

NO. 73704-01

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

JOHN GROGAN, an individual,

Appellant

v.

SEATTLE BANK, a Washington State registered bank; PATRICK
PATRICK, an individual; and J.D. DELAFIELD, an individual,

Respondents.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

APPELLANT'S OPENING BRIEF

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APPELLANT'S OPENING BRIEF
FILED
NOV 10 2010
10:34 AM

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I. INTRODUCTION

John Grogan seeks to enforce a clear and unambiguous contract: his employment agreement. There is no dispute that Seattle Bank wrongfully withheld Mr. Grogan's severance package expressly due to him under his Employment Agreement. Despite this, [REDACTED]

[REDACTED]. And the Court below refused to examine this decision, ordering instead that Mr. Grogan would be paid only one year of severance, instead of three, and would not be able to obtain from Seattle Bank any interest, attorney's fees, or costs. Grogan's attorney's fee award is not a "golden parachute". [REDACTED]

[REDACTED] Both of these exceptions apply to Mr. Grogan and the Superior Court should have ordered Seattle Bank to pay Mr. Grogan what it owes despite the [REDACTED]

[REDACTED]. Mr. Grogan appeals this decision.

II. ASSIGNMENTS OF ERROR

1. The Superior Court erred in failing to enforce its judgment against Seattle Bank for attorney's fees because Mr. Grogan's fee award is not a "golden parachute".

2. The Superior Court erred in reducing Mr. Grogan's damages to \$180,000 because the state law and "white knight" exceptions to 12 C.F.R. § 359 apply here.

III. STATEMENT OF THE CASE

A. Factual Background

1. **Seattle Bank used contractual guarantees to induce Mr. Grogan to help it recover its financial footing.**

In 2008, Seattle Bank recruited John Grogan—a well-respected, veteran commercial banker and debt work-out specialist—to serve as Seattle Bank's Chief Credit Officer. (C.P. 53 ¶¶ 2-4.) At the time, Seattle Bank was struggling and knew it needed to hire Grogan to help improve its performance. Mr. Grogan was serving in a similar position at a stable institution so, in order to secure Mr. Grogan's services, Seattle Bank made several contractual promises—including a promise to pay him three years' worth of salary in the event he resigned following a change in control of

Seattle Bank. (C.P. 53 ¶ 8.) The promise was reduced to writing in Mr. Grogan's Employment Agreement and Mr. Grogan joined Seattle Bank in October 2008. (C.P. 53, Ex. A (the "Employment Agreement") at ¶9(b)(i).) Mr. Grogan would not have accepted a position with Seattle Bank without the protection offered by the change-in-control severance payment. (C.P. 53 ¶ 8.) At his deposition, Mr. Grogan testified that:

I would not have gone to Seattle Bank without a contract, because I had one [at my existing job] that was protecting me already and I knew that Seattle Bank was in a lot of trouble and was going to be in a lot more trouble, not sure whether it was going to survive or not.

(C.P. 85 Ex. F, at 21:21-21:25.)

[REDACTED]

[REDACTED]

[REDACTED] (C.P. 85 Ex. E, at 9:16-11:4.) But Seattle Bank assured Mr. Grogan it would seek pre-approval of the Employment Agreement (including, by extension, the severance payment) and he relied on Seattle Bank to do so. (C.P. 53 ¶ 5.)

2. A change-in-control occurred and Mr. Grogan exercised his severance rights.

In June of 2010, Seattle Bank's sole-shareholder, Seattle Financial Group, sold all of its equity in Seattle Bank to a group of shareholders led by J.D. Delafield. (C.P. 85 Ex. A, at 58:20-59:7; C.P. 85, Ex. D, at 10:12-11:6, 11:22-12:5; C.P. 85 Ex. E, at 5:16-25, 6:16-7:8; C.P. 85, Ex. C, at 10:22-11:2, 12:10-20, 14:1-9.) Seattle Bank's recapitalization continued via a single unified offering through May of 2011. (See C.P. 85, Ex. A, at 40:10-41:5, 42:19-25, and Ex. 13; C.P. 85 Ex. E, 7:9-15; and C.P. 85 Ex.B, 27:3-12, 28:5-19.) Delafield confirmed that all of the money raised between June of 2010 and May of 2011 was part of the same transaction. (C.P. 85 Ex. B, 16:18-17:4.)

In connection with the change in ownership, a new slate of directors was elected to govern the Board and Ms. Sas, Seattle Bank's CEO, was forced out and replaced by Patrick Patrick. This constituted a change-in-control under the terms of Mr. Grogan's Employment Agreement which defines the term as: "a merger, consolidation, or reorganization involving Seattle Bank or [Seattle

Financial Group (SFG)¹]” so long as the shareholders of Seattle Bank immediately prior to the reorganization do not continue to own more than 50% of the combined voting power. (C.P. 53, Ex. A at ¶ 9(a)(ii).) Seattle Bank’s own 2011 Stock Purchase Agreement circular specifically warns potential investors that:

The June 30, 2010 interim recapitalization resulted in a ‘change of control’ under that certain Employment Agreement between Seattle Bank and John Grogan, dated October 6, 2008.

(C.P. 53 Ex. C at 20.)

Mr. Grogan resigned in May 2011, within a year of the change in control. By the terms of the Employment Agreement he was entitled to receive three times his annual salary—a total of \$540,000. (C.P. 53, Ex. A at 9(b)(i).)

3. Seattle Bank refused to pay Mr. Grogan his severance or even apply for permission to do so, and litigation commenced.

In his May 2011 letter of resignation, Mr. Grogan requested that Seattle Bank pay him the severance payment owed to him under the Employment Agreement. (C.P. 85 Ex. A, at Ex. 10.) Seattle

¹ As of October 2010, Seattle Financial Group, which was solely owned and controlled by the Story family, was the sole shareholder in Seattle Bank. (C.P. 85 Ex. E, 5:16-25.)

Bank informed him that it believed the payment was regulated by 12 C.F.R. § 359 but claimed it would make the payment upon obtaining approval from federal regulators. (C.P. 85 Ex. A, at Ex. 12.) In June of that year, Seattle Bank’s Board of Directors “instructed management to make application to the regulators for ... approval to pay Mr. Grogan what was allowed.” (C.P. 85 Ex. A at 171:23-172:10.) But Seattle Bank subsequently refused to even make the application, forcing Grogan to retain counsel and ultimately file this lawsuit.

4. Mr. Grogan was not responsible for Seattle Bank’s [REDACTED] condition—indeed he helped stabilize Seattle Bank during his tenure.

A major purpose of 12 C.F.R. § 359 is to prevent “payment to bank insiders who had been responsible [REDACTED] (C.P. 126 at 7:24-26.) And here, the parties agree that Mr. Grogan was not responsible for [REDACTED]

[REDACTED]

[REDACTED]

5. Seattle Bank withheld key evidence until summary judgment, to the prejudice of Mr. Grogan.

During the first two years of the underlying litigation, Seattle Bank and the other defendants refused to produce documents or answer deposition questions related to its primary defense—that 12 C.F.R. § 359 precluded any payment to Mr. Grogan. (C.P. 129 ¶ 2.) Seattle Bank insisted that any disclosure required FDIC permission, but it refused to seek that permission until the close of discovery. (*Id.* at ¶ 3.) And even after a protective order was put in place, Seattle Bank only sought authorization to disclose some of the documents within its possession, rather than all responsive documents. (*Id.* at ¶ 4.) Seattle Bank then relied on these self-selected documents to oppose Mr. Grogan’s motion for summary judgment and sought summary judgment of its own. (*Id.* at ¶ 5; C.P. 126.)

6. Seattle Bank willfully refused to seek FDIC permission to pay Mr. Grogan one year’s worth of severance—

After a series of negotiations and a mediation, the parties agreed

[REDACTED] (*Id.* at ¶ 7.) But Seattle Bank refused to let Mr. Grogan review the submission to the FDIC beforehand. [REDACTED] Seattle Bank initially refused to allow Mr. Grogan (or his counsel) to review either the submission *or* the rejection. (*Id.*) And despite its promise to use best efforts [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] But Seattle Bank did not seek permission to do so. (C.P. 129, ¶ 9.) In fact, Seattle Bank insisted that it would not do so unless Mr. Grogan waived his rights to the remaining two-year's of salary the Employment Agreement calls for and relinquished his claims against Seattle Bank for violations of Washington wage law. (*See* C.P. 126 at 6:1-5.)

B. Procedural History

1. The Superior Court correctly held that Mr. Grogan is entitled to at least one year's worth of severance, interest, attorneys' fees, and costs.

The Superior Court held a hearing on January 9, 2014 to consider the parties' early motions for summary judgment. (*See* January 9, 2014 R.P.) At that time the Court correctly observed that Mr. Grogan was entitled to at least one year's worth of severance, and Seattle Bank's counsel readily agreed that Seattle Bank would apply for permission to pay a judgment equal to that amount:

THE COURT: Everybody seems to agree that [Seattle Bank] could pay [Mr. Grogan] one year's severance if the [FDIC] said it was ok.

...

...shouldn't I just enter a judgment saying that what Mr. Grogan is entitled to is \$180,000, and then you guys can go apply to the FDIC and see whether you can pay it or not?

MR. THOMAS: If the FDIC approves it.

THE COURT: Yeah, I mean, obviously—

MR. THOMAS: Yeah.

THE COURT: -- if the FDIC approves it.

MR. THOMAS: That's exactly what I think should happen in this case, is that—you know, they have told us what the maximum is, we should be the—equitably direct us to go submit it. And if [the FDIC] says yes, then [Seattle Bank] pays it.

(*Id.* at 37:14-16; 47:5-19.)

Again on March 13, 2014, the Superior Court and Seattle Bank agreed that Mr. Grogan is entitled to one year salary. (March 13, 2014 R.P.) And Seattle Bank admitted that it should “deal with attorney’s fees... separately... maybe that’s even something that needs to be put off until we see what the FDIC says on... one-year payment”. (March 13, 2014 R.P. at 9:11-14.) Mr. Grogan advocated for an order compelling Seattle Bank to apply to the FDIC for permission to pay Mr. Grogan one year salary, and indicated that Mr. Grogan would “separately petition for reasonably attorney’s fees”. (March 13, 2014 R.P. at 14:13-22.) And the Superior Court agreed:

I’d like to be able to give him more than that. But... I recognize that the FDIC may not allow me to give him more than that... I can enter an order awarding him all of that, it’s probably... going to be rejected by the FDIC... I could also just order... a judgment for one year and then just leave the case hanging on the grounds that we need to get approval from the FDIC and then we can address whether there’s anything else we’re going to do after we get the one year approved by the FDIC.

(March 13, 2014 R.P. at 30:3-20.) Pursuant to the Court’s March 13, 2014 request, Mr. Grogan’s moved for Entry of Order and Judgment

(C.P. 138.) The Court granted Mr. Grogan's Motion, ordering Seattle Bank to request permission from the FDIC to pay Mr. Grogan an amount equal to one-year salary (\$180,000) and judgment against Seattle Bank for interest and attorneys' fees. (C.P. 147.)

2. The Superior Court ordered Seattle Bank to seek permission to pay Mr. Grogan \$180,000 but Seattle Bank violated the letter and spirit of this order,

[REDACTED]

On April 24, 2014, the Superior Court issued a detailed, four-page order directing Seattle Bank to use its "best efforts" to obtain FDIC permission to pay Grogan \$180,000. (C.P. 147.) This amount was significant for two reasons. First, it reflected the year's worth of wages the Court found Seattle Bank wrongfully withheld from Grogan under RCW Ch. 49.48. (See C.P. 147.) Importantly, it also reflected an amount [REDACTED]

[REDACTED] 12 C.F.R. § 359. The Court also granted Mr. Grogan's Motion for Summary Judgment. (C.P. 148.)

And on June 6, 2014, the Court awarded Mr. Grogan attorneys' fees in the amount of \$300,114.38 and fees in the amount of \$1,597.16.

(C.P. 162.)

The Order featured several safeguards designed to ensure Seattle Bank actually used its “best efforts”, including:

- Requiring Seattle Bank to provide Grogan a copy of the proposed submission to the FDIC and incorporate his reasonable input into the same;
- Requiring Seattle Bank, with the FDIC’s permission, to disclose any rejection and all related communications to and from regulators;
- Requiring Seattle Bank to appeal any rejection; and
- Warning Seattle Bank that if it violated any provision of the Order or “otherwise failed to use its best efforts to obtain permission to pay Mr. Grogan” the Court would sanction Seattle Bank “whatever amount [the Court] deems necessary to make Mr. Grogan whole”.

(C.P. 147.)

Through counsel, Grogan vigorously exercised his right to reasonable input into Seattle Bank’s original submission to the FDIC. (C.P. 207 at ¶¶ 2-3.) Upon being provided a copy of the proposed submission, Grogan’s counsel carefully reviewed it and provided several points of feedback to Seattle Bank’s regulatory counsel. (C.P. 207 at ¶ 3, Ex. A.) Grogan’s objections centered around four points:

1. [REDACTED]

2. [REDACTED]

3. [REDACTED]

4. [REDACTED]

(See C.P. 207 at ¶ 3, Ex. A.)

Grogan's counsel specifically noted that [REDACTED]

[REDACTED] were not required by any federal

regulations and were entirely inconsistent with Seattle Bank's court-ordered obligation to use "best efforts" to obtain approval of Grogan's pay. (*Id.*) In response to this feedback, Seattle Bank's regulatory counsel agreed to "remove all references" to attorney's fees, or "other payments" from the final submission. (C.P. 207 at ¶¶ 4, Ex. C; also compare C.P. 207 Ex. A (Draft Submission) with C.P. 170 at Ex. A (Seattle Bank's May 23 Submission to FDIC).)

But less than a month later, without consulting this Court or Grogan, and without providing Grogan any opportunity to be heard, [REDACTED] (C.P. 207 at ¶ 5; Dkt. No. 170 at Ex. D (Seattle Bank's June 20 Submission to FDIC (the "Supplemental Submission").) [REDACTED]

[REDACTED]

[REDACTED] (*See* Dkt. No. 170 at Ex. C (June 12 FDIC Letter). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

bounds of the April 24 Order, writing: “[REDACTED]

[REDACTED]

[REDACTED] (C.P. 174 at 2:23-37.) Seattle Bank claimed it did so “to be done with this litigation”. (*Id.*)

Whatever the motive, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*See Supplemental*

Submission at 3.) [REDACTED]

[REDACTED]

[REDACTED] Grogan. (*See* Dkt. No. 170

Ex. E.) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Dkt. No. 170 Ex. E at 3.) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*Id.* at 3.)

3. **Despite Mr. Grogan's entitlement to his full severance, interest, and attorney's fees, and Seattle Bank's blatant attempts [REDACTED], the Superior Court reduced Mr. Grogan's award to one year of pay and dismissed his case.**

[REDACTED], Seattle Bank

once again sought relief from the Court's orders. On January 15,

2015, the Court vacated its previous orders except the April 24

Order granting Mr. Grogan \$180,000. The Superior Court reasoned:

[T]he original rationale of why I entered the orders I did in this case was it was clear that the FDIC said that in terms of the basic amount, you know, or severance payment that somebody can get, it's limited to one year. And so I entered \$180,000 for that. It wasn't a hundred percent clear that the regulation further said, and you can't award interest or attorney's fees or anything else. So I said, okay, well why don't we – we'll enter that and see whether it will fly or not. [REDACTED]

[REDACTED] And so while I grant you that as a political matter there may be a certain coziness between Seattle Bank and the FDIC, you know, I don't operate here in the political realm. I mean, I basically try to follow the law and enter orders. [REDACTED]

(January 15, 2015 R.P. at 15:6-22.) On March 16, Seattle Bank notified the Superior Court and Mr. Grogan that it had complied with the Court's Order. (C.P. 218.) [REDACTED]

[REDACTED] (C.P. 219.) Finally, on May 27, 2015, the Superior Court dismissed Mr. Grogan's case. (C.P. 221.)

IV. ARGUMENT

The Superior Court's dismissal of Mr. Grogan's case when he has only been paid a fraction of what he is owed is contrary to Washington law and should be reversed.

A. Standard of Review.

An appellate court reviews a grant of summary judgment *de novo*. *Washington Imaging Services, LLC v. Washington State Dept. of Revenue*, 171 Wn. 2d 548, 555, 252 P.3d 885 (2011). The court engages in the same inquiry as the trial court. *TracFone Wireless, Inc. v. Dep't of Revenue*, 170 Wash.2d 273, 280–81, 242 P.3d 810 (2010); *Wilson v. Steinbach*, 98 Wash.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is proper if there are no genuine issues

of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). Here, there are no disputed issues of material fact. Rather, the issue is whether Seattle Bank can escape liability for Mr. Grogan's interest and attorney's fees because █

█ This is a question of law reviewed de novo. *See, e.g., Erwin v. Cotter Health Ctrs.*, 161 Wash.2d 676, 678, 167 P.3d 1112 (2007) (application of law to the facts of a case is a question of law reviewed de novo); *Tapper v. Emp't Sec. Dep't*, 122 Wash.2d 397, 403, 858 P.2d 494 (1993) (same); *In re Estate of Jones*, 116 Wash. 424, 426, 199 P. 734 (1921) (same).

B. The State of Washington vigorously protects the wage rights of employees.

Both RCW Ch. 49.52 and RCW Ch. 49.48 are part of the Legislature's "comprehensive [statutory] scheme to ensure payments of wages." *See Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 35 (2002) (internal quotations omitted). "Our courts have long recognized Washington's long and proud history of being a pioneer in the protection of employee rights." *Int'l Ass'n of Fire Fighters*, 146 Wn.2d at 35. The Washington Supreme Court

holds that “these statutes should be liberally construed to advance the Legislature’s intent to protect employee wages and assure payment.” *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 520 (2001). The statutes must be interpreted in light of “a strong legislative intent to assure payment to employees of wages they have earned.” *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 159 (2001). And exceptions must be narrowly construed. *See Morgan v. Kingen*, 166 Wn.2d 526, 537-538 (2009); *Bates v. City of Richland*, 112 Wn. App. 919, 939 (2002).

RCW Ch. 49.52 prohibits employers from willfully withholding any wages owed to an employee under “statute, ordinance or contract”, and RCW Ch. 49.48 requires immediate payment of all outstanding wages upon termination. *See* RCW §§ 49.52.050, 49.48.010. Any employer who violates RCW Ch. 49.52 shall be liable to the aggrieved employee in a civil action for twice the wages it unlawfully and willfully withheld. The employee is also entitled to costs and reasonable attorney’s fees for a successful claim under *either* of these statutes. RCW §§ 49.52.070, 49.48.030.

C. Grogan’s attorney’s fee award is not part of a “golden parachute”.

The Superior Court based its dismissal of Mr. Grogan’s attorney’s fee award on the ground that [REDACTED]

[REDACTED] A “golden parachute payment” is:

[A]ny payment (or any agreement to make any payment) in the nature of compensation by any insured depository institution or an affiliated depository institution holding company for the benefit of any current or former IAP pursuant to an obligation of such institution or holding company that... (ii) Is received on or after... (c) A determination by the insured depository institution's or depository institution holding company's appropriate federal banking agency, respectively, that the insured depository institution or depository institution holding company is in a troubled condition...

12 C.F.R. § 359.1(f) (emphasis added). But there is no support in Washington law or elsewhere for the proposition that an attorney’s fee award is “in the nature of compensation” and neither the court below [REDACTED] offered any legal support for their conclusion.

12 C.F.R. § 359.1 never mentions attorney’s fees in connection with golden parachute payments. Instead, it treats attorney’s fees separately, specifically prohibiting the payment of

attorney’s fees in connection with an indemnification payment to an IAP who has been assessed a civil money penalty, removed from office, or required to cease and desist. *See* 12 C.F.R. § 359.1(i)(1); *compare* 12 C.F.R. § 359.2 (prohibiting golden parachute payments) *with* 12 C.F.R. § 359.3 (prohibiting indemnification payments.) The explicit inclusion of attorney’s fees in the indemnification provisions of Part 359 indicates that attorney’s fees were deliberately excluded from the golden parachute provisions. *See Keene Corp. v. United States*, 508 U.S. 200, 208 (1993).² *But c.f. Harrison v. Ocean Bank*, 614 Fed. Appx. 429, 438 (11th Cir. 2015).

The golden parachute provisions of the Internal Revenue Code (“IRC”) are instructive.³ Section 280G of the IRC denies a corporate employer a deduction for “excess parachute payments”. 26

² Canons of construction are frequently invoked when interpreting an agency’s regulations. *See, e.g., Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 668–69 (2007) (invoking the canon against surplusage in interpretation of regulation); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007) (invoking the canon that the specific governs the general).

³ Under general principles of construction, when a word or phrase is defined in the statute or elsewhere in the United States Code, then that definition governs if applicable in the context used. In appropriate circumstances, courts will assume that “adoption of the wording of a statute from another legislative jurisdiction carries with it the previous judicial interpretations of the wording.” (*Carolene Products Co. v. United States*, 323 U.S. 18, 26 (1944); *and see, e.g., Sullivan v. Stroop*, 496 U.S. 478, 483 (1990).)

U.S.C. § 280G(a). And the definition of a parachute payment in Section 280G is nearly identical to that of 12 C.F.R. 359.1: A parachute payment therein means “any payment in the nature of compensation to (or for the benefit of) a disqualified person”. 26 U.S.C. § 280G(b)(2)(A). 26 C.F.R. § 1.280G-1 explains:

Q-11: What types of payments are in the nature of compensation?

A-11: (a) General rule. For purposes of this section, all payments—in whatever form—are payments in the nature of compensation if they arise out of an employment relationship or are associated with the performance of services. . . . Payments in the nature of compensation include (but are not limited to) wages and salary, bonuses, severance pay, fringe benefits, life insurance, pension benefits, and other deferred compensation (including any amount characterized by the parties as interest thereon)... However, payments in the nature of compensation do not include attorney's fees or court costs paid or incurred in connection with the payment of any amount described in paragraphs (a)(1), (2), and (3) of Q/A-2 [(Answering the Question “What is a parachute payment for purposes of section 280G?”)].

26 C.F.R. § 1.280G-1 (emphasis added). *See also Sullivan v. Easco Corp.*, 662 F. Supp. 1396, 1399 (D. Md. 1987) (employee entitled to award of attorney’s fees under employment agreement and “such

fees are in addition to the allowable cap, given that they are not parachute payments.”).

Mr. Grogan’s attorney’s fees are not part of a “golden parachute” and for this reason, the Superior Court erred in refusing to enforce its judgment against Seattle Bank.

D. Mr. Grogan’s damages under RCW Ch. 49.48 and 49.52 are exempted from the golden parachute prohibition.

[REDACTED]

[REDACTED] and should not have been given deference by the Superior Court. The text of Section 359 specifically exempts severance payments that are required under state law.

(2) Exceptions. The term golden parachute payment shall not include:

...

(vi) Any severance or similar payment which is required to be made pursuant to a state statute or foreign law which is applicable to all employers within the appropriate jurisdiction (with the exception of employers that may be exempt due to their small number of employees or other similar criteria).

12 C.F.R. § 359.1(2)(vi).

This exception applies here. There is no dispute that RCW Ch. 49.48 and 49.52 are each “a state statute...which is applicable to

all employers within the appropriate jurisdiction”. In fact, in addition to the civil penalties already discussed, it is a criminal misdemeanor for any employer to willfully “pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract.” RCW § 49.52.050(2).

And there is no dispute that Mr. Grogan’s severance package constitutes wages under Washington’s wage law statutes. Because neither RCW Ch. 49.48 nor RCW Ch. 49.52 defines “wages”, Washington courts apply the definition found in sister-statute RCW Ch. 49.46 (the Minimum Wage Act): “‘Wage’ means compensation due to an employee by reason of employment.” RCW § 49.46.010(2); *see also Gaglidari v. Denny’s Restaurants, Inc.*, 117 Wn.2d 426, 449 (2001); *Dice v. City of Monsanto*, 131 Wn. App. 675, 689 (2006) (collecting cases). Because RCW Ch. 49.48 and RCW Ch. 49.52 are remedial statutes, they are broadly interpreted and apply to “any type of compensation due by reason of employment”. *See Dice*, 131 Wn. App. at 689. As a matter of law, Washington’s wage protection statutes apply to employment contracts, such as the one at issue here. *See Gaglidari*, 117 Wn.2d at

450-51 (applying RCW § 49.48 to employment contract). And severance payments—such as the one owed to Mr. Grogan—are considered “wages” under RCW Ch. 49.52 as a matter of law. *See Dice*, 131 Wn. App. at 689-690 (holding that a contractual claim to pay an employee three-month’s salary in severance constituted “wages”). As such, Mr. Grogan’s wages and severance should not be limited by [REDACTED]

During the course of the underlying litigation Seattle Bank made two arguments against applying the state-law exception here, neither of which are persuasive. First, it argued that applying the state-law exception to RCW Ch. 49.48 and 49.52 would interpret it more broadly than the FDIC intended. But it’s only authority for this position is commentary to the rule. And, as discussed above, where the language of the rule is clear—as it is here—such commentary deserves no deference. *UPMC-Braddock Hosp.*, 592 F.3d 427, 437 (3rd Cir. 2010). Separately, the commentary itself does not indicate that applying the exception here would “swallow the rule”. The text indicates the exception was created to avoid forcing California institutions from choosing between violating the new federal

regulation and violating existing state laws protecting employees' right to severance. Similarly, applying the exception here would eliminate banks' dilemma in choosing to comply with RCW Ch. 49.48 and 49.52 or the federal regulation. Seattle Bank speculated that the California laws were narrower in scope than Washington's wage laws but it offers no citation in support of its position.

Second, Seattle Bank argued that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

not set policy, establish precedent or receive deference from courts.

Wos v. E.M.A. ex rel. Johnson, 133 S. Ct. 1391,402 (2013).

Separately, applying the state-law exception here would allow 12 C.F.R. § 359 and Washington's wage protection statutes to co-exist. By contrast, not applying the exception would effectively preempt Washington's statutory framework protecting employee rights in favor of 12 C.F.R. § 359. As a matter of law, preemption analysis favors leaving state law's undisturbed wherever possible. *See State*

v. *Norris*, 157 Wn. App. 50, 73-74 (2010). Accordingly, the Superior Court erred when it refused to apply the state-law exception to [REDACTED]

E. Mr. Grogan’s entire severance should have been approved because he is within the “White Knight” exception and Seattle Bank should not profit from its failure to seek pre-approval.

The Superior Court erred in refusing to hold Seattle Bank responsible for not seeking pre-approval of Mr. Grogan’s contract, despite assuring him it would do so. The pre-approval option is available to institutions [REDACTED]

[REDACTED]. See 12 C.F.R. § 359.4(a)(2).

An institution in either of these categories may seek pre-approval for the compensation package of sophisticated business people who are hired to help [REDACTED] organization.

The pre-approval option reflects the FDIC’s understanding that:

...individuals who possess the experience and expertise which qualify them for [a position with a federally regulated institution or holding company] are highly sought after business persons who, in most circumstances, already have established successful careers with other financial institutions. In order to induce such an individual to leave an established,

stable career for a job in a troubled institution which may not survive regardless of that individual's efforts, it is generally necessary to agree to pay that individual some sort of severance payment in the event that the efforts of the individual for the institution are not successful. It is the FDIC's view that . . . such agreements reflect good business judgment.

See McCarron v. FDIC, 111 F.3d 1089, 1091 (3d Cir. Pa. 1997)

(quoting 60 Fed. Reg. 16069, 16071 (March 29, 1995)).

[REDACTED]
[REDACTED]
[REDACTED]. Seattle Bank should have sought pre-approval if Grogan's contract. Instead, it failed to do so and then used that failure as a shield against liability for Mr. Grogan's wages. And the Superior Court erred in allowing Seattle Bank to avoid its obligation to Mr. Grogan with a loophole of its own making.

F. The Trial Court was not bound by [REDACTED]

As described herein, the Superior Court's decision to dismiss Mr. Grogan's case after he had been paid only \$180,000 – one year of the three years' pay promised to him and no interest, attorneys' fees, or costs – was based on its erroneous belief that it was bound

by the determination of the FDIC [REDACTED]

The FDIC's decision was not entitled to deference by the Superior Court. Grogan was not provided with any opportunity to be heard and was instead summarily deprived of the damages and fees awarded by the Superior Court. Federal agency adjudication requires the agency to give "all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment..." 5 U.S.C. § 554(c). And deprivation of rights without an effective opportunity to be heard is a violation of Mr. Grogan's due process rights. *See Board of Regents v. Roth*, 408 U.S. 564, 569-70 (1972). As such, the Superior Court should not have deferred to the FDIC's position.

Even if the FDIC's [REDACTED] was entitled to deference, the Superior Court should have overruled the FDIC in this case because it ignored the fact that Grogan was a "white knight" and failed to apply the state-law exception discussed above.

The Administrative Procedures Act ("APA") sets forth standards governing judicial review of decisions made by federal

administrative agencies. *See Dickinson v. Zurko*, 527 U.S. 150, 152 (1999); *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 638 (9th Cir. 2004); *Public Util. Dist. No. 1 v. Federal Emergency Mgmt. Agency*, 371 F.3d 701, 706 (9th Cir. 2004). Pursuant to the APA, agency decisions may be set aside if “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); *United States v. Bean*, 537 U.S. 71, 77 (2002); *Gardner v. U.S. Bureau of Land Mgmt.*, 638 F.3d 1217, 1224 (9th Cir. 2011); *Latino Issues Forum v. EPA*, 558 F.3d 936, 941 (9th Cir. 2009); *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 706 (9th Cir. 2004); *Public Util. Dist. No. 1 of Snohomish County, WA v. Federal Emergency Management Agency*, 371 F.3d 701, 706 (9th Cir. 2004). The reviewing court must determine whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *See Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989); *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 859 (9th Cir. 2004); *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1097 (9th Cir. 2003); *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 858 n.36 (9th Cir. 2003).

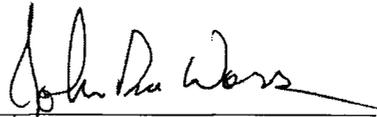
And the agency, however, must articulate a rational connection between the facts found and the conclusions made. *See Latino Issues Forum*, 558 F.3d at 941; *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1032 (9th Cir. 2008).

A court may reverse under the arbitrary and capricious standard if the agency has failed to consider an important aspect of the problem. *See Greater Yellowstone Coalition v. Lewis*, 628 F.3d 1143, 1148 (9th Cir. 2010) (as amended) (relying on *The Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc), *overruled on other grounds by Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008)); *Env'tl. Def. Ctr.*, 344 F.3d at 858 n.36; *Brower v. Evans*, 257 F.3d 1058, 1065 (9th Cir. 2001).

The Superior Court in this case considered none of these factors. It refused to question [REDACTED] in any way and even though the Court acknowledged that Mr. Grogan “is entitled to more than that, quite frankly, and I’d like to be able to give him more than that.” (March 3, 2014 R.P. at 29:3-8.) Despite this, the Court insisted – without considering any power it may have to set aside an erroneous agency decision - that [REDACTED]

in so failing, allowed Seattle Bank to avoid its obligations under Washington law. For these reasons, Appellant John Grogan respectfully requests that this Court vacate the Order of Dismissal and order the Superior Court to award Mr. Grogan the full amount due him.

RESPECTFULLY SUBMITTED this 13th day of November 2015.

A handwritten signature in black ink, appearing to read "John Du Wors", written over a horizontal line.

JOHN DU WORS, WSBA 33987
Attorney for Appellant
John Grogan

CERTIFICATE OF SERVICE

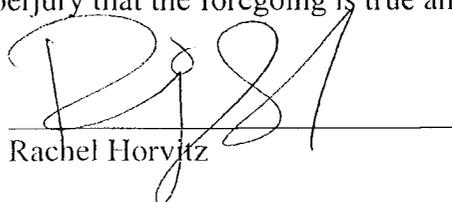
I hereby certify that on November 13, 2015, I caused the foregoing to be served via US mail and Email to:

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I declare under penalty of perjury that the foregoing is true and correct.


Rachel Horvitz