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Court of Appeals  
Division I  
State of Washington

No. 72846-6

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

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NIELS HVIDTFELDT,

Appellant,

v.

SITRION SYSTEMS AMERICAS, INC.,

Respondent.

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**RESPONSE BRIEF OF RESPONDENT  
SITRION SYSTEMS AMERICAS, INC.**

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## I. INTRODUCTION

Respondent Sitrion Systems Americas, Inc. (“Sitrion” or “SSA”) requests the Court affirm the trial court order granting Sitrion’s motion for summary judgment. This dispute concerns bonus payments allegedly owed to Appellant Niels Hvidtfeldt (“Mr. Hvidtfeldt”) after Sitrion terminated his employment. The Employment Agreement between Sitrion and Mr. Hvidtfeldt does not provide for post-termination bonus payments and Mr. Hvidtfeldt knew this to be true when he signed the Agreement. The parties do not dispute the material facts and the trial court correctly applied the law when it dismissed Mr. Hvidtfeldt’s claims of breach of employment contract and unpaid wages.

Sitrion is an international company that develops, sells, and maintains workplace computer management software. Sitrion originally hired Mr. Hvidtfeldt in 2012 to serve as General Manager of its North American operation. Mr. Hvidtfeldt’s Employment Agreement paid him both a base salary and bonus payments conditioned on achievement of specific quarterly and annual financial goals. Prior to accepting employment with Sitrion, Mr. Hvidtfeldt spent approximately two months negotiating the terms of the Employment Agreement, particularly those terms related to his total compensation. Mr. Hvidtfeldt requested the addition of a post-termination “tail clause” that would entitle him to post-

termination bonus payments. While Sitrion agreed to several other financial concessions, it flatly refused Mr. Hvidtfeldt's request for post-termination bonus payments and clearly communicated this information to him: "...there is no post agreement tail and we have no intention to add one. **As long as you are with the company you will receive compensation, if you leave this ends.**" Although Mr. Hvidtfeldt was disappointed about unsuccessfully negotiating a "tail clause" for post-termination bonus payments, he nevertheless signed the Employment Agreement and began his employment with Sitrion. Mr. Hvidtfeldt was plainly aware of the lack of post-termination bonus payments, in fact, after signing the Employment Agreement he continued lobbying Sitrion to revise the agreement and include a "tail clause." Sitrion declined the invitation.

During the first quarter, Sitrion met its financial goals and paid Mr. Hvidtfeldt a \$36,000 bonus in addition to his base salary. Sitrion did not meet its revenue goals in the second or third quarters and therefore did not pay Mr. Hvidtfeldt a bonus. In September of 2012, Sitrion terminated Mr. Hvidtfeldt's employment. Because Mr. Hvidtfeldt was no longer employed, he was not eligible for fourth quarter or annual bonus payments.

Despite being terminated before bonuses became due, Mr. Hvidtfeldt claims he is entitled to bonus payments worth \$180,000 based on Sitrion's financial performance in the fourth quarter and year-end annual total. No further bonus payments are owed to Mr. Hvidtfeldt. The Employment Agreement expressly provides Mr. Hvidtfeldt served as an "at will" employee and did not contain any provision for continued compensation following termination. Under established principles of contract interpretation, the Employment Agreement is clear and unambiguous and should be enforced as written. Mr. Hvidtfeldt is not owed any further compensation. Looking beyond the four corners of the contract, the parties' intent is demonstrated by their contract negotiations. During lengthy e-mail negotiations, Mr. Hvidtfeldt requested post-termination bonus payments, and Sitrion refused. Armed with this information, Mr. Hvidtfeldt nevertheless signed the Employment Agreement and agreed to be bound by its terms. After beginning his employment, Mr. Hvidtfeldt continued to protest the lack of post-termination bonus payments, but Sitrion again refused to modify the Employment Agreement.

In support of his claim for post-termination bonus payments, Mr. Hvidtfeldt takes a warped view of contract interpretation, arguing several points that do not withstand scrutiny:

- “Mr. Hvidtfeldt did not leave SSA,” therefore his right to bonus payments persists.
- Sitrion “has never terminated the Employment Agreement,” therefore bonus payments continue to be owed even though the employment relationship itself was terminated.
- Sitrion’s argument against post-termination bonus payments “proves too much.”

These arguments were not viewed favorably by the trial court, which seriously questioned Mr. Hvidtfeldt’s interpretation of the contract and his argument that the Employment Agreement (and right to compensation) somehow survived his termination. As reflected by his opening appeal brief—which is nearly identical to the briefing he submitted to the trial court—Mr. Hvidtfeldt’s arguments have not changed on appeal. Neither the law nor the facts considered by the trial court have changed, either. Finding the plain language of the Employment Agreement unambiguous, the trial court dismissed both the breach of contract and unpaid wage claims with prejudice.<sup>1</sup> Sitrion requests this Court affirm the trial court’s ruling.

## II. ASSIGNMENT OF ERROR

There is no error on appeal. The trial court properly interpreted the law and facts when it granted Sitrion’s motion for summary judgment,

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<sup>1</sup> Oral argument on Sitrion’s motion for summary judgment was not recorded at the trial court level, therefore no transcript (RP) is available on appeal.

dismissing Mr. Hvidtfeldt's breach of employment contract and unpaid wage claims with prejudice. CP 118-19.

### **III. STATEMENT OF THE CASE**

#### **A. Mr. Hvidtfeldt's Employment with Sitrion.**

Sitrion develops, sells, and services workplace computer management software. CP 26. Daniel Kraft serves as Sitrion's President and CEO. *Id.* Mr. Hvidtfeldt was employed by Sitrion as General Manager, serving in this capacity from January 1, 2012 through September 10, 2012. *Id.*

Sitrion was first introduced to Mr. Hvidtfeldt during a business arrangement with eRhapsody, a business owned by Mr. Hvidtfeldt and located in Redmond, Washington. *Id.* Near the end of 2011, Sitrion ended its business relationship with eRhapsody and entered into negotiations with Mr. Hvidtfeldt to hire him directly as General Manager of Sitrion's North American business operation. *Id.*

In November 2011, Mr. Hvidtfeldt began negotiating the terms of his Employment Agreement with Sitrion. CP 27. During approximately two months of negotiations that followed, Mr. Hvidtfeldt continuously pressed Sitrion to make concessions to the various terms governing compensation. *Id.* Mr. Hvidtfeldt successfully received several concessions from Sitrion. *Id.* For example, Sitrion agreed to reduce the

financial targets the company needed to achieve in order for Mr. Hvidtfeldt to receive a bonus payment. *Id.* However, Mr. Hvidtfeldt's efforts to negotiate a post-termination tail clause fell flat. *Id.* On January 10, 2012, Mr. Hvidtfeldt sent Sitrion an e-mail outlining additional proposed modifications to the Employment Agreement. CP 36-39. Mr. Hvidtfeldt's email noted that the "Draft Employment Agreement does not address tail payments for bonus amounts." CP 37. Mr. Kraft responded to Mr. Hvidtfeldt's email on the same day:

We believe the attached documents represent the final agreements and we consider this our final offer.

\* \* \* \*

Individual Feedback to your today's mail:

**Post-agreement tail (compensation)**

**You are correct, there is no post agreement tail and we have no intention to add one. As long as you are with the company you will receive compensation, if you leave this ends.** This is consistent with all similar agreements currently in place in the company.

CP 41 (emphasis added).

On January 11, 2012, Mr. Hvidtfeldt agreed to the Employment Agreement and returned a signed copy to Sitrion: "In the interest of getting back to business, I have signed and attached the agreements." CP 44. The Employment Agreement was retroactively effective to January 1, 2012. CP 30. Despite signing the Employment Agreement,

Mr. Hvidtfeldt made known to Sitrion that he was unhappy with his compensation: “I want you to understand that I am very interested in continuing the Sitrion business in the Americas, **even if I am forfeiting substantial future and earned commissions.**” CP 37 (emphasis added). As a result, Mr. Hvidtfeldt continued his efforts to negotiate modifications to the Employment Agreement: “When convenient, please consider modifying the agreement to align this with industry norms.” CP 44. Mr. Kraft rejected this request and refused to negotiate any further: “There is nothing to comment. This was discussed with you (twice) and agreed.” CP 47. Before, during, and after contract execution, Mr. Hvidtfeldt knew post-termination bonus payments were not provided in the Employment Agreement.

**B. The Terms of the Employment Agreement.**

Based on the terms of the Employment Agreement, Mr. Hvidtfeldt served as an “at will” employee, terminable by either party at any time, with or without cause. CP 30. Mr. Hvidtfeldt was paid compensation in two parts. First, he was paid a base salary of \$100,000. *Id.* He was also entitled to variable bonus payments referred to in the Employment Agreement as a “Success Bonus.” *Id.* Appendix 1 to the Employment Agreement dictated the formula for the bonus payments. CP 34.

The Employment Agreement states that only specific portions of the Agreement survive termination. CP 32. The section of the Agreement titled “continuing obligations” specifies those portions that survive: “Notwithstanding the termination of Employee for any reason, the provision of paragraph 5, 6, 7, 9, and 13 of this Agreement will continue in full force and effect following such termination.” *Id.* The surviving paragraphs are identified as follows:

- Paragraph 5 - Confidentiality
- Paragraph 6 - Non-Compete Agreement
- Paragraph 7 - Non-Solicitation of Employees
- Paragraph 9 - Inventions
- Paragraph 13 - Non-Disparagement

*Id.* The “continuing obligations” clause does *not* state that continued compensation survives termination. No section of the Employment Agreement provides for compensation, either base salary or bonus payments, following termination. CP 30-32. No terms of the agreement in any manner suggest post-termination bonus payments exist. *Id.* This is consistent with the information provided by Sitrion to Mr. Hvidtfeldt prior to his signature: “...there is no post agreement tail and we have no intention to add one. As long as you are with the company you will receive compensation, if you leave this ends.” CP 41.

**C. Mr. Hvidtfeldt's Employment, Bonus Payments, and Termination.**

Mr. Hvidtfeldt's employment at Sitrion was effective January 1, 2012. CP 30. Mr. Hvidtfeldt received his base salary during his tenure. CP 27. In addition to his base salary, Sitrion achieved its first quarter financial goal, therefore Sitrion paid Mr. Hvidtfeldt a Q1 bonus payment of \$36,000. *Id.* Sitrion did not meet its second and third quarter financial goals, therefore Mr. Hvidtfeldt did not receive Q2 or Q3 bonus payments. CP 28. On September 10, 2012, Sitrion terminated Mr. Hvidtfeldt's employment. CP 3. Mr. Hvidtfeldt's termination took place during the financial third quarter. CP 28.

Mr. Hvidtfeldt was employed for the first three financial quarters of 2012. During his tenure, he was timely paid his base salary and any bonus payments owed to him. CP 27-28. Despite Mr. Hvidtfeldt's efforts to negotiate a post-termination tail clause, no such clause exists in the Employment Agreement. To the contrary, Sitrion confirmed to Mr. Hvidtfeldt that any right to compensation ended at termination. CP 41. Mr. Hvidtfeldt was not employed during the financial fourth quarter and therefore was not entitled to a Q4 bonus payment. CP 28. Likewise, Mr. Hvidtfeldt was not employed at the end of the year, and

therefore was not entitled to bonus payments based on Sitrion's annual financial performance.

**D. Mr. Hvidtfeldt's Employment Agreement is Not Unique; Sitrion Has a Uniform Policy Against Post-Termination Bonus Payments.**

Mr. Hvidtfeldt's Employment Agreement with Sitrion was not unique. As Mr. Kraft explained to Mr. Hvidtfeldt, once an employee separates from Sitrion, whether voluntarily or involuntarily, all compensation ends. CP 41. Indeed, less than two months following his own start date, Mr. Hvidtfeldt personally drafted and signed an offer letter for another Sitrion regional sales director, Dean Read. CP 57-58. Like Mr. Hvidtfeldt, Mr. Read was paid a base salary and was eligible for commissions after achieving certain financial targets. *Id.* Like Mr. Hvidtfeldt, Mr. Read was not eligible for post-termination commission payments. Indeed, Mr. Read's offer letter, personally prepared and executed by Mr. Hvidtfeldt, provides that "Commissions will only be paid on recognized sales up to and including effective date of termination. Bonuses will not be paid pro-rata; **they must be earned in full prior to termination.**" *Id.* (emphasis added).

In his opening appeal brief, Mr. Hvidtfeldt argues his own Employment Agreement does not contain language identical to the language in Mr. Read's offer letter, therefore Sitrion intended to treat the

two employees differently (*i.e.* post-termination payments for Mr. Hvidtfeldt, but not for Mr. Read). Appellant's Opening Brief, p. 15. Quite the opposite is true. Prior to accepting employment at Sitrion, when Mr. Hvidtfeldt was negotiating the terms of his own Employment Agreement, Mr. Kraft clearly communicated to him that Sitrion has a company-wide policy against post-termination payments of any kind: "As long as you are with the company you will receive compensation, if you leave this ends. **This is consistent with all similar agreements currently in place in the company.**" CP 41 (emphasis added). While Mr. Kraft repeatedly emphasized the Employment Agreement was clear and there would be no tail compensation of any kind, Mr. Hvidtfeldt continued to press the issue, requesting Sitrion reconsider the issue (and even urging Sitrion to amend the agreement after it was already signed). CP 44. Accordingly, it is not surprising that in the next round of drafting language related to the same bonus for Dean Read, Sitrion further enhanced the language. This does not diminish the fact that the terms of Mr. Hvidtfeldt's Employment Agreement amply and unequivocally demonstrate he is suing for compensation to which he knows he is not entitled.

**E. Mr. Hvidtfeldt Cites Two “Red Herring” Contracts That Do Not Alter Interpretation of the Employment Agreement.**

In support of his position on appeal, Mr. Hvidtfeldt argues the existence of two external contracts somehow establish a “common course of dealing” between the parties that bonus payments are owed following his involuntary termination. Appellant’s Opening Brief, p. 24. These two external contracts have entirely different language, for entirely different purposes, and are simply not relevant to the interpretation of Mr. Hvidtfeldt’s Employment Agreement.

Mr. Hvidtfeldt first points to an earlier “Cooperation Agreement” between eRhapsody (a corporation owned by Mr. Hvidtfeldt) and Sitrion’s parent company, Sitrion Systems GMBH. Appellant’s Opening Brief, pp. 2-3. Unlike the Employment Agreement between Mr. Hvidtfeldt and Sitrion, which did not include any language discussing the right to post-termination bonus payments, the Cooperation Agreement included express language that eRhapsody would continue to receive certain commission payments for 12 months after termination of the agreement. CP 88-89. No similar language is found in the Employment Agreement. *Cf.* CP 30 (Employment Agreement) *with* CP 88-89 (Cooperation Agreement). Moreover, the Cooperation Agreement is inapplicable to interpretation of the Employment Agreement for three reasons: (1) the Cooperation Agreement was between two completely different legal entities

(eRhapsody and Sitrion Systems GMBH); (2) the Cooperation Agreement was governed by German law, not Washington law; and (3) the Cooperation Agreement served a fundamentally different purpose and contained drastically different language governing duration, termination, and compensation. CP 86-93.

Mr. Hvidtfeldt also points to the “Incentive Agreement” between himself and Sitrion as proof he is entitled to post-termination bonus payments. CP 100-01. The Incentive Agreement was an independent agreement negotiated and executed apart from Mr. Hvidtfeldt’s Employment Agreement. The Incentive Agreement related to potential stock incentives owed to Mr. Hvidtfeldt in the event of a stock sale. *Id.* Unlike the Employment Agreement, which does not provide for post-termination payments of any kind, the Incentive Agreement expressly states that it continues for 12 months following termination. The Incentive Agreement applied only to stock options, not bonus payments. Moreover, no similar language is found in the Employment Agreement. *Cf.* CP 30 (Employment Agreement) *with* CP 100 (Incentive Agreement).

The two “red herring” contracts cited by Mr. Hvidtfeldt do not help his position, they hurt it. Both the Cooperation Agreement and the Incentive Agreement include *express* contract language discussing and providing post-termination compensation. No similar language is found in

Mr. Hvidtfeldt's Employment Agreement. The point is clear: when Sitrion intends to provide post-termination compensation, it does so by providing clear contract language directly on point. The absence of such language in the Employment Agreement serves only to reiterate Sitrion's position that post-termination bonus payments were never contemplated nor agreed to.

#### IV. AUTHORITY AND ARGUMENT

##### A. The Standard of Review.

Contract interpretation is an issue of law to be resolved at summary judgment if the contract language is unambiguous. *Central Credit Collection Control Corp. v. Grayson*, 7 Wn. App. 56, 59-60 (1972). Likewise, "whether a contract is ambiguous is a question of law." *GMAC v. Everett Chevrolet*, 179 Wn. App. 126, 135 (2014). "A provision is not ambiguous simply because the parties suggest opposing meanings." *Dice v. City of Montesano*, 131 Wn. App. 675, 684 (2006). In construing a written contract, the basic principles require that (1) the intent of the parties controls; (2) a court ascertains the intent from reading the contract as a whole; and (3) a court will not read ambiguity into a contract that is otherwise clear and unambiguous. *Id.* at 684-85. On appeal, the standard of review on summary judgment is *de novo*. *Cook v. USAA Cas. Ins. Company*, 121 Wn. App. 844, 847 (2004).

The trial court properly granted summary judgment.

Mr. Hvidtfeldt's breach of contract claim fails for two reasons: (1) the Employment Agreement is a clear and unambiguous and plainly precludes post-termination compensation; and (2) extrinsic evidence during negotiations demonstrates Mr. Hvidtfeldt knew the Employment Agreement did not provide for post-termination compensation. Because Mr. Hvidtfeldt is not owed any further compensation by Sitrion, his claim for unpaid wages under RCW 49.52.050 and RCW 49.52.070 necessarily fails as well.

**B. The Four Corners of the Employment Agreement Plainly Exclude Post-Termination Bonus Payments.**

"Clear and unambiguous contracts are enforced as written."

*McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 733-34 (1992).

Words in a contract are given their ordinary, usual, and popular meaning unless an agreement clearly demonstrates a contrary intent. *Grey v.*

*Leach*, 158 Wn. App. 837, 850 (2010). Courts interpreting a contract

attempt to determine the parties' intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective

intent of the parties. *Hearst Communications, Inc. v. Seattle Times*, 154

Wn.2d 493, 503 (2005). An ambiguity will not be read into a contract

where it can reasonably be avoided by reading the contract as a whole.

*McGary v. Westlake Investors*, 99 Wn.2d 280, 285 (1983). When a contract is clear, its interpretation is a matter of law and thus issues related to it should be resolved at summary judgment. *Dice v. City of Montesano*, 131 Wn. App. 675, 684, 128 P.3d 1253 (2006).

Mr. Hvidtfeldt's Employment Agreement is unambiguous. With respect to his compensation, the Employment Agreement provides as follows:

## 2. COMPENSATION

Base Salary: For services provided, Employer will pay Employee an annual base salary of US \$100,000 paid in accordance with Employer's annual payroll procedures. The Base Salary will increase to US \$120,000 in fiscal year 2013.

Success Bonus: In addition to the base salary, the Employee will be receiving an annual variable compensation in the amount of US\$180,000 (at 100% target achievement) per year to be paid upon achieving targets defined by the Board of the Employer. See Appendix 1 for the 2012 Bonus agreement. The Success Bonus increases to US\$230,000 (at 100% target achievement) in fiscal year 2013.

CP 30. The Employment Agreement signed by Mr. Hvidtfeldt does not include any provision for post-termination compensation of any kind. *Id.* Interpreting the Employment Agreement in a manner that provides for post-termination compensation requires inserting contract language that simply

does not exist. The Employment Agreement individually lists those provisions, and only those provisions, that survive termination:

14. CONTINUING OBLIGATIONS

Notwithstanding the termination of Employee for any reason, the provision of paragraph 5 [confidentiality], 6 [non-compete agreement], 7 [non-solicitation of employees], 9 [inventions], and 13 [non-disparagement] of this Agreement will continue in full force and effect following such termination.

CP 32. None of the surviving paragraphs in the “continuing obligations” section of the Employment Agreement relate to compensation. Thus, according to the express and unambiguous terms of the Employment Agreement, Sitrion was obligated to pay Mr. Hvidtfeldt bonuses only if certain quarterly and annual financial goals were achieved *during* his employment. *Id.* Mr. Hvidtfeldt was terminated during the third financial quarter. He was compensated with the base salary and any Q1-Q3 bonus payments owed to him during his tenure. CP 27-28. Mr. Hvidtfeldt was not employed during the financial fourth quarter (Q4) or the end of the year, and therefore was not entitled to Q4 or annual bonus payments.

CP 28. While Mr. Hvidtfeldt may not have been happy with his compensation, he nevertheless signed the Employment Agreement and was bound to it as a matter of law. And, while Mr. Hvidtfeldt might have

subjectively hoped to modify the employment at some later date to improve his compensation, no such modification was ever achieved.

**1. Mr. Hvidtfeldt Offers a Strained Interpretation of the Employment Agreement By Cherry-Picking Words and Phrases.**

Mr. Hvidtfeldt argues the language of the Employment Agreement should be interpreted in absurd ways. Mr. Hvidtfeldt attempts to cherry-pick specific words and phrases, such as “will be receiving” and “to be paid,” in support of his position that bonus payments were mandatory and not linked to his continued employment. Appellant’s Opening Brief, p. 13. Mr. Hvidtfeldt’s interpretation of these specific terms and phrases is divorced from the context in which they appear in the Employment Agreement. The relevant provision states, in full:

Success Bonus: In addition to the base salary, the Employee will be receiving annual variable compensation in the amount of US \$180,000 (at 100% target achievement) per year to be paid upon achieving targets defined by the Board of the Employer. See Appendix 1 for the 2012 Bonus agreement. The Success Bonus increases to US \$230,000 (at 100% target achievement) in fiscal year 2013.

CP 30. This section of the Employment Agreement does not reference any right to post-termination compensation. It comes immediately after the section of the Employment Agreement governing duration, which plainly provides that Mr. Hvidtfeldt served “at will” and that the relationship could “be terminated by Employee or Employer **at any time.**”

CP 30 (emphasis added). It is clear from the above that Mr. Hvidtfeldt would only receive bonus compensation of \$180,000 *upon achieving* targets at 100% as set forth in the 2012 bonus agreement, assuming he remained employed with Sitrion. Mr. Hvidtfeldt pinpoints specific phrases (“will be receiving” and “to be paid”), isolated in context, as proof of a mandatory right to bonus payments. He also argues there is somehow a distinction between Sitrion’s obligation to pay him his base salary versus bonus payments:

When SSA terminated Mr. Hvidtfeldt’s employment in September 2012, its obligation to pay him his base salary ceased under the plain terms of the Employment Agreement. There is, however, no similar language in the Employment Agreement conditioning SSA’s obligation to pay Mr. Hvidtfeldt his variable compensation on his continued performance of services for the company for any period of time.

Appellant’s Opening Brief, p. 14. This is a distinction without a difference. Both base salary and the Success Bonus are defined together as “compensation.” CP 30. There are no “plain terms” stating that base salary terminates while bonus payments survive. No contract language suggests either form of compensation survives termination of the employment relationship. By isolating specific language, Mr. Hvidtfeldt jumps to unwarranted conclusions and ignores other important language in the Employment Agreement. This is not a credible interpretation of the

contract—an interpretation that was expressly questioned and rejected by the trial court.<sup>2</sup>

**2. Mr. Hvidtfeldt’s Argument that Sitrion Never Terminated the Employment Agreement is Disingenuous.**

Mr. Hvidtfeldt also argues he is owed bonus payments because Sitrion terminated only his employment, not the Employment Agreement itself:

...[Sitrion] has never terminated the Employment Agreement.

\* \* \* \*

[Sitrion’s] rejection of the “post agreement tail compensation” proposal is irrelevant to the present dispute between the parties because SSA has never terminated the Employment Agreement.

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<sup>2</sup> Mr. Hvidtfeldt also attempts to introduce ambiguity into the Employment Agreement by comparing it to Appendix 1, which governs the formula for determining bonus payments. CP 34. The “compensation” section of the Employment Agreement provides Mr. Hvidtfeldt became eligible for bonus payments “upon achieving targets defined by the Board of the Employer.” CP 30. Appendix 1 provides details of the specific quarterly and annual financial targets Mr. Hvidtfeldt needed to achieve. CP 34. Based on the use of the term “Employer” in Appendix 1, Mr. Hvidtfeldt leaps to the conclusion that the only condition governing his bonus payments was Sitrion’s performance, not his individual performance or even his continued employment at Sitrion. Appellant’s Opening Brief, p. 8. This argument, which again focuses on isolated words and phrases, does not pass muster. Taken as a whole, the language from the Employment Agreement demonstrates Mr. Hvidtfeldt needed to achieve individual goals to qualify for bonus payments: “Success Bonus...to be paid upon achieving targets defined by the Board.” CP 30. As a legal entity, Sitrion is only capable of acting through its employees, particularly its Managing Director, so while the employer itself achieves revenue goals, the achievement is brought about by employees themselves. As required by the Employment Agreement, it was impossible for Mr. Hvidtfeldt to “achieve targets defined by the Board” at a time when he was no longer employed.

Appellant's Opening Brief, pp. 19-20. This argument does not withstand scrutiny. Unlike the Cooperation Agreement between eRhapsody and Sitrion GMBH, which was governed by German law and between two separate legal entities, the Employment Agreement between Mr. Hvidtfeldt and Sitrion contained no specific procedure or provisions regarding termination. The Employment Agreement is for an indefinite length, terminable "at will" by either party at any time, with or without cause. Under Washington law, "when a contract for a continuing performance fails to specify the intended duration, we construe it to be terminable-at-will by either party after a reasonable time." *Cascade Auto Glass, Inc. v. Progressive Cas. Ins. Co.*, 135 Wn. App. 760, 766 (2006). Here, the Employment Agreement between Sitrion and Mr. Hvidtfeldt did not specify an intended duration, either party had the right to terminate the employment relationship at any time. CP 30. Because Sitrion already gave reasonable notice to Mr. Hvidtfeldt that it was terminating his "at will" employment, it is nonsensical to suggest Sitrion also needed to inform him that it was terminating the Employment Agreement. The two are one of the same. Other Washington courts are in accord, treating termination of an employment relationship the same as termination of an "at will" Employment Agreement. *Thompson v. St. Regis Paper Company*, 102 Wn.2d 219, 223 (1984) ("Generally, an employment

contract, indefinite as to duration, is terminable at will by either the employee or employer.”); *Roberts v. Atlantic Richfield Company*, 88 Wn.2d 887, 894 (holding the same).

The termination of Mr. Hvidtfeldt’s employment, which indisputably occurred in September of 2012, was co-terminus with the termination of the Employment Agreement. In this lawsuit, Mr. Hvidtfeldt seeks only \$180,000 in bonus payments allegedly owed to him for the year 2012. If Mr. Hvidtfeldt took his own argument seriously concerning the continued validity of the Employment Agreement (which, according to Mr. Hvidtfeldt, has never been terminated by Sitrion), he would also be seeking unpaid base salary for the remainder of 2012 and up to the present, in addition to bonus payments owed for 2013 and beyond.<sup>3</sup> The fact Mr. Hvidtfeldt seeks only 2012 bonus payments and not any additional compensation underscores his recognition of the futility of his own argument. CP 3.

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<sup>3</sup> The Employment Agreement provides Mr. Hvidtfeldt is compensated with a base salary and bonus payments “annually,” with an increase to both in 2013. CP 30. If Mr. Hvidtfeldt took his own argument seriously concerning survival of the Employment Agreement, he would be seeking compensation owed all the way through the present date in 2015.

**C. The Parties' Statements During Contract Formation Demonstrate Their Intention to Exclude Post-Termination Bonus Payments.**

As recognized by the trial court when it granted Sitrion's motion for summary judgment, the Employment Agreement is unambiguous and plainly precludes post-termination bonus payments. However, Mr. Hvidtfeldt continues to assert the Employment Agreement is ambiguous because it does not *expressly* condition bonus payments on this continued employment: "...there is no express term conditions payment of his Success Bonus on his continued employment..." Appellant's Opening Brief, p. 2. The parties' communications during contract formation demonstrate their mutual interpretation and understanding that post-termination bonus payments did not exist.

**1. The Parties' Communications During Negotiations Demonstrates Their Intent to Exclude Post-Termination Bonus Payments.**

If there is any ambiguity in a contract, the parties' interpretation is entitled to great, if not controlling, weight in ascertaining the meaning of the contract. *Mercer Place Condo Ass'n v. State Farm Fire & Cas. Co.*, 104 Wn. App. 597, 602 (2000). "The touchstone of contract interpretation is the parties' intent." *Tanner Elec. Corp. v. Puget Sound Power & Light*, 128 Wn.2d 656, 674 (1996). Washington courts apply the *Berg* "context rule" to ascertain the parties' intent. *Berg v. Hudesman*, 115 Wn.2d 657,

667 (1990). Washington courts have explained the “context rule” as follows:

This “context rule” allows a court, while viewing the contract as a whole, to consider extrinsic evidence, such as the circumstances leading to the execution of the contract, the subsequent conduct of the parties and the reasonableness of the parties’ respective interpretations ... The context rule applies even when the provision at issue is unambiguous.

*Roats v. Blakely Island Maint. Commission, Inc.*, 169 Wn. App. 263, 274 (2012) (quoting *Berg*, 115 Wn.2d at 666-69). “In order to aid courts in ascertaining the intent of the parties to a contract, we adopted the “context rule” in *Berg*. Under that rule, extrinsic evidence is admissible in order to assist the court in ascertaining the intent of the parties and in interpreting the contract. Such evidence is admissible regardless of whether or not the contract language is deemed ambiguous.” *U.S. Life Credit Life Ins. Co. v. Williams*, 129 Wn.2d 565, 569 (1996) (citing *Berg v. Hudesman*, 115 Wn.2d 657, 667-69 (1990)).

Any dispute concerning interpretation of the Employment Agreement is resolved by reliance on extrinsic evidence, namely, the e-mail exchange between Sitrion and Mr. Hvidtfeldt during contract negotiations. The parties expressly discussed post-termination compensation before signing the Employment Agreement. Negotiations spanned two months and went into significant detail over the terms of

compensation. While Mr. Hvidtfeldt may not have been happy about it, he clearly understood the Employment Agreement did *not* provide any form of post-termination compensation. On January 10, 2012, Mr. Hvidtfeldt sent an email to Daniel Kraft of Sitrion inquiring into a post-termination compensation: “Draft Employment Agreement does not address tail payments for bonus amounts.” CP 37. Hours later, Mr. Kraft responded to Mr. Hvidtfeldt’s e-mail, confirming post-termination compensation was not provided:

We believe the attached documents represent the final agreements and we consider this our final offer.

\* \* \* \*

**Post-agreement tail (compensation)**

You are correct, there is no post agreement tail and we have no intention to add one. **As long as you are with the company you will receive compensation, if you leave this ends.** This is consistent with all similar agreements currently in place in the company.

CP 41 (emphasis added). Thus, not only was Mr. Hvidtfeldt informed the Employment Agreement did not provide post-termination compensation, he was also placed on notice that Sitrion had no intention of ever adding such a clause. The Employment Agreement, as written, constituted Sitrion’s final offer. Armed with this knowledge, Mr. Hvidtfeldt nevertheless signed and returned the Employment Agreement on January 11, 2012. CP 44. Extrinsic evidence demonstrates that the intention of the

parties could not be clearer. Mr. Hvidtfeldt's breach of contract claim should be dismissed with prejudice.

In his opening appeal brief and in response to written discovery served by Sitrion during this lawsuit, Mr. Hvidtfeldt offered the following rationale as to why he was entitled to post-termination bonus payments:

Plaintiff contends that the plain terms of the Employment Agreement informed him that his variable compensation [bonus payments] for 2012, but not his salary, would survive the termination of his employment in that the Employment Agreement provided he would **"be paid"** a Success Bonus for 2012 if certain conditions were met.

CP 53 (emphasis added). However, the plain terms of the Employment Agreement define "compensation" as both base salary and bonus payments, yet neither is included in the "continuing obligations" section of the agreement. CP 30-33. Sitrion had the right to terminate Mr. Hvidtfeldt's employment "at any time." CP 30. Nothing in the Employment Agreement "informed" Mr. Hvidtfeldt of the right to post-termination bonus payments, particularly because Mr. Hvidtfeldt's request was rejected by Sitrion during negotiations. Instead, Daniel Kraft informed Mr. Hvidtfeldt there was no post-termination tail clause, and Mr. Hvidtfeldt knew this to be true when he signed the Employment Agreement. Mr. Hvidtfeldt continues to insist that isolated language from the Employment Agreement, such as "will be receiving" and "to be paid,"

bestows him a mandatory right to the disputed bonus payments, and therefore Mr. Kraft's statement should be inadmissible as extrinsic evidence that varies, modifies, or contradicts the Employment Agreement. Appellant's Opening Brief, pp. 23-24. This position violates the very purpose of the *Berg* "context rule," which permits a court, "while viewing the contract *as a whole*," to consider extrinsic evidence and "the reasonableness of the parties' respective interpretations." *Roats*, 169 Wn. App. at 274 (emphasis added). By pinpointing only isolated phrases of the Employment Agreement, Mr. Hvidtfeldt ignores the directive to view the contract "as a whole." His interpretation is simply not reasonable.

**2. Mr. Hvidtfeldt's Assertion He Never Left Sitrion is Without Merit.**

During the parties' negotiations, Mr. Hvidtfeldt does not dispute that Daniel Kraft, acting on behalf of Sitrion, informed him of the following point: "As long [as] you are with the company you will receive compensation, **if you leave this ends.**" CP 41. Mr. Kraft's email did not distinguish between Mr. Hvidtfeldt leaving voluntarily or involuntarily. *Id.* Fantastically, Mr. Hvidtfeldt argues he remains entitled to bonus payments *he never actually left* Sitrion:

Mr. Kraft told Mr. Hvidtfeldt on January 10, 2012, that Mr. Hvidtfeldt's right to compensation from SSA would end if Mr. Hvidtfeldt *left* the company. **Mr. Hvidtfeldt did not leave SSA.**

Appellant's Opening Brief p. 24 (emphasis added). Instead, Mr. Hvidtfeldt argues he did not leave Sitrion because Sitrion "involuntary terminated his employment." *Id.* While Mr. Hvidtfeldt points to the *reason* why he departed Sitrion, this does not change the fact that he did pack his things and *leave* Sitrion in September of 2012. Certainly, Mr. Hvidtfeldt is not seriously arguing he remains employed by Sitrion. Mr. Kraft made very clear that the right to compensation ended if Mr. Hvidtfeldt *left* Sitrion. CP 41. Mr. Hvidtfeldt served as an "at will" employee, and Mr. Kraft did not condition Mr. Hvidtfeldt's departure on any specific circumstances (*i.e.* voluntarily or involuntarily, with or without cause). Stated another way, the right to compensation ended when the employment relationship was terminated, regardless of whether termination was due to voluntary resignation, termination for cause, termination without cause, death, or closure of the company. Mr. Hvidtfeldt's attempt to read ambiguity into an unambiguous statement is disingenuous. The trial court rejected this argument and so should this Court.

**3. The "Red Herring" Contracts Cited by Mr. Hvidtfeldt Support Sitrion's Interpretation of the Employment Agreement.**

Under the *Berg* "context rule," a court may consider the course of dealing between parties to ascertain the parties' intent. *Spectrum Glass*

*Co. Inc. v. PUD No.1 of Snohomish County*, 129 Wn. App. 303, 311 (2005). A course of dealing is described as a “sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.” Restatement (Second) of Contracts, § 223 at 157-58 (1981). As discussed earlier in this brief, Mr. Hvidtfeldt argues a course of conduct exists between the parties based on two external contracts, the Cooperation Agreement and Incentive Agreement. Mr. Hvidtfeldt believes these two contracts support his argument for post-termination bonus payments. As demonstrated by both the Cooperation Agreement and Incentive Agreement, when Sitrion intends to provide post-termination compensation, it does so with express contract language. The absence of such language in the Employment Agreement is fatal to Mr. Hvidtfeldt’s argument that an established course of dealing provides him the right to post-termination compensation.

The Cooperation Agreement between eRhapsody and Sitrion’s parent company, Sitrion Systems GMBH, centered around marketing Sitrion’s products and services within the local region. CP 86. While governed by German law, the Cooperation Agreement contained an express provision governing post-termination commission payments.

CP 88-89. If Sitrion terminated the Cooperation Agreement, eRhapsody retained a right to commission payments for 12 months thereafter:

After the expiry or termination of this Agreement, the commission payments (“post-expiry commissions”) are agreed upon as follows:

\* \* \* \*

- I. If Sitrion gives notice of termination of this Agreement (not due to a breach committed by eRhapsody), only license and support/maintenance commissions based on orders associated with approved commission forms within **12 months** following the notice date will be paid out to eRhapsody according to (b).

CP 88-89 (emphasis added). No similar language is found in the Employment Agreement. CP 30-33.

Similarly, the Incentive Agreement between Sitrion and Mr. Hvidtfeldt governed cash proceeds owed to Mr. Hvidtfeldt in the event of a stock sale. CP 100. The Incentive Agreement provided that the right to cash proceeds from a stock sale would last 12 months following termination of the Employment Agreement:

If the employment agreement between Employee and Sitrion Systems, Inc. is terminated by Sitrion Systems, Inc. without cause, the term of this [Incentive] Agreement shall expire **12 months** after the employment agreement between Employee and Sitrion Systems, Inc. is terminated.

CP 100 (emphasis added). Again, no similar language is found in the Employment Agreement. No language in the Employment Agreement suggests or references any right to post-termination compensation. By

arguing for post-termination bonus payments, Mr. Hvidtfeldt is reading language into the Employment Agreement that does not exist. The parties' course of dealing, as evidenced by the two other contracts, demonstrates their practice of memorializing contract language whenever they agree to any form of post-termination compensation. When Sitrion intends to provide post-termination compensation, it does so by providing clear contract language directly in the contract.<sup>4</sup> The absence of such language in the Employment Agreement serves only to reiterate Sitrion's position.

**D. Mr. Hvidtfeldt's Argument Concerning "Subsequent Remedial Measures" Misconstrues the Evidence Offered by Sitrion.**

In its motion for summary judgment, Sitrion introduced an offer letter to another Sitrion employee, Dean Read, as evidence that Sitrion has a company-wide policy against post-termination compensation and that Mr. Hvidtfeldt knew this to be true. CP 57-59. Indeed, less than two months following his own hire, Mr. Hvidtfeldt drafted and signed an offer letter to Mr. Read, providing both a base salary and bonus payments. The offer letter provides that "Commissions will only be paid on recognized

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<sup>4</sup> In his opening appeal brief, Mr. Hvidtfeldt argues the parties would have expressly *excluded* post-termination compensation from the Employment Agreement if that was their intention: "If the parties had intended Mr. Hvidtfeldt's continued employment through December 31, 2012, to be a condition for the payment of his entire 2012 bonus, they would have said so." Appellant's Opening Brief, p. 13. However, as reflected by the parties' course of dealing with two other contracts, post-termination compensation is provided only when express contract language bestowing such a right is *included* in the contract.

sales up to and including effective date of termination. **Bonuses will not be paid pro-rate; they must be earned in full prior to termination.**”

CP 58 (emphasis added). This underscores Mr. Hvidtfeldt both knew and understood post-termination bonus payments were not available, as further evidenced by his complaints to Sitrion: “I want you to understand that I am very interested in continuing the Sitrion business in the Americas, **even if I am forfeiting substantial future and earned commissions.**”

CP 37 (emphasis added). It also underscores Mr. Kraft’s earlier representation to Mr. Hvidtfeldt that Sitrion has a company-wide policy against post-termination compensation: “This is consistent with all similar agreements currently in place in the company.” CP 41. Mr. Kraft made this statement to Mr. Hvidtfeldt *before* Mr. Hvidtfeldt signed the Employment Agreement, negating an argument that Mr. Hvidtfeldt somehow lacked knowledge at the time of contract execution.

In his opening appeal brief, Mr. Hvidtfeldt appears to have misconstrued Sitrion’s argument with respect to Dean Read’s offer letter:

...SSA contended for the first time at oral argument on its motion for summary judgment that Mr. Read’s employment contract was a “subsequent remedial measure” inadmissible under ER 407.

Appellant’s Opening Brief, p. 16. This is incorrect. Sitrion is not attempting to exclude evidence of the offer letter. To the contrary, Sitrion

itself introduced the offer letter as evidence by attaching it to its motion for summary judgment. Mr. Hvidtfeldt personally drafted and signed the offer letter, demonstrating his understanding that Sitrion does not provide post-termination bonus payments. The fact that language in Mr. Read's offer letter is improved does not diminish the language precluding post-termination bonus payments in Mr. Hvidtfeldt's Employment Agreement. To the contrary, courts outside of Washington have admitted evidence of quasi "subsequent remedial measures" in a contract as proof a party took steps to make its intentions even clearer:

Subsequent remedial measures are not generally admissible in evidence; however, when the dispute concerns the terms of a contract, changes in the language that make the intent of the drafter clearer, the court should consider that change in evaluating the disputed term.

*Smith v. Miller Brewing Co. Health Benefits Program*, 860 F.Supp. 855, 857 fn. 1 (M.D. Ga. 1994) (after an ERISA dispute arose concerning interpretation of contract language, the drafter later changed the language to make his original intent even clearer). After hearing continued complaints from Mr. Hvidtfeldt concerning the lack of post-termination bonus payments, Sitrion later improved its contract language to make its intent more certain. The fact that Mr. Hvidtfeldt personally drafted the improved contract language makes his mutual understanding all the more apparent.

**E. Mr. Hvidtfeldt's Claim for Unpaid Wages Fails Because No Wages are Owed to Him or Because a "Bona Fide" Dispute Exists.**

Mr. Hvidtfeldt seeks recovery of unpaid wages, double damages, attorney fees, and costs under Washington's wage rebate statutes, RCW 49.52.050 and RCW 49.52.070. CP 3-4. First, Sitrion did not withhold any wages owed to Mr. Hvidtfeldt because he was not entitled to post-termination bonus payments, therefore his unpaid wage claim fails as a matter of law. Second, assuming for the sake of argument that Mr. Hvidtfeldt is somehow entitled to additional bonus payments (disputed by Sitrion), the unpaid wage claim is still properly dismissed because Sitrion did not "willfully" withhold wages.

Under the wage rebate statutes, it is illegal for an employer to "willfully" deprive an employee "of any part of his or her wages." RCW 49.52.050(2). A finding of "willfulness" does not exist when a "bona fide" dispute exists between the employer and employee. *Wash. State. Nurses Ass'n v. Sacred Heart Medical Center*, 175 Wn.2d 822, 834 (2012). A "bona fide" dispute is a "fairly debatable" question over whether any portion of wages is owed. *Id.* "An employer's genuine belief that he or she is not obligated to pay certain wages precludes the withholding of those wages from falling within the scope of RCW 49.52.050 and 49.52.070." *Garrison v. Merchant & Gould, P.C.*, 2011

WL 887749, \*10 (W.D. Wash. 2011). When the material facts are undisputed, the question of “willfulness” may be resolved at summary judgment. *Snoqualmie Police Ass’n v. City of Snoqualmie*, 165 Wn. App. 895, 908 (2012).

Assuming for the sake of argument that Mr. Hvidtfeldt is entitled to post-termination bonus payments, such a conclusion is only reached after an extended debate and interpretation of the Employment Agreement between the parties. In fact, even the trial court (correctly) believed Mr. Hvidtfeldt was not owed any additional compensation under the plain terms of the Employment Agreement. At a minimum, a “bona fide” dispute exists as to whether Mr. Hvidtfeldt is owed any further compensation. Sitrion has not “willfully” withheld any wages. To the contrary, it has denied post-termination payments to Mr. Hvidtfeldt based on a genuine belief that Mr. Hvidtfeldt is not owed anything further. CP 28. On this basis alone, liability under the wage rebate statutes is inappropriate and should be dismissed at summary judgment.

## V. CONCLUSION

Based on the foregoing authority, Sitrion requests the Court affirm the trial court’s summary judgment order. Under the law and the facts, Mr. Hvidtfeldt’s claims of breach of employment contract and unpaid wages fail as a matter of law and were properly dismissed with prejudice.

DATED this 1<sup>st</sup> day of June, 2015.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on the date below, I caused the foregoing document to be served upon the following, via the indicated method:

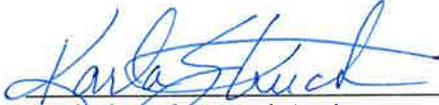
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Karla Struck, Legal Assistant