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No. 69694-7

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

KIRSTEN WILEY, an individual,

Appellant,

v.

MICROSOFT CORPORATION, a Washington corporation,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

In this employment discrimination lawsuit, Appellant Kirsten Wiley challenges the lower court's dismissal of her case on summary judgment. The trial court properly granted summary judgment, and Microsoft respectfully submits that this Court should affirm that decision.

Following extensive discovery and an exhaustive hearing, the trial court granted summary judgment because Wiley, a Microsoft employee, failed to produce evidence establishing a genuine issue of material fact as to either (1) her gender discrimination claims or (2) her claim that Microsoft made and breached a specific and enforceable promise of specific treatment in specific circumstances.

On appeal, Wiley challenges the trial court's decision, but offers little more than overheated rhetoric, rather than the specific admissible evidence required by Civil Rule 56, to support her appeal. This is wholly insufficient. The trial court scoured the record for supporting evidence and, finding none, properly granted summary judgment. The trial court's decision should be affirmed.

II. RESTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in concluding that Wiley failed to make out a prima facie case of promotion discrimination where she never applied for a promotion or identified a less-qualified similarly situated male who was promoted rather than her?

2. Did the trial court err in concluding that Wiley failed to make out a prima facie case of pay discrimination where she failed to identify similarly situated male comparators who were doing substantially the same work as she and who were treated more favorably?

3. Did the trial court err in concluding that Wiley failed to make out a prima facie case of discrimination with respect to a meeting at which Microsoft provided her feedback about her performance and offered her coaching, where she did not show that any decision-maker was motivated by gender animus, or any adverse employment action, or that a similarly situated male employee had been treated more favorably?

4. Did the trial court err in concluding that Wiley failed to provide evidence that Microsoft's legitimate nondiscriminatory reasons for the performance-related actions she challenges were pretextual where her only evidence is her own subjective perception of her performance?

5. Did the trial court err in dismissing Wiley's *Thompson* claim where Wiley did not rely on any specific promise of specific treatment that Microsoft breached, and where she premises her claim on a handbook containing a prominent disclaimer that she repeatedly signed?

III. RESTATEMENT OF THE CASE

A. Wiley's Employment with Microsoft

Wiley joined Microsoft as an at-will employee in 1992 in an entry-level sales position.¹ CP 87, 90 (Wiley Dep. 29:4-18, 33:1-2). She had no technical degrees or experience (she holds a B.A. degree) and no public relations background, but gained some on-the-job experience. CP 88-89, 91-93 (Wiley Dep. 30:23-31:8, 38:17-22, 39:19-40:19). She was promoted many times over the years, most recently in 2007 to a Level 66 Marketing and Communications ("MarComm") Director position. Since

¹ Wiley is no longer a Microsoft employee, for reasons that are neither germane to this appeal nor in the record on appeal.

2003, she has reported to Kevin Schofield, the General Manager of US Microsoft Research ("MSR") Strategy Management. CP 93-95, 128 (Wiley Dep. 40:20-42:2, 96:3-10), 242-43. Since becoming a Level 66 MarComm Director, Wiley has never applied for a promotion to another position at Microsoft. CP 205-06 (Wiley Dep. 257:16-258:19).

B. Wiley's Compensation

Microsoft paid Wiley well. Her most recent annual compensation package included a base salary of \$168,412, a bonus of \$15,868, and an award of Microsoft stock that vested over time subject to certain conditions. CP 113-15 (Wiley Dep. 68:7-70:18), 236-41. She received a pay raise almost every year as well as a bonus and stock award. CP 113-16 (Wiley Dep. 68:5-70:18, 70:21-71:18).

C. Wiley's Role in Microsoft's Public Relations Organization

As MarComm Director, Wiley helped to shape MSR's external image. MSR is Microsoft's research organization and is one of the world's largest computer science research organizations. MSR advances the state of the art in various technologies and academic disciplines, such as contributions to Kinect for Xbox 360, developing an HIV vaccine and creating new education techniques for rural communities.

Wiley provided marketing and PR services to business partners within MSR as they defined marketing and PR plans and generated news

coverage and publicity to support their goals. CP 128-32 (Wiley Dep. 96:23-100:5). Wiley also directed some of the work of Microsoft's outside PR agency, Waggener Edstrom ("WagEd"). CP 135-37 (Wiley Dep. 103:21-104:11, 116:4-12). She managed WagEd's discussions with reporters on behalf of MSR, approving or denying requests for interviews and news stories and reviewing press releases to ensure consistency with Microsoft's research and marketing goals and objectives. CP 128-33, 135-36 (Wiley Dep. 96:23-100:5, 101:10-16, 103:21-104:11).

Given the nature of Wiley's position, she needed to communicate effectively and have effective working relationships with others, including those she supervised, her "clients" and coworkers within MSR, employees at WagEd, and business partners from other Microsoft organizations. CP 137-39 (Wiley Dep. 116:21-117:9, 119:9-15). Her performance reviews and other feedback in the last several years of her employment contained both positive comments and constructive criticism on the need to improve her communications with others. CP 140, 142-46, 186-87 (Wiley Dep. 122:10-17, 128:25-132:20, 204:14-205:2); CP 339 (Schofield Decl. ¶ 5); CP 591-94 (Second Schofield Decl. ¶¶ 4-11). Likewise, over the years—and well before the arrival of Frank Shaw, Corporate Vice President of Microsoft's Corporate Communications group, at Microsoft that Wiley blithely characterizes as a "game changer," App. Br. at 8,—multiple

individuals discussed amongst themselves or raised with Schofield their frustration or concern about Wiley's lack of responsiveness and her abrupt communications style. CP 594-96 (Second Schofield Decl. ¶¶ 13-14).

In 2009, Craig Mundie, Microsoft's Research and Strategy Officer, directed MSR to work more closely and collaboratively with Microsoft's Corporate Communications group with respect to marketing and PR efforts within MSR. CP 147-49 (Wiley Dep. 98:25-99:11, 141:20-142:4, 142:8-143:3). Corporate Communications is a distinct organization from MSR, and thus its employees do not report to MSR and MSR employees do not report to it. CP 128 (Wiley Dep. 96:3-22). Mundie's directive to MSR to work more closely with Corporate Communications was part of an initiative to ensure that Microsoft—across all of its businesses—had cohesive and coordinated external communications. The move to this more collaborative cross-organizational model was a struggle for Wiley.

The record reflects that—as had others before them—a number of individuals in Corporate Communications complained that Wiley was difficult to work with and that she failed to keep them apprised of news stories as they developed, did not respond timely to questions, and would not allow them to provide input. CP 141, 173-74, 180-81 (Wiley Dep. 123:17-25, 172:7-173:6, 194:10-195:17), 260-61. Wiley freely admits that she struggled to work effectively with Corporate Communications. CP

149-50 (Wiley Dep. 143:24-144:10). Given the greater emphasis on collaboration, effective communications and relationships were essential to Wiley's role. Nevertheless, her shortcomings caused her work relationships to deteriorate.

Ultimately, in spring 2010, Schofield told Wiley that a number of individuals had complained that she was difficult to work with, and he informed her that she was expected to improve her relationships with Corporate Communications personnel. CP 141, 175-77 (Wiley Dep. 123:17-25, 174:22-176:2), 339-40 (Schofield Decl. ¶ 6). But Wiley did not improve her working relationships, and business partners continued to express significant concerns to Schofield about Wiley with increasing urgency. CP 340 (Schofield Decl. ¶ 7). Ultimately, several managers met with Schofield to discuss their concerns. *Id.* (Schofield Decl. ¶¶ 7-8).

Thereafter, to collect full and accurate information, Schofield and Human Resources ("HR") representatives invited many of Wiley's business partners and subordinates (both women and men) to provide feedback, as Microsoft HR does in the ordinary course of its business when these kinds of issues arise. CP 340-41 (Schofield Decl. ¶¶ 9-10), 332-33 (Scovil Decl. ¶¶ 3-6). HR Director Sheryl Peterson led this effort and was assisted by HR Business Partners Kate Zimberg and Jason Scovil. *Id.* (Scovil Decl. ¶¶ 1, 4). HR interviewed no less than 17 individuals,

including from MSR, Corporate Communications, other business partners, WagEd, and Wiley's own direct reports. CP 333 (Scovil Decl. ¶ 5). Thus, most of those who gave feedback were not from Corporate Communications and did not report to Shaw, who was not interviewed. CP 333 (Scovil Decl. ¶ 6); *see also* CP 340-41 (Schofield Decl. ¶¶ 9-10).

D. Discussion of Feedback

On December 6, 2010, Schofield and Peterson met with Wiley to discuss with her the information received from the 17 individuals. CP 182, 184-85 (Wiley Dep. 200:7-17, 202:23-203:3). They summarized the feedback, which was consistent, specific, and overwhelmingly negative, on PowerPoint slides. CP 183-87 (Wiley Dep. 201:4-205:15), 264-66.

Wiley's colleagues critiqued her inability to build effective working relationships. She was "bullying," "blocking" and "scapegoating," and "people fear[ed]" her. CP 264-66. She had a "negative attitude," was "disrespectful of leaders . . . and other groups," was "defensive" when approached, and "confrontational and resistant when people reach[ed] out to her." CP 264. She had "zero credibility with partner teams." CP 265. Indeed, some felt that Wiley and her team "crippled" the business. *Id.*

Interviewees also expressed serious concerns about Wiley's leadership. Wiley had a "lack of engagement, availability and physical

presence" and "[did]n't want to do work or be accountable." CP 264.

Others noted that they "pick[ed] up a lot of work because of" Wiley "when it [was not] their job to do so." CP 265. At the same time, some found that Wiley was "[u]nwilling to delegate" and "micromanage[d]." *Id.*

Finally, interviewees critiqued Wiley's marketing skills. Wiley had a "lack of strategy, marketing skills, experience and thought leadership," did not "understand the basics of marketing and PR," and her "plans d[id]n't have goal[s] [or] strategies." *Id.* As a result of all of this, "[m]ost people d[id] not want to work with" Wiley. CP 264. Perhaps most alarming, Microsoft learned that many of Wiley's colleagues had been afraid to come forward affirmatively with their concerns about Wiley, because they feared she might retaliate against them for doing so. CP 340 (Schofield Decl. ¶ 8).

These concerns with Wiley's behavior were entirely consistent with concerns that Schofield had received and previously discussed with Wiley. CP 591-95 (Second Schofield Decl. ¶¶ 3-13). Peterson and Schofield reviewed this feedback in detail with Wiley and told her—not surprisingly—that these issues were serious and that she needed to address them immediately. CP 192 (Wiley Dep. 227:19-25), 270.

Schofield asked Wiley to work with him to develop a plan for addressing these issues, told her he would support her during the process,

and indicated thereafter that she was a "valuable member of the Microsoft team" and his goal was to help her "succeed over the long term at Microsoft." CP 270, 278-81, 341 (Schofield Decl. ¶¶ 11-12).

E. Wiley's Post-Feedback Complaint

To put it mildly, Wiley did not respond well to this constructive criticism. After this meeting, she promptly sent an e-mail expressing her disagreement. CP 188-89 (Wiley Dep. 218:16-219:18), 267. She also, for the first time, hypothesized that Shaw was targeting her for an incident that had occurred nine months earlier. CP 267.

That incident occurred in March 2010 when Wiley had declined a KUOW reporter's request to conduct an interview about a Microsoft technology. CP 152-55, 188-89 (Wiley Dep. 146:23-149:5, 218:16-219:11), 768-71. Wiley instead responded bluntly, in the terse fashion that she had already become known for (and counseled about), that "Microsoft doesn't comment on patents." CP 155 (Wiley Dep. 149:3-5), 768-71.

Shaw—and others—disagreed with Wiley's decision. CP 155 (Wiley Dep. 149:8-12). Indeed, Shaw was confused by her response because he had never seen or heard of a "no commenting on patents" policy. CP 764 (Shaw Decl. ¶ 10). His confusion was hardly surprising: no such policy exists at Microsoft. CP 342 (Schofield Decl. ¶ 15), 596-98

(Second Schofield Decl. ¶¶ 15-19), 764 (Shaw Decl. ¶ 10).² Wiley's response was particularly puzzling because the KUOW inquiry involved a patent that had been *issued*, and which had been a matter of public record for nearly two years at that point—it had even been the subject of a question on the quiz show Jeopardy! CP 596-98 (Second Schofield Decl. ¶¶ 15-19). Whatever confidentiality concerns Microsoft might have with pending patent *applications* had been made irrelevant with respect to the patent at issue, which had been published, literally, two *years* earlier.

In any event, Shaw thought—and indicated—that the story could be done, with Wiley or Schofield steering the reporter away from sensitive areas (if that issue even arose). CP 156-58 (Wiley Dep. 150:20-151:7, 151:15-152:4), 764 (Shaw Decl. ¶ 10), 768-71. Although Microsoft had *already* publicly commented on this technology, and Wiley admits that the decision whether to comment on a technology belongs to the relevant business owner or researcher—not her—Wiley and Schofield declined to pursue further discussions with the reporter. CP 131-33, 159-60 (Wiley

² Wiley's sole support for her claim that a "no commenting on patents" policy exists—which is critical to her claims—is left to a footnote. App. Br. at 9 n.7. She cites to Mundie's deposition testimony in which he outlines the entirely different proposition that when Microsoft is prosecuting a patent *application* that is thus *not yet public record*, Microsoft does not "talk about these applications in any detailed way." CP 1041 (Mundie Dep. 32:10-17); *see also* CP 369-70 (Second Hamilton Decl. ¶¶ 10-13) (explaining how the patent prosecution process works). Oddly, Wiley told Shaw that Microsoft did not comment on patents—not patent applications—and KUOW's inquiry was about a *published* patent in the public record. CP 369-70 (Second Hamilton Decl. ¶¶ 10-13).

Dep. 99:12-17, 100:15-101:1, 156:21-157:10), 768-71. Shaw expressed dismay, noting that he believed "we wildly overcomplicated this" because Wiley or Schofield "could have done a short interview that would have reflected well on Microsoft and MSR in our local community." CP 768. Shaw expressed his "complete confidence that for a nontechnical general audience, either [Wiley or Schofield] could have knocked this out of the park, while completely avoiding any potential worries about patent conversations." CP 157-58 (Wiley Dep. 151:15-152:4), 768.

In December 2010, nine full months later, Wiley suddenly claimed (with no evidentiary support, then or now) that Shaw had somehow orchestrated the negative feedback about her from 17 individuals to retaliate against her because, she surmised, he did not like being told "no" by a woman. CP 188-89 (Wiley Dep. 218:16-219:11), 267. When asked why she related Shaw's disagreement about a business decision (i.e., her handling of the KUOW inquiry) to her gender, Wiley responded that she felt Shaw was angry with her because she "stood up to him, and that it was because [she] was a woman." CP 190-91 (Wiley Dep. 222:4-223:9). She has no evidence that Shaw made any comments about her gender and nothing to support her suspicion of gender bias other than the fact that she is a woman. *Id.* No other evidence on this point exists.

F. Wiley Rejects Microsoft's Offer of Coaching and Support, and Goes on Leave, Never to Return

Following the December 2010 meeting, Schofield and Wiley prepared and discussed an action plan to address the concerns that had been raised. CP 191-95 (Wiley Dep. 223:10-20, 227:12-25, 233:3-235:11), 268-81. As a result, Microsoft offered Wiley an outside executive coach and mentor to assist her in relationship mending and building, CP 195, 198-99 (Wiley Dep. 235:13-17, 245:24-246:9), 283-89, which Schofield indicated he fully supported, CP 283-86. Wiley, however, declined the offer. CP 196-97 (Wiley Dep. 237:24-238:2).

Instead, on February 16, 2011, Wiley filed her Complaint alleging (a) gender discrimination ("and/or retaliation") and (b) a *Thompson* claim for an alleged breach of "[s]pecific [e]mployer [r]epresentations." See CP 1-9. Wiley commenced a medical leave in November 2011 and never returned to work. CP 200-01 (Wiley Dep. 251:22-252:12).

Wiley asserts that "no one can plausibly deny that her 20-plus year career at the company has been destroyed." App. Br. at 20. It is, however, undisputed that Microsoft did not suspend, demote, discipline, or fire Wiley. Rather, it simply presented her with feedback and tried to work with her to address the concerns raised. After she went on leave (one year later), Microsoft held her position open for seven months before it finally

was forced to backfill it, since it could not leave the position vacant indefinitely, and she had never provided a return-to-work date. CP 598 (Second Schofield Decl. ¶ 20).³

G. Facts Germane to Wiley's *Thompson* Claim

1. Wiley's Failure to Identify the "Promise" on Which She Supposedly Relied

In her Complaint, Wiley alleges that Microsoft "promises employees that if they refuse to violate corporate policy, the Company will not permit retaliation against them" and she relied on this "promise" to her detriment "when she refused to violate corporate policy by speaking to the media about patent applications, as Frank Shaw insisted." CP 6 (Compl. ¶ 3.22). Wiley did not identify the source of this "promise."

At her deposition, Wiley testified that the claim was premised *solely* on a promise that Microsoft would not "permit retaliation against [her] for following corporate policy." CP 7-8 (Compl. ¶ 5.2), 211-12 (Wiley Dep. 263:18-264:2). Wiley explained that she did not know where this "promise" was made but just "figured" it was somewhere in the Employee Handbook (the "Handbook"). CP 212 (Wiley Dep. 264:3-11).

³ Wiley claims that Microsoft has replaced her with a less-qualified male, Kevin Kutz, but offers no evidence regarding Kutz's qualifications for the position. And Kutz was hired by Schofield—who hired Wiley as well—roughly seven months *after* Wiley went on leave (and a *year and a half* after the December 2010 feedback session). CP 598 (Second Schofield Decl. ¶ 20). Contrary to Wiley's claim, App. Br. at 20, Kutz did not work in Corporate Communications with Shaw. *See* CP 598 (2nd Schofield Decl. ¶ 20).

In opposition to Microsoft's summary judgment motion, Wiley conceded that the Handbook contains no such statement, stating that "I do not find that specific promise in that Handbook." CP 1331 (Wiley Decl. ¶ 27).

After thus making a concession fatal to her claim, Wiley attempted to resuscitate it by submitting a "corrected declaration," after summary judgment briefing closed, stating that she had "now located the specific promise" in the Handbook. *See* CP 773 (Corrected Wiley Decl. ¶ 3). This "Corrected" Declaration was her fifth bite at the apple, as she had not identified the policy on which she supposedly relied in her Complaint, her deposition, the sworn corrections she then made to her deposition, or her opposition to summary judgment. *See* CP 779 (Third Hamilton Decl. ¶ 2).

Wiley's evasiveness about the supposed source of the alleged "specific promise" at issue continues on appeal. Wiley claims in her brief, without citation, that "[s]uch promises may be found in a number of [unidentified] written policies, guidelines, and training materials, as well as other, repeated, representations and practices." App. Br. at 24-25. She says that "[s]ome of the statements" are in the Handbook but others are not. *Id.* at 25. While Wiley does not clearly set out the specific policies on which her claim is based, in a footnote she references the Open Door and Whistleblowing Reporting Procedure and Guidelines in the Handbook and Microsoft's Standards of Business Conduct. *Id.* at 25 n.18.

2. Wiley Repeatedly Signed the Handbook's Disclaimer

The Handbook is available online on Microsoft's intranet. CP 793-94 (Third Scovil Decl. ¶ 2). Employees cannot access the Handbook without first reviewing and acknowledging a variety of disclaimers and notices expressly stating that the Handbook is not intended to make promises of specific treatment in specific situations or create a contract, does not alter the at-will employment relationship, and instead is simply a general information resource. These various disclaimers and notices are described in detail at CP 793-95 (Third Scovil Decl. ¶¶ 2-6).

Wiley readily admitted that she was familiar with the Handbook's prominent and straightforward disclaimers, which she had reviewed and acknowledged no fewer than *33 separate times* in the last 11 years of her employment. *See* CP 152 (Wiley Dep. at 146:18-22), 795, 798.

The Standards of Business Conduct also has a clear disclaimer. *See* CP 1342 ("The Standards . . . do not create an employment contract, and do not create any contractual rights . . . or create any express or implied promise for specific treatment in specific situations").

H. Procedural History

On October 19, 2012, the trial court heard oral argument on Microsoft's motion for summary judgment and issued its ruling from the bench. The trial court ruled in Microsoft's favor as to each of Wiley's

claims on multiple, independent grounds. In her opening brief, Wiley does not discuss the trial court's disposition of Microsoft's motion for summary judgment in any detail, leaving that task to Microsoft.

Despite what might be suggested from her brief, Wiley does not present claims for constructive discharge, sex discrimination on a disparate impact theory, or sexual harassment. The trial court considered each of the claims she *did* actually present and rejected each in turn.

With respect to Wiley's disparate treatment claim, given the dearth of direct evidence of discrimination, the trial court applied the *McDonnell Douglas* burden-shifting test further described below. RP 90:14-91:15. With regard to Wiley's prima facie case of discrimination, the trial court focused its inquiry on whether Wiley could demonstrate that she was treated less favorably than a similarly situated male. RP 92:19-93:3. The trial court found no evidence establishing this element. RP 94:4-20.

Although the trial court held that Wiley failed to make out a prima facie case, it nevertheless proceeded to apply the rest of the burden-shifting test. It held that Microsoft established a legitimate, nondiscriminatory reason for whatever purported adverse employment action Wiley posited—in main, the largely negative feedback it had received from 17 individuals about Wiley's performance, which was

consistent with negative feedback about Wiley evident in the record from as early as 2008. RP 94:21-95:21.

Finally, the trial court found that Wiley did not establish pretext. It found "no evidence" supporting Wiley's claim "the 17 people that were interviewed were simply a sham." RP 95:19-96:7. The record shows how diligently the trial court searched the record for evidence of pretext:

I have looked over—well, I've looked over every declaration and every deposition trying to cull out where there would be some evidence of motivation based on gender. And . . . I have not seen sufficient circumstantial evidence to support that.

RP 96:11-18.

The trial court also considered and dismissed Wiley's *Thompson* claim. It considered the whistleblowing policy that Wiley had belatedly pointed to as the source of the "specific promise," but noted that it pertained only to employee reports about violations of a company policy. RP 96:21-97:20. Wiley's claim was that there was a "specific company policy with regard to patents and that you will not comment on patents." RP 97:21-24. The trial court diligently searched the record to no avail to try to identify any evidence of a Microsoft policy precluding employees from commenting on patents. RP 97:21-98:21. It then noted that, even assuming such a policy existed, Wiley was never asked to comment on a patent. RP 98:22-99:21. Finally, the trial court held that even if such a

specific policy had existed, and that policy had been violated, Wiley could not demonstrate that she had reasonably relied on the policy to her detriment because the Handbook contains a "prominent" disclaimer that "was very clearly known" to Wiley. Thus, the trial court concluded:

I'm not sure there was a specific promise that was made in this case. I'm not sure that that specific promise applies to Ms. Wiley. And . . . there is a disclaimer in this case that would have relieved Microsoft regardless in terms of whether or not it would be considered to be an alteration of her at will employment pursuant to Thompson.

RP 100:3-9.

Finally, the trial court concluded that Wiley was not alleging a separate retaliation claim. RP 92:23-93:3. It was not clear below whether she intended to do so and, to the extent she did, she has now abandoned her retaliation claim on appeal. *See* App. Br. at 1 (Statement of Issues).

IV. ARGUMENT

A. Wiley's Burden on Summary Judgment

Summary judgment shall be granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Sheehan v. Cent. Puget Sound Reg'l Transit Auth.*, 155 Wn.2d 790, 797 (2005); CR 56(c). The opposing party must designate specific facts to show that there is a genuine issue for trial. *White v. State*, 131 Wn.2d 1, 9 (1997). If the nonmovant "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that

party will bear the burden of proof at trial, then the court should grant the motion." *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225 (1989) (internal quotation marks and citation omitted). This Court reviews de novo the trial court's order granting summary judgment.

B. The Trial Court Did Not Err in Dismissing Wiley's Sex Discrimination Claims on Summary Judgment

Wiley alleges three sex discrimination claims, each of which the trial court properly rejected: (1) Microsoft failed to promote her because of her gender; (2) Microsoft paid her less than similarly situated male employees; and (3) the feedback she received in 2010 regarding her workplace performance and behavior was prompted by gender animus.⁴

Wiley devotes page after page to a boilerplate articulation of legal authority, *see* App. Br. at 29-38, but then fails to *apply* that framework to the record evidence. She offered the same hodgepodge of sweeping arguments and speculative factual assertions below, which—as the trial court determined—fails to meet her burden on summary judgment.

1. Framework for Disparate Treatment Claims

To prove sex discrimination under the Washington Law Against Discrimination, Chapter 49.60 RCW ("WLAD"), an employee must show that her employer "treats some people less favorably than others because

⁴ As the trial court noted, it is not clear whether the "feedback" claim is intended as a separate discrimination claim, an adverse employment action, or evidence of pretext. RP 92:19-93:3. However styled, it fails as a matter of law.

of their" gender. *Shannon v. Pay 'N Save Corp.*, 104 Wn.2d 722, 726 (1985) (internal quotation marks and citation omitted).⁵ This requires either "direct evidence" of discrimination or, in the absence of such evidence, sufficient circumstantial evidence. *Fulton v. Dep't of Social & Health Servs.*, 169 Wn. App. 137, 147-48 (2012). Unadorned speculation or belief, no matter how fervently held, cannot defeat summary judgment.

Here, Wiley did not present any direct evidence of discrimination.⁶ Instead, based on her own subjective interpretations and beliefs, she surmises that discrimination was "*really*" the motivation behind the actions of which she complains. This is, by any measure, insufficient.

Where an employee relies on circumstantial evidence, courts use the burden-shifting analysis established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Domingo v. Boeing Emps.' Credit Union*, 124 Wn. App. 71, 77 (2004). A plaintiff has the initial burden of proving a prima facie case. *Id.* The employer must then rebut any inference of discrimination by presenting evidence that the alleged adverse action

⁵ WLAD "substantially parallel[s] Title VII," and so courts "may look to federal law for guidance." *Washington v. Boeing Co.*, 105 Wn. App. 1, 8 (2000).

⁶ Direct evidence typically includes "discriminatory statements by a decision maker." *Fulton*, 169 Wn. App. at 148 n.17; *see, e.g., Conklin v. City of Reno*, 433 F. App'x 528, 531 (9th Cir. 2011) (plaintiff referred to as a "cunt" and "dike"); *Dominguez-Curry v. Nev. Transp. Dep't*, 424 F.3d 1027, 1038 (9th Cir. 2005) (supervisor said that women should only be in subservient positions.); *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (9th Cir. 1998) (decision-maker "did not want to deal with another female"). *No such evidence exists here.*

occurred for a nondiscriminatory reason. *Id.* If an employer does so, the court grants summary judgment, unless the plaintiff shows that the proffered reason is a pretext for discrimination. *Id.*⁷

Wiley suggests that she must "produce very little evidence" to survive summary judgment and that summary judgment "should rarely be granted in employment discrimination cases." App. Br. at 31. But courts routinely dismiss such cases where, as here, the plaintiff cannot meet her burden under Civil Rule 56.⁸ It is "[o]nly when the parties meet their evidentiary burdens under all three prongs of the *McDonnell Douglas* burden-shifting scheme and the record contains evidence supporting *reasonable but competing* inferences of both discrimination and nondiscrimination [that] the superior court [should] send the case to a jury." *Fulton*, 169 Wn. App. at 161.

⁷ Relying on *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), Wiley appears to argue that the trial court should have denied summary judgment regardless of whether she made out a prima facie case because the jury could simply choose to disbelieve Microsoft's evidence. But *Reeves* was not a summary judgment case—it arose from the trial court's rejection of a *jury verdict* in the plaintiff's favor. *Id.* at 138. The case did not concern the "intermediate evidentiary burdens [that] shift back and forth," on summary judgment, as here, but instead the plaintiff's *ultimate* burden at trial of proving discrimination. *Id.* at 143. The *McDonnell Douglas* framework is not used at trial. *Sanghvi v. City of Claremont*, 328 F.3d 532, 540-41 (9th Cir. 2003). *Reeves* is not relevant here.

⁸ See, e.g., *Fulton*, 169 Wn. App. at 161 (insufficient evidence to allow the inference the employer engaged in intentional sex discrimination); *Hines v. Todd Pac. Shipyards Corp.*, 127 Wn. App. 356, 372 (2005) (same); *Domingo*, 124 Wn. App. at 81-82 (same); *Milligan v. Thompson*, 110 Wn. App. 628, 637-38 (2002) (same); *Kuyper v. State*, 79 Wn. App. 732, 738-39 (1995) (same); *Hatfield v. Columbia Fed. Sav. Bank*, 68 Wn. App. 817, 823-24 (1993) (same).

2. Wiley's Promotion Claim Fails as a Matter of Law

To establish a prima facie case for a promotion claim, a plaintiff must show "(1) she is a woman; (2) she applied and was qualified for an available promotion; (3) she was not offered the position; and (4) the promotion went to a male." *Barker v. Advanced Silicon Materials, LLC*, 131 Wn. App. 616, 623-24 (2006).

Wiley's promotion claim fails at the threshold. Her brief—and the record—will be searched in vain for any evidence (or even allegation) that Wiley (a) applied for *any* promotion, (b) was qualified for a promotion to an available open position, or (c) even, at the most basic level, that the promotion went to a male instead of to her. Indeed, Wiley has candidly conceded that she "did not apply for another new job," CP 205 (Wiley Dep. 257:18-22), and could not identify any open position she sought that would have resulted in a promotion, CP 204-06 (Wiley Dep. 256:21-257:15, 258:11-19), when she should have been promoted, CP 203-04 (Wiley Dep. 255:16-256:20), or who received the promotion instead of her, CP 205-06 (Wiley Dep. 257:18-258:19). These are fatal concessions.

On appeal, Wiley bases her claim solely on her assertion that Microsoft should have promoted her at some unspecified time because she had been identified as "high-potential" in 2008-09, which she falsely asserts means that Microsoft "expected that she would receive two (2)

promotions with the next three to five years" and "[t]hat is how it was supposed to work according to Microsoft's own [high potential] policies and practices." App. Br. at 46. These bald assertions are Wiley's only "evidence" on her promotion claim and they have no support in the record—indeed, they contradict it.

As the record reflects, Microsoft uses a "high potential" designation to identify employees with the *potential* to advance. But as even a cursory examination of the document on which Wiley purports to rely reveals, being designated as "high potential" is neither a promise nor a guarantee. CP 1024 ("[B]eing identified as a HiPo is not to be used as . . . [a]n automatic gateway or implied guarantee to a future promotion"); *see also* CP 379-82 (Scovil Dep. 77:21-80:19) ("There are no guarantees . . . that you would remain a high potential person year over year, no guarantees that you would be promoted to the next band.").

In short, Wiley failed to establish that she ever sought and was denied a promotion, was qualified for such a promotion, or that any such promotion went instead to a less-qualified male. In the absence of such evidence, her promotion claim fails. The trial court properly dismissed this claim on summary judgment and that decision should be affirmed.

3. The Pay Discrimination Claim Fails as a Matter of Law

Wiley fares no better with her pay discrimination claim as it, too, was properly dismissed. To establish a prima facie case for unequal pay using circumstantial evidence, a "plaintiff must show (1) she belongs to a protected class, (2) she was treated less favorably in the terms or conditions of her employment than a similarly situated, nonprotected employee, and (3) she and the nonprotected 'comparator' were doing substantially the same work." *Domingo*, 124 Wn. App. at 81.

Thus, to establish a prima face case of disparate treatment in pay, a plaintiff must identify "comparators" who are similarly situated "in all material respects." *Moran v. Selig*, 447 F.3d 748, 755 (9th Cir. 2006).⁹ It is highly relevant whether the alleged comparators were evaluated by the same standards and the same decision-makers. *Kirby v. City of Tacoma*, 124 Wn. App. 454, 475 n.16 (2004) ("[s]imilarly situated employees must have the same supervisor, [and] be subject to the same standards").

Wiley complains that the trial court required her to meet her burden of showing a similarly situated male was treated more favorably

⁹ *Vasquez v. Cnty. of L.A.*, 349 F.3d 634, 641 (9th Cir. 2003) ("individuals are similarly situated when they have similar jobs and display similar conduct"; alleged comparator with greater responsibility was not "similarly situated"); *see also Fox v. State Univ. of N.Y.*, 686 F. Supp. 2d 225, 232 (E.D.N.Y. 2010) (same: "In the context of unequal pay, important factors for the Court to consider with respect to putative comparators are 'specific work duties, education, seniority, and performance history'") (citations omitted).

than she with respect to compensation. App. Br. at 44-45. But it *was* Wiley's burden to produce such evidence. *Domingo*, 124 Wn. App. at 80 ("In any sex discrimination action . . . , the plaintiff must demonstrate that she or he was treated differently from persons of the opposite sex who are otherwise similarly situated."). This is not illicit "fact-finding," App. Br. at 44; rather, it is a basic application of the relevant law.¹⁰

The question on summary judgment is whether Wiley can meet her burden of *production* without either direct evidence or evidence that she was treated less favorably than a similarly situated male. She cannot. Myriad courts have granted summary judgment where a plaintiff failed to show a "similarly situated" employee was treated more favorably than she.¹¹ And in considering this issue, the trial court must—as it did here—

¹⁰ Relying on *Johnson v. Chevron U.S.A., Inc.*, Wiley claims that "comparator evidence" is not required to survive summary judgment. 159 Wn. App. 18 (2010). But in that case, the court considered whether a plaintiff alleging discrimination can meet her ultimate burden of *persuasion* to prove discrimination *at trial* in the absence of comparator evidence. *Id.* at 33.

¹¹ *See, e.g., Fulton*, 169 Wn. App. at 163 (employee was not similarly situated to the plaintiff where he had applied for a position previously and she had not); *Domingo*, 124 Wn. App. at 81 (same where the plaintiff testified that she believed she had been treated differently from others based on her sex but submitted no proof); *Kirby*, 124 Wn. App. at 475 (employee not similarly situated where the plaintiff pointed to alleged misconduct by other employee that had occurred years before the plaintiff's own misconduct, because "[e]ight and 15-year spans allow for numerous personnel and policy changes"); *see also Knight v. Brown*, 797 F. Supp. 2d 1107, 1127 (W.D. Wash. 2011), *aff'd*, 485 F. App'x 183 (9th Cir. 2012) (sergeant who worked day shift at courthouse not similarly situated to sergeant who worked night shift); *Ankeny v. Napolitano*, C09-1379-JCC, 2010 WL 5094687, at *2-3 (W.D. Wash. Dec. 7, 2010) (employees in other positions not similarly situated to plaintiff); *Bray v. King Cnty.*, C06-1059 JLR, 2007 WL 2138754, at *5 (W.D. Wash. July 22, 2007)

consider whether those employees are similarly situated in all *material* respects. That is the law.¹² And the record here fell far short of that mark.

Wiley also fails to show any error in the substance of the trial court's holding that she failed to meet her burden of establishing that the six men she identified as purported "comparators" are similarly situated to her. To get a good sense of why the trial court found that these men are *not* similarly situated to Wiley, this Court need look no further than Wiley's inexplicable attempts to compare herself to Dr. Daron Green, who (1) has a Ph.D. in theoretical chemistry and physics (compared to Wiley's liberal arts B.A.); (2) works in a different group, reporting to a different manager; (3) performs highly technical work based on his assessment of anticipated technological developments; and (4) is not a marketing professional. CP 334 (Scovil Decl. ¶ 8); CP 89 (Wiley Dep. 31:3-10).

(employee not similarly situated to the plaintiff "because he was a field-level employee that was not responsible for leading, directing or assigning work to other employees," as she was); *Jones v. U.S. Bank Nat'l Ass'n*, CS-03-414-FVS, 2006 WL 1635704, at *5 (E.D. Wash. June 1, 2006) (dismissing WLAD discrimination claim in the absence of evidence that employees were in fact similarly situated), *aff'd*, 194 F. App'x 281 (9th Cir. 2008); *Brooks v. City of Tacoma*, C05-5051RJB, 2006 WL 126276, at *5 (W.D. Wash. Jan. 17, 2006) (police officers were not similarly situated where one was on call and another was not); *Flateau v. S.C. Comm'n for Blind*, 50 F. Appx 653, 655 (4th Cir. 2002) (same, where the supervisor responsible for denying the plaintiff a salary increase was not involved in awarding a salary increase to alleged male comparators).

¹² Wiley's claim that the trial court required her to show "comparators" who were similarly situated "in all respects," App. Br. at 44, is belied by the record. *Compare* RP 94:12-15 (Wiley failed to demonstrate that her "comparators" were "similarly situated in all *material* respects") (emphasis added), *with Moran*, 447 F.3d at 755 (a plaintiff must identify "comparators" who are similarly situated "in all *material* respects") (emphasis added).

Wiley cannot show that Dr. Green or the other ostensible "comparators" were performing "substantially the same work" and were evaluated by the same managers using the same standards. *Domingo*, 124 Wn. App. at 81. Indeed, she barely attempted the task. As is true with Dr. Green, none of Wiley's supposed "comparators" is similar to her—*none* works in marketing; *all* hold very different jobs than Wiley with different responsibilities; and *all* have technical backgrounds and/or advanced degrees.¹³ Four of the six did not even report to the same manager as Wiley. The two that did have fundamentally different jobs. Both are Level 67 employees (one level above Wiley), both have B.S. degrees (as required for their roles and unlike Wiley), and have technical positions focusing on technology itself rather than, as with Wiley, marketing or publicizing technology. CP 342-43 (Schofield Decl. ¶¶ 17-18).

As a result, even Wiley admitted that most of the purported comparators held jobs very different from hers. *See* CP 99, 101, 103-04, 106-07 (Wiley Decl. 49:4-15, 51:5-22, 53:11-54:17, 56:15-20, 57:5-7). In the face of these standards, Wiley offers nothing but her own bare testimony that she "interfaced" with these men during the course of her job and that she and they had to engage in "ongoing collaboration" to do their jobs. CP 1330 (Wiley Decl. ¶ 23). This is patently insufficient.

¹³ *See* CP 333-35 (Scovil Decl. ¶¶ 7-11), 342-43 (Schofield Decl. ¶¶ 17-18); *see also* CP 57-58 (chart summarizing positions of "comparators").

Microsoft is unaware of any court in any jurisdiction that has ever held that two employees are "similarly situated" on the basis of such an "interface" argument—and Wiley certainly has cited no such authority.

Finally, even if these men had been similarly situated to Wiley—which they are not—the trial court further held that Wiley had failed to establish that she was treated less favorably than these "comparators" with respect to her compensation. RP 94:18-20. It was Wiley's burden to provide sufficient evidence to allow a reasonable fact-finder to examine the different roles performed by Wiley and her comparators and their employment histories and respective seniorities and conclude that discrimination was the reason for any material differentials in pay. Her inability to do so is her own failure—not that of the trial court.¹⁴

The trial court properly dismissed the pay discrimination claim.

4. Wiley's "Feedback" Claim Fails

Finally, Wiley's gender discrimination claim fails to the extent she asserts that the widespread and consistent criticism provided in late 2010

¹⁴ Wiley complains, App. Br. at 44 n.34, that the trial court expressed uncertainty about the significance of terminology used in Microsoft's performance review system. But the difficulty the trial court faced is that the record is silent in this respect, a point illustrated by the answer of Wiley's counsel to the trial court's questions: Rather than pointing to *evidence* to answer the court's questions, counsel instead repeatedly offered her *opinion*: "Huge . . . It's huge in bonuses, it's huge in stock awards, and it's huge in terms of how you're reviewed in the future and whether you're going to get promoted or not. It's huge." RP 71:10-21. This is not evidence.

by 17 of Wiley's business partners and supervisees (women and men) was motivated by her gender.

a. Wiley presented no evidence that anyone involved in gathering, providing, or presenting the feedback was motivated by discrimination

Nothing suggests that the information provided was motivated by Wiley's gender (which is *the* essential element of her discrimination claim). Seventeen of her business partners, direct reports and others were interviewed. Many were women. Nothing even remotely suggests that this was anything *other than* a good faith effort to collect feedback with respect to Wiley and her performance and workplace behavior.

It is undisputed that Wiley presented no evidence that any person involved in the gathering of feedback had any gender bias, including Schofield—who was responsible for reviewing her performance and making decisions concerning her pay and promotions in the first instance. CP 112, 117 (Wiley Dep. 66:5-13, 74:9-18). Nor does Wiley provide such evidence with respect to the three HR employees who were responsible for soliciting, gathering, and presenting feedback about her (which would, in any event, have been surprising since two of the three HR representatives involved are female). She does not allege otherwise on appeal.

b. Wiley has no evidence that anyone gave negative feedback about her because of her gender

Thus, Wiley is left to argue that—although she has no evidence that anyone involved in the feedback process was motivated by gender bias—somehow Shaw orchestrated the whole process. Even this effort collapses at the outset, because Wiley fails to adduce any evidence of gender discrimination on Shaw's part (or anyone else's for that matter). *See, e.g.*, CP 80-81 (Wiley Dep. 11:11-12:24). She just points to a single incident in which she and Shaw disagreed about how to handle a media inquiry and speculates that his disagreement was prompted by her gender. Her "evidence" is that Shaw is a (1) man and (2) was once in the Marines. App. Br. at 8-9. This is not evidence of discrimination and is absurd.¹⁵

Wiley's repeated characterizations of Shaw's so-called Corporate Communications "ol' boys" club also fall short of showing discriminatory motive. As Wiley confirmed, Shaw heard that phrase used to describe the group before he arrived because "there were a set of people who had been there a long time." CP 1075 (Shaw Dep. 38:16-22), 1330 (Wiley Decl.

¹⁵ *Guthrey v. State*, 63 Cal. App. 4th 1108, 1118 (1998) (The "mere fact [a manager] is a female and plaintiff a male does not give rise to the inference that her alleged aggressive conduct was motivated by a desire to discriminate on the basis of gender."); *see also* CP 761-63 (Shaw Decl. ¶¶ 2-9) (describing his history of military service and the various women he has reported to, supervised, or mentored); *cf. Hawthorne v. Mercer Cnty. Children & Youth Servs.*, CA 05-1635, 2007 WL 2254565, at *9 (W.D. Pa. Aug. 6, 2007) (rejecting speculative claim that supervisors "were hostile toward [plaintiff] and . . . males in general").

¶ 20). It was a reference to tenure, not gender—the group was headed by a *woman* at the time of the reference. CP 763 (Shaw Decl. ¶ 8).¹⁶

Wiley's claim that Tom Pilla, a communications manager, told her that certain unnamed persons in Corporate Communications (which is, again, an organization entirely separate from MSR) had referred to her as "Mrs. No" and "bitch" does not aid her claim either. App. Br. at 4-5. Even if true and admissible on summary judgment (which it is not),¹⁷ however, this would not establish a discriminatory animus motivating the widespread criticism of her workplace performance and behavior from multiple individuals (male and female) working in entirely separate groups. "Mrs. No" expresses displeasure with Wiley's approach to problem solving but it is not a comment on her *gender*. Wiley does not contend that Pilla himself called her a "bitch," only that he reported that *unidentified others* in Corporate Communications used that term. Wiley has no evidence regarding who those purported individuals were, their gender, what they said, when, or in what context and whether any of them

¹⁶ See also *Steinhauer v. DeGolier*, 359 F.3d 481, 487 (7th Cir. 2004) (use of phrase "good ol' boys' club" . . . in no way creates a reasonable inference that sex motivated an employment decision"); *DeLoach v. Infinity Broad.*, 164 F.3d 398, 403 (7th Cir. 1999) (reference to old boys' network does not indicate age animus, but rather is a comment about those in power).

¹⁷ Pilla's out-of-court statement is offered for the truth of the matter asserted—that other individuals said certain things about Wiley. ER 802; *Dunlap v. Wayne*, 105 Wn.2d 529, 535 (1986) ("A [trial] court cannot consider inadmissible evidence when ruling on a motion for summary judgment.").

played any role in providing feedback on her performance or workplace conduct or any decisions relating to her employment. At most, this is a stray remark that does not evince discrimination.¹⁸

Finally, the instant message exchange between Pilla and his best friend that Wiley refers to so often is, again, at most a "stray remark," and her near-total reliance on it says more about the dearth of evidence to support her claims than its probative value. The exchange (1) took place over a year *after* the events giving rise to this lawsuit; (2) does not mention or even indirectly refer to Wiley; and (3) instead, contains gossip between personal friends about a New Year's Eve social event and "people who have nothing to do with Microsoft." CP 1176 (Pilla Dep. 129:8-25), 1279-85. This exchange has nothing to do with Wiley or her claims. It is irrelevant and shows Wiley is grasping at straws.

But even if Wiley did have some evidence that Shaw harbored discriminatory animus toward her, he was not interviewed as part of the

¹⁸ *Hawthorne*, 2007 WL 2254565, at *9 ("Stray remarks by non-decisionmakers or by decisionmakers unrelated to the decision process are rarely given great weight") (internal quotation marks and citations omitted); *Miller v. Clatsop Care Ctr. Health Dist.*, CV 03-1719-HU, 2004 WL 1803327, at *7 (D. Or. Aug. 11, 2004) ("[S]tray remarks which vaguely reference age" and that are not made by any employee involved in the adverse action do not evince age discrimination); *Roberts v. Swift & Co.*, 198 F. Supp. 2d 1049, 1064 (S.D. Iowa 2002) (dismissing as "stray remarks" racial slurs that "were not made by persons involved in the decisionmaking process and [that] ha[d] no link to the adverse employment decision"); *Jenkins-Allen v. Powell Duffryn Terminals, Inc.*, 18 F. Supp. 2d 885, 890 (N.D. Ill. 1998) (same, where the plaintiff did not identify when slur was made or whether it was connected to the adverse action).

feedback process and there is no evidence whatsoever to suggest that he was somehow responsible for the feedback that 17 others provided. Indeed, having spent most of her brief disparaging Shaw and Pilla, she abruptly reverses course entirely and complains that "most of all the really damaging statements" received during the feedback process came from two *women*—Heather Mitchell and Ann Paradiso. App. Br. at 16-17. She offers *no* evidence that Paradiso or Mitchell (or anyone else) gave the feedback they did or that HR or Schofield responded to that feedback as they did because Wiley is a woman. Wiley must but fails to offer record evidence, and her subjective beliefs and conjecture are legally irrelevant.

Moreover, Wiley cannot demonstrate that Microsoft considered and resolved the negative feedback it undisputedly received about her any differently than it would have had she been male. Indeed, she *agrees* that it is "good management practice" to address complaints about managers like her. CP 416 (Wiley Dep. 267:9-16).

c. Even if Wiley had evidence of gender animus, providing feedback is not an adverse employment action

Finally, even if Wiley could present proof the 2010 feedback was prompted by a discriminatory animus, that feedback did not constitute an adverse employment action, as required to establish a *prima facie* case.

Kirby, 124 Wn. App. at 468 (disability discrimination).¹⁹ Wiley may feel she was the subject of "unfair criticism," CP 3 (Compl. ¶ 3.11), but she cannot show that this criticism changed the terms or conditions of her employment, *Hua v. Boeing Corp.*, No. C08-0010RSL, 2009 WL 1044587, at *2 (W.D. Wash. Apr. 17, 2009) (supervisor's "criticisms of plaintiff's work . . . did not 'materially affect the compensation, terms, conditions, or privileges of employment' and did not, therefore, constitute [an] adverse employment action[']") (quoting *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1089 (9th Cir. 2008)). Wiley remained in her position for almost a year after receiving the feedback before commencing leave on her doctor's direction. Microsoft did not suspend, demote, discipline, or fire her due to the feedback.²⁰ Courts routinely reject the claim that fear of

¹⁹ See also *Chuang v. Univ. of Cal. Davis, Bd. of Trs.*, 225 F.3d 1115, 1126 (9th Cir. 2000) (no adverse employment action where challenged action "did not materially affect the compensation, terms, conditions, or privileges of the [plaintiff's] employment").

²⁰ Microsoft left Wiley's position open for seven months while she was on leave, waiting for her to return to work. When she did not—and could provide no indication of when she would—Microsoft was forced to bring in another PR person to fill the position. CP 598 (Second Schofield Decl. ¶ 20). Wiley claims Microsoft replaced her with a less-qualified male, Kevin Kutz. App. Br. at 20 n.14. But she remained employed and offers no evidence regarding Kutz's qualifications. And Kutz was hired by Schofield—who hired Wiley as well. *Griffith v. Schnitzer Steel Indus., Inc.*, 128 Wn. App. 453, 438 (2005) (where the same decision-maker who hired plaintiff is accused of taking an adverse employment action against her, there is a "strong inference" there is no discrimination); see also CP 598 (Second Schofield Decl. ¶ 20).

a *future* adverse employment action is a *present* adverse employment action that can sustain a claim of sex discrimination.²¹

On appeal, Wiley attempts to articulate a new "cat's paw" theory of liability but this fails, too. First, she has waived any such argument. On appeal, Wiley relies entirely on the U.S. Supreme Court's decision in *Staub v. Proctor Hospital*, 131 S. Ct. 1186 (2011). App. Br. at 29-30, 40. But she did not cite *Staub* or discuss "cat's paw liability" in her opposition to Microsoft's motion for summary judgment. See CP 968-92. As a result, she is barred from raising it now for the first time on appeal. *Kellar v. Estate of Kellar*, 172 Wn. App. 562, 579 (2012) (citing RAP 2.5(a)).²²

Second, the problem with Wiley's speculative feedback claim is that she has no *evidence* to support any aspect of it. Under federal law, a "cat's paw" theory requires proof a biased supervisor was the cause of an adverse employment action. *Seoane-Vazquez v. Ohio State Univ.*, 2:10-CV-622, 2012 WL 6138661, at *15 (S.D. Ohio Dec. 11, 2012). But Shaw was not Wiley's supervisor, she has no evidence that Shaw (or anyone else) took any action against her because of her gender, and she cannot

²¹ *McKenzie v. Ill. Dep't of Transp.*, 31 F. App'x 922, 926 (7th Cir. 2002) ("speculative" claim that plaintiff "might lose her job in the future" was "not [a] materially adverse change[] in her employment"); *Dage v. Johnson*, 537 F. Supp. 2d 43, 61-62 (D.D.C. 2008) ("a subjective fear of future employment action . . . does not create a triable issue of fact").

²² In the record below, *Staub* appears only once, in a passing reference made at oral argument. RP 45:9-12.

show that Shaw was the cause of any adverse employment action—rather than the conclusions Schofield and HR reached based on the feedback of 17 of Wiley's coworkers, business partners, and subordinates.²³ On this record, there is simply no support for a "cat's paw" theory of liability.

Wiley cannot establish a prima facie case of discrimination on her feedback claim. The trial court properly dismissed it and that decision should be affirmed on appeal.

5. Microsoft's Legitimate Nondiscriminatory Reason

Even if the trial court erred in holding that Wiley could not make a prima facie case, Microsoft had a "legitimate and non-discriminatory reason for any kind of adverse employment action" that Wiley asserted. RP 95:19-21. In particular, Microsoft had such a reason for addressing Wiley's performance in late 2010—many of her coworkers expressed significant concerns about her. Wiley mischaracterizes Microsoft's

²³ See, e.g., *Romans v. Mich. Dep't of Human Servs.*, 668 F.3d 826, 836-37 (6th Cir. 2012) (affirming summary judgment for employer after an independent investigation that included statements from seven witnesses); *Bichindaritz v. Univ. of Wash.*, C10-1371RSL, 2012 WL 1378699, at *4-5 (W.D. Wash. Apr. 20, 2012) ("[w]hile it may be true that [an allegedly biased colleague] did not particularly like [the plaintiff] as a colleague, any such animosity was not on account of her gender," and regardless, an allegedly biased recommendation against tenure was not a causal factor in the university's decision against tenure where the provost conducted an independent review of tenure file that contained mixed recommendations); *Seoane-Vazquez*, 2012 WL 6138661 (same); *Hampton v. Vilsack*, 791 F. Supp. 2d 163, 168 (D.D.C. 2011) (affirming grant of summary judgment where allegedly biased supervisor passed along other employees' reports that plaintiff had engaged in misconduct, which resulted in the plaintiff's termination after an independent investigation).

legitimate, nondiscriminatory reason, but does not dispute that it has one. App. Br. at 36. Wiley also does not challenge the trial court's conclusion that Microsoft had a legitimate, nondiscriminatory reason with respect to her promotion and pay discrimination claims. *See* App. Br. at 43-47 (addressing prima facie case as to these claims, but presenting no argument or evidence regarding Microsoft's legitimate reason or pretext).

6. Wiley Has No Evidence of Pretext

Even if Wiley could make out a prima facie case, her claim would fail because she cannot show pretext, as the trial court concluded after an exhaustive review of the record. RP 96:4-13 ("I've looked at this evidence over and over and over, and I am just not seeing it. . . . I have looked over . . . every declaration and every deposition trying to cull out where there would be some evidence of motivation based on gender."). This conclusion was not in error, and it is amply supported by the record below.

To show that Microsoft's reason for addressing her performance was a pretext for discrimination, Wiley must produce *specific* evidence showing that reason is "unworthy of belief." *Hines*, 127 Wn. App. at 372. The "focus of a pretext inquiry is whether the employer's stated reason was honest, not whether it was accurate, wise, or well-considered." *Stewart v. Henderson*, 207 F.3d 374, 378 (7th Cir. 2000).

Wiley has no evidence of discriminatory intent, let alone "specific and substantial" evidence as the law requires. *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1031 (9th Cir. 2006) (internal quotation marks and citation omitted). It is undisputed that Microsoft received and documented concerns over many years that some found Wiley difficult to work with and nonresponsive. *See supra* at 4-5. It is undisputed that many coworkers gave similar feedback in late 2010 to HR and Schofield.²⁴

Rather, Wiley only speculates, incorrectly, that Shaw somehow orchestrated the feedback she received in December 2010 because she and he had disagreed about whether to comment on the KUOW story in March 2010 and, she further speculates, this made him angry because she is a woman who "stood up" to him. CP 190-91 (Wiley Dep. 222:4-223:9).²⁵ But she stands bereft of *evidence* that might demonstrate such gender bias.

²⁴ Wiley's claim that this Court can find pretext because Shaw claimed he was never upset with Wiley and never put pressure on Schofield to address her performance, App. Br. at 41-42, mischaracterizes the record. Shaw testified consistently that—like many others before him had found to be the case—collaborating with Wiley was challenging and he expressed concerns to her manager and others to that effect. CP 1077, 1079, 1081-82 (Shaw Dep. 50:1-25, 55:3-16, 61:7-62:17); *see also* CP 764 (Shaw Decl. ¶¶ 10-11).

²⁵ Had Wiley made out a *prima facie* case on her promotion claim, she would have been able to show pretext only by presenting evidence that her credentials were "*so superior* to the credentials of the person selected for the job that *no reasonable person*, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question." *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 103 (2d Cir. 2001) (internal quotation marks and citation omitted). She cannot do so because she cannot even point to any position to which she should have been promoted. Likewise, had she made out a *prima facie* pay discrimination claim, she would need to adduce

In support of this claim, she offers nothing but rank speculation and her own subjective view that her job performance was, apparently, so unassailably superb that Microsoft's mere decision to seek feedback regarding the concerns raised about Wiley and present her with the overwhelmingly negative feedback provided by 17 individuals and the opportunity to address it—rather than dismiss it out of hand—must evince discrimination.²⁶ But an employee cannot defeat summary judgment with speculation, and her "subjective beliefs . . . are irrelevant" to questions of employer intent. *Griffith*, 128 Wn. App. at 447. As a result, "mere assertions that [an employer] had discriminatory motivation and intent . . . [are] inadequate." *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983). Thus, "[a]n employee's assertion of good performance to contradict the employer's assertion of poor performance does not give rise to a reasonable inference of discrimination." *Chen v. State*, 86 Wn. App.

evidence that questioned the veracity of Microsoft's reason for any pay disparity between her and her "comparators"—the fact they were performing different jobs and were generally more senior than she. *Butler v. Albany Int'l*, 273 F. Supp. 2d 1278, 1288-89 (M.D. Ala. 2003), *aff'd*, 107 F. App'x 184 (11th Cir. 2004). Wiley has no such evidence. Again, Wiley does not accuse Schofield, her manager, of discrimination. CP 112, 117 (Wiley Dep. 66:5-13, 74:9-18).

²⁶ Wiley's characterization of the feedback process is, again, a string of unsupported conclusory assertions, none of which provides the specific admissible evidence necessary to defeat summary judgment. *See, e.g.*, App. Br. at 14 (surmising that "[i]n order to 'justify' the decision that had already been made (to 'quickly' remove Ms. Wiley from her position), Kevin Schofield and Sheryl Peterson of HR began soliciting negative 'feedback' about her."); *id.* at 16 (asserting that feedback from two women "would not have been credited" if the feedback process "had not been rigged from the start").

183, 191 (1997); *see also* *Fulton*, 169 Wn. App. at 162 ("[A]n employee's disagreement with her supervisor's assessment of her job performance does not demonstrate pretext or give rise to a reasonable inference of discrimination.") (internal quotation marks and citations omitted).²⁷

Washington courts have frequently recognized "that the courts are ill-equipped to act as super personnel agencies." *White*, 131 Wn.2d at 19-20 (internal quotation marks and citations omitted).²⁸ Yet that is precisely what Wiley seeks. Wiley cannot demonstrate pretext or raise material issues of fact by asking this Court to second-guess Microsoft's legitimate and genuinely held belief that she had performance issues warranting a performance discussion.²⁹ It is not enough for Wiley to accuse Heather

²⁷ Wiley's rank speculation is illustrated by her resort to contradictory arguments. Thus, she claims that the feedback was "rigged from the start" to garner negative feedback, but she then cites to "the very positive statements about Ms. Wiley" Microsoft solicited during the process. App. Br. at 14, 16. The feedback was orchestrated by Shaw and his "good ol' boys," but "most of the really negative statements" came from *two women*. App. Br. at 16-17.

²⁸ *See also* *Wash. Fed'n of State Empls. v. State Personnel Bd.*, 29 Wn. App. 818, 820 (1981) (same); *see also* *Blise v. Antaramian*, 409 F.3d 861, 867 (7th Cir. 2005) ("We have repeatedly stressed that 'we do not sit as a superpersonnel department' where disappointed . . . employees can have the merits of an employer's decision replayed to determine best business practices.") (quoting *Holmes v. Potter*, 384 F.3d 356, 361-62 (7th Cir. 2004)); *Piantanida v. Wyman Ctr., Inc.*, 927 F. Supp. 1226, 1241-42 (E.D. Mo. 1996) ("The Court is not permitted to second-guess the plaintiff's supervisors [and their view of her job performance] or correct a bad business decision if the decision was based on non-discriminatory reasons."), *aff'd*, 116 F.3d 340 (8th Cir. 1997).

²⁹ *Kariotis v. Navistar Int'l Transp. Corp.*, 131 F.3d 672, 677 (7th Cir. 1997) ("[T]he question is not whether the employer's reasons for a decision are *right* but whether the employer's description of its reasons is *honest*.") (internal quotation marks and citation omitted); *Richards v. City of Seattle*, No. CO7-10227, 2008 WL 2570668, at *10 (W.D. Wash. June 26, 2008) ("The Court's

Mitchell of being a "backbiter" whose feedback should have been ignored or that Wiley does not feel that she worked sufficiently closely with Ann Paradiso for Ms. Paradiso's feedback to be valid. App. Br. at 17. Wiley cannot demonstrate pretext merely because she disagrees with the feedback provided by coworkers and business partners to Schofield and HR, particularly given her inability to show that *any of these people* were motivated by gender animus. To the contrary, even Wiley acknowledges that it is "good management practice" to address complaints that are brought to management about bullying or inappropriate behavior by managers." CP 215 (Wiley Dep. 267:9-16). That is precisely what Microsoft did here as the record amply demonstrates. Nothing more.

The trial court did not err in concluding that Wiley failed to meet her burden of showing pretext. That decision should be affirmed.

C. Wiley's *Thompson* Claim Fails

Finally, the lower court dismissed Wiley's *Thompson* claim. Wiley gives short shrift to this after-thought claim, devoting a mere three and a half pages of argument to it in her brief, and this Court can and should do the same in summarily affirming its dismissal.

function . . . is not to second-guess the employer[] . . . interpretation, but rather to assess whether sufficient evidence of discriminatory . . . behavior has been presented to warrant a trial."), *aff'd*, 342 F. App'x 289 (9th Cir. 2009); *Green v. Maricopa Cnty. Cmty. Coll. Sch. Dist.*, 265 F. Supp. 2d 1110, 1128 (D. Ariz. 2003) (the court determines whether there is evidence of pretext rather than "evaluat[ing] the wisdom of Defendant's internal management policies").

To proceed on this claim, Wiley must show evidence that (1) Microsoft made promises of specific treatment in specific situations; (2) she justifiably relied on any of those promises; and (3) the promises of specific treatment were breached. *Bulman v. Safeway, Inc.*, 144 Wn.2d 335, 340-41 (2001). As the trial court properly concluded, she showed none of these things. RP 96:21-100:11. That conclusion is amply supported by the record on appeal.

1. There Is No Patent "Policy" Prohibiting PR Interviews

Wiley's claim fails first and foremost because there is, in fact, no Microsoft policy that bars public comment on patented technology, much less a policy containing specific promises to employees that Microsoft will not "retaliate" against them for enforcing such a nonexistent "policy."

Wiley did not identify any policy prohibiting public discussion of patents, or that could even be reasonably read to do so. Indeed, Wiley acknowledges, as she must, that Microsoft can and does comment on patents and patented technology. CP 166-72 (Wiley Dep. 165:20-171:9), 313-26. Further, she acknowledges that—to the extent commenting on a patent poses any business risks—the decision whether to do so is the *business owner's and researcher's* decision, not hers. CP 131-33, 159-60 (Wiley Dep. 99:12-17, 100:15-101:1, 156:21-157:4). Microsoft is a technology company and Wiley is a PR professional. Publicizing

Microsoft's technological research was Wiley's *job*. CP 131-34, 167-68 (Wiley Dep. 99:18-100:12, 101:17-102:13, 166:22-167:20).

Further, as the trial court found, even if the policies that Wiley now points to could be construed as "no commenting on patents" policies, those policies do not make a specific promise that could support a *Thompson* claim. In *Quedado v. Boeing Co.*, 168 Wn. App. 363, 370, *review denied*, 175 Wn.2d 1011 (2012), which Wiley conspicuously fails to cite, this Court similarly held that Boeing's Code of Conduct—which required employees to report suspected code violations and prohibited retaliation against employees for doing so—did not make a specific promise of specific treatment. *Id.* at 370-71. The Code of Conduct in *Quedado* is nearly identical in material respects to the whistleblowing policy Wiley relies on here. *Compare id. with* App. Br. at 25 n.18.

Further, Wiley cannot show that Microsoft breached any such promise. The KUOW inquiry was about a *published* patent, the details of which had already been public record for nearly *two years* and about which Microsoft had already publicly commented. *See supra* at 9-10. Shaw disagreed with Wiley's refusal to do the KUOW story because he was unaware of any (nonexistent) policy about not commenting on patents and, in any event, thought a conversation with the reporter could be conducted without talking about patents at all. CP 764 (Shaw Decl. ¶ 10),

768. The undisputed facts show that Shaw never asked Wiley to comment on a patent, even if doing so would have violated Microsoft policy.

The trial court properly concluded that Wiley had not identified a specific "promise" that altered her at-will employment or that Microsoft breached any such promise. That conclusion is amply supported by the record and should be affirmed on appeal.

2. The Claim Fails Because Wiley Could Not Identify a "Promise" on Which She Supposedly Relied

Even if Microsoft had made the specific promise that it would not tolerate retaliation against Wiley if she refused to comment on patents that were a matter of public record (which it did not and which would make no sense), she cannot establish that she relied on any such promise.

The trial court concluded that in the absence of a "no commenting on patents" policy or evidence that Shaw asked Wiley to violate such a policy, Wiley could not show the necessary justifiable reliance. RP 99:16-21. The conclusion is correct and should be affirmed. But the claim fails for an even more fundamental reason, which the trial court did not address specifically—Wiley did not identify a specific promise on which she claims to have relied. *See Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 491 (2008) ("An appellate court may affirm . . . [the] disposition of a summary judgment motion on any basis supported by the record.").

At her deposition, Wiley stated that she just "figured" the Handbook somewhere made the specific promise she articulated in her Complaint, CP 212 (Wiley Dep. 264:3-11), and she ultimately admitted, in her declaration on summary judgment, that the Handbook did *not* contain that promise. CP 1331 (Wiley Decl. ¶ 27). A plaintiff who is unable to identify the policy on which she supposedly relied, by definition, has conceded that her claim has no merit. *Bulman*, 144 Wn.2d at 342-44, 348 (dismissing handbook claim where plaintiff testified she had "probably" seen the provision at issue but could not "demonstrate any familiarity" with it); *Klontz v. Puget Sound Power & Light Co.*, 90 Wn. App. 186, 192 (1998) (dismissing handbook claim where employee only "read the policy guide in detail" after he was terminated). Wiley's effort to resuscitate the claim by submitting a belated "corrected" declaration fails, because she cannot create a genuine issue of material fact by contradicting her own deposition testimony (let alone her own summary judgment opposition papers).³⁰ And even if Wiley's "corrected" declaration is considered, her claim still falls far short, as the trial court concluded. *See supra* at 17.

³⁰ *See, e.g., Klontz*, 90 Wn. App. at 192 ("To the extent that Klontz's subsequent declaration contradicts his prior deposition testimony, a genuine issue of material fact . . . does not arise"); *Isaacson v. DeMartin Agency, Inc.*, 77 Wn. App. 875, 877 n.1 (1995) (same); *Marshall v. AC&S, Inc.*, 56 Wn. App. 181, 185 (1989) (per curiam) (same).

Thus, even if Wiley could identify a specific promise in the Handbook that Microsoft prohibits retaliation against PR professionals who refuse to comment publicly on public patents (which it does not) or that Microsoft breached any such promise (which it did not), she cannot establish that she justifiably relied on any such promise to her detriment.

3. The Trial Court Properly Concluded That the Handbook's Disclaimer Is Effective

Finally, Wiley's claim fails because, as the trial court properly concluded (RP 99:22-100:2), the Handbook expressly disclaims any intent to make a "specific promise" or contract or to alter the at-will employment relationship, and Wiley signed and acknowledged that disclaimer nearly three dozen times. Her claim fails accordingly.

It has long been established that there is no enforceable promise where an employer makes clear that its written policies are general in nature and not intended to create legal obligations. *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 230 (1984) (employers will not "be bound by statements in employment manuals" if "[t]hey . . . specifically state in a conspicuous manner that nothing contained therein is intended to be part of the employment relationship and are simply general statements of company policy"). Again, "an employer can disclaim what might

otherwise appear to be enforceable promises in handbooks or manuals or similar documents." *Quedado*, 168 Wn. App. at 374.³¹

The reason for this rule—and the cautious and sparing application of *Thompson*—is clear. Employment in Washington is at-will, but there is obvious utility for both employers and employees if an employer provides employees information about its general policies and practices. If an employer had no effective means of providing general statements of policy without stumbling unwittingly into binding contracts, no employer would maintain an employee handbook. The *Thompson* exception is narrow because otherwise it would eviscerate the at-will doctrine.

Here, as discussed above (*supra* at 15), The Handbook contains multiple, unambiguous disclaimers that make clear its intent to avoid any contractual promise, implied or otherwise. For example, an employee cannot sign into the Handbook without reviewing and signing (by typing her name) the following acknowledgment, stated here in relevant part:

At-Will Employment Not Modified:

This handbook . . . contain[s] general guidelines only. [It is] not intended and shall not be read to create any express or implied promise or contract for employment, for any

³¹ See also *Hollenback v. Shriners Hosps. for Children*, 149 Wn. App. 810, 827 (2009) (handbook did not make specific promises where it disclaimed intent to do so); *Nelson v. Southland Corp.*, 78 Wn. App. 25, 33-34 (1995) (same); *Birge v. Fred Meyer, Inc.*, 73 Wn. App. 895, 900-01 (1994) (same); *Sharpe v. Am. Tel. & Tel. Co.*, 66 F.3d 1045, 1051 (9th Cir. 1995) (same); *Smoot v. Boise Cascade Corp.*, 942 F.2d 1408, 1411-12 (9th Cir. 1991) (same).

benefit, or for specific treatment in specific situations. Do not rely on any contrary oral or written statements, practices or conduct of Microsoft or its employees. Your employment relationship with Microsoft is at-will.

CP 752-53. Wiley admits that she was familiar with this prominent and straightforward disclaimer. CP 151-52 (Wiley Dep. 145:20-146:22). This is no surprise—she acknowledged the disclaimer *33 separate times* just in the last 11 years of her employment, and *nine* times in the last two years of her employment alone. *See* CP 798. To the extent she relies on the Standards of Business Conduct, it too sets out basic guidelines and disclaims any intent to make "promises of specific treatment."³²

Wiley's reliance on *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512 (1992), is entirely misplaced. In *Swanson*, an employer attempted to defuse a labor dispute by sending managers from company headquarters to meet with a group of employees for two days, during which the employer presented and had all employees sign a "Memorandum of Working Conditions," which it informed them had been written specifically for them and would govern their employment. *Id.* at 515-16. The employer specifically discussed a "Work Rights" provision in this document, which drew distinctions between employees who could be terminated at-will and

³² *See* CP 1342 ("The Standards are not intended to and do not create an employment contract, and do not create any contractual rights between Microsoft and its employees or create any express or implied promise for specific treatment in specific situations").

employees who were subject to the specific terms of a progressive discipline policy. *Id.* at 516. The employer then held a second meeting after it learned that the employees were seeking union representation to assure them that the "company would abide by the rules in the agreement and that no union representation would be necessary." *Id.* at 517.

After the employer terminated the plaintiff in violation of this Memorandum of Working Conditions, it sought to justify its actions by pointing to a disclaimer in *another* document—an employee benefits manual provided to all employees. *Id.* at 517. The plaintiff never signed the disclaimer, it was unclear whether he had even *seen* the disclaimer, and it was unclear whether the benefit manual even discussed termination procedures. *Id.* at 529-30. The court thus held that an issue of fact remained as to whether the handbook disclaimer negated the employer's "extensive representations" to the plaintiff that a "Memorandum of Working Conditions defined his employment." *Id.* at 529-30, 535. Absent peculiar facts such as these, courts regularly distinguish *Swanson* and grant summary judgment on handbook claims.³³

³³ See *Quedado*, 168 Wn. App. at 374 (distinguishing *Swanson*: a plaintiff cannot simultaneously claim to rely on specific provisions of handbook and claim ignorance of prominent and effective disclaimer in that same document); *Birge*, 73 Wn. App. at 901 (1994) (same, where disclaimer was signed by plaintiff and on the same page as the language upon which she sought to rely); *Payne v. Sunnyside Cmty. Hosp.*, 78 Wn. App. 34, 40 (1995) (affirming summary judgment where disclaimer appeared on handbook's first page and

Here, unlike *Swanson*, Wiley relies on statements in the same Handbook that contains a prominent disclaimer she signed 33 times, and she has no evidence that Microsoft told her to disregard the disclaimer and treat the Handbook as the source of the terms of her employment (indeed, it did not). The trial court properly concluded that, as a matter of law, the Handbook effectively disclaimed any intent to set out specific promises of specific treatment rather than general statements of company policy.

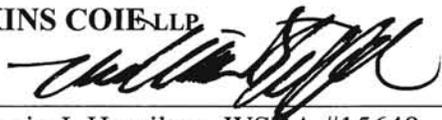
Wiley's *Thompson* claim fails for this reason as well.

V. CONCLUSION

The trial court thoughtfully and fully considered Wiley's claims. It dismissed them, in each case on multiple, independent grounds. The record on appeal amply supports the trial court's disposition of Wiley's claims. The Court should therefore affirm the trial court's order granting Microsoft's motion for summary judgment on Kirsten Wiley's claims.

DATED: April 22, 2013

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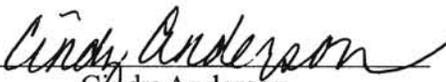
plaintiff had read it); *cf. Bulman*, 144 Wn.2d at 344 (*Swanson* stands only for the proposition that an employee *may* be able to create issues of fact).

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on April 22, 2013, I arranged for the foregoing Respondent's Reply Brief to be served by way of messenger to:

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DATED this 22nd day of April 2013 at Seattle, Washington.

By: 
Cindy Anderson
Legal Secretary