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Case No. 993807

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

TODD PIERCE,

Plaintiff/Respondent-Cross-Petitioner,

v.

BILL & MELINDA GATES FOUNDATION,

Defendant/Petitioner.

ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION

Lindsay L. Halm, WSBA #37141
Rebecca J. Roe, WSBA #7560
Attorneys for Plaintiff/Respondent-Cross-Petitioner

SCHROETER GOLDMARK & BENDER
500 Central Building
810 Third Avenue
Seattle, Washington 98104
(206) 622-8000

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I. INTRODUCTION

Todd Pierce proved at trial that the Foundation's Leigh Morgan pulled a bait and switch and that he lost millions as a result. The Foundation has tried to evade responsibility for Morgan's actions ever since, asking the trial court, the Court of Appeal, and now this Court to undo the promises it made and saddle Pierce with the cost of its mistakes. This Court should deny the Foundation's petition to review Division One's decision insofar as it seeks to reverse liability for breach of contract because nothing in the opinion on this issue conflicts with appellate authority or raises questions of constitutional dimension that warrant review.

The Court should, however, take review of Division One's decision striking Pierce's promissory estoppel claim. Pierce proved the elements of his claim at trial and the trier of fact guarded against double recovery. This was entirely proper and Division One erred in concluding otherwise. Long-standing precedent permits alternate theories of liability to be tried together; and Pierce's promissory estoppel claim – backed by findings that are verities on appeal – provides an alternate basis on which to affirm the judgment.

Finally, Pierce agrees with the Foundation that Division One's decision on contract damages is flawed, albeit for different reasons. Below, the court held that an at-will employee who proves breach and bad faith during the relationship is nevertheless barred from pursuing reliance damages

as a matter of law. Division One's ruling conflicts with caselaw recognizing such damages as an alternate measure for breach of contract.

If Division One's ruling stands, and employees' reliance interest goes unrecognized, employers will be able to lure talented workers away from competitors only to fire them without consequence. The matters presented here raise issues of substantial public interest, including the reach of the at-will doctrine, how we value human resources, and the rights of civil litigants to pursue alternate theories of liability. The Court should grant review of Parts II and III of the decision under RAP 13.4(b)(1), (2), and (4).

II. STATEMENT OF THE CASE

On appeal, the Foundation challenged none of the trial court's 91 findings of fact. Still, it continues to "highlight" the parts of the record it likes, retelling its version of events. Given space constraints, Pierce cannot respond in kind, but urges this Court to review the findings in their entirety, CP8-18, and offers the following by way of brief review:

Pierce is a "noted thought-leader in the IT space" and an innovator in the healthcare sector. CP8; Ex.12. When Leigh Morgan – the Foundation's newly minted Chief Operations Officer – recruited Pierce, he was working at Salesforce where he was paid in cash compensation and equity. CP9-10. Morgan knew she would need to surround herself with talent like Pierce if

she wanted to succeed. CP10. In August 2014, Morgan reached out to Pierce to brainstorm various IT issues. *Id*; Ex.1.[1]

Morgan's questions to Pierce about IT morphed into active recruitment. CP10; Exs.5, 9, 12. In fact, the day she asked Pierce to meet about working at the Foundation, Morgan began planning to oust the then-CIO (Chief Information Officer) in hopes she could replace him with Pierce. CP10; RP1690-91. She knew the Foundation's mission was a powerful recruitment tool and that Pierce would have to take a "big pay cut" to join. CP10; Exs.2, 7, 11.

From the start, Pierce made it clear to Morgan he was not interested in a "head of IT" or CIO-type job. CP10.[2] If he were going to leave the private sector behind, it would be for something with impact and vision – like a CDO (Chief Digital Officer) role. *Id*. Morgan understood that a CDO was something different from an IT manager. CP11; Exs.12, 18. In turn, she drafted a CDO job description, listing seven areas of accountability, with only one focused on traditional IT. CP11; Ex.13. Pierce approved the job description as written. Ex.218. (The Foundation argues that this single email

[1] Morgan and the Foundation's CEO had worked with Pierce before (at Genentech) and valued his creativity and leadership. CP10; RP526.

[2] He had already had several of those, overseeing IT teams many times the size of the Foundation's. CP10; RP257,1474-75, 1080.

shows Pierce didn't "meaningfully engage" in developing the role, though the trial court made no such finding.[3])

In December 2014, Morgan invited Pierce to interview with Bill Gates. CP11-12. She knew it would have a "binary outcome:"

> [E]ither Bill decides Todd is a worthy thought-partner/leader or, he doesn't. If the answer is no, then I may end up hiring a CIO as finding someone with Todd's unique background will be hard.

Ex.12. Morgan prepared talking points for Gates that repeated the CDO job description. CP11; Ex.18. At trial, the Foundation's CEO volunteered that the description was provided to Gates so he and Pierce could have a "meeting of the minds" and come away with "shared agreements." RP551.

Pierce's meeting with Gates was a success; the two had a lively discussion about how digital technologies could help transform the Foundation. CP12. Pierce articulated a vision during the interview process and throughout his tenure of using digital technologies to put money directly into the hands of people in need. *Id*.; RP773, 423-25; *see also* RP409-410 (Pierce explaining how 70% of Foundation money gets "eaten up by [] intermediaries"). In turn, on January 20, 2015, the Foundation made a written offer to Pierce for the CDO job, CP12, which he accepted, Ex.256.

Before extending the offer, Morgan did nothing to determine how a

[3] Although drawing inferences is the fact finder's role, *H.B.H. v. State*, 192 Wn.2d 154, 182, 429 P.3d 484 (2018), the Foundation's practice of "highlighting" certain items of evidence has had its intended effect, with Division One repeating this slight in a published opinion. *See* 475 P.3d at 1017.

CDO would fit into the organization nor broach the topic with program staff. CP12.[4] And while she emphasized the expanded nature of the position to Pierce and Gates, she told others at the Foundation that Pierce's number one job was to "fix IT." CP12; RP1699-1701; Ex.19.[5] Morgan's boss, the CEO, admitted that convincing Foundation staff to engage with a CDO in cross-programmatic work was a "tall order." RP653. So, like Morgan, she didn't try, explaining, "I would have predicted the outcome" anyway: they would have asked "what is a CDO and why do I have to have one?" *Id.*

On March 13, Morgan sent an all-staff email that simultaneously welcomed Pierce and announced the CIO's departure. CP13; Ex.26. The message was met with instant confusion, skepticism, and "turf" questions. CP13.[6] On arrival, Pierce too had a sinking feeling the Foundation was not prepared for or committed to the CDO role. *Id*; RP379. For him to succeed, employees needed a mandate to work across functions; Pierce instead found budgets and workflows unique to each program. CP13.[7]

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[4] Moreover, the Foundation had done nothing to implement recommendations from outside consultants to overhaul the organization's structure, despite having just written off $70 million in losses from a failed digital/IT project. CP11, 13.

[5] At trial, when asked whether she said anything like this to Pierce, Morgan waffled. RP1703-06.

[6] Within an hour of the announcement, a deputy director called and then emailed Morgan with urgent questions about how a CDO would fit into his work. Ex. 253. He assumed (and sought reassurance from Morgan) that there was no "secret plan" for the CDO to direct "all things digital," plainly unaware that was the whole idea, at least as it was promised to Pierce. CP13.

[7] At trial, the Foundation's blow-up organizational chart said it all: the trustees, the CEO, and the dozens of programs were all there in a constellation of rectangles; Morgan's

The next 18 months of Pierce's employment were explored fully at trial, with the relevant points captured in written findings.[8] In sum, the Foundation did not deliver the CDO role as promised, and Morgan thwarted Pierce's efforts along the way. CP14. Eventually, Morgan terminated Pierce because of the mismatch "between [his] talents and the needs of the Foundation." Ex.58.[9] Morgan's reason for terminating Pierce all but admits of a broken promise: "in retrospect," she says, the CDO concept was "ahead of its time." CP16.

Pierce suffered financial harm when he left Salesforce for a job that did not exist. *See* CP17; Ex.11. In addition to cash compensation, he left behind unvested Restricted Stock Units (RSUs or "shares") and Incentive Stock Options. CP17; RP917; ASRP16. At trial, the Foundation called no expert to testify on damages nor did it offer any alternate calculation of its own. Its cross-examination of Pierce on the subject was minimal. *Compare* RP2260-62 (cross-examination on damages), *with* RP935-1077, 1265-1446, 2245-2260) (other topics).[10]

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operations (where Pierce worked) were not. RP1150; 867; Ex.85. The CDO was, literally, not on the Foundation's radar. RP361.

[8] In its brief, as at trial, the Foundation criticizes Pierce's job performance, ignoring findings rejecting such charges, CP16, along with evidence that his innovative leadership style led to a high-functioning team, RP1872, 1903-04; Ex. 90.

[9] Her reasons were outlined in "talking points," including that she simply wanted "a senior technology person," and it would waste Pierce's talents to do "ditch digging work." *Id*.

[10] Had the Foundation never extended the CDO offer, Pierce would have stayed working at Salesforce for at least another eight months, through November 2015. CP17. By then, an additional 25,180 shares of stock would have vested and become Pierce's to hold or sell

On the morning of September 13, the trial court delivered a verdict in Pierce's favor. RP2387-2422. The trial judge noted the importance of enforcing promises to promote "efficient economic usage of resources" including "human resources." RP2415. She concluded her remarks with praise for the Foundation's work and regret that Pierce's talents had been squandered by one bad actor (Morgan). RP2421-22.

On appeal, Division One affirmed liability for breach of contract, struck Pierce's promissory estoppel claim, vacated the award, and remanded for a new trial on damages. *See* Pet for Rev., App. A (*Bill & Melinda Gates Found. v. Pierce*, 475 P.3d 1011 (2020)).

III. ANSWER TO PETITION FOR REVIEW

A. Division One Did Not Err in Affirming the Existence of an Enforceable Contract

First, the Foundation argues that its promise to Pierce for the CDO role is too vague to enforce. To get there, it reduces the promise to a pair of adjectives ("far-reaching" and "transformational") and suggests that Pierce didn't do enough to define the role it offered him.

Division One and the trial court properly rejected the Foundation's attempt to ignore the facts and circumstances surrounding formation of the parties' agreement. 475 P.3d at 1017 (citing *Hearst Commc'ns, Inc. v. Seattle*

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as he pleased; and 21,049 options would have become available to him to purchase. *Id.*; Ex.81.

Times Co., 154 Wn.2d 493, 503-504, 115 P.3d 262 (2005)); CP19 (¶98) (same). Far from "illusory,"[11] the Foundation's promise was the product of extensive discussion over the course of many months, including with Gates himself, and culminating in an offer letter, signed and returned by Pierce. 475 P.3d at 1017 (the "testimony, and hundreds of exhibits made clear" the existence of an enforceable promise). Indeed, while the significance of a CDO role may be lost on us lawyers, the same can't be said for the pioneer of the personal computer.

Division One was correct in reasoning that the world's largest philanthropic enterprise was free to create a cutting-edge role and bargain with a person uniquely qualified to fill it. *See* 475 P.3d at 1018; *accord Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 176, 94 P.3d 945 (2004) (parties enjoy freedom of contract). Such conclusion hardly triggers constitutional concerns; rather, courts routinely consider the nature and sophistication of the parties. *E.g.*, *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 314, 103 P.3d 753 (2004) (holding confidentiality provision unconscionable as applied to employee in contrast to similar provision brokered by two "sophisticated parties"); *Wagenblast v. Odessa Sch. Dist.*,

[11] To constitute an illusory promise as a matter of law, the promise must be "so indefinite" as to be meaningless or made optional by the contract's express terms. *See Goodpaster v. Pfizer, Inc.*, 35 Wn. App. 199, 203, 665 P.2d 414 (1983); *Interchange Assoc. v. Interchange, Inc.*, 16 Wn. App. 359, 360-61, 557 P.2d 357 (1976).

110 Wn.2d 845, 855, 758 P.2d 968 (1988) (reasoning that school district's "near-monopoly power" over student athletics gave it superior bargaining power in negotiating releases).

B. Division One Properly Rejected the Foundation's Unilateral Modification Argument

Next, the Foundation contends that the power to fire "at will" comes with it the right to unilaterally modify the CDO job, thus defeating any finding of breach. Division One properly rejected this argument too.

To begin, no modification occurred in *fact*. CP17 (¶81).[12] Thus, even if the Foundation had the theoretical power to unilaterally re-write the parties' deal midstream – an assertion Pierce strongly rejects – it went unexercised. Instead, the Foundation fired Pierce because it wasn't ready for a CDO after all; it wanted an IT manager. CP16.

In addition to being unsupported by the record, the Foundation's modification argument fails at *law*. Bilateral contracts, as here, require mutual assent to modify. *Jones v. Best*, 134 Wn.2d 232, 240, 950 P.2d 1 (1998); *Ebling v. Gove's Cove, Inc.*, 34 Wn. App. 495, 499, 663 P.2d 132 (1983).[13]

[12] The Foundation suggests that Pierce knew his job duties could be modified out of existence and that he accepted the change by continuing to work. Pet. at 14. This inference does not exist in the record and conflicts with findings that Pierce tried to hold up his end of the bargain even as Morgan frustrated his efforts. *See* CP15 (¶¶63, 66); RP2414.

[13] Division One correctly refers to the parties' agreement as a bilateral contract. 475 P.3d at 1018; *accord Flower v. T.R.A. Indus., Inc*., 127 Wn. App. 13, 27-28, 111 P.3d 1192 (2005) (bilateral contract formed where salesperson agreed to sell his house and move to Washington in exchange for secure employment and signing bonus).

The unchallenged findings make clear that the Foundation never proposed – and Pierce never agreed to – a change in position. Thus, the Foundation's string of cases involving *unilateral* deals, Pet. at 12-13, does not persuade.[14]

Yes, the at-will doctrine gives employers the right to fire with or without cause, but it does not give them carte blanche to rewrite bargained-for contractual terms that have nothing to do with hiring and firing. *See Ebling*, 34 Wn. App. at 499; *cf. Barrett v. Weyerhaeuser Co. Severance Pay Plan*, 40 Wn. App. 630, 633-34, 700 P.2d 338 (1985) (employee's at-will status did not preclude enforcement of severance plan); *Barclay v. Spokane*, 83 Wn.2d 698, 700, 521 P.2d 937 (1974) (terminated employees entitled to recover wages under contract).[15] Division One properly rejected the Foundation's attempt to use the at-will doctrine to vitiate a finding of breach.

[14] To illustrate: *White v. State*, concerns a secretary's whistleblower claim against her nursing home employer; the case involves no bargained-for agreement at all and the alleged adverse action (a job transfer) failed on the evidence. 131 Wn.2d 1, 18-20, 929 P.2d 396 (1997).

[15] Decisions across the nation are in accord. *Thompson v. Burr*, 490 P.2d 157, 159 (Or. 1971) (reasoning that employer's right to fire employee did not mean it could disavow contract for bonus). *Smith v. Neyer, Tiseo & Hindo, Ltd*., 1993 WL 57653, at *3 (E.D. Pa. Mar. 1, 1993) (reasoning that at-will status was irrelevant to contract claim for unpaid compensation); *Melville Capital, LLC v. Tennessee Commerce Bank*, 2011 WL 6888476, at *5 (M.D. Tenn. Dec. 29, 2011) (same); *Horwitz v. Sonnenschein Nath & Rosenthal LLP*, 926 N.E.2d 934, 945 (Ill. App. Ct. 2010) (same and noting that employee status was "irrelevant to allegations of a breach while plaintiff was employed.").

C. The Court Correctly Applied the Duty of Good Faith

The Foundation next suggests that, as a matter of law, employers are not required to act in good faith or deal fairly with employees even on matters that have nothing to do with at-will termination.

Division One rejected this argument and held that the Foundation was required to act in good faith in carrying out its promise to Pierce. 475 P.3d at 1018 (citing *Badgett v. Sec. State* Bank, 116 Wn.2d 563, 569, 807 P.2d 356 (1991) (holding that the duty of good faith exists "in every contract")); *accord Rekhter v. State, Dep't of Soc. & Health Servs.*, 180 Wn.2d 102, 117, 323 P.3d 1036 (2014) (reasoning that good faith limits the authority of a party to re-interpret contract terms). It correctly drew from the caselaw "a rather simple principle": while a decision to terminate at-will may escape the reach of good faith, the "other terms and conditions" do not. *Id.* at n.3 (citing and distinguishing *Thompson v. St. Regis*, 102 Wn.2d 219, 685 P.2d 1081 (1984)); *accord Scribner v. Worldcom, Inc.*, 249 F.3d 902, 910 (9th Cir. 2001) (applying duty of good faith in connection with employee's stock option contract).[16]

[16] The Foundation takes aim at Division One for not reaching the issue of "egregious employer abuse" and suggests, by implication, the court must not have found such abuse to exist. Pet. at 17 (citing *Trimble v. Washington State Univ*., 140 Wn.2d 88, 97, 993 P.2d 259 (2000) (noting, in dicta, that duty of good faith could apply in "egregious" exercise of at-will power)). To begin, such finding was already made by the trial court, CP20 (¶106), and could not have been second-guessed on appeal. Moreover, not reaching the issue is consistent with the "simple principle" announced in the preceding discussion.

In sum, the Court should deny the Foundation's petition to revisit liability under contract; however, for the reasons discussed below, the Court should accept review of Division One's decision on promissory estoppel and contract damages.

CROSS-PETITION

IV. CROSS-PETITIONER'S ISSUES FOR REVIEW

1. Pierce proved the elements of breach of contract and promissory estoppel at trial and the trial judge guarded against double recovery in awarding damages. Did Division One err in striking Pierce's promissory estoppel claim when it provides an alternate basis on which to affirm the judgment?

2. Pierce proved at trial that the Foundation (a) failed to deliver on its promise of the CDO role and (b) interfered with Pierce's efforts to perform it. The trier of fact awarded reliance damages to place Pierce in the same position as if the promise had not been made. Did Division One err in holding that such reliance damages for breach of contract are unavailable as a matter of law?

V. ARGUMENT

A. Division One Erred in Striking Pierce's Promissory Estoppel Claim

This Court should review Part II of Division One's decision in which it accepts the Foundation's argument that promissory estoppel "does not

apply" because a contract "governs." 475 P.3d at 1019. This contract is the very one the Foundation insists is unenforceable, modifiable, and immune to good faith. Pierce had every right and reason to pursue both contract and promissory estoppel theories at trial, the judge considered both, and then guarded against double recovery. CP22. This was entirely proper.

Rather than strike the claim, Division One should have affirmed the judgment on promissory estoppel grounds. Indeed, "the judgment of the trial court will not be reversed when it can be sustained on any theory." *Sprague v. Sumitomo Forestry Co., Ltd.*, 104 Wn.2d 751, 758, 709 P.2d 1200 (1985); *accord Palin v. Gen. Const. Co.*, 47 Wn.2d 246, 251, 287 P.2d 325 (1955). Such is the case here. Whatever the Foundation may argue about the availability of damages under *contract*, there is no question the trial judge had discretion to award damages at equity for Pierce's detrimental reliance. *See Crafts v. Pitts*, 161 Wn.2d 16, 23, 162 P.3d 382 (2007) ("Equity will not suffer a wrong to be without a remedy.") None of the Foundation's assignments of error below challenged such discretion and the record on Pierce's promissory estoppel claim supports the verdict. *See Sprague*, 104 Wn.2d at 758 (verdict affirmed despite jury using wrong method to calculate damages where another method sustained the result).

In striking the claim, Division One appears to have confused attempts to "recover" twice with alternate theories of liability. 475 P.3d at 1019. As a

factual matter, there was no double recovery here; the reliance damages were simply the same amount with respect to both claims (and the court did not award them twice). As a legal matter, contract and promissory estoppel claims are routinely brought and tried together. *Hellbaum v. Burwell & Morford*, 1 Wn. App. 694, 699-700, 463 P.3d 225 (1969) (upholding verdict on both breach and promissory estoppel grounds); *Flower*, 127 Wn. App. at 33 (remanding contract and promissory estoppel claims for trial); *Corbit v. J. I. Case Co.*, 70 Wn.2d 522, 538-40, 424 P.2d 290 (1967) (same as to one defendant); *Cweklinsky v. Mobil Chem. Co.*, 364 F.3d 68, 78 (2d Cir. 2004) (remanding contract and equity claims for trial with direction to avoid double recovery); *see also* Wash. Pattern Jury Instr. Civ. WPI 301A.01, Cmt. (7th ed.) ("Additional or alternative claims").[17]

Division One's earlier decision in *Spectrum Glass v. Pub. Util. Dist. No. 1 of Snohomish Cty.* (the sole case cited below) does not compel a contrary conclusion. There, the plaintiff attempted to use promissory estoppel to circumvent the express terms of a binding contract. 129 Wn. App. 303, 318, 119 P.3d 854 (2005). *Spectrum* cannot be read to preclude a plaintiff from pursuing an alternate theory at trial where the very existence of the

[17] Indeed, had the trial court struck Pierce's promissory estoppel claim prior to trial, such decision would have been reversible error. *See Cweklinsky*, 364 F.3d at 78.

contract is disputed.[18] While Washington courts may not have had occasion to make this point obvious, federal courts have. *E.g.*, *Air Atlanta Aero Eng'g Ltd. v. SP Aircraft Owner*, 637 F. Supp. 2d 185, 195-96 (S.D.N.Y. 2009) (promissory estoppel claim is appropriate when agreement's validity is disputed).

Permitting multiple, even inconsistent, theories to proceed to trial has a firm grounding in Washington practice. *See Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 547, 442 P.3d 608 (2019). Trial judges address concerns over double recovery on verdict forms, through remittitur, in post-trial proceedings as in *Rekhter*, or in a written order, as here. *E.g.*, *Conrad ex rel. Conrad v. Alderwood Manor*, 119 Wn. App. 275, 291, 78 P.3d 177 (2003); *Goodman v. Boeing Co.*, 127 Wn.2d 401, 405, 899 P.2d 1265 (1995); *see also Ngo v. Senior Operations, LLC*, No. C18-1313RSL, 2020 WL 2614737, at *7 (W.D. Wash. May 22, 2020) (rejecting "double recovery" as basis to strike claim when procedures available to prevent it).

Striking an alternate theory on appeal is improper when no double recovery occurs and when it provides a basis to sustain the judgment. The Court should accept review of Division One's decision on promissory estoppel.

[18] Such issue was simply not present in *Spectrum* where there was no doubt the plaintiff-glass company had a written, binding contract with the public utility on the very subject in dispute (utility rates). 129 Wn. App. at 314-15.

B. Division One Erred in Precluding Reliance Damages for Breach of Contract

The Court should also grant review of Part III of Division One's decision concerning damages. To reiterate, the trial court awarded reliance damages – i.e., the expenses Pierce incurred (primarily lost stock/options) in preparing to perform the role of CDO. Reliance damages aim to place the breached-upon party in "as good a position as he would have been in had the contract not been made." Restatement (Second) of Contracts §344 (1981).

Pierce did not seek, nor did the trial court award him, future lost wages stemming from his termination. Even so, Division One held that, as a matter of law, an at-will employee who proves breach cannot recover reliance damages. 475 P.3d at 1021. In support, it cites two cases: *Ford v. Trendwest* and *Bakotich v. Swanson*, but fails to recognize that reliance and expectation damages are two distinct concepts.[19] *Ford* does not once refer to "reliance damages" in name or in substance, *see generally* 146 Wn.2d 146, and *Bakotich* makes mention of the measure only to distinguish it (with emphasis), 91 Wn. App. at 315. Simply put, Division One cites two cases

[19] Unlike here, the plaintiff-employees in *Ford* and *Bakotich* sought future lost earnings (expectation damages) stemming from withdrawn job offers. *Ford*, 146 Wn.2d 146, 157, 43 P.3d 1223 (2002); *Bakotich* 91 Wn. App. 311, 316-317, 957 P.2d 275 (1998). Neither case concerns a prayer for reliance damages for breach of a bilateral contract *during* the parties' relationship (nor a finding of bad faith, nor a bargained-for C-suite level position). Division One's conclusion that Pierce was awarded "exactly" the same damages as in these cases, 475 P.3d at 1020, is incorrect and confounding.

having nothing to do with reliance damages to erase the trial court's award of reliance damages. It does not explain why, as a matter of law, reliance damages are unavailable to employees. And in cases closely resembling this one, courts conclude otherwise. *See Glasscock v. Wilson Constructors, Inc*., 627 F.2d 1065, 1066-69 (10th Cir. 1980) (affirming reliance damage award to plaintiff who lost profit-sharing points when he quit his job in reliance of defendant's promise); *Hunter v. Hayes*, 533 P.2d 952, 953-54 (Colo. App. 1975) (same as to lost wages from prior job).[20]

What is more, Washington courts regularly reject attempts to force the injured party to select one measure of damages over another. *See Rathke v. Roberts*, 33 Wn.2d 858, 880, 207 P.3d 716 (1949) (holding that trial judge erred in limiting plaintiff to contract price [expectation] damages, permitting plaintiff to prove the lost profits "he prayed for"); *Columbia Park Golf Course, Inc. v. City of Kennewick*, 160 Wn. App. 66, 84, 248 P.3d 1067 (2011) (declining to apply presumption that reliance damages were the only remedy for breach of contract to negotiate); *cf. No Ka Oi Corp. v. Nat'l 60 Minute Tune, Inc.*, 71 Wn. App. 844, 846, 863 P.2d 79 (1993) (declining rigid application of new business rule considering the unique marketplace).

[20] Such ruling also subjects employment contracts to a different set of rules from other contracts, contrary to *Kloss v. Honeywell*, 77 Wn. App. 294, 298, 890 P.2d 480 (1995) and *Flower*, 127 Wn. App. at 27.

For example, the defendant-City in *Columbia Park* sought to limit its exposure for breach of an option contract by arguing that the lesser measure of damages (there, reliance) was the only remedy available to the plaintiff. 160 Wn. App. at 84. (This is precisely the ploy the Foundation attempts here, arguing that Pierce should be forced to select a measure it contends results in $0.) Division Three rejected this argument, siding with "better reasoned authority" that upholds "usual contract principles" – namely, that the measure of damages available in a particular case will depend on the facts. 160 Wn. App. at 84-85; *accord Dunseath v. Hallauer*, 41 Wn.2d 895, 904, 253 P.2d 408 (1953); *see also* Restatement (Second) of Contracts §344 (1981) ("The interests described [expectation, restitution, reliance] are not inflexible limits on relief…").[21] As in these cases, Pierce should be permitted to select the measure suited to the facts of his case. Restatement (Second) of Contracts §349 (1981) (reliance damages stand as an "alternative" measure an injured party "has a right" to pursue); Wash. Pattern Instr., §303.05 (Notes on Use).

Next, on what appears to be an alternate basis for vacating Pierce's award, Division One finds reliance damages unavailable on the logic that Pierce would have lost his unvested stock and options anyway even had the Foundation performed as promised. 475 P.3d at 1020-21; *see also id.* at 1022-23 (suggesting Pierce can be awarded damages only *after* breach). This is

[21] The appropriate *measure* of damages – e.g., expectation, restitution, reliance, lost profits – should not be confused with the *amount* or valuation of such damages (a fact question), *Platts v. Arney*, 50 Wn.2d 42, 43, 309 P.2d 372 (1957) (selecting proper measure of damages is a question of law).

problematic for two reasons. First, the court misunderstands the very nature of reliance damages, which is to compensate a party for losses that occur *prior* to contract performance when the breaching party subsequently fails to perform. *Specialty Asphalt & Constr., LLC v. Lincoln Cty.*, 191 Wn.2d 182, 197, 421 P.3d 925 (2018). Next, in second-guessing whether Pierce proved a causal connection between the Foundation's broken promises and damages (a *fact* question), the court improperly substituted its judgment for that of the fact finder. *See Pardee v. Jolly*, 163 Wn.2d 558, 571, 182 P.3d 967 (2008). Here, the trial judge's (unchallenged) findings are well within the evidence and its damages award should not have been second-guessed on appeal. *See, e.g.*, *Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev., Inc.*, 160 Wn. App. 728, 253 P.3d 101 (2011) (affirming calculations based in part on round-number discounts, rejecting "mathematical certainty"); *Aecon Bldgs. Inc. v. Vandermolen Const. Co., Inc*., 155 Wn. App. 733, 743, 230 P.3d 594 (2009) (no abuse of discretion where defendant provides no alternative damage calculation at trial); *Scully v. US WATS, Inc*., 238 F.3d 497, 508, 512 (3d Cir. 2001) (affirming trial judge's valuation of cancelled stock options, which rejected both parties' calculations).[22]

To be sure, there are scant Washington decisions exploring a party's reliance interest in contract. Presumably, this is because losses incurred in

[22] Indeed, the evidence here as to the number of shares/options at issue is unchallenged and incontrovertible. Ex. 81. Determining what shares/options would have vested had Pierce continued at Salesforce through November 2015 was a matter of arithmetic. *See* CP17.

preparation to perform on a contract (reliance) are typically less than those resulting from the entire deal going south (expectation). Here, Pierce left a higher-paying job for less compensation because being the Foundation's CDO was a once-in-a-lifetime opportunity that would entail pecuniary and non-pecuniary benefits beyond his salary. Because valuing this lost opportunity is difficult to measure, Division One was correct in approaching Pierce's damages with flexibility. *See Reefer Queen Co. v. Marine Const. & Design Co.*, 73 Wn.2d 774, 781, 440 P.2d 448 (1968) ("where the fact of damage is firmly established, the wrongdoer is not free of liability because of difficulty in establishing the dollar amount"). However, it was unnecessary for Division One to remand for a new trial under a new test when Pierce's reliance damages provide a reasonable measure of his loss. *See Arcadian Phosphates, Inc. v. Arcadian Corp*., 884 F.2d 69, 74 (2d Cir. 1989) (reasoning that out-of-pocket reliance damages "are particularly appropriate where…the plaintiff cannot rationally calculate the benefit of the bargain.").

VI. CONCLUSION

For the reasons stated, Pierce respectfully requests that the Court deny the Foundation's petition for review of Division One's decision on contract liability, grant Pierce's request to review the court's decision on promissory estoppel and damages (Parts II and III), and reinstate the judgment.

DATED this 29th day of January, 2021.

Respectfully submitted,

SCHROETER GOLDMARK & BENDER

s/ Lindsay L. Halm

Lindsay L. Halm, WSBA #37141
Rebecca J. Roe, WSBA #7560

810 Third Avenue, Suite 500
Seattle, WA 98104
Telephone: (206) 622-8000
Fax: (206) 682-2305
Email: roe@sgb-law.com
Email: halm@sgb-law.com

Attorneys for Todd Pierce,
Respondent/Cross-Petitioner

SCHROETER GOLDMARK BENDER

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