92572-1

Court of Appeals No. 32702-7-III
Superior Court No. 14-2-01009-0

SUPREME COURT

STATE OF WASHINGTON

CRAIG S. CULBERTSON

Appellant,

v.

WELLS FARGO INSURANCE SERVICES USA, INC.;

JOSHUA TYNDELL and JANE DOE; and

RHONDA IDE and JOHN DOE;

Respondents.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONERS

The Petitioner is Craig S. Culbertson ("Culbertson"), the appellant, and the plaintiff in the proceedings below.

II. CITATION TO COURT OF APPEALS' DECISION

Petitioner seeks review of the decision dated November 3, 2015, in the Court of Appeals, Case No. 32702-7-III ("the Decision").[1]

III. ISSUES PRESENTED FOR REVIEW

1. Does the Decision conflict with this Court's holding in *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512 (1992), that the employer's disclaimers in its handbook are negated by inconsistent promises of specific treatment in specific situations?
2. Can an "at will" employer unilaterally modify a compensation agreement formed by an exchange of promises which provides the independent consideration to support a restrictive covenant?
3. Does the doctrine of judicial estoppel prevent an "at will" employer from making inconsistent assertions in two different judicial proceedings that the compensation agreement arose from an exchange of promises, and that the compensation agreement is an unilateral agreement which the employer can later modify upon reasonable notice?

[1] Reproduced as Appendix, A-1.

IV. STATEMENT OF THE CASE

1. PROMISES OF SPECIFIC TREATMENT IN SPECIFIC SITUATIONS.

The Decision completely ignores and omits any citation to the record regarding the language in the Wells Fargo Insurance Services USA, Inc. ("Wells Fargo") Handbook[2] which contains promises of specific treatment in specific situations.

a. *The Opportunity To Use Internal Problem-Solving Resources And The Dispute Resolution Process.*

The Wells Fargo 2006 Handbook makes the specific promise to provide "each team member" the "opportunity to use internal problem-solving resources" for "any work-related problem," "when they're needed." CP 634.

> At Wells Fargo *we feel it's essential to provide team members with a prompt, fair review of any work-related problem. So, we've developed a process through which each team member has an opportunity to use internal problem-solving resources.*
>
> Although we can't *guarantee* that every team member will always be satisfied with the outcome, *we can make sure that all team members have dispute resolution methods available when they're needed*... .
>
> If you need alternatives or to escalate your dispute further, *you can follow the process outlined below. It's strongly recommended you use these resources in the order they're shown here*... .
>
> *The process stops at any point you decide to discontinue it, or when you've exhausted all the resources described here.*

CP 634-635.

> After speaking with your supervisor, if you feel you haven't been able to communicate effectively with him or her—or *if you want*

[2] Reproduce excerpts as Appendix, A-2

> *someone else to review the situation—you can meet with your supervisor's manager (or another manager above your supervisor in the chain of reporting relationships) to discuss the issue. Again, if you prefer, you can also contact your HR consultant and ask him or her to facilitate the meeting with your supervisor's manager, or to help you prepare for the meeting.*

CP 635 (emphasis added).

Wells Fargo's 2006 Handbook describes in detail the dispute resolution process. CP 634-636. The *"process"* begins with speaking with your supervisor *or another manager* above your supervisor. CP 635. The "process" also states, "you can contact *your* HR consultant." CP 635. The next step in the "process" allows the employee to contact "*your* Employee Relations consultant."

> Employee Relations consultants review disputes from an *objective position* and act in a consultative role to help resolve work-related issues. *Your Employee Relations consultant will work with your HR consultant to obtain related information in order to review the matter and make recommendations to you or your group's management, if appropriate.*

CP 635 (emphasis added).

It is undisputed that at the end of Culbertson's surprise and short meeting with his branch manager and the Wells Fargo investigator they fired him, and escorted him out the door. CP 142-143. Wells Fargo never afforded Culbertson the *opportunity* to meet with anyone else in Wells Fargo's management reporting chain or *anyone in an objective position to assist him in obtaining any related information* to rebut the serious accusations his branch manager leveled against him. CP 142-143.

Wells Fargo's 2006 Handbook, Section 4.6, titled "Third Party

Representation" makes the following promise summarizing the dispute resolution process:

> *We respect your right to communicate directly*, on an individual basis, *with* your supervisor, manager, *or HR consultant about any of the terms or conditions of your employment....*
>
> If you encounter *any problems* on the job, *bring your concerns to your supervisor, manager*, or *HR consultant*. *They're willing to discuss any work-related problem with you on a direct, person-to-person basis.*

CP 636 (emphasis added).

Wells Fargo completely ignored Culbertson's "*right*" to communicate on an individual basis with another manager in the reporting chain or with *his* HR consultant and *his* Employee Relations consultant about the serious accusations leveled against him before and after his termination. CP 142-144. The record undisputedly shows that Wells Fargo never, at any time, made any dispute resolution resources available to Culbertson. CP 142-144. Culbertson never had the opportunity to decide when to discontinue the dispute process—because Wells Fargo prevented Culbertson from starting the dispute resolution process. CP 142-144.

b. *The Specific Promise To Review The Termination Decision "From An Objective Position."*

The Wells Fargo 2006 Handbook *makes the specific promise* to review termination decisions by "your HR consultant" and "if necessary it can be referred to Employees Relations." CP 636, 688.

> **Review of Termination.** If your employment is terminated involuntarily and you want to have that decision reviewed, contact your HR consultant as soon as possible following the

> termination. *Once your HR consultant has reviewed the matter, if necessary it can be escalated to Employee Relations.* They'll determine whether a further review is warranted based on the circumstances—and if so, they'll conduct one. (See "Dispute Resolution" on page 44.)

CP 636 (emphasis added). See also CP 688.

No representative from the Wells Fargo HR Department or any other manager in the Wells Fargo reporting chain contacted Culbertson in response to his February 3, 2014, letter, requesting a written statement as to the reasons for his discharge. CP 144-145. Instead, Culbertson's former supervisor who fired him mailed a letter to Culbertson dated February 14, 2014, repeating the same unspecified and unsubstantiated allegations made by the Wells Fargo investigator that Culbertson had falsified records. CP 144-45, 158-59.

After Wells Fargo fired Culbertson, Wells Fargo did not respond to his February 27, 2014, letter requesting a review of the decision to terminate his employment at Wells Fargo. CP 145.

c. *Inconspicuous Disclaimers.*

The disclaimers buried in Wells Fargo's 189 page 2006 Handbook are not "conspicuous." CP 585-733. The disclaimer language is not set out in large font, bold, capitalized, underlined, or italicized print, nor is it set out on separate pages. CP 585-733. There is nothing to make the disclaimers obvious to the eye or mind. There is nothing to attract attention to the disclaimers in order to make them noticeable. CP 585-733.

2. POST-TERMINATION COMMISSIONS.

On November 1, 2006, Culbertson signed a job offer letter from Acordia/Wells Fargo setting forth the terms of his compensation, which included broker commissions for new and renewed business. CP 47, 56-57, 429, 561-562. Nothing in the job offer letter to Culbertson stated that Culbertson would not be paid commissions on his sales after his employment at Wells Fargo terminated. CP 47, 56-57, 429, 561-562. On November 1, 2006, Culbertson also signed a Trade Secrets Agreement (TSA) which included a provision prohibiting Culbertson from soliciting business from his former Wells Fargo customers for two (2) years after the termination of his employment. CP 47-48, 59-62, 575-578.

On or about December 22, 2009, Wells Fargo's Spokane Branch Manager, Mark Neupert, presented Culbertson with a single-page document titled "*WFIS Producer Plan Appendix A Participant Draw and Commission Rates*" ("2010 Producer Plan")[3], and told Culbertson, "Here's your new comp plan." CP 9, 28, 48, 49, 64, 429, 565. No other documents were attached to, enclosed with, or accompanied the 2010 Producer Plan when the Wells Fargo Spokane Branch Manager presented the 2010 Producer Plan to Culbertson for his signature. CP 48, 64, 429, 565. On December 22, 2009, Culbertson accepted, by his signature, the single-page 2010 Producer Plan agreement setting forth the terms of his compensation, which were the same commission rates as upon his hire. CP 9, 28, 48-49, 64, 429, 565.

[3] Reproduced as Appendix, A-3.

In the 2010 Producer Plan, Wells Fargo promised to pay Culbertson commissions for "new business" and "renewal business." CP 64. Wells Fargo also promised in the 2010 Producer Plan to pay Culbertson a one-time payment of additional commissions on top of his regular commissions for calendar year 2010 as "consideration for signing a new TSA." CP 48-49, 64, 429, 565. Wells Fargo's representatives signed the 2010 Producer Plan agreement on January 14, 2010. CP 48-49, 64, 429, 565.

There was no provision in the 2010 Producer Plan specifying how Wells Fargo would pay commissions after the termination of Culbertson's employment. CP 49, 64, 429, and 565. Additionally, although the 2010 Producer Plan promised a one-time payment of additional commissions in 2010, there was no specific duration to the 2010 Producer Plan terminating the parties' obligations under the agreement on a certain date. CP 49, 64, 429, and 565.

On January 5, 2010, Culbertson signed the "*Wells Fargo Agreement Regarding Trade Secrets, Confidential Information, Non-Solicitation, and Assignment of Inventions*" ("2010 TSA"). CP 66-68, 429, 566-568. The 2010 TSA introduction states, "In consideration of my continued employment by a Wells Fargo company..., the ability to participate in a new compensation plan containing new and additional benefits which include, but are not limited to, a guaranteed draw and an increased commission percentage for new revenue and net new revenue

generated in 2010, I agree as follows:... ." CP 66, and 566.

The 2010 TSA was similar to the TSA signed by Culbertson upon his hire in 2006, but the 2010 TSA included an additional provision which restricted Culbertson from *both soliciting and accepting* business from former Wells Fargo clients for two (2) years after his employment ended. CP 59-62, 66-68, 566-568, 575-578.

The 2010 TSA signed by Culbertson on January 5, 2010, contained no language expressly specifying how commissions would be paid after Culbertson's employment at Wells Fargo terminated. CP 50, 66-68, 566-568.

On November 22, 2011, Culbertson accepted a single-page agreement titled "*WFIS Sales Incentive Plan Appendix A Participant Draw and Commission Rates*" ("2011 Incentive Plan")[4] by signing it. CP 10, 28, 50-51, 70, 429, 569. No other documents were attached to, enclosed with, or accompanied, the single-page 2011 Incentive Plan when the Wells Fargo Spokane Branch Manager handed it to Culbertson for signature. CP 51.

On November 29, 2011, Wells Fargo accepted the 2011 Incentive Plan agreement by signing it. CP 50-51, 70, 429, 569.

There was no provision in the 2011 Incentive Plan specifying how Wells Fargo would pay commissions after the termination of Culbertson's employment. CP 50-51, 70, 429, 569. The 2011 Producer Plan promised to pay Culbertson the same commissions promised in the

[4] Reproduced as Appendix, A-4.

2010 Producer Plan, including the one-time additional commissions in 2010 as "consideration for signing a new TSA;" however, the 2011 Incentive Plan added a one-time "Grandfathered Incidentals" payment to Culbertson for $1,956.60. CP 50-51, 70, 429, 569. Just like the 2010 Producer Plan, the 2011 Incentive Plan contained no specific duration which terminated the parties' obligations under the agreement on a certain date. CP 51-52, 70, 429, 569.

The 2011 Incentive Plan agreement contained the following language in the bottom, left-hand corner: "Effective October 1, 2011." CP 51-52, 70, 429, 569.

During the course of his entire employment at Wells Fargo, Culbertson never received a printed copy of, nor read an electronic copy of any document titled or represented to him as the "*Wells Fargo Insurance Services USA, Inc. Insurance Brokerage Sales Incentive Plan Effective April 1, 2013*" ("2013 Sales Incentive Plan"). CP 142.

After Wells Fargo fired Culbertson on February 3, 2014, Wells Fargo refused to pay Culbertson commissions for broker fees from the sales of annual employee benefits accounts which Culbertson opened and/or renewed before Wells Fargo fired him. CP 12, 30, 52, 53, 72, 518-519, 526-527, 529-531. Wells Fargo successfully moved Spokane County Superior Court (Judge Michael Price) to dismiss Culbertson's breach of employment contract claim by asserting that the compensation agreement between Wells Fargo and Culbertson was "at will;" and as

such, Wells Fargo could unilaterally modify it by electronically rolling out the 2013 Sales Incentive Plan, which contained a provision limiting payment of post-termination commissions. CP 483-489, 496-500, 1042-1053, 1080-1081, 1098-1105.

3. WELLS FARGO'S INCONSISTENT ASSERTIONS IN OTHER PROCEEDINGS.

On March 21, 2014, Wells Fargo filed a separate lawsuit against Culbertson, in a different department of the Spokane County Superior Court, to enforce the 2010 TSA against Culbertson. CP 109-130. In its lawsuit, Wells Fargo successfully argued to the superior court (Judge Annette Plese) that the 2010 TSA was enforceable against Culbertson by asserting that the *exchange of promises* contained in the 2010 Producer Plan provided the independent consideration to support the enforcement of the restrictive covenants in the 2010 TSA. CP 227-303. RP 1-18.

Wells Fargo's counsel successfully asserted in its lawsuit that the restrictive covenants in the 2010 TSA were enforceable because the exchange of promises in the 2010 Producer Plan to pay Culbertson a one percent extra commissions in 2010 if he signed a new TSA provided the necessary independent consideration[5].

> The TSA itself and the Appendix to the Wells Fargo Producer Plan provides an increase in commission, specifically in consideration for the non-acceptance/non-solicitation 2010 TSA. (Complaint Exs. 1 and 2) That increased 1% in commissions was not an existing obligation of Wells Fargo, nor an existing benefit for Culbertson prior to his agreement to enter into the 2010 TSA. *The*

[5] Excerpts of Wells Fargo's assertions in *Wells Fargo v. Craig Culbertson* , Spokane County Superior Court Case No. 14-2-01021-9 reproduced as Appendix, A-5.

bargained for exchange of promises was an increase in commission for entering into the new agreement.

CP 239 (emphasis added).

> The express terms of [2010 Producer Plan] Appendix A and the 2010 TSA establish that *consideration for the 2010 TSA was offered and accepted by Culbertson, in the form of increased commissions* of 1%, which he was in fact paid.

CP 245 (emphasis added).

> *[T]he 2010 TSA's consideration was the additional 1% commissions which was established in* [2010 Producer Plan] *Appendix A Culbertson signed....*

CP 250 (emphasis added).

> He received and signed [2010 Producer Plan] Appendix A, which despite his continued protestations, indeed contained the specific terms for "TSA Consideration," which increased his compensation by 1% on new revenue and 1% on net new revenue for a single year period if he signed the "new TSA." That consideration was again referenced in the 2010 TSA which Culbertson signed 14 days later. Culbertson accepted the additional 1% commissions when he signed the 2010 TSA, and thereafter received the additional 1% commissions. These facts establish the appropriate additional consideration independent of Wells Fargo's previous agreements with Culbertson, and satisfy Washington law rendering the 2010 enforceable....

CP 250-251.

> Culbertson has made various claims, but has not presented any specific facts which rebut the fact that *he received* [2010 Producer Plan] *Appendix A which identified an offer of additional consideration for the "new TSA" in return for signing it,* and he indeed signed the new 2010 TSA, accepting that consideration, which he was paid... .
>
> The only issue of law before the court is whether independent consideration existed as a matter of law for the 2010 TSA...*Only* [2010 Producer Plan] *Appendix A, which Culbertson signed, contained the offer of consideration under the heading "TSA Consideration." By its terms, the consideration offered was 1% on*

new revenue, and 1% on new net revenue, which "participant will receive...for signing the new TSA."

CP 262-63 (emphasis added).

The [2010 Producer Plan] *appendix is merely saying we're offering, we're telling you if want to sign this, we are going to give you additional consideration, more money. Culbertson had that choice. He signed it. He got it.*

CP 284. RP 12. (emphasis added).

They said hey, *we're going to offer you this. We're promising, obligating ourself. If you sign a new TSA, we'll give you one percent on your revenue, one percent on new net revenue. He signed it. He got paid it. He's obligated by the contract, and that's Washington law.* No Washington law says that's not valid and enforceable.

CP 287. PR 15. (emphasis added).

He signed a legally enforceable document, essentially a covenant not to compete. Washington enforces those. If they're signed midstream, they have to have independent consideration.

There's no question before this Court *there was an obligation of promise and offer made that we'll pay you if you sign this. He signed it. They paid him. He's now under the terms he promises he'll abide by....*

CP 288-89. RP 16-17. (emphasis added).

V. ARGUMENT

A. THE DECISION CONFLICTS WITH THIS COURT'S HOLDING IN *SWANSON V. LIQUID AIR CORP.*, 118 WN.2d 512 (1992), THAT THE EMPLOYER'S DISCLAIMERS IN ITS HANDBOOK ARE NEGATED BY INCONSISTENT PROMISES OF SPECIFIC TREATMENT IN SPECIFIC SITUATIONS.

The State of Washington Supreme Court has held that employers are not entitled to use their employee handbooks to speak out of both sides of their mouths. "An employer's inconsistent representations can

negate the effect of a disclaimer... ." *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 532 (1992). "We reject the premise that this disclaimer can, as a matter of law, effectively serve as an eternal escape hatch for an employer who may then make whatever unenforceable promises of working conditions it is to its benefit to make." *Id.* "First and most importantly, *an employer is not entitled to make extensive promises as to working conditions—promises which directly benefit the employer in that employees are likely to carry out their jobs satisfactorily with promises of assured working conditions—and then ignore those promises as illusory.*" *Id.* at 536 (emphasis added). "*We note that even if a disclaimer appears in the same handbook as the relied upon policy, summary judgment may be inappropriate.*" *Id.* at 535 (emphasis added). "It would be inconsistent with *Thompson [v. St. Regis Paper Co.,* 102 Wn.2d 219 (1984)] and its progeny to conclude that once an application containing an at-will provision is signed, the employer is thereafter free to make whatever promises it wishes to make without any obligation to carry them out." *Korslund v. DynCorp Tri-Cities Servs.*, 156 Wn.2d 168, 188 (2005).

"*We hold that the questions of reasonable notice and of applicability and effectiveness of the disclaimer involve issues of material fact which must be decided by the trier of fact.*" *Swanson*, 118 Wn.2d. at 538. (emphasis added).

Moreover, the disclaimers in Wells Fargo's Handbook are not

conspicuous, and therefore do not meet the *minimum* requirements to be effective. *Id.* at 527.

The Decision does not make a single citation or reference to *Swanson*. Other than the disclaimer, the Decision does not make a single citation, or reference to the record supporting the conclusion of law that "reasonable minds could reach but one conclusion... the handbook stated a process that both sides could agree to use, but did not require either side to do so." Decision p. 8. Instead, the Decision quotes at length the Handbook's disclaimer language.

By focusing only on the disclaimer language in the Handbook, and ignoring the other language containing promises of specific treatment in specific situations, the Court of Appeals ignored this Court's holdings in *Swanson* and *Korslund*. The Decision is in conflict with—and effectively overrules—this Court's decisions in *Swanson* and *Korslund*.

B. AN "AT WILL" EMPLOYER CANNOT UNILATERALLY MODIFY A COMPENSATION AGREEMENT FORMED BY AN EXCHANGE OF PROMISES WHICH PROVIDED THE INDEPENDENT CONSIDERATION TO SUPPORT A RESTRICTIVE COVENANT.

The 2010 Producer Plan was a bilateral contract because it was created by an exchange of promises. CP 49, 64, 429, 565. "In a bilateral contract, the parties' promises, not their performance, make the contract." *Flower v. TRA Industries, Inc.*, 127 Wn. App. 12, 27 (Div. 3, 2005), review denied 156 Wn.2d. 1030 (2006). In *Flower*, the Court of Appeals concluded, among other things, that an exchange of promises constituted a bilateral employment contract despite the question of fact as to whether

an acknowledgement of the employee handbook containing an "at will" provision signed by Mr. Flower was a final expression of a fully integrated agreement with his employer. *Id.* at 26, 30, 32-33.

Here, the 2010 Producer Plan was a bilateral compensation agreement between Wells Fargo and Culbertson as to the terms of his compensation. Wells Fargo promised to pay Culbertson extra commissions in 2010 in exchange for Culbertson's promise to sign a TSA with extra terms restricting post-termination competition. CP 48-49, 64, 429, 565. Wells Fargo and Culbertson agreed to link compensation with a post-termination restricted covenant by exchanging their promises in the 2010 Producer Plan and accepting it with their signatures. Any modification of the compensation agreement required mutual assent between Culbertson and Wells Fargo. "Without a mutual change of obligations or rights, a subsequent agreement lacks consideration and cannot serve as modification of an existing contract." *Id.* at 27-28 (citing *Ebling v. Gove's Cove, Inc.,* 34 Wn. App. 495, 499 (Div. 1) review denied 100 Wn.2d 1005 (1983)). Indeed, Wells Fargo and Culbertson modified the 2010 Producer Plan with the exchange of promises in the 2011 Incentive Plan which added a one-time "Grandfathered Incidentals" payment to Culbertson for $1,956.60. CP 50-51, 70, 429, 569. Wells Fargo's "roll out" of its 2013 Sales Incentive Plan cannot unilaterally modify Culbertson's compensation agreement with Wells Fargo without Culbertson's mutual assent.

In *Ebling*, Edward Gove agreed to pay Neil Ebling a 35 percent commission if he would manage the Westlake office. *Id. at 497.* When Mr. Gove later unilaterally reduced the commission rate and paid a salary, Mr. Ebling terminated his employment and filed suit. The Court of Appeals affirmed the trial court finding that there was "abundant evidence" demonstrating that the compensation agreement was a bilateral contract between an employee and employer, but there was no mutual agreement concerning the change in commission. *Id.* 498-99.

> A similar fact situation existed in the case of *Warner v. Channel Chem. Co.,* 121 Wn. 237 (1922). In that case, Warner was employed as a commissioned salesman and was performing adequately, having earned the right to exercise an option to renew his employment contract according to its terms, and having exercised that option. While continuing to perform, he was informed by his employer that the terms of the contract were being changed and his commission was being cut from 7 to 5 percent. The salesman refused to accept the arbitrary change in the contract, but continued to perform his duties for the employer. The court held the employee had elected to treat the employer's action as a breach of contract, which breach he did not waive by continuing to work for the employer.

Ebling, 34 Wn.App. at 499. The *Ebling* Court held that Ebling was entitled to his commissions under the original contract terms because Ebling never agreed to the terms of modification. *Id.* at 499-500.

The Decision's reliance on *Duncan v. Alaska USA Fed. Credit Union, Inc.* 148 Wn. App. 52, 73 (Div. 1, 2008) is misplaced. In *Duncan* the Court held, "Nowhere in this record is there any evidence that could be fairly characterized as an "exchange of reciprocal promises," characterizing a bilateral contract." *Id.* at 74. Here, the record contains "abundant evidence" demonstrating that the 2010 Producer Plan was

formed by Wells Fargo's promise to pay Culbertson extra commissions in 2010 in exchange for Culbertson's promise to sign a new TSA. CP 48-49, 64, 429, 565. The record further shows that the parties modified their compensation agreement by their promises exchanged in the 2011 Incentive Plan. CP 51-52, 70, 429, 569. Neither the 2010 Producer Plan nor the 2011 Incentive Plan provided a definite termination date. CP 48-49, 64, 429, 565; CP 51-52, 70, 429, 569. A bilateral contract with no specific duration establishes on-going duties and obligations, terminable by failure to perform. *Warren v. Stoddart*, 105 U.S. 224, 229, 26 L. Ed. 1117 (1881).

The Decision is in conflict with the Court of Appeals' decisions in *Flower* and *Ebling*—and effectively overrules—this Court's decision in *Warner*. Moreover, the Decision involves an issue of substantial public interest that should be determined by this Court: can an employer unilaterally modify a compensation agreement formed by an exchange of promises which provided the independent consideration to support a restrictive covenant? The Decision allows an employer to treat a compensation agreement as illusory when it provides the independent consideration to support restrictive covenants—by allowing the employer to unilaterally change the compensation terms after the employee signs the new restrictive covenant.

C. THE DOCTRINE OF JUDICIAL ESTOPPEL PREVENTS INCONSISTENT ASSERTIONS IN TWO DIFFERENT JUDICIAL PROCEEDINGS.

"The doctrine of judicial estoppel is an equitable doctrine that

precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." *Miller v. Campbell,* 164 Wn.2d 529, 539 (2008) (internal citations and quotations omitted). The record above clearly shows that in its lawsuit to enforce the 2010 TSA against Culbertson, Wells Fargo asserted that an exchange of promises in the 2010 Producer plan formed an agreement providing the independent consideration to support the restrictive covenants in the 2010 TSA. CP 238-39, 245, 250-52, 262-63, 282, 283, 287-89; RP 10-17.[6] In this lawsuit, Wells Fargo asserts that it could unilaterally modify its compensation agreement with Culbertson by "rolling out" the 2013 Sales Incentive Plan.

By definition, a contract formed by an exchange of promises is a bilateral contract. See *Flower*, 127 Wn. App. at 27-28; *Ebling,* 34 Wn.App. at 499. "Modification of a bilateral contract requires a meeting of the minds as well as consideration separate from that of the original contract." *Duncan*, 148 Wn. App. at 74. The Decision's reliance upon the "at will" language in the 2010 TSA to hold that Wells Fargo did not make any inconsistent assertions is misplaced. An "at will" employment relationship does not preclude a bilateral compensation agreement which requires mutual agreement for modification. *Flower*, 127 Wn. App. at 27-28 (an "at will" acknowledgment signed by an employee after formation of a bilateral compensation agreement does not rescind it, but does

[6] Reproduced in Appendix, A-2.

rescind the employer's promise to terminate an employee only for cause); *Ebling,* 34 Wn.App. at 499 (an employer could not unilaterally modify an employee's commission rate after forming a bilateral compensation contract promising an increase in an employee's commissions in exchange for new duties).

"The purpose of the doctrine is to preserve respect for judicial proceedings and to avoid inconsistency, duplicity, and ... waste of time. *Miller,* 164 Wn.2d at 540 (2008) (internal citations and quotations omitted).

VI. CONCLUSION

This Court's review is warranted under RAP 13.4(b)(1), (2), and (4) because the Decision conflicts with prior decisions of the Supreme Court, it conflicts with decisions of another Court of Appeals, and involves an issue of substantial public interest that should be determined by the Supreme Court. Culbertson respectfully requests the Supreme Court to accept review and to award attorney fees and costs under RCW 49.48.030.

Respectfully submitted this 3rd day of December, 2015.

PATRICK J. KIRBY LAW OFFICE, PLLC.

By: _____

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APPENDIX

A-1: The unpublished decision filed November 3, 2015, in the Court of Appeals, Case No. 32702-7-III ("the Decision").

A-2: Excerpts of Wells Fargo 2006 Handbook: CP 585, 634-36, 688.

A-3: 2010 Producer Plan: CP 64.

A-4: 2011 Incentive Plan: CP 70.

A-5: Wells Fargo Inconsistent Assertions In Other Proceedings: CP 238-39, 245, 250-52, 262-63, 282, 283, 287-89; RP 10-17.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of December, 2015, I caused to be served a true and correct copy of the foregoing document to the following:

☒	HAND DELIVERY	Scott A. Gingras
☐	U.S. MAIL	Winston Cashatt, P.S.
☐	OVERNIGHT MAIL	Bank of America Financial Center
☐	FACSIMILE	601 W. Riverside, Suite 1900
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NOVEMBER 3, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

CRAIG S. CULBERTSON, a married man, Appellant, v. WELLS FARGO INSURANCE SERVICES USA, INC., a North Carolina corporation; JOSHUA TYNDELL and JANE DOE, and the marital community comprised thereof; RHONDA IDE and JOHN DOE, and the marital community comprised thereof, Respondent.	)	No. 32702-7-III UNPUBLISHED OPINION

KORSMO, J. — Craig Culbertson appeals the dismissal at summary judgment of his wrongful termination suit against Wells Fargo Insurance Services, primarily contending that his employer did not live up to the promises of the employee handbook and that he was owed commissions earned after his departure from the company. We affirm.

FACTS

Mr. Culbertson was hired by a Wells Fargo subsidiary company in 2006 on an at-will basis to sell employee benefit plans, primarily health and dental insurance. He was

at that time given an employee handbook that outlined Wells Fargo policies and procedures for resolving internal disputes and reviewing termination decisions. The handbook opened with the disclaimer that it did not constitute a contract and did not alter at-will employment status. Clerk's Papers (CP) at 591. It also repeated that disclaimer at the beginning of both the "Dispute Resolution" and "Involuntary Termination" sections of the handbook. CP at 634, 635, 687.

In general terms, Mr. Culbertson was paid a salary and also received a commission from both existing accounts and new sales. Wells Fargo adjusted his compensation rates and employment terms on a nearly annual basis. The 2013 sales incentive plan provided that commissions would be paid on a quarterly basis. CP at 1022. The employee was entitled only to commissions earned up to the point of termination. CP at 1023. Prior compensation plans had been silent concerning commissions earned after termination. Information about the 2013 compensation plan was included in an email that contained a link to a website posting of the new plan.

When originally hired in 2006, Mr. Culbertson signed a Trade Secrets Agreement (TSA). Among its provisions, the TSA required Mr. Culbertson to maintain the company's secrets after his employment, included a noncompetition agreement that prohibited him from soliciting business from his customers for two years, and expressly confirmed that his employment remained at-will. CP at 575-578. The TSA was updated in 2010. CP at 545-547, 566-568. The new TSA again included a confidentiality

agreement, a strengthened (from the company's perspective) noncompetition agreement, and a reaffirmation that employment remained at-will. *Id.* In exchange for signing the agreement, Wells Fargo agreed to pay an increased commission for one year. CP at 547, 566. Mr. Culbertson signed the agreement. CP at 568.

On February 3, 2014, Mr. Culbertson was called into his supervisor's office, accused of falsifying customer accounts, and summarily fired without resort to the company's dispute resolution process. CP at 142. Litigation rapidly ensued, with both sides suing the other on the same day, March 21, 2014. Wells Fargo filed suit to enforce the TSA, while Mr. Culbertson filed the present case challenging his termination and the nonpayment of earned commissions.

Wells Fargo moved for partial summary judgment in the TSA litigation, seeking to strike Mr. Culbertson's affirmative defense of lack of consideration. There Wells Fargo took the position that it had provided adequate compensation for the new TSA. Judge Annette Plese granted the motion, determining that there was sufficient compensation to support the modification of the TSA.

Meanwhile, after a period of discovery, Wells Fargo moved for summary judgment on most of the claims in the wrongful termination litigation. Mr. Culbertson filed a motion for a continuance, seeking additional time to obtain discovery concerning, and perform a study of, his Wells Fargo computer to confirm that he had never clicked on the

link to the 2013 compensation plan contained in the email he had received. The trial court denied the continuance.

The trial court, the Honorable Michael Price, then granted Wells Fargo's motion for summary judgment. After stipulating to dismissal of his remaining additional claims, Mr. Culbertson timely appealed the summary judgment ruling. The matter ultimately proceeded to oral argument before this panel.

ANALYSIS

Mr. Culbertson argues that the trial court erred in denying his request to continue the hearing for additional discovery, erred in determining that the handbook did not create an enforceable promise, and erred in applying the 2013 compensation plan to deny him commissions on existing accounts. We address those three claims in the noted order.[1]

Continuance for Discovery

CR 56(f) permits the trial court to order a continuance to allow further discovery where it appears that the responding party, for good reason, cannot present facts essential to its opposition of summary judgment. Review of a denial of a motion under CR 56(f) is for an abuse of discretion. *Tellevik v. Real Prop. Known As 31641 W. Rutherford St.*, 120

[1] Mr. Culbertson also argues that he is entitled to attorney fees pursuant to RCW 49.48.030 in the event he successfully obtains his commissions. In light of our disposition of that issue, we do not further discuss the attorney fee request.

Wn.2d 68, 90, 838 P.2d 111 (1992). A court may deny such a motion where (1) the requesting party fails to offer a good reason for the delay, (2) the requesting party does not state what evidence is desired, or (3) the desired evidence will not raise a genuine issue of material fact. *Id.*

The requested information failed the third *Tellevik* standard. Mr. Culbertson argued that he was unaware of the terms of the 2013 compensation plan. While we will discuss the merits of that argument later, discovery in support of that claim was of no moment here. For purposes of summary judgment, the trial court was required to view the evidence in Mr. Culbertson's favor. *E.g.*, *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). Mr. Culbertson's affidavit in opposition to the motion for partial summary judgment stated that he had never clicked the e-mail link to check the terms of the 2013 compensation plan and had never read the plan. CP at 142. A favorable report on the anticipated discovery would do no more than corroborate Mr. Culbertson's affidavit.[2]

Thus, the discovery would add nothing to the summary judgment since the trial court already had to assume the truth of Mr. Culbertson's evidence on that point. The discovery would not raise an issue of material fact. Under *Tellevik*, the trial court had reasonable grounds for denying the request. There was no abuse of discretion.

[2] Counsel for Mr. Culbertson agreed during oral argument to this court that the information would corroborate his client.

Employee Handbook

Mr. Culbertson argues that he was wrongfully terminated because Wells Fargo denied him the process guaranteed him by the employee handbook. That document does not bear the interpretation he places on it.

Initially, we note the well settled standards governing review of a summary judgment. This court reviews a summary judgment de novo, performing the same inquiry as the trial court. *Lybbert*, 141 Wn.2d at 34. The facts, and all reasonable inferences to be drawn from them, are viewed in the light most favorable to the nonmoving party. *Id.* If there is no genuine issue of material fact, summary judgment will be granted if the moving party is entitled to judgment as a matter of law. *Id.* "A defendant in a civil action is entitled to summary judgment if he can show that there is an absence or insufficiency of evidence supporting an element that is essential to the plaintiff's claim." *Tacoma Auto Mall, Inc. v. Nissan N. Am., Inc.*, 169 Wn. App. 111, 118, 279 P.3d 487 (2012).

The moving party bears the initial burden of establishing that it is entitled to judgment because there are no disputed issues of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If a defendant makes that initial showing, then the burden shifts to the plaintiff to establish there is a genuine issue for the trier of fact. *Id.* at 225-226. "A material fact is one that affects the outcome of the litigation." *Owen v. Burlington N. & Santa Fe R.R.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). While questions of fact typically are left to the trial process, they may be treated

as a matter of law if "reasonable minds could reach but one conclusion" from the facts. *Hartley v. State*, 103 Wn.2d 768, 775, 698 P.2d 77 (1985). A party may not rely on speculation or having its own affidavits accepted at face value. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Instead, it must put forth evidence showing the existence of a triable issue. *Id.*

Here, the trial court concluded that there was no material issue of fact to present to a jury because the handbook did not provide a promise of specific treatment and did not alter the at-will nature of the employment relationship. CP at 223. We agree.

The handbook describes a process of escalating responses to issues at work, starting with a discussion with a supervisor, then proceeding to either the supervisor's supervisor or a human resources representative, and possibly even mediation. CP at 634-635. However, the policy also expressly states:

> In most cases, if you have a performance issue your supervisor will work with you to provide the appropriate performance counseling and corrective action so that you have the opportunity to improve. ***However, the policy is not progressive.*** This means that we reserve the right to escalate the process or use any part of it that we feel is appropriate for the situation—and, if necessary, to terminate employment without implementing performance counseling and corrective action. This is consistent with our "employment at will" policy below.

CP at 633 (emphasis in original).

The handbook then goes on to discuss at will employment:

> This *Handbook* is not a contract of employment. Your employment with a Wells Fargo company has no specified term or length; both you and Wells

> Fargo have the right to terminate your employment at any time, with or without advance notice and with or without cause.
>
> This is called "employment at will." Only an officer of Wells Fargo at the level of executive vice president or higher, authorized by the senior Human Resources Manager for your region or line of business, may alter your at-will status or enter into an agreement for employment for a specified period of time. Any modification to your at-will employment status must be confirmed in writing by an officer of Wells Fargo at the level of executive vice president or higher, authorized by the senior Human Resources Manager for your region or line of business.

Id.

Reasonable minds could reach but one conclusion in this situation. Although Wells Fargo had a process for resolving disputes, neither party had to follow that process and the existence of the process did not alter the at-will nature of the employment relationship. Indeed, Wells Fargo expressly stated that it reserved the right not to follow the process in cases of termination. CP at 633.

The handbook stated a possible dispute resolution process, but did not specifically promise that the process would apply in all circumstances, and particularly noted the termination process as one likely exception. Instead, the handbook stated a process that both sides could agree to use, but did not require either side to do so.

The handbook did not create a right of Mr. Culbertson to invoke the dispute resolution process. Summary judgment was properly granted on this issue.

Commissions After Termination

Mr. Culbertson also argues that Wells Fargo owed him commissions earned on his existing accounts after he left employment. He contends that the 2013 compensation plan was ineffectual because his compensation was subject to bilateral agreement due to the 2010 TSA amendment and that Wells Fargo was judicially estopped from contending otherwise. Since he did not agree to the 2013 plan, he concludes that the procuring cause doctrine would allow him to earn post-termination commissions. However, Judge Price concluded that the 2013 compensation plan was effective and that Wells Fargo already had made all payments owing under that plan. CP at 223-224. We again agree.

Several different legal doctrines relate to this argument. First, we note that a terminable-at-will employment contract may be modified unilaterally by the employer. *Duncan v. Alaska USA Fed. Credit Union, Inc.*, 148 Wn. App. 52, 73, 199 P.3d 991 (2008). Modification is an inherent feature of at-will employment since the employer could simply terminate the old contract and offer a new one. *Id.* at 77-78.

The second doctrine at play is judicial estoppel. This equitable doctrine prevents a party from gaining an advantage by asserting one position in court and later taking a clearly inconsistent position. *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 224-225, 108 P.3d 147 (2005). A second purpose of the doctrine is to "'preserve respect for judicial proceedings.'" *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (quoting *Cunningham*, 126 Wn. App. at 225). Courts focus

on three factors when deciding whether to apply judicial estoppel: (1) whether the party's later position is clearly inconsistent with its earlier position, (2) whether accepting the new position would create the perception that a court was misled, and (3) whether a party would gain an unfair advantage from the change. *Miller v. Campbell*, 164 Wn.2d 529, 539, 192 P.3d 352 (2008) (citing *Arkison*, 160 Wn.2d at 538-539).

The third doctrine implicated by this argument involves Washington's policy on noncompetition agreements. A noncompetition agreement entered into at the start of employment is ordinarily valid as part of the employment contract, but any change to the agreement or a newly incorporated noncompetition agreement requires independent consideration to be valid. *See Labriola v. Pollard Grp., Inc.*, 152 Wn.2d 828, 100 P.3d 791 (2004). This third doctrine was at issue before Judge Plese. As noted previously, Judge Plese concluded that the increased commission was adequate consideration for the amended TSA.

Mr. Culbertson argues that Wells Fargo's representations before Judge Plese estop it from challenging his argument that he now had a bilateral compensation agreement due to his signing the 2010 TSA. This argument fails on several bases. First, there is nothing in the arguments to Judge Plese indicating that Wells Fargo contended Mr. Culbertson's future compensation was governed by the new TSA agreement. Instead, it simply argued, and Judge Plese found, that the one year bump in commissions was adequate compensation for the more stringent noncompetition agreement. The fact

that Mr. Culbertson signed the 2010 TSA was not in dispute in the prior litigation. Mr. Culbertson wants to draw a legal *conclusion* from that action, but it was not a conclusion that Wells Fargo argued for in the TSA litigation and there is no basis for applying estoppel in this case.

Second, the 2010 TSA itself does not support the argument Mr. Culbertson is now making. The TSA expressly indicated that the new compensation was for 2010 only, and the TSA agreement again confirmed that it did not alter the at-will employment status.[3] CP at 566, 568. There is no basis for finding that the 2010 TSA agreement implicitly created a provision contrary to its expressed terms.

Third, even if the parties in 2010 had a bilateral compensation agreement, the continued existence of the at-will employment relationship still permitted Wells Fargo to unilaterally change the terms of employment. *Duncan*, 148 Wn. App. at 73. That was done here. Wells Fargo first changed the terms of compensation in 2011. Wells Fargo changed the terms of compensation again in 2013.[4] The at-will nature of the employment permitted the changes. *Id.*

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[3] "I understand that my employment with the Company is 'at will' and nothing in this document changes, alters or modifies my 'at will' status. . . ." CP at 568.

[4] We note that whether or not he knew about the 2013 terms, Mr. Culbertson did know that the company had unilaterally implemented them and did not challenge that action when it was taken, just as he did not challenge the 2011 changes.

For all three of the noted reasons, we agree with the trial court that the 2013 compensation plan was in effect. Wells Fargo paid Mr. Culbertson the commissions he was owed under that plan. Accordingly, the trial court also correctly granted summary judgment on that issue.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

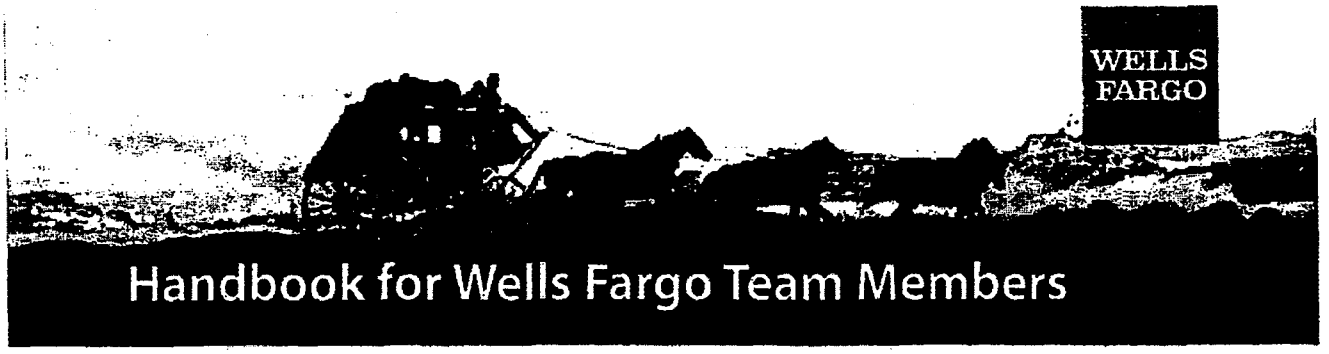
Korsmo, J.

WE CONCUR:

Brown, A.C.J.

Fearing, J.

A – 2



How to get around

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Welcome to your online *Handbook for Wells Fargo Team Members*. This book describes employment policies in effect as of June 1, 2004, and is updated online on an ongoing basis. The most recent updates were made to certain sections in this online document on January 1, 2006.

Updates

This online *Handbook* is updated as policy information changes. When a section has been updated, it will show in a shaded box with the date of the change, like this: **<Last update: July 1, 2004>**. If there is no "Last update" notation, the information is in effect as of June 2004.

About this handbook

This book supersedes all previous communications, written or oral, regarding these policies. These policies were created by Wells Fargo & Company, and many Wells Fargo companies have adopted them. Throughout this book, when you see the term "Wells Fargo" or "the company," it means the Wells Fargo company that employs you directly.

Although most Wells Fargo companies have adopted the policies, benefits and processes described here, in some cases this information may not apply to all Wells Fargo companies. If you're unsure whether a particular item applies to you, check with your supervisor or manager.

Formal Warning

If performance, behavior or attendance shows no signs of improvement or keeps declining after informal counseling — or if something happens to cause the escalation of the performance counseling and corrective action process — your supervisor may document the situation in a written formal warning.

The formal warning usually contains:

- An explanation of the issue
- A definition of the expected level of performance or the improved behaviors or attendance needed
- An improvement timeframe, and
- A warning that if the issue continues, it can lead to termination of employment

The written warning memo will become a part of your official personnel file.

Final Notice

Some situations may require corrective action just short of termination. In a situation like this, you may receive a final notice advising you that if the situation occurs again at any time during your Wells Fargo employment, your employment will be terminated immediately. This notice is typically a written memo, which will become a part of your official personnel file.

Termination

If you don't achieve the improvement in performance, behavior or attendance that was outlined in the informal counseling or formal warning, your employment may be terminated.

Employment can also be terminated if the situation documented in a final notice reoccurs, or if the problem involves a breach of policy, including a violation of the Code of Ethics and Business Conduct, or if your performance or conduct is such that continued employment is no longer in the best interest of Wells Fargo. For examples of this kind of conduct and more information about situations appropriate for immediate termination, see "Involuntary Termination" on page 97.

4.5 - Dispute Resolution

At Wells Fargo we feel it's essential to provide team members with a prompt, fair review of any work-related problem. So, we've developed a process through which each team member has an opportunity to use internal problem-solving resources.

Although we can't guarantee that every team member will always be satisfied with the outcome, we can make sure that all team members have dispute resolution methods available when they're needed. In addition, we prohibit retaliation against any team member for using the dispute resolution process.

Overview of the Dispute Resolution Process

If you have a work-related dispute, you should first try to resolve it directly with your supervisor — he or she is usually closest to the situation and in the best position to review it.

If you need alternatives or to escalate your dispute further, you can follow the process outlined below. It's strongly recommended you use these resources in the order they're shown here — it's logical that those closest to your situation will be able to understand it best, so you'll want to go to those resources first.

The process stops at any point you decide to discontinue it, or when you've exhausted all the resources described here.

It's important to begin the process promptly when the issue arises (normally within 30 days), because delay can affect Wells Fargo's ability to respond to your concerns.

Wells Fargo Resources

Your Supervisor - In most cases, you should discuss any work-related issue with your immediate supervisor, since he or she is in the best position to help with a prompt resolution. If you prefer, you can also contact your HR consultant and ask him or her to facilitate a meeting with your supervisor, or to help you prepare for the meeting.

Your Supervisor's Manager - After speaking with your supervisor, if you feel you haven't been able to communicate effectively with him or her — or if you want someone else to review the situation — you can meet with your supervisor's manager (or another manager above your supervisor in the chain of reporting relationships) to discuss the issue. Again, if you prefer, you can also contact your HR consultant and ask him or her to facilitate the meeting with your supervisor's manager, or to help you prepare for the meeting.

Your HR Consultant - After you've spoken with your supervisor's manager, if you feel you haven't been able to communicate effectively with him or her — or if you want someone else to review the situation or facilitate a meeting with either of them — you can contact your HR consultant.

Your Employee Relations Consultant - After you've spoken with your HR consultant, if you still want your dispute reviewed further you can contact your Employee Relations consultant. Employee Relations consultants review disputes from an objective position and act in a consultative role to help resolve work-related issues. Your Employee Relations consultant will work with your HR consultant to obtain related information in order to review the matter and make recommendations to you or your group's management, if appropriate. You may be asked to provide written information to help this process.

To contact an Employee Relations consultant, call the toll-free number, 1-888-284-9147, and your issue will be referred to the appropriate consultant for review.

Mediation

After you've spoken with your HR consultant *and* your Employee Relations consultant, if there are still unresolved issues involving a legally protected right — for example, an allegation that the termination or terms of your employment involved discrimination or harassment based on race, color, gender, national origin, religion, age, sexual orientation, physical or mental disability, pregnancy, marital status or veteran status — you can request mediation. Mediation will be scheduled only if Wells Fargo agrees it's appropriate.

The mediation program doesn't alter or modify Wells Fargo's "employment at will" policy (see page 10).

Mediation involves an external, objective, professional mediator who will provide a neutral forum where you and the company can try to resolve the issues. The mediation process emphasizes open discussion and seeks to resolve

the issue through compromise. It's not a formal process like arbitration or litigation, where a decision-maker decides which party will prevail.

If you request mediation and Wells Fargo agrees it's appropriate, we will make the arrangements. If your request for mediation is denied, then the dispute resolution process ends at that point.

Cost - There's a cost for mediation, which will be shared between you and Wells Fargo. Your share is 10% (up to a maximum of $200) and Wells Fargo's is 90% plus any expenses that exceed your $200 maximum.

Timing - If you decide to ask for mediation, we must receive your request for mediation within 30 days after you have escalated your concerns and received a final response from your Employee Relations consultant.

How to Request Mediation - For more information about mediation or to initiate a request, contact Employee Relations at 1-888-284-9147.

Termination Decision Review

If your employment is terminated involuntarily (see "Involuntary Termination" on page 97) and you want to have that decision reviewed, contact your HR consultant as soon as possible following the termination. Once your HR consultant has reviewed the matter, if necessary it can be referred to Employee Relations. They'll determine whether a further review is warranted based on the circumstances — and if so, they'll conduct one.

4.6 - Third Party Representation

It is the intent of all Wells Fargo policies to provide a productive and fair work environment. We respect your right to communicate directly, on an individual basis, with your supervisor, manager or HR consultant about any of the terms or conditions of your employment. Within our work environment, we believe that those who are also Wells Fargo team members can be more responsive to your needs and concerns than anyone outside of the company such as an attorney, labor organization, association or group.

For that reason we conduct team member communications and problem-solving, as well as performance counseling, corrective action and internal investigations, without participation by an individual or a "representative" who is not a Wells Fargo team member. Confidential information relating to employment should be discussed only between the team member and his or her supervisor, or another authorized Wells Fargo team member.

Note: On rare occasions, a team member who is a minor (under age 18) may be interviewed as part of an internal investigation or fact-finding. In this limited circumstance, the minor team member may bring one parent or guardian to the meeting — but a parent or guardian who chooses to attend will not participate in the investigation meeting or discussion.

If you encounter any problems on the job, bring your concerns to your supervisor, manager or HR consultant. They're willing to discuss any work-related problem with you on a direct, person-to-person basis.

- Theft, attempted theft or damage to Wells Fargo's or a team member's property
- Misuse of a PCard or other company-paid credit or travel card
- Misuse or inappropriate use of company property or equipment
- Insubordination (for example, refusal to perform your job duties — see "Insubordination" in the Glossary, page 130)
- Fighting on company premises, physical intimidation, violence or threats of violence
- Except as authorized by the Director of Security or the Chief Auditor, possession of firearms and dangerous or lethal weapons, including stun guns:
  - On company premises
  - On company business
  - In company vehicles while on company business
- Failure to participate fully and honestly in an investigation or fact-finding process conducted by a Wells Fargo business unit, or failure to respect the confidentiality of the process
- Other acts involving dishonesty or breach of trust

Administrative Time Off

Although the company reserves the right to terminate your employment immediately, you first may be placed on administrative time off, with or without pay, based on the specific circumstances.

Termination Due to Employment Ineligibility

Team members who aren't eligible for coverage under the terms of Wells Fargo's fidelity bond, or who do not meet the requirements of the Federal Institutions Reform, Recovery and Enforcement Act (FIRREA), will not be permitted to continue their employment at Wells Fargo (see "Breach of Trust or Dishonesty" on page 15).

Team members who cannot provide documents establishing eligibility to work in the United States are also ineligible to continue employment (see "Verifying Employment Eligibility" on page 15).

Review of Termination

If your employment is terminated involuntarily and you want to have that decision reviewed, contact your HR consultant as soon as possible following the termination. Once your HR consultant has reviewed the matter, if necessary it can be escalated to Employee Relations. They'll determine whether a further review is warranted based on the circumstances — and if so, they'll conduct one. (See "Dispute Resolution" on page 44.)

Position Elimination

Like any business, Wells Fargo is constantly evaluating profitability and making appropriate changes in our organizational structure. In some cases this may result in the need to eliminate positions. If this happens, you'll receive information about the programs or services the company will provide to assist you during the transition period.

Retain – At Wells Fargo we have a strong commitment to retaining qualified team members whenever possible — this "Retain" philosophy is intended to focus on team members whose positions have been eliminated and give them an opportunity to find new positions within the company. Throughout the company, business lines or regions may devise their own specific policies and practices to support the Retain philosophy.

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Emp ID: 739827
Culbertson

WFIS Producer Plan
- Appendix A
Participant Draw and Commission Rates

Participant Name	**CULBERTSON, CRAIG S**
Job Code	**449128**
Job Title	**SALES EXECUTIVE COMMERCIAL**
Employee ID	**739827**
WFIS MD	**Diane Dussean**
Office Location	**SPOKANE, WA**
Payment Period (Mthly, Qtrly, Semi-Annull or Annually)	**Quarterly**
Annual Draw (% of Trailing 12 Month Revenue)	**Up to 100% Maximum**
Commission Rates	
New Business	**35%**
Renewal Business	**25%**
PIC/BIC Business Referrals	**Same as above if greater than threshold.**
Other Pay Agreements: Transferred business will be paid at a rate of 18%.	
TSA Consideration: For the 2010 Plan year only (January 1, 2010 through December 31, 2010), Participant will receive the following consideration for signing the new TSA for Wells Fargo Insurance Services USA: Additional 1% on New Revenue and Additional 1% on Net New Revenue Net New Revenue is defined as new revenue recorded in 2010 less lost business (revenue booked in 2009, not retained in 2010). Producer must have positive net new to earn the additional 1.0% opportunity. This is a one-time payment that will be made after the end of the plan year. All terms and conditions of the Plan apply to the calculation and payout of this consideration.	
WFIS Account Thresholds (1)	**NA**

(1) WFIS will not pay commission on accounts less than the threshold listed above in annual revenue. Only the WFIS President and/or his/her designees have the discretion to change the Participant's compensation thresholds (requests should be submitted in writing through the WFIS RMD.)

Participant Signature — Date: 12-22-2009

WFIS MD Signature — Date: 1/4/10

WFIS RMD Signature — Date: 1/14/10

The Participant's signature above acknowledges that the Plan and Appendix A have been reviewed by the Participant. The provisions of the WFIS Producer Plan will be applied and the Participant will be paid in accordance with its terms even if the Participant does not sign Appendix A. Send a copy of this Appendix to the WFIS Sr. HR Manager. A copy of this Appendix will also be sent to the Participant's Original Personal File (OPF).

A – 4

pl# 739827

WFIS SALES INCENTIVE PLAN
APPENDIX A
PARTICIPANT DRAW AND COMMISSION RATES

Participant Name	**CULBERTSON, CRAIG S**
Job Code	**449120**
Job Title	**SALES EXECUTIVE COMMERCIAL**
Employee ID	**739827**
WFIS MD	**Diane Duncan**
Office Location	**SPOKANE, WA**
Payment Period (Mthly, Qtrly, Semi-Annual or Annually)	**Quarterly**
Annual Draw (% of Trailing 12 Month Credited Commissions or $ value of Draw)	**Up to a maximum of 100%**
Commission Rates	
New Business	**35 %**
Renewal Business	**25 %**
PIC/BIC Business Referrals (Only note if % is an exception to guidelines)	**Same as above if greater than threshold**
Other Pay Agreements: Transferred business paid at rate of 18% Grandfathered incidentals: ($1,956.60) TSA Consideration: For the 2010 Plan year only (January 1, 2010 through December 31, 2010), Participant will receive the following consideration for signing the new TSA for Wells Fargo Insurance Services USA: Additional 1% on New Revenue and Additional 1% on Net New Revenue Net New Revenue is defined as new revenue recorded in 2010 less lost business (revenue booked in 2009, not retained in 2010). Producer must have positive net new to earn the additional 1.0% opportunity. This is a one-time payment that will be made after the end of the plan year. All terms and conditions of the Plan apply to the calculation and payout of this consideration.	
WFIS Account Threshold (1) (Only note if Threshold is an exception to guidelines)	**NA**

(1) WFIS will not pay commissions on accounts less than the threshold listed in the WFIS Threshold Guidelines. Only the WFIS President and/or his/her designee has the discretion to change the Participant's compensation threshold (requests should be submitted in writing through the WFIS Team). Only exceptions need to be noted in the Appendix.

Participant Signature — 11.22.11 Date

WFIS MD Signature — 11-29-11 Date

POOR QUALITY COPY RECEIVED

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(1978) (increase in number of shares of stock sufficient consideration for non-compete agreement); AmeriGas Propane, Inc. v. Crook, 844 F.Supp. 379 (M.D. Tenn. 1993) (non-compete signed on occasions of salary increases enforceable); Criss v. Davis, Presser & LaFaye, P.A., 494 So.2d 525 (Fla.App. 1986) (salary increase following signing of non-compete agreement constituted consideration); 84 Lumber Co. L.P. v. Houser, 2011 WL 6938591 (Ohio App. 2011) (allowing new bi-weekly draws on future commissions sufficient consideration for non-compete); Dixie Parking Service, Inc. v. Hargrove, 691 So.2d 1316 (La.App. 1997) (participation in profit sharing bonus plan sufficient consideration for non-compete); Van Dyck Printing v. DiNicola, 648 A.2d 898 (Conn. 1993) (enhanced commission rate sufficient consideration for non-compete agreement).

In this instance, there are no disputed facts relative to the 2010 TSA; Culbertson admits that he signed both Appendix A and the 2010 TSA, and that these documents speak for themselves. (Answer, ¶¶2.10, 2.11, 2.12, 2.12.1) The TSA itself and the Appendix to the Wells Fargo Producer Plan provides an increase in commission, specifically in consideration for the non-acceptance/non-solicitation 2010 TSA. (Complaint, Exs. 1 and 2) That increased 1% in commissions was not an existing obligation of Wells Fargo, nor an existing benefit for Culbertson prior to his agreement to enter into the 2010 TSA. The bargained for exchange of promises was an increase in commission for entering into the new agreement. It is further undisputed that employees of Wells Fargo who did not sign the 2010 TSA did not receive the increased commission. (Aff. of N. Taylor-Babcock, ¶8) It is further undisputed that Culbertson indeed was actually paid the increased commissions after he signed and entered into the

Winston & Cashatt
A PROFESSIONAL SERVICE CORPORATION
Bank of America Financial Center
601 West Riverside Avenue, Suite 1900
Spokane, Washington 99201-0695
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Culbertson's breach. First, Culbertson admits he signed "WFIS Producer Plan Appendix A Participant Draw and Commission Rates" on December 22, 2009; second, he admits he signed the "Wells Fargo Agreement Regarding Trade Secrets, Confidential Information, Non-solicitation, and Assignment of Inventions" on January 5, 2010; finally, he admits he was paid the additional 1% commissions on new revenue and net new revenue for the calendar year 2010. The express terms of Appendix A and the 2010 TSA establish that consideration for the 2010 TSA was offered and accepted by Culbertson, in the form of increased commissions of 1%, which he was in fact paid.

Culbertson is a sophisticated employee benefits insurance sales executive, but the remainder of his "undisputed facts" basically argue that no one explained the documents he signed to him, and that he did not understand the terms of the documents he signed, or that he subjectively interprets the express terms of the documents differently, and as a result, he cannot be bound by them. Those subjective assertions do not render the agreements he signed unenforceable, and based on the undisputed terms of those documents, the Agreement precluding competition he executed in 2010 is enforceable as a matter of law.[1]

II. RELEVANT UNDISPUTED FACTS

Culbertson admits to having signed and being bound to "an Accordia Northwest, Inc. agreement regarding trade secrets, confidential information, and non-solicitation" ("2006 TSA")

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[1] Wells Fargo disputes the course of events and interpretations as Culbertson has outlined them in his motion, but those facts do not create a genuine issue for trial, because they are not relevant to void the unambiguous contract Culbertson executed which entitles Wells Fargo to summary judgment. However, because Culbertson's "facts" are disputed, in no event is he entitled to summary judgment.

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Here, Culbertson, while ostensibly moving for summary judgment, appears in reality to attempt to create issues of fact to dispute the terms of the contract he signed, via his subjective interpretation of facts. However, a court enforces unambiguous contract terms as a matter of law, and a contract does not become ambiguous because a party suggests opposing meanings. GMAC, 179 Wn.App. at 126. Thus, Culbertson has failed to establish that no consideration exists as a matter of law to preclude enforcement of the 2010 TSA based on his version of the facts, which are contrary to the unambiguous terms of the contract.

A. The 2010 TSA, by its express terms and those in Appendix A, was supported by additional consideration of 1% increases in commission; Culbertson acknowledges signing both documents, precluding his claim the 2010 TSA is unenforceable as a matter of law.

The parties here agree that the law in Washington provides that there must be independent consideration to support a non-compete/non-solicitation agreement executed by an employee after he began employment. See, Labriola v. Pollard Group, Inc., 152 Wn.2d 828, 834, 100 P.3d 791 (2004). However, Culbertson's interpretation of the unambiguous documents simply create no issue of fact to establish that the 2010 TSA was not enforceable. In fact, by the very terms of the document, to which Culbertson is bound, the 2010 TSA's consideration was the additional 1% commissions which was established in Appendix A Culbertson signed. None of the "spin" Culbertson places on the facts can change those unambiguous terms.

Culbertson's attempts to create confusion or ambiguity (in the guise of undisputed facts) simply fail based on the existence of three very clear facts. He received and signed Appendix A, which despite his continued protestations, indeed contained the specific terms for "TSA

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Consideration," which increased his compensation by 1% on new revenue and 1% on net new revenue for a single year period if he signed the "new TSA." That consideration was again referenced in the 2010 TSA which Culbertson signed 14 days later. Culbertson accepted the additional 1% commissions when he signed the 2010 TSA, and thereafter received the additional 1% commissions. These facts establish the appropriate additional consideration independent of Wells Fargo's previous agreements with Culbertson, and satisfy Washington law rendering the 2010 TSA enforceable.

Culbertson's attempts to disclaim the enforceability by saying that no one explained the contract to him, or that he did not understand, or that he did not receive the Producer Plan along with the supplemental Appendix, simply do not alter the clear terms of the new consideration to which he agreed.

1. A party to a contract is bound to the terms of that contract that he has voluntarily signed.

A fundamental principle of Washington contract law is that a party to a contract which he has voluntarily signed will not be heard to declare that he did not read it, or was ignorant of its contents. Washington Fed. Sav. & Loan Assn. v. Alsager, 165 Wn.App. 10, 266 P.3d 905 (2011). Parties are charged with the knowledge of the contents of the documents that they sign, and have a duty to read the contracts they sign. Recreational Equipment, Inc. v. World Wrapps N.W., Inc., 165 Wn.App. 553, 266 P.3d 924 (2011); Nishikawa v. U.S. Eagle High, LLC, 138 Wn.App. 841, 852, 158 P.3d 1265 (2007). One who accepts a written contract is conclusively presumed to know its contents and to assent to them. State v. Chase, 134 Wn.App. 792, 806,

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as a matter of law. However, the documents that Culbertson signed, which established the offer of the one plus one percent commission increases for "signing the new TSA" (which Culbertson did two weeks later), remain undisputed. Culbertson's contrary interpretation of these unambiguous documents cannot defeat summary judgment on the existence of consideration. Moreover, Culbertson's claim that he did not receive the offer of consideration and the 2010 TSA at the same time, that he did not read them, or that he was somehow pressured to sign the 2010 TSA, cannot abrogate the contract as a matter of law; he has failed to establish any genuine issue for trial based on claims he was somehow ignorant of the terms of the agreement he voluntarily signed, or that there was some artifice that prevented him from reading or understanding it. He is a sophisticated, English speaking business person and his allegations do not overcome the undisputed consideration established by the contract.

II. ARGUMENT

A. The "disputed facts" do not operate to defeat Wells Fargo's summary judgment.

The non-moving party in summary judgment may not rely on speculation, or argumentative assertions that unresolved factual issues have remained, or on affidavits considered at face value. Meyer v. University of Washington, 105 Wn.2d 847, 852, 719 P.2d 98 (1986). A non-moving party must set forth specific facts which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact; issues of material fact cannot be raised by merely claiming contrary facts. Id. Culbertson has made various claims, but has not presented any specific facts which rebut the fact that he received

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Appendix A which identified an offer of additional consideration for the "new TSA" in return for signing it, and that he indeed signed the new 2010 TSA, accepting that consideration, which he was paid.

1. **Whether or not Culbertson received the Producer Plan to which Appendix A was attached is irrelevant.**

The only issue before the court is whether independent consideration existed as a matter of law for the 2010 TSA. The Producer Plan that was rolled out in December of 2009, providing changes to sales executive compensation, had no terms relative to the new TSA, and that Plan is not at issue here. Only Appendix A, which Culbertson signed, contained the offer of consideration under the heading "TSA Consideration." By its terms, the consideration offered was 1% on new revenue, and the 1% on new net revenue, which "participant will receive...for signing the new TSA." Whether or not Culbertson received the Producer Plan is simply irrelevant to whether independent consideration existed for the new TSA.

2. **The identity of the person who provided Culbertson with Appendix A and the 2010 TSA, when he received them, and when he signed them is similarly irrelevant.**

Who provided Culbertson with Appendix A which offered the consideration, and who provided him with the 2010 TSA, are not relevant to the fact he admittedly got them and signed them. Whether Ms. Kitley provided all three documents, whether Mr. Neupert provided either of

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statements, he is a professional businessman, and there's a plethora of Washington case law that says if you are -- if the terms of the contract are ambiguous and you voluntarily sign it, whether or not you say now you didn't read it or you didn't understand it is not relevant for this Court.

Second says they were signed fourteen days apart. Well, Wells Fargo has put forth in this case it's extremely old 1910 case of *Essex vs. Turner* that talks about two documents signed about two weeks apart and says if consideration is in one or the other, that's still one document.

In here, I would argue that the Court doesn't even get there because there's two documents. We have Appendix A. An appendix, by itself, is not, you know, the term of art. Appendix would mean it's something attached to an additional plan, but that's talking about the comp plan. Then there's the TSA, the trade secret agreement.

The appendix is merely saying we're offering, we're telling you if you want to sign this, we are going to give you additional consideration, more money. Culbertson had that choice. He signed it. He got it.

At this point, he has buyer's remorse. He wishes he didn't sign it, but undisputed facts are that he did, and now he wants to unwind that.

I'll reserve any response or reply arguments to Mr. Kirby. Thank you.

(THE FOLLOWING IS PLAINTIFF'S REBUTTAL ARGUMENT.)

MR. GINGRAS: I'm going to be brief in my reply, Your Honor, because I think based on your question that you get it.

They said hey, we're going to offer you this. We're promising, obligating ourself. If you sign a new TSA, we'll give you one percent on your revenue, one percent on new net revenue. He signed it. He got paid it. He's obligated by the contract, and that's Washington law. No Washington law says that that's not valid and enforceable. I think that this Court by its comments understands that.

I want to hit again on this concept of caution ability or knowledge of what he signed and then, also, the comments about equitable estoppel.

I go back to the Washington case law says you're bound to know what you signed, and when he met with his lawyers after he was fired, he's bound to know what he signed, which was the 2010 TSA. So when he's asked or his lawyer asks him or he talks to his lawyer, he could have told his lawyer about the 2010 TSA, about he couldn't accept

insurance business, and when it was sent Fed Ex to Mr. Kirby's office on February 13th, they had it, and he accepted insurance business after that.

So this whole argument of equitable estoppel I think, Your Honor, with the timeframe, this isn't as though they went years or months or forever or acted like or expressly said the 2010 wasn't enforceable and then pull the switcheroo. This was clearly when they fired, they gave him the wrong agreement. He knew or he's at least duty bound under Washington law to know what he signed.

Under *Washington Federal Savings and Loan vs. Alsager* 165 Wn.App. 10, 2011, which we cited, says that the law is that a party to a contract which is voluntarily signed will not be heard to declare he did not read it or is ignorant of its contents.

It's what you're hearing. You're hearing yeah, I signed it, but I didn't know. I was ignorant. I'm a sophisticated businessman, but I didn't know it was unconscionable. They asked me, forced me to sign it.

Again, *Del Rosario vs. Del Rosario*, 116 Wn.App. 886, 2003, which was in Wells Fargo briefing, stands for their proposition there's no requirement that a party explain the terms of a contract that are arms-length transactions. There hasn't been, you know, any issue there.

He signed a legally enforceable document, essentially a

covenant not to compete. Washington enforces those. If they're signed midstream, they have to have independent consideration.

There's no question before this Court there was an obligation of promise and offer made that we'll pay you if you sign this. He signed it. They paid him. He's now under the terms he promises he'll abide by, and he's here before the Court telling you I'm not abiding by it. I'm not abiding by it because it wasn't fair. I wasn't treated fairly how I signed it because for a couple days after I was fired, they didn't tell me about the 2010 TSA even though he signed it.

That's the issue before this Court, and it's unfair maybe as Mr. Culbertson feels, and I'm going to go back to the issue of buyer's remorse that Wells Fargo is not saying he can't, quote, compete. He can't accept insurance business of those customers and clients that were Wells Fargo's customers and clients within six months of his termination, and he's done that and continues to do that, and he's done that even after Wells Fargo filed this lawsuit to seek enforce of the 2010 TSA.

Respectfully, Wells Fargo is asking that you grant breach of contract they're not equitably estopped from, and Mr. Culbertson is in violation of it.

(END OF PLAINTIFF'S ARGUMENT.)