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FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 SEP 16 PM 3:35

No. 67030-1-I

COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON

REYNOLD QUEDADO,

Plaintiff/Appellant,

v.

THE BOEING COMPANY,

Defendant/Respondent.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. Questions Of Fact Remain As To Whether Mr. Quedado Justifiably Relied Upon Promises Made In Boeing Policies.	1
1. Issue Of Fact As To Mr. Quedado’s Inducement To Remain On The Job.	1
2. Question Of Fact As To Mr. Quedado’s Awareness Of The Policies.	3
B. Whether The Boeing Code Of Conduct Created An Actual Or Implied Contract Involves Issues Of Fact That Cannot Be Resolved On Summary Judgment.	6
C. Boeing’s Attempt To Minimize The Legal And Operative Effect Of Its Code Of Conduct Does Not Support The Trial Court’s Summary Judgment Ruling; Whether The Code Of Conduct Created An Implied Contract With Mr. Quedado Is For The Trier Of Fact To Determine.	7
D. Summary Judgment Was Improper Because Boeing’s Disciplinary Policies Promised Specific Treatment In Specific Situations – Mr. Quedado Was Promised A Fair And Objective Investigation And The Imposition Of Any Corrective Action Had To Be Consistent With Other Similar Violations.	10
1. A Fair-Minded, Rational Person Would Not Have Been Convinced Mr. Quedado Violated Hiring Policies.	13
2. Based On The Mandate In BPI-2616, Review Of Comparable Corrective Action Is Relevant To Determine If Mr. Quedado Was Treated Consistently With Other Similarly Situated Employees.	17

TABLE OF AUTHORITIES

Cases

<i>Bering v. Share</i> , 106 Wn.2d 212, 721 P.2d 918 (1986).....	13
<i>Bulman v. Safeway, Inc.</i> , 144 Wn.2d 335, 27 P.3d 1172 (2001).....	3, 4, 5
<i>Evergreen Int’l Airlines, Inc. v. Boeing Co.</i> , U.S. Dist. Ct., Western Dist. of Washington, No. C10-0568-JCC.....	8, 9
<i>Gaglidari v. Denny’s Restaurants</i> , 117 Wn. 2d 426, 815 P.2d 1362 (1991).....	7
<i>Korslund v. DynCorp Tri-Cities Services, Inc.</i> , 121 Wn. App. 295, 88 P.3d 966 (2004).....	passim
<i>Korslund v. DynCorp. Tri-Cities Services, Inc.</i> , 156 Wn.2d 168, 125 P.3d 119 (2005).....	passim
<i>Sourakli v. Kyriakos, Inc.</i> , 144 Wn. App. 501, 182 P.3d 985 (2008).....	2
<i>Thompson v. St. Regis Paper Co.</i> , 102 Wn.2d 219, 685 P.2d 1081 (1984).....	passim

Rules

Federal Rule of Appellate Procedure 32.1	8
General Rule of Civil Procedure 14.1	8
Rule of Appellate Procedure 9.12	2

Appendices

<i>Evergreen Int’l Airlines, Inc. v. Boeing Co.</i> , U.S. Dist. Ct., Western Dist. of Washington, No. C10-0568-JCC, Order dated June 9, 2010	iii
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Petitioner Reynold Quedado submits this reply to the Brief of Respondent The Boeing Company (“Boeing Br.”).

A. **Questions Of Fact Remain As To Whether Mr. Quedado Justifiably Relied Upon Promises Made In Boeing Policies.**

Boeing asserts the trial court properly granted summary judgment on Mr. Quedado’s specific promises of specific treatment claim because the record fails to establish that he justifiably relied upon any promises made. Brief of Respondent (“Boeing Br.”) at 23-26. *Citing Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 230, 685 P.2d 1081 (1984), Boeing relies on a two-part test to establish justifiable reliance: (1) the employee was aware of the promises he or she seeks to enforce; and (2) the employee was induced thereby to remain on the job and not actively seek other employment. Boeing argues that summary judgment was properly entered because Mr. Quedado failed to prove either of these two steps. Boeing’s arguments fail.

1. **Issue Of Fact As To Mr. Quedado’s Inducement To Remain On The Job.**

Boeing asserts there is no evidence in the record that demonstrate the promises made by Boeing induced Mr. Quedado to remain in his job and not seek employment elsewhere. This argument fails for two reasons. First, Boeing has impermissibly raised this argument for the first time on appeal. In its summary judgment motion, Boeing argued only that Mr.

Quedado failed to prove the first prong of the reliance test, i.e. awareness of the content of the specific policies at issue. Boeing never raised the issue as to whether Mr. Quedado was induced by those promises to stay employed with Boeing. See CP 30-32 (Boeing's Motion for Summary Judgment). Because Boeing failed to bring this issue to the attention of the trial court, it cannot be raised for the first time on appeal. *Sourakli v. Kyriakos, Inc.*, 144 Wn. App. 501, 509, 182 P.3d 985 (2008); RAP 9.12.

Second, even if the issue had been raised with the trial court, there remain issues of fact as to Mr. Quedado's inducement to remain employed with Boeing in reliance upon the promises made. The two Washington Supreme Court cases cited by Boeing hold that whether an employee was induced to remain employed is an issue of fact not properly determined on summary judgment. In *Korlund v. DynCorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 125 P.3d 119 (2005) ("*Korlund I*"), devoid from the record was any evidence as to whether the claimant employees were induced to remain in their positions based on promises made by DynCorp.¹ All that the *Korlund* court stated on the issue was that to prove justifiable reliance, an employee must show that he or she was both aware of the specific promises allegedly breached and that those promises induced him

¹ In the preceding decision in *Korlund v. DynCorp Tri-Cities Services, Inc.*, 121 Wn. App. 295, 88 P.3d 966 (2004) ("*Korlund P*"), the Court of Appeals also noted the absence of evidence in the record on the question of inducement.

or her to remain on the job and not seek other employment. 156 Wn.2d at 190-191. As to whether the employee could establish justifiable reliance, the *Korslund* court held that summary judgment had been improperly entered on this issue:

Whether the plaintiff justifiably relied on promises of specific treatment in specific situations is a fact question appropriately left for the trial court's consideration on remand.

156 Wn.2d at 191.

The other Washington Supreme Court case relied upon by Boeing is *Bulman v. Safeway, Inc.*, 144 Wn.2d 335, 27 P.3d 1172 (2001). The *Bulman* court held only that the employee had failed to establish the first prong of the justifiable reliance test; there was no proof he had any degree of familiarity with the personnel policies upon which he relied. As explained by the *Bulman* court, the employee could not have been induced to remain employed by Safeway based on promises of which he had neither knowledge nor was aware. 144 Wn.2d at 349-350.

2. Question Of Fact As To Mr. Quedado's Awareness Of The Policies.

Boeing also argues that Mr. Quedado failed to establish an issue of fact as to the first prong of the reliance test, i.e. that he was aware of the specific promises contained in the Boeing policies at issue. This argument likewise is without merit. Boeing misrepresents the record, claiming that

Mr. Quedado described himself as only “generally aware of Boeing’s discipline policies.” Boeing Br. at 25. Mr. Quedado makes clear in his declaration that although he had not specifically read word-for-word the specific policies, he was specifically aware of the policies, their content, and how the policies were to be applied and executed. CP 196-199. As explained in his declaration, Mr. Quedado was specifically aware of the promises made in the policies from (1) his management training; (2) his actual management experience implementing the policies with subordinate employees; (3) his close interaction with Boeing human resource personnel while serving in a management position; and (4) his actual implementation of the policies during the investigation and discipline of at least two employees. CP 196-199.

In making its argument, Boeing also misstates the holdings and underlying records in *Korlund I*, *Korlund II*, and *Bulman*. In *Korlund I*, the employer pointed out that the evidence in the summary judgment record demonstrated that the employees were only “vaguely aware” of the personnel policies upon which they relied. 121 Wn. App. at 327. The plaintiffs in *Korlund I* did not present proof that they had actually read the policies, but did offer evidence that they were “aware” of the policies from a variety of sources. 121 Wn. App. at 327. Just like the employees

in *Koroslund I*, Mr. Quedado has presented evidence creating a factual issue on the first prong of the justifiable reliance test.

In *Bulman*, the employee failed to prove that before his termination he was actually aware of the content or purpose of the policies relied upon in support of his specific promise of specific treatment claim. The best evidence the employee could muster was some general awareness as to the existence of the policies. The *Bulman* court determined that this level of awareness was insufficient to prove justifiable reliance. However, the *Bulman* court also stated that proof of reliance does not require any actual or specific reading of a policy at issue:

We are *not* prescribing here a preferred means of becoming aware enough of employment policies to justifiably rely upon them, although certainly that awareness is not established, as the dissent would find, solely by the mere knowledge of the *existence* of a manual containing specific promises of specific treatment in specific circumstances.... We are simply affirming precedent stating that there could not “be an enforceable promise of specific treatment in specific circumstances because there could be no justifiable reliance where the employee did not know about the ‘promise’ until after he was discharged.

144 Wn. 2d at 349, n. 7 (Citations omitted; Emphasis by the Court).

Later in its brief, Boeing goes on to contradict itself concerning the evidence of Mr. Quedado’s justifiable reliance. In arguing that disclaimers in the policies at issue precluded Mr. Quedado’s reliance upon them, Boeing asserts that Mr. Quedado’s deposition testimony and his

declaration establish that he actually read versions of the policies. Boeing Br. at 27.

Boeing can't have it both ways – either it concedes or does not concede Mr. Quedado was sufficiently aware of the policies to justifiably rely upon their promises. In any event, questions of fact remain as to whether Mr. Quedado indeed justifiably relied upon the specific promises made by Boeing. Summary judgment on this issue was improper.

B. Whether The Boeing Code Of Conduct Created An Actual Or Implied Contract Involves Issues Of Fact That Cannot Be Resolved On Summary Judgment.

Boeing misconstrues Mr. Quedado's implied contract claim. As explained in Mr. Quedado's brief, the implied contract claim is based principally upon Boeing's Code of Conduct. Brief of Appellant ("Quedado Br.") at 35-40. As drafted by Boeing, the Code of Conduct incorporates by reference both PRO-1909 and BPI-2616. Contrary to Boeing's assertion, Mr. Quedado did establish in the record all the requisites of contract formation: offer, acceptance, and consideration. Quedado Br. at 35-36; *Thompson v. St. Regis Paper Co.*, 102 Wn. 2d 219, 228, 685 P.2d 1081 (1984).

Boeing nonetheless argues that as a matter of law, that there could be no *mutual assent* between Boeing and Quedado to form a contract because its *disciplinary policies* specifically disavowed the formation of

any contract. What Boeing omits to acknowledge is that *the Code of Conduct itself does not contain any disclaimer or other disavowal of the formation of a contract with each of its employees*. CP 220. As Boeing expressly communicates to all of its employees, the annual signing of the Code of Conduct and compliance with its express terms (including the Expected Behaviors incorporated by reference, *see* CP 260) remains a condition of employment. Quedado Br. at 6-7.

The effectiveness and operation of any policy disclaimers in the context of the Code of Conduct cannot be resolved on summary judgment. The absence of a disclaimer in the Code of Conduct in and of itself creates an issue of fact as to whether it effectively modified and nullified the disclaimers found in the personnel policies. *See Gaglidari v. Denny's Restaurants*, 117 Wn. 2d 426, 434-436, 815 P.2d 1362 (1991). Boeing's actions, intentions, and implementation of the policies could also nullify the disclaimers, presenting factual issues that were improperly resolved on summary judgment. Quedado Br. at 42.

C. **Boeing's Attempt To Minimize The Legal And Operative Effect Of Its Code Of Conduct Does Not Support The Trial Court's Summary Judgment Ruling; Whether The Code Of Conduct Created An Implied Contract With Mr. Quedado Is For the Trier Of Fact To Determine.**

Whether an implied contract is created between an employer and employee based on employment policies is a question of fact that should

not be decided by summary judgment. *Quedado Br.* at 37-38. That rule equally applies to the Boeing Code of Conduct.

Boeing attempts to portray the Code of Conduct as the equivalent of a mission statement, or nothing more than a compilation of “aspirational” language. *Boeing Br.* at 23. In support of this portrayal, Boeing relies solely upon an unpublished interlocutory order issued on a Rule 12(b)(6) motion by U.S. District Judge John C. Coughenour in *Evergreen Int’l Airlines, Inc. v. Boeing Co.*, U.S. Dist. Ct., Western Dist. of Washington, No. C10-0568-JCC. There are several obvious reasons why Judge Coughenour’s Order has no application here. First, the Order is an unpublished ruling by a court of original jurisdiction, without precedential value.² Second, the Order was issued on a Rule 12(b)(6) motion, i.e. determined solely upon the parties’ pleadings and in the absence of an evidentiary record. That is in stark contrast to the evidentiary record here, which includes testimony from Boeing 30(b)(6) witnesses (Thomas Hansen and Steve Miller), Mr. Quedado’s testimony, and relevant Boeing business records, among which is Boeing’s FAQ publication to employees that both interprets and explains the intent behind and function of the Code of Conduct. CP 313-319.

² Although of no value here, Boeing appears to have cited to Judge Coughenour’s Order under GR 14.1 and Federal Rule of Appellate Procedure 32.1. Boeing inadvertently omitted to attach a copy of the interlocutory order to its brief per GR 14.1(b), at least with the brief served on Mr. Quedado’s counsel. A copy is appended to this reply brief.

Finally, *Evergreen* was a contract dispute between Boeing and a subcontractor. The parties' subcontract did not specifically incorporate by reference the Code of Conduct. In fact, the subcontract made only an oblique reference to it. The actual terms of the Code of Conduct had to be hunted down through a web search. As Judge Coughenour noted in footnote 3 of his Order:

The Court observes that the Boeing Code of Conduct is not specifically *incorporated* into the Contract. Rather, the Contract simply directs the reader to a website where copies of Boeing's Code of Conduct can be found.

Order at p. 9, n. 3 (Appendix 1).

In *Evergreen*, the subcontractor never saw the Code of Conduct, never signed it, and never agreed to it as a condition of its contract relationship with Boeing. In contrast and as the facts establish here, Mr. Quedado was required to read and sign the Boeing Code of Conduct each and every year as a condition of his continued employment relationship.

Boeing's Code of Conduct is similar to the "Ethics: Standards of Business Ethics and Conduct" policy at issue in *Korlund I and II*. The employer, DynCorp distributed its ethics policy to employees each year, who were required to annually acknowledge receipt. The *Korlund* court held that it was at least a question of fact as to whether this ethics policy modified the employment at will relationship by making specific promises

of specific treatment, or otherwise creating an implied contract. *Korslund I*, 121 Wn. App. at 329-331. *See also, Korslund II*, 156 Wn.2d at 188-190.

D. Summary Judgment Was Improper Because Boeing's Disciplinary Policies Promised Specific Treatment In Specific Situations – Mr. Quedado Was Promised A Fair And Objective Investigation And The Imposition Of Any Corrective Action Had To Be Consistent With Other Similar Violations.

Twice in its brief, Boeing cites to the legal principle drawn from H. Wood's two centuries old treatise, *Master and Servant* (2d ed. 1886): at will employees can be discharged by their employers "...for no cause, good cause, or even cause morally wrong without fear of liability." Boeing Br. at 19, 31 (*citing Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 225-226, 685 P.2d 1081 (1984).

As the Washington Supreme Court noted in *Thompson*, employment law has evolved somewhat since the publication date of Wood's treatise. Among other changes assuring protection of employee interests, Washington courts have adopted the rule that where an employer announces a specific policy or practice, especially in light of the fact that it expects employees to abide by the same, the employer may not treat its promises as illusory. *Thompson*, 102 Wn.2d at 230. Hence the rule that employees can enforce an employer's promise of specific treatment in specific situations:

...If an employer, for whatever reason, creates an atmosphere of job security and fair treatment with promises *of specific treatment in specific situations* and an employee is induced thereby to remain on the job and not actively seek other employment, those promises are enforceable components of the employment relationship. We believe that by his or her unilateral objective manifestation of intent, the employer creates an expectation, and thus an obligation of treatment in accord with those written promises.

102 Wn.2d at 230 (Emphasis by the Court).

At issue in this proceeding are two policies unilaterally adopted by Boeing governing the investigation of personnel policy violations and the determination of appropriate corrective action if a policy violation is found to have occurred: BPI-2616 and PRO-1909. Boeing argues that the language found in these policies make them entirely discretionary, and that no specific promises as to how investigations would be conducted or corrective action imposed were otherwise made to Mr. Quedado or any other employee. Boeing's position is unsupportable, based on the plain and clear language found in the policies and the record before the trial court. Quedado Br. at 43-46. Whether the promises in BPI-2606 and PRO-1909 are specific enough to be relied upon and enforceable is a question of fact. Quedado Br. at 44.

Central to Mr. Quedado's claims is the impropriety of the investigation conducted by Boeing leading to its determination in his

CAM that he "...engaged in behaviors that violate PRO-6477 and the hiring process by using (his) position to influence the hiring and placement of friends and relatives." CP 263. Under the explicit terms of BPI-2616, any incident involving Mr. Quedado "must be evaluated on the facts after a thorough investigation of the circumstances in the specific case." CP 234. Any investigation of Mr. Quedado was subject to the following express requirements Boeing unilaterally chose to impose upon its designated investigators:

Insure that a thorough investigation has been conducted and all relevant facts and data have been gathered. Investigations include:

- ***Gathering facts, as opposed to opinions and hearsay;***
- Interviewing all material parties involved in documenting information received;
- ***Weighing the evidence appropriately*** and reviewing the employee's work and ECA (employee corrective action) history.

CP 234 (emphasis added).

It is too late for Boeing to treat as illusory the standards found in PRO-1909 and BPI-2616. *Thompson*, 102 Wn.2d at 230. Like it or not, in BPI-2616 Boeing effectively imposed upon itself a substantial evidence standard when conducting employee investigations: reliance only upon relevant facts; disregard of opinions or hearsay; and weighing the evidence appropriately. Substantial evidence exists if the record contains evidence

of a sufficient quantity to persuade a fair-minded, rational person of the truth of the premise or finding. *Bering v. Share*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986). Boeing's effective adoption of a substantial evidence standard is further overlaid by its mandate that its corrective action procedures "...must be applied consistently throughout the workplace." CP 233.

Boeing's brief focuses almost entirely upon justifying the disciplinary action taken against Mr. Quedado. Boeing devotes little discussion to the investigation and facts supporting the finding that Mr. Quedado violating hiring policies. That finding was the "condition precedent" to corrective action, i.e. his demotion. Boeing's brief mirrors the investigation of Mr. Quedado, giving short shrift to the relevant and material facts, and totally disregarding those facts that exonerated him. Mr. Quedado was specifically promised a fair investigation by PRO-1909 and BPI-2616, with any findings supported by substantial evidence. It was a question of fact precluding summary judgment as to whether that promise was actually fulfilled by Boeing.

1. **A Fair-Minded, Rational Person Would Not Have Been Convinced Mr. Quedado Violated Hiring Policies.**

To have made a finding that Mr. Quedado violated PRO-6477 and PRO-58, Boeing needed "substantial evidence" (i.e. relevant facts, not

opinions or hearsay, with the totality of the evidence appropriately weighed and considered) that his relatives were hired resulting from Mr. Quedado's "actual or perceived preferential treatment, improper influence, or other conflict." CP 113. A fair-minded, rational person would find that evidence was totally absent, both in the hiring of Mr. Quedado's second cousin, Reynoldo Joven, or the later internal transfer of his nephew, Allan Alonzo.

At pages 4-5 of its brief, Boeing describes the full extent of the "facts" it relied upon in determining Mr. Quedado "influenced" the hiring of Mr. Joven: *after* Boeing employees Geoffrey Fischer and Bill Knutson screened a pool of candidates for structured interviews (one of whom was Mr. Joven), Mr. Quedado made off hand comments to the effect that Mr. Joven "was a real good guy" and that they should "take a look" at him. Boeing Br. at 4-5. Unlike a fair-minded, rational person, Boeing ignores these critical facts:

- Mr. Knutson and Mr. Fischer independently of Mr. Quedado created an interview pool of over 30 candidates. Mr. Quedado's comment concerning Mr. Joven came only after the pool had been selected by Mr. Knutson and Mr. Fischer.
- Mr. Knutson and Mr. Fischer did not participate in the structured interview process. Mr. Quedado's comment to "take a look at Joven" to Mr. Knutson and Mr. Fischer at that juncture was meaningless. They were not the ones who would be "taking a look" at Mr. Joven. That task belonged to the interviewers, Tim Harlan and Kevin Tomer.

- The structured interviews were conducted by two different employees, Tim Harlan and Kevin Tomer. Neither Mr. Harlan nor Mr. Tomer spoke with Mr. Quedado concerning any of the candidates being interviewed, including Mr. Joven. There was no evidence that Mr. Quedado's "take a look" comment was shared by Mr. Fischer or Mr. Knutson with either Mr. Tomer or Mr. Harlan.
- Mr. Harlan and Mr. Tomer both concurred that Mr. Joven was an acceptable candidate, and made the offer to hire, "...with no encouragement from others or outside solicitation on Joven." *Id.*

Quedado Br. at 17-19.

Similarly concerning the placement of Mr. Quedado's nephew, Allan Alonzo, Boeing is superficial in its characterization of the evidence.

Boeing likewise ignores the relevant and substantial evidence affirming that Mr. Quedado had no part in the placement of Mr. Alonzo:

- Boeing's 30(b)(6) designee, Thomas Hansen, affirmed that Mr. Quedado had no influence in Boeing's decision to hire Allan Alonzo.
- Mr. Quedado's minimal involvement in the later placement of Mr. Alonzo was limited to responding to a solicitation for assistance recommended by Doug Ackerman at BCI Payloads and Structures in Everett, and then referring the solicitation to two individuals, Pete Masten (who reported to Mr. Quedado), and Geoffrey Tribou (another manager in a business unit entirely outside of Mr. Quedado's group). The decision to ultimately place Mr. Alonzo was not made until the first week of January, 2006. That decision was made solely by Boeing manager, Don Pennington. Mr. Quedado did not participate in that decision: he was in Florida at the time.

Quedado Br. at 19-24. Based on the evidence, a fair-minded, rational person would not have found Mr. Quedado's conduct to be in violation of Boeing's hiring policies.

Boeing also overstates and pejoratively describes Mr. Quedado's reluctance to disclose his relationship to Mr. Joven and Mr. Alonzo as "lying," and attempts to use this characterization as a substitute for the absence of facts supporting the finding that he violated hiring policies. Mr. Quedado provides an entirely different explanation of the facts regarding his disclosure of the family connection, leaving this a matter for the trier of fact to determine who to believe:

My first formal notice of the investigation was in a meeting with Mr. Totman and the Human Resource investigator, Jana Lackie, on May 11, 2006. During that meeting, I was asked questions by Ms. Lackie, concerning the hiring of Reynaldo Joven and Allan Alonzo. I specifically was asked if either of them were immediate family members of mine. I initially stated "no", a kneejerk reaction to protect them from any allegation of preferential treatment. But I knew there had been no preferential treatment, so in my very next breath I immediately corrected myself and acknowledged that Mr. Joven was a second cousin and that Mr. Alonzo was my nephew. In response to further questions from Ms. Lackie, I explained my lack of involvement in the hiring process for either Mr. Joven or Mr. Alonzo. Ms. Lackie did not seem that concerned about the hiring of Mr. Joven. Rather, her focus was on the placement of Mr. Alonzo after he had been hired by Mr. Hazari and BCA Payloads and Structures Engineering.

CP 211.

Boeing's willingness to rely upon unreliable information even years after issuance of Mr. Quedado's CAM is reflected by the Declaration of Pete Masten filed in support of its summary judgment motion. At page 7 of its brief, Boeing asserts that Mr. Quedado "inaccurately contends" that Mr. Masten "retracted" statements made to Boeing investigators in April 2006. What Mr. Quedado actually points out is that statements made by Mr. Masten in his declaration under penalty of perjury were retracted but a short time later during his deposition. CP 163-165; CP 436-443.

2. **Based On The Mandate In BPI-2616, Review Of Comparable Corrective Action Is Relevant To Determine If Mr. Quedado Was Treated Consistently With Other Similarly Situated Employees.**

BPI-2616 also mandates that investigations and corrective action be consistently applied throughout Boeing. On this point, Boeing identified in discovery only three (3) employees receiving corrective action for violating any hiring policy. Quedado Br. at 25-27. One of the three is Mr. Quedado. *Id.* In its brief, Boeing dismisses the comparison of these similar employee investigations. According to Boeing, the two other hiring policy violations leading to corrective action "...are not comparable anyway." Boeing Br. at 18. To the contrary, the violation of promises made to Mr. Quedado in BPI-2616 is further revealed by comparing both

the investigation of Mr. Quedado and its outcome with that of employee “EV”.³

EV, like Mr. Quedado was charged with violation of PRO-6477, the Boeing hiring policy prohibiting favoritism of friends and family in the hiring process. CP 348. Like Mr. Quedado, EV was a second level manager, having similar responsibilities for insuring that the hiring process in his organization was in compliance with Boeing policy. CP 349. Also like Mr. Quedado, EV was a long time Boeing employee, having 22 years with the company. CP 349. It is here where the similarities end.

According to EV’s CAM, his violation and subsequent corrective action were based on the following facts, none of which EV disputed:

- EV himself knowingly selected candidates who were unqualified for minimum job requirements both by education and related experience, and
- EV himself selected a candidate he knew was related to an individual in EV’s organization, and then subsequently personally telephoned and offered the candidate a job in further violation of Boeing policy.

CP 348. These are the facts leading to EV’s CAM:

- EV and another manager were involved in the down select process, identifying candidates for the structured interviews. The other manager selected ten candidates for interview; EV added five additional candidates, for a total of 15 candidates for the structured

³ At Boeing’s request, the names of the respondent employee “EV” and witnesses involved in this CAM were redacted, and replaced with initials only.

interview pool. Among the five added by EV were two individuals that he knew were related to Boeing employees in his organization. These candidates were plainly unqualified for the posting based on education and experience;

- From among the group of 15 interviewees, EV determined the five finalists for interviews. The five finalists included the two unqualified individuals EV also knew were related to employees in his organization;
- EV selected the finalist to be offered the position. The reason for hiring the individual was because of her relationship to a person in EV's organization. He then immediately telephoned the candidate to inform her that she would be offered the position.

CP 350-354.

In the EV case, the second level manager was directly involved in controlling and manipulating the hiring process, from down select, through the structured interviews, and the ultimate hiring decision. He got off with five days away from work unpaid. Mr. Quedado, on the other hand, had no involvement in the down select, structured interviews, or ultimate hiring decision for Mr. Joven or Mr. Alonzo. He was punished by demotion and five days off without pay. The trier of fact is entitled to determine if Mr. Quedado received the consistent application of BPI-2616 and PRO-1909 as promised by Boeing.

RESPECTFULLY SUBMITTED on September 16, 2011.

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By  _____
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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2011, I caused the foregoing document to be served on the following counsel of record, via hand delivery:

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THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

EVERGREEN INTERNATIONAL
AIRLINES, INC., an Oregon corporation,

Plaintiff,

v.

THE BOEING COMPANY, a Delaware
corporation,

Defendant.

Case No. C10-0568-JCC

ORDER

This matter comes before the Court on Defendant’s Motion to Dismiss (Dkt. No. 15), Plaintiff’s Opposition (Dkt. No. 20), and Defendant’s Reply (Dkt. No. 21). Having thoroughly considered the parties’ briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS IN PART and DENIES IN PART the motion for the reasons explained herein.

I. BACKGROUND

In 2005, the Boeing Company (“Boeing”) and Evergreen International Airlines, Inc. (“Evergreen”) signed a contract that called for Evergreen to operate, maintain, and provide ground handling for a particular aircraft, called the Large Cargo Freighter, that is part of Boeing’s “Dreamliner” airplane program. (Compl. ¶ 2 (Dkt. No. 1 at 2).) The contract was one of set duration, providing that

ORDER
PAGE - 1

1 The period of performance under this Contract may continue through an
2 extended period of twenty (20) years or the life of the 787 Program, whichever
is shorter, and is subject to the completion of an Initial Term and the exercise of
up to three (3) consecutive five (5) year options to renew as indicated below.

3 (Compl. ¶ 19 (Dkt. No. 1 at 6); Contract Ex. G ¶ 3.1 (Dkt. No. 15-4 at 7).) The Initial Term
4 was for five years, ending September 30, 2010. (See Contract Ex. G ¶ 3.2 (Dkt. No. 15-4 at 8).)

5 Although the contract could last for up to twenty years, it provided a number of ways in
6 which the parties could terminate their relationship before twenty years had elapsed. One of
7 those ways was through timely written notice: Boeing could cancel the contract at the end of
8 the Initial Period, so long as it gave Evergreen written notice six months in advance of
9 September 30, 2010. (Contract Ex. G ¶ 3.3(ii) (Dkt. No. 15-4 at 8).) Boeing did, in fact, follow
10 these procedures, and cancelled the contract at the end of the Initial Period. (Compl. ¶ 21 (Dkt.
11 No. 1 at 6–7).) Evergreen claims that Boeing cancelled the contract because it had been
12 secretly negotiating a deal with Atlas Air, Inc., one of Evergreen’s competitors, and that it
13 offered the Large Cargo Freighter contract to Atlas in order to offset its liability to Atlas in a
14 separate legal dispute. (Compl. ¶¶ 1, 31–33 (Dkt. No. 1 at 1, 10–11).) Although Evergreen
15 allows that the contract “provided that either party could cancel” it, Evergreen claims that
16 Boeing’s actions in terminating the contract, negotiating with Atlas, and replacing Evergreen
17 with Atlas amounted to a breach of both the common-law implied covenant of good faith and
18 fair dealing, and an express covenant in the contract that obligated Boeing to conduct its
19 business “fairly, impartially, and in an ethical and proper manner.” (Compl. ¶ 22, 59, 67 (Dkt.
20 No. 1 at 7, 19, 20); Contract Ex. G ¶ 25.4 (Dkt. No. 15-4 at 26).)

21 Plaintiff also claims that Boeing breached its contract, and violated Washington law, by
22 obtaining confidential and proprietary documents from Evergreen, and then giving those
23 documents to Atlas. The contract requires Boeing and Evergreen to “keep confidential and
24 protect from unauthorized use and disclosure” all confidential, proprietary, and/or trade secret
25 information. (Contract Ex. G ¶ 21 (Dkt. No. 15-4 at 21–22).) The parties provided that
26 proprietary materials should be used only in relation to performance of the contract, in various

ORDER
PAGE - 2

1 specified ways. (*Id.*) Boeing retained the right to “use, disclose, and reproduce” Evergreen’s
2 proprietary information “for the purposes of testing, certification, use, sale or support of any
3 goods” delivered under the contract or any agreement referencing it. (*Id.*)

4 Evergreen alleges that Boeing turned over engine reports to Atlas without its
5 knowledge or consent. (Compl. ¶ 49 (Dkt. No. 1 at 17).) Evergreen also alleges that Boeing has
6 requested a large amount of documents, data, and equipment pertaining to Evergreen’s
7 operation, maintenance, and ground handling of the Large Cargo Freighter program, in order to
8 provide those materials to Atlas during the transition. (*Id.* at ¶ 50.) Plaintiff claims that this
9 action was a violation of Boeing’s confidentiality obligations under the contract (*Id.* at ¶ 60–
10 61(Dkt. No. 1 at 19) and a violation of the Washington Uniform Trade Secrets Act (*Id.* at ¶ 70–
11 75 (Dkt. No. 1 at 21 –22)), and seeks declaratory judgment that there is no obligation under the
12 contract for it to help Boeing transition from it to Atlas (*Id.* at 82–83 (Dkt. No. 1 at 23)).

13 Boeing now moves to dismiss all of Evergreen’s claims against it.

14 **II. STANDARD OF REVIEW**

15 Under Federal Rule of Civil Procedure 12(b)(6), a cause of action may be dismissed for
16 failure to state a claim upon which relief can be granted. To avoid dismissal under this rule
17 upon a motion to dismiss, a plaintiff must allege “sufficient factual matter, accepted as true, to
18 state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, --- U.S. ---, 129 S.Ct.
19 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). For
20 purposes of the motion, the Court accepts as true all facts alleged in the complaint, and draws
21 all reasonable inferences in favor of the plaintiff. *al-Kidd v. Ashcroft*, 580 F.3d 949, 956 (9th
22 Cir. 2009).

23 Generally, the scope of review on a motion to dismiss for failure to state a claim is
24 limited to the contents of the complaint. See *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d
25 1136, 1141 n.5 (9th Cir. 2003). However, a court may consider evidence on which the
26 complaint “necessarily relies” if: (1) the complaint refers to the document; (2) the document is

1 central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached
2 to the 12(b)(6) motion. If it meets these three conditions, the Court may treat the document as
3 part of the complaint. *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006). No party contests
4 that the contract at issue in this case should be considered to be a document on which the
5 Complaint necessarily relies, and the Court therefore considers the contents of that
6 document—attached to Boeing's motion to dismiss (Dkt. No. 15-2, 15-3, 15-4)—to be true for
7 purposes of this motion. *See id.*

8 Washington contract law governs this dispute. (Contract Ex. D ¶ 24.13 (Dkt. No. 15-3
9 at 52).) When clear and unambiguous, the court enforces the contract language as written.
10 *Wheeler v. Rocky Mountain Fire & Cas. Co.*, 103 P.3d 240, 242 (Wash. Ct. App. 2004)
11 (citations omitted). Only if the contract is ambiguous should courts turn to extrinsic evidence
12 of the parties' intent. *See Sharbono v. Universal Underwriters Ins. Co.*, 161 P.3d 406, 413
13 (Wash. Ct. App. 2007) (citing cases). The Court may grant this motion to dismiss, therefore,
14 only where the contract terms are so clear and unambiguous that consideration of extrinsic
15 evidence is unnecessary. *See, e.g., Valley Fruit Orchards, LLC v. Global Horizons Manpower,*
16 *Inc.*, No. CV-09-3071-RMP, 2010 WL 1286367, at *1–2 (E.D. Wash. Mar. 26, 2010)
17 (discussing the general requirement that consideration of extrinsic evidence converts a 12(b)(6)
18 motion to a summary judgment motion).

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ORDER
PAGE - 4

1 **III. DISCUSSION**

2 **A. Boeing's Termination of the Contract After the Initial Term**

3 As discussed above, the contract specifically allowed Boeing to terminate after the
4 initial five-year term, so long as it provided written notice to Evergreen at least six months
5 before that initial term ended. (Contract Ex. G ¶¶ 3.1, 3.3(ii), 18 (Dkt. No. 15-4 at 8, 18).)¹
6 Those provisions do not require any condition, circumstance, or reason to free Boeing from its
7 obligations; they do not even require Boeing to explain itself. Instead, the contract provided
8 Boeing with the unconditional right not to renew the contract for another five years. It is
9 unambiguous. Despite Evergreen's expectations that the contract would continue for twenty
10 years in the absence of one of the other causes for termination, (*see* Compl. ¶ 19 (Dkt. No. 1 at
11 6)), and its "differering interpretation" of the length of the contract, the Court must interpret
12 this unequivocal cancellation provision to mean exactly what it says.

13 Evergreen acknowledges (in fits) that the contract "afforded Boeing the right not to
14 renew." (*Id.* at 9 (Dkt. No. 20).) Nonetheless, Evergreen alleges that Boeing's adherence to the
15 contract's literal terms was nonetheless a violation of its legally implied duties of good faith
16 and fair dealing and express contractual promises of fairness and impartiality.

17
18 ¹ The pertinent provisions provide:

19 3.1 Overview. The period of performance under this Contract may continue through
20 an extended period of twenty (20) years or the life of the 787 Program, whichever is shorter,
21 and is subject to the completion of an Initial Term and the exercise of up to three (3)
22 consecutive five (5) year options to renew as indicated below. . . . Boeing has the option, but
not the obligation, to exercise any of the options specified below.

23 3.3 Renewal. The Term of this Contract will automatically renew for an additional
24 five (5) years unless either:

25 (ii) written notice of cancellation is received by a Party in accordance with the
26 notification requirements set forth in Article 18 herein of this Contract. . . . For notice of
cancellation sent by Boeing, Boeing must give the Operator written notice at least (6) months
in advance of the termination date for the Initial Term . . .

ORDER
PAGE - 5

1 The facts alleged in the complaint are as follows. Evergreen first claims that Boeing
2 entered into confidential negotiations with Atlas, in which Boeing at some point determined
3 that Atlas would take over the contract from Evergreen. (*Id.* ¶ 34 (Dkt. No. 1 at 11–12).) In late
4 2009, Boeing employees then advised Evergreen’s leadership that it was “entering into a
5 period of contract review,” which it alleged was “standard procedure.” (*Id.* ¶ 35 (Dkt. No. 1 at
6 11).) Later that same day, Boeing informed Evergreen that it would be investigating other
7 options for assignment of the contract. (*Id.*) When Boeing and Evergreen executives met in
8 January 2010, Boeing’s representative admitted that there was a carrier (later revealed to be
9 Atlas) with a “sizeable assertion against Boeing for lost revenues,” and although he was
10 “completely satisfied with Evergreen’s performance,” the termination of the contract was non-
11 negotiable and the contract would go to that carrier as part of a settlement of that claim. (*Id.* ¶
12 37 (Dkt. No. 1 at 12–13).) Along the way, Boeing, while not entirely forthcoming about the
13 identity of the other carrier and saying that the switch would provide the “best value,”
14 maintained that the cause of the termination was not Evergreen’s performance. (*Id.* ¶ 39 (Dkt.
15 No. 1 at 13–14).) The press reported that the switch might have been motivated by Boeing’s
16 liability to Atlas, and a Boeing employee was quoted as saying that Evergreen had been a
17 “good operator” but that “other factors contributed to the decision.” (*Id.* ¶ 41–42 (Dkt. No. 1 at
18 14–15).) To bolster its claim, Evergreen points out that it does not believe that it was in
19 Boeing’s interest to replace Evergreen with Atlas. (*Id.* ¶ 45 (Dkt. No. 1 at 15).)

20 The common-law duty of good faith and fair dealing is implied in every contract in
21 Washington, but it has very specific boundaries. This duty obligates the parties to cooperate
22 with each other so that each may obtain the full benefit of performance. *Badgett v. Security*
23 *State Bank*, 807 P.2d 356, 360 (Wash. 1991). “The covenant of good faith applies when the
24 contract gives one party discretionary authority to determine a contract term; it does not apply
25 to *contradict* contract terms.” *Goodyear Tire & Rubber Co. v. Whiteman Tire Inc.*, 935 P.2d
26 628, 632 (Wash. Ct. App. 1997) (emphasis in original) (citing *Amoco Oil Co. v. Ervin*, 908

ORDER
PAGE - 6

1 P.2d 493, 498 (Colo. 1995)). Generally, the duty arises when a contract term imparts discretion
2 to one party; the exercise of that discretion must be in good faith. *See Goodyear*, 935 P.2d at
3 633 (contract term did not require discretion, and party had a right to exercise unconditional
4 right under the contract even after making assurances to the contrary). It does not, however,
5 impose or inject additional substantive terms into the contract, nor does it obligate a party to
6 accept a material change in contract terms. *Id.* It only requires that the parties perform in good
7 faith the obligations imposed by their agreement. *Id.* (citing cases). “As a matter of law, there
8 cannot be a breach of the duty of good faith when a party simply stands on its rights to require
9 performance of a contract according to its terms.” *Id.* (quoting *Badgett*, 807 P.2d at 368).

10 Casting the allegations in the light most favorable to Evergreen, Evergreen has not
11 stated a claim for breach of the implied duty of good faith and fair dealing. Evergreen, in
12 effect, has argued in its motion papers and its Complaint that the contract was automatically
13 renewable unless a certain set of enumerated causes occurred—force majeure, convenience,
14 breach, default, etcetera—and that giving the contract to someone else to settle a business
15 dispute was forbidden. (Compl. ¶ 19 (Dkt. No. 1 at 6); Opp. 8 (Dkt. No. 20).) But that is not
16 the contract that Evergreen signed. The contract contemplated termination for any reason after
17 the end of the initial five-year term, and the implied duty of good faith did not impose a
18 requirement that Boeing only terminate the contract for cause. Nor was there a requirement
19 that Boeing refrain from negotiating with Evergreen’s competitors, nor that the switch be
20 beneficial to Boeing’s shareholders. In sum, terminating the contract according to its express
21 terms, on the facts alleged here, does not give rise to a claim for a breach of the implied duty of
22 good faith and fair dealing. *See Badgett*, 807 P.2d at 368.

23 In addition, the Court observes that, contrary to Plaintiff’s assertions, Boeing did not
24 really “lie” to Evergreen. It is entirely possible that settlement of a large dispute was, in fact,
25 the “best value” for the contract that Boeing could obtain. (Compl. ¶ 39 (Dkt. No. 1 at 13–14).)
26 Boeing’s actions and representations in the press actually praised Evergreen for its work under

ORDER
PAGE - 7

1 the contract and acknowledged that the contract was terminated for “other factors,” ensuring
2 that Evergreen’s reputation was not impugned. (*Id.* ¶ 41–42 (Dkt. No. 1 at 14–15).) Put simply,
3 Boeing did not evade the spirit of the bargain by adhering to the contract’s terms here. *See*
4 *Scribner v. Worldcom, Inc.*, 249 F.3d 902, 910 (9th Cir. 2001).

5 The cases cited by Plaintiff are inapposite. Unlike in *Abbouds’ McDonald’s, LLC v.*
6 *McDonald’s Corp.*, No. C04-1895-MJP, 2005 U.S. Dist. LEXIS 30185, at *14 (W.D. Wash.
7 Feb. 15, 2005),² Plaintiff has not claimed that Boeing’s choice to terminate according to the
8 terms of the contract was illegal or discriminatory. It is not illegal to use a service contract to
9 settle a separate legal dispute. Unlike in *Columbia Park Golf Course, Inc. v. City of*
10 *Kennewick*, No. CV-07-5054-EFS, 2008 WL 4830820, at *9 (E.D. Wash. Nov. 5, 2008), there
11 is no issue of fact as to whether the parties had an enforceable exclusive dealing contract;
12 rather, the contract unambiguously allowed Boeing to terminate after the initial term of five
13 years. There is no claim stated that Boeing refused to consider Evergreen’s good performance
14 in deciding not to renew. *Cf. Metropolitan Park Dist. of Tacoma v. Griffith*, 723 P.2d 1093,
15 1100–01 (Wash. 1986). Nor did Boeing abuse its discretion by redefining any term in the
16 contract through discretionary review—rather, Boeing was not under an obligation to terminate
17 the contract for any particular reason, and thus had nothing to interpret. *Scribner*, 249 F.3d at
18 910–12. Plaintiff has failed to state a claim for breach of the implied duty of good faith.

19 In addition to this implied duty, Evergreen alleges that Boeing’s “favoritism and
20 improper motive” breached express provisions in the contract that obligated Boeing to
21 “conduct its business fairly, impartially, and in an ethical and proper manner.” (Compl. ¶ 44
22 (Dkt. No. 1 at 15); *see also* Contract Ex. G ¶ 25.4 (Dkt. No. 15-4 at 26).) Boeing’s Code of
23

24
25 ² The Court also notes that *Abbouds* was later dismissed in full on summary judgment.
26 All of the plaintiff’s good faith claims were eventually denied. *Abbouds’ McDonald’s, LLC v.*
McDonald’s Corp., C04-1895-MJP, 2005 WL 2656591, at *6–7 (W.D. Wash. Oct. 14, 2005).

1 Conduct, which is referenced in the contract, also provides that “integrity must underlie all
2 company relationships . . .” (Compl ¶ 22 (Dkt. No. 1 at 7).)³

3 Boeing argues that these provisions cannot bear the weight that Plaintiff puts on them,
4 and the Court agrees. First, the Court is doubtful that this aspirational language can give rise to
5 a claim for breach. Plaintiff relies heavily on *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081
6 (Wash. 1984) for the proposition that parties can contractually obligate themselves to
7 statements in company policy manuals, but Evergreen misses the point of that case. The
8 Washington Supreme Court was careful to emphasize that an employer’s enforceable
9 obligation would extend only to “promises of specific treatment in specific situations” in an
10 atmosphere of job security and fair treatment. 685 P.2d at 1088. “[P]olicy statements as written
11 may not amount to promises of specific treatment and merely be general statements of
12 company policy and, thus, not binding.” *Id.* The Court finds nothing specific in the quoted
13 sections that would give rise to an enforceable promise.

14 Additionally, for the reasons described above, the Court does not find that it was
15 improper for Boeing to stand on its contractual right to cancel the contract after the initial term
16 of five years, even if the reason for that cancellation was to give the contract to a third party to
17 whom Boeing had incurred separate liability. Boeing’s action, as alleged, did not demonstrate
18 favoritism or partiality. Such is the nature of business. Even if there were facts that would give
19 rise to a breach of this provision, Evergreen has not alleged those facts here. Plaintiff has failed
20 to state a claim for breach of Boeing’s policy provisions.

21 Boeing’s Motion to Dismiss is therefore GRANTED as to the claims for breach due to
22 the termination of the contract after the first five-year initial period lapsed.

23
24 ³ The Court observes that the Boeing Code of Conduct is not specifically *incorporated*
25 into the Contract. Rather, the Contract simply directs the reader to a website where copies of
26 Boeing’s Code of Conduct can be found. (Contract Ex. G ¶ 25.4 (Dkt. No. 15-4 at 26).) The
Court does not view the “integrity” provision to be part of the contract, but mentions it here to
give full shrift to the allegations in the Complaint. (*See also* Opp. 13 (Dkt. No. 20 at 15).)

1 **B. Confidentiality**

2 While Evergreen has not stated a claim for improper termination of the contract,
3 Evergreen has stated a claim for violation of the contract’s confidentiality provisions.

4 Boeing and Evergreen contracted to “keep confidential and protect from unauthorized
5 use and disclosure all (i) confidential, proprietary and/or trade secret information, [and] (ii)
6 tangible items and software containing, conveying or embodying such information . . .”
7 (Contract Ex. G ¶ 21 (Dkt. No. 15-4 at 21–22).) The parties agreed to use this information
8 “only in the performance of and for the purpose of this Contract and/or any other agreement
9 referencing this Contract.” (*Id.* at 22.) Boeing did, however, maintain the right to “use,
10 disclose, and reproduce [Evergreen’s] Proprietary Information and Materials . . . for the
11 purpose of testing, certification, use, sale or support of any goods delivered under this Contract
12 or any other agreement referencing this Contract.” (*Id.*) And Boeing contracted to maintain
13 ownership of a significant amount of work product—including technical data and inventions—
14 “first produced or resulting from performance” of the contract, and may use that data in any
15 manner it chooses. (Contract Ex. G. ¶ 20.2 (Dkt. No. 15-4 at 20–21).)

16 Whether Evergreen has stated a claim for breach of the confidentiality provision, then,
17 will turn on the contents of the information, and when it was created—namely, (1) whether the
18 allegedly proprietary information was “first produced or resulting from” performance of the
19 contract, and/or (2) if it was not, whether Boeing’s disclosure was for purposes of the contract
20 between it and Evergreen. Evergreen has alleged in the Complaint that Boeing requested
21 “engine reports” that were generated from a proprietary Evergreen system that predates the
22 LCF contract and is used by Evergreen to monitor engine performance of its entire fleet.
23 (Compl. ¶ 48 (Dkt. No. 1 at 16).) Evergreen also alleged that Boeing has requested that it turn
24 over volumes of documents, data, and equipment pertaining to Evergreen’s handling of the
25 Large Cargo Freighter program. (*Id.* at 50 (Dkt. No. 1 at 17).) Although many of these
26 documents may be Boeing’s property under the contract, the Court cannot make a

ORDER
PAGE - 10

1 determination as to whether *all* of this information is Boeing's in a vacuum, without reference
2 to the contents of the information (i.e. whether it reveals proprietary information about
3 Evergreen's preexisting systems) and Boeing's use of it (i.e. whether it was used for "testing,
4 certification, use, sale, or support"). Under the liberal pleading standards of Federal Rule of
5 Civil Procedure 8(a), Evergreen was not required to plead this information with such deep
6 particularity, even in light of *Twombly* and *Iqbal*.

7 Evergreen has also stated a claim under the Washington Trade Secrets Act for the same
8 conduct. In Washington, a trade secret is information that (1) derives independent value from
9 not being readily ascertainable by others, and (2) is the subject of efforts that are reasonable to
10 maintain its secrecy. WASH. REV. CODE § 19.108.010(4) (paraphrased). "While the definition
11 of a trade secret is a matter of law under the Uniform Trade Secrets Act, RCW 19.108.010(4),
12 the determination in a given case whether specific information is a trade secret is a factual
13 question." *Ed Nowogroski Ins., Inc. v. Rucker*, 971 P.2d 936, 941 (Wash. 1999). Boeing argues
14 that Plaintiffs' complaint does not adequately allege that the information Boeing disclosed—
15 and wishes to disclose—to Atlas is a trade secret, but, as above, there is no particularity
16 requirement with trade secret pleading. Evergreen made sufficient allegations in its Complaint
17 to survive a motion to dismiss. (*See* Compl. ¶¶ 48, 49, 51 (Dkt. No. 1 at 16–17) (alleging that
18 the materials were developed at great expense, disclose particular engines tracked in
19 Evergreen's system, etcetera).)

20 Boeing's motion is therefore DENIED as to the confidentiality and trade secret claims.

21 **C. Transition**

22 Finally, Boeing argues that Evergreen is not entitled to declaratory relief that the
23 contract "imposes no transition obligations" on Evergreen—namely, that Evergreen is not
24 required to turn over large quantities of documents and data pertaining to the Large Carrier
25 Freight program in order to aid Atlas in taking over its responsibilities. (Compl. ¶ 77–83 (Dkt.
26 No. 1 at 22–23). This issue is directly tied to which documents Evergreen is obligated to

ORDER
PAGE - 11

1 provide because they are Boeing's property under the contract, and which ones it is not. As
2 described above, this is not an issue that can be resolved on a motion to dismiss.

3 Boeing's motion is therefore DENIED as to the claims regarding Evergreen's
4 obligations in the transition to Atlas.

5 **IV. CONCLUSION**

6 For the foregoing reasons, Defendant's Motion to Dismiss (Dkt. No. 15) is GRANTED
7 IN PART and DENIED IN PART.

8 DATED this 9th day of June, 2010.

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12 John C. Coughenour
13 UNITED STATES DISTRICT JUDGE
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ORDER
PAGE - 12