missouri*, 127 F.3d 709, 714 (8th Cir. 1997) (emphasis added).

As the Superior Court noted, Turner “did not receive a judgment or achieve any benefit sought in her Complaint.” CP 3976-77. On the contrary, she lost on all claims, while Vulcan won on all claims it pursued

breach-of-contract claim, even though fees could not be recovered for prevailing on employee’s civil rights claims).

through the arbitration hearing. This Court should affirm the Order denying Turner's motion for fees, which comports with Washington law.

VII. ARGUMENT FOR VULCAN'S CROSS-APPEAL

Vulcan cross-appeals the Superior Court's Order vacating, on public policy grounds, the Arbitrator's initial award of attorneys' fees to Vulcan. CP 3500-02 (App. I). That award—for successfully compelling arbitration—was authorized by a bilateral contract provision and carefully tailored to exclude fees for work on Turner's statutory claims. A fee provision for precisely that purpose—compelling arbitration—at issue in a similar case involving an employee's WLAD claims (a statute containing a nonreciprocal fee provision) was upheld by the Washington Supreme Court in *Zuver*. As such, the Superior Court erred in ruling that there is an explicit, well-defined, and dominant public policy against such an award.

A. Standard of Review

The court's vacatur of the Arbitrator's initial award of attorneys' fees is subject to de novo review. *Kitsap Cnty.*, 167 Wn.2d at 434.

B. The Superior Court Erred in Vacating the Arbitrator's Original Award of Attorneys' Fees to Vulcan

1. The Original Fee Award Was Not Contrary to an Explicit, Well-Defined, and Dominant Public Policy

The Superior Court erred in vacating the initial fee award to Vulcan because there is not an explicit, well-defined, and dominant public

policy against fee awards for motions to compel arbitration. The court’s Memorandum Opinion vacating the fee award pointed to *no authority* for such a public policy, much less to authority containing an explicit and well-defined statement of it. No such statement can be found even in cases where the underlying claims are exclusively based on statutes with nonreciprocal fee provisions (such as WLAD). This is not surprising, given that the merits of such claims are not at issue on a motion to compel arbitration. Had the court properly applied the governing standard, this absence of explicit authority should have ended the inquiry. Instead, the court identified a judicial practice on a *different* issue—barring fee awards to employers who successfully defend against discrimination and wage claims—and *extended* it to litigation over arbitrability. This extension of judicial policy not to grant fees for successfully defending claims brought under WLAD and the MWA (a policy the Arbitrator expressly recognized and followed, CP 3994-96) was error.²⁹

²⁹ The relevant public policy should be framed narrowly. *See Stead Motors of Walnut Creek v. Auto. Machinists Lodge No. 1173*, 886 F.2d 1200, 1212 (9th Cir. 1989) (instructing, in a case involving a terminated auto mechanic, that “[i]f a court relies on public policy to vacate an arbitral award reinstating an employee, it must be a policy that bars *reinstatement*” rather than an inference about how to implement other policies promoting public safety). In this case, the Superior Court erroneously tied arbitrability to the *merits* of Turner’s WLAD and MWA claims, characterizing arbitration as a “procedural defense” to those statutory claims. CP 3430. But arbitrability is not a defense (procedural or otherwise). It is simply a process for determining the proper forum for adjudicating claims and defenses, wholly separate from the merits. Washington courts routinely parse fee awards based on whether fees are recoverable for different claims. *See, e.g., Boguch v. Landover Corp.*, 153 Wn. App. 595 (2009)

That the court went well beyond any explicit, well-defined public policy in imposing a “no-reciprocal fees” mandate in a new field of activity (arbitrability) is even more apparent when one considers *Zuver*, 153 Wn.2d at 319, which addressed the same issue raised in this cross-appeal. In *Zuver*, an employee asserting claims under WLAD argued that a fee provision permitting either party to recover fees for successfully compelling arbitration was substantively unconscionable because it would “discourage[] an employee from bringing a discrimination claim.” *Id.* at 300, 319. The court rejected this argument, noting that the provision would allow “*either* party to recover fees on a successful motion to stay an action and/or compel arbitration.” *Id.* at 319. “Thus,” the court concluded, “it does not appear to be so one-sided and harsh as to render it substantively unconscionable.” *Id.* *Zuver*, therefore, expressly rejected the extension of public policy that the Superior Court would impose in this case and the rationale the court relied on (the alleged “chilling effect” of the award, CP 3431). It upheld the validity of a fee provision that would do precisely what the Arbitrator did here.³⁰ For these reasons, *Zuver* is dispositive of the issue raised by this cross-appeal. It establishes that no

(remanding to trial court for segregation of recoverable fees based on contract from unrecoverable fees relating to tort claims).

³⁰ See also *Perez v. Qwest Corp.*, 883 F. Supp. 2d 1095, 1127 (D.N.M. 2012) (enforcing fee provision in arbitration agreement and awarding attorneys’ fees to employer for successfully compelling arbitration in Title VII case).

public policy bars fee awards for successfully compelling arbitration, even in cases involving statutory claims.³¹ Accordingly, the Superior Court's decision should be reversed and the initial fee award reinstated.

2. Upholding the Original Fee Award Would Not Undermine the Identified Public Policy

Finally, the Superior Court's decision to vacate should be reversed because the public policies against workplace discrimination and wrongful withholding of wages do not "specifically militate[] against the relief ordered by the arbitrator." *Matthews*, 688 F.3d at 1111. An award of fees for compelling arbitration does not undermine those policies. Instead, as the *Zuver* court implicitly recognized, a bilateral fee provision *in favor of arbitration* (which is itself supported by a strong public policy) is neutral with respect to an employee's effort to vindicate her statutory rights.³²

³¹ The Superior Court speculated about "whether the *Zuver* court's exclusive focus on the bilateral nature of the fee provision continues to represent the current view of the court." CP 3430. The court then relied instead on *Gandee*, 176 Wn.2d at 605-06, which is readily distinguishable, as it involved a "loser pays" fee-shifting provision allowing recovery of fees for successfully litigating the *merits* of a CPA claim, not for compelling arbitration, in a context far different from the facts of this case. (It is relevant, for example, that the Arbitrator's initial fee award in this case was for Vulcan's successful efforts to compel arbitration *a second time*.) In misreading *Gandee* to "raise a serious question" about the continuing validity of *Zuver*'s holding on the availability of fees for compelling arbitration, and then ruling in a manner directly at odds with *Zuver* on that issue, the Superior Court ignored both the relevant standard (requiring an explicit, well-defined public policy) and the Supreme Court's admonition that "until our precedents are specifically overruled they remain good law." *Saleemi*, 176 Wn.2d at 379.

³² As *Kitsap County* and *International Union of Operating Engineers* illustrate, arbitrators are every bit as protective of employees' rights (statutory or otherwise) as courts. In this case, the Arbitrator (a highly experienced Seattle attorney who specializes in labor law) protected Turner's statutory rights by stating that no fees would be awarded to Vulcan for its successful defense of the WLAD and MWA claims. CP 3994-96.

Concern about the potential “chilling effect” of the fee award is particularly inapt considering the unique circumstances of this case. No fees were awarded in connection with the motion to compel arbitration in *Turner I*, and thus Turner was not “sanctioned” for an initial attempt to assert her claims in court. The circumstances of this case—an award of fees incurred compelling arbitration a *second* time—will rarely be repeated, and defiance of an initial order compelling arbitration should not be encouraged through application of the public policy exception.

VIII. ATTORNEYS’ FEES ON APPEAL

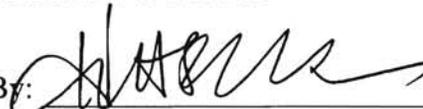
Vulcan requests an award of reasonable attorneys’ fees and costs incurred on appeal, as authorized by the EIPA. CP 2362; RAP 18.1.

IX. CONCLUSION

For the foregoing reasons, the Court should (1) affirm the Superior Court’s June 8, 2012, Order compelling arbitration, (2) affirm the Superior Court’s April 1, 2014, Order denying Turner’s motion for attorneys’ fees, (3) reverse the Superior Court’s October 30, 2013, Order vacating the original attorneys’ fee award to Vulcan that was included in the initial Final Award, and (4) remand to Superior Court with instructions to enter an order confirming the initial Final Award and an amended judgment for the purpose of restoring the original \$113,235 fee award to Vulcan and including the attorneys’ fee award to Vulcan on appeal.

DATED: October 15, 2014

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CERTIFICATE OF SERVICE

On the 15th day of October, 2015, I caused to be served upon the following, at the addresses stated below, via the method of service indicated, a true and correct copy of the foregoing document.

Rebecca J. Roe, WSBA #7560
Kathryn Goater, WSBA #9648
Schroeter Goldmark & Bender
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roe@sgb-law.com
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- Via Hand Delivery
- Via U.S. Mail, 1st Class, Postage Prepaid
- Via Overnight Delivery
- Via Facsimile
- Via E-filing
- Via E-mail

Jeffrey I. Tilden, WSBA #12219
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- Via Hand Delivery
- Via U.S. Mail, 1st Class, Postage Prepaid
- Via Overnight Delivery
- Via Facsimile
- Via E-filing
- Via E-mail

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

Dated at Seattle, Washington, this 15th day of October, 2014.


Roxann Ditlevson

2015 OCT 15 PM 4:41
COURT APPEALS DIV 1
STATE OF WASHINGTON

Appendix A

Appendix A



**Vulcan and Affiliates
Employee Intellectual Property Agreement**

In exchange for my becoming employed (or my employment being continued) by Vulcan Inc. and/or any of its current or future affiliates (collectively "Vulcan"), and for any cash compensation for my services, I, the undersigned employee, agree as follows for the benefit of Vulcan:

1. **Confidentiality.** I agree that information or physical material that is not generally known or available to the public to which I have been or will be exposed as a result of my being employed by Vulcan is confidential information that belongs to Vulcan. This includes information developed by me, alone or with others, or entrusted to Vulcan by others. I will hold Vulcan's confidential information in strict confidence, and not disclose or use it except as authorized by Vulcan and for Vulcan's benefit. If anyone tries to compel me to disclose any of Vulcan's confidential information, by subpoena or otherwise, I will immediately notify Vulcan so that Vulcan may take any actions it deems necessary to protect its interests. My agreements to protect Vulcan's confidential information apply both while I am employed by Vulcan and after my employment by Vulcan ends, regardless of the reason it ends.

Vulcan's confidential information includes, without limitation, (a) Vulcan Inventions (as defined below), (b) laboratory notebooks, (c) information relating to: (i) financial and marketing matters, (ii) investment matters, (iii) trade secrets, (iv) research and development, or (v) Vulcan's employees, and (d) information about Paul Allen, his family, friends, business associates, business or personal interests, assets or properties (including interests, assets or properties held in trust for him), and business or technical information related thereto.

VULCAN.COM

I understand that this agreement does not limit my right to use my own general knowledge and experience, whether or not gained while employed by Vulcan, or my right to use information that is or becomes generally known to the public through no fault of my own, but I have the burden in any dispute of showing that information is not Vulcan's confidential information.

I understand it is Vulcan's policy not to improperly obtain or use confidential, proprietary or trade secret information that belongs to third parties, including others who have employed or engaged me or who have entrusted confidential information to me. I will not use for Vulcan's benefit or disclose to Vulcan confidential, proprietary or trade secret information that belongs to others, unless I advise Vulcan that the information belongs to a third party and both Vulcan and the owners of the information consent to the disclosure and use.

2. **Inventions, Copyrights and Patents.** Vulcan owns all Inventions that I make, conceive, develop, discover, reduce to practice or fix in a tangible medium of expression, alone or with others, (a) during my employment by Vulcan (including past employment with Vulcan, and whether or not during working hours) or (b) if the invention results from any work I performed for Vulcan or involves the use or assistance of Vulcan's facilities, materials, personnel or confidential information (collectively, "Vulcan Inventions").

I will promptly disclose to Vulcan, will hold in trust for Vulcan's sole benefit, will assign to Vulcan and hereby do assign to Vulcan all Vulcan Inventions and any rights that I may have or

505 Fifth Ave S Suite 900
Seattle, WA 98104

206 342 2000 Tel
206 342 3000 Fax

acquire in such Vulcan Inventions. I will waive and hereby do waive any moral rights I have or may have in Vulcan Inventions. Vulcan Inventions shall be considered "works made for hire" to the fullest extent permitted by law.

I attach hereto as Exhibit A a complete list of all Inventions, if any, made or conceived or first reduced to practice by me, alone or jointly with others prior to my employment relationship with Vulcan that are relevant to Vulcan's business, and I represent and warrant that such list is complete. If no such list is attached to this Agreement, I represent that I have no such Inventions at the time of signing this Agreement. If I use or incorporate an Invention in which I have an interest and that is not otherwise a Vulcan Invention into any Vulcan Invention, I hereby grant to Vulcan a non-exclusive, fully paid-up, perpetual, world-wide license of my interest in such Invention, to make, use, sell, offer for sale, import and sublicense, such Invention without restrictions of any kind.

"Inventions" means discoveries, developments, concepts, ideas, know-how, designs, improvements, processes, procedures, machines, products, compositions of matter, formulas, algorithms, systems, computer programs and techniques, original works of authorship (including interim work product, modifications and derivative works, and all similar matters), all other matters ordinarily intended by the word "invention," and all records and expressions thereof, whether or not patentable, copyrightable or otherwise legally protectable.

I understand that this agreement does not apply to any Invention for which no equipment, supplies, facilities or trade secret information of Vulcan was used and which was developed entirely on my own time, unless (a) the Invention relates directly to Vulcan's business or actual or demonstrably anticipated research or development, or (b) the Invention results from any work I performed for Vulcan.

3. **Further Assistance; Power of Attorney.** I agree to perform, during and after my employment with Vulcan, all acts deemed necessary or desirable by Vulcan to permit and assist it, at its expense, in obtaining and enforcing the full benefits, enjoyment, rights and title throughout the world in Vulcan Inventions. Such acts may include, but are not limited to, execution of documents and assistance or cooperation in legal proceedings. Vulcan shall have full control over all applications for patents or other legal protection of these Vulcan Inventions. If, for any reason, I am unable or do not perform the acts set forth herein, I hereby irrevocably designate Vulcan and its duly authorized officers and agents as my agent and attorney-in-fact to execute and file on my behalf any applications for patents or other legal protection of Vulcan Inventions and to do all other lawful acts to further the prosecution and issuance of patents, copyright and other registrations related to such Vulcan Inventions. This power of attorney shall not be affected by my subsequent incapacity.
4. **Vulcan Materials.** All documents and property in my care, custody or control relating to my employment or Vulcan's business, including without limitation any documents that contain Vulcan's confidential information, will be and will remain the sole property of Vulcan. I will safeguard such documents and property during my employment with Vulcan and return such documents and property to Vulcan when my employment ends, or sooner if Vulcan requests.
5. **Non-raiding of Employees, Consultants and Other Parties.** During my employment with Vulcan and for twelve (12) months after my employment ends, regardless of the reason it

ends, I will not directly or indirectly solicit any employee or consultant to leave his or her employment or consultancy with Vulcan. This includes that I will not (a) disclose to any third party the names, backgrounds or qualifications of any Vulcan employees or consultants, or otherwise identify them as potential candidates for employment; (b) personally or through any other person approach, recruit or otherwise solicit Vulcan employees or consultants to work for any other employer; or (c) participate in any pre-employment interviews with any person who was engaged by Vulcan as an employee or consultant while I was employed by Vulcan. During my employment with Vulcan and for twelve (12) months after my employment ends, regardless of the reason it ends, I will not solicit any licensor, licensee or customer of Vulcan that is known to me, with respect to any business, products or services that are competitive to the business, products or services of Vulcan or under development as of the date of termination of my relationship with Vulcan.

6. **Publicity; No Disparagement or Interference.** I will not be involved in the preparation of any book, article, story, video or film about Mr. Allen, his family, friends, business associates or business or personal interests, and I will not give interviews about Mr. Allen, his family, friends, business associates or business or personal interests. I will not disparage Vulcan or its business or products and will not interfere with Vulcan's relationships with its customers, employees, vendors, bankers or others. I will not disparage Mr. Allen, his family, friends, business associates or business or personal interests. These agreements apply both while I am employed by Vulcan and after my employment by Vulcan ends, regardless of the reason it ends.
7. **Other Employment While Employed By Vulcan.** While I am employed by Vulcan I will not do work that competes with or relates to any of Vulcan's activities without first obtaining Vulcan's written permission. Any business opportunities related to Vulcan's business that I learn of or obtain while employed by Vulcan (whether or not during working hours) belong to Vulcan, and I will pursue them only for Vulcan's benefit. Before I undertake any work for myself or anyone else during my employment by Vulcan that will involve subject matter related to Vulcan's activities, I will fully disclose the proposed work to Vulcan.
8. **Future Consulting or Employment for Vulcan.** If my employment relationship with Vulcan ends but Vulcan employs me again or engages me as a consultant, then this agreement shall apply to my later employment(s) or engagement(s) unless they follow a period of a year or more during which I was neither employed nor engaged by Vulcan. If this agreement becomes applicable to a consulting relationship, the references in this agreement to my employment by Vulcan shall be treated, as appropriate, as referring to my consulting relationship with Vulcan.
9. **No Guarantee of Employment.** I understand this agreement is not a guarantee of continued employment. My employment is terminable at any time by Vulcan or me, with or without cause or prior notice, unless otherwise provided in a written employment agreement.
10. **No Conflicting Agreements.** I am not a party to, and during my employment with Vulcan, I will not, enter into any agreements, such as confidentiality or non-competition agreements, that limit my ability to perform my duties for Vulcan;

11. **Miscellaneous.** If I breach this agreement it will cause Vulcan irreparable harm. If I breach or threaten to breach this agreement, Vulcan will be entitled to injunctive or other equitable relief as well as money damages. If I breach this agreement, I will hold in trust for Vulcan all income I receive as a result of the violation. I consent to Vulcan notifying anyone to whom I may provide services of the existence and terms of this agreement. In any lawsuit arising out of or relating to this agreement or my employment, including without limitation arising from any alleged tort or statutory violation, the prevailing party shall recover their reasonable costs and attorneys fees, including on appeal. This agreement shall be governed by the internal laws of the state of Washington without giving effect to provisions thereof related to choice of laws or conflict of laws. Venue and jurisdiction of any lawsuit involving this agreement or my employment shall exist exclusively in state and federal courts in King County, Washington, unless injunctive relief is sought by Vulcan and, in Vulcan's judgment, may not be effective unless obtained in some other venue. If any part of this agreement is held to be unenforceable, it shall not affect any other part. If any part of this agreement is held to be unenforceable as written, it shall be enforced to the maximum extent allowed by applicable law. My obligations under this agreement supplement and do not limit other obligations I have to Vulcan, including without limitation under the law of trade secrets. This agreement shall be enforceable regardless of any claim I may have against Vulcan. This agreement shall survive the termination of my employment, however caused. The waiver of any breach of this agreement or failure to enforce any provision of this agreement shall not waive any later breach. This agreement is binding on me, my heirs, executors, personal representatives, successors and assigns, and benefits Vulcan and its successors and assigns. This agreement is the final and complete expression of my agreement on these subjects, and may be amended only in writing.

DATED this 13 day of JANUARY 2010.

Signature

Print Name:

_____ TRAVIS THOMPSON

Vulcan Inc.

By: _____



Exhibit A

Prior Inventions

Vulcan Inc.
505 Fifth Avenue South, Suite 900
Seattle, WA 98104
Attn: General Counsel

The following is a complete list of all inventions relevant to the subject matter of my employment by Vulcan that have been made or conceived or first reduced to practice by me, alone or jointly with others. I represent that such list is complete.

VULCAN.COM

By: Theri T. Anderson

[Print Name]

505 Fifth Ave S, Suite 900
Seattle, WA 98104
206 342 2000 Tel
206 342 3000 Fax

Appendix B

Appendix B



Dear Traci Turner;

We are pleased to extend to you this offer to guarantee your 2011 discretionary bonus, in exchange for your agreement to waive any potential claims against Vulcan and its affiliates. If, after reviewing this letter, you would like to accept this offer, please sign and return this letter to me at your earliest convenience. Of course I would be happy to discuss the details or answer any questions you might have as well.

A. Guaranteed 2011 Bonus

In exchange for your waiver and release of any claims as set forth below, Vulcan will guarantee, on a one-time basis, your 2011 Annual Bonus Opportunity at 125% of your 2011 annual bonus target, pro rated from your start date or the beginning of the year (whichever is more recent) through the end of the year (your "Guaranteed Bonus"). Traci, you are eligible for a minimum bonus of \$25,156 under this agreement. If your employment terminates for any reason (including voluntary resignation) before December 31, 2011, you will receive a prorated amount of your Guaranteed Bonus through the date your Vulcan employment ends on the date bonuses would normally be paid. You do not need to be employed by Vulcan on the day the bonuses are paid in order to receive the Guaranteed Bonus. Except as set forth above, the Guaranteed Bonus will otherwise be payable pursuant to Vulcan's applicable bonus schedule and policies.

B. Full Release of Claims

You hereby release and forever discharge (i) Vulcan, and each and every affiliate (meaning any person or entity which controls, is controlled by, or is under common control with Vulcan), and every shareholder, member, partner, manager, director, officer, employee, contractor, agent, consultant, representative, administrator, fiduciary, attorney and benefit plan of Vulcan and any such affiliate, and (ii) every predecessor, successor, transferee and assign of each of the persons and entities described in this sentence, from any and all claims, disputes and issues of any kind, known or unknown, that arose on or before the date you signed this Agreement. This release of claims, however, does not extend to claims that arise after you sign this agreement.



C. Arbitration

Any and all claims, disputes, or other matters in controversy on any subject arising out of or related to this Agreement and your employment shall be subject to confidential arbitration; provided, however, that Vulcan shall have the right, upon its election, to seek emergency injunctive relief in court in aid of arbitration to preserve the status quo pending determination of the merits in arbitration and venue and jurisdiction for any such injunctive action will exist exclusively in state and federal courts in King County, Washington. Upon receipt of a demand for arbitration, the parties shall promptly attempt to mutually agree on an arbitrator and, if mutual agreement cannot be made, an arbitrator shall be selected and any arbitration proceedings shall be conducted in Seattle, Washington in accordance with applicable AAA rules. The award rendered by the arbitrator shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof. The parties and the arbitrator shall treat all aspects of the arbitration as strictly confidential and not subject to disclosure to any third party or entity, other than to the parties, the arbitrator and any administering agency.

D. Confidentiality

The terms of this Agreement and your employment with Vulcan are intended to be confidential. Except as specifically permitted by this Agreement, in response to a lawful subpoena, court order or governmental administrative request, or as otherwise required by law, you have not and will not discuss with or communicate to any person or entity the terms of this Agreement.

E. Applicable Law

This Agreement will be governed by the laws of the State of Washington, without regard to conflict of law principles.

Please carefully review this letter. I would be happy to respond to any questions you might have. If you would like to accept this offer, please sign and date this letter and return a copy to me at your earliest convenience.



F. Other Terms of Employment

Except as provided in this Agreement, your other terms of employment and the agreements that govern your employment, including your Employee Intellectual Property Agreement, shall remain in full force and effect.

G. Other Terms

You are entitled to seek the advice of your own counsel before executing this Agreement. If you should seek such advice, remember that your attorney must also agree to be bound by the confidentiality provisions of this Agreement.

Thank you for your continued service at Vulcan.

Sincerely,

Kathy Leodler

AGREED and ACCEPTED this 26 day of July 2011:

TRACI TURNER
Print Name

[Signature]
Signature

GUARANTEED BONUS PAYOUT COMMUNICATION SHEET
For Period Ending December 31, 2011

Employee:	Traci Turner
Title:	Executive Protection Lead
Hire Date:	1/17/2011
Annualized Base Pay Rate::	\$140,000.12
Eligible O/T (if earned):	To be determined
Target Bonus Opportunity:	15%
Number of eligible months:	11.5
Payout Percentage	125% of Target Bonus Opportunity

The amount of the bonus payment has two components. 1) Half of the bonus is awarded based on individual performance. 2) The other half of the bonus is tied to achievement of the overall corporate financial "bottom line" for 2011.

1) 50% Employee Contribution Payout:	12,578
2) 50% Company Payout:	12,578
Company Performance Adjustment:	<u> TBD</u>
TOTAL BONUS PAYOUT AMOUNT:	25,156

Appendix C

Appendix C

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PERKINS COIE

THE HONORABLE PATRICK OISHI
Noted for Consideration: October 5, 2011
Oral Argument Requested

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

TRACI TURNER,

Plaintiff,

v.

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

Defendants.

No. 11-2-32744-2 SEA

[PROPOSED] ORDER GRANTING
DEFENDANT VULCAN INC.'S MOTION
TO COMPEL ARBITRATION AND TO
STAY PROCEEDINGS

THIS MATTER came regularly before the Court on Defendant Vulcan, Inc.'s Motion to Compel Arbitration and to Stay Proceedings. The Court considered the motion, the declarations of Harry H. Schneider, Jr. and Nicole Stansfield in support of the motion, *the declaration of Traci Turner in support of plaintiff's response,* plaintiff's response, *if any,* and Defendant's reply, *if any,* and being fully advised, hereby:

ORDERS that Defendant's motion to compel arbitration is GRANTED.

Accordingly, plaintiff is ordered to submit his claims to arbitration pursuant to the

[PROPOSED] ORDER GRANTING
DEFENDANT'S MTN TO COMPEL
ARBITRATION - 1

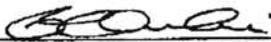
34528-0102/LEGAL21803670.1

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

1 arbitration provision set out in the parties' Guaranteed Bonus Agreement, attached as
2
3 Exhibit B to the Stansfield Declaration. All further proceedings in this matter are stayed
4
5 until the completion of arbitration.

6 *Furthermore, the Court denies the plaintiff's request to*
7 *grant defendant's motion to compel arbitration as a dispositive*
8 *motion under CR 56 because the matter was not properly noted,*

9 DATED: this 6th day of October, 2011.


Honorable Patrick Oishi

10
11 Presented by:

Filed, or scheduled pursuant to the
requirements of CR 56 and King County
LCR 56.

12
13 /s Harry H. Schneider, Jr.

14
15 Harry H. Schneider, Jr., WSBA No. 09404

16 HSchneider@perkinscoie.com

17 Kevin J. Hamilton, WSBA No. 15648

18 KHamilton@perkinscoie.com

19 Joseph M. McMillan, WSBA No. 26527

20 JMcMillan@perkinscoie.com

21 Perkins Cole LLP

22 1201 Third Avenue, Suite 4800

23 Seattle, WA 98101-3099

24 Telephone: 206.359.8000

25 Facsimile: 206.359.9000
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[PROPOSED] ORDER GRANTING
DEFENDANT'S MOTION TO COMPEL
ARBITRATION - 2

34528-0102/LEGAL21803670.1

Perkins Cole LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Appendix D

Appendix D

FILED

12 APR 16 PM 3: 28

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

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THE HONORABLE MONICA J. BENTON
Noted for Oral Argument: April 5, 2012 at 9:00 a.m.

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

TRACI TURNER,
Plaintiff,

No. 12-2-03514-8 SEA

v.

~~[PROPOSED]~~ STIPULATED ORDER ON
PARTIES' MOTIONS ARGUED ON APRIL
5, 2012

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

THESE MATTERS, having come before the Court on Defendant Vulcan Inc.'s
Motion to Dismiss and for Other Relief, Defendant Vulcan Inc.'s and Defendants Colliver's
and Macdonald's Motion for Protective Order Quashing Notice of Deposition to Laura
Macdonald, Defendant Vulcan's Motion for Consolidation of Two Related Motions,
Defendant Vulcan's Motion to Shorten Time on Vulcan's Motion for Consolidation; and on
Plaintiff Turner's Motion for Relief from Order Compelling Arbitration (CR 60), Plaintiff
Turner's Motion to Stay Arbitration, and Plaintiff Turner's Motion to Shorten Time on
Plaintiff's Motion to Stay Arbitration;

[PROPOSED] STIPULATED ORDER ON PARTIES'
MOTIONS ARGUED ON APRIL 5, 2012 - 1

ORIGINAL

1 AND THE COURT HAVING CONSIDERED the following documents and
2 materials:
3

4 Defendant Vulcan's Motion to Dismiss and for Other Relief, the supporting
5 declaration of Harry H. Schneider, Jr. with accompanying Exhibits A-N, the supporting
6 declaration of Nicole Stansfield with accompanying Exhibits A-B, the opposition papers
7 filed by Plaintiff, the supporting declaration of Patrick Leo McGuigan with accompanying
8 attachments 1-8, the supporting declaration of Traci Turner, the supporting declaration of
9 Kathleen Leodler, Defendant's Reply, and the supporting declaration of Harry Schneider
10 with accompanying Exhibits A-H;
11

12 Defendant Vulcan's Motion for Protective Order Quashing Notice of Deposition to
13 Laura Macdonald, the supporting declaration of Harry H. Schneider, Jr., the opposition
14 papers filed by Plaintiff, the supporting declaration of Patrick Leo McGuigan, Defendants'
15 Reply, the supporting declaration of Harry H. Schneider, Jr., and Defendant Laura
16 Macdonald's Motion for Protective Order Quashing Notice of Deposition;
17

18 Defendant Vulcan's Motion for Consolidation of Two Related Motions, the
19 supporting declaration of Harry H. Schneider Jr., the opposition papers filed by Plaintiff, the
20 supporting declaration of Patrick Leo McGuigan, Defendant's Reply,
21

22 Defendant Vulcan's Motion to Shorten Time on Vulcan's Motion for Consolidation,
23 the supporting declaration of Harry H. Schneider Jr., the opposition papers filed by Plaintiff,
24 the supporting declaration of Patrick Leo McGuigan, Defendant's Reply; and the Joinder of
25 Ray Colliver and Laura Macdonald in Vulcan's Motion for Consolidation of Two Motions;
26

27 Plaintiff's Motion for Relief from Order Compelling Arbitration (CR 60), the
28 supporting declarations of Plaintiff Turner, Kathy Leodler, and Patrick Leo McGuigan, the
29 opposition papers filed by Defendant, the supporting declaration of Harry H. Schneider Jr.,
30 Plaintiff's Reply, the supporting declaration of Patrick Leo McGuigan and Jerald Pearson;
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40 [PROPOSED] STIPULATED ORDER ON PARTIES'
41 MOTIONS ARGUED ON APRIL 5, 2012 - 2 - 2
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1 and the Opposition of Defendants Colliver and Macdonald to Plaintiff's Motion for Relief
2 from Order Compelling Arbitration, and the supporting Declaration of Laura Macdonald;

3 Plaintiff's Motion to Stay Arbitration, the supporting declaration of Patrick Leo
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McGuigan, the opposition papers filed by Defendant, the supporting declaration of
Joseph M. McMillan, Plaintiff's Reply, the supporting declaration of Lisa Burke;

Plaintiff's Motion to Shorten Time on Plaintiff's Motion to Stay Arbitration, the
supporting declaration of Patrick Leo McGuigan, the opposition papers filed by Defendant,
the supporting declaration of Joseph M. McMillan, Plaintiff's Reply, the supporting
declaration of Lisa Burke; and Ray Colliver's and Laura Macdonald's Response to Plaintiff's
Motion to Stay Arbitration proceedings and Motion to Shorten Time;

AND THE COURT HAVING HEARD THE ARGUMENTS of counsel for the
parties at a hearing held on April 5, 2012;

IT IS HEREBY ORDERED as follows:

Defendant Vulcan Inc.'s Motion to Dismiss is: Granted Denied Reserved

The parties will submit additional briefing on the issue of whether the Plaintiff's five
additional claims are subject to mandatory arbitration vis-à-vis a mandatory arbitration
provision, contained in an underlying employment contract. That briefing will follow the
schedule outlined below:

All parties must file their moving briefs by Thursday, May 9, 2012¹;

All parties must file their opposition briefs no later than Monday, May 21, 2012;

No reply briefing will be permitted by any party.

¹ Page limits pursuant to CR 56

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IT IS FURTHER ORDERED as follows:

Defendants' Motion for Protective Order Quashing Notice of Deposition to Laura Macdonald is: Granted Denied as moot

Defendant's Motion for Consolidation of Two Related Motions is: Granted Denied as moot

Defendant's Motion to Shorten Time on Vulcan's Motion for Consolidation is: Granted Denied as moot

Plaintiff's Motion for Relief from Order Compelling Arbitration (CR 60) is: Granted Denied

Plaintiff's Motion to Stay Arbitration is: Granted Denied as moot

Plaintiff's Motion to Shorten Time on Plaintiff's Motion to Stay Arbitration is: Granted Denied as moot

DATED this 16 day of April, 2012.


Honorable Monica J. Benton

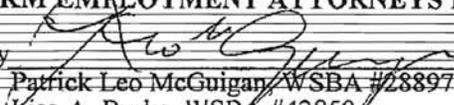
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Presented by:

s/ Harry H. Schneider, Jr., WSBA No. 9404
Harry H. Schneider, Jr., WSBA No. 09404
HSchneider@perkinscoie.com
Kevin J. Hamilton, WSBA No. 15648
KHamilton@perkinscoie.com
Joseph M. McMillan, WSBA No. 26527
JMcMillan@perkinscoie.com
Perkins Coie LLP
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Facsimile: 206.359.9000

Attorneys for Defendants
Vulcan Inc., Paul Allen, and Jody Allen

HKM EMPLOYMENT ATTORNEYS PLLC

By 
Patrick Leo McGuigan, WSBA #28897
Lisa A. Burke, WSBA #42859
Attorneys for Plaintiff Traci Turner

GORDON TILDEN THOMAS & CORDELL LLP

By Jeffrey I. Tilden, WSBA #12219
Attorneys for Defendants Ray Colliver and Laura Macdonald

1 Presented by:

2
3 s/ Harry H. Schneider, Jr., WSBA No. 9404

4 Harry H. Schneider, Jr., WSBA No. 09404

5 HSchneider@perkinscoie.com

6 Kevin J. Hamilton, WSBA No. 15648

7 KHamilton@perkinscoie.com

8 Joseph M. McMillan, WSBA No. 26527

9 JMcMillan@perkinscoie.com

10 **Perkins Coie LLP**

11 1201 Third Avenue, Suite 4800

12 Seattle, WA 98101-3099

13 Telephone: 206.359.8000

14 Facsimile: 206.359.9000

15
16 Attorneys for Defendants

17 Vulcan Inc., Paul Allen, and Jody Allen

18
19
20
21 **HKM EMPLOYMENT ATTORNEYS PLLC**

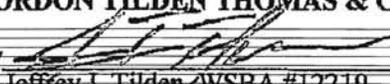
22
23 By

24 Patrick Leo McGuigan, WSBA #28897

25 Lisa A. Burke, WSBA #42859

26 Attorneys for Plaintiff Traci Turner

27
28
29 **GORDON TILDEN THOMAS & CORDELL LLP**

30
31 By 

32 Jeffrey I. Tilden, WSBA #12219

33 Attorneys for Defendants Ray Colliver and Laura Macdonald

Appendix E

Appendix E

FILED
KING COUNTY, WASHINGTON

JUN 8 2012

SUPERIOR COURT CLERK
JON SCHROEDER
DEPUTY

THE HONORABLE MONICA J. BENTON
Noted for Consideration: May 22, 2012

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

TRACI TURNER,

Plaintiff,

v.

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

Defendants.

No. 12-2-03514-8 SEA

~~[REVISED PROPOSED]~~ ORDER
COMPELLING PLAINTIFF TO
ARBITRATE CLAIMS AND STAYING
PROCEEDINGS

THIS MATTER, having originally come before the Court on April 5, 2012, at which time the Court heard oral argument on various motions brought by Plaintiff Turner and Defendants Vulcan, Colliver and Macdonald;

AND THE COURT HAVING ENTERED ON APRIL 16, 2012, ITS ORDER ON PARTIES MOTIONS ARGUED APRIL 5, 2012, in which the Court DENIED Plaintiff Turner's Motion for Relief From Order Compelling Arbitration (CR 60), RESERVED its ruling on Defendants' Motion to Dismiss, and ORDERED the parties to submit additional

[REVISED PROPOSED] ORDER
COMPELLING PLAINTIFF TO ARBITRATE
CLAIMS AND STAYING PROCEEDINGS - 1
34528-0102/LEGAL23723742.1

ORIGINAL

Perkins Coie LLP
201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

1 briefing on the issue of whether the Plaintiff's five additional claims are subject to
2
3 mandatory arbitration vis-à-vis a mandatory arbitration provision contained in an underlying
4
5 employment contract;

6
7 AND THE COURT HAVING RECEIVED AND CONSIDERED the supplemental
8
9 briefing of the parties including:

10
11 1. Vulcan Defendants' Supplemental Brief on Arbitrability of Plaintiffs'
12
13 Remaining Claims, filed May 9, 2012, together with supporting Declarations and out-of-
14
15 state authorities.

16
17 2. Plaintiff's Supplemental Briefing to Defendant Vulcan Inc.'s Motion to
18
19 Dismiss and for Other Relief, filed May 9, 2012, together with supporting Declarations and
20
21 out-of-state authorities.

22
23 3. Vulcan Defendants' Response to Plaintiff's Supplemental Brief on
24
25 Arbitrability of Remaining Claims, filed May 21, 2012, together with supporting
26
27 Declarations and out-of-state authorities.

28
29 4. Plaintiff's Response Brief, filed May 21, 2012, together with supporting
30
31 Declarations and out-of-state authorities.

32
33 5. Opening Brief of Defendants Colliver and Macdonald Regarding Mandatory
34
35 Arbitration of Claims, filed May 9, 2012, together with supporting Declaration.

36
37 6. Responding Brief of Defendants Colliver and Macdonald Regarding
38
39 Mandatory Arbitration of Claims, filed May 21, 2012.

40
41 IT IS HEREBY ORDERED as follows:

42
43 1. Further oral argument is not necessary and Defendants' Request for Oral
44
45 Argument is DENIED;

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47
[REVISED PROPOSED] ORDER
COMPELLING PLAINTIFF TO ARBITRATE
CLAIMS AND STAYING PROCEEDINGS - 2

34528-0102/LEGAL23723/42.1

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Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

1 2. As indicated in its oral ruling on April 5, 2012, and in its April 16, 2012,
2
3 Order On Parties' Motions Argued April 5, 2012, Plaintiff's claims in this matter ("*Turner*
4 *II*") that were previously asserted in King County Superior Court Case No. 11-2-32744-2
5 SEA ("*Turner I*") are hereby DISMISSED, on the grounds that those claims have already
6
7 been referred to arbitration by Judge Oishi in *Turner I*. Accordingly, the following of
8
9 Plaintiff's claims are DISMISSED WITHOUT PREJUDICE to their resolution in the AAA
10
11 arbitration now underway involving Plaintiff Turner and Defendant Vulcan:
12

13 2.1 Gender Discrimination

14 2.2 Hostile Work Environment

15 2.3 Retaliation

16 2.4 Wrongful Constructive Termination of Employment

17 2.5 Defamation

18
19 3. Vulcan's Motion to Dismiss Plaintiff's remaining claims in this matter is
20
21 GRANTED on the grounds of res judicata and/or collateral estoppel and on the basis that the
22
23 parties' written agreement is not procedurally or substantively unconscionable or otherwise
24
25 unenforceable, and the following of Plaintiff's claims are DISMISSED WITHOUT
26
27 PREJUDICE to their resolution in the same AAA arbitration now underway involving
28
29 Plaintiff Turner and Defendant Vulcan:
30

31 3.1 Sexual Orientation Discrimination

32 3.2 Age Discrimination

33 3.3 Intentional Infliction of Emotional Distress

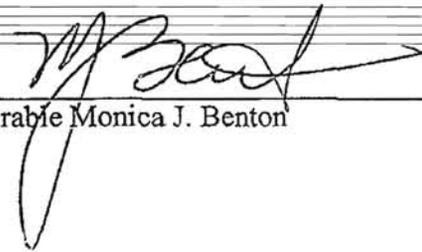
34 3.4 Negligent Infliction of Emotional Distress

35 3.5 Willful Withholding of Wages
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1 4. Plaintiff is ORDERED to submit all of her claims arising out of or related to
2 her employment with Vulcan to binding arbitration pursuant to the written agreement of the
3 parties in the Guaranteed Bonus Agreement containing an arbitration clause.
4
5

6 5. All further proceedings in this matter are STAYED until completion of
7 arbitration.
8
9

10
11
12 DATED: this 8 day of June, 2012.

13 
14 Honorable Monica J. Benton
15
16
17
18

19 Presented by:

20
21
22 s/ Harry H. Schneider, Jr., WSBA No. 9404
23 Harry H. Schneider, Jr., WSBA No. 09404
24 HSchneider@perkinscoie.com
25 Kevin J. Hamilton, WSBA No. 15648
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27 Joseph M. McMillan, WSBA No. 26527
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36 Attorneys for Defendants
37 Vulcan Inc., Paul Allen, and Jody Allen
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Appendix F

Appendix F

ARBITRATOR CAROLYN CAIRNS

AMERICAN ARBITRATION ASSOCIATION
EMPLOYMENT ARBITRATION TRIBUNAL

VULCAN INC.,

Claimant,

v.

TRACI TURNER,

Respondent

v.

RAY COLLIVER and LAURA
MACDONALD,

Third-Party Respondents.

Case No.: 75 166 00410 11 DWPA

**FINDINGS OF FACT, CONCLUSIONS
OF LAW AND INTERIM
ARBITRATION AWARD**

I, the undersigned Arbitrator, having been designated in accordance with the arbitration agreement entered into between the above-named parties, and having been duly sworn, and having duly heard the proofs and allegations presented by Claimant Vulcan Inc., and Third-Party Respondents Ray Colliver and Laura MacDonald, do hereby issue this INTERIM AWARD, as follows:

FINDINGS OF FACT

1. Claimant Vulcan Inc. ("Vulcan") is a Washington corporation that manages the affiliated businesses, charitable foundations and assets of Paul G. Allen. Vulcan initiated this

FINDINGS OF FACT, CONCLUSIONS OF LAW AND
INTERIM ARBITRATION AWARD - 1
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(206) 426-6000

proceeding by filing a Demand for Arbitration with the American Arbitration Association ("AAA") on December 14, 2011.

2. Respondent Traci Turner is a former Vulcan employee. Ms. Turner was employed as a member of Vulcan's Executive Protection ("EP") team from January 17, 2012, until she submitted her resignation on September 23, 2012. She subsequently asserted employment-related claims in two separate lawsuits against Vulcan, the first on September 26, 2011, and the second on January 27, 2012.

3. In both of the lawsuits filed by Turner, the court granted Vulcan's motion to compel arbitration and stayed the litigation pending resolution of Turner's claims in this arbitration. Turner's claims in this matter are styled "counterclaims" because Vulcan initiated the arbitration when Turner failed to do so after the court granted Vulcan's first motion to compel arbitration in October 2011.

4. Ray Colliver and Laura Macdonald are Vulcan executives and Third-Party Respondents in this proceeding. Turner has asserted the same claims against Colliver and Macdonald as against Vulcan. Colliver is Vice President of Design and Construction at Vulcan, and was the senior executive supervising the EP team during Turner's tenure at Vulcan. Laura Macdonald is Vulcan's Senior Director of Human Resources.

5. In its Demand for Arbitration, Vulcan asserted the following claims against Turner:

- (1) Breach of Employee Intellectual Property Agreement ("EIPA");
- (2) Anticipatory Breach of Employee Intellectual Property Agreement;
- (3) Breach of Duty of Loyalty;
- (4) Breach of Confidential Relationship;
- (5) Violation of Computer Fraud and Abuse Act;
- (6) Repayment of Prorated Bonuses;
- (7) Declaratory Relief – Nonliability for Employment-Related Causes of Action;

- (8) Declaratory Relief – Nonliability for Fraud;
- (9) Declaratory Relief – Nonliability for Defamation;
- (10) Declaratory Relief – Nonliability for Actions Prior to July 26, 2011, Release.

6. By letter from Turner's counsel dated March 9, 2012, Turner asserted the following counterclaims against Vulcan, Colliver, and Macdonald:

- (1) Gender Discrimination in Violation of RCW 49.60 et seq.;
- (2) Sexual Orientation Discrimination in Violation of RCW 49.60 et seq.;
- (3) Age Discrimination in Violation of RCW 49.60 et seq.;
- (4) Hostile Work Environment;
- (5) Retaliation;
- (6) Wrongful Constructive Termination;
- (7) Intentional Infliction of Emotional Distress;
- (8) Negligent Infliction of Emotional Distress;
- (9) Defamation; and
- (10) Willful Withholding of Wages.

7. On October 31, 2012, the Arbitrator granted Vulcan's Motion for Partial Summary Judgment on Validity and Effect of Release, ruling as a matter of law that a "Release granted to Vulcan by Traci Turner on July 26, 2011, is valid and enforceable, covers Vulcan Inc. as well as Third-Party Respondents Ray Colliver and Laura Macdonald, and precludes reliance by Turner on acts or events on or before that date to support her claims or counterclaims in this proceeding." Vulcan is therefore entitled to an award in its favor on its claim for Declaratory Relief on the Validity and Effect of the Release (claim 10 listed in paragraph 5 above).

8. On October 31, 2012, the Arbitrator also granted Vulcan's Motion for Partial Summary Judgment on Defamation Claim, dismissing Turner's defamation counterclaim as a matter of law. Vulcan is therefore entitled to an award in its favor on its claim for Declaratory Relief – Nonliability for Defamation (claim 9 listed in paragraph 5 above).

9. Prior to the arbitration hearing in this matter, Vulcan dismissed without prejudice its claims against Turner for Breach of the EIPA, Anticipatory Breach of the EIPA, Breach of Duty of Loyalty, Breach of Confidential Relationship, Violation of Computer Fraud and Abuse Act, and Declaratory Relief – Nonliability for Fraud.

10. A hearing in this matter was held by the Arbitrator on November 26, 2012. Representatives of Vulcan and Third-Party Respondents participated in the hearing, introducing documentary evidence and presenting testimony from four witnesses:

Ray Colliver;

Laura Macdonald;

Frank Liebscher;

Josh Sternberg.

11. Respondent Traci Turner withdrew from these proceedings on October 17, 2012 and declined to participate further. Ms. Turner did not appear, introduce evidence, or participate in the hearing. The Arbitrator reviewed Ms. Turner's deposition taken by Vulcan on May 10, 2012.

12. Turner has failed to carry her burden of proof with respect to any of the elements of the causes of action she asserted in this proceeding. Accordingly, Vulcan, Colliver and Macdonald are entitled to an award on the merits, dismissing all of Turner's claims with prejudice.

13. In addition, the unrebutted testimony of the four witnesses at the arbitration hearing, plus the documentary evidence submitted by Vulcan, establish that Ms. Turner suffered neither adverse employment action nor any hostile work environment while at Vulcan. Moreover, she was fully paid for all work performed, was not constructively terminated, and was not subject to either intentional or negligent infliction of emotional distress.

14. Based on the validity of the Release signed by Ms. Turner on July 26, 2011, and the evidence introduced by Vulcan, Colliver and Macdonald at the November 26, 2012, hearing, Vulcan has shown that it is not liable to Turner on any employment-related claims. Accordingly,

Vulcan is entitled to an award in its favor on its claim for declaratory relief that it is not liable to Turner for employment-related causes of action.

15. Vulcan has also proven that pursuant to the terms of Turner's Employment Offer Letter, Turner received from Vulcan a signing bonus of \$5000.00 and an additional bonus of \$14,531.32 to reimburse her for repayment to her former employer for relocation expenses. The Employment Offer Letter provided, however, that if Turner's employment with Vulcan was terminated for any reason, voluntarily or involuntarily, within the one-year period following her start date, then Turner would be required to repay both of these bonuses to Vulcan on a prorated scale.

16. Turner's employment at Vulcan terminated upon her resignation on or about September 23, 2011, which was less than one year after her start date of January 17, 2011. By letter dated October 6, 2011, Vulcan demanded repayment from Turner of a prorated portion of the bonuses, in the amount of \$5,696.63, consistent with the terms of the Employment Offer Letter that Turner accepted. Turner failed to respond to that demand. Turner is in breach of that contractual obligation, and is liable to Vulcan for damages in the amount of \$5,696.63.

17. Upon joining Vulcan, Ms. Turner signed the Employee Intellectual Property Agreement ("EIPA"), which contains the following fees provision:

In any lawsuit arising out of or related to this agreement or my employment, including without limitation arising from any alleged tort or statutory violation, the prevailing party shall recover their reasonable costs and attorneys' fees, including on appeal.

18. The EIPA is a valid and enforceable contract, supported by consideration, subject to paragraph 19 of the Findings of Fact.

19. This dispute arises out of Ms. Turner's employment at Vulcan, and Vulcan is a prevailing party in this proceeding; however, Vulcan may not recover attorneys' fees and costs flowing from Ms. Turner's statutory claims of employment discrimination in the absence of a showing that her statutory claims were "frivolous, unreasonable, or without foundation". Based on the available record, the Arbitrator cannot conclude that this is among the rare cases where

such a finding should be made. Based on the fees provision in the EIPA, Ms. Turner is liable for Vulcan's reasonable costs and attorneys' fees in this arbitration only as to non-statutory claims and some portion of the attorneys' fees and costs incurred in two lawsuits seeking to enforce the arbitration clause contained in the bonus agreement signed by Ms. Turner on July 26, 2011.

CONCLUSIONS OF LAW

Based on the foregoing, the Arbitrator enters the following Conclusions of Law:

1. Dismissal with Prejudice of Turner's Claims. All of Respondent Traci Turner's claims in this proceeding, as listed in paragraph 6 of the Findings of Fact above, fail for lack of proof and for the reasons set forth in the Arbitrator's October 31, 2012, Orders entered in this case. Those claims have also been effectively rebutted by Vulcan's affirmative showing at the arbitration hearing and are hereby dismissed with prejudice. This dismissal covers all claims asserted against Claimant Vulcan and against Third-Party Respondents Colliver and Macdonald.

2. Declaratory Relief of Non-Liability on Employment-Related Claims. Vulcan is not liable to Turner on any employment-related claims, whether based on statute or sounding in contract or in tort. Accordingly, Vulcan is entitled to an award in its favor on its claim for Declaratory Relief that it is not liable to Turner for employment-related causes of action.

3. Vulcan's Right to Recover Prorated Portion of Bonuses. Turner has breached her contractual obligation to repay Vulcan a prorated portion of the bonuses she received at the start of her employment at Vulcan. Accordingly, Turner is liable to Vulcan for damages for that breach in the amount of \$5,696.63.

4. Turner Is Liable to Vulcan for Its Reasonable Costs and Attorneys' Fees. The EIPA is a valid and enforceable contract that contains a fees provision. This dispute arises out of Turner's employment at Vulcan, and Vulcan is a prevailing party in this proceeding.

Accordingly, based on the fees provision in the EIPA, Turner is liable for Vulcan's reasonable costs and attorneys' fees as to nonstatutory claims in this arbitration. The Arbitrator cannot conclude on this record that Ms. Turner's statutory claims of employment discrimination were "frivolous, unreasonable, or without foundation". *Walters v AAA Waterproofing, Inc.*, 151

Wn. App. 316, 323 (2009). Accordingly, Vulcan may not recover attorneys' fees and costs in defending Ms. Turner's unsuccessful statutory claims. Vulcan may also recover a portion of its reasonable fees and costs as to the two lawsuits filed by Ms. Turner to the extent they relate to Vulcan's efforts to have the litigation stayed pending resolution in this forum.

INTERIM AWARD

Based on the Findings of Fact and Conclusions of Law set forth above, the Arbitrator enters the following Interim Award, which is a final determination on liability issues, and interim only with respect to the amount of reasonable costs and attorneys' fees awarded under paragraph 4 below:

1. Dismissal with Prejudice of Turner's Claims. All of Respondent Traci Turner's claims in this proceeding, as listed in paragraph 6 of the Findings of Fact above, are hereby dismissed with prejudice. This dismissal covers all claims asserted against Claimant Vulcan and against Third-Party Respondents Colliver and Macdonald.
2. Declaratory Relief: Vulcan Not Liable on Employment-Related Claims. Vulcan is hereby awarded Declaratory Relief that it is not liable to Ms. Turner for any employment-related causes of action.
3. Vulcan Is Awarded \$5,696.63 from Turner for Breach of Contract. Ms. Turner has breached her contractual obligation to repay Vulcan a prorated portion of the bonuses she received at the start of her employment at Vulcan. Accordingly, Vulcan is awarded damages for that breach from Ms. Turner in the amount of \$5,696.63.
4. Turner Is Liable to Vulcan for Its Reasonable Costs and Attorneys' Fees. The EIPA is a valid and enforceable contract that contains a fees provision. This dispute arises out of Turner's employment at Vulcan, and Vulcan is a prevailing party in this proceeding. Accordingly, based on the fees provision in the EIPA, Turner is liable for Vulcan's reasonable costs and attorneys' fees as to nonstatutory claims in this arbitration. The Arbitrator cannot conclude on this record that Ms. Turner's statutory claims of employment discrimination were frivolous, unreasonable or without foundation. Accordingly, Vulcan may not recover attorneys'

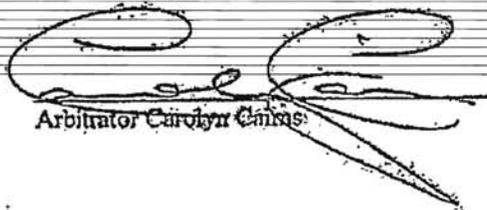
fees and costs in defending Ms. Turner's unsuccessful statutory claims. Vulcan may also recover a portion of its reasonable fees and costs as to the two lawsuits filed by Ms. Turner to the extent they relate to Vulcan's efforts to have the litigation stayed pending resolution in this forum.

5. Vulcan May Submit Post-Hearing Briefing on Reasonable Fees and Costs.

Within 30 days of receipt of these Findings of Fact, Conclusions of Law, and Interim Award, Vulcan may submit declarations and documentary evidence to establish the amount of costs and fees that it reasonably incurred in defending nonstatutory claims in arbitration and in having Ms. Turner's two lawsuits stayed pending resolution in arbitration. The Arbitrator will consider that submission and issue a Final Award that includes the amount of costs and fees awarded, which Final Award will supersede this Interim Award.

This Interim Award shall remain in full force and effect until such time as a final Award is rendered.

DATED this 21st day of December, 2012.


Arbitrator Carolyn Camras

Presented by:

Harry H. Schneider, Jr., WSBA No. 09404
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Kevin J. Hamilton, WSBA No. 15648
KHamilton@perkinscoie.com
Joseph M. McMillan, WSBA No. 26527
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FINDINGS OF FACT, CONCLUSIONS OF LAW AND
INTERIM ARBITRATION AWARD - 8
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Appendix G

Appendix G

1 ARBITRATOR CAROLYN CAIRNS

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6 AMERICAN ARBITRATION ASSOCIATION
7 EMPLOYMENT ARBITRATION TRIBUNAL

8 VULCAN INC.,
9 Claimant,
10 v.
11 TRACI TURNER,
12 Respondent,
13 v.
14 RAY COLLIVER and LAURA
MACDONALD,
15 Third-Party Respondents.

No. 75 160 00410 11 DWPA
FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND FINAL ARBITRATION
AWARD

16 I, the undersigned Arbitrator, having been designated in accordance with the arbitration
17 agreement entered into between the above-named parties, and having been duly sworn, and
18 having previously rendered an Interim Award in this matter on December 21, 2012, and having
19 reviewed the evidence and memorandum submitted by Vulcan Inc. in support of its Motion for
20 Attorneys' Fees and Entry of Final Award, do hereby issue these Findings of Fact, Conclusions
21 of Law, and Final Award, as follows:

22 This Final Award is final and binding on the parties, consistent with the terms of the
23 arbitration clause in the Guaranteed Bonus Agreement and Rule 39(g) of the AAA Employment
24 Arbitration Rules.

25
26 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
FINAL ARBITRATION AWARD - I

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1. Findings of Fact and Conclusions of Law. The Findings of Fact and Conclusions of Law contained in the Interim Award are made final by, and incorporated into, this Final Award.
2. Dismissal with Prejudice of Turner's Claims. All of Respondent Traci Turner's counterclaims in this proceeding, as listed in paragraph 6 of the Findings of Fact contained in the Interim Award, are hereby dismissed with prejudice. Ms. Turner's Defamation claim was previously dismissed on October 31, 2012. The instant dismissal includes all claims asserted against Claimant Vulcan and against Third-Party Respondents Colliver and Macdonald.
3. Declaratory Relief: Vulcan Not Liable on Employment-Related Claims. Vulcan is hereby awarded Declaratory Relief that it is not liable to Ms. Turner for any employment-related causes of action.
4. Vulcan Is Awarded \$5,696.63 from Turner for Breach of Contract. Ms. Turner has breached her contractual obligation to repay Vulcan a prorated portion of the bonuses she received at the start of her employment at Vulcan. Accordingly, Vulcan is awarded damages for that breach from Ms. Turner in the amount of \$5,696.63.
5. Award of \$113,235 in Attorneys' Fees to Vulcan. The Employee Intellectual Property Agreement ("EIPA") signed by Ms. Turner at the outset of her employment with Vulcan is a valid and enforceable contract that contains a fee provision in the event of a dispute concerning Ms. Turner's employment. This dispute arises out of Turner's employment at Vulcan, and Vulcan is a prevailing party in this proceeding. Accordingly, based on the fees provision in the EIPA, Vulcan is entitled to an award of reasonable attorneys' fees except with respect to Ms. Turner's statutory employment discrimination claims (for which only prevailing plaintiffs are eligible for an attorneys' fee award except in rare cases). Vulcan seeks an award of \$117,735.00 in fees. Its request is limited to those fees

1 incurred only in the second lawsuit in which Vulcan successfully sought to
2 enforce the arbitration provision contained in the Guaranteed Bonus Agreement
3 (*Turner II*). Vulcan does not seek fees incurred in the first lawsuit in which it
4 successfully sought to enforce the arbitration provision (*Turner I*). Vulcan has
5 further limited its request to only those fees incurred in *Turner II* for partners
6 Harry H. Schneider Jr., Joseph M. McMillan, and then associate Jeffrey M.
7 Hanson, and only as to days on which that lawyer billed at least three hours on
8 this matter.

9 Alternatively, Vulcan seeks attorneys' fees only for time spent in
10 connection with its two successful motions for partial summary judgment
11 regarding Ms. Turner's defamation claim and on the validity and effect of the
12 contractual release she signed. Those fees amount to \$39,524.50, and Vulcan
13 seeks them only as an alternative to the amounts requested for *Turner II*. The
14 arbitrator concludes that Vulcan is entitled to attorneys' fees requested for work
15 performed on *Turner II*, with minor adjustments as described below.

16 The arbitrator has reviewed all billing records provided by Vulcan counsel
17 to support its request for attorneys' fees for *Turner II*. The arbitrator has reduced
18 the already-reduced fees by \$4500.00 as follows:

- 19 • J. Hanson spent 10.2 hours on April 12, 2012 researching and drafting a motion
20 for protective order and conferences with J. McMillan re same; J. Hanson spent
21 another 5.8 hours on April 13, 2012 drafting and conferencing regarding the same
22 motion: on April 14, 2012, Mr. Hanson spent an additional 4.8 hours researching
23 and drafting the same order and emailing with Mr. McMillan re same. The total
24 time spent on the motion for protective order was 20.8 hours. The arbitrator has
25 reduced the award for this work by 10.0 hours, or \$4500.00.

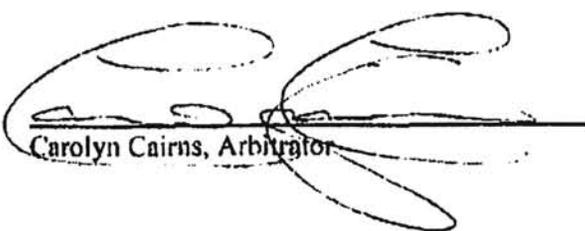
26 Accordingly, Vulcan's request for Entry of Final Award is hereby
GRANTED. Vulcan's motion for attorneys' fees against Respondent Traci Turner

1 is GRANTED in the amount of \$113,235.00, which represents reasonable
2 attorneys' fees incurred by Vulcan in support of its effort to secure a second Court
3 order compelling arbitration. Vulcan's request for an award against Ms. Turner of
4 \$5696.63 for breach of contract is GRANTED.

5 Vulcan has previously agreed to pay the Arbitrator's compensation in full and to
6 pay AAA's administrative costs and fees. The administrative filing and case
7 service fees of the AAA, totaling \$1,400.00, shall be borne as incurred. The fees
8 and expenses of the arbitrator, totaling \$32,126.24 shall be borne as incurred.

9 This AWARD is in full settlement of all claims and counterclaims
10 submitted to this arbitration.

11 DATED this 7 day of March, 2013.

12
13
14 
Carolyn Cairns, Arbitrator

15 Presented by:

16
17 s/ Harry H. Schneider, Jr., WSBA No. 09404

18 Harry H. Schneider, Jr., WSBA No. 09404

19 HSchneider@perkinscoie.com

20 Kevin J. Hamilton, WSBA No. 15648

21 KHamilton@perkinscoie.com

22 Joseph M. McMillan, WSBA No. 26527

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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
FINAL ARBITRATION AWARD - 4

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Appendix H

Appendix H

FILED
KING COUNTY SUPERIOR COURT

SEP 27 2013

SUPERIOR COURT
BY JOSEPH MASON
DEPUTY

Carolina Ceja

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

TRACI TURNER,

Plaintiff,

v.

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

Defendants.

No. 12-2-03514-8 SEA

MEMORANDUM OPINION

I. INTRODUCTION

This matter is before the court on cross motions to confirm and vacate an arbitration award. The two primary issues presented are (1) whether the Arbitrator's refusal to grant a continuance of the arbitration hearing constituted "misconduct" under the Federal Arbitration Act and (2) whether the award of \$113,234 in attorneys' fees against Traci Turner should be vacated, either because it is "completely irrational" or because it violates public policy. The court concludes that the Arbitrator's denial of the requested continuance was within her discretion. However, the court vacates the attorneys' fee award because it violates public policy.

MEMORANDUM OPINION

- Page 1

Judge Bruce E. Heller
King County Superior Court
516 Third Avenue, C - 203
Seattle, WA 98104
(206) 477-1641

1 **II. BACKGROUND**

2 *Traci Turner began working for Vulcan as a Senior Executive Protection Specialist on*
3 *January 17, 2011. This job involved providing security for Paul Allen and his family. When*
4 *she was hired, Turner signed an Employee Intellectual Property Agreement (EIPA) that*
5 *provided:*

6 *In any lawsuit arising out of or relating to this agreement or my employment, including*
7 *without limitation arising from any alleged tort or statutory violation, the prevailing*
8 *party shall recover their reasonable costs and attorneys fees, including an appeal.*

9 Declaration of Harry Schneider, Ex. 7, Section 11.

10 On July 26, 2013, Turner signed a Guaranteed Bonus Agreement (GBA) that contained
11 the following arbitration provision:

12 *Any and all claims, disputes, or other matters in controversy on any subject arising out*
13 *of or related to this Agreement and your employment shall be subject to confidential*
14 *arbitration.*

15 Declaration of Rebecca Roe, paragraph C. The GBA also included a release of claims
16 provision that applied to all claims arising prior to its execution. *Id.*, paragraph B.

17 In September 2011, Turner terminated her employment with Vulcan. Soon thereafter,
18 she filed a lawsuit in this court against Vulcan and several of its executives (collectively
19 “Vulcan”), alleging constructive discharge, hostile work environment, gender discrimination
20 and retaliation (“*Turner I*”). On October 6, Judge Patrick Oishi granted Vulcan’s Motion to
21 Compel Arbitration. Turner filed a motion for reconsideration but took a voluntary nonsuit
22 before obtaining a ruling. After an unsuccessful mediation, Turner filed a second lawsuit in
23 this court that alleged discrimination based on sexual orientation, age and gender, hostile work
24 environment, retaliation, willful withholding of wages, constructive termination, defamation,
and negligent and intentional infliction of emotional distress (“*Turner II*”). On June 8, 2012,

MEMORANDUM OPINION

- Page 2

Judge Bruce E. Heller
King County Superior Court
516 Third Avenue, C - 203
Seattle, WA 98104
(206) 477-1641

1 Judge Monica Benton ordered Turner to submit all of her employment claims against Vulcan
2 to binding arbitration.

3 Meanwhile, on December 14, 2011, Vulcan filed a demand for arbitration with the
4 American Arbitration Association. On March 1, 2012, Carolyn Cairns was appointed as the
5 arbitrator. On July 13, 2012, Turner's counsel requested a four-month continuance of the
6 November 26, 2012 arbitration hearing in order to provide additional time for discovery. The
7 Arbitrator denied the continuance. On August 27, 2012, Turner's attorney withdrew from the
8 case. On September 7, 2012, Turner, now acting pro se, requested a four-month continuance
9 of the hearing date:

10 I am requesting this continuance on the basis for my active search for new counsel, and
11 due to the inactivity around discovery during the month of August while motions were
12 being heard . . .

13 I will keep you appropriately apprised of my progress around finding new counsel . . .
14 As you are aware, I am a layperson with respect to legal matters and do not possess the
15 institutional knowledge necessary to answer and respond to motions, pleadings, etc.
16 However, I assure you I will do my best to keep up with the process in a timely
17 manner.

18 Schneider Decl. Ex. 31.

19 Vulcan opposed the continuance. It argued that the requested continuance was the
20 latest in Turner's attempts to avoid and delay the arbitration, noting that Turner's attorney had
21 informed her that his withdrawal would result in a continuance of the hearing. Vulcan urged
22 the arbitrator to hear its motion for partial summary judgment on the validity of the Release of
23 Claims provision in the GBA and revisit the issue of continuing the hearing if the motion were
24 denied. Vulcan also advised the arbitrator that it would take no further action in the case until
September 30, 2012 in order to give Turner thirty days from her attorney's August 27, 2013
withdrawal to obtain new counsel. Finally, Vulcan argued that a continuance was not

MEMORANDUM OPINION

- Page 3

Judge Bruce E. Heller
King County Superior Court
516 Third Avenue, C - 203
Seattle, WA 98104
(206) 477-1641

1 warranted for conducting further discovery because, according to Vulcan, Turner's attorney
2 had refused to go forward with scheduled discovery beginning on July 30, 2012.

3 On September 18, 2012, the arbitrator denied the requested continuance:

4 There is no current basis for granting a motion for continuance of any length, let alone
5 120 days. Ms. Turner's motion is denied without prejudice, meaning that she can make
another request for a continuance depending on the outcome of [Vulcan's proposed
6 motion on the enforceability of Turner's release of claims].

7 Schneider Decl. Ex. 33. The Arbitrator further explained that if she granted Vulcan's motion
8 and upheld the release, the case would be substantially reduced, resulting in the need for less
9 discovery. On the other hand, if the motion were denied, the Arbitrator would revisit the issue
of discovery and hearing dates. *Id.*

10 On September 26, 2012, Turner, still acting pro se, urged the Arbitrator not to consider
11 Vulcan's motion to enforce the release of claims provision, contending the GBA was
12 procedurally unconscionable. On October 17, 2012, after Vulcan filed its motion, Turner
13 withdrew from the arbitration proceedings:

14 I am incapable of continuing pro se. I am not an attorney and I simply don't know
what I'm doing . . .

15 I am unable to pay for counsel because I'm unemployed and do not have the financial
16 means to pay hourly fees. I fear I am only hurting myself by continuing in a process
that requires years of schooling.

17 Roe Decl. Ex. 29.

18 On October 31, 2012, the Arbitrator granted Vulcan's Motion for Partial Summary
19 Judgment on Validity and Effect of Release. Schneider Decl. Ex. 35. The Arbitrator noted
20 that although Turner had filed no response to the motion, she had considered the pleadings
21 filed by Turner's counsel in *Turner I* and *Turner II* regarding the enforceability of the GBA.

22
23 MEMORANDUM OPINION

24 - Page 4

Judge Bruce E. Heller
King County Superior Court
516 Third Avenue, C - 203
Seattle, WA 98104
(206) 477-1641

1 The arbitration hearing took place on November 26, 2012, without Turner being in
2 attendance. On December 21, 2012, the Arbitrator ruled in Vulcan's favor on all issues
3 presented. In her Findings of Fact, Conclusions of Law, and Interim Arbitration Award
4 ("Interim Arbitration Award"), she dismissed Turner's claims with prejudice and awarded
5 Vulcan \$5,696.63 based on Vulcan's claim of breach of contract related to a relocation bonus.

6 Schneider Decl. Ex. 38. With regard to attorneys' fees, the Arbitrator found:

7 Vulcan may not recover attorneys' fees and costs flowing from Ms. Turner's statutory
8 claims of employment discrimination in the absence of a showing that her statutory
9 claims were frivolous, unreasonable, or without foundation. Based on the available
10 record, the Arbitrator cannot conclude that this is among the rare cases where such a
11 finding should be made. Based on the fees provision in the EIPA, Ms. Turner is liable
12 for Vulcan's reasonable costs and attorneys' fees in this arbitration only as to non-
13 statutory claim **and some portion of the attorneys' fees and costs incurred in two**
14 **lawsuits seeking to enforce the arbitration clause contained in the [GBA].**

11 *Id.* at ¶19 (emphasis added, internal quotation marks omitted). Vulcan subsequently filed a
12 motion for an award of attorneys' fees. The fee request was limited to a portion of its fees
13 incurred in *Turner II*. On March 7, 2013, the Arbitrator awarded Vulcan \$113,235 in
14 attorneys' fees based on Vulcan's successful efforts to compel arbitration in *Turner II*.

15 Schneider Decl. Ex. 40.

16 III. DISCUSSION

17 A. Standard of Review

18 Judicial review of arbitration awards under the Federal Arbitration Act ("FAA"), 9
19 U.S.C. § 1-16 is "extremely narrow and exceedingly deferential." *UMass Mem'l Med. Ctr. v.*
20 *United Food & Commercial Workers Union*, 527 F.3rd 1, 5 (1st Cir. 2008) (internal quotation
21 marks omitted). Both federal and Washington cases have consistently reaffirmed this limited
22

23 MEMORANDUM OPINION

24 - Page 5

Judge Bruce E. Heller
King County Superior Court
516 Third Avenue, C - 203
Seattle, WA 98104
(206) 477-1641

1 scope of review. Thus, in *Bosack v. Soward*, 586 F.3rd 1096, 1106 (9th Cir. 2009)(as
2 amended), the court stated that:

3 [W]e do not decide the rightness or wrongness of the arbitrator's contract
4 interpretation, only whether the panel's decision draws its essence from the contract.
5 We will not vacate an award simply because we might have interpreted the contract
6 differently." (citations and internal quotation marks omitted).

7 In *International Union of Operating Engineers v. Port of Seattle*, 176 Wn.2d 712, 720, 295
8 P.3rd 736 (2013), the Washington Supreme Court observed that to apply anything other than a
9 limited standard of review would "call into question the finality of arbitration decisions and
10 undermine alternate dispute resolution." However, notwithstanding such judicial deference,
11 arbitration awards will be vacated if they violate "an explicit well defined and dominant public
12 policy, not simply general considerations of supposed public interest." *Id.*, 176 Wn.2d at 721.
13 (internal quotation marks omitted).

14 **B. The Arbitrator's Denial of Turner's Request for a Continuance of the Hearing
15 Was Within Her Discretion**

16 Turner asks the court to vacate the arbitration Award based on Section 10(a)(3) of the
17 FAA, which grants courts the power to vacate arbitration awards "where the arbitrators were
18 guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown . . ."

19 9 U.S.C. § 10(a)(3). Courts have interpreted Section 10(a)(3) to mean that except where
20 fundamental fairness is violated, arbitration determinations will not be second-guessed.
21 *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3rd 16, 20 (2nd Cir. 1997). Thus, courts will not
22 intervene in an arbitrator's decision denying a requested continuance if any reasonable basis
23 for it exists. *El Dorado Sch. Dist. No. 15 v. Continental Cas. Co.*, 247 F.3rd, 843, 848 (8th Cir.
24 2001).

MEMORANDUM OPINION

- Page 6

Judge Bruce E. Heller
King County Superior Court
516 Third Avenue, C - 203
Seattle, WA 98104
(206) 477-1641

1 The failure by an arbitrator to give a reason for the denial does not indicate misconduct
2 as long as reasons for the decision appear in the record. *Id.* In *Tempo Shain*, the court found
3 that an arbitration panel's refusal to keep open the record to permit the testimony of a witness
4 unable to attend the hearing because of his wife's unexpected reoccurrence of cancer
5 constituted misconduct under Section 10(a)(3). *Id.*, 120 F.3d at 20. Similarly, in *Naing Int'l*
6 *Enterprises, Ltd v. Ellsworth Assoc., Inc.*, 961 F.Supp. 1, 3-5 (D.D.C. 1997), a refusal to allow
7 one party to complete a critical pre-hearing investigation constituted misconduct because it
8 resulted in "the foreclosure of the presentation of pertinent and material evidence." *Id.* at 3.
9 On the other hand, an arbitrator's denial of an attorney's request for a continuance on the eve
10 of the hearing because his son had been scheduled for outpatient surgery for a recurrent ear
11 infection problem was held not to violate Section 10(a)(3). *El Dorado*, 247 F.3d at 847-48.

12 Turner argues that the Arbitrator's denial of her request for a continuance was
13 tantamount to a refusal to hear evidence from her. She points out that her request came at a
14 crucial point in the arbitration when the Arbitrator was about to consider the validity of the
15 Release of Claims provision in the GBA. Further, in her decision granting Vulcan's motion
16 for partial summary judgment, the Arbitrator stated that Turner's testimony would have been
17 relevant in determining whether the release was unconscionable, but without any submission
18 from Turner, the Arbitrator had no choice but to accept Vulcan's version of the events.

19 According to Turner, the denial of the motion for continuance of the motion also
20 ensured that she would be unable to find counsel. Turner's current counsel, Ms. Rebecca Roe,
21 provided a declaration stating that she was approached about the possibility of representing
22 Turner in August or September 2012 but declined "because of the very real possibility the
23 arbitration would occur in November." Suppl. Roe Decl. at ¶3. The Roe Declaration also

24 MEMORANDUM OPINION

- Page 7

Judge Bruce E. Heller
King County Superior Court
516 Third Avenue, C - 203
Seattle, WA 98104
(206) 477-1641

1 notes that Judge George Finkle, acting as an arbitrator in a parallel case involving Vulcan and
2 co-employees of Turner's (presumably represented by counsel), denied the identical motion
3 for partial summary judgment by Vulcan. *Id.* at ¶5.

4 In response, Vulcan argues that the Arbitrator did not refuse to consider evidence but
5 rather that Turner refused to present evidence when she abandoned the arbitration process.

6 Vulcan relies on *Three S Delaware, Inc. v. Dataquick Info Systems, Inc.*, 492 F.3rd 520(4th Cir.
7 2007) in which the court rejected a Section 10(a)(3) challenge to an arbitration award because
8 the party challenging the award would have had an ample opportunity to present its evidence if
9 its owner had not insisted on abandoning the arbitration hearing. According to Vulcan,
10 nothing prevented Turner from telling her side of the story regarding how she came to sign the
11 GBA. Vulcan also asserts that the issues involved in the partial summary judgment motion –
12 the conscionability of the GBA – had been litigated twice in *Turner I* and *Turner II*, and that
13 the Arbitrator considered those briefs, including declarations by Turner, in her decision.
14 Finally, Vulcan argues that the Arbitrator would have been fully justified in viewing Turner's
15 counsel's withdrawal as tactical given counsel's admission that he told Turner that his
16 withdrawal would likely result in a continuance.

17 In ruling on motions for continuance to seek new counsel, arbitrators, like judges,
18 must balance the needs of the party requesting the continuance against the adverse party's right
19 to finality without undue delay. Whether this court believes that the Arbitrator struck the right
20 balance is not the question. Rather, it is whether there are reasons in the record that would
21 support the Arbitrator's decision and whether the decision deprived Turner of fundamental
22 fairness. As to the first question, the Arbitrator, like this court, was presented with competing,

23 MEMORANDUM OPINION

24 - Page 8

Judge Bruce E. Heller
King County Superior Court
516 Third Avenue, C - 203
Seattle, WA 98104
(206) 477-1641

1 non-frivolous arguments which supplied a basis for her decision. Consequently, her denial of
2 the requested continuance was not arbitrary.

3 Whether the Arbitrator's ruling deprived Turner of fundamental fairness is a closer
4 question. Even though, as Vulcan points out, Turner was capable of presenting evidence
5 regarding the circumstances surrounding the execution of the GBA, she was placed at a severe
6 disadvantage in having to resist Vulcan's partial summary judgment motion without legal
7 representation. For example, she could not have been expected to know that the legal
8 standards applicable to enforcement of releases may be distinct from an unconscionability
9 analysis and that perhaps a different approach from the briefing in *Turner I* and *Turner II* was
10 required. *See Finch v. Carlton*, 84 Wn.2d 140, 143 (1974)(setting forth five-factor test in
11 determining whether release was "fairly and knowingly made."). The fact that other former
12 Vulcan employees with legal representation were successful in resisting the same partial
13 summary judgment motion before another arbitrator is troubling.

14 Ultimately, however, the court concludes that Turner bears some of the responsibility
15 for what occurred. When she requested the continuance, Turner told the Arbitrator, "I will
16 keep you appropriately apprised of my progress around finding new counsel." *Schneider Decl.*
17 *Ex. 31*. She never did. Had Turner told the Arbitrator, for example, that she was diligently
18 seeking new counsel and that she was unsuccessful because no attorney was willing to step in
19 given the current deadlines, the Arbitrator might have considered a different briefing and
20 hearing schedule. Or, if new counsel had made a limited appearance and asked for a
21 reasonable continuance to get up to speed, it is difficult to imagine a fair-minded arbitrator
22 denying the request. Instead, Turner never requested an adjustment of the summary judgment

23 MEMORANDUM OPINION

24 - Page 9

Judge Bruce E. Heller
King County Superior Court
516 Third Avenue, C - 203
Seattle, WA 98104
(206) 477-1641

1 briefing schedule and then withdrew a few days before her summary judgment response was
2 due.

3 Under these circumstances, without any additional information about Turner's progress
4 in obtaining counsel, the Arbitrator's scheduling orders were within her discretion and cannot
5 be considered misconduct.

6 **C. The Award of Attorneys' Fees**

7 **1. The Fee Award is not completely irrational**

8 Under Section 10(a)(4) of the FAA, a reviewing court may vacate an award "where the
9 arbitrators exceeded their powers." An arbitrator exceeds her powers where the award "is
10 completely irrational or exhibits a manifest disregard for the law." *Kyocera Corp. v.*
11 *Prudential-Bache Trade Services*, 341 F.3rd 987, 997 (9th Cir. 2003). Review of an
12 arbitrator's award under Section 10(a)(4) requires the same deferential standard of review as
13 under Section 10(a)(3). In *Oxford Health Plans LLC v. Sutter*, ___ U.S. ___, 133 S.Ct. 2064,
14 2068, 2013 WL 2459522 (June 10, 2013), the United States Supreme Court stated with respect
15 to Section 10(a)(4): "... [A]n arbitral decision even arguably construing or applying the
16 contract must stand, regardless of a court's view of its (de)merits." (internal quotations marks
17 omitted).

18 Here, the arbitrator based her fee award on Section 11 of the EIPA, which provides: "In
19 any lawsuit arising out of or relating to this agreement or my employment, including without
20 limitation arising from any alleged tort or statutory violation, the prevailing party shall recover
21 their reasonable costs and attorneys fees, including on appeal." *Schneider Decl. Ex. 7.*
22 Turner's contention that the award of attorneys' fees was "completely irrational" is based on

1 the argument that Section 11 is limited to lawsuits, whereas the fees here were awarded in an
2 arbitration proceeding:

3 Vulcan neither included an attorney fees provision in the GBA, nor incorporated the
4 EIPA's lawsuit-fees provision in the GBA. In contrast, in the GBA, Vulcan confirmed
prior confidentiality provisions to which employees had agreed.

5 Mem. in Support of Motion to Vacate at 21.

6 ~~Regardless of the merits of this argument, it does not follow that the Arbitrator's~~
7 ~~contrary conclusion "is completely irrational or exhibits a manifest disregard for the law."~~

8 *Kyocera Corp, Inc.*, 341 F.3d at 997. First, it could be argued that in limiting fees to the
9 *Turner II* lawsuit, the Arbitrator's ruling was consistent with Section 11 of the EIPA, which
10 allows for fees "in any lawsuit." Second, case law from California and Florida supports the
11 argument that the term "lawsuit" in the EIPA may be broadly construed to encompass
12 arbitrations. *Severtson v. Williams Constr. Co.*, 222 Cal.Rptr. 400, 406 (Ct. App. 1985)("[T]he
13 use of the term 'suit' in the present contract was broad enough to embrace arbitration, and
14 attorneys' fees and costs were properly awarded by the arbitrator."); *Tate v. Saratoga Sev. &*
15 *Loan Assn.*, 265 Cal. Rptr. 440, 448 (Ct. App. 1989)(same); *Par Four, Inc. v. Gottlieb*, 602
16 So.2d 689, 690 (Fla. Dist. Ct. App. 1992)(The phrase "in the event of any litigation, the
prevailing party would be entitled to attorneys' fees" included arbitration proceedings.).

17 Based on the existence of legitimate arguments supporting the Arbitrator's reliance on
18 the fee provision in the EIPA, the court concludes that Turner has not met her burden of
19 demonstrating that the fee award was completely irrational.

20 **2. The Award of Attorneys' Fees Against an Employee Raising Statutory Claims**
21 **Violates Public Policy**

22 As previously noted, courts will vacate an arbitration award that violates "an explicit,
well-defined, and dominant public policy, not simply general considerations of supposed

23 MEMORANDUM OPINION

24 - Page 11

Judge Bruce E. Heller
King County Superior Court
516 Third Avenue, C - 203
Seattle, WA 98104
(206) 477-1641

1 public interest.” *Operating Engineers*, 176 Wn.2d at 721. The need to identify with precision
2 the public policy at issue stems from the fact that the public policy exception is a
3 “narrow” one, *Kitsap County Deputy Sheriffs Guild v. Kitsap County*, 167 Wn.2d 428, 436
4 (2009), and that courts are not to vacate arbitration awards simply because they disagree with
5 the result.

6 Since Turner brought claims in *Turner II* pursuant to the Washington Law Against
7 Discrimination (WLAD), RCW 49.60 et seq., and the Washington Minimum Wage Act
8 (MWA), RCW 49.48 et seq., the court begins its analysis with those statutes. First, regarding
9 the WLAD, the Washington Supreme Court has held that “[t]he laws against workplace
10 discrimination set forth an explicit, well-defined and dominant public policy.” *Operating*
11 *Engineers*, 176 Wn.2d at 721. The WLAD aims “to enable vigorous enforcement of modern
12 civil rights litigation and to make it financially feasible for individuals to litigate civil rights
13 violations.” *Martinez v. City of Tacoma*, 81 Wn.App. 228, 235 (1996). Consequently, the
14 WLAD entitles prevailing plaintiffs, but not prevailing defendants, to reasonable attorneys
15 fees. RCW 49.60.030(2); *Collins v. Clark Cnty Fire District No. 5*, 155 Wn.App. 48, 98
16 (2010).

17 The wage and hour laws occupy a position of similar importance in Washington. “The
18 Legislature has evidenced a strong policy in favor of payment of wages due employees by
19 enacting a comprehensive scheme to ensure payment of wages.” *Schilling v. Radio Holdings,*
20 *Inc.*, 136 Wn.2d 152, 157 (1998). Additionally,

21 [b]y providing for costs and attorney fees, the Legislature has provided an effective
22 mechanism for recovery even where wage amounts wrongfully withheld may be small.
This comprehensive legislative system with respect to wages indicates a strong
legislative intent to assure payment to assure payment to employees of wages they have
earned.

23 MEMORANDUM OPINION

24 - Page 12

Judge Bruce E. Heller
King County Superior Court
516 Third Avenue, C - 203
Seattle, WA 98104
(206) 477-1641

1 *Id.* at 159.

2
3 Consequently, an employment agreement or arbitration award that denies attorneys'
4 fees to a prevailing plaintiff or awards fees to a prevailing defendant in a WLAD or wage and
5 hour lawsuit violates public policy. In *Gandee v. LDL Freedom Enterprises, Inc.*, 176 Wn.2d
6 598 (2013), the court found unconscionable a "loser pays" provision in an arbitration
7 agreement contained in a debt adjustment contract that is virtually identical to the provision in
8 Section 11 of the EIPA. The court reasoned that "[b]ecause the 'loser pays' provision serves
9 to benefit only Freedom and, contrary to the legislature's intent, effectively chills Gandee's
10 ability to bring suit under the CPA, it is one-sided and overly harsh." *Id.* at 606. In *Walters v.*
11 *A.A.A. Waterproofing, Inc.*, 151 Wn.App. 316 (2009), Division I reached a similar conclusion:

12 While *Walters* is assured that he will recover his expenses and legal fees if he wins
13 decisively, he must assume the risk that if he loses, he will have to pay
14 Waterproofing's expenses and legal fees. This risk is an enormous deterrent to an
15 employee contemplating a suit to vindicate the right to overtime pay. Under these
16 circumstances, in the context of an employee's suit where the governing statutes
17 provide that only a prevailing employee will be entitled to recover fees and costs, a
18 reciprocal attorney fees provision is unconscionable, and therefore, unenforceable.

19 *Id.* at 324-325.

20 In this case, the Arbitrator awarded Vulcan its attorneys' fees based on a provision that
21 is substantially similar, if not identical, to the "loser pays" provisions found unconscionable in
22 *Gandee* and *Walters*. Both Vulcan (implicitly) and the Arbitrator (explicitly) recognized that
23 Section 11 was unenforceable if it were used to award fees incurred by Vulcan in defeating
24 statutory claims at arbitration. Instead, Vulcan limited its fee request to its efforts to compel

MEMORANDUM OPINION

- Page 13

Judge Bruce E. Heller
King County Superior Court
516 Third Avenue, C - 203
Seattle, WA 98104
(206) 477-1641

1 arbitration in *Turner II*, and the Arbitrator agreed. The narrow issue before the court is

2 whether this “carve-out” violates public policy. The court concludes that it does.¹

3 As counsel for Vulcan acknowledged at oral argument, there are no cases recognizing
4 an exception to fee shifting principles if an employer prevails on procedural, as opposed to
5 substantive, grounds. Thus, if an employee brought a discrimination claim that was
6 subsequently dismissed on statute of limitations grounds, the prevailing employer would not
7 be entitled to attorneys’ fees. Yet Vulcan argues it is entitled to fees because in *Turner II* it
8 prevailed based on a different procedural defense, i.e., that the litigation should occur in a
9 different forum.

10 Vulcan relies primarily on *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293,
11 319 (2004), in which the Washington Supreme Court upheld a provision requiring a party who
12 files a judicial action to pay the attorneys fees and costs of the opposing party who
13 successfully compels arbitration. The court based this holding on the following two sentences:

14 . . . [A]s Airtouch aptly notes, this provision permits *either* party to recover fees on a
15 successful motion to stay an action and/or to compel arbitration. Thus it does not
16 appear to be so one-sided and harsh as to render it substantively unconscionable.

17 *Id.* at 319.

18 There is a serious question whether the *Zuver* court’s exclusive focus on the bilateral
19 nature of the fee provision continues to represent the current view of the court.² In *Gandee*,
20 issued nine years later, the court invalidated a bilateral “loser pays” provision because (1) in

21 ¹ Neither party has briefed the issue of whether the Arbitrator exceeded her powers by giving a
22 more limited interpretation, i.e., “blue-pencilling,” a fee provision that is unconscionable on its face. It
23 is not necessary to address this issue in light of the court’s conclusion that the “carve-out” is
24 unenforceable as well.

² *Zuver* is not directly on point since it addressed unconscionability as opposed to violations of public
policy. However, the two concepts are closely related. A provision in an arbitration agreement may be

MEMORANDUM OPINION

- Page 14

Judge Bruce E. Heller
King County Superior Court
516 Third Avenue, C - 203
Seattle, WA 98104
(206) 477-1641

1 reality, the provision benefited only one party, and (2) the prospects of having to pay the
2 company's fees effectively chilled the consumer's exercise of her rights under the CPA.

3 These two rationales apply equally here. First, while it is theoretically possible that an
4 employee could be awarded fees against an employer resisting arbitration, such a scenario is
5 extremely unlikely. When arbitration agreements are signed in the employment setting, they
6 are, almost without exception, done so at the behest of the employer, not the employee. That
7 is what occurred here when Vulcan presented Turner with the GBA. Therefore, the party
8 benefitting from a fee provision like the one in *Zuver* will almost invariably be the employer,
9 not the employee. Second, the prospects of having to pay attorneys' fees to an employer
10 successful in compelling arbitration will almost certainly have a chilling effect on an employee
11 contemplating a court action to challenge the conscionability of an arbitration agreement
12 and/or to vindicate her statutory rights.

13 An additional distinction between this case and *Zuver* is that there was no evidence
14 presented in *Zuver* regarding the effect of the fee provision on the employee. This perhaps
15 explains the court's conclusion that the provision did not "appear to be" overly harsh. *Id.* at
16 319. Here, the effect of the Arbitrator's fee award was to impose a daunting amount --
17 \$113,235 -- on a terminated employee who a few months earlier had written the Arbitrator, "I
18 am unable to pay for counsel because I'm unemployed and do not have the financial means to
19 pay hourly fees." *Roe Decl. Ex. 29*. In *Gandee*, the court defined a substantively
20 unconscionable provision as being "one-sided or overly harsh" and "shocking the conscience."

21
22 substantively unconscionable if it effectively undermines an employee's ability to vindicate his or her
23 statutory rights. *Adler v. Fred Lind Manor*, 153 Wash.2d 316, 355 (2004). It is difficult to conceive of
24 a provision that fits within this definition of unconscionability that would not also violate public policy.

MEMORANDUM OPINION

- Page 15

Judge Bruce E. Heller
King County Superior Court
516 Third Avenue, C - 203
Seattle, WA 98104
(206) 477-1641

1 *Id.*, 176 Wn.2d at 603 (quoting *Adler*, 153 Wn.2d at 344-45). In this court's view, these terms
2 aptly describe the effect of the fee award on Turner.

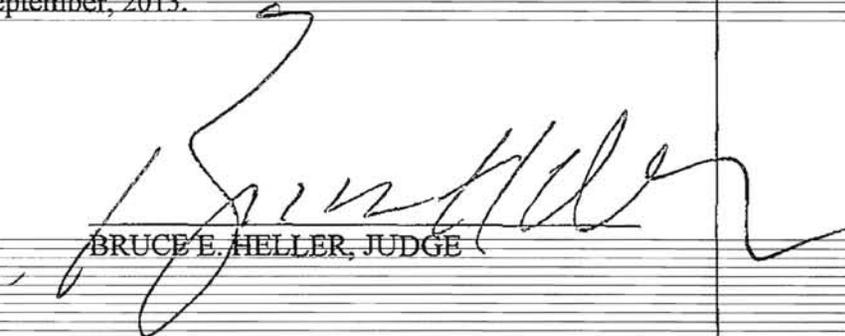
3 In addition to being unconscionable, the court finds that the \$113,235 fee award
4 violates an explicit, well-defined, and dominant public policy because it undermines an
5 employee's ability to vindicate her statutory rights.

6 **III. CONCLUSION**

7 The Arbitrator's Interim and Final Awards are hereby CONFIRMED in part. The
8 award of attorneys' fees in both Awards is VACATED. The parties are directed to present on
9 Order consistent with this Opinion.

10 IT IS SO ORDERED.

11 ENTERED this ^{27th} day of September, 2013.

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15 BRUCE E. HELLER, JUDGE

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23 MEMORANDUM OPINION

24 - Page 16

Judge Bruce E. Heller
King County Superior Court
516 Third Avenue, C - 203
Seattle, WA 98104
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Appendix I

Appendix I

FILED

HON. BRUCE E. HELLER

KING COUNTY SUPERIOR COURT

OCT 30 2013

SUPERIOR COURT CLERK
BY JOSEPH MASON
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

TRACI TURNER,

Plaintiffs,

v.

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

Defendants.

No. 12-2-03514-8 SEA

AMENDED ORDER CONFIRMING IN PART AND VACATING IN PART ARBITRATION AWARD, AND REMANDING FOR CONSIDERATION OF ALTERNATIVE BASIS FOR FEE AWARD

The Court, having considered briefing and oral argument from the parties on cross-motions to confirm or, on the other hand, to vacate the Final Arbitration Award, having requested and received supplemental briefing on whether one aspect of the Final Arbitration Award (specifically, the award of attorneys' fees) violates public policy, and having issued a Memorandum Opinion on September 27, 2013, that provided rulings on these questions, now issues the following ORDER consistent with the Memorandum Opinion:

1. Final Arbitration Award. The Final Arbitration Award dated March 7, 2013 (attached hereto as Exhibit A) is CONFIRMED in all respects, with one exception: the award of \$113,235 in attorneys' fees to Vulcan as set forth in paragraph 5 of the Final Arbitration Award is VACATED for the reasons set forth in the Memorandum Opinion.

AMENDED ORDER CONFIRMING IN PART AND VACATING IN PART ARBITRATION AWARD -

Page 1

Judge Bruce E. Heller
King County Superior Court
516 Third Avenue, C - 203
Seattle, WA 98104
(206) 477-1641

1 2. Findings of Fact, Conclusions of Law, and Interim Award. The Findings of Fact,
2 Conclusions of Law, and Interim Award dated December 21, 2012, which were made final by,
3 and incorporated into the Final Arbitration Award (and which are attached hereto as Exhibit B)
4 are also CONFIRMED in all respects, with the following exceptions: (a) Finding of Fact ¶ 19,
5 stating that that Vulcan is entitled to recover “some portion of the attorneys’ fees and costs
6 incurred in two lawsuits seeking to enforce the arbitration clause,” is OVERRULED, and (b)
7 the specific portions of Conclusion of Law ¶ 4 and Interim Award ¶ 4 providing that “Vulcan
8 may . . . recover a portion of its reasonable fees and costs as to the two lawsuits filed by Ms.
9 Turner to the extent they relate to Vulcan’s efforts to have the litigation stayed pending
10 resolution in [the arbitral] forum” are VACATED. As with the Final Arbitration Award, these
11 exceptions are made for reasons of public policy as described in the Memorandum Opinion.

12 3. Remand to the Arbitrator for Limited Purpose. Remand to an arbitrator is proper
13 “to clarify an ambiguous award or to require the arbitrator to address an issue submitted to him
14 but not resolved by the award.” *Indus. Mut. Ass’n v. Amalgamated Workers, Local Union No.*
15 *383, 725 F.2d 406, 413 n. 3 (6th Cir. 1984).* In paragraph 5 of her Final Award, the Arbitrator
16 acknowledged Vulcan’s alternative requests for attorneys’ fees and concluded that Vulcan was
17 “entitled to attorneys’ fees requested for work performed in *Turner II*.” It is not clear whether
18 the Arbitrator (1) considered and rejected Vulcan’s request for fees based on work performed
19 in connection with the defamation and the release issues, or (2) never considered that
20 alternative request, having opted to award attorneys’ fees based on Vulcan’s efforts in *Turner*
21 *II*. If the former, then the Arbitrator would be barred by the *functus officio* doctrine and AAA
22 Rule 40 from revisiting that issue now. The Court therefore remands this matter to the
23 Arbitrator to clarify whether she has already addressed Vulcan’s alternative request for fees. If
24 she has, then her jurisdiction is at an end. If not, then the issue of Vulcan’s alternative fee
request is remanded to the Arbitrator for consideration in light of this Court’s Memorandum
Opinion.

**AMENDED ORDER CONFIRMING IN PART AND
VACATING IN PART ARBITRATION AWARD -**

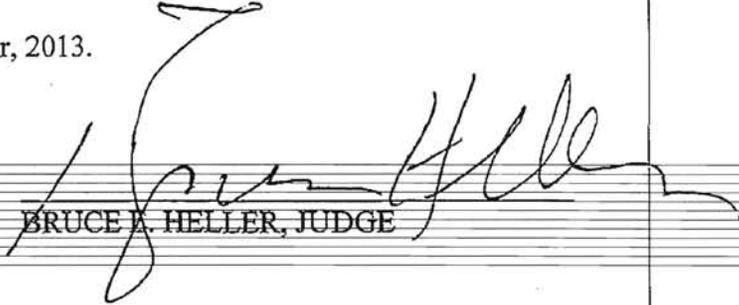
Page 2

Judge Bruce E. Heller
King County Superior Court
516 Third Avenue, C - 203
Seattle, WA 98104
(206) 477-1641

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4. Confirmation of Arbitrator's Decision on Fees and Judgment. Following the Arbitrator's decision with respect to an alternative basis for an award of fees, either party may move in this Court to confirm, modify, or vacate the Arbitrator's ruling on fees.

ENTERED this 29TH day of October, 2013.



BRUCE E. HELLER, JUDGE

AMENDED ORDER CONFIRMING IN PART AND VACATING IN PART ARBITRATION AWARD -

Page 3

Judge Bruce E. Heller
King County Superior Court
516 Third Avenue, C - 203
Seattle, WA 98104
(206) 477-1641

Appendix J

Appendix J

AMERICAN ARBITRATION ASSOCIATION
EMPLOYMENT ARBITRATION TRIBUNAL

VULCAN, INC.,

Claimant,

v.

TRACI TURNER,

Respondent

v.

RAY COLLIVER and
LAURA MACDONALD.

Case No.: 75 160 00410 11 DWPA

AMENDED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND FINAL
ARBITRATION AWARD

I the undersigned Arbitrator, having been designated in accordance with the arbitration agreement between Vulcan Inc. and Traci Turner, and having been duly sworn, rendered an Interim Award in this matter on December 21, 2012, and a Final Award on March 7, 2013.

On October 29, 2013, the Honorable Bruce E. Heller issued an Amended Order Confirming in Part and Vacating in Part Arbitration Award, and Remanding for Consideration of Alternative Basis for Fee Award (hereafter the "Court's October 29 Order") in *Turner v. Vulcan Inc.*, No. 12-2-03514-8 SEA. Having reviewed the Court's October 29 Order, the evidence and briefing submitted by Vulcan Inc. and Traci Turner, the Arbitrator does hereby issue these Amended Findings of Fact, Conclusions of Law, and Final Award, as follows:

1. Findings of Fact and Conclusions of Law. The Findings of Fact and Conclusions of Law contained in the Interim Award are made final by, and incorporated into, this Final Award, except as herein amended:

a. Finding of Fact ¶ 19, stating that Vulcan is entitled to recover "some portion of the attorneys' fees and costs incurred in two lawsuits seeking to enforce the arbitration clause", was OVERRULED by the Court's October 29 Order, and

b. The specific portions of Conclusion of Law ¶ 4 and Interim Award ¶ 4 providing that "Vulcan may. . . recover a portion of its reasonable attorneys' fees and costs as to

AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND FINAL ARBITRATION AWARD - 1
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STOKES LAWRENCE, P.S.
1420 FIFTH AVENUE, SUITE 3000
SEATTLE, WASHINGTON 98101-2393
(206) 626-6000

1 the two lawsuits filed by Ms. Turner to the extent they relate to Vulcan's efforts to have the
2 litigation stayed pending resolution in [the arbitral] forum" was VACATED by the Court's
3 October 29 Order.

4 2. Dismissal with Prejudice of Turner's Claims. All of Respondent Traci Turner's
5 counterclaims in this proceeding, as listed in ¶ 6 of the Findings of Fact contained in the Interim
6 Award, are hereby dismissed with prejudice. Ms. Turner's Defamation claim was previously
7 dismissed on October 31, 2012. The instant dismissal includes all claims asserted against
8 Claimant Vulcan and against Third-Party Respondents Colliver and MacDonald.

9 3. Declaratory Relief: Vulcan Not Liable on Employment-Related Claims. Vulcan
10 is hereby awarded Declaratory Relief that it is not liable to Ms. Turner for any employment-
11 related causes of action.

12 4. Vulcan Is Awarded \$5,696.63 from Turner for Breach of Contract. Ms. Turner
13 has breached her contractual obligation to repay Vulcan a prorated portion of the bonuses she
14 received at the start of her employment at Vulcan. Accordingly, Vulcan is awarded damages for
15 that breach from Ms. Turner in the amount of \$5,696.63.

16 5. Award of \$39,524.50 in Attorneys' Fees to Vulcan. The Employee Intellectual
17 Property Agreement ("EIPA") signed by Ms. Turner at the outset of her employment with
18 Vulcan is a valid and enforceable contract that contains a fees provision in the event of a dispute
19 concerning Ms. Turner's employment. This dispute arises out of Turner's employment at
20 Vulcan, and Vulcan is a prevailing party in this proceeding. Accordingly, based on the fees
21 provision in the EIPA, Vulcan is entitled to an award of reasonable attorneys' fees except with
22 respect to Ms. Turner's statutory employment discrimination claims (for which only prevailing
23 plaintiffs are eligible for an attorneys' fee award except in rare cases).

24 In the Final Award entered March 7, 2013, the Arbitrator awarded Vulcan \$113,235 for
25 attorneys' fees incurred in connection with compelling arbitration in *Turner II*. In making that
26 award, the Arbitrator acknowledged, but did not reach, an alternative basis for an attorneys' fee
27 award that was included in Vulcan's motion for fees. The Court's October 29 Order vacated the

1 fee award based on *Turner II* on public policy grounds, and the Court remanded the case to the
2 Arbitrator for potential consideration of Vulcan's alternative basis for attorneys' fees.

3 On remand, Vulcan seeks an award of (1) \$18,875 for attorneys' fees incurred in
4 connection with a successful motion for partial summary judgment on Ms. Turner's defamation
5 claim, and (2) \$21,449.50 for prevailing on a motion for partial summary judgment on the
6 enforceability of a contractual release signed by Ms. Turner. Vulcan has limited its request to a
7 portion of fees incurred by partner Joseph M. McMillan, then associate Jeffrey M. Hanson, and
8 paralegal Patricia Marino.

9 The requested fees were incurred in connection with nonstatutory claims and are
10 warranted based on the contractual fee provision and under Washington law. The arbitrator has
11 reviewed all billing records provided by Vulcan counsel to support its request for attorneys' fees
12 for both motions, and the fees requested are reasonable. Ms. Turner objects to a fee award on the
13 ground that it was not necessary for Vulcan to file partial summary judgment motions rather than
14 having the issues addressed at hearing. Ms. Turner presents no authority, and the Arbitrator is
15 aware of none, that would require Vulcan to forego summary judgment motions in favor of
16 presenting evidence at the hearing. Nor does Ms. Turner challenge the rates charged by
17 Vulcan's counsel or the specific time spent by counsel on the motions.

18 Accordingly, Vulcan's motion for attorneys' fees against Respondent Traci Turner on
19 remand is GRANTED in the amount of \$39,524.50, which represents reasonable attorneys' fees
20 incurred by Vulcan in support of its successful efforts on the two motions for partial summary
21 judgment. Vulcan's request for an award against Ms. Turner of \$5,696.63 for breach of contract
22 is GRANTED.

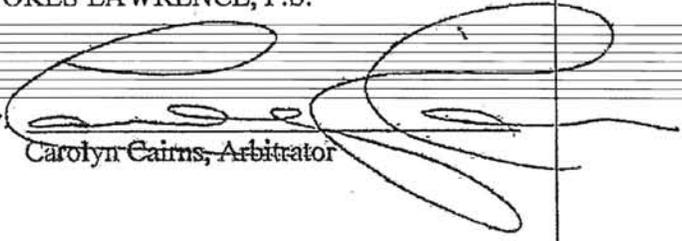
23 Vulcan has previously agreed to pay the Arbitrator's compensation in full and to pay
24 AAA's administrative costs and fees. The administrative filing and case service fees of the AAA,
25 totaling \$1,400.00, shall be borne as incurred. The fees and expenses of the arbitrator, totaling
26 \$34,961.24 shall be borne as incurred.

1 This AWARD is in full settlement of all claims and counterclaims submitted to this

2 arbitration.

3 DATED this 30 day of January, 2014.

4 STOKES LAWRENCE, P.S.

6 By 
Carolyn Cairns, Arbitrator

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Appendix K

Appendix K

FILED
KING COUNTY WASHINGTON

APR 01 2014

SUPERIOR COURT CLERK
BY JOSEPH MASON
DEPUTY

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

TRACI TURNER,

Plaintiff,

v.

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

Defendants.

No. 12-2-03514-8 SEA

**ORDER DENYING PLAINTIFF'S
MOTION FOR AWARD OF
ATTORNEYS' FEES**

This matter is before the Court on Plaintiff's Motion for Award of Attorneys' Fees. In addition to the motion, the Court has considered the Declaration of Rebecca J. Roe and attachments thereto, Defendants' Opposition, the Declaration of Joseph M. McMillan and attachments thereto, Turner's Reply, and other relevant records on file in this matter.

A prevailing party "is one who receives judgment in that party's favor" or who "succeeds on any significant issue which achieves some benefit the party sought in bringing suit." *Blair v. Washington State Univ.*, 108 Wn.2d 558, 572 (1987). Further, "status as a prevailing party is determined on the outcome of the case as a whole, rather than by piecemeal assessment of how a party fares on each motion along the way." *Jenkins v. State of Mo.*, 127 F.3rd 709, 714 (8th Cir. 1997). While plaintiff succeeded in overturning a substantial award of attorneys' fees on public policy grounds, she did not receive a judgment

ORDER DENYING PLAINTIFF'S MOTION FOR AWARD OF
ATTORNEYS' FEES - 1

Judge Bruce E. Heller
King County Superior Court
516 Third Avenue, C - 203
Seattle, WA 98104
(206) 477-1641

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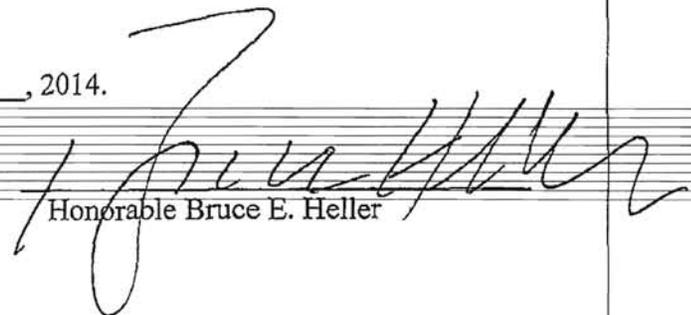
or achieve any benefit sought in her Complaint.

The Court has considered *Balark v. City of Chicago*, 81 F.3d 658 (7th Cir. 1996), cited by plaintiff, and finds it distinguishable. In *Balark*, a plaintiff class was deemed a prevailing party even though a consent decree in plaintiffs' favor was ultimately overturned.

Unlike this case, plaintiffs obtained various forms of relief that were not affected by the prospective termination of the consent decree.

As the non-prevailing party, plaintiff's request for attorneys' fees is DENIED.
IT IS SO ORDERED.

DATED this 1 day of April, 2014.



Honorable Bruce E. Heller

Appendix L

Appendix L

FILED
KING COUNTY, WASHINGTON

APR 01 2014

SUPERIOR COURT CLERK
BY JOSEPH MASON
DEPUTY

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THE HONORABLE BRUCE E. HELLER
Noted for Consideration: February 26, 2014
(without oral argument)

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

TRACI TURNER,

Plaintiff,

v.

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

Defendants.

No. 12-2-03514-8 SEA

**[PROPOSED] ORDER CONFIRMING
FINAL ARBITRATION AWARD**

The Court, having considered the Vulcan Defendants' Motion for Confirmation of Amended Final Arbitration Award and Entry of Judgment, the Declaration of Harry H. Schneider, Jr., and attachments thereto, any opposition brief, any reply brief, and other relevant records on file in this matter, and being fully advised in the premises, now, therefore, it is hereby

ORDERED that the Vulcan Defendants' Motion for Confirmation of Amended Final Arbitration Award and Entry of Judgment is GRANTED, and it is further

**[PROPOSED] ORDER CONFIRMING FINAL ARBITRATION
AWARD - 1**

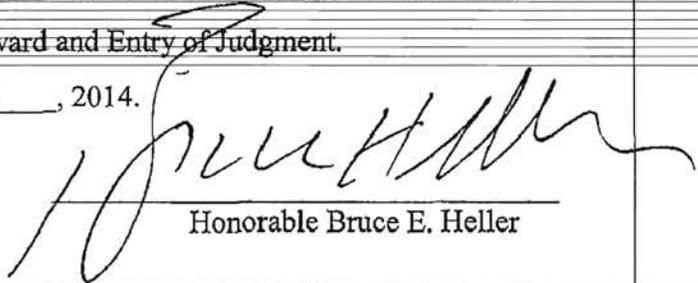
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Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

1 ORDERED that the Amended Findings of Fact, Conclusions of Law, and Final
2 Arbitration Award entered by Arbitrator Carolyn Cairns on January 30, 2014, in the
3 arbitration proceeding among the parties, a copy of which is attached hereto as Exhibit A, is
4 CONFIRMED, and it is further ordered that
5

6 JUDGMENT be entered in favor of Vulcan and against Plaintiff Traci Turner in the
7
8 total amount of \$45,221.13, in the form submitted with the Vulcan Defendants' Motion for
9
10 Confirmation of Amended Final Arbitration Award and Entry of Judgment.
11

12 DATED this 1 day of April, 2014.



Honorable Bruce E. Heller

13 Presented by:

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20
21 s/ Harry H. Schneider, Jr., WSBA No. 9404
22 Harry H. Schneider, Jr., WSBA No. 09404
23 HSchneider@perkinscoie.com
24 Kevin J. Hamilton, WSBA No. 15648
25 KHamilton@perkinscoie.com
26 Joseph M. McMillan, WSBA No. 26527
27 JMcMillan@perkinscoie.com
28 Perkins Coie LLP
29 1201 Third Avenue, Suite 4800
30 Seattle, WA 98101-3099
31 Telephone: 206.359.8000
32 Facsimile: 206.359.9000
33

34 Attorneys for Defendants
35 Vulcan Inc., Paul Allen, and Jody Allen
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[PROPOSED] ORDER CONFIRMING FINAL
ARBITRATION AWARD - 2

34528-0102/LEGAL29125329.1

Perkins Coie LLP
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Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Appendix M

Appendix M

FILED
KING COUNTY WASHINGTON

APR 01 2014

SUPERIOR COURT CLERK
BY JOSEPH MASON
DEPUTY

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THE HONORABLE BRUCE E. HELLER
Noted for Consideration: February 26, 2014
(without oral argument)

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

TRACI TURNER,

Plaintiff,

v.

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

Defendants.

No. 12-2-03514-8 SEA

**FINAL JUDGMENT ON FINAL
ARBITRATION AWARD**

JUDGMENT IS HEREBY ENTERED in favor of Vulcan Inc. and against plaintiff
Traci Turner in the total amount of \$45,221.13.

JUDGMENT SUMMARY

1. Judgment Creditor: Vulcan Inc.
2. Judgment Debtor: Traci Turner
3. Principal Judgment Amount: \$5,696.63

FINAL JUDGMENT ON FINAL ARBITRATION AWARD – 1

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

34528-0102/LEGAL29125541.1

1	4.	Interest to Date of Judgment:	<u>N/A</u>
2			
3	5.	Attorneys' Fees:	<u>\$39,524.50</u>
4			
5	6.	Costs:	<u>N/A</u>
6			
7	7.	TOTAL JUDGMENT	<u>\$45,221.13</u>
8			
9	8.	Other Recovery Amounts:	<u>N/A</u>
10			
11	9.	Attorneys for Judgment Creditor: Harry H. Schneider, Jr., Kevin J. Hamilton,	
12		Joseph M. McMillan, and Perkins Coic LLP	

JUDGMENT

17 This action was commenced by Plaintiff Traci Turner on January 27, 2012, when she
18 filed a complaint in which she asserted employment-related claims against Defendants
19 Vulcan Inc. ("Vulcan"), Paul Allen, Jody Allen, Ray Colliver, and Laura Macdonald. On
20 March 2, 2012, Vulcan moved to dismiss Ms. Turner's claims, compel arbitration, and stay
21 the action pending arbitration. On June 8, 2012, the Court granted Vulcan's motion and
22 entered an Order Compelling Plaintiff to Arbitrate Claims and Staying Proceedings.
23
24

25 The dispute between plaintiff and defendants was subject to arbitration based on the
26 terms of an agreement between Defendant Vulcan and Plaintiff Turner, dated July 26, 2011.
27
28

29 The issues in dispute between plaintiff and defendants were tried to a single
30 arbitrator, Carolyn Cairns. A hearing was held before the arbitrator on November 26, 2012,
31 which included the presentation of evidence and testimony. On March 7, 2013, the
32 Arbitrator issued Findings of Fact, Conclusions of Law, and Final Award ("Final Award"),
33 which incorporated the Findings of Fact and Conclusions of Law contained in an Interim
34 Award entered by the Arbitrator on December 21, 2012 ("Interim Award").
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42 This Court vacated the attorneys' fee portion of the Final Award on October 29,
43 2013, when it entered an "Amended Order Confirming in Part and Vacating in Part
44 Arbitration Award, and Remanding for Consideration of Alternative Basis for Fee Award."
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1 On remand, the Arbitrator awarded Vulcan \$39,524.50 in attorneys' fees in connection with
2 Vulcan prevailing on two partial summary judgment motions involving nonstatutory claims.
3
4 The revised attorneys' fee award was included in the Arbitrator's Amended Findings of
5
6 Fact, Conclusions of Law, and Final Arbitration Award ("Amended Final Award"), which
7
8 was issued on January 30, 2014. A copy of the Amended Final Award is attached as
9
10 **Exhibit A**. The Amended Final Award incorporated the Findings of Fact and Conclusions
11 of Law contained in the Interim Award, with the exception of amendments specified in the
12 Amended Final Award to conform fully with this Court's October 29, 2013, Order. A copy
13 of the Interim Award is attached as **Exhibit B**.
14
15

16
17 Consistent with the Arbitrator's Amended Final Award, dated January 30, 2014, and
18 as confirmed by Order of this Court dated April 1, 2014, the Court enters Judgment as
19 follows:
20
21

22 1. Defendant Vulcan is awarded judgment against Plaintiff Turner in the
23 amount of \$45,221.13, which consists of \$5,696.63 for breach of contract and \$39,524.50
24 for reasonable attorneys' fees, as determined in the Arbitrator's Amended Final Award.
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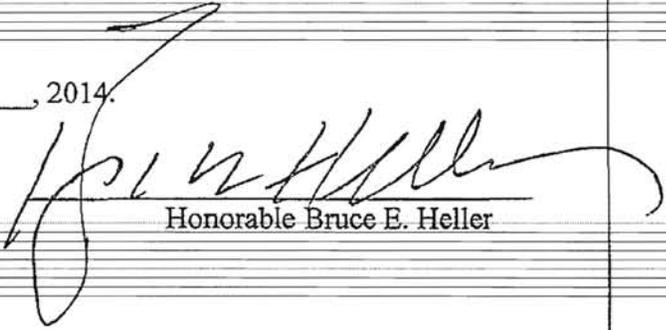
27 2. Defendant Vulcan is awarded Declaratory Relief that it is not liable to
28 Plaintiff Turner for any employment-related causes of action.
29
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31 3. All of Plaintiff Turner's claims against Defendants asserted in the arbitration
32 or in this action are dismissed with prejudice.
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35 4. Post-judgment interest shall accrue at the statutory rate of 12% per annum.
36 RCW 4.56.110(4); RCW 19.52.020(1).
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1 The Amended Final Award of the Arbitrator, in accordance with the agreement
2 between the parties, is final and binding upon them. The Court accepts the Amended Final
3 Award and its findings of fact and conclusions of law as its own, rules that they are final and
4 binding on the parties, and enters this Judgment accordingly.
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9 DATED this 1 day of April, 2014.
10
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12
13 
14 Honorable Bruce E. Heller
15

16 Presented by:

17
18 s/ Harry H. Schneider, Jr., WSBA No. 9404
19 Harry H. Schneider, Jr., WSBA No. 09404
20 HSchneider@perkinscoie.com
21 Kevin J. Hamilton, WSBA No. 15648
22 KHamilton@perkinscoie.com
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28 Telephone: 206.359.8000
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31 **Attorneys for Defendants**
32 **Vulcan Inc., Paul Allen, and Jody Allen**
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FINAL JUDGMENT ON FINAL ARBITRATION AWARD – 4

34528-0102/LEGAL29125541.1

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
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Exhibit A

Exhibit A

AMERICAN ARBITRATION ASSOCIATION
EMPLOYMENT ARBITRATION TRIBUNAL

VULCAN, INC.,

Claimant,

v.

TRACI TURNER,

Respondent

v.

RAY COLLIVER and
LAURA MACDONALD.

Case No.: 75 160 00410 11 DWPA

AMENDED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND FINAL
ARBITRATION AWARD

I the undersigned Arbitrator, having been designated in accordance with the arbitration agreement between Vulcan Inc. and Traci Turner, and having been duly sworn, rendered an Interim Award in this matter on December 21, 2012, and a Final Award on March 7, 2013.

On October 29, 2013, the Honorable Bruce E. Heller issued an Amended Order Confirming in Part and Vacating in Part Arbitration Award, and Remanding for Consideration of Alternative Basis for Fee Award (hereafter the "Court's October 29 Order") in *Turner v. Vulcan Inc.*, No. 12-2-03514-8 SEA. Having reviewed the Court's October 29 Order, the evidence and briefing submitted by Vulcan Inc. and Traci Turner, the Arbitrator does hereby issue these Amended Findings of Fact, Conclusions of Law, and Final Award, as follows:

1. Findings of Fact and Conclusions of Law. The Findings of Fact and Conclusions of Law contained in the Interim Award are made final by, and incorporated into, this Final Award, except as herein amended:

a. Finding of Fact ¶ 19, stating that Vulcan is entitled to recover "some portion of the attorneys' fees and costs incurred in two lawsuits seeking to enforce the arbitration clause", was OVERRULED by the Court's October 29 Order, and

b. The specific portions of Conclusion of Law ¶ 4 and Interim Award ¶ 4 providing that "Vulcan may. . . recover a portion of its reasonable attorneys' fees and costs as to

AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND FINAL ARBITRATION AWARD - 1
01122-123 \ 75 160 410 11 Revised Final Award.docx

STOKES LAWRENCE, P.S.
1420 FIFTH AVENUE, SUITE 3000
SEATTLE, WASHINGTON 98101-2393
(206) 626-6000

1 the two lawsuits filed by Ms. Turner to the extent they relate to Vulcan's efforts to have the
2 litigation stayed pending resolution in [the arbitral] forum" was VACATED by the Court's
3 October 29 Order.

4 2. Dismissal with Prejudice of Turner's Claims. All of Respondent Traci Turner's
5 counterclaims in this proceeding, as listed in ¶ 6 of the Findings of Fact contained in the Interim
6 Award, are hereby dismissed with prejudice. Ms. Turner's Defamation claim was previously
7 dismissed on October 31, 2012. The instant dismissal includes all claims asserted against
8 Claimant Vulcan and against Third-Party Respondents Colliver and MacDonald.

9 3. Declaratory Relief: Vulcan Not Liable on Employment-Related Claims. Vulcan
10 is hereby awarded Declaratory Relief that it is not liable to Ms. Turner for any employment-
11 related causes of action.

12 4. Vulcan Is Awarded \$5,696.63 from Turner for Breach of Contract. Ms. Turner
13 has breached her contractual obligation to repay Vulcan a prorated portion of the bonuses she
14 received at the start of her employment at Vulcan. Accordingly, Vulcan is awarded damages for
15 that breach from Ms. Turner in the amount of \$5,696.63.

16 5. Award of \$39,524.50 in Attorneys' Fees to Vulcan. The Employee Intellectual
17 Property Agreement ("EIPA") signed by Ms. Turner at the outset of her employment with
18 Vulcan is a valid and enforceable contract that contains a fees provision in the event of a dispute
19 concerning Ms. Turner's employment. This dispute arises out of Turner's employment at
20 Vulcan, and Vulcan is a prevailing party in this proceeding. Accordingly, based on the fees
21 provision in the EIPA, Vulcan is entitled to an award of reasonable attorneys' fees except with
22 respect to Ms. Turner's statutory employment discrimination claims (for which only prevailing
23 plaintiffs are eligible for an attorneys' fee award except in rare cases).

24 In the Final Award entered March 7, 2013, the Arbitrator awarded Vulcan \$113,235 for
25 attorneys' fees incurred in connection with compelling arbitration in *Turner II*. In making that
26 award, the Arbitrator acknowledged, but did not reach, an alternative basis for an attorneys' fee
27 award that was included in Vulcan's motion for fees. The Court's October 29 Order vacated the

1 fee award based on *Turner II* on public policy grounds, and the Court remanded the case to the
2 Arbitrator for potential consideration of Vulcan's alternative basis for attorneys' fees.

3 On remand, Vulcan seeks an award of (1) \$18,875 for attorneys' fees incurred in
4 connection with a successful motion for partial summary judgment on Ms. Turner's defamation
5 claim, and (2) \$21,449.50 for prevailing on a motion for partial summary judgment on the
6 enforceability of a contractual release signed by Ms. Turner. Vulcan has limited its request to a
7 portion of fees incurred by partner Joseph M. McMillan, then associate Jeffrey M. Hanson, and
8 paralegal Patricia Marino.

9 The requested fees were incurred in connection with nonstatutory claims and are
10 warranted based on the contractual fee provision and under Washington law. The arbitrator has
11 reviewed all billing records provided by Vulcan counsel to support its request for attorneys' fees
12 for both motions, and the fees requested are reasonable. Ms. Turner objects to a fee award on the
13 ground that it was not necessary for Vulcan to file partial summary judgment motions rather than
14 having the issues addressed at hearing. Ms. Turner presents no authority, and the Arbitrator is
15 aware of none, that would require Vulcan to forego summary judgment motions in favor of
16 presenting evidence at the hearing. Nor does Ms. Turner challenge the rates charged by
17 Vulcan's counsel or the specific time spent by counsel on the motions.

18 Accordingly, Vulcan's motion for attorneys' fees against Respondent Traci Turner on
19 remand is GRANTED in the amount of \$39,524.50, which represents reasonable attorneys' fees
20 incurred by Vulcan in support of its successful efforts on the two motions for partial summary
21 judgment. Vulcan's request for an award against Ms. Turner of \$5,696.63 for breach of contract
22 is GRANTED.

23 Vulcan has previously agreed to pay the Arbitrator's compensation in full and to pay
24 AAA's administrative costs and fees. The administrative filing and case service fees of the AAA,
25 totaling \$1,400.00, shall be borne as incurred. The fees and expenses of the arbitrator, totaling
26 \$34,961.24 shall be borne as incurred.

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This AWARD is in full settlement of all claims and counterclaims submitted to this arbitration.

DATED this 30 day of January, 2014.

STOKES LAWRENCE, P.S.

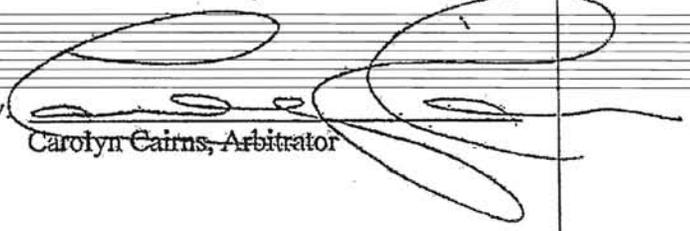
By 
Carolyn Cairns, Arbitrator

Exhibit B

Exhibit B

ARBITRATOR CAROLYN CAIRNS

AMERICAN ARBITRATION ASSOCIATION
EMPLOYMENT ARBITRATION TRIBUNAL

VULCAN INC.,

Claimant,

v.

TRACI TURNER,

Respondent

v.

RAY COLLIVER and LAURA
MACDONALD,

Third-Party Respondents.

Case No.: 75 166 00410 11 DWPA

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND INTERIM
ARBITRATION AWARD

I, the undersigned Arbitrator, having been designated in accordance with the arbitration agreement entered into between the above-named parties, and having been duly sworn, and having duly heard the proofs and allegations presented by Claimant Vulcan Inc., and Third-Party Respondents Ray Colliver and Laura MacDonald, do hereby issue this INTERIM AWARD, as follows:

FINDINGS OF FACT

1. Claimant Vulcan Inc. ("Vulcan") is a Washington corporation that manages the affiliated businesses, charitable foundations and assets of Paul G. Allen. Vulcan initiated this

FINDINGS OF FACT, CONCLUSIONS OF LAW AND
INTERIM ARBITRATION AWARD - 1
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proceeding by filing a Demand for Arbitration with the American Arbitration Association ("AAA") on December 14, 2011.

2. Respondent Traci Turner is a former Vulcan employee. Ms. Turner was employed as a member of Vulcan's Executive Protection ("EP") team from January 17, 2012, until she submitted her resignation on September 23, 2012. She subsequently asserted employment-related claims in two separate lawsuits against Vulcan, the first on September 26, 2011, and the second on January 27, 2012.

3. In both of the lawsuits filed by Turner, the court granted Vulcan's motion to compel arbitration and stayed the litigation pending resolution of Turner's claims in this arbitration. Turner's claims in this matter are styled "counterclaims" because Vulcan initiated the arbitration when Turner failed to do so after the court granted Vulcan's first motion to compel arbitration in October 2011.

4. Ray Colliver and Laura Macdonald are Vulcan executives and Third-Party Respondents in this proceeding. Turner has asserted the same claims against Colliver and Macdonald as against Vulcan. Colliver is Vice President of Design and Construction at Vulcan, and was the senior executive supervising the EP team during Turner's tenure at Vulcan. Laura Macdonald is Vulcan's Senior Director of Human Resources.

5. In its Demand for Arbitration, Vulcan asserted the following claims against Turner:

- (1) Breach of Employee Intellectual Property Agreement ("EIPA");
- (2) Anticipatory Breach of Employee Intellectual Property Agreement;
- (3) Breach of Duty of Loyalty;
- (4) Breach of Confidential Relationship;
- (5) Violation of Computer Fraud and Abuse Act;
- (6) Repayment of Prorated Bonuses;
- (7) Declaratory Relief – Nonliability for Employment-Related Causes of Action;

- (8) Declaratory Relief – Nonliability for Fraud;
- (9) Declaratory Relief – Nonliability for Defamation;
- (10) Declaratory Relief – Nonliability for Actions Prior to July 26, 2011, Release.

6. By letter from Turner's counsel dated March 9, 2012, Turner asserted the following counterclaims against Vulcan, Coliver, and Macdonald:

- (1) Gender Discrimination in Violation of RCW 49.60 et seq.;
- (2) Sexual Orientation Discrimination in Violation of RCW 49.60 et seq.;
- (3) Age Discrimination in Violation of RCW 49.60 et seq.;
- (4) Hostile Work Environment;
- (5) Retaliation;
- (6) Wrongful Constructive Termination;
- (7) Intentional Infliction of Emotional Distress;
- (8) Negligent Infliction of Emotional Distress;
- (9) Defamation; and
- (10) Willful Withholding of Wages.

7. On October 31, 2012, the Arbitrator granted Vulcan's Motion for Partial Summary Judgment on Validity and Effect of Release, ruling as a matter of law that a "Release granted to Vulcan by Traci Turner on July 26, 2011, is valid and enforceable, covers Vulcan Inc. as well as Third-Party Respondents Ray Coliver and Laura Macdonald, and precludes reliance by Turner on acts or events on or before that date to support her claims or counterclaims in this proceeding." Vulcan is therefore entitled to an award in its favor on its claim for Declaratory Relief on the Validity and Effect of the Release (claim 10 listed in paragraph 5 above).

8. On October 31, 2012, the Arbitrator also granted Vulcan's Motion for Partial Summary Judgment on Defamation Claim, dismissing Turner's defamation counterclaim as a matter of law. Vulcan is therefore entitled to an award in its favor on its claim for Declaratory Relief – Nonliability for Defamation (claim 9 listed in paragraph 5 above).

9. Prior to the arbitration hearing in this matter, Vulcan dismissed without prejudice its claims against Turner for Breach of the EIPA, Anticipatory Breach of the EIPA, Breach of Duty of Loyalty, Breach of Confidential Relationship, Violation of Computer Fraud and Abuse Act, and Declaratory Relief – Nonliability for Fraud.

10. A hearing in this matter was held by the Arbitrator on November 26, 2012. Representatives of Vulcan and Third-Party Respondents participated in the hearing, introducing documentary evidence and presenting testimony from four witnesses:

Ray Colliver,

Laura Macdonald;

Frank Liebscher;

Josh Sternberg.

11. Respondent Traci Turner withdrew from these proceedings on October 17, 2012 and declined to participate further. Ms. Turner did not appear, introduce evidence, or participate in the hearing. The Arbitrator reviewed Ms. Turner's deposition taken by Vulcan on May 10, 2012.

12. Turner has failed to carry her burden of proof with respect to any of the elements of the causes of action she asserted in this proceeding. Accordingly, Vulcan, Colliver and Macdonald are entitled to an award on the merits, dismissing all of Turner's claims with prejudice.

13. In addition, the unrebutted testimony of the four witnesses at the arbitration hearing, plus the documentary evidence submitted by Vulcan, establish that Ms. Turner suffered neither adverse employment action nor any hostile work environment while at Vulcan. Moreover, she was fully paid for all work performed, was not constructively terminated, and was not subject to either intentional or negligent infliction of emotional distress.

14. Based on the validity of the Release signed by Ms. Turner on July 26, 2011, and the evidence introduced by Vulcan, Colliver and Macdonald at the November 26, 2012, hearing, Vulcan has shown that it is not liable to Turner on any employment-related claims. Accordingly,

Vulcan is entitled to an award in its favor on its claim for declaratory relief that it is not liable to Turner for employment-related causes of action.

15. Vulcan has also proven that pursuant to the terms of Turner's Employment Offer Letter, Turner received from Vulcan a signing bonus of \$5000.00 and an additional bonus of \$14,531.32 to reimburse her for repayment to her former employer for relocation expenses. The Employment Offer Letter provided, however, that if Turner's employment with Vulcan was terminated for any reason, voluntarily or involuntarily, within the one-year period following her start date, then Turner would be required to repay both of these bonuses to Vulcan on a prorated scale.

16. Turner's employment at Vulcan terminated upon her resignation on or about September 23, 2011, which was less than one year after her start date of January 17, 2011. By letter dated October 6, 2011, Vulcan demanded repayment from Turner of a prorated portion of the bonuses, in the amount of \$5,696.63, consistent with the terms of the Employment Offer Letter that Turner accepted. Turner failed to respond to that demand. Turner is in breach of that contractual obligation, and is liable to Vulcan for damages in the amount of \$5,696.63.

17. Upon joining Vulcan, Ms. Turner signed the Employee Intellectual Property Agreement ("EIPA"), which contains the following fees provision:

In any lawsuit arising out of or related to this agreement or my employment, including without limitation arising from any alleged tort or statutory violation, the prevailing party shall recover their reasonable costs and attorneys' fees, including on appeal.

18. The EIPA is a valid and enforceable contract, supported by consideration, subject to paragraph 19 of the Findings of Fact.

19. This dispute arises out of Ms. Turner's employment at Vulcan, and Vulcan is a prevailing party in this proceeding; however, Vulcan may not recover attorneys' fees and costs flowing from Ms. Turner's statutory claims of employment discrimination in the absence of a showing that her statutory claims were "frivolous, unreasonable, or without foundation". Based on the available record, the Arbitrator cannot conclude that this is among the rare cases where

such a finding should be made. Based on the fees provision in the EIPA, Ms. Turner is liable for Vulcan's reasonable costs and attorneys' fees in this arbitration only as to non-statutory claims and some portion of the attorneys' fees and costs incurred in two lawsuits seeking to enforce the arbitration clause contained in the bonus agreement signed by Ms. Turner on July 26, 2011.

CONCLUSIONS OF LAW

Based on the foregoing, the Arbitrator enters the following Conclusions of Law:

1. Dismissal with Prejudice of Turner's Claims. All of Respondent Traci Turner's claims in this proceeding, as listed in paragraph 6 of the Findings of Fact above, fail for lack of proof and for the reasons set forth in the Arbitrator's October 31, 2012, Orders entered in this case. Those claims have also been effectively rebutted by Vulcan's affirmative showing at the arbitration hearing and are hereby dismissed with prejudice. This dismissal covers all claims asserted against Claimant Vulcan and against Third-Party Respondents Colliver and Macdonald.

2. Declaratory Relief of Non-Liability on Employment-Related Claims. Vulcan is not liable to Turner on any employment-related claims, whether based on statute or sounding in contract or in tort. Accordingly, Vulcan is entitled to an award in its favor on its claim for Declaratory Relief that it is not liable to Turner for employment-related causes of action.

3. Vulcan's Right to Recover Prorated Portion of Bonuses. Turner has breached her contractual obligation to repay Vulcan a prorated portion of the bonuses she received at the start of her employment at Vulcan. Accordingly, Turner is liable to Vulcan for damages for that breach in the amount of \$5,696.63.

4. Turner Is Liable to Vulcan for Its Reasonable Costs and Attorneys' Fees. The EIPA is a valid and enforceable contract that contains a fees provision. This dispute arises out of Turner's employment at Vulcan, and Vulcan is a prevailing party in this proceeding.

Accordingly, based on the fees provision in the EIPA, Turner is liable for Vulcan's reasonable costs and attorneys' fees as to nonstatutory claims in this arbitration. The Arbitrator cannot conclude on this record that Ms. Turner's statutory claims of employment discrimination were "frivolous, unreasonable, or without foundation". *Walters v AAA Waterproofing, Inc.*, 151

Wn. App. 316, 323 (2009). Accordingly, Vulcan may not recover attorneys' fees and costs in defending Ms. Turner's unsuccessful statutory claims. Vulcan may also recover a portion of its reasonable fees and costs as to the two lawsuits filed by Ms. Turner to the extent they relate to Vulcan's efforts to have the litigation stayed pending resolution in this forum.

INTERIM AWARD

Based on the Findings of Fact and Conclusions of Law set forth above, the Arbitrator enters the following Interim Award, which is a final determination on liability issues, and interim only with respect to the amount of reasonable costs and attorneys' fees awarded under paragraph 4 below:

1. Dismissal with Prejudice of Turner's Claims. All of Respondent Traci Turner's claims in this proceeding, as listed in paragraph 6 of the Findings of Fact above, are hereby dismissed with prejudice. This dismissal covers all claims asserted against Claimant Vulcan and against Third-Party Respondents Colliver and Maedonald.
2. Declaratory Relief: Vulcan Not Liable on Employment-Related Claims. Vulcan is hereby awarded Declaratory Relief that it is not liable to Ms. Turner for any employment-related causes of action.
3. Vulcan Is Awarded \$5,696.63 from Turner for Breach of Contract. Ms. Turner has breached her contractual obligation to repay Vulcan a prorated portion of the bonuses she received at the start of her employment at Vulcan. Accordingly, Vulcan is awarded damages for that breach from Ms. Turner in the amount of \$5,696.63.
4. Turner Is Liable to Vulcan for Its Reasonable Costs and Attorneys' Fees. The EIPA is a valid and enforceable contract that contains a fees provision. This dispute arises out of Turner's employment at Vulcan, and Vulcan is a prevailing party in this proceeding. Accordingly, based on the fees provision in the EIPA, Turner is liable for Vulcan's reasonable costs and attorneys' fees as to nonstatutory claims in this arbitration. The Arbitrator cannot conclude on this record that Ms. Turner's statutory claims of employment discrimination were frivolous, unreasonable or without foundation. Accordingly, Vulcan may not recover attorneys'

fees and costs in defending Ms. Turner's unsuccessful statutory claims. Vulcan may also recover a portion of its reasonable fees and costs as to the two lawsuits filed by Ms. Turner to the extent they relate to Vulcan's efforts to have the litigation stayed pending resolution in this forum.

5. Vulcan May Submit Post-Hearing Briefing on Reasonable Fees and Costs.

Within 30 days of receipt of these Findings of Fact, Conclusions of Law, and Interim Award, Vulcan may submit declarations and documentary evidence to establish the amount of costs and fees that it reasonably incurred in defending nonstatutory claims in arbitration and in having Ms. Turner's two lawsuits stayed pending resolution in arbitration. The Arbitrator will consider that submission and issue a Final Award that includes the amount of costs and fees awarded, which Final Award will supersede this Interim Award.

This Interim Award shall remain in full force and effect until such time as a final Award is rendered.

DATED this 21st day of December, 2012.


Arbitrator Carolyn Cairns

Presented by:

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND
INTERIM ARBITRATION AWARD - 8
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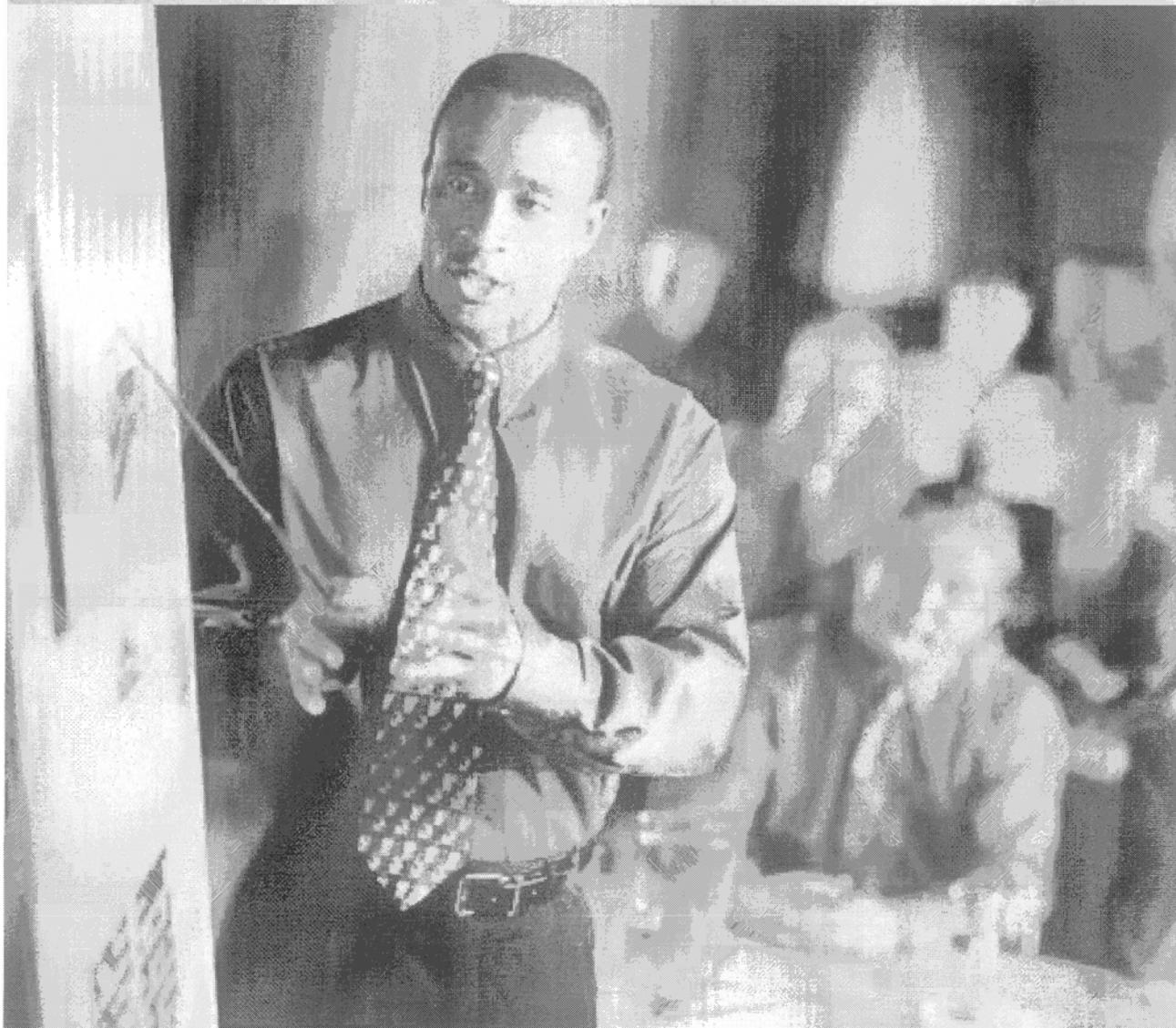
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Appendix N

Appendix N

Employment Arbitration Rules and Mediation Procedures

*Rules Amended and Effective November 1, 2009
Fee Schedule Amended and Effective June 1, 2010*



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The arbitrator, in exercising his or her discretion, shall conduct the proceedings with a view toward expediting the resolution of the dispute, may direct the order of proof, bifurcate proceedings, and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.

Documentary and other forms of physical evidence, when offered by either party, may be received in evidence by the arbitrator.

The names and addresses of all witnesses and a description of the exhibits in the order received shall be made a part of the record.

29. Arbitration in the Absence of a Party or Representative

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be based solely on the default of a party. The arbitrator shall require the party who is in attendance to present such evidence as the arbitrator may require for the making of the award.

30. Evidence

The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator deems necessary to an understanding and determination of the dispute. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any party or arbitrator is absent, in default, or has waived the right to be present, however “presence” should not be construed to mandate that the parties and arbitrators must be physically present in the same location.

An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.