

COURT OF APPEALS  
DIVISION II

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NO. 38211-3-II

STATE OF WASHINGTON  
BY *[Signature]*

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

GLOBAL HORIZONS, INC.,

Respondent/Cross-Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF  
WASHINGTON AND EMPLOYMENT SECURITY DEPARTMENT,

Appellants/Cross-Respondents.

**BRIEF OF APPELLANTS  
DEPARTMENT OF LABOR & INDUSTRIES AND  
EMPLOYMENT SECURITY DEPARTMENT**

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**ORIGINAL**

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## I. INTRODUCTION

This case concerns a dispute over a settlement agreement between Global Horizons, Inc., (Global) and two Washington state agencies, the Department of Labor and Industries (L&I) and the Employment Security Department (ESD).<sup>1</sup> Global had settled with L&I regarding several violations of the Farm Labor Contractor Act, RCW 19.30, and with ESD regarding issues involved in the recruitment and referral of local workers as part of foreign H-2A visa work-site programs. Because of Global's breach of the settlement agreement, L&I revoked Global's farm labor contractor license (FLC license) and ESD discontinued its recruitment and referral services.

The settlement agreement provides in multiple provisions that upon violation of the law or the settlement agreement, L&I could, in its sole discretion, revoke Global's FLC license. The superior court improperly construed a notice provision in the agreement to provide an opportunity to cure before revocation. The notice provision does not contain opportunity-to-cure language. Rather it provides for two weeks notice before revocation and further provides that Global agreed that L&I was not required to provide a hearing or an opportunity for Global to be heard before revocation. *See* Section IV.L.5 ("§ L5") at CP 30. This

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<sup>1</sup> Where appropriate, L&I and ESD will be referred to collectively as "the Departments."

provision read individually, and the agreement read as a whole, gives L&I sole discretion to revoke Global's FLC license without any opportunity to cure.

The superior court also erroneously ruled that the two-week notice provision in § L5 applied to ESD. Not only does § L5 not mention ESD, other provisions in the settlement agreement expressly provide that ESD may immediately discontinue recruitment and referral services upon breach by Global.

Although the superior court incorrectly decided that the Departments breached the notice provision of the settlement agreement, the superior court correctly decided that any such breach was not material.

The Departments ask that the Court rule for the Departments on the grounds of contract interpretation, breach, and materiality. If the Court rules for the Departments on materiality, it need not reach the other issues.

## **II. ASSIGNMENTS OF ERROR**

### **Assignment of Error No. 1**

The superior court erred by entering summary judgment and declaratory judgment on March 14, 2008, that the settlement agreement contains a two-week notice and opportunity-to-cure provision that was

breached by the Departments.<sup>2</sup>

### Assignment of Error No. 2

The superior court erred by denying the Departments' motions for partial summary judgment on March 14, 2008.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. The settlement agreement provides that "L&I may, in its sole discretion, immediately revoke Global's license as a farm labor contractor" upon determining that Global violated the law or breached the agreement. The settlement agreement also provides that L&I give two weeks notice of the revocation and, in the same provision, provides that L&I does not have to provide "an opportunity for Global to be heard prior to the revocation." Does the settlement agreement give L&I sole discretion to revoke Global's FLC license without any opportunity to cure?
2. By letter dated December 20, 2005, L&I informed Global of Global's failure to meet certain requirements of the settlement agreement, and L&I also directed Global to rectify its violations by December 30, 2005. By letter dated December 30, 2005, L&I notified Global that L&I was revoking Global's farm labor contractor license. The December 30, 2005 letter did not specify the effective date of the revocation. L&I sent a letter on January 5, 2006, clarifying that the effective date of revocation was January 13, 2006. Does the December 30, 2005 letter constitute L&I's notice of revocation, and does that letter satisfy the settlement agreement requirement of giving two weeks notice of revocation?
3. Does § L5 apply to ESD when this provision references L&I only?

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<sup>2</sup> The superior court entered several findings of fact that the Departments dispute, including 1.1, 1.2, 1.3, 1.4. Findings of fact are irrelevant to summary judgment and parties need not assign error to findings in summary judgment. See *Wash. Optometric Ass'n v. County of Pierce*, 73 Wn.2d 445, 448, 438 P.2d 861 (1968).

#### IV. STATEMENT OF THE CASE

##### A. Background

Global Horizons, Inc., is a business that provides temporary agricultural workers to growers under the federal H-2A visa program. CP 20. Global uses the services of ESD, which provides services delegated to ESD by the U.S. Department of Labor, the federal agency that administers the H-2A Program. CP 20. ESD oversees the recruitment and referral of local workers to determine if there is a need for foreign H-2A workers on H-2A jobsite applications. CP 20. If a need exists for such labor, Global places the workers on specific job sites after showing the need. CP 5-6.

Global is also regulated by the Farm Labor Contractor Act, RCW 19.30, which provides for contractor requirements regarding agricultural employment. L&I administers the Farm Labor Contractor Act.

Global began operating as a farm labor contractor in Washington State in January 2004. It obtained an FLC license in October 2004.

##### B. Global Violated Laws Governing Agricultural Workers

After Global started operating in Washington, it failed to comply with a wide range of employment-related laws. CP 286-92 (stipulation of parties). Global admitted that during 2004 and 2005 it violated laws related to farm labor contractor licensing, recruitment and referral of farm laborers, industrial insurance tax premiums, payments to workers, safety,

health, and housing. CP 286-92.

These violations include operating as an unlicensed farm labor contractor in Washington from January to October 2004, while providing farm laborers to two orchards. CP 286.

Additionally, throughout 2004, Global underreported the number of hours worked by its farm laborers for the purpose of industrial insurance tax premiums. CP 21, 50. The total number of hours actually worked for the first nine months of 2004 alone exceeded 157,000. CP 289. Global reported and paid premiums based on approximately 83,000 hours worked. CP 289. As a result of both underreporting of hours and reporting under the wrong risk classification, Global paid significantly less than it should have, as required by Washington law, for industrial insurance premiums. CP 289-90.

Global also failed to pay all of its workers the full amount of wages and reimbursements (totaling over \$100,000) by withholding non-existent state income tax and improperly withholding federal income and payroll taxes (H-2A workers are exempted). CP 287-88. Global also underreported the number of workers it intended to bring to work in Washington, and it violated other worker-documentation requirements. CP 51.

Global did not disclose information to ESD in its H-2A

applications, including appropriate housing locations.<sup>3</sup> In addition, Global violated federal regulations by failing to timely reimburse the cost of airfare between Thailand and the United States once the H-2A farm laborers had completed 50 percent of their contracts. CP 52.

L&I revoked Global's FLC license on December 30, 2004, and issued a notice of violation against Global alleging multiple violations of the Farm Labor Contractor Act on June 3, 2005. CP 10.

Because Global violated federal laws and regulations related to the H-2A program, ESD discontinued recruitment and referral services to Global on May 10, 2005. CP 47-53. Global appealed the revocation, the discontinuation of services, and citations to the Office of Administrative Hearings (OAH). CP 10.

**C. Global and the Departments Reached a Settlement That Allowed Global to Continue To Operate in Washington State**

The parties entered into a settlement to resolve the appeals at OAH on September 22, 2005. CP 20-53. The settlement agreement provided Global "a limited opportunity for a second chance to operate as a licensed farm labor contractor in the State of Washington." CP 21.

The settlement took a global approach to Global's violations of

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<sup>3</sup> Global housed its employees at three locations not listed in its H-2A applications without the requisite prior approval of the United States Department of Labor, and it did not submit the required documents and fees to operate temporary worker housing at these locations. CP 288. Global was issued four separate "serious" WISHA safety citations for violations at sites where Global housed workers. CP 289.

many different types of laws. CP 97. Besides addressing the pending litigation over L&I's farm labor contracting citations and revocation, and over ESD's discontinuation of services, the settlement also addressed issues not before OAH related to the payment of industrial insurance premium taxes, worker housing, worker safety, and laws enforced by the Department of Revenue. CP 97-109.

The settlement agreement addressed Global's past violations of laws, contained provisions that addressed future compliance with Washington and federal laws, and identified the consequences and created the procedures if Global breached the settlement agreement or violated the law. CP 295-301. Global agreed to pay the past unpaid wages, industrial insurance premiums, and penalties. CP 97-98. Global also agreed to supply an independent quarterly audit of wages and premiums to certify the accuracy of the wages paid, industrial insurance premiums due, and unemployment insurance taxes due. CP 102-03 (section IV.E).<sup>4</sup>

The settlement agreement contains multiple provisions in which L&I in its sole discretion may revoke Global's FLC license upon breach,

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<sup>4</sup> Additionally, Global agreed to: fully and correctly identify to L&I, ESD, and the DOH the current location of temporary and permanent housing for any worker for whom Global was required to provide housing (section II.A); maintain and provide ESD with documentation relating to the H-2A program and workers (section II.C); maintain compliance with all applicable Washington statutes and rules and federal H-2A requirements, laws, and rules (section IV.C); post a repatriation bond to cover cost of airfare for workers' return trips to their countries of origin (section IV.F); and retain and notify workers of the identity of an independent third party who would provide ESD with reports on Global's treatment of workers (section IV.G). CP 100-08.

providing at section I.C:

Immediate revocation of farm labor contractor license. Global stipulates that L&I's determination, in its sole discretion, that a violation of any of the conditions of this Agreement or provisions of the law has occurred constitutes an immediate threat to the public health, safety, and welfare and serves as a sufficient basis for L&I to immediately revoke Global's farm labor contractor license. L&I has agreed to provide notice and a limited ability to continue to operate pending an appeal as provided for in section IV.L. Global acknowledges if its farm labor contractor license is revoked, ESD has the discretion to immediately cease providing services, and waives any right to stay the discontinuance pending an appeal.

CP 22-23.

Section IV.L addresses L&I's discretion to revoke Global's FLC license, and ESD's discretion to discontinue recruitment and referral services. CP 30. Section IV.L.2 states:

If either DOR, ESD, or L&I issue a determination alleging a violation of law or breach of this Agreement, L&I may, in its sole discretion, immediately revoke Global's license as a farm labor contractor, and ESD may, in its sole discretion, immediately discontinue recruitment and referral services to Global.

CP 30.

The notice provision that the trial court based its conclusion that the agreement contained an opportunity to cure is contained in Section IV.L.5 (§ L5). CP 30. § L5 states:

L&I agrees that it will notify Global at least two weeks prior to revoking Global's farm labor contractor license. By providing the notice, Global agrees that L&I is not

required to provide a hearing or an opportunity for Global to be heard prior to the revocation. After receiving notice of revocation, Global may not undertake new farm labor contracts or extend any existing contracts unless L&I's revocation decision is reversed or expires.

CP 30.

Upon Global's violation of the law or breach of the Agreement, the agreement also addresses when ESD may discontinue recruitment and referral services, as stated in section II.D:

Immediate discontinuation of ESD recruitment and referral services. Global stipulates that ESD's determination, in its sole discretion, that a violation of any of the conditions of this Agreement has occurred constitutes a sufficient basis under 20 C.F.R. 658.501(b) for ESD to institute an immediate discontinuation of ESD recruitment and referral services. Global waives any right to stay the discontinuance pending appeal.

CP 24. Section IV.L.6 also provides that "[i]mmediate discontinuation of ESD services or revocation of the farm labor contractor license shall not be stayed pending appeal, except as provided in IV.L.4." CP 30.

Section IV.M describes how the parties should notify each other of an alleged breach:

In the event of a breach of this Settlement Agreement, notification shall be provided in writing. However, this notification process shall not disrupt immediate discontinuation of ESD services or immediate revocation of the farm labor contractor license.

CP 31.

The Agreement provides that the appeal rights of RCW 34.05

apply and that Global may file an administrative appeal of any determination by ESD or L&I. CP 30. Section IV.L.3 states:

Global may appeal any determination by DOR, ESD, or L&I as provided by law. For instance, a Notice of Violation issued under RCW 19.30 is reviewable under RCW 34.05. Global's appeal of an immediate discontinuation of services by ESD is by a petition to reinstate services filed with the state Office of Administrative Hearings under 20 C.F.R. 658.504.

CP 30.

All parties and their respective attorneys signed the settlement agreement, including Mordechai Orian, President of Global, Gary Weeks, then-Director of L&I, and Karen Lee, Commissioner of ESD. CP 32-37. Section IV.N states that the written terms of the settlement agreement represent the parties' complete understanding of their rights and responsibilities. CP 31.

**D. Global Did Not Meet Deadlines in the Settlement Agreement**

Global was required to submit the completed third quarter 2005 certified audit report on or before November 30, 2005. CP 25. The purpose in Section IV.E of the settlement agreement was to verify the accuracy of Global's wages paid to its workers, industrial insurance premiums, and unemployment taxes paid. CP 25. Global did not engage an accounting firm to complete the audit until a few weeks before the deadline for submitting the certified audit report. CP 296. The

Department extended the deadline to December 15, 2005. CP 56. On December 15, 2005, Global did not submit the audit. CP 56.

Global also did not file its quarterly reports and pay taxes due to L&I and ESD on October 31, 2005 until well into December 2005. CP 297. Both agencies provided multiple reminders to Global to submit the premiums and taxes that were overdue. CP 297, 300.

**E. On December 20, 2005, the Departments Detailed Global's Breaches in Writing**

On December 20, 2005, as required by Section IV.M. of the settlement agreement, the Departments detailed in writing Global's breaches of the settlement agreement. CP 125-28.

The Departments alleged the following violations of the settlement agreement: (1) failure to file reports to the agencies by statutory deadlines and pay premiums and taxes when due; (2) failure to file the certified audit report; (3) failure to execute a contract with Mr. Mendoza, the independent third party; (4) failure to pay its workers in full by the date identified in its agreements with the workers; (5) failure to submit its business entity disclosure until six weeks after the October 15, 2005 deadline; and, (6) failure to provide copies of the cancelled worker-settlement checks, which were required by November 30, 2005. CP 303-06.

The Departments told Global that Global must take “[i]mmediate actions to cure,” stating that “[i]n order to immediately abate and rectify these violations, Global must complete the following no later than 3:00 p.m. PST on December 30, 2005.” CP 303-06.

**F. A Notice of Revocation Was Issued On December 30, 2005**

As of December 30, 2005, Global remained in violation of several provisions of the settlement agreement, as well as legal requirements governing the payment of premiums and unemployment taxes. CP 321-22. Global had failed to file the certified audit report after the two 15-day extensions (first, November 30, 2005 to December 15, 2005, and then to December 30, 2005). CP 322. Global also owed industrial insurance premiums and penalties and interest on those unpaid premiums. CP 60. It owed unpaid unemployment taxes, and interest and penalties on the unpaid taxes. CP 61.

The Departments notified Global on December 30, 2005, that Global’s FLC license was being revoked, and that ESD’s recruitment and referral services were immediately discontinued. CP 130-32. In the Departments’ December 30, 2005 notice, the Departments outlined nine violations of the law and breaches of the settlement agreement committed by Global since the settlement agreement was signed on September 22, 2005. CP 130-32.

The December 30, 2005 notice stated that because Global had failed to cure numerous violations of both the law and the settlement agreement, “we are left with no choice but to revoke Global’s farm labor contractor license under RCW 19.30.060 and immediately discontinue recruitment and referral services.” CP 307. The December 30, 2005 notice did not specify an effective date for revocation of Global’s FLC license. CP 307-09.

By letter dated January 5, 2006, responding to Global’s untimely January 4, 2006 application to renew its license, L&I clarified that the revocation date would have been January 13, 2006, but for Global’s failure to timely apply to renew its FLC license. CP 311. *See* discussion of the license-renewal facts immediately below.

**G. Global Did Not Apply for Renewal of Its Farm Labor Contractor License Before the Expiration Date**

Farm labor contractor licenses require yearly renewal by December 31st. CP 313, 316. In October 2005, L&I sent Global its renewal package with a reminder that Global’s FLC license expired on December 31, 2005. CP 314. Because L&I did not receive a renewal application from Global before December 31, 2005, the FLC license expired on that day. CP 314.

On January 4, 2006, Global applied to L&I for renewal of its license. CP 314. On January 5, 2006, the Department sent Global a

response letter. CP 311. The letter stated that although the revocation was to have been effective on January 13, 2006, “Global does not have a valid 2006 Washington state farm labor contractor license.” CP 311. Thus, “effective immediately,” Global was no longer licensed to operate as a farm labor contractor in Washington because Global’s FLC license automatically expired on December 31, 2005. CP 311. L&I indicated that although the application was not complete, that, “[r]egardless, under RCW 19.30.050(2), an application for a farm labor contractor’s license has been revoked within three years.” CP 311.

#### **H. Procedural History**

Global appealed to OAH from L&I’s revocation and ESD’s discontinuation of services. CP 254-55, 754, 762. The matters were consolidated for hearing. CP 373.

Six weeks before the scheduled start of the OAH hearings, and a year after the revocation of Global’s FLC license and ESD’s discontinuation of recruitment and referral services, Global brought the present action in Thurston County Superior Court. CP 5. Global also asked OAH to stay the adjudicative proceedings on the basis that a binding court interpretation of the settlement agreement was necessary to adjudicate that matter at OAH. CP 5. OAH granted Global’s motion to stay proceedings on March 26, 2007. CP 373.

The parties cross-moved for summary judgment in superior court. CP 182, 207. Both parties provided extrinsic evidence in support of their arguments about the meaning of the settlement agreement. CP at 182-206, 211-21. The Departments challenged Global's evidence on admissibility and relevance grounds. CP 821-23.

In a decision dated March 14, 2008, the superior court entered a declaratory judgment and summary judgment. CP 1018-23. The court ruled that the explicit requirement of the agreement for two weeks notice of revocation was impliedly an opportunity-to-cure provision. *See* CP 1117; RP 5. Thus, the court determined that the requirement of two weeks notice before revocation of the farm labor contractor license and discontinuation of ESD services was for the purpose of giving Global an opportunity to cure alleged violations. CP 1020. In the alternative, the court ruled that there was extrinsic evidence of discussions between the parties that conclusively supported reading into the agreement an opportunity to cure. CP 1020.

The court concluded against the Departments, as follows: (1) that the Departments' December 20, 2005 letter (not, as contended by the Departments, L&I's December 30, 2005 letter) was the Departments' notice of revocation that gave Global 10 days opportunity to cure alleged violations; (2) that the Departments gave only 10 days notice, which was

four days short; and (3) that this breached the agreement, which the court interpreted to require giving a two week opportunity to cure. CP 1017-1020. The court rejected the Departments' arguments: (1) that the December 20, 2005 L&I letter was not a notice of revocation, and that the actual notice of revocation occurred on December 30, 2005; (2) that the effective date of revocation under the December 30, 2005 letter was January 13, 2006; and (3) that the settlement agreement did not require that the Departments give an opportunity to cure violations, so it did not matter that the December 30, 2005 letter gave no opportunity to cure violations. CP 1103-04.

Although the court concluded that the Departments breached the agreement by not giving Global two weeks to cure its violations, the court also concluded the Departments' breach was not a material breach because Global did not cure its violations either within two weeks of the December 20, 2005 letter or within two weeks of the December 30, 2005 letter. *See* CP 1020, 1110. The court also ruled against Global on its due process and public policy arguments. CP 1020-21.

Global, L&I, and ESD have appealed the superior court's decision to this Court.

## V. SUMMARY OF THE ARGUMENT

The primary issue here is whether the settlement agreement gives L&I sole discretion to revoke Global's FLC license without any opportunity to cure. The superior court interpreted the settlement agreement to require an opportunity to cure before L&I's revocation of Global's FLC license. The settlement agreement allows L&I to revoke Global's FLC license if L&I determines in its sole discretion that Global has breached the agreement. The language of § L5 provides for two weeks notice before the effective date of revocation, but does not require an opportunity to cure. There is no "cure" language in the settlement agreement, and none is implied given the discretion to revoke granted L&I. The settlement agreement contemplates only notice, which would allow Global time to cease operations before the effective revocation date.

The superior court also erred by concluding that there was admissible extrinsic evidence showing intent by the parties to provide an opportunity to cure. The evidence presented by Global not only is largely inadmissible but also demonstrates only Global's unilateral subjective intent, which is irrelevant and insufficient to prove the meaning of the settlement agreement. The evidence of conduct by the Departments in their December 20, 2005 letter, which voluntarily provided a cure period, is also insufficient to prove there was an opportunity-to-cure provision in

the settlement agreement because all parties treated the December 20, 2005 letter's 10-day opportunity to cure as a last chance provided solely at the discretion of the Departments.

If the Court determines that Global presented relevant extrinsic evidence on the opportunity-to-cure question, then there is a material issue of fact that cannot be resolved on summary judgment. This is because different inferences may be drawn from Global's evidence and because L&I presented ample extrinsic evidence that in fact there was no "cure" language in the settlement agreement.

Another issue before this Court is whether the superior court erred in concluding that the Department's December 20, 2005 letter – rather than the Department's December 30, 2005 letter – constituted the notice of revocation. If opportunity to cure is not required under the agreement, then the December 30, 2005 letter, when viewed in light of subsequent clarifying correspondence, gave the 14 days notice of revocation required under the agreement.

Finally, the superior court also erred by applying § L5 to ESD. Under the express terms of the settlement agreement, the two-week notice requirement does not apply to ESD; the notice requirement applies only to L&I. There was no evidence offered by Global to refute this point. The settlement agreement provides in numerous provisions for ESD's sole

discretion to immediately discontinue recruitment services.

## VI. STANDARD OF REVIEW

On review of a summary judgment order, the appellate court's inquiry is the same as the superior court's. *Lynott v. Nat'l Union Fire Ins. Co.*, 123 Wn.2d 678, 685, 871 P.2d 146, 149 (1994). Summary judgment is appropriate when no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). However, summary judgment is appropriate only if the pleadings, affidavits, admissions, and depositions on file demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Hall v. State Farm Mut. Auto. Ins. Co.*, 133 Wn. App. 394, 398, 135 P.3d 941 (2006).

The court must consider all facts and reasonable inferences in the light most favorable to the nonmoving party. *Hall*, 133 Wn. App. at 398. In cases of contract interpretation, if reasonable minds can draw different conclusions considering the admissible evidence, summary judgment is not proper. *Scott Galvanizing, Inc. v. Nw. EnviroServices, Inc.*, 120 Wn.2d 573, 584-85, 844 P.2d 428 (1993); *Vacova Co. v. Farrell*, 62 Wn. App. 386, 401-02, 814 P.2d 255 (1991); CR 56(e).

## VII. ARGUMENT

### A. The Settlement Agreement Provides That Revocation of Global's FLC License Is in Sole Discretion of L&I.

#### 1. Read as a whole, the settlement agreement gave L&I sole discretion to revoke Global's FLC license without an opportunity to cure.

Despite clear language to the contrary, the superior court concluded that the settlement agreement provides Global an opportunity to cure its violations if it breaches the agreement. The superior court apparently concluded that the only conceivable purpose for a revocation-notice provision in a contract is "to provide an opportunity to cure." CP 1103.

The interpretation of contract language which gives reasonable, fair, just and effective meaning to all manifestations of intention is preferred to an interpretation which leaves a part of such manifestations unreasonable, imprudent, or meaningless. *Public Util. Dist. No. 1 of Lewis County v. Wash. Public Power Supply Sys.*, 104 Wn.2d 353, 373, 705 P.2d 1195 (1985), *order modified*, 713 P.2d 1109 (1986) (quoting *Dickson v. United States Fid. & Guar. Co.*, 77 Wn.2d 785, 790, 466 P.2d 515 (1970)). A contract must also be read as a whole and given a "fair, reasonable, and sensible construction as would be given to the contract by the average person." *Hall*, 133 Wn. App. at 399.

Multiple sections of the settlement agreement show that L&I could revoke Global's FLC license immediately upon its determination that Global breached the agreement.<sup>5</sup> Importing an opportunity-to-cure provision would render these provisions meaningless.

These sections provide that upon Global's breach, "sole discretion" resides with L&I whether to revoke Global's FLC license:

- Section I.C ("L&I's determination, in its sole discretion, that a violation of any of the conditions of this Agreement or provisions of the law . . . serves as a sufficient basis for L&I to immediately revoke Global's farm labor contractor license.").
- Section IV.L.2 ("If either DOR, ESD, or L&I issue a determination alleging a violation of law or breach of this Agreement, L&I may, in its sole discretion, immediately revoke Global's license as a farm labor contractor, and ESD may, in its sole discretion, immediately discontinue recruitment and referral services to Global.").
- Section IV.M ("In the event of a breach of this Settlement Agreement, notification shall be provided in writing. However, this notification process shall not disrupt immediate discontinuation of ESD services or immediate revocation of the farm labor contractor license.").

CP 99-100, 107, 108.

These provisions do not say that L&I may revoke only after giving Global an opportunity to cure, rather they provide that revocation may be made "immediately" if L&I determines "in its sole discretion" that Global violated either the law or a settlement provision. CP 99-100 (Section I.C.), 107 (Section IV.L.2), 108 (Section IV.M).

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<sup>5</sup> Likewise, other sections provide ESD with sole discretion to discontinue recruitment and referral services, *see* discussion *infra* Part VII.C.

L&I was also not required to give Global an opportunity to be heard before revocation. CP 30. It is counterintuitive that while L&I is not required to provide Global “an opportunity to be heard prior to revocation,” CP 30, it would be required to permit Global a time period to rectify its wrongs. It is also counterintuitive that the settlement agreement gives Global a right to cure when Global stipulated that its breach of any terms of the settlement agreement is an “immediate threat to the public health, safety, and welfare.” CP 21-22 (Section I.C.).

It is not reasonable to interpret the contract as having an opportunity-to-cure provision, especially given the multiple provisions in the agreement, because the settlement agreement provides no parameters or measures as to how an opportunity to cure would work in practice. *See Eurick v. Pemco Ins. Co.*, 108 Wn.2d 338, 340-43, 738 P.2d 251 (1987) (the goal in contract interpretation is to give effect to the intentions of the parties with practical and reasonable results). The settlement agreement requires Global to comply with all state and federal laws. CP 20. If L&I determined that Global broke the law, Global cannot cure this situation. An opportunity-to-cure provision would be meaningless because Global would have already taken the illegal action.

By design, the settlement agreement was very favorable to L&I because Global’s numerous violations in 2004 supported revocation.

Global entered into this unfavorable settlement agreement after negotiations between Global's former attorneys and the AAGs representing the Departments, because Global received the significant benefit of operating despite a history of violations that would have resulted in OAH upholding revocation. CP 643, 644, 648.<sup>6</sup>

Under the agreement, L&I in its sole discretion determines if Global has violated the law or otherwise breached the contract. L&I need not take into account any effort to cure or explanation that Global makes. The settlement agreement in its entirety shows the intent to give L&I broad authority to revoke Global's license upon any breach or violation of the law. The superior court's ruling that the agreement contained an opportunity-to-cure provision is not consistent with this intent.

**2. The language of the settlement agreement does not provide an opportunity to cure**

The primary provision the court relied on is the notice provision, § L5, which provides for two-week notice before the revocation of Global's farm labor contractor license by L&I:

L&I agrees that it will notify Global at least two weeks prior to revoking Global's farm labor contractor license. By providing the notice, Global agrees that L&I is not required to provide a hearing

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<sup>6</sup> Attorney Natalie Brouwer describes why Global entered into the agreement containing Section I.C.: "I know that I was very unhappy with this type of provision, but the agencies had Global in an extremely difficult position that ended up resulting in a pretty one-sided settlement agreement, so I don't know if I specifically talked to Ms. Goss about this provision, but I know I didn't like it." CP 639.

or an opportunity for Global to be heard prior to the revocation. After receiving notice of revocation, Global may not undertake new farm labor contracts or extend any existing contracts unless L&I's revocation decision is reversed or expires.

CP 30.

Washington courts treat settlement agreements as contracts. *Evans & Son, Inc. v. City of Yakima*, 136 Wn. App. 471, 477, 149 P.3d 691 (2006). Washington courts use the context rule for contract interpretation. *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990). Under the context rule, intent is discerned by “viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.” *Berg*, 115 Wn.2d at 667.

While Washington courts use the context rule for contract interpretation, (*Berg*, 115 Wn.2d at 657), courts consistently begin their inquiries into contract matters by analyzing the written word of the contract. *E.g., Hearst Comm., Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503-04, 115 P.3d 262 (2005). When interpreting contracts, the subjective intent of the parties is generally irrelevant if the intent can be determined from actual words used. *Hearst*, 154 Wn.2d at 509 (general testimony about purpose of contract was not relevant to determining meaning of specific words of contract).

The superior court determined that the settlement agreement impliedly contained a two-week opportunity-to-cure provision. CP 1020-21. The word “cure” does not appear in the settlement agreement. CP 20-31. Global admits that there is no explicit opportunity-to-cure language in § L5 or elsewhere in the agreement. See CP 1131. By construing the contract to impliedly contain an opportunity-to-cure provision, the superior court impermissibly imputed a new term into the agreement that is inconsistent with the express terms of the settlement agreement. See *U.S. Life Credit Life Ins. Co. v. Williams*, 129 Wn.2d 565, 571, 919 P.2d 594 (1996) (court does not rewrite contracts).

The superior court’s determination is premised on the notion that the term “notice” provided in § L5 itself necessarily implies an opportunity to cure, and that there would be no other purpose for having a notice provision. CP 1117. But the notice provision provides just that, notice, and providing notice, by itself, is a useful purpose.

“Courts give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement demonstrates a contrary intent.” *Hearst*, 154 Wn.2d at 504 (quoting *Universal/Land Constr. Co. v. City of Spokane*, 49 Wn. App. 634, 637, 745 P.2d 53 (1987)). Because notice is not defined in the agreement, its meaning may be ascertained by use of a standard dictionary. *Wm. Dickson Co. v. Pierce County*, 128 Wn.

App. 488, 493, 116 P.3d 409 (2005). Notice means “formal or informal warning or intimation of something: ANNOUNCEMENT . . . .” Webster’s Third New Int’l Dictionary, 1544 (2002). It is a “notification by one of the parties to an agreement . . . of intention of terminating it at a specific time <tenants’ right freely to give [notice] . . . >.” See Webster’s at 1544.

Under the ordinary meaning of notice, L&I was required to announce that it was revoking Global’s license. This is the reasonable interpretation of the word notice and reflects the parties’ intent in the contract in view of the language giving L&I sole discretion to revoke and the language that provides for no hearing before revocation. *Hearst*, 154 Wn.2d at 503 (court imputes an intention corresponding to the reasonable meaning of the words used). Beyond the announcement function, the term “notice” does not connote taking other action such as providing an opportunity to cure. But there are multiple other purposes for such a revocation-notice provision, as evidenced in the instant context.

Advance notice on December 30, 2005, provided time for Global to cease activities that would be violations of the law if Global continued to act as a farm labor contractor without a license.<sup>7</sup> Notice allowed Global to decide whether and when to start work on new contracts, given that its ability to operate after revocation hinged upon whether agricultural work

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<sup>7</sup> RCW 19.30.150 provides both criminal and civil penalties for violations of the Farm Labor Contractor Act.

has begun, *see* section IV.L.4, CP 107. Notice allowed Global to get its affairs in order before its license revocation went into effect.

Notice also allowed Global's current and prospective customers and workers to decide whether, and if, a pending revocation would affect their interests. And, finally, the notice provided by the December 30, 2005 letter allowed Global to ask L&I to provide Global with yet another chance to keep its license, an opportunity – outside the terms of the settlement agreement – to cure the violations. The ordinary definition of notice (“announcement”) must be used unless the contract demonstrates a contrary intent, which it does not. *See Hearst Comm.*, 154 Wn.2d at 504.

**3. Global presents no relevant extrinsic evidence to establish that the settlement agreement contains an opportunity-to-cure provision**

The superior court determined that in the alternative to the settlement agreement language, “there is overwhelming extrinsic evidence of settlement discussions about a cure that supports a finding that the notice provision was intended by the parties to be an opportunity to cure provision.” CP 1103. The evidence does not support this determination, both in terms of considering only the relevant admissible evidence discussed in this section, and also in terms of viewing all the evidence in the light most favorably to the non-moving parties, the Departments. In

particular, the admissible testimony of AAG Amanda Goss,<sup>8</sup> as discussed *infra* Part VII.A.4, shows that the settlement agreement does not contain an opportunity-to-cure provision.

While the Supreme Court has explicitly rejected the plain meaning rule, the Court has emphasized that extrinsic evidence “is admitted for the purpose of aiding in the interpretation of what is in [a written] instrument and not for the purpose of showing intention independent of the instrument.” *Lynott*, 123 Wn.2d at 684 (quoting *Berg*, 115 Wn.2d at 669). The Washington courts do not use extrinsic evidence for the purpose of contradicting or modifying an integrated instrument.<sup>9</sup> Therefore affidavits submitted in summary judgment motions must set forth facts that would be admissible in evidence. *Vacova*, 62 Wn.2d at 395 (citing CR 56(e)).

Several post-*Berg* opinions of the Supreme Court further delineate the scope of admissible extrinsic evidence under the context rule. In *Hollis v. Garwall, Inc.*, the Court summarized the post-*Berg* case law:

[A]dmissible extrinsic evidence does *not* include:

- Evidence of a party’s unilateral or subjective intent as to the meaning of a contract word or term;
- Evidence that would show an intention independent of the

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<sup>8</sup> AAG Goss’s testimony is admissible because she testifies to what was specifically stated to Mr. Edgley, as opposed to her unexpressed intentions. *Hearst*, 154 Wn.2d at 503.

<sup>9</sup> In this case, the settlement agreement contains an integration provision in Section N. CP 108.

instrument; or,

- Evidence that would vary, contradict or modify the written word.

137 Wn.2d 683, 695-96, 974 P.2d 836 (1999) (citing *In re Marriage of Schweitzer*, 132 Wn.2d 318, 326-27, 937 P.2d 1062 (1997); *U.S. Life Credit Life Ins. Co.*, 129 Wn.2d at 569-70; *Nationwide Mutual Fire Ins. Co. v. Watson*, 120 Wn.2d 178, 189, 840 P.2d 851 (1992)); see also *Hearst*, 154 Wn.2d at 503.

Here, the superior court erred by relying on evidence about the unilateral, subjective intent of Global. This evidence shows an intention independent of the settlement agreement. See *Hearst*, 154 Wn.2d at 503-04. As emphasized by the *Hearst* Court, such evidence is irrelevant in determining the parties' intent:

We take this opportunity to acknowledge that Washington continues to follow the objective manifestation theory of contracts. Under this approach, we attempt to determine the parties' intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties . . . . We impute an intention corresponding to the reasonable meaning of the words used . . . . Thus, when interpreting contracts, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used.

*Hearst*, 154 Wn.2d at 503-04 (internal citations omitted). The evidence Global offered in its motion before the superior court included testimony of Mordechai Orian, Global's President, and of Natalie Brouwer and Ryan

Edgley, Global's former attorneys, who took part in drafting the settlement agreement. Their respective unilateral, subjective perceptions of the parties' mutual intent are irrelevant.

Global President Orian claimed in his declaration that he believes § L5 is an opportunity-to-cure provision. CP 92-93. However, Mr. Orian did not participate directly in the negotiations with the Department representatives. In his declaration, Mr. Orian states, "I had instructed my attorney at the time, Natalie K. Brouwer, to vigorously negotiate for this notice and opportunity to cure provision on behalf of Global and me." CP 92-93.<sup>10</sup> Global has never asserted that Mr. Orian personally made any such assertion to L&I or to any Assistant Attorney General (AAG) representing the Departments. His statements of what he thought was the purpose of the notice provision of § L5 are irrelevant to this Court's analysis because he was expressing only what he thought the provision contained and what he expressed to his attorney, not what was communicated to the Departments. An affidavit that discusses one party's intent for a contractual provision is not relevant. *See Hollis*, 137 Wn.2d

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<sup>10</sup> While Mr. Orian provides self-serving testimony regarding what he communicated to his counsel in his declaration, CP 92-93, Global repeatedly asserted attorney-client privilege during the depositions of Natalie Brouwer when she was asked to describe the interactions between Mr. Orian, Mr. Edgley, and herself in discussing the provisions of the settlement agreement. CP 626, 631, 651. However, attorney Brouwer did concede that attorney Edgley handled the negotiations of substantive provisions, and attorney Brouwer never had substantive discussions with L&I's attorney about § L5. CP 635.

at 696.

Although Mr. Edgley participated in the negotiations, his subjective beliefs as Global's former attorney do not show the parties' mutual intentions objectively manifested in the agreement. The declaration of Mr. Edgley states: "The notice and opportunity to cure provision [AAG Amanda] Goss and I negotiated is included in Section IV.L.5 of the Settlement Agreement. In my recent review of the Agreement, I realize that the exact words 'opportunity to cure' do not appear in the document." CP 148, ¶ 9. In his deposition, Mr. Edgley conceded that the language of the settlement agreement did not say what he wanted it to say, but that he was describing terms that he believed AAG Goss and he had discussed. CP 852-53, 863.

Q. Mr. Edgley, where—just for clarification, where in Paragraph C does it indicate that Global has 14 days—or Global has a right to 14 days' notice?

A. It doesn't say it in C.

Q. And where does it say anywhere in this agreement in Subsection C on Page 3 of Exhibit 11 that Global has an opportunity to cure or remedy any alleged violations?

A. It doesn't say that, but that's what Amanda and I discussed.

CP 853.

Mr. Edgley did not testify as to what AAG Goss specifically said,

instead he provided the following subjective understanding in support of his proposition that § L5 provides an opportunity to cure: “[t]he purpose of notice, when you’re dealing with a contract and good faith and fair dealing, is an opportunity to fix whatever the problem is.” CP 854-55. Under *Hearst*, specific statements by AAG Goss directly addressing § L5 would be admissible to determine “the meaning of specific words in the agreement,” but desires unexpressed to L&I or not directed to the meaning of words in the agreement would be irrelevant. 154 Wn.2d at 509 (refusing to admit extrinsic evidence about the desires of the parties outside of words expressed in text of the contract). Mr. Edgley’s testimony and declaration amount to a subjective understanding of the negotiations and contradict the written terms in the agreement based on his subjective beliefs and therefore should be disregarded. *Id.* at 503-04.

In the testimony by former Global attorney Brouwer, she likewise could not point to an opportunity-to-cure provision. But to try to convince the superior court that such was implied, she testified as follows: “[m]y understanding was that the notice included opportunity to cure. From what I understood from Mr. Edgley, that was very clearly agreed to with the agencies, and I didn’t think it was necessary to spell out every single provision. I thought that the agencies would act in good faith and abide by their oral negotiations, so I didn’t make a point of having to spell out

something that I thought was clear in the agreement and in the negotiations.” CP 660.

However, the deposition testimony shows that Ms. Brouwer did not discuss the notice provision directly with AAG Goss, and she admitted that she had little to do with the substantive negotiations. CP 635, 661. Her testimony reflects only her subjective understanding of what was said by Mr. Edgley.<sup>11</sup> The deposition testimony and declarations offered by Global show only the subjective intent of Global’s former attorneys and president not directed to specific words in the agreement. If this evidence is not considered, the remaining evidence fails to show – through connection to the words of the agreement – that the parties mutually agreed to an opportunity-to-cure provision.

Global has argued that the December 20, 2005 letter from the Departments shows that the Departments believed that there was an opportunity-to-cure requirement in the settlement agreement. CP 200-01. On December 20, 2005, the Departments outlined all of Global’s outstanding breaches and provided a 10-day period to cure those breaches. CP 303-06. The Departments’ decision, however, to give Global another opportunity to comply fails to show that the parties mutually intended a cure provision. A party’s conduct subsequent to execution of a contract is

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<sup>11</sup> Besides being irrelevant as reflecting her subjective intent, her beliefs should be not considered because they are based on the hearsay of Mr. Edgley.

admissible only to the extent the conduct sheds light on the meaning of the words of the contract themselves. *Hearst*, 154 Wn.2d at 510, n.14.

If the party's conduct does not shed light on the meaning of the contractual words, then it is irrelevant to the meaning of the contract. *Hearst*, 154 Wn.2d at 510, n.14. The December 20, 2005 letter does not elucidate the terms of the contract. It does not define notice in terms of providing an opportunity to cure. The letter did not reference § L5 at all. Because Global cannot point to anything specific in the contract's "*words themselves*" that provide an opportunity to cure, the December 20, 2005 letter does not shed light on specific contractual words; used in the way Global would use the letter, it only adds new terms.

The December 20, 2005 letter addressed to Mr. Orian specifically stated that the letter was "notice to you of Global Horizons, Inc.'s (Global's) failure to satisfy the terms." CP 125. The letter provided notice of a breach in writing as required by Section M. CP 108. While Section M states that notification of the breach shall be provided in writing, it also provides that such notification shall not disrupt immediate revocation of the FLC license. CP 108. The letter is consistent with the notification process for breach.

The letter was also consistent with the fact that the settlement agreement gave the Departments the discretion to decide whether to allow

Global more time to comply with the settlement terms. But, as discussed by L&I's former Director Weeks, the fact the Departments decided to give Global a limited opportunity to cure does not mean they understood the settlement agreement to require that opportunity. CP 295-98. In correspondence from Global dated December 23, 2005, Global specifically noted its appreciation for the opportunity to cure "any deficiencies and remain in good standing with the agencies." CP 749. Global understood that it was being provided an opportunity that was not provided for in the settlement agreement.

While Global could attempt to remedy its violations and ask for another chance to come into compliance with the law, the Departments were under no obligation to provide Global an opportunity to cure, and L&I was under no obligation to waive its right to revoke Global's license. Under the terms of the settlement agreement, this is true regardless of whether Global fixed its breach within two weeks or at any time following the notice provided. L&I retained sole discretion. The subsequent conduct of L&I (the December 20, 2005, December 30, 2005, January 5,

2006, and February 23, 2006 letters<sup>12</sup>) is not necessary to and does not elucidate the meaning of the contractual words. CP 303-306, 307-310, 311-312, 317-319.

In support of Global's contention that it has an opportunity to cure under the settlement agreement, Global can offer only the inadmissible extrinsic evidence of the subjective intent of Mr. Orian, Mr. Edgley, and Ms. Brouwer, that would modify the written words of the agreement, *see Hollis*, 137 Wn.2d at 695-96, and extrinsic evidence of the post-settlement letters that fail to elucidate the meaning of the contractual words, *Hearst*, 154 Wn.2d at 510, n 14. Such evidence is irrelevant. *See Hearst*, 154 Wn.2d at 503-04. Summary judgment should be granted to L&I that the settlement agreement provides for a two-week notice provision only and not for an opportunity to cure.

**4. If the Court accepts Global's extrinsic evidence, summary judgment is not appropriate because there are genuine issues of material fact**

In Washington, a factual dispute exists if the contract lends itself to two reasonable inferences, considering the admissible evidence. *Scott*

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<sup>12</sup> The December 30, 2005 letter was notice of the impending revocation by L&I and the "immediate" discontinuation of services by ESD. CP 130. The January 5, 2006 letter from L&I was a response to Global's 2006 FLC license application. CP 135. Because Global's license expired on December 31, 2006, L&I needed to clarify that Global's license was no longer in effect despite the 14-day notice period as part of its response to the Global's new application. CP 135. The February 23, 2006 letter from L&I responds to Global's lengthy (and factually incorrect) notice of appeal; in the February 23 letter, L&I again clarified its revocation decision of December 30, 2005. CP 138.

*Galvanizing, Inc.*, 120 Wn.2d at 582. Only when interpretation does not depend upon the use of extrinsic evidence, or when there is only one reasonable inference that can be drawn from extrinsic evidence, will it be a question of law. *Id.*; *SAS America, Inc. v. Inada*, 71 Wn. App. 261, 264, 857 P.2d 1047 (1993).

Here, the negotiating parties did not mutually agree to an opportunity to cure. Global's extrinsic evidence is subject to multiple interpretations and is controverted by extrinsic evidence offered by the Departments. If the extrinsic evidence Global offers is relevant, then the meaning of the settlement agreement must be decided by the trier of fact considering all the available evidence.

Assuming for argument that the extrinsic evidence offered by Global is relevant, the declarations of Gary Weeks and Karen Lee show that there is a dispute of material fact as to whether the parties mutually believed an opportunity to cure was among the terms of the settlement agreement. CP 561-64, 565-68. The declarations of Mr. Weeks and Mr. Lee show that the Departments' understanding of the terms of the settlement agreement did not include an opportunity for Global to cure. The Departments' understanding of the settlement agreement is consistent with its explicit wording. "Cure" is nowhere mentioned. CP 20-31. Mr. Weeks described the reasons for not granting Global a right

to cure violations of the law or breaches of the settlement agreement:

Giving Global a two week window to purportedly fix its violations as notified by the Departments could lead to a cycle of continued monitoring. This would furthermore give Global a perpetual window of time to violate the law and then fix its violations before [the Departments] could take action, which opportunity is not available to other employers in Washington.

CP 298; *see also* CP 302. This testimony shows that it was not the parties' agreement to have a cure provision.

Furthermore, Global CEO Mordechai Orian's email dated December 29, 2005, directly contradicts Global's purported interpretation that notice means a two-week opportunity to cure that prevents L&I from revoking Global's FLC license if Global cures the alleged violation. On December 29, 2005, Mr. Orian informed his employee, Tanya, that "we can be revoked tomorrow if we don't have the appropriate documents." CP 613. Facts and reasonable inferences must be drawn in favor of the Departments upon Global's motion for summary judgment. *Hall*, 133 Wn. App. at 398. Mr. Orian's statement raises a disputed fact given the inference drawn in favor of the Departments, the non-moving parties for the purposes of Global's motion.

Further evidence that more than one reasonable inference may be drawn from the extrinsic evidence can be found in the deposition testimony of Global's former attorney Natalie Brouwer and AAG Goss. As discussed above, Ms. Brouwer essentially admitted that the settlement agreement did not

contain a cure provision:

my understanding was that the notice included opportunity to cure. From what I understood from Mr. Edgley, that was very clearly agreed to with the agencies, I didn't think it was necessary to spell out every single provision. I thought that the agencies would act in good faith and abide by their oral negotiations, so I didn't make a point of having to spell out something that I thought was clear in the agreement and in the negotiations.

CP 660.<sup>13</sup> She may have had the unilateral intention that the settlement agreement provided a cure provision, but this was not expressed in the agreement itself. Viewing her statement in the light most favorable to the nonmoving parties, the Departments, she accepts that there was not a cure provision in the agreement.

AAG Goss testified as to her understanding in the negotiations about the meaning of the two-week notice provision:

[Mr. Edgley] asked if there could be a 14-day opportunity for Global to have an opportunity to plead their case before the agencies revoked. And we discussed specifically that this did not mean that Global had a hearing, that Global would have an opportunity to cure with impunity, meaning that, if Global corrected every violation within that timeframe, that that would somehow affect the agencies' discretion to still revoke the FLC license. What we specifically discussed was the scenario that, if there were violations or there was a breach or what have you that what Global wanted was an opportunity to talk to the Department to try to fix it or address it or whatever, but that, in no way, would affect the Department's discretion to revoke that license after that time period, nor would it

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<sup>13</sup> Ms. Brouwer's statement that Mr. Edgley told her that agencies agreed that there was an opportunity-to-cure provision should be disregarded because as hearsay.

constitute a hearing.

CP 585-86. The testimony of Ms. Goss, viewed in the light most favorable to the Departments, likewise is extrinsic evidence that there is not a cure provision in the agreement.

The parties also sent a number of drafts of the agreement back and forth before arriving at a final version. CP 616.<sup>14</sup> Many provisions that appeared in early drafts did not appear in the final draft. For example, Mr. Edgley's initial settlement proposal contained a provision that provided Global an opportunity to "correct an omission." CP 708. This opportunity-to-cure provision is conspicuously absent from the final agreement.<sup>15</sup> Ms. Brouwer identified this missing provision as "an opportunity to cure provision that we wanted, obviously, for a long period,

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<sup>14</sup> During the course of this case, Global implied this settlement agreement was drafted by the Departments with little input from Global. CP 201. However, the multiple drafts of the settlement agreement belies this. CP 702-48.

<sup>15</sup> Mr. Edgley had proposed the following provision:

**Expedited Resolution of Disputes or Omissions:**

If either the Department of Labor & Industries or Department of Employment Security fails to receive any of the periodic submissions from Global Horizons, Inc. required by this agreement, the agency shall send written notice of the deficiency to the attention of Mordechai Orian. . . Global shall have 28 days to correct the omission. If an omission to the Department of Labor and Industries is not so corrected, said omission may be considered a basis to revoke Global's farm labor contractor license. If an omission to the Department of Employment Security is not so corrected, said omission may be considered a basis to discontinue employment referral services to global Horizons pursuant to 20 C.F.R. § 658.501(a).

CP at 708.

which was 28 days, to give Global an opportunity to fix problems and continued to operate legally in the state, and that if Global failed to – it failed after certain prescribed period to cure the violations, it was in the discretion of the agency to revoke Global’s license.” CP 632. AAG Goss testified that the Departments specifically rejected the 28-day opportunity-to-cure provision, and the counterproposal “didn’t include it at all.” CP 594. She explained that instead the Departments suggested a 14-day limited notice period before the revocation would become effective. CP 595-96. The evidence regarding the negotiations viewed in the light most favorable to the Departments shows that, after negotiation over specific draft language, a cure provision was not included in the settlement agreement, and that this was intentional by the parties.

The totality of the extrinsic evidence, if admissible, shows that there is more than one reasonable interpretation of the settlement agreement with respect to whether an opportunity for cure is provided. Thus, assuming it is necessary to consider extrinsic evidence, there is a genuine issue of material fact regarding this provision that can only be resolved at trial. *See SAS America*, 71 Wn. App. at 262-63.

**B. L&I Gave Notice of Revocation on December 30, 2005 and Did Not Breach the Settlement Agreement**

The superior court erred in concluding that the December 20, 2005 letter – rather than the December 30, 2005 letter – constituted the notice of revocation. If opportunity to cure is not required under the agreement, then the December 30, 2005 letter, when viewed in light of subsequent clarifying correspondence, gave the 14 days notice of revocation of the FLC license required under the agreement. Hence, there was no breach of the agreement by L&I.

Thus, it was the December 30, 2005 letter by which L&I provided notice that it was revoking Global's license. CP 60-62. By operation of § L5, the revocation was effective two weeks after the notice of revocation issued on December 30, 2005. CP 30. L&I concedes that the December 30, 2005 notice of revocation was not clear as to when the revocation was to be effective. But, by letter dated January 5, 2006, L&I clarified that the revocation would have been effective on January 13, 2006, but for Global's failure to timely renew its license:

Under the settlement agreement, L&I agreed to provide 14 days notice prior to revoking Global's farm labor contractor license. Under RCW 19.30.081 [which requires yearly applications for license renewal], Global's farm labor contractor license automatically expired on December 31, 2005. Although the revocation is technically effective on January 13, 2006, Global does not have a valid 2006 Washington state farm labor contractor license.

CP 65-66.

This letter clarifies that the effective date of the revocation under the settlement agreement was two weeks after the issuance of the December 30, 2006 notice of revocation.<sup>16</sup> During the two-week period after December 30, 2006, Global did not contest that the revocation would be effective on January 13, 2006. Nor did Global otherwise contemporaneously assert that L&I had not provided two weeks notice of the revocation. Section M required Global to notify the Departments of a breach of the settlement agreement, which Global did not do. CP 31.

Instead, Global opted to exercise its right to appeal L&I's decision to OAH under RCW 34.05. On January 27, 2006, Global sent correspondence appealing the revocation of its FLC license. CP 751. In its January 27, 2006 letter, Global argued that L&I had lacked a sufficient basis for revoking Global's FLC license, but it never asserted in its letter that L&I had breached the notice requirement in § L5. CP 754-76.

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<sup>16</sup> The letter states that the revocation is "technically effective" because as noted above, separate from the revocation at issue in this case, Global also was not licensed because its license expired at the end of the year, and Global failed to timely submit a complete application needed to renew its license. CP 65. RCW 19.30.081 provides that farm labor contractors may have a one-year or two-year license that "shall run to and include the 31st day of December." WAC 296-310-020 provides the specific requirements for renewal of a yearly FLC license. Global had a one-year license that ran until December 31, 2005. CP 314-315. Global filed an incomplete application on January 4, 2006. CP 314. Global did not possess a 2006 FLC license because it did not renew its license as required before December 31, 2005. CP 313-314.

The settlement agreement did not supersede the normal application process required of all farm labor contractors under RCW 19.30, but in any event, there is no language in the Agreement that excludes Global from the normal application process.

Indeed, Global has never asserted that it notified the Department that this was a breach of the settlement agreement in writing as required by Section M. CP 31. Global waited until this case was already in litigation at OAH before asserting breach of contract was at issue. CP 339. Global also waited an entire year before filing in superior court to assert its contract claims.

The superior court determined that the Departments breached the settlement agreement by giving 10 days instead of two weeks notice, “as such notice was four days short of the notice required.” CP 1117. This was based on the December 20, 2005 letter. *See* CP 1103, 1131. This letter, however, was not the notice of revocation. On December 20, 2005, the Departments provided a letter detailing to Global numerous breaches of the settlement agreement and violations of the law, and the Department voluntarily offered Global another chance to remedy these violations by December 30, 2005. CP 55.

The period between December 20 and 30, 2005, was one last chance for Global to remain in business in Washington before the issuance of a notice of revocation. The December 20, 2005 letter was not the notice of revocation contemplated in § L5 of the settlement agreement; it was the written notification of breach described in Section M of the agreement. CP 30, 31.

Through the settlement agreement, Global agreed to strictly comply with deadlines and end its persistent pattern of noncompliance. When Global signed the settlement agreement on September 22, 2005, it did so knowing that it was required to submit the completed third quarter 2005 certified audit report on or before November 30, 2005. CP 25 Despite this knowledge, Global did not engage an accounting firm to complete the audit until almost two months later, just a few weeks before the deadline for submitting the certified audit report. CP 296.

L&I twice extended the audit submission deadline. CP 296. Although Global managed to meet the other deadlines outlined in the December 20, 2005 letter, Global has conceded that it was still in breach of the settlement agreement on December 30, 2005. CP 330.<sup>17</sup>

After Global breached the settlement agreement (CP 330), L&I provided notice of this breach in writing (December 20, 2005 letter), and then provided notice of the revocation that was effective two weeks later (December 30, 2005 notice of revocation and January 5, 2006 letter). Based on these facts, L&I is entitled to summary judgment. In the alternative, this issue should be remanded for trial.

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<sup>17</sup> In the December 30, 2005 notice, the Departments also identified other legal and contract provisions violated by Global. CP 60-62.

**C. Summary Judgment for ESD Is Appropriate Because the Settlement Agreement Permitted ESD to Discontinue Its Services Immediately After Global Breached the Agreement**

The superior court applied § L5 to ESD in its decision. CP 1117.

The notice provision in § L5 does not reference ESD and speaks only to the duties of L&I.<sup>18</sup> Mention of L&I but not ESD shows the intent of the parties to apply the provision to L&I only. *See Hearst*, 154 Wn.2d at 506-08. Under § L5, L&I agrees to notify Global two weeks before revoking Global's FLC license. The rest of the paragraph discusses the limitations on L&I's notice and the duties of Global once it is given notice of the revocation by L&I.

ESD does not have authority to revoke (or otherwise administer) farm labor contractor licenses. Global argued below that while "technically ESD may not be required to give notice prior to revoking Global's FLC license, both L&I and ESD are bound by this requirement." CP 416. There is nothing in the record in terms of either the contract language or the extrinsic evidence to support such an argument.

Two provisions of the settlement agreement, Section II.D and Section IV.L.2, explicitly permit ESD to immediately discontinue

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<sup>18</sup> § L5 provides: "*L&I* agrees that it will notify Global at least two weeks prior to revoking Global's farm labor contractor license. By providing the notice, Global agrees that *L&I* is not required to provide a hearing or an opportunity for Global to be heard prior to the revocation. After receiving notice of revocation, Global may not undertake new farm labor contracts or extend any existing contracts unless *L&I*'s revocation decision is reversed or expires." CP at 30 (emphasis added).

recruitment and referral services upon Global's breach of the agreement or violation of the law. Upon Global's violation of the law or the settlement agreement, ESD is not required to provide any advance notice before it discontinues recruitment and referral services per Section II.D of the settlement agreement:

Immediate discontinuation of ESD recruitment and referral services. Global stipulates that ESD's determination, in its sole discretion, that a violation of any of the conditions of this Agreement has occurred constitutes a sufficient basis under 20 C.F.R. 658.501(b) for ESD to institute an immediate discontinuation of ESD recruitment and referral services. Global waives any right to stay the discontinuance pending appeal.

CP 24. The proposition that ESD may immediately discontinue recruitment and referral services upon breach by Global is repeated in Section IV.L.2: "If either DOR, ESD, or L&I issue a determination alleging a violation of law or breach of this Agreement. . . . ESD may, in its sole discretion, immediately discontinue recruitment and referral services to Global." CP 30. Read individually or together, Section II.D and Section IV.L.2 allow ESD to immediately discontinue services without notice. This is consistent with § L5, which specifically has a notice requirement for L&I, but does not mention ESD. Moreover, nothing in the settlement agreement requires ESD to provide an opportunity to cure for the reasons stated above, *supra* Part VII.A.

The context of ESD's services shows why the agreement contains

separate rights for ESD. The recruitment and referral services provided by ESD are distinguishable from the regulatory duties required of L&I. While L&I issues the farm labor contractor licenses and ensures compliance with those requirements, ESD affirmatively provides services for the recruitment and referral of local labor under the H-2A program, as well as administers federal laws on behalf of the United States Department Of Labor. CP 20; 20 C.F.R. § 658.501.<sup>19</sup> ESD retained an independent right to discontinue services because the nature of its involvement with Global was different than L&I's.

Global admits it was still in breach of the settlement agreement on December 30, 2005. CP 330, lns. 18-20. Global's admitted breach of the settlement agreement constituted sufficient basis for ESD to immediately discontinue recruitment and referral services under Sections II.D and IV.L.2. As the pleadings, declarations, and deposition testimony demonstrate, no disputes of material fact exist as to whether the notice provision in § L5 applies to ESD. ESD is therefore entitled to summary judgment that specifies that notice (or an opportunity to cure) was not

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<sup>19</sup> In order to qualify to bring foreign nationals to perform a specific jobsite application, an H-2A farm labor contractor must show the U.S. Department of Labor that there is a genuine need for nonimmigrant foreign laborers by demonstrating a shortage of domestic workers who could perform the temporary and seasonal agricultural labor required for that job application. 8 U.S.C. § 1188(a); 20 C.F.R. § 655.90. Washington's ESD provides the mechanism for a Washington farm labor contractor to make that showing to the federal DOL.

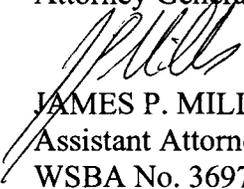
required of ESD when it discontinued recruitment and referral services on December 30, 2005, and, accordingly, ESD did not breach the settlement agreement.<sup>20</sup>

### VIII. CONCLUSION

For the reasons set out above, the Departments request that this Court reverse the superior court and grant summary judgment to the Departments. If this Court believes it necessary to examine the extensive extrinsic evidence in this matter to interpret the settlement agreement or determine breach, it should remand this matter to trial.

RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of April, 2009.

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<sup>20</sup> Should this Court determine that ESD was subject to § L5, ESD should also prevail for the reasons set forth in Part IV.A-B.



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DATED this 22<sup>nd</sup> day of April, 2009.

A handwritten signature in black ink, appearing to read "Sara L. Franz", written over a horizontal line.

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