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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

DANIEL M. MULLENIX and  
CINDY C. MULLENIX, D & C  
ENTERPRISES, INC., a Washington  
corporation, f/k/a INLAND MEATS,  
INC.,

Plaintiffs,

vs.

SYSCO SPOKANE, INC.,  
a Delaware corporation,

Defendant.

No. CV-13-305-LRS

**ORDER GRANTING  
PLAINTIFFS' MOTION  
FOR PARTIAL SUMMARY  
JUDGMENT RE TERMINATION  
OF EMPLOYMENT AND  
WILLFUL WITHHOLDING  
OF WAGES**

**BEFORE THE COURT** is Plaintiffs' Motion For Partial Summary Judgment Re Termination Of Employment And Willful Withholding Of Wages (ECF No. 27). The motion was heard with oral argument on June 12, 2014. C. Matthew Andersen, Esq., argued for Plaintiffs. Thaddeus O'Sullivan, Esq., argued for Defendant.

**I. BACKGROUND**

On May 1, 2012, Inland Meats, Inc. (now known as D & C Enterprises), Daniel M. Mullenix, Cindy C. Mullenix, and Sysco Spokane, Inc., entered into a contract for the sale of substantially all of Inland's assets to Sysco Spokane. This contract is referred to as the Asset Purchase Agreement (APA). The sale closed on May 18, 2012, and on that same date, Mr. Mullenix entered into a two year employment

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1 agreement as part of the APA.

2 At issue in this partial summary judgment motion is whether Defendant  
3 improperly terminated Mr. Mullenix's employment and wrongfully and willfully  
4 withheld wages from him. Plaintiff is moving for summary judgment on his "First  
5 Claim For Relief: Breach Of Employment Contract," "Second Claim For Relief:  
6 Violation Of The Covenant Of Good Faith And Fair Dealing- Employment  
7 Agreement," and "Fifth Claim For Relief: Willful Withholding Of Wages" pled in his  
8 Verified Amended Complaint (ECF No. 10).

## 9 10 **II. UNDISPUTED FACTS**

11 Section 6(b) of the May 18, 2012 Employment Agreement between Mr.  
12 Mullenix ("Executive") and Sysco Spokane ("Company") states:

13 During the Term, the Company may terminate Executive's  
14 employment (x) **without Cause . . . upon thirty (30) days**  
15 **written notice to Executive or (y) for Cause upon written**  
16 **notice of termination to Executive . . . which notice shall**  
17 **specify Cause in reasonable detail.** As used herein,  
18 "Cause" shall mean: (i) Executive's failure to substantially  
19 perform his duties hereunder; (ii) Executive's violation of  
20 the Sysco Corporation Business Code of Conduct . . .; (iii)  
21 Executive's act(s) or omission(s) amounting to negligence  
22 in the performance of his duties hereunder to the detriment  
23 of the Company; (iv) Executive's fraud or embezzlement  
24 against the Company, its suppliers or customers; (v)  
25 Executive's conviction of or pleading guilty to any felony  
26 or misdemeanor involving moral turpitude under applicable  
27 law; (vi) Executive's failure to observe or perform any  
28 covenant, condition or provision of Sections 9 through 12  
of this Agreement; or (vii) Executive's breach of that certain  
Noncompetition and Nonsolicitation Agreement of even date  
herewith, by and between Executive and the Company  
(the "Noncompetition Agreement"). Except as to the  
immediately preceding clauses (iv), (v), (vi) and (vii) and  
with respect to those Causes that are not capable of  
being cured, Executive will have thirty (30) days from the  
date he receives written notice from the Company  
specifying in reasonable detail the events or  
circumstances constituting Cause to cure such Cause, and  
upon such timely cure, such Cause shall be deemed not  
to have occurred.

(ECF No. 29-1 at p. 12). (Emphasis added).

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1 Section 10 of the Employment Agreement states:

2 Executive covenants and agrees that until this Agreement  
3 is terminated and for twelve (12) months thereafter, he  
4 will not, directly or indirectly, engage in any Competing  
5 Business within the Territory wherein Executive will  
6 perform duties that are the same or substantially similar  
7 to those Executive performed for the Company during  
8 the last twelve (12) months of Executive's employment  
9 with the Company. Executive covenants and agrees that  
10 the Territory set forth on Exhibit B attached hereto  
11 represents the geographical location throughout which the  
12 Company, and Executive on behalf of the Company,  
13 services customers and operates the Company Business.<sup>1</sup>

14 (ECF No. 29-1 at p. 14). Section 8(b) defines "Competing Business" as "any person  
15 or entity engaged in a business that is substantially similar to or the same as the  
16 Company Business, and only that portion of such business that is in competition with  
17 the Company Business." Section 8(a) defines "Company Business" as "the business  
18 of processing and packaging meat and poultry products and distributing meat,  
19 poultry, seafood and cheese products to restaurants and other commercial enterprises  
20 in the Territory as conducted by the Company as of the date hereof." (ECF No. 29-1  
21 at p. 13). The "Territory" includes specified counties in Idaho, Washington, Montana  
22 and Oregon. The Oregon counties listed include Gilliam, Wheeler, Morrow and  
23 Umatilla. (ECF No. 29-1 at p. 21).

24 The "Noncompetition and Nonsolicitation Agreement of even date," also dated  
25 May 18, 2012, and between Sysco Spokane and Mr. Mullenix (as "Shareholder"),  
26 states in relevant part:

27 Shareholder covenants and agrees that Shareholder shall  
28 not, during the Noncompetition period, either directly or  
indirectly, within the Territory (i) provide or perform services  
for the benefit of, manage, operate, or in any way participate  
in, a Competing Business, either on his or her own behalf  
or on behalf of any other Person, and regardless of whether  
as an employee, agent, consultant or independent contractor,  
paid or otherwise, or (ii) have a financial interest in, own  
or control any Competing Business, whether as a stockholder,

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29 <sup>1</sup> "Company" means Sysco Spokane, Inc. Sysco Spokane, Inc., is a  
30 subsidiary of parent company, Sysco Corporation, Inc.

1 owner, partner, proprietor, lender or otherwise . . . .  
2 (ECF No. 29-6 at p. 38).

3 “Competing Business” is defined as”

4 [A]ny person engaged in a business that is substantially  
5 similar to or the same as the Business, and only that portion  
6 of the business that is in competition with the Business.

6 (ECF No. 29-6 at p. 36).

7 “Business” is a reference to Mr. Mullenix’s previous business operating as  
8 Inland Meats, Inc., that being “the business of processing and packaging meat and  
9 poultry products and distributing meat, poultry, seafood and cheese products to  
10 restaurants and other commercial enterprises in the Territory . . . .” (*Id.*).

11 “Territory” is defined as “the geographical location(s) described on  
12 Exhibit A attached hereto, which the parties acknowledge are all of the geographical  
13 locations in which Seller [Mr. Mullenix and Inland Meats] conducted the Business  
14 as of the Closing Date [May 18, 2012] or within the twelve (12) months preceding the  
15 Closing Date.” (ECF No. 29-6 at p. 37). Exhibit A identifies certain counties in  
16 Idaho, Washington and Montana. It does not identify any counties in Oregon.

17 Previously, on May 12, 2012, Mr. Mullenix signed a “Confidentiality and Non-  
18 Competition Agreement.” It states:

19 Employee agrees that s/he will during the term of his/her  
20 employment with Employer promptly and fully disclose to  
21 Employer any business opportunity coming to Employee’s  
22 attention, or conceived or developed in whole or part by  
23 Employee, which relates to the Employer’s business, or  
24 anticipated business. Employee will not at any time exploit  
25 such business opportunities for his/her own gain or that of  
26 any people or entity other than Employer . . . .  
27 Employee further acknowledges that Employer’s business is  
28 conducted in the state of Idaho and in areas of the Inland  
Northwest of Washington but that Employer may choose to  
expand its business to other locations during the course of  
Employee’s employment or shortly thereafter. Accordingly,  
Employee agrees that s/he will not compete with Employer  
in any of these areas.

27 (ECF No. 48-2 at p. 50).

28 Neither the Employment Agreement or the “Noncompetition and

1 Nonsolicitation Agreement” make any specific reference to the May 12  
2 “Confidentiality and Non-Competition Agreement.” The May 12, 2012 agreement  
3 is not included in the May 18, 2012 Employment Agreement as a cause for  
4 termination.

5 On or about May 9, 2013, Sysco Spokane learned through an e-mail search that  
6 Mr. Mullenix had invested in a purchase of prime rib from a Florida company (“North  
7 South Foods”), which he later sold to a food distributor in Oregon (“Pacific Foods”).  
8 Pacific Foods is a vendor of Sysco Spokane that ships into the Sysco Spokane market.  
9 It is located in Tualatin, Oregon which is in Clackamas County.

10 On May 16, 2013, Mr. Mullenix was provided with a letter from Grant Birch,  
11 Director of Human Resources for Sysco Spokane, indicating that based on the  
12 findings of an investigation into Mr. Mullenix’s activities, his employment was being  
13 “terminated for Cause pursuant to Section 6(b)(ii), (vi), and (vii)” of the Employment  
14 Agreement. (ECF No. 29-10 at p. 49). The termination occurred one day before Mr.  
15 Mullenix was due a \$100,000 guaranteed bonus upon completion of his first year of  
16 employment, as specified in the May 18, 2012 Employment Agreement.

17 Mr. Birch sent Mr. Mullenix a follow-up letter dated May 28, 2013, providing  
18 additional information regarding the reasons for Mr. Mullenix’s termination, but  
19 reiterating that the termination was “for Cause, . . . pursuant to Section 6(b)(ii), (vi),  
20 and (vii) of your Employment Agreement.” (ECF No. 29-11 at p. 50).

### 21 22 **III. SUMMARY JUDGMENT STANDARD**

23 The purpose of summary judgment is to avoid unnecessary trials when there  
24 is no dispute as to the facts before the court. *Zweig v. Hearst Corp.*, 521 F.2d 1129  
25 (9th Cir.), *cert. denied*, 423 U.S. 1025, 96 S.Ct. 469 (1975). Under Fed. R. Civ. P.  
26 56, a party is entitled to summary judgment where the documentary evidence  
27 produced by the parties permits only one conclusion. *Anderson v. Liberty Lobby,*  
28 *Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505 (1986); *Semegen v. Weidner*, 780 F.2d 727,

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1 732 (9th Cir. 1985). Summary judgment is precluded if there exists a genuine dispute  
2 over a fact that might affect the outcome of the suit under the governing law.  
3 *Anderson*, 477 U.S. at 248.

4 The moving party has the initial burden to prove that no genuine issue of  
5 material fact exists. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S.  
6 574, 586, 106 S.Ct. 1348 (1986). Once the moving party has carried its burden under  
7 Rule 56, "its opponent must do more than simply show that there is some  
8 metaphysical doubt as to the material facts." *Id.* The party opposing summary  
9 judgment must go beyond the pleadings to designate specific facts establishing a  
10 genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548  
11 (1986).

12 In ruling on a motion for summary judgment, all inferences drawn from the  
13 underlying facts must be viewed in the light most favorable to the nonmovant.  
14 *Matsushita*, 475 U.S. at 587. Nonetheless, summary judgment is required against a  
15 party who fails to make a showing sufficient to establish an essential element of a  
16 claim, even if there are genuine factual disputes regarding other elements of the  
17 claim. *Celotex*, 477 U.S. at 322-23.

#### 18 19 **IV. DISCUSSION**

20 Washington has long adhered to the "terminable-at-will" doctrine as governing  
21 the relationship between an employer and an employee. This relationship, however,  
22 can be modified by express contract; by unilateral contract if the terms provide for job  
23 security and such terms are supported by offer, acceptance and consideration; and by  
24 a species of estoppel if the employer creates an atmosphere of job security and fair  
25 treatment with promises of specific treatment in specific situations and the employee  
26 relies thereon. *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 437, 815 P.2d  
27 1362 (1991). "Just cause" is the standard applied where a contract provides specific  
28 grounds for dismissal. If an employer relies on one of those grounds, it must reach

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1 a good faith and reasonable conclusion that the ground exists and is supported by  
2 substantial evidence. *Id.* at 438.

3 “[A] discharge for ‘just cause’ is one which is not for any arbitrary, capricious,  
4 or illegal reason and which is based on facts (1) supported by substantial evidence  
5 and (2) reasonably believed by the employer to be true.” *Baldwin v. Sisters of*  
6 *Providence in Washington, Inc.*, 112 Wn.2d 127, 139, 769 P.2d 298 (1989).  
7 Although the employer may not make arbitrary determinations of just cause, whether  
8 the plaintiff actually committed the violation is irrelevant; the question is whether “**at**  
9 **the time** plaintiff was dismissed defendant reasonably, in good faith, and based on  
10 substantial evidence believed plaintiff” had committed the violation.  
11 *Gaglidari*, 117 Wn.2d at 438 (emphasis added).

12 “The duty of good faith and fair dealing applies when one party has discretion  
13 to determine certain terms of a contract.” *Scribner v. Worldcom, Inc.*, 249 F.3d 902,  
14 909 (9<sup>th</sup> Cir. 2001), quoting *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86  
15 Wn.App. 732, 935 P.2d 628, 632-33 (1997). The duty of good faith limits the  
16 employer’s discretion to interpret or define cause for termination in a manner which  
17 undermines the employee’s reasonable expectations as to what “cause” means. *Id.*  
18 at 911. The covenant of good faith and fair dealing requires “consistency with the  
19 justified expectations of the other party.” *Id.* at 910, quoting *Restatement (Second)*  
20 *of Contracts*, §205, cmt. A (1979).<sup>2</sup>

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21  
22 <sup>2</sup> It appears in Washington there is not an implied covenant of good faith  
23 and fair dealing in an employment relationship which is terminable at will. As  
24 discussed above, however, good faith is relevant to the construction of a contract  
25 term. See *Gaglidari*, 117 Wn.2d at 459 (Brachtenbach J., concurring and  
26 dissenting). It is a covenant that is not implied, but which arises from the contract  
27 itself.

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1           The undisputed facts show that Sysco Spokane, at the time it discharged Mr.  
2 Mullenix, did not reasonably and in good faith conclude Mr. Mullenix had violated  
3 Section 10 of the Employment Agreement or the “Noncompetition and  
4 Nonsolicitation Agreement” (Sections 6(b)(vi) and (vii) of the Employment  
5 Agreement). Buying beef as an investment was not the “same or substantially  
6 similar” to the duties performed by Mr. Mullenix in his capacity as “Director of  
7 Business Development” reporting to the “Vice President of Sales.” (See Section 3  
8 of the Employment Agreement). Mr. Mullenix’s duties involved selling, not buying.  
9 Furthermore, buying beef as an investment did not involve “processing and packaging  
10 meat and poultry products and distributing meat, poultry, seafood and cheese  
11 products to restaurants and other commercial enterprises in the Territory . . . .”

12           Moreover, even assuming Mr. Mullenix’s purchase of beef amounted to  
13 competition with Sysco Spokane, it is clear he did not violate the territorial  
14 restrictions specified in either the Employment Agreement or the “Noncompetition  
15 and Nonsolicitation Agreement.” Mr. Mullenix invested in a purchase of prime rib  
16 from a Florida company which he later sold to a food distributor in Oregon located  
17 in Tualatin, Oregon in Clackamas County. Florida is not one of the states specified  
18 in the territorial restrictions set forth in either of the aforementioned agreements.  
19 Oregon is not one of the three states specified in the “Noncompetition and  
20 Nonsolicitation Agreement.” And while several counties of Oregon are specified in  
21 the Employment Agreement, Clackamas County is not one of them. The arbitrary and  
22 capricious nature of Sysco Spokane’s reliance on Section 10 of the Employment  
23 Agreement and the “Noncompetition and Nonsolicitation Agreement” is revealed by  
24 the fact that at the time Mr. Mullenix was terminated, the individuals from Sysco  
25 Corporation who terminated him did not know the scope of the territorial restrictions  
26 specified in those agreements. (Declaration of Daniel C. Mullenix, ECF No. 29 at  
27 Paragraphs 31 and 37). Furthermore, Sysco Spokane President Kevin Pribilsky did  
28 not know whether the prime rib transaction occurred in the restricted territory

1 designated in the agreements. (ECF No. 30-1 at p. 165, Lines 2-6; ECF No. 60-1 at  
2 p. 159, Lines 22-25; p. 178, Lines 4-21; p. 179, Lines 5-9).

3 A stronger argument could be made that Mr. Mullenix’s purchase of beef  
4 violated the May 12, 2012 “Confidentiality and Non-Competition Agreement”  
5 because it constituted a “business opportunity coming to Employee’s attention, or  
6 conceived or developed in whole or part by Employee.” The geographical scope of  
7 this restriction is problematic, however (Idaho and areas of the Inland Northwest of  
8 Washington), unless a reasonable argument could be made that Clackamas County,  
9 Oregon was a location the “Employer may choose to expand its business . . . during  
10 the course of Employee’s employment or shortly thereafter.” In any event, the May  
11 12, 2012 agreement is not specified in the Employment Agreement as a grounds for  
12 termination with cause, and Sysco Spokane did not specify it as a ground for  
13 termination in its May 16, 2013 notice of termination.

14 What that leaves then is the alleged violation of the Sysco Corporation  
15 Business Code of Conduct (Section 6(b)(ii) of the Employment Agreement). The first  
16 problem with this asserted ground for termination with cause is the May 16, 2013  
17 notice provided to Mr. Mullenix. The Employment Agreement required that notice  
18 of termination “specify Cause in reasonable detail.” The May 16, 2013 letter from  
19 Mr. Birch did no such thing. It simply identified Section 6(b)(ii),(vi), and (vii) of the  
20 Employment Agreement as the grounds for termination with no supporting details  
21 whatsoever. This is particularly significant with regard to the alleged code of conduct  
22 violation, the code being much broader in scope than the narrower confines of the  
23 “Noncompetition and Nonsolicitation Agreement,” and Sections 9 to 12 of the  
24 Employment Agreement. As noted above, the law requires that “at the time plaintiff  
25 was dismissed defendant reasonably, in good faith, and based on substantial evidence  
26 believed plaintiff” had committed the violation. It is impossible to conclude from the  
27 perfunctory nature of Sysco Spokane’s notice of termination that it reasonably, in  
28 good faith, and based on substantial evidence ,believed Mr. Mullenix had violated

1 any provisions of the Employment Agreement and the “Noncompetition and  
2 Nonsolicitation Agreement,” let alone the code of conduct.

3 Mr. Birch’s follow-up letter dated May 28, 2013, in response to an inquiry from  
4 Mr. Mullenix, provided “additional information regarding the reasons for . . .  
5 termination of employment for Cause,” although it did not specifically refer to the  
6 code of conduct and explain what particular sections of the code had allegedly been  
7 violated, nor did it explain how the non-compete covenants had allegedly been  
8 violated. Mr. Birch’s letter states:

9 In early May 2013, Sysco Spokane began investigating  
10 allegations that you planned to start a meat company  
in violation of your obligations to Sysco Spokane.

11 In the course of the investigation, Sysco Spokane learned  
12 that you procured meat products through an entity called  
D & C Enterprises, Inc. D & C Enterprises conducts  
13 business from your home address. In engaging in business  
through D & C Enterprises, you inappropriately made use  
14 of the Inland Meats name, including issuance of a check in  
the name of Inland Meats to procure meat products on behalf  
15 of D & C Enterprises. Similarly, you used a Certificate of  
Insurance naming Inland Meats for purposes of obtaining  
16 credit to make purchases through D & C Enterprises.

17 At no point prior to the interview conducted with you on  
May 16, 2013 did you disclose to anyone at Sysco Spokane  
18 that you were engaging in the purchase of meat products  
outside of your role at Sysco. In addition, you did not  
19 have permission to use the Inland meats name for any  
purpose. Moreover, you engaged in outside business  
20 activities using Sysco resources. Further, you provided  
inaccurate and dishonest answers during your May 16,  
21 2013 interview.

22 (ECF No. 29-11).

23 Mr. Mullenix does not deny that he purchased the beef through D & C  
24 Enterprises and that he issued a check in the name of Inland Meats to make the  
25 purchase. He does not deny that he used a certificate of insurance naming Inland  
26 Meats for the purpose of obtaining credit to make purchases through D & C  
27 Enterprises. He also does not deny that he used his Sysco e-mail account to send e-  
28 mails facilitating the purchase.

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1 The Sysco Corporation Business Code of Conduct includes a section dealing  
2 with “Conflicts of Interest.” It lists examples of “conflicts or potential conflicts that  
3 must be disclosed and resolved.” (ECF No. 48-2 at pp. 65). These include:

- 4 • Receiving any financial or personal benefit (either yourself  
5 or through a family member) from or on behalf of a company  
6 that competes with Sysco [Corporation], does business with  
7 Sysco [Corporation] or seeks to business with Sysco [Corporation]
- 8 • Taking, or directing another company to take, a business  
9 opportunity discovered through the use of Sysco’s property  
10 or information or through your position with Sysco. If  
11 you become aware of a business opportunity that Sysco  
12 may have an interest in pursuing, you should present the  
13 opportunity to Sysco.
- 14 • Using Sysco’s property, information or position for your  
15 personal gain or the personal gain of a friend or family  
16 member.

17 (*Id.* at pp. 65-66).

18 As Plaintiffs point out, Mr. Birch’s May 28, 2013 letter said nothing about  
19 Sysco Spokane losing a business opportunity, nor is there a declaration from anyone  
20 from Sysco Spokane stating how a business opportunity was lost. Furthermore, the  
21 court is unaware of any evidence in the record that Mr. Mullenix discovered his prime  
22 rib investment opportunity “through the use of Sysco’s property or information or  
23 through [his] position with Sysco.” That appears to be of significance if it is the only  
24 type of business opportunity contemplated in the sentence which follows: “If you  
25 become aware of a business opportunity that Sysco may have an interest in pursuing,  
26 you should present the opportunity to Sysco.” Assuming, however, that the code of  
27 conduct contemplated the type of business transaction engaged in by Mr. Mullenix,  
28 and assuming Pacific Foods is a “competitor” of Sysco Spokane, this would not be  
a basis for termination with cause as it would constitute a violation of Sysco  
Spokane’s duty of good faith and fair dealing. As noted above, the duty of good faith  
limits an employer’s discretion to interpret or define cause for termination in a  
manner which undermines the employee’s reasonable expectations as to what “cause”

1 means. *Scribner*, 249 F.3d at 911. The reasonable and justified expectation of Mr.  
2 Mullenix was that his non-compete covenants extended only as far as specified in the  
3 Employment Agreement and the “Noncompetition and Nonsolicitation Agreement,”  
4 including their limited territorial restrictions. Therefore, the court will not enforce  
5 the alleged non-compete covenants of the code of conduct which contain no territorial  
6 restrictions and the bounds of which, if any, are left entirely to the discretion of Sysco  
7 to determine.

8 It is not apparent how the issuance of an old check using the Inland Meats  
9 name, instead of D & C Enterprises, Inc., might be a violation of the code of conduct.  
10 D & C Enterprises was not acquired by Sysco Spokane. The check was issued on a  
11 D & C account. (Supplemental Declaration of Daniel C. Mullenix, ECF No. 61 at  
12 Paragraph 18). D & C Enterprises, the successor corporation to Inland Meats, was  
13 clearly identified by Mr. Mullenix as the purchaser in the prime rib transaction. (ECF  
14 No. 48-2 at pp. 75, 77 and 81).

15 Mr. Mullenix’s use of his Sysco e-mail account to facilitate the prime rib  
16 transaction may well constitute a code of conduct violation (using Sysco’s property  
17 information or position for personal gain). It is not apparent, however, if Sysco  
18 Spokane reasonably believed this to be so on May 16, 2013 when it issued the  
19 termination notice offering no details about the alleged code violation. It was not  
20 until the May 28, 2013 letter that Mr. Birch specifically alleged that Mr. Mullenix  
21 “engaged in outside business activities using Sysco resources.” Again, the law  
22 requires that at the time of dismissal, the employer reasonably, in good faith, and  
23 based on substantial evidence, believed the employee had committed the violation.

24 Section 6(b)(ii) code of conduct violations, unlike Section 6(b)(vi) and (vii)  
25 violations, are not specifically enumerated in the Employment Agreement as a cause  
26 incapable of being cured. Sysco Spokane argues, however, that such violations fall  
27 within the broader exception specified in the Employment Agreement (“and with  
28 respect to those Causes that are not capable of being cured”) and therefore, it was not

1 necessary to afford Mr. Mullenix 30 days to cure the alleged code of conduct  
2 violation. Assuming that at the time of Mr. Mullenix’s dismissal, Sysco Spokane  
3 reasonably believed he had used Sysco resources for personal gain, it nonetheless  
4 could not have reasonably believed this was a cause for termination which was  
5 incapable of being cured and therefore, for which no opportunity to cure should be  
6 given. In the May 16, 2013 termination notice and the subsequent May 28, 2013  
7 letter, Sysco Spokane offered no explanation why use of a Sysco Spokane email  
8 account to facilitate a transaction for personal gain, was incapable of being cured. To  
9 date, Sysco Spokane has still not offered any such explanation, other than asserting  
10 in conclusory fashion that the transaction cannot be undone and inappropriately  
11 shifting the burden to Mr. Mullenix to explain why his alleged code transgression was  
12 curable. Because Sysco Spokane relies on the “incapable of being cured” language  
13 as a basis for justifying its immediate termination of Mr. Mullenix, it is its burden to  
14 explain exactly why the alleged code transgression was “incapable of being cured.”  
15 Sysco Spokane did not have a reasonable belief that any code of conduct violations  
16 were incapable of being cured. During oral argument, counsel for Sysco Spokane  
17 acknowledged that the mere use of the e-mail account was not incurable, but asserted  
18 what was incurable was the business opportunity allegedly lost by Sysco Spokane.  
19 As discussed above, the court will not enforce the code’s alleged non-compete  
20 covenants as they are contrary to the reasonable and justified expectations of Mr.  
21 Mullenix that he was bound only by the specific non-compete covenants set forth in  
22 the Employment Agreement and the “Noncompetition and Nonsolicitation  
23 Agreement.” Furthermore, based on the provisions of the Employment Agreement,  
24 Mr. Mullenix had a reasonable and justified expectation that he would have an  
25 opportunity to cure any code violations. Because Sysco Spokane did not provide him  
26 with that opportunity, it violated its duty of good faith and fair dealing in that regard  
27 as well.

28 The May 18, 2012 Employment Agreement provides that “[d]uring the Term,

1 the Company may terminate Executive’s employment (x) without Cause . . . upon  
2 thirty (30) days written notice to Executive.” The existence of this language does not  
3 excuse Sysco Spokane from justifying its termination of Mr. Mullenix pursuant to the  
4 prevailing Washington law set forth above. Mr. Mullenix was notified he was  
5 terminated based on grounds for dismissal specified in the Employment Agreement.  
6 He was never notified his termination was “without cause.” Although Sysco Spokane  
7 could have terminated Mr. Mullenix “at will” and without cause, it did not do so. It  
8 purported to terminate him with cause pursuant to the terms of the Employment  
9 Agreement and in so doing, was obligated to reasonably and in good faith conclude,  
10 based on substantial evidence, that he had violated the non-compete clauses and/or  
11 the code of conduct and that it was not necessary to provide him with an opportunity  
12 to cure. The provisions in the Employment Agreement modified the at-will  
13 relationship and promised specific treatment in specific situations (i.e., notice and  
14 opportunity to cure).

15 Sysco Spokane did not have a “genuine belief” that it was entitled to  
16 immediately terminate Mr. Mullenix’s employment and forego paying him the rest  
17 of the money he would have earned under the Employment Agreement. *Duncan v.*  
18 *Alaska Fed. Credit Union*, 148 Wn.App. 52, 79, 199 P.3d 991 (2008). The non-  
19 payment of these monies is not due to a “bona fide” dispute that is “fairly debatable.”  
20 *Id.* Therefore, it is “willful” and Mr. Mullenix is entitled to double damages under  
21 RCW 49.52.050(2) and .070.

## 22

## 23 **V. CONCLUSION**

24 At the time it dismissed Mr. Mullenix from employment on May 16, 2013,  
25 Sysco Spokane did not have substantial evidence from which it could have reasonably  
26 concluded in good faith that Mr. Mullenix had violated the non-compete covenants  
27 in either the Employment Agreement or the “Noncompetition and Nonsolicitation  
28 Agreement.” At that time, it did not have substantial evidence from which it could

1 have reasonably concluded that Mr. Mullenix had violated the Sysco Corporation  
2 Business Code of Conduct, or that if he did, said violation was incapable of being  
3 cured. Mr. Mullenix reasonably and justifiably believed he was bound only by the  
4 non-compete covenants in the Employment Agreement and the “Noncompetition and  
5 Nonsolicitation Agreement,” and not by any additional non-compete restrictions  
6 contained in the code of conduct. He also reasonably and justifiably believed he  
7 would have an opportunity to cure any code of conduct violations. Sysco Spokane  
8 violated its duty of good faith and fair dealing by acting contrary to Mr. Mullenix’s  
9 reasonable and justified expectations. Sysco Spokane acted arbitrarily and  
10 capriciously in terminating Mr. Mullenix purportedly for cause just one day before  
11 he was due a \$100,000 bonus.

12 Because there are no genuine issues of material fact, Plaintiffs’ Motion For  
13 Partial Summary Judgment Re Termination Of Employment And Willful Withholding  
14 Of Wages (ECF No. 27) is **GRANTED**. Mr. Mullenix is awarded his \$100,000 first  
15 performance year bonus; his second performance year wage of \$108,000; and his  
16 guaranteed second performance year bonus of \$50,000, for a total of \$258,000.  
17 Doubling this amount results in an award of \$516,000. The court will consider  
18 additional relief (payable benefits and attorney’s fees and costs) based upon a further  
19 motion filed by Plaintiffs.

20 **IT IS SO ORDERED.** The District Court Executive is directed to enter this  
21 order and provide copies to counsel.

22 **DATED** this 21st day of July, 2014.

23  
24 *s/Lonny R. Suko*

25 \_\_\_\_\_  
26 LONNY R. SUKO  
27 Senior United States District Judge  
28

**ORDER GRANTING MOTION  
FOR PARTIAL SUMMARY JUDGMENT - 15**